JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

30 September 2003 *

In Case T-158/00,

Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland (ARD), established in Cologne (Germany), represented by P. Mailänder and A. Bartosch, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by P. Wiedner, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

supported by

KirchPayTV GmbH & Co. KGaA, established in Unterföring (Germany), represented by K. Metzlaff, lawyer, with an address for service in Luxembourg,

and by

British Sky Broadcasting Group plc (BSkyB), established in Isleworth (United Kingdom), represented by S. Wisking and D. Livingston, solicitors, with an address for service in Luxembourg,

interveners,

APPLICATION for annulment of Commission Decision SG (2000) D/102552 of 21 March 2000 (Case COMP/JV.37), which declared the proposed concentration by which BSkyB acquired joint control of KirchPayTV to be compatible with the common market and with the Agreement on the European Economic Area, pursuant to Article 6(1)(b) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of: M. Jaeger, President, K. Lenaerts and J. Azizi, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 9 January 2002,

gives the following

Judgment

Legal framework

1 Under Article 1 thereof Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1), as corrected (OJ 1990 L 257, p. 13) and as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1), (hereinafter 'Regulation No 4064/89' or 'the Merger Regulation') is to apply to concentrations with a Community dimension as defined in Article 1(2) and (3).

2 Under Article 6(1)(b) of Regulation No 4064/89, where the Commission finds that the notified concentration, although falling within the scope of that regulation, does not raise serious doubts as to its compatibility with the common market, it must decide not to oppose it and must declare it compatible with the common market ('Phase I').

3 By contrast, under Article 6(1)(c) of Regulation No 4064/89, where the Commission finds that the concentration notified falls within the scope of the regulation and raises serious doubts as to its compatibility with the common market, it must decide to initiate proceedings ('Phase II').

4 Article 6(2) of Regulation No 4064/89 provides as follows:

'Where the Commission finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts within the meaning of paragraph 1(c), it may decide to declare the concentration compatible with the common market pursuant to paragraph 1(b).

The Commission may attach to its decision under paragraph 1(b) conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into *vis-à-vis* the Commission with a view to rendering the concentration compatible with the common market.'

5 Under Article 18(1) of Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time-limits and hearings provided for in Regulation No 4064/89 (OJ 1998 L 61, p. 1), 'commitments proposed to the Commission by the undertakings concerned pursuant to Article 6(2) of Regulation... No 4064/89 which are intended by the parties to form the basis for a decision pursuant to Article 6(1)(b) of that Regulation shall be submitted to the Commission within not more than three weeks from the date of receipt of the notification'.

6 In the Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98 (OJ 2001 C 68, p. 3, hereinafter 'the Notice on remedies'), the Commission sets out the guidelines it intends to follow as regards commitments.

Facts

7 On 22 December 1999, the companies British Sky Broadcasting Group plc (hereinafter 'BSkyB') and Kirch Vermögensverwaltungs GmbH & Co. KG (hereinafter 'KVV') notified a proposed concentration to the Commission, in accordance with Article 4 of Regulation No 4064/89, as amended by Council Regulation No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1), and as corrected (OJ 1998 L 40, p. 17), hereinafter 'Regulation No 1310/97'). That proposal provided for the acquisition by BSkyB of joint control together with KVV of the undertaking KirchPayTV GmbH & Co KGaA (hereinafter 'KirchPayTV').

8 BSkyB is a British undertaking active in the media field, principally in analogue and digital television services transmitted in the United Kingdom and Ireland via satellite and cable, and also in the field of digital terrestrial television in the United Kingdom. BSkyB supplies its own pay-TV channels for retail and wholesale for cable and terrestrial operators. It also has an interest in British Interactive Broadcasting/Open, which provides digital interactive television services in the United Kingdom. In addition, BSkyB provides a whole range of television-related services.

9 At the time of the notification, BSkyB was not present on the German market in pay-TV, digital interactive television and acquisition of broadcasting rights.

10 KirchPayTV, a German company, was, at the time of the notification, controlled exclusively by KVV, itself a wholly-owned subsidiary of the Kirch group, a media group active in the fields of commercial television, sports rights trade, rights trade

(fiction), film and television production, business television, pay-TV and pay-TV-related technical services.

11 The notification of the proposed concentration of 22 December 1999 was published in the Official Journal of 11 January 2000 (OJ 2000 C 7, p. 5). On the same day, the applicant received a request from the Commission, asking it to submit, by 14 January 2000, its comments on the effects of the proposed merger on competition.

12 The applicant informed the Commission, within the prescribed time-limit, that the proposed concentration in question would, in its view, lead to a strengthening of KirchPayTV's dominant position in the markets for pay-TV, acquisition of programme rights and provision of pay-TV-related technical services, and also to the emergence of a dominant position in the market for digital interactive television services. The applicant also expressed its fear that the closer links between Kirch and BSkyB would strengthen the vertical integration of the undertakings active in the market in question and give rise to restrictions of competition between Member States, especially in the fields of television-programme acquisition and digital interactive television.

13 On 21 January 2000, the applicant sent additional in-depth comments on the matter to the Commission. It submitted that the Commission should prohibit the notified concentration, on the ground that it would be incompatible with the common market. It submitted, in the alternative, that any authorisation of the operation should be subject to certain minimal requirements and conditions.

14 At the request of the Commission, the applicant informed it by letter of 22 February 2000 of the requirements, conditions or public contractual commitments which in its view were necessary, from a competition law standpoint, for the merger procedure in question.

15 It reiterated its position that the conditions for authorising the proposed concentration were not met and put forth, as an alternative, a number of proposed commitments which the parties to the notified concentration should, in its view, accept in any event.

16 The parties to the notified concentration informed the Commission of a package of commitments. On 29 February 2000, the Commission asked the applicant to submit its comments on those commitments by 2 March 2000.

17 In its response of 2 March 2000, the applicant criticised those proposed commitments, stating that they amounted to nothing more than a promise not to abuse KirchPayTV's dominant position.

18 On 14 March 2000, the Commission asked the applicant to submit its comments on an initial amended version of the package of commitments by 15 March 2000 at 13.00 hrs. The applicant submitted brief comments.

19 The Commission did not inform the applicant of, or ask it to submit its comments on, a second amended version of the package of commitments, of which the applicant was apprised on 18 March 2000 through the intermediary of a third party.

20 By decision of 21 March 2000 (hereinafter 'the contested decision'), the Commission approved the merger in question, subject to conditions, pursuant to Article 6(1)(b) and Article 6(2) of Regulation No 4064/89, and also to Article 57 of the Agreement on the European Economic Area.

The contested decision

21 In the contested decision, the Commission examined the effect of the notified concentration on the three markets concerned: pay-TV, digital interactive television and acquisition of broadcasting rights.

1. *Pay-TV market*

22 According to recitals 23 to 27 of the contested decision, pay-TV constitutes a distinct market from free television, that is, advertising-financed private television and public television financed through fees and advertising. According to the Commission, the pay-TV market is national in dimension.

23 In the contested decision, the Commission finds that KirchPayTV has, through the company Premiere, a quasi-monopoly in the provision of pay-TV services in Germany. It also finds that BSkyB dominates the pay-TV market in the United Kingdom. In recital 51, the Commission concludes that the operation raises serious doubts as to its compatibility since it strengthens KirchPayTV's dominant

position on the market for pay-TV in Germany. The Commission considers that BSkyB's financial resources and know-how will enable KirchPayTV to maintain its dominant position in the market. It states:

'Influx of financial resources and know-how

50. The parties themselves acknowledge that Kirch PayTV is in need of "an injection of significant resources" to develop its business. They have estimated the total investment required by KirchPayTV at..., with accrued losses standing at... According to its notification, KirchPayTV has, however, been unable to raise the funds it needs on the open market. In addition to money, BSkyB will add a wealth of marketing and distribution know-how which, it has been suggested to the Commission by certain operators in the market, KirchPayTV crucially lacks.

Given the significant costs of operating in this market, particularly the need to digitalise services over the next few years, the Commission has serious doubts as to whether KirchPayTV would have been able to maintain its position on the pay-TV market in Germany in the absence of this operation. For instance, failure to modernise its pay-TV services according to market expectations, or an inability to maintain its control over the content necessary for pay-TV, could significantly improve the conditions for entry by a third party in the medium term. As specified by Article 2(1)(b) of the Merger Regulation, the economic and financial power of the parties are factors which the Commission must take into account when assessing the effects on competition of a concentration. It also has to be noted that the Commission has, in a number of decisions, held that the addition of greater financial resources as a result of a concentration can lead to the creation or strengthening of a dominant position.'

24 Moreover, in recitals 52 to 72 of the contested decision, the Commission also examined the issue of elimination of potential competition. In recital 54, it concluded that neither BSkyB nor any other undertaking was likely to enter the German pay-TV market 'in the short to medium term'. That conclusion was based on four main reasons:

— the predominance of free television in Germany makes pay-TV quite difficult to develop;

— through BetaResearch, Kirch controls the decoder infrastructure (d-box) and the technology necessary for access control in Germany;

— BSkyB does not have a supply of programmes suitable for the German market;

— entry into the German pay-TV market requires investment of enormous financial resources.

25 In recital 70 of the contested decision, the Commission concludes that, 'in the short to medium term', BSkyB is not a potential entrant into the market in question.

2. *Market in digital interactive television services*

26 The contested decision states that digital interactive television services are not currently available in Germany. The Commission notes, however, that Kirch-PayTV will be active in that market in the near future. The Commission also observes that at least four other undertakings, Bertelsmann, the applicant, UPC and Primacom group, are planning to enter the market in the near future. BSkyB is the only undertaking in Europe with direct experience of the digital interactive television services market.

27 The operators on those markets are not typically the suppliers of the goods and services purchased by consumers. The operators provide a 'platform' through which content vendors or providers promote and sell their goods and services. Thus, for the operators, the primary source of demand, and therefore income, will be from those vendors. The services generally likely to be offered on digital interactive television are, inter alia, home banking, home shopping, and holiday and travel services.

28 Although the Commission finds that the market in digital interactive television services is a separate market from that for pay-TV services, it notes that the latter is likely to be a 'driver' for the former. This is because pay-TV offers exclusive programmes, which enables operators to attract a high number of above-average income viewers. Thus the two markets are separate but complementary. The relevant geographic market here is also national.

29 As regards digital interactive television services, the Commission finds that, because Kirch controls the predominant decoder infrastructure in Germany

(d-box decoder), which is also necessary for the provision of digital interactive television services, it already has a significant competitive advantage as a provider of those services. The Commission believes that the concentration could work even more strongly to favour the creation of a dominant position, since BSkyB would contribute the necessary financial resources and the know-how gained in the British market. Accordingly, the Commission also has serious doubts on this point as to the compatibility of the operation with the common market.

3. *Market in the acquisition of broadcasting rights*

30 According to the contested decision, films and sport are pay-TV's 'drivers' and it is necessary to hold the rights to them in order to have sufficiently attractive programmes to persuade potential subscribers to pay for receiving television services.

31 Broadcasting rights are still acquired on a national basis or at the most by language area (or 'common language'), in this case the German or German-speaking market. Some sporting rights, however, are acquired for all of Europe and then re-sold by country. There could thus be a separate geographical market in pan-European sports rights. The Commission takes the view, however, that it is not necessary to define the market more precisely in the present case.

32 In the contested decision the Commission found that Kirch dominated the market in the acquisition of broadcasting rights in Germany (through long-term exclusive agreements), whereas BSkyB dominated the same market in the United Kingdom.

33 The Commission did not express any doubts about the market in the acquisition of broadcasting rights. It finds that there is no indication that KirchPayTV and BSkyB would buy joint rights.

4. *The commitments*

34 In the light of the commitments proposed by the parties which, according to the Commission, were capable of dispelling its serious doubts as to the compatibility of the notified concentration with the common market as regards its effects on the markets in pay-TV and digital interactive television services, the Commission authorised the notified concentration pursuant to Article 6(1)(b) of Regulation No 4064/89.

Procedure and forms of order sought

35 By application lodged at the Registry of the Court on 13 June 2000, the applicant brought this action.

36 By document lodged at the Registry of the Court on 29 September 2000, KirchPayTV applied for leave to intervene in support of the Commission. That application was granted by order of 11 December 2000.

37 By document lodged at the Registry of the Court on 23 November 2000, BSkyB applied for leave to intervene in support of the Commission. That application was granted by order of 19 February 2001.

38 The applicant claims that the Court should:

— annul the Commission's decision of 21 March 2000 in Case COMP/JV.37;

— order the Commission to pay the costs.

39 The Commission contends that the Court should:

— dismiss the action as inadmissible or, in the alternative, as unfounded;

— order the applicant to pay the costs.

40 KirchPayTV contends that the Court should:

— dismiss the action as inadmissible or, in the alternative, as unfounded;

— order the applicant to pay the costs.

41 BSkyB contends that the Court should:

— dismiss the action as inadmissible or, in the alternative, as unfounded;

— order the applicant to pay the costs, including those of BSkyB.

Admissibility

1. *Standing of the applicant to bring the action*

Arguments of the parties

42 The applicant maintains that the contested decision is of direct and individual concern to it within the meaning of the fourth paragraph of Article 230 EC.

43 The Commission expresses doubts as to whether the applicant is individually concerned by the contested decision.

44 It submits that participation in the administrative procedure, even at the request of the Commission, does not by itself make the undertaking individually concerned by the contested decision, especially when, as in this case, many other undertakings have expressed views in the procedure or have been consulted by the Commission. The examination of a notified concentration, by its very nature, involves regular contact with many undertakings.

45 It states that the applicant is currently active only in the free television market, an area not covered by the contested decision. In any event, the obligations referred to by the applicant for achieving objectives for the adoption of digital transmission technologies concern only that market.

46 Conversely, there are no factors to indicate that the applicant is intending to become involved in the pay-TV market, which the contested decision does cover. It thus cannot even be viewed as a potential competitor in that market.

47 It could, at most, be regarded as a potential competitor in the future market in digital interactive television services. However, in that regard, it would only be one of many competitors in that future market. That conclusion is not called in question by the fact that it is involved in the development of a competing technical platform.

48 With respect to the applicant's argument that it is individually concerned by the contested decision because the strengthening of the dominant position in the pay-TV market has an effect on the position held by the parties in the market in technical services for digital television and, therefore, in the free digital television

market, the Commission points out that if under the case-law, the mere fact of being a competitor — and moreover only a potential competitor — in a market under examination in the contested decision is insufficient by itself to establish individual concern, that is all the more so in the case of an undertaking present in a market which is not even the subject-matter of the decision.

49 With respect to the commitments undertaken by the parties to the notified concentration, the Commission submits that, if the applicant believes itself to be a beneficiary of those commitments, the same must apply to any third parties seeking to rely on them.

50 The Commission concludes that the applicant is merely one of many undertakings which are potential competitors or clients of the parties to the notified concentration. Its situation is thus no different from that of all undertakings which might be viewed as (potential) competitors of KirchPayTV or which operate in neighbouring markets. Thus, contrary to the situation in Case T-2/93 *Air France* v *Commission* [1994] ECR II-323, '*Air France I*', paragraph 82, and Case T-3/93 *Air France* v *Commission* [1994] ECR II-121, '*Air France II*', paragraph 45, the applicant is not the sole competitor of the undertakings taking part in the notified concentration. In addition, unlike the applicant in *Air France I*, cited above (paragraph 82), its position is not affected in regard to the notified concentration in question in a manner clearly different from that of other undertakings active in the same sector.

51 KirchPayTV disagrees that the applicant is directly concerned by the contested decision. Referring to paragraph 80 of *Air France I*, it submits that, to be directly concerned within the meaning of the fourth paragraph of Article 230 EC, the person concerned must be active in the markets to which the contested decision refers. The contested decision, however, affects the applicant only in respect of its position in the free digital television market, in which it is a potential competitor, but which does not form the subject-matter of the contested decision.

52 KirchPayTV also disagrees that the applicant is individually concerned by the contested decision.

53 In that regard, it argues, first, that mere participation in the administrative procedure is not sufficient to distinguish the applicant individually.

54 The objective of requiring *locus standi* to bring an action or annulment, namely to allow actions only within certain limits, would no longer be attained if mere participation in merger procedures were to be deemed a sufficient criterion. Given the large numbers of participants in those procedures, the number of persons entitled to bring an action would be excessively high.

55 KirchPayTV refutes, second, that the commitments put forward by the parties to the notified concentration are such as to distinguish the applicant individually. Those commitments could in fact benefit numerous competitors, and not just the applicant.

56 KirchPayTV refutes, third, that the applicant's participation in the Free Universe Network (hereinafter 'FUN') is such as to distinguish it individually. FUN is not a potentially competing technical platform, but rather merely an interest group whose objective is to impose certain technical solutions for the purpose of operating technical platforms. Thus FUN, as a interest group, cannot be individually concerned by the contested decision. *A fortiori* mere participation by the applicant in that group cannot warrant the inference that it is individually concerned by that decision.

57 KirchPayTV notes, fourth, that the applicant is a trade association of public radio broadcasting institutions. However, according to settled case-law, an association created with a view to defending common interests of a group of members is not individually concerned by a decision adversely affecting the common interests of that group (Case C-409/96 P *Sveriges Betodlares and Henrikson* v *Commission* [1997] ECR I-7531, paragraph 45; and Case T-86/96 *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag-Lloyd* v *Commission* [1999] ECR II-179, paragraph 55 et seq.). In particular, such an association cannot bring an action where, as in the present case, its members are not entitled to do so.

Findings of the Court

58 Under the fourth paragraph of Article 230 EC, '[a]ny natural or legal person may... institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'.

59 The applicant is not an addressee of the contested decision, which was addressed solely to the parties to the notified concentration. Accordingly, it is appropriate to examine whether the decision is of direct and individual concern to it.

60 Contrary to KirchPayTV's assertions, it cannot be disputed that the contested decision is of direct concern to the applicant. Since it enables the notified concentration to be put into effect immediately, the contested decision is such as to bring about an immediate change in the situation in the markets concerned, depending solely on the wishes of the parties (*Air France II*, cited above, paragraph 80; and Case T-114/02 *BaByliss* v *Commission* [2003] ECR II-1279, paragraph 89).

61 Accordingly, it is appropriate to examine whether the applicant is also individually concerned by the contested decision.

62 It is settled case-law that persons other than those to whom a decision is addressed may claim to be individually concerned only if the decision 'affects them by reason of certain attributes peculiar to them or by reason of factual circumstances in which they are distinguished from all other persons, and by virtue of those factors distinguishes them individually in the same way as the person addressed' (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at p. 107; and Case C-312/00 P *Commission* v *Camar and Tico* [2002] ECR I-11355, paragraph 73, and the case-law cited therein).

63 In the present case, it is appropriate to examine to what extent the applicant's participation in the procedure and the effect on its market position are such as to distinguish it individually for the purposes of Article 230 EC.

64 First of all, with respect to participation in the procedure, the Court finds that on 11 January 2000 the applicant received a request for information from the Commission, pursuant to Article 11 of Regulation No 4064/89, in which it was asked to provide, within three days, its comments on the effects of the proposed concentration on competition. By letter of 14 January 2000, the applicant provided the information requested.

65 On 21 January 2000, that is to say within the 10-day time-limit set in the prior notification of the merger published in the Official Journal pursuant to Article 4(3) of Regulation No 4064/89, the applicant sent the Commission additional comments on the effects the notified concentration in question would have on competition in the markets concerned and on its own position.

66 On 22 February 2000, at the request of the Merger Task Force, the applicant again sent the Commission a very detailed memorandum reiterating its comments on all of the sensitive aspects of the merger procedure, whilst maintaining that the concentration envisaged was not compatible, and outlining the requirements, conditions or commitments which in its view ought to be imposed if the Commission were to decide not to oppose the concentration. Those proposals concerned the conditions for opening up the markets in question, in particular non-discriminatory access for decoders other than the d-box to all televised programmes and to all interactive services, access for other operators to the rights to KirchPayTV's programmes and a means of preventing the Kirch group from influencing indirectly the use of the Deutsche Telekom AG's cable broad-band infrastructure.

67 It appears from a reading of the contested decision that the Commission makes 10 references to comments from third parties (recitals 49, 50, 53, 57, 71, 73, 75, 77, 79 and 84 of the contested decision) and that most of them concern questions which were expressly raised by the applicant in the comments it sent to the Commission during the administrative procedure.

68 Thus, in its comments of 22 February 2000, the applicant stated that Kirch alone would not have sufficient financial power to undertake the development of digital services on its own and, in its comments of 14 and 21 January 2000, that BSkyB had unmatched experience and know-how in marketing and distribution of pay-TV which was to be transferred under the agreement. Moreover, in recital 49 of the contested decision, the Commission states that a number of third parties maintained that the notified concentration would strengthen KirchPayTV's dominant position in the German pay-TV market by bringing in considerable financial resources and know-how. In recital 50 et seq. of the contested decision, the Commission concluded that, on the basis of those considerations, serious doubts continued to subsist.

69 Next, in recital 53 of the contested decision, the Commission states that a number of third parties suggested that BSkyB was the most plausible entrant into the German pay-TV market, a point referred to by the applicant in its comments of 14 January 2000.

70 Likewise, in recital 75 of the contested decision, the Commission finds that, as was stressed by the applicant in its observations of 21 January 2000, the entry of KirchPayTV into the market in digital interactive television services was likely to create a dominant position because its d-box would be imposed as the standard decoder in Germany.

71 Lastly, in recital 84 of the contested decision, the Commission replies to the argument of third parties concerning Kirch's purchasing power for acquiring the broadcasting rights, an issue raised by the applicant in its comments of 14 and 21 January 2000.

72 It follows that, in the contested decision, the Commission based itself on many arguments raised by the applicant in the course of the administrative procedure.

73 The Commission also asked the applicant to make known its views on possible commitments which might dispel the serious doubts raised by the merger and the applicant's proposals were, at least in part, taken up in the contested decision.

74 The Commission also gave the applicant the two first versions of the commitments for comment. In response to written questions from the Court,

the Commission stated that, besides the applicant, only two other undertakings, Bertelsmann AG and Universal Studios Inc., had also received copies of the first two versions of the commitments, although Bertelsmann had also received the third and final version of them, which the applicant had not.

75 In addition, it should be noted that the correspondence from the applicant to the Commission is not merely a unilateral, unsolicited step on its part, but that the Commission had on several occasions invited it to submit its comments.

76 It follows that the applicant participated actively in the procedure. Although, as rightly pointed out by the Commission, mere participation in the procedure is indeed not by itself sufficient to establish that the applicant is individually concerned by the decision, especially in the field of concentrations, the thorough examination of which requires contact with numerous undertakings, active participation in the administrative procedure is a factor to be taken into consideration, inter alia, in the more specific field of control of mergers, in establishing, in the light of other specific circumstances, whether an action is admissible (*BaByliss* v *Commission*, paragraph 95). This is all the more so in this case where, as found above, that active participation had an effect on the course of the procedure and, at least in part, on the content of the contested decision, both as regards the finding that the merger raised serious doubts and as regards the commitments necessary, in the Commission's view, to dispel those doubts (see, to that effect, Case 169/84 *Cofaz* v *Commission* [1986] ECR 391, paragraphs 24 and 25).

77 Second, as to the effect on the applicant's position in the market, it should be recalled, first, that the merger in question concerns the pay-TV market and that it is common ground that the applicant is not present on that market. The applicant even stated in a letter of 22 February 2000 to the Commission that 'ARD public broadcasting stations are neither mandated nor considering to enter the Pay-TV market'.

78 However, the fact that the applicant cannot be considered to be a competitor, or even a potential competitor of KirchPayTV on the pay-TV market, does not necessarily mean that it is not individually concerned by the decision. Although KirchPayTV is mostly active in pay-TV, that market is only one of the three markets on which the Commission found that the merger strengthened the Kirch group's dominant position. Moreover, in the same way as potential competitors of the parties to the concentration may have standing to apply for annulment of an approval decision in the case of oligopolistic markets (see, to that effect, Case T-290/94 *Kaysersberg* v *Commission* [1997] ECR II-2137; and *BaByliss* v *Commission*, cited above), where, as in the present case, an undertaking holding a monopoly sees its position strengthened by a concentration, an action for annulment brought by an operator present only on neighbouring upstream or downstream markets may, in certain circumstances, also be admissible.

79 In this case, the five following factors are such as to establish that the applicant's position is affected: the existence of some competition between free television and pay-TV; future convergence between free television and pay-TV due to digitalisation; the effect of the merger on digital interactive television services; the applicant's participation in the FUN project; and the acquisition of broadcasting rights.

Existence of some competition between free television and pay-TV

80 Although the free television market, where the applicant is present, is, as stated in recitals 23 to 25 of the contested decision, a distinct market from the pay-TV market, that decision none the less expressly recognises in recital 56 that there is a certain amount of interaction between the two markets. The decision essentially finds that, in the examination of the obstacles pay-TV faces in entering the German market, that market is developing very slowly because of the power of the free television market.

81 It follows that, in so far as the concentration has as its object the strengthening of Kirch's financial power through BSkyB's contributing resources and know-how in order to enable Kirch to modernise its activities in the field of pay-TV, it is such as to entail certain effects on the free television market. The applicant is one of two public television undertakings active in the free television market in Germany and is also one of the principal operators in that market. If Kirch manages to attract new subscribers following the merger, the applicant can be expected to suffer losses of television viewers and thereby see its advertising revenues diminish. It follows that, in this respect, the contested decision is capable of affecting the applicant.

Future convergence between free television and pay-TV due to digitalisation

82 The contested decision also recognises in recital 25 that, with digitalisation, pay-TV and free television can in future be expected to converge to a certain extent.

83 In addition, since pay-TV is the only field where digital television has been able to develop for the moment, KirchPayTV's dominant position in the pay-TV market has an effect on the digital television market.

84 Yet the applicant is bound by its public service obligations to achieve State objectives concerning the introduction of digital broadcasting technologies.

85 Accordingly, even if the merger is taking place on the pay-TV market, it is likely to affect the applicant's competitive position in the future market in free digital television in Germany.

Effect of the merger on digital interactive television services

86 It is apparent from recitals 30 to 41 and 73 to 80 of the contested decision that the operation in question is capable of affecting the future market in digital interactive television services. In fact the Commission points out in that regard, in recitals 32, 40 and 94, that the pay-TV market is a 'driver' for the development of that market in that pay-TV offers exclusive programming allowing operators of interactive television services to attract large numbers of high-income viewers. Since the concentration will strengthen Kirch's position in the pay-TV market (recital 50), it will thus also strengthen its position in the future market in interactive television services. Yet, according to recital 73, the applicant is one of four operators which have announced their intention to develop interactive services in the near future.

87 Moreover, the installation of a technical infrastructure for the transmission of digital interactive television services calls for substantial investments. In this respect, the contested decision finds in recital 75 that the concentration is likely to reduce substantially the opportunities for third parties to penetrate the market because it will enable Kirch to enter the market before any other operators, thereby raising considerably the barriers to entry, by establishing the d-box as the standard decoder in Germany.

88 Accordingly, the concentration is capable of affecting the applicant's position as a future operator in the market in digital interactive television services because, on the one hand, it strengthens Kirch as a potential competitor and, on the other, it increases the applicant's dependency on Kirch's technology, which is necessary for entry into that market.

Applicant's participation in the FUN project

89 It is common ground that the supply of digital television services, whether it be pay-TV, free television or interactive television, requires a certain level of technology. In the current state of development, the only technology used in Germany for the cable transmission of digital signals is the technology developed by BetaResearch, a subsidiary of Kirch, and operated by BetaDigital, another Kirch subsidiary, and by Deutsche Telekom, which holds a licence from BetaResearch for the use of Kirch's technology. Yet the applicant is the sole television operator taking part in the FUN group, which is made up of undertakings which all contribute in various ways (inter alia by contributing scrambling technology, a decoder and an electronic programming guide) to the development of a second digital platform in Germany. That group has set itself the objective of developing an open alternative platform, that is, one which, unlike KirchPayTV's, does not work with a patented access control system. KirchPayTV's dominant position in the market in technical services for digital television, which results from the position held in the market in pay-TV-related services, is capable of making the development of the FUN platform more difficult. Accordingly, the applicant is particularly concerned by the effects of the concentration at issue.

Acquisition of broadcasting rights

90 Inasmuch as the merger strengthens the financial power of Kirch and its ties to BSkyB, another major purchaser of broadcasting rights, it cannot be excluded that it will affect the applicant in its capacity as a purchaser of those rights.

91 According to recitals 81 and 83 of the contested decision, Kirch and BSkyB respectively dominate the German and British markets for the acquisition of broadcasting rights for films and major sporting events, with BSkyB also holding some broadcasting rights in Germany.

92 It is true that, in recital 85 et seq. of the contested decision, the Commission concluded that the concentration did not raise serious doubts on that market, noting inter alia that it did not lead to a significant strengthening of Kirch's dominant position or to a likelihood of collusion between KirchPayTV's parent companies.

93 None the less, the applicant expressed fears during the administrative procedure that the concentration might lead to a regrouping of demand for the acquisition of film and sports event rights on the German market, and the parties to the concentration lodged a commitment aimed at rectifying that situation. Moreover, before the Court the applicant contests both whether that commitment is sufficient and the fact that the Commission, in the contested decision, merely noted that commitment without making it a prerequisite for the approval of the merger.

94 In those circumstances as well, the applicant, which competes with the parties to the concentration in the market for the acquisition of broadcasting rights for the German market, is affected by the contested decision.

95 It follows from all of the foregoing considerations that, through its specific participation in the administrative procedure, during which the applicant submitted comments which partly determined the content of the contested decision and the nature of the commitments, and the specific effect on its position in the markets in digital television, digital interactive television services, technical services for digital television and the acquisition of broadcasting rights, the applicant is directly and individually concerned by the contested decision. Accordingly, the action is admissible.

2. *The requirements of Article 44(1) of the Rules of Procedure*

96 First of all, the Commission submits that the action is inadmissible inasmuch as it refers indiscriminately to the arguments from the administrative procedure or does not set out the legal arguments in a sufficiently clear manner.

97 It cannot but be noted that reference to the arguments deployed during the administrative procedure cannot render the action inadmissible. However, as this Court has previously held, since 'it is not for the Court to seek and identify in the annexes the grounds on which it may consider the action to be based, since the annexes have a purely evidential and instrumental function' (Case T-84/96 *Cipeke* v *Commission* [1997] ECR II-2081, paragraph 34), it is not appropriate to take account of the arguments put forward by the applicant during the administrative procedure but not reproduced in the application.

98 Second, the Commission submits that the application does not satisfy the requirements of Article 44(1)(c) and (e) of the Rules of Procedure because grounds are not given for the pleas or because the applicant has not provided any evidence at all to prove its statements. Those criticisms do not relate to the admissibility of the action itself but rather to the admissibility of various pleas, and will thus be dealt with in the context of the examination of those pleas.

Substance

99 In support of its action, the applicant relies on five pleas in law, based, first, on an error of assessment of the facts in regard to Article 2(3) and (4) of Regulation No 4064/89; second, on an infringement of Article 6(2) of Regulation

No 4064/89; third, on the insufficiency of the commitments; fourth, on an irregularity resulting from the failure to initiate the procedure provided for in Article 6(1)(c) of Regulation No 4064/89; and, fifth, on an unacceptable curtailment of the rights of third parties to participate in the procedure.

1. *First plea: error of assessment of the facts in regard to Article 2(3) and (4) of Regulation No 4064/89*

Arguments of the parties

100 The applicant points out that, in recital 54 of the contested decision, based on the arguments discussed in recitals 56 to 70 therein, the Commission found, with regard to the effect of the notified concentration on existing competition in the pay-TV market in Germany, that neither BSkyB nor any other undertaking is, in the short to medium term, a potential competitor of KirchPayTV on that market.

101 It observes that that finding contradicts the finding reached by the Commission in recital 50 of the contested decision, where it stated that it had serious doubts as to KirchPayTV's ability to maintain its position in the pay-TV market in Germany if the notified concentration were not to go ahead and that, if KirchPayTV were not to maintain its position on that market, the opportunities for access to that market for third parties could improve significantly in the medium term.

102 It thus criticises the Commission for assessing the effect of the notified concentration on potential competition on that market by referring only to the

status quo existing at the time of the decision, that is, KirchPayTV's undeniable dominant position, instead of referring to the development which, by its own findings, that position would undergo in the medium term if the notified concentration were not to go ahead.

103 It criticises that assessment of the potential competition. With respect to the determination of the market position of the undertaking subject to the notified concentration and thus the extent of the barrier to market entry for potential competitors represented by that position, that assessment, it claims, merely refers to the status quo and fails to take account of the likely future evolution of that position.

104 It considers that such a manner of assessing the potential competition amounts to an erroneous assessment of the facts, which prevents a proper assessment of the notified concentration under Article 2(3) and (4) of the Merger Regulation.

105 The applicant explains that it does not dispute any of the facts referred to by the Commission in recitals 56 to 70 of the contested decision in support of its finding that neither BSkyB nor any other undertaking can be considered potential competitors of KirchPayTV.

106 In response to KirchPayTV's argument that the Commission, in its analysis of the effect of the notified concentration on potential competition between KirchPayTV and BSkyB or other undertakings, allegedly took a medium-term prognosis into consideration and thus did not base itself on the status quo, the applicant acknowledges that the Commission, in conducting that analysis, did partially take a medium-term view. However, in the course of that analysis, the Commission failed to consider the fact, which it raised itself in recital 50 of the contested decision, that, without a major injection of capital into KirchPayTV, opportunities for third parties to penetrate the German pay-TV market could

improve significantly in the medium term. Instead of taking into account that medium-term reduction of the barriers to market entry, the Commission instead based itself on KirchPayTV's current dominant position in technology and programming content in order to conclude that there was no potential competition. In so doing, it assessed the potential competition on the basis of the existing situation.

107 The applicant disputes the well-foundedness of BSkyB's arguments that the size of the free television market in Germany constitutes a major obstacle to potential competitors seeking to access the pay-TV market in that country, and that failure by KirchPayTV would not favour access to that market by potential competitors but, on the contrary, would deter them by illustrating the actual extent of the barriers to entering that market.

108 In fact, those arguments are purely hypothetical and, thus plainly irrelevant. Only the legal considerations actually put forward by the Commission in the contested decision, and not those which it might have put forward, are relevant for the purposes of determining whether it infringed Article 2(3) of the Merger Regulation.

109 In addition, the size of the German free television market is only one argument of the four put forward by the Commission in order to challenge the existence of potential competition in the German pay-TV market. There is nothing in any passages of the contested decision to indicate that the Commission considered that the German free television market was of any specific importance in that regard. Likewise, the Commission did not state that a failure by KirchPayTV would have a dissuasive effect on potential competitors.

110 The Commission contends, principally, that the plea is inadmissible.

111 First, the plea is inadmissible because it refers in undifferenciated manner to arguments submitted by the applicant during the administrative procedure. In that regard, the Commission refers inter alia to the following passage from page 6 of the application:

'For the application, the applicant also reiterates its arguments against the Commission concerning the assessment and necessary monitoring of competition against the effects of the disputed merger.'

112 Second, the application does not set out the legal arguments in a sufficiently clear manner. The applicant merely puts forward a number of allegations, namely that the Commission modified its decision-making practice, helped KirchPayTV to achieve long-term consolidation of its dominant position and wrongly excluded BSkyB as a potential competitor. It did not, however, explain how the Commission's assessment was vitiated by error in the contested decision.

113 In the alternative, the Commission, supported by KirchPayTV and BSkyB, contends that the plea is unfounded.

Findings of the Court

114 As regards the Commission's argument that the plea is inadmissible, the Court finds that, although the application is not very explicit, it is none the less apparent from it that the applicant is relying on a plea that there has been an error of assessment for the purposes of Article 2(3) and (4) of Regulation No 4064/89 in

that the Commission did not regard BSkyB as a potential competitor. Moreover, the fact that the applicant has not backed up its statement that BSkyB should be considered a potential competitor of KirchPayTV is a matter which goes to the substance of the case. It follows that the plea is admissible.

115 The applicant claims essentially that the Commission made an erroneous assessment of the facts in regard to Article 2(3) of Regulation No 4064/89 in finding, in recital 54 of the contested decision, that neither BSkyB nor any other undertaking was likely to penetrate the German pay-TV market, whereas it had acknowledged, in recital 50 of the contested decision, that, without the capital injection resulting from the merger, KirchPayTV would not be able to make the investments necessary to preserve its dominant position in that market. The applicant alleges that the Commission did not take into account KirchPayTV's financial weakness and that it erred by not considering BSkyB to be a potential competitor.

116 At the outset it cannot but be noted that, contrary to the applicant's assertions, the assessments in recitals 50 and 54 are not contradictory.

117 First, the assessments made in those two recitals do not relate to the same period. Whilst the improvement in market entry conditions for third parties is contemplated in recital 50 only for the medium term, the finding in recital 54 that neither BSkyB nor any other undertakings are potential competitors refers only to a short- to medium-term period, thus a shorter time frame than that envisaged in recital 50.

118 Second, recital 50 of the contested decision is formulated in hypothetical terms, the Commission merely stating that 'failure [by KirchPayTV] to modernise its

pay-TV services according to market expectations, or an inability to maintain its control over the content necessary for pay-TV, could significantly improve the conditions for entry'.

119 It is also plain from the very wording of recital 54 of the contested decision that, contrary to the applicant's assertions, the Commission did not base itself on the status quo in its analysis of the effect on competition of the notified concentration, but rather put forward a prognosis for the short to medium term.

120 Second, it is appropriate to recall that the finding in recital 54 of the contested decision that neither BSkyB nor any other undertaking is a potential competitor of KirchPayTV on the pay-TV market in Germany in the short to medium term is based, as indicated in recital 55 of the contested decision, on four principal grounds which are elaborated upon in recitals 56 to 70 of the contested decision: the strength of the free television market in Germany (recitals 56 and 57 of the contested decision); the Kirch group's control over the decoder infrastructure and encryption technology used in Germany (recitals 58 to 64 of the contested decision); the Kirch group's control over rights to major films and sport events, making it difficult for potential competitors to access that content (recitals 65 to 67 of the contested decision); and the small likelihood of BSkyB's entering the market in the short to medium term, due to the considerable investments required (recitals 68 to 70 of the contested decision).

121 The applicant does not dispute any of those four grounds, as it expressly acknowledged in its reply.

122 The applicant claims, however, that because Kirch's financial weakness prevents it from putting sufficient investment into programming and technical infra-

structure, the barriers to entry in the market are reduced so much that BSkyB should be considered a potential competitor.

123 This plea must be rejected, since the applicant does not show how the Kirch group's financial weakness, by itself and notwithstanding the arguments raised by the Commission, enable it to be concluded that there is potential competition on the market in question in the short or medium term.

124 In that regard the Court notes that KirchPayTV's financial weakness could at the most affect only two of the four grounds relied on by the Commission to support the finding of there being no potential competition: Kirch's control in Germany over the decoding infrastructure and encryption technology, and access to programme content. Far from undermining the two other grounds based on the strength of the free television market in Germany and the need for sizeable financial resources, Kirch's financial difficulties rather confirm their well-foundedness. A failure by Kirch would be likely to dissuade other undertakings from penetrating that market and would confirm that there are major barriers to market entry which are independent of KirchPayTV's position.

125 Thus, the fact that KirchPayTV is not managing to achieve profitability rather tends to discourage other operators from penetrating that market at all, given the power of free television in Germany and despite KirchPayTV's dominant position in terms of infrastructure and programme content, and despite the fact that it is the only operator in the pay-TV market.

126 Likewise, financial failure by KirchPayTV would only serve to strengthen the well-foundedness of the argument based on the need to have substantial means in order to penetrate the market. Yet the applicant has not disputed the finding in recitals 68 and 69 of the contested decision that since BSkyB is required to invest

considerable amounts to establish itself as a provider of digital television services in the United Kingdom and to build a satellite platform in the face of competition, it is unlikely that it will have access to the resources necessary to enter a loss-making new market.

127 It follows that the applicant's argument that, without new financial resources being made available to KirchPayTV following the concentration, potential competitors would gain access to the market in question, is based on the unsubstantiated premiss that financial failure by KirchPayTV in that market would be likely to favour access to the market by potential competitors.

128 It follows from the foregoing that the argument that the Commission made an error of assessment in finding that BSkyB could not be considered a potential competitor in the short or medium term is unfounded.

129 The plea is, in any event, irrelevant since the Commission found, in recitals 51 and 92 of the contested decision, that the concentration raised serious doubts because it strengthened KirchPayTV's dominant position in the pay-TV market in Germany owing to the financial resources contributed by BSkyB. Accordingly, the finding in recital 54 of the contested decision that there is no potential competition in the short or medium term does not appear to be an essential element of the basis for the contested decision and, consequently, cannot result in its annulment.

130 In that regard, under Article 2(2) of Regulation No 4064/89, a concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it must be declared compatible with the common market. It follows that, when a concentration creates or strengthens a dominant position, the Commission must none the less authorise the operation if it does not lead to

effective competition being significantly impeded (see, to that effect, *Air France I*, paragraphs 78 and 79; Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraphs 170, 180 and 193; and Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585, paragraph 58).

131 Since the Commission found that the operation raised serious doubts, it necessarily had to find that it led to competition being significantly impeded and, since it is common ground that KirchPayTV is in a monopoly position in the pay-TV market in Germany, that restriction on competition can be of concern only to potential competitors. It follows that, despite the finding in recital 54 of the contested decision that there was no potential competition, since the Commission raised serious doubts and required commitments, it is clear that the contested decision none the less is based on the assumption that there was potential competition, even if only in the long term, and that the concentration would lead to its being impeded.

132 It follows from the foregoing that the first plea, alleging an error of assessment of the facts in that BSkyB should have been viewed as a potential competitor, cannot be accepted.

2. *Second plea: infringement of Article 6(2) of Regulation No 4064/89*

Arguments of the parties

133 The applicant observes that in the present case the notified concentration was declared compatible with the common market pursuant to Article 6(1)(b) of the

Merger Regulation in the first phase of the merger control procedure, following commitments offered by the undertakings concerned.

134 It points out that the Commission's common practice of declaring a concentration compatible with the common market on the basis of commitments offered by the undertakings concerned during the first phase of the merger control procedure, which has been subjected to much criticism by academic commentators, has only recently been given a formal legal basis in the new Article 6(2) of the Merger Regulation, introduced by Regulation No 1310/97.

135 It observes that Regulation No 1310/97 imposes restrictive conditions on that practice which, according to the eighth recital of the preamble to that regulation, may only be used 'where the competition problem is readily identifiable and can easily be remedied...'.

136 It submits that this restriction on the use of the practice in question is in keeping with the logic of Article 6(1) of the Merger Regulation, which provides that where the Commission finds that the notified concentration raises serious doubts as to its compatibility with the common market, it must decide to initiate proceedings under the second phase of the merger control procedure. According to the applicant, it is precisely in cases where the competition problems raised by the notified concentration do not satisfy the criteria laid down in the eighth recital of the preamble to Regulation No 1310/97 that the Commission is obliged to initiate the second phase of the merger control procedure.

137 The applicant acknowledges that, in determining whether a competition problem is 'readily identifiable and can easily be remedied', the Commission has a wide margin of discretion which is subject to only limited review by the Court (see, to that effect, Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 62).

138 It notes that the substantive correctness of that interpretation has been disputed by neither the Commission nor BSkyB, but only by KirchPayTV, whose arguments it refutes, however.

139 In response to KirchPayTV's argument that the applicant's viewpoint does not take account of the principle of proportionality and the requirement of promptness, the applicant replies, first, that those principles are observed by the new Article 6(2) of the Merger Regulation. However, the eighth recital in Regulation No 1310/97 constitutes a specific limit to the requirement of promptness. Second, KirchPayTV errs in basing its reasoning on the assumption that whenever the commitments offered in the first phase of the merger control procedure are sufficient, it is disproportionate to initiate the second phase. According to the applicant, it is only when the competition problem raised is readily identifiable and can easily be remedied that the Commission is in a position to assess, in the first phase of the merger control procedure, whether the commitments are capable of dispelling its serious doubts as to the compatibility of the notified concentration with the common market. Conversely, if it were open to the Commission to conclude, at the end of the first phase, that its doubts had been dispelled, even though the conditions laid down by the eighth recital of Regulation No 1310/97 are not met, the Commission would then be rushed into accepting major commitments supposed to resolve very complex competition problems, merely in order to avoid initiation of the second phase of the merger control procedure for the undertakings concerned.

140 In response to KirchPayTV's argument that the time period given to the Commission to examine the proposed commitments is almost as limited during the second phase of the merger control procedure (four weeks) as during the first phase (three weeks), the applicant complains that that line of argument does not clarify the legal scope to be given to the eighth recital of Regulation No 1310/97, and questions on what grounds that recital is deprived of legal significance. In addition, KirchPayTV does not take account of the fact that the four-week examination period in the second phase of the control procedure is preceded by a three-month time period running from the time the second phase is initiated, which in turn is preceded by the time period in the first phase. During the first

three months of the second phase, it is open to the Commission to conduct an in-depth analysis of the competition problems raised. Conversely, if it wished to declare the notified concentration compatible with the common market on the basis of commitments from the undertakings concerned at the end of the first phase, it would have, in all, only six weeks as from notification of the operation to adopt a definitive decision.

141 In response to KirchPayTV's argument that it may be inferred from the Commission's Green Paper on the Review of the Merger Regulation (COM(96) 19 final of 31 January 1996) that the Commission considered that two weeks were sufficient for examining commitments offered during the first phase of the merger control procedure, the applicant submits that that passage, in recital 126, must be read with and in the light of the Commission's statement in recital 123 that the acceptance of commitments is the first phase was conceivable only '... for concentrations where the competition problem is well defined in relation to the project as a whole, where the problem can be easily remedied and where compliance with commitments is not difficult to monitor'.

142 The applicant considers that in the present case the requirements in the eighth recital of Regulation No 1310/97 were not observed. It submits that the competition problems raised by the notified concentration were not readily identifiable and could not easily be remedied.

143 In support of its argument, it refers, first, to the fact that three other notified concentrations concerning the Kirch group and the German markets in pay-TV and related technical and administrative services have in recent years been declared incompatible with the common market: Commission Decision 94/922/EC of 9 November 1994 (Case IV/M.469 — MSG Media Service, OJ 1994 L 364, p. 1, hereinafter 'the MSG Media Service decision'); Commission

Decision 1999/153/EC of 27 May 1998 (Case IV/M.993 — Bertelsmann/Kirch/Premiere, OJ 1999 L 53, p. 1, hereinafter 'the Bertelsmann/Kirch/Premiere decision'); and Commission Decision 1999/154/EC of 27 May 1998 (Case IV/M.1027 — Deutsche Telekom/BetaResearch, OJ 1999 L 53, p. 31, hereinafter 'the Deutsche Telekom/BetaResearch decision').

144 It considers that this fact alone proves that the competition problems which have arisen on those same markets bear, in the context of the present case, similarities to the three earlier cases and are neither limited in scope nor easily remedied.

145 It makes clear that it is not maintaining that the facts underlying the three abovementioned opposition decisions and the facts giving rise to the authorisation decision contested in the present case are identical. However, in its view, the effects on competition which would have resulted, had the notified concentrations prohibited in the three abovementioned decisions been authorised, would have been identical to those resulting from the concentration authorised by the contested decision in the present case.

146 It observes that the three abovementioned decisions and the decision contested in the present case raised the same issue of the strengthening of the Kirch group's dominant position in the markets in pay-TV and acquisition of broadcasting rights, as well as the market in digital interactive television services, which was first examined in the contested decision.

147 It also observes that this strengthening of the Kirch group's dominant position has become even more pronounced since the adoption of the three abovementioned decisions, due to the acquisition by KirchPayTV of control of the Bertelsmann group's pay-TV station Premiere and Canal+ SA, and the transfer of the assets of the digital pay-TV station DF1 to Premiere.

148 The difficulty common to all four cases has been to assess correctly the extent of the technical and administrative services provided to digital television and, in that context, the control exercised by the Kirch group on decoding technology through the d-box decoder.

149 In that regard, the applicant observes that, in the Bertelsmann/Kirch/Premiere decision (recital 139) and the Deutsche Telekom/BetaResearch decision (recitals 64 and 78), the notified concentrations were declared incompatible with the common market, inter alia, because the commitments offered by the undertakings in question did not put a check on control of decoding technology by the Kirch group. By contrast, in the decision contested in the present case, the Commission adopted a radically different position by accepting commitments which, nevertheless, do not check that control.

150 The applicant submits that this radical change of position entails acceptance of one of the two following conclusions: either the Commission had difficulty in assessing correctly the competition problems raised by the notified concentration, which would mean that they are not readily identifiable, or it correctly identified the competition problems raised. In the latter hypothesis, the fact that the commitments offered in the cases giving rise to the Bertelsmann/Kirch/Premiere and Deutsche Telekom/BetaResearch decisions were rejected whereas those offered in the present case were, notwithstanding their similarity, accepted, leads to the conclusion that although the competition problems raised in those cases may have been identifiable, they were not easily remedied.

151 In either case, the conditions entitling the Commission to accept commitments during the first phase of the merger control procedure are not met.

152 The applicant refutes the argument put forward by both KirchPayTV and BSkyB that the three decisions which preceded the one at issue in the present case attest the experience acquired by the Commission in the examination and resolution of competition problems likely to be raised by notified concentrations in the markets in question and are thus, contrary to the applicant's line of argument, an indication that the competition problems in the present case were readily identifiable and easily remedied. In that regard the applicant questions how the interveners can explain the fact that in 1998 the Commission took the view that the problem of the Kirch group's dominant position being strengthened in the pay-TV market in Germany could be resolved only by that group's renouncing control over the d-box decoding system, whereas fewer than two years later, and faced with identical market conditions, it has taken the view, on the basis of no other reasoning, that that problem may also be resolved without such commitments being given.

153 Second, the applicant refers to the fact that in the present case the Commission was called on to resolve the question of whether and, if so, how, given the existence of a current monopoly situation and the threat of a future monopoly situation, it might be possible to keep markets open for future potential competitors and avoid a situation where other operators in those markets, who would be obliged to use the monopolised services to develop their own activities, would be bound by the conduct of the monopoly holders. It concludes that the competition problems raised by the notified concentration were extremely complex and, therefore, not readily identifiable or easily remedied.

154 Third, the applicant submits that the complexity of the competition problems raised is apparent from the findings of the contested decision itself. In that connection it observes that the Commission states twice, at recitals 51 and 80, that the notified concentration raises serious doubts as to its compatibility with the common market, since it is likely, first, to strengthen the Kirch group's dominant position in the pay-TV market in Germany (recital 51) and, second, to create a dominant position, or even a monopoly, in the future market in digital interactive television services (recital 80).

155 Fourth, the applicant refers to the number, the complexity and the very controversial nature of the commitments proposed by the undertakings in question, and to the successive amendments which they underwent in the course of the procedure.

156 The applicant disagrees with BSkyB's argument that the larger the number of commitments offered by the undertakings in question, the easier it is to resolve the competition problems. It argues instead that the more the undertakings in question have to offer commitments in order to resolve the competition problems, the more difficult and complex is the resolution of those problems.

157 Lastly, the applicant refutes BSkyB's argument that the commitments suggested by it in its observations during the proceedings to dispel the serious doubts as to the compatibility of the concentration operation with the common market indicate that the competition problems raised could easily be remedied. First of all, it made its proposals only in the alternative and because it had been expressly asked to do so by the Commission, whereas in its observations, it set out in great detail why it believed the notified concentration had to be declared incompatible with the common market. In addition, BSkyB's argument is based on the premiss that any notified concentration involving competition problems which can be resolved by commitments necessarily gives rise to the inference that those problems are easily remedied. That premiss is plainly incorrect. If it were correct, commitments offered during the first phase of the merger control procedure, if accepted, would necessarily have to be accepted at that stage, since the principle of proportionality would then preclude initiation of the second phase.

158 The Commission contends that the plea is inadmissible because the applicant does not set out the legal arguments in a sufficiently clear manner. No grounds whatsoever are given for the plea, which is based on a vague reference to merger control practice.

159 The Commission and the interveners maintain that the plea is inadmissible and, in any event, unfounded.

Findings of the Court

160 As regards the Commission's contention that the plea is inadmissible because the applicant does not set out its legal arguments in a sufficiently clear manner, inasmuch as it confines itself to a vague reference to merger control practice, without providing any reasoning, the Court finds that, although it is true that the application is not very explicit, it none the less enables it to be determined that the applicant is alleging an infringement of Article 6(2) of Regulation No 4064/89. Moreover, the fact that the applicant has not provided sufficient support for its line of argument goes to substance, not admissibility.

161 The applicant essentially maintains that the Commission was not entitled to approve the merger during the first phase of the examination procedure by having regard to commitments because the competition problems were not readily identifiable and could not easily be remedied.

162 In that regard it should be observed at the outset that Regulation No 4064/89, in its initial version, did not contain any explicit provision concerning the Commission's acceptance of commitments in the first phase, since Article 8(2) provided that the Commission could declare a concentration compatible only in the second phase, where the commitments offered by the parties dispelled the serious doubts. Article 6(2), concerning first-phase decisions, did not have any equivalent provision, which seemed to imply that, when the Commission found that a concentration raised serious doubts, it had no choice but to initiate the

second phase. None the less, in light of the principle of proportionality and the requirement of promptness which are characteristics of the merger control procedure, the Commission has, in practice, approved several notified concentrations in the first phase when the commitments offered by the parties enabled the competition problems to be resolved.

163 Regulation No 1310/97 amended the Merger Regulation, inter alia with the introduction of a provision expressly allowing the Commission to approve a concentration in the first phase having regard to the commitments offered by the parties. The eighth recital of Regulation No 1310/97 reads as follows: '[w]hereas the Commission may declare a concentration compatible with the common market in the second phase of the procedure, following commitments by the parties that are proportional to and would entirely eliminate the competition problem; whereas it is also appropriate to accept commitments in the first phase of the procedure where the competition problem is readily identifiable and can easily be remedied'. Under Article 6(2) of the Merger Regulation, as amended by Regulation No 1310/97, concerning the examination conducted by the Commission in the first phase: '[w]here the Commission finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts within the meaning of paragraph 1(c), it may decide to declare the concentration compatible with the common market pursuant to paragraph 1(b)'.

164 It follows that this plea raises two questions. The first question is whether Article 6(2) allows, as the applicant maintains, acceptance of commitments in the first phase only where the competition problem is readily identifiable and can be easily remedied in accordance with the eighth recital of Regulation No 1310/97, or whether, as the Commission contends, commitments may be accepted in the first phase, even if the problem is not readily identifiable or cannot easily be remedied, where those commitments enable the Commission to conclude that the concentration no longer raises serious doubts, in the same way as during the second phase. The second question which, by contrast, concerns the legal classification of the facts, is whether the competition problem raised by the proposed concentration at issue may be deemed to be readily identifiable and easily remedied.

165 The Court finds it appropriate to begin by examining the second question.

166 At the application stage the applicant merely submitted, in support of that plea, that the Commission had raised serious doubts and that it had previously opposed three notified concentrations in the markets in question.

167 That argument concerning the finding by the Commission that the concentration raised serious doubts as to its compatibility with the common market is manifestly without foundation. In fact it is only when the Commission finds that the concentration under examination raises serious doubts that the parties are invited to offer commitments in order to dispel those doubts. By their nature commitments are always intended to dispel the serious doubts and render the proposed concentration compatible with the common market. It follows that the fact that the Commission raised serious doubts in no way proves that the competition problems raised in this case were not readily identifiable or could not easily be remedied.

168 Turning to the applicant's argument that the competition problems raised by the proposed concentration in question were not readily identifiable, the Court observes that, in response to the Commission's request for information of 11 January 2000, the applicant expressed its view that the merger would lead inter alia to a strengthening of KirchPayTV's dominant position in the markets in pay-TV services, acquisition of rights to programmes and provision of pay-TV-related technical services and that, given the significant interaction between technical services for the provision of pay-TV and those for the provision of digital interactive television services (set-top box, review of electronic television programmes, conditional access system), the Kirch group's dominant position in Germany was a major barrier to market access for all potential competitors in the market in digital interactive television services. It thus appears that, within a period of only three days, the applicant was in a position to identify the main

potential competition problems which the Commission specifically mentioned in the contested decision. In those circumstances the applicant cannot maintain that the proposed concentration raised competition problems which were not readily identifiable.

169 As regards the fact that the Commission had already previously adopted three negative merger decisions in the markets in question, the Court notes, first, that all notified concentrations must be examined in light of their own impact on the market. Thus, the same notified concentration, re-notified following an opposition, could possibly be authorised if market conditions had evolved in such a way that it no longer appears to be incompatible with the common market. Accordingly, a comparison with other merger cases can be relevant only if it is established that they raise the same competition problems and concern markets with the same characteristics and where conditions have not changed.

170 It follows that merely to allege unspecifically that the Commission has previously prohibited other concentrations in the television markets in Germany is not sufficient to establish that the Commission was not entitled to accept commitments during the first phase of the merger control procedure at issue. On that ground alone the applicant's plea must be rejected.

171 The Court further notes that the decisions relied on by the applicant are not relevant inasmuch as they concern different parties and the markets in question and competition issues raised are not comparable.

172 It is true that, like the present case, the Bertelsmann/Kirch/Premiere decision concerned the pay-TV market in Germany. That decision, however, concerned a concentration between the only two undertakings operating in the German

market, Bertelsmann and Kirch, whereas the contested decision concerns the acquisition by BSkyB, the undertaking active in the British pay-TV market, of interests in an undertaking operating in the German market. Since it is common ground that pay-TV markets must be delimited along national, or possibly linguistic, lines, the merger at issue does not involve any overlapping of market shares, but only the strengthening of KirchPayTV's dominant position following the injection of capital from BSkyB. It follows that the competition problems raised by the two cases are not comparable.

173 The Deutsche Telekom/BetaResearch decision did not concern the same markets as those at issue in the present case. That concentration, which ran concomitantly with the one which was the subject of the Bertelsmann/Kirch/Premiere decision, gave Deutsche Telekom access to Kirch's decoder technology to supply its cable networks, thereby making it the only one available for the German market for both satellite and cable, so that Deutsche Telekom, the dominant cable operator, would have been able to block entry on cable by any competitors of the digital bouquet broadcast via satellite by Premiere.

174 The MSG Media Service decision concerned the creation of a dominant position in the market in pay-TV technical services in Germany, which would also have led to the creation of a dominant position in the pay-TV market. It is therefore not comparable, either, to the decision contested in this case, which concerns improved access to financial resources.

175 The applicant's allegation, at the reply stage, that whilst the facts in those three cases differ from those of the present case the effects of the concentrations on competition would have been identical to the effects at issue had they been authorised, merely confirms that the problems raised in those cases are not comparable. The mergers in those three cases were intended to create monopolies by pooling the parties' various competing or complementary activities, whereas in this case the problem arises from the strengthening of KirchPayTV's position following the capital injections by BSkyB.

176 In any event it does not appear, nor does the applicant maintain, that the Commission adopted those three opposition decisions on the grounds that the competition problems were not readily identifiable or could not easily be remedied by commitments offered in the first phase. Those decisions were in fact adopted at the end of the second phase, not because the problems were not readily identifiable or could not be easily remedied but because the commitments offered by the parties were not sufficient to dispel the serious doubts and render the concentration compatible with the common market. As the applicant has itself stressed, this plea must not be confused with the question arising in the context of the third plea as to whether the commitments offered and accepted in the contested decision are sufficient.

177 Far from establishing that the competition problems raised in this case were not readily identifiable and could not be easily remedied, the three decisions relied on by the applicant attest the Commission's in-depth knowledge of the sector. It is true, as already stated, that the effects of those three proposed concentrations on competition were different from those arising in the present case; however, those three earlier decisions already afforded the Commission the opportunity of examining the competition problems in the German markets in pay-TV, technical services and broadcasting rights for films and sport.

178 The argument based on the technical nature of the case is unfounded, given the wealth of experience acquired by the Commission from those earlier cases, as well as a series of other Commission decisions not referred to by the applicant, especially British Interactive Broadcasting/Open (Case IV/36.539), concerning the creation of a joint venture supplying interactive television services in the United Kingdom with the participation of the pay-TV operator BSkyB with its command of broadcasting rights and decoder-related technical services and British Telecom, the dominant operator in the telecommunications sector. The Court notes, moreover, that the highly technical nature of the matter and the volume and complexity of the commitments do not of themselves preclude the possibility that the Commission's serious doubts about the compatibility of the notified concentration with the common market may be easily dispelled. Moreover, although a technical area may at first sight appear complex to a

layman, it may not necessarily be so for professionals in that field, more particularly the parties concerned as well as interested third parties, who are also perfectly able to advise the Commission, if necessary. Moreover, the regulation does not distinguish between notified concentrations on the basis of their substantive area.

179 Likewise, no argument may be inferred from the large number of commitments provided by the parties, which may equally well indicate that that large number enabled all aspects of the competition problems raised by the proposed concentration to be resolved.

180 Lastly, the applicant's argument concerning the dominant position held by KirchPayTV or, more generally, by the Kirch group, is unsupported. The degree of dominance by itself does not prove that the problem cannot be easily remedied.

181 It follows from the foregoing that the second plea must be rejected because it has not been proven that the Commission manifestly erred in its view that the problem was readily identifiable and could be easily remedied. In that connection it is not necessary to rule on whether the commitments can be accepted during the first phase only where the competition problems are readily identifiable and can be easily remedied or whether it is sufficient that the commitments enable the serious doubts raised by the merger to be dispelled.

3. *Third plea: insufficiency of commitments*

182 The applicant claims that the commitments accepted by the Commission are insufficient to dispel the serious doubts as to the compatibility of the notified

concentration with the common market. In support of its plea, it puts forward complaints about the commitments as a whole, specific complaints about individual commitments and complaints about certain commitments which it alleges were essential but which were not obtained.

Observations on the commitments as a whole

Arguments of the parties

183 The applicant submits, first, that merger control must offer more than the general monitoring of abuses of dominant positions provided for by Article 82 EC; in other words, it must not only prevent abuse of a dominant position but also prevent the creation or strengthening of that dominant position (see, to that effect, recital 137 of Commission Decision 2001/98/EC of 13 October 1999 declaring a concentration to be compatible with the common market and the EEA Agreement (Case IV/M.1439, Telia/Telenor, OJ 2001 L 40, p. 1)).

184 It concludes that a commitment whose object is merely to promise not to abuse a dominant position does not allow for merger control to offer more than the general monitoring provided for in Article 82 EC. Such a commitment in fact merely aims to prevent conduct which is in any event prohibited by Article 82 EC, namely abuse of a dominant position, but is not capable of preventing the creation or strengthening of that dominant position, which is, however, the purpose of merger control.

185 For that goal to be attained, the commitments offered by the parties must reflect accurately the competition problems raised by the notified concentration.

186 It submits that the commitments offered are merely promises not to abuse dominant positions found by the Commission to exist, but are not such as to prevent the creation or strengthening of those dominant positions. It infers therefrom that they were not likely to dispel the Commission's serious doubts as to the compatibility of the notified concentration with the common market. Accordingly, the Commission should not have accepted them, but rather should have initiated the second phase of the merger control procedure.

187 The applicant refutes KirchPayTV's argument that the commitments bind the undertakings in the Kirch group, in this case BetaDigital, Gesellschaft für digitale Fernsehdienste GmbH (hereinafter 'BetaDigital') and BetaResearch, Gesellschaft für die Entwicklung und Vermarktung digitaler Infrastrukturen GmbH (hereinafter 'BetaResearch'), which do not themselves hold a dominant position in the markets in which they are active, with the result that the purpose of the commitments is more than a promise not to abuse a dominant position.

188 The applicant acknowledges, as regards BetaDigital, that its position as a user of the Kirch group's satellite technical broadcasting platform, is weakened by the widespread use of cable broadcasting in Germany compared to satellite broadcasting. It submits, however, that account should be taken of the fact that the cable technical broadcasting platform is in fact operated by an undertaking outside the Kirch group, namely MSG MediaServices GmbH, a subsidiary of Deutsche Telekom, which however uses the decoding technology from BetaResearch, which is part of the Kirch group. In order to ensure the opening of pay-TV markets in Germany and digital interactive television services, thus services which can reasonably be broadcast only by two means, namely cable and satellite at the same time, it was imperative to ensure that that decoding technology is not used exclusively by MSG MediaServices GmbH.

189 Second, the applicant submits that the commitments contradict the Notice on remedies. In that notice, the Commission, interpreting *Gencor* v *Commission*, states that all commitments must be capable of being implemented effectively and within a short period, and that commitments should not require additional monitoring once they have been implemented (paragraph 10). However, in the present case, contrary to that principle, the commitments require monitoring in the medium and long term.

190 Third, the applicant observes that the commitments are binding only on the Kirch group. Yet, it is open to BSkyB, subject to observance of certain conditions, to gain sole control of KirchPayTV and therefore hold a dominant position, without being bound in return by the commitments contained in the contested decision.

191 The Commission and the interveners maintain that these pleas are unfounded.

Findings of the Court

192 It is appropriate to recall, as a preliminary point, that under Article 6(2) of Regulation No 4064/89, where the Commission finds that, following commitments proposed by the parties, a notified concentration no longer raises serious doubts, it may decide to declare the concentration compatible with the common market pursuant to Article 6(1)(b). Since that regulation aims to prevent the emergence or strengthening of market structures likely significantly to impede effective competition in the common market, the commitments proposed must be capable of dispelling the serious doubts which the Commission believes are raised by the notified concentration in question.

193 According to the case-law, the Commission is empowered to accept only commitments which are capable of preventing the creation or strengthening of the dominant position identified by it in its analysis of the notified concentration. In order to ascertain whether that criterion is met, it is appropriate to examine the commitments on a case-by-case basis, without its being necessary to examine whether the commitment may be categorised as behavioural or structural. Although structural commitments are, as a rule, preferable to behavioural commitments, inasmuch as they prevent once and for all, or at least for some time, the emergence or strengthening of the dominant position and do not require medium- or long-term monitoring measures, nevertheless the possibility cannot automatically be ruled out that commitments which at first sight are behavioural, for instance the granting of access to essential facilities on non-discriminatory terms, may themselves also be capable of preventing the emergence or strengthening of a dominant position (*Gencor* v *Commission*, paragraph 319).

194 Moreover, given the complex economic assessments which the Commission is required to carry out in exercising the discretion which it enjoys with respect to examining the commitments proposed by the parties to the concentration, in order to obtain annulment of a decision approving a concentration on the ground that the commitments are insufficient to dispel the serious doubts, the applicant must show that the Commission has committed a manifest error of assessment (Case T-119/02 *Royal Philips Electronics* v *Commission* [2003] ECR II-1433, paragraph 78).

195 It is in the light of these principles that the plea alleging the insufficiency of the commitments must be examined.

196 In this case, the Commission's finding that the notified concentration in question is likely to strengthen the Kirch group's dominant position in the German pay-TV market and create a dominant position for that group in the future market in digital interactive television services is based on the existence of barriers to access

to that market by third parties. The applicant does not contest the serious doubts described in the contested decision and does not allege that the concentration raises other serious doubts, but claims only that the commitments were insufficient to eliminate those doubts.

197 In order to dispel those serious doubts, the Commission required and accepted a major package of commitments. The aim of those commitments was to resolve the competition problems identified by lowering the barriers to market access as regards the supply of subscription television services and to prevent KirchPayTV from using its alleged dominance in the subscription television services market to its advantage in its activities in the digital interactive television services market. The first part of those commitments essentially concerns free market access for programme suppliers (commitments 1 to 5). The second part of the commitments is aimed at lowering the market entry thresholds for technical platform operators, thereby ensuring additional opportunities to broadcast programmes via competing platforms (commitments 6 to 10). It thus appears at first sight that the package of commitments has the effect of bringing about an attendant lowering of the market entry thresholds and thus of dispelling the serious doubts raised by the strengthening of KirchPayTV's dominant position as a result of the notified concentration.

198 Under the first part of its plea, the plaintiff puts forward three general complaints concerning the commitments as a whole.

199 Turning, first, to the complaint that the commitments are mere promises not to abuse dominant positions found by the Commission, the Court finds, first of all, that although the commitments appear to be rather behavioural in nature, they are nevertheless structural because they are aimed at resolving a structural problem, namely market access by third parties. Thus the Commission was reasonably entitled to conclude that the Simulcrpyt agreements, the opening up to third parties of the programming interface for the d-box, the establishment of the

DVB-MHP standard and the grant of licences for the d-box decoder technology and its manufacture consistently provide for and strengthen competition at the various levels of the digital infrastructure. It follows that the commitments cannot be categorised as mere behavioural commitments unsuitable for resolving the competition problems identified by the Commission.

200 As stated above, in so far as the commitments lead to the opening up of competition at the various levels of the digital broadcasting structure, they go much further than merely prohibiting the abuse of a dominant position.

201 Next, it should be stated that the issue is not whether the obligations resulting from the commitments allegedly stem from Article 82 EC, but rather whether those commitments are capable of resolving the problems caused by the merger. Yet it cannot but be noted that, in its application, the applicant calls in question only in abstract form the appropriateness of the commitments and does not examine their proportionality in relation to the competition problems clearly identified by the Commission.

202 Moreover, the applicant does not demonstrate that the commitments do not offer more in relation to the general monitoring of abuses of dominant positions provided for by Article 82 EC. In the general monitoring of abuses of dominant positions under Article 82 EC, proof of a dominant position in the market in question and abuse thereof must be adduced by the Commission and by third parties. Conversely, the commitments imposed as preconditions of a decision approving a concentration have the effect of transferring the burden of proof of compliance to the undertakings concerned by the operation in question. To that extent, the commitments already go beyond the general monitoring provided for in Article 82 EC.

203 In addition, if there were no commitments, it would be necessary to introduce a national or Community procedure under Article 82 EC, the outcome of which would be uncertain and, in any event, more difficult to impose. Traders would thus be faced with greater legal uncertainty. Commitments, on the other hand, impose detailed obligations to be met within short periods of time, compliance with which is ensured by an effective, binding arbitration procedure which reverses the burden of proof and places it on the Kirch group. Commitments thus offer far greater legal certainty than Article 82 EC.

204 Nor, it has to be stated, has the applicant established that the conditions for the application of Article 82 EC were satisfied.

205 Thus, although it is apparent from the contested decision that KirchPayTV holds a dominant position in the German pay-TV market, the applicant has not demonstrated or even alleged in what way KirchPayTV has abused that dominant position. However, the package of commitments will, with immediate effect, enable the barriers to entry by third parties to both the pay-TV market and adjacent markets to be significantly lowered.

206 Likewise, as rightly pointed out by KirchPayTV, the commitments bind a certain number of undertakings in the Kirch group which are active in markets other than those contemplated in the contested decision and with regard to which it has not been established that they hold a dominant position either in the markets in question or in those where they are active.

207 Thus, commitments 1 to 3 are addressed to BetaDigital, which operates the Kirch group's satellite technical broadcasting platform through the intermediary of which KirchPayTV's and other broadcasting organisations' programmes are broadcast. Since satellite broadcasting is not as widespread in Germany as broadcasting via cable and since the cable technical broadcasting platform is

operated by an undertaking outside the Kirch group, namely MSG MediaServices GmbH, a subsidiary of Deutsche Telekom, it does not appear at first sight that BetaDigital enjoys a dominant position in the technical services market.

208 Nor has the applicant established that the characteristics of the market in question, and the position held in that market by the Kirch group undertakings, are such that the restrictive conditions required for the application of the case-law concerning essential facilities are satisfied in this case, or a fortiori that they would have enabled obligations or sanctions to be imposed likely to facilitate the opening up of the markets to competition to the same extent as the commitments.

209 In addition, the penalty for failure to comply with obligations in the case of commitments is more effective than in the case of legal obligations under Article 82 EC. In fact, under Article 8(5) of Regulation No 4064/89 the Commission may revoke the decision which it has taken where the undertakings concerned commit a breach of an obligation attached to the decision. Article 82 EC provides for no such penalty.

210 Turning, second, to the argument that the commitments are not acceptable in so far as they impose medium-term monitoring, the Court notes that the Notice on remedies does not have the significance and scope attributed to it by the applicant.

211 In point 10 of the Notice on remedies, the Commission notes that once the concentration has been implemented, the competitive conditions which must prevail on the market cannot actually be restored until the commitments have been implemented. It goes on to state that commitments must be capable of being implemented effectively and within a short period and that they should not require additional monitoring once they have been implemented. That clarification is not intended to prohibit any monitoring by the Commission of the performance of the commitments, but rather to ensure that the commitments are

suited to resolving the competition problems raised by the notified concentration so that, once implemented, they will not also require permanent monitoring by the Commission.

212 In the present case, it should be stated that the commitments provide for a series of specific measures seeking to open up access to the various markets and a binding arbitration procedure if problems of compliance arise.

213 As regards, third, the argument that the notified agreement also provides for the acquisition of control of KirchPayTV by BSkyB alone, it is sufficient to recall that the contested decision concerns only the joint acquisition of control of KirchPayTV by BSkyB and Kirch. The takeover of KirchPayTV by BSkyB alone would constitute a new concentration which should be notified to the Commission and form the subject-matter of a fresh examination.

214 It follows from the foregoing that the complaints put forward under the first part of the plea must be rejected.

Specific observations on certain commitments

Access for third parties to the Kirch platform (commitments 1 to 3)

— Arguments of the parties

215 The applicant submits that the commitments to allow interested third parties to have access to the Kirch group's technical platform, and thus to offer technical

services on fair, reasonable and non-discriminatory terms, merely reiterates the legal obligation which, according to the Court's case-law, is binding on any undertaking holding a dominant position in the market and supplying equipment which others need in order to be able to carry on their economic activity. In that regard it observes that when a supplier of an infrastructure which is indispensable for the performance of other services on subordinate markets is in a dominant position, and that infrastructure cannot be replicated by the other operators at a reasonable cost, that supplier must allow those operators access to the infrastructure in question (Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraph 48 et seq.; and Case C-7/97 *Bronner* [1998] ECR I-7791, paragraph 23 et seq.).

216 Accordingly, those commitments simply make it more difficult for KirchPayTV to abuse its dominant position, without however calling in question the strengthening of the dominant position brought about by the concentration. They are therefore insufficient.

217 The applicant adds that the commitments entail subsequent medium- and long-term monitoring by the Commission, which runs counter to *Gencor* v *Commission* and to the Notice on remedies.

218 It contests KirchPayTV's allegation that the market in technical services is not concerned by the notified concentration. That allegation contradicts the fact, acknowledged by KirchPayTV, that the commitments, by allowing potential competitors to have access to the technical services supplied by the Kirch group, are intended to resolve the competition problems raised by the notified concentration. In that way KirchPayTV is by implication recognising that the opening-up of the technical services market is of prime importance in ensuring access by potential competitors to the pay-TV and digital interactive television services markets.

219 The Commission and the interveners maintain that the plea is unfounded.

— Findings of the Court

220 The applicant essentially submits that the commitments seeking to enable interested third parties to have access to the Kirch group's technical platform merely constitute the implementation of the legal obligation imposed by Article 82 EC on any undertaking holding a dominant position in the market to make its technical services available to third parties in order to enable them to compete with it. It is thus contesting the sufficiency of the commitments.

221 The Kirch group's first three commitments are aimed at giving content providers access to the pay-TV and digital interactive television services market. They guarantee access, on fair, reasonable and non-discriminatory terms, to the Kirch group's satellite technical platform, so that their digital services can be received by the d-box. The three commitments therefore have a structural effect. They do not amount to a mere promise not to abuse a dominant position under Article 82 EC and do not appear as such inappropriate for resolving the competition problems raised by the proposed concentration at issue in the present case.

222 Moreover, the Court notes that the various services are all offered separately, that there is an obligation to keep separate accounts for each service and to give third parties access to those accounts within two weeks, that the Kirch group is required to divulge prices and conditions of sale and that it is subject to an obligation of cooperation and an obligation to treat third parties on an equal footing with the undertakings in the group.

223 Likewise, the commitments bind a number of undertakings in the Kirch group which are active in markets other than those covered by the contested decision, and in respect of which it is not established that they hold a dominant position either in the market in question or in markets where they are active. It thus does not appear that those undertakings come within the scope of Article 82 EC. Accordingly, it cannot be accepted that the commitments amount to an undertaking not to infringe Article 82 EC.

224 That conclusion is not called in question by the fact that, in exceptional cases, Article 82 EC also covers competition problems of a structural nature comparable to those which gave rise to the commitments (see Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215; *RTE and ITP* v *Commission*, paragraph 48 et seq.; and *Bronner*, paragraph 23 et seq.).

225 It follows from the case-law referred to that an abuse can be found to exist only where the refusal to allow access to an infrastructure indispensable to the provision of other services on subordinate markets has the effect of eliminating all competition in the downstream market without any objective necessity.

226 In this case, the applicant has not established that Kirch has such an infrastructure which would require it to comply with those obligations.

227 On the contrary, digital signals can be broadcast either by cable networks or via satellite. The FUN project is aimed at developing just such an alternative platform, although one which will be operational only for satellite broadcasting. Moreover, the contested decision states in recital 62 that in Germany satellite broadcasting is not comparable to cable broadcasting, because a television

operator which broadcasts by satellite would reach only one-third of all households. In addition, Kirch's cable broadcasting equipment consists only of the technology used in the cable networks belonging to Deutsche Telekom.

228 It follows from the foregoing that the plea must be rejected.

Access of third-party applications to Kirch's d-box system (commitment 4)

— Arguments of the parties

229 The applicant claims, first, that the opening up of access to Kirch's d-box system for third-party applications is merely the reiteration of a legal obligation which, according to the case-law concerning Article 82 EC, exists in any event. In that regard it submits that since the d-box system already gives rise to a monopoly position, a point evidenced by the contested decision (recital 61 et seq.), it in any event falls to be examined under the general monitoring of abuses of dominant positions provided for by Article 82 EC. It adds that the commitment does not entail any absolute obligation to allow access, but rather provides that Kirch and third parties are to reach agreement on fair, reasonable and non-discriminatory conditions. Accordingly, that commitment simply introduces permanent monitoring of conduct such as already exists under Article 82 EC in the case of undertakings holding a dominant position without in that regard offering additional advantages to third parties.

230 The applicant submits, second, that only divestiture by the Kirch group of its control over the d-box system would have been sufficient.

231 In that regard it submits that the commitment in no way alters Kirch's continuing control over the technological development of the d-box system. It observes that in the Bertelsmann/Kirch/Premiere (recitals 37 to 39) and Deutsche Telekom/BetaResearch (recitals 56 to 61) decisions, the Commission declared the notified concentrations at issue to be incompatible with the common market inter alia with a view to preventing the d-box system technology from becoming the only digital standard used in the German-speaking market, which means that any other potential operators of an access control system would be dependent on the licensing policies of BetaResearch, which is part of the Kirch group. The commitment in question specifically did not end Kirch's control of the technological infrastructure and the consequence flowing therefrom, namely that third parties are dependent on the grant to them of a licence by the Kirch group. The applicant observes that in Bertelsmann/Kirch/Premiere (recital 139) and Deutsche Telekom/BetaResearch (recital 64) decisions, the Commission rejected commitments comparable to the commitment in this case on the ground that they were not such as to challenge the Kirch group's control of the d-box system technology.

232 In the same vein the applicant refutes the Commission's argument that the Bertelsmann/Kirch/Premiere and Deutsche Telekom/BetaResearch decisions are not comparable to the present case. Those cases may well be different in terms of the facts, but not in terms of the competition problems raised, which arise in the same way in all those cases.

233 The applicant further observes that the commitment does not satisfy the criteria laid down by the Commission in the Notice on remedies. It observes that that notice provides that 'where the competition problem is created by control over key technology, a divestiture of such technology is the preferable remedy as it eliminates a lasting relationship between the merged entity and its competitors. However, the Commission may accept licensing arrangements (preferably exclusive licences without any field-of-use restrictions on the licensee) as an alternative to divestiture where, for instance, a divestiture would have impeded efficient, on-going research...' (paragraph 29).

234 It concludes that in the present case the problem of Kirch's dominant position in the markets in pay-TV and digital interactive television services could, in principle, have been resolved only if the Kirch group had divested itself completely of control over the decoding technology, which is essential for access to those markets, which would have entailed divestiture by Kirch of control of the BetaResearch undertaking. It adds that at no time did the parties to the notified concentration submit arguments justifying a derogation from the principle laid down in the Notice on remedies, in particular the situation mentioned therein concerning the impediment to on-going research caused by divestiture.

235 Lastly, the applicant contests KirchPayTV's argument that the commitment allows third parties to provide their services through the d-box without being required to obtain a licence or authorisation beforehand from the Kirch group. In fact, that commitment does not cover access control technology and therefore does not affect third parties' practical need of having to conclude an agreement with the Kirch group for the use of the technology, in this case Simulcrypt arrangements. That consequence could have been avoided if, as the applicant had requested during the administrative procedure, the Kirch group had accepted the installation of a common interface in the d-box, which the Kirch group categorically rejected.

236 The Commission and the interveners maintain that the plea is unfounded.

— Findings of the Court

237 The applicant maintains that opening up access to the d-box system is not sufficient. It states that since the d-box system already gives rise to a monopoly

position, it is in any event subject to the general monitoring of abuses of dominant positions provided for in Article 82 EC. The applicant submits that only divestiture by the Kirch group of its control over the d-box system would be sufficient.

238 The Court notes that Kirch's control of the technological infrastructure is not affected by the notified concentration.

239 The Court recalls that, by its fourth commitment, Kirch is to ensure that the interface enabling applications (d-box system) will be open to third parties, thereby generating additional applications such as programme guides.

240 It cannot but be noted that the applicant does not explain why only divestiture by the Kirch group of its control over the d-box system would have been sufficient to eliminate the serious doubts raised by the concentration.

241 It should also be borne in mind that the notified concentration does not concern the digital decoding technology market. In addition, since the commitment would allow third parties to provide their services through the d-box independently of any licence or authorisation from the Kirch group, the control of that system, and thus its subsequent development, does not appear such as to prevent third parties from having access to the pay-TV and digital interactive television services markets.

242 The applicant's argument that the commitment is merely the reiteration of a legal obligation under Article 82 EC cannot be accepted, for the reasons set out above.

243 Accordingly, the plea relating to that commitment must be rejected.

244 That finding cannot be called in question by the applicant's argument to the effect that in the Bertelsmann/Kirch/Premiere and Deutsche Telekom/BetaResearch decisions the Commission rejected commitments comparable to those in the present case on the ground that they did not challenge the Kirch group's control of the d-box system technology. As set out above, the concentration at issue in this case and the competition problems raised by it are not in fact comparable to those which formed the subject-matter of those three decisions.

245 Moreover, in order to adjudge whether the Commission manifestly erred in its assessment, it is appropriate to determine whether it was entitled to find that the proposed commitments as a whole enabled the competition problems identified to be resolved, and not whether a specific commitment, taken in isolation, was held to be insufficient in another notified concentration. In this case, the Commission concluded at the end of phase I that the commitments eliminated the serious doubts raised by the notified concentration. In fact the purpose of the commitment is to enable interested third parties to develop applications for digital interactive television on Kirch's technical platform. In the light inter alia of the interoperability of the applications, it does not appear that the Commission manifestly erred in its assessment in finding that that commitment is also conducive to the opening up of the digital television market.

246 It follows that the plea must be rejected.

Interoperability of applications (commitment 5)

— Arguments of the parties

247 The applicant submits that the commitment to ensure interoperability of applications is merely the necessary corollary to the commitment discussed above, which adds only a supplementary element to the permanent monitoring of conduct and is not likely to resolve the competition problem already established in the Bertelsmann/Kirch/Premiere and Deutsche/BetaResearch decisions, and in the contested decision (in particular recital 61), that is to say, the Kirch group's control over the d-box system.

248 The Commission and the interveners maintain that the plea is unfounded.

— Findings of the Court

249 By its fifth commitment, the Kirch group undertakes to ensure interoperability of the applications, that is to say, the existence of a common standard, the MHP.

250 The Court recalls that commitments as to conduct may be accepted if they have a structural effect, that is to say, if they are capable of preventing the emergence or strengthening of a dominant position (*Gencor* v *Commission*).

251 The applicant has not established that the commitment in question does not fall into that category. On the contrary, interoperability of applications seeks to ensure that interested third parties can develop applications for digital interactive television capable of being used on several technical platforms. Contrary to the applicant's assertion, the installation of competing technical platforms appears to be conceivable, since the FUN project is aimed at developing just such a technical platform.

252 In addition, and again contrary to the applicant's assertion, the obligation to establish the DVB-MHP standard does not require permanent monitoring of conduct, since the standardised interface will open the market structurally to suppliers of competing applications. Any undertaking will thereby be able to develop ready-to-use application programmes and to offer corresponding services, independently of any licence or authorisation from the Kirch group.

253 Moreover, the fourth and fifth commitments taken together allow the market to be opened up to applications.

254 In any event, it cannot but be noted that the applicant has not adduced proof of a manifest error of assessment by the Commission.

255 It follows from the foregoing that the plea cannot be accepted.

Interoperability of competing technical platforms (commitment 6)

— Arguments of the parties

256 The applicant maintains that the commitment whereby the Kirch group undertakes to ensure that Simulcrypt arrangements are entered into with the operators of competing technical platforms is not such as to challenge the dominant position held by the Kirch group in the technical services market, which also includes the access control systems by means of the d-box's protected conditional access system. The commitment amounts to an obligation as to conduct which the Kirch group is, in any event, bound to observe under Article 82 EC and therefore goes no further than what is already entailed by the general monitoring of abuses of dominant positions under that article.

257 Indeed, the content of the obligation as to conduct to which the Kirch group has committed itself remains particularly vague. First of all, the Kirch group undertakes merely to endeavour as far as possible to ensure that the Simulcrypt arrangements are operational as soon as possible. Next, compliance with that commitment is contingent upon the collaboration, as far as objectively necessary, of the operator of a competing technical platform, and the securing by that operator of fair and reasonable terms. Lastly, the technical security of the conditional access system must not be such as to create a threat to the corresponding d-box system.

258 In addition, according to the applicant, the commitment, which entails that Simulcrypt arrangements are entered into by the operators of competing platforms with BetaResearch, a subsidiary of the Kirch group, is always dependent on the goodwill of the Kirch group. That goodwill on the part of the Kirch group is questionable, however, since it, too, is a programme provider and risks incurring losses in that capacity as a result of the Simulcrypt

arrangements, which facilitates the broadcasting of competing programmes. Thus, there is a risk of conflict between the interests of BetaResearch, the provider of technical services, and those of the programme provider of the group controlling it. Accordingly, the independence of BetaResearch's business decisions cannot be guaranteed.

259 In that regard, the applicant observes that this risk of abuse was analysed and censured by the Commission in the Bertelsmann/Kirch/Premiere (recital 58) and Deutsche Telekom/BetaResearch (recital 38) decisions. It also refers to the negative experiences of the FUN association in attempting to negotiate a Simulcrypt arrangement with the Kirch group.

260 Lastly, it observes that the commitment presupposes the existence of competing conditional access systems, although it is difficult to see how they could gain a foothold in the market.

261 In response to KirchPayTV's argument that Simulcrypt arrangements are entered into only between technical platforms but that the Kirch group does not operate such a platform in cable broadcasting, the applicant states that the major technical platform in that field, MSG MediaServices GmbH, uses only technology developed by the Kirch group.

262 In relation to KirchPayTV's observation on the recent emergence of new technical platforms in cable broadcasting, the applicant points out that this factor was not present at the time of the contested decision, that it is therefore not relevant and that, even now, this emergence has not really taken place, given the constraints which Deutsche Telekom imposes on potential operators of competing platforms since it is the owner of the major part of the cable network and, through its subsidiary MSG MediaServices GmbH, the operator of the major technical

platform in cable broadcasting. In that connection it refers to the very considerable difficulties encountered by PrimaCom, the operator of a competing platform, in concluding a Simulcrypt arrangement with MSG MediaService GmbH.

263 The Commission and the interveners maintain that the plea is unfounded.

— Findings of the Court

264 This sixth commitment is aimed at allowing other pay-TV channels and digital interactive services to use the d-box.

265 The Kirch group has thus undertaken to enter into Simulcrypt arrangements with operators of technical platforms which use other encryption systems. It must be borne in mind that the Simulcrypt procedure enables different encryption systems to be used without the customer's needing to use several decoders to decipher the signal received by the exchange of encryption keys between platform operators. All corresponding programmes can then be received using a single decoder.

266 This commitment seeks to guarantee the installation of competing technical platforms by allowing capture through the d-box using Simulcrypt when a technical services provider wishes to use a competing encryption system. The Commission and the interveners stated, and were not contradicted by the applicant on this point, that technical service providers thereby have the possibility of choosing their encryption system freely and that competition is strengthened by this commitment not only between technical platform operators but also in the market in decoders.

267 It should also be borne in mind that any commitment gives rise to a legal obligation, infringement of which may, in an appropriate case, lead the Commission to revoke the authorisation for the concentration. The fact, which moreover has not been proven by the applicant, that Kirch might not show goodwill in living up to the commitment, is not such as to establish that the Commission committed a manifest error of assessment in finding that the commitment is capable of resolving the competition problems.

268 In addition, the commitment in question is not isolated and must be viewed in the overall context of all of the commitments undertaken by the Kirch group, especially the commitment providing for another technical platform for Kirch's pay-TV programming.

269 It follows that this plea must be rejected.

Access to Kirch pay-TV services by other technology platforms (commitment 7)

— Arguments of the parties

270 The applicant submits, first, that the commitment by which the Kirch group undertakes to market its pay-TV programmes using other technical platforms as well, including through Simulcrypt arrangements, is not such as to challenge the dominant position held by the Kirch group in the markets in pay-TV and related technical services and goes no further than what is already entailed by the monitoring of abuses of dominant positions provided for by Article 82 EC.

271 First, this commitment, instead of facilitating access for competing platforms in the market, merely presupposes their existence and offers them fair conduct in accordance with contract law.

272 Second, the implementation of that offer of goodwill is subject to particularly vague conditions.

273 Third, the commitment gives rise to a conflict of interest which undermines its effectiveness. By requiring the Kirch group to market its pay-TV programmes via competing technical platforms, it compels it to adopt decisions which would, depending on the case, be contrary to its own interests as a programme provider. In those circumstances, it is doubtful that the commitment would be fulfilled faithfully. The applicant points out that the Commission correctly found this to be the case in the Bertelsmann/Kirch/Premiere and Deutsche Telekom/BetaResearch decisions.

274 In that regard the applicant refers first to the negative experience of FUN which, when it sought to establish a competing technical platform, was refused access by KirchPayTV to the Kirch group's pay-TV supply, in breach of the relevant commitment and on false pretexts. Next it refers to the difficulties encountered by PrimaCom's cable broadcasting technical platform in concluding a Simulcrypt arrangement with the Kirch group. Lastly, it observes that there currently are no examples of technically feasible Simulcrypt solutions which can work between different decryption systems.

275 Second, the applicant submits that the commitment requires subsequent monitoring of conduct, which runs counter to *Gencor* v *Commission* and to the Notice on remedies.

276 The Commission and the interveners maintain that the plea is unfounded.

— Findings of the Court

277 By this seventh commitment, the Kirch group undertakes to market its pay-TV programmes inter alia using other technical platforms, including by means of Simulcrypt arrangements.

278 It cannot but be noted that this commitment facilitates market access for operators of competing technical platforms and thus indirectly favours competition between pay-TV suppliers by allowing them to broadcast their programmes with the Kirch group's pay-TV programmes, via those technical platforms.

279 As regards, first, the applicant's argument about the difficulties allegedly encountered by it in the implementation of commitment 7 as a co-operator of the alternative FUN platform, the Court notes that, according to the statements of the interveners, which were not contradicted by the applicant, FUN did not initiate the arbitration procedure provided for in the commitments.

280 As regards, second, the applicant's argument that commitment 7 does not lead to the opening up of the market, but already presupposes the existence of competing technical platforms, it should again be pointed out that the commitments cannnot be considered in isolation from each other.

281 As pointed out by the Commission, market access for a technical platform will be facilitated by the interoperability of competing technical platforms through Simulcrypt arrangements (commitment 6), by access to the Kirch group's pay-TV programmes (commitment 7) and, as the case may be, by access to the d-box system technology under licence (commitment 8). Commitments 6 and 7 thus seek to enable a pay-TV competitor to operate by means of a technical platform other than that operated by Kirch.

282 Accordingly, the complaints concerning commitment 7 must be rejected.

Use of the d-box system technology by other competing platforms (commitment 8)

— Arguments of the parties

283 The applicant submits that the Kirch group's commitment to allow operators of competing platforms access to the d-box system technology is not such as to challenge the Kirch group's dominant position in the technological development of that system.

284 In that regard it observes, first, that a commitment of the same kind was rejected by the Commission in the Bertelsmann/Kirch/Premiere (recital 139) and Deutsche Telekom/BetaResearch (recital 64) decisions on the ground that it was not likely to put an end to the dominant position. It states that the contested decision does not contain any grounds explaining how a different assessment under competition law is called for in this case when the factual situation is the same as it was in the two aforementioned cases.

285 Second, it submits that the commitment runs counter to the conditions laid down by the director of the Merger Task Force as prerequisites for the acceptance of commitments of this kind (Drauz, G.-H., 'Remedies under the Merger Regulation', *International Antitrust Law & Policy*, Fordham Corporate Law Institute, New York, 1996, pp. 219 to 238, see p. 225 et seq.), in particular commitments whereby:

— the party granting the licence must not be able to avoid the consequences of the licence granted by, for example, refusing important technical assistance;

— the party granting the licence must not charge the licence holder an excessive fee;

— the Commission must not be required to conduct permanent monitoring of compliance with the licence contract, such as checks on whether the operating fees are appropriate.

286 In this connection the applicant observes, first, that it is only the reference to the reasonable and non-discriminatory terms which is supposed to prevent the fixing of excessive fees for the use of licences, next, that the commitment does not contain specific provisions concerning technical assistance and, last but not least, that the commitment involves the Commission in permanent monitoring of conduct.

287 It adds that this permanent monitoring of conduct runs counter to the Notice on remedies.

288 In response to KirchPayTV's argument that the existence of such monitoring of conduct is contradicted by the provision of an arbitration procedure entailing a reversal of the burden of proof to the detriment of the Kirch group, the applicant points out that those factors do not call in question the fact of such monitoring and that, on the contrary, the need for an arbitration procedure proves the existence of that monitoring.

289 Third, the applicant submits that the contested decision contains an internal contradiction. On the one hand, the decision accepts the commitment in question whilst, on the other, noting that there is a major risk of abuse in the licensing policy which will probably be applied by BetaResearch, a subsidiary of the Kirch group, in its relations with potential competitors of KirchPayTV in the market in digital interactive television services, even referring to specific cases of abuse notified by interested third parties (recital 37 of the contested decision).

290 The applicant contests KirchPayTV's argument that the operators of technical platforms may choose either the d-box system technology under the commitment in question, or a competing technology and reach d-box subscribers using Simulcrypt arrangements. The negative experiences of FUN and PrimaCom in their attempts to negotiate Simulcrypt arrangements with the Kirch group show the manifestly inappropriate nature of the second option.

291 The Commission and the interveners maintain that the plea is unfounded.

— Findings of the Court

292 It is appropriate to bear in mind that the purpose of this commitment is to allow operators of competing platforms access to the d-box system technology.

293 It thus facilitates the setting-up of competing technical platforms and thereby also market access for competing content providers, such as to foster competition in the pay-TV market.

294 The applicant's argument alleging a contradiction between the contested decision and the decisions in Bertelsmann/Kirch/Premiere and Deutsche Telekom/BetaResearch must be rejected on the grounds set out above.

295 As to the applicant's argument that the commitment at issue entails permanent monitoring of conduct, which would run counter to the Notice on remedies, it is sufficient to observe that all disputes concerning compliance with commitment must be subject to arbitration, which guarantees sufficient monitoring. Moreover, third parties who are not satisfied with the implementation of the commitment may make use of an arbitration procedure under which the burden of proof is placed on the Kirch group. Thus, although compliance with the commitment is subject to monitoring, it is not the Commission which is responsible for that monitoring.

296 As to the applicant's argument that the commitment runs counter to the conditions defined in a publication by the director of the Merger Task Force as being prerequisites for the acceptance of this type of commitment, it is sufficient

to note that statements by a Commission official do not reflect any official position of the Commission and are not binding on it.

297 Lastly, the applicant's argument that, in accepting the commitment, the Commission disregarded the risk of abuse of a dominant position by Beta-Research in its granting of operating licences for the d-box system must be rejected. First, the operators of technical platforms are free to choose a competing technology and to reach d-box subscribers using Simulcrypt arrangements. Second, as pointed out above, the commitment in question must not be considered in isolation, but rather as part of a package of commitments guaranteed by corresponding obligations and conditions, and in particular a binding arbitration procedure.

298 Accordingly, the plea relating to commitment 8 must be rejected.

Production of 'multiple system' boxes (commitment 9)

— Arguments of the parties

299 The applicant states that the commitment to grant licences for what may be termed multiple system decoders also runs counter to the Commission's assessment in the earlier Bertelsmann/Kirch/Premiere (recital 139) and Deutsche Telekom/BetaResearch (recital 64) decisions, according to which such a commitment is not likely to eliminate the serious doubts arising under competition law, since it did not have the effect of withdrawing from Kirch

control over technological development. In its view, the change in assessment under the law on merger control, even though the facts are identical, is in no way based on any statement of reasons by the Commission.

300 That dominance could only have been challenged if the Commission had imposed the additional obligation on the Kirch group to allow holders of manufacturing licences for d-boxes to integrate in them not only competing access systems, but also a common interface. In fact the integration of competing access systems is a wholly insufficient solution because it compels operators of technical platforms using those competing encryption systems to enter into Simulcrypt arrangements with the Kirch group and thus does not challenge the Kirch group's dominance over the d-box system.

301 In that regard it contests the Commission's statement that the commitment includes the possibility of integrating a common interface into the d-box.

302 The Commission and the interveners maintain that the plea is unfounded.

— Findings of the Court

303 The purpose of this ninth commitment is to offer decoder manufacturers licences to develop d-box decoders, by allowing them to integrate it with other access control systems, including a common interface. Common interface is understood to mean a module system provided in each d-box allowing the use of different types of decryption.

304 It cannot but be noted that the applicant has not established that this commitment is not capable of guaranteeing that future d-box subscribers can also be reached through other encryption systems. Commitment 9 thus seeks to open up the market to technical platform operators, content providers, potential d-box manufacturers and also encryption system providers.

305 It should also be borne in mind that this case is not comparable to the background to the Bertelsmann/Kirch/Premiere and Deutsche Telekom/BetaResearch decisions. Since the factual situation was not identical, the Commission was not under an obligation to state specific reasons for its decision.

306 Accordingly, this plea must be rejected.

Transition from the analogue system to the digital system (commitment 10)

— Arguments of the parties

307 The applicant submits that the commitment to offer a digital decoder (d-box) to every KirchPayTV subscriber who has only an analogue decoder is not capable of making it easier for interested operators to access the pay-TV and digital interactive services markets and to offer their services to those subscribers. Owing to rejection of the common interface solution, access by third parties to the markets in question through the d-box requires as a minimum the conclusion of Simulcrypt arrangements with the Kirch group, which, however, refuses to enter into them.

308 The Commission and the interveners maintain that the plea is unfounded.

— Findings of the Court

309 The Court notes that the applicant does not dispute that this commitment to offer a digital decoder (d-box) to every KirchPayTV subscriber who has only an analogue decoder guarantees that Premiere subscribers will have a digital decoder and that programme providers will not be excluded from the market because they broadcast digitally. It avoids a situation where competing operators' activities in the markets in question are impeded because consumers' use of analogue decoders are not suitable for those activities. Accordingly, the applicant has not established how the Commission committed a manifest error of assessment in finding that that commitment enables the market to be opened up to third parties.

310 Accordingly, the plea relating to this commitment must be rejected.

Limitation on additional cable capacity (commitment 11)

— Arguments of the parties

311 The applicant submits that the commitment whereby KirchPayTV undertakes not to apply for further digital cable capacity until 31 December 2000 is not such as

to challenge the Kirch group's technological dominance of the market. Nor does it remove the concern expressed by the Commission in the contested decision (recital 78) arising from the use by Deutsche Telekom of the technology of BetaResearch, which is part of the Kirch group, in order to broadcast television programmes digitally on the broadband cable network. It observes that that concern centred on apprehension about the emergence of a dominant position for KirchPayTV in the market in digital interactive television services.

312 It observes that those concerns have, in the meantime, turned out to be all the more pertinent because Deutsche Telekom and the Kirch group currently propose to run BetaResearch as a joint venture, a proposal which has been notified to the Bundeskartellamt.

313 It contests the Commission's assertion that it sought the imposition of obligations on a third party to the notified concentration, namely Deutsche Telekom. It claims merely that the commitment is not capable of dispelling the serious doubts as to the compatibility of the notified concentration with the common market expressed by the Commission in the contested decision (recital 78).

314 The Commission and the interveners maintain that the plea is unfounded.

— Findings of the Court

315 The commitment not to apply for further digital cable capacity until 31 December 2000 is intended to dispel the concern that Kirch's pay-TV supply takes up too

much space on the cable network, such that there is not sufficient space left for third parties' supply.

316 The applicant's complaint that the Commission did not require Deutsche Telekom to use technology other than Kirch's for its cable network cannot be accepted. Deutsche Telekom is in fact a third party to the notified concentration at issue, and the Commission cannot therefore impose obligations on it under the present procedure.

317 In addition, the notified concentration at issue is not in any way related to Deutsche Telekom's decision to use Kirch's technology for its cable network.

318 Moreover, the applicant's observations concerning the proposed creation of a joint venture between Deutsche Telekom and BetaResearch are of no relevance, since any competition problems raised by that project are not related in any way to the contested decision.

319 Accordingly, the applicant's plea must be rejected.

Observations criticising the lack of certain indispensable commitments

320 The applicant complains that the Commission did not impose certain commitments which it had suggested during the administrative procedure (letters of 22 February, 2 March and 15 March 2000) which, in its view, were capable of

eliminating the most serious doubts which the Commission itself found as to the compatibility of the notified concentration with the common market without, however, being sufficient to ensure compatibility.

321 It criticises KirchPayTV's argument that commitments 1 to 5 were sufficient but that commitments 6 to 9, concerning the opening up of the technical services market, were not even necessary and that other commitments having an even greater scope were also not necessary. By considering commitments 6 to 9 to be unnecessary, KirchPayTV is failing to recognise the importance that the Kirch group's domination, through the Kirch group, of the d-box system technology has for the opening up of the pay-TV and digital interactive television services markets. In addition, if the logic of the argument is followed, then the contested decision must be annulled for having imposed unnecessary commitments.

Lack of a commitment to have the d-box decoder equipped with a common interface

— Arguments of the parties

322 The applicant maintains that it was wrong not to require the parties to the notified concentration to undertake to equip the d-box decoder with a common interface, as it had suggested.

323 In that regard it submits that, on the basis of the commitments accepted, operators competing with KirchPayTV will be able to broadcast their programmes via the d-box decoder only by using the conditional access system

developed by BetaResearch, belonging to the Kirch group, namely BetaCrypt, which they are entitled to use only after having concluded a Simulcrypt arrangement with BetaResearch. The need to conclude a Simulcrypt arrangement makes those operators dependent on BetaResearch, and the Kirch group may abuse that position in order to safeguard its interests in the pay-TV and digital interactive television services markets by placing its potential competitors in those markets at a disadvantage.

324 The applicant points out that that risk of abuse was a matter of concern which attracted the Commission's censure in the Bertelsmann/Kirch/Premiere (recital 58) and Deutsche Telekom/BetaResearch (recital 38) decisions. It was also censured by the Swiss federal ministry of the environment, transport, energy and communication in a decision of 8 November 1999 concerning the Swiss pay-TV operator Teleclub AG, which also uses the d-box decoder and in which KirchPayTV holds a 40% interest.

325 It adds that that risk has, in the meantime, become greater following the takeover of the Premiere pay-TV channel by the Kirch group alone and the merging of that channel with DF1 to make Premiere World. It also refers in this context to the practical difficulties encountered by some operators, including FUN, in concluding Simulcrypt arrangements with BetaResearch.

326 It states that, in order to avoid this risk, it proposed that the Kirch group should be required to equip the d-box decoder with a common interface, which would allow the same decoder to receive programmes encoded using different conditional access systems. That solution, known as Multicrypt, would avoid the disadvantages referred to above by enabling competing operators to broadcast their programmes protected by conditional access systems other than the one used by the Kirch group, via the d-box, without having to conclude Simulcrypt arrangements with that group.

327 In response to KirchPayTV's arguments, the applicant disagrees that Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals (OJ 1995 L 281, p. 51, hereinafter 'Directive 95/47'), which is a harmonisation directive adopted on the basis of Article 47(2) EC, Article 55 EC and Article 95 EC, limits the Commission's discretion in assessing the commitments to be accepted in merger control. It also contests, in the context of merger control, the relevance of arguments about the practical advantages for the ultimate consumer of Simulcrypt as opposed to Multicrypt.

— Findings of the Court

328 As a preliminary point, it should be borne in mind that the Commission enjoys broad discretion in assessing the necessity of obtaining commitments in order to dispel the serious doubts raised by a notified concentration.

329 It follows that it is not for the Court of First Instance to substitute its own assessment for that of the Commission; the Court's review must be limited to ascertaining that the Commission has not committed a manifest error of assessment. In particular, failure to take into consideration commitments suggested by the applicant does not by itself prove that the contested decision is vitiated by a manifest error of assessment. Moreover, the fact that other commitments also might have been accepted, or even might have been more favourable to competition, cannot entail annulment of the contested decision inasmuch as the Commission was reasonably entitled to conclude that the commitments contained in the decision dispel the serious doubts.

330 The applicant maintains that the Commission should have imposed a commitment that the d-box decoders be equipped with a common interface rather than one providing for Simulcrypt arrangements.

331 In that regard it is appropriate to note, first, that the Simulcrypt encryption and the common interface both avoid a situation where a television viewer subscribing to pay channels protected by access control systems has to use several decoders. In Directive 95/47 the two solutions are considered to be equivalent.

332 Likewise, the applicant has not contested KirchPayTV's statement that the Simulcrypt encryption procedure offers a number of advantages over the common interface. KirchPayTV stated, first, that Simulcrypt ensures greater protection against electronic pirating and, second, that the common interface requires the television viewer to purchase, in addition to the decoder, modules for the various conditional access systems in addition to the decoder and to change module to be able to watch encrypted programmes using a different access system. It also observed that the current d-box population cannot be reached using the common interface.

333 Moreover, as has already been established, the applicant's plea that the commitment to conclude Simulcrypt arrangements is not sufficient to resolve the competition problems raised in this case is unfounded.

334 In those circumstances, the Commission cannot be regarded as having committed a manifest error of assessment by not requiring a commitment concerning the common interface.

Lack of a commitment concerning possible links between BetaResearch and Deutsche Telekom

— Arguments of the parties

335 The applicant complains that the Commission did not take account of its suggestion to impose a commitment aimed at prohibiting corporate or contractual legal links from arising between BetaResearch and Deutsche Telekom for the purpose of ensuring that the technological standard developed by BetaResearch became the only one used in the broadband cable networks belonging to Deutsche Telekom, which controls most of the available networks. It states that the prospect of such links arising is a source of serious concern which was discussed by the Commission in the Deutsche Telekom/BetaResearch decision (recital 33 et seq.).

336 In response to the Commission's argument that it could not have imposed legal obligations on third parties, the applicant states that the Commission could very well have required the Kirch group to intervene with Deutsche Telekom in order that the latter might put an end to the exclusive use of the technological standard developed by BetaResearch. It states that if the Kirch group had been unable to comply with that commitment, the Commission should have established that it was non-compliant and persisted with the doubts under competition law which it had expressly formulated concerning that exclusive use (recital 61 of the contested decision).

337 It adds that the Commission has not hitherto opposed the plan by Deutsche Telekom and the Kirch group to run BetaResearch as a joint venture, even though that plan involves two undertakings in dominant positions.

338 In response to KirchPayTV's argument that the likelihood of Deutsche Telekom's using the technological standard developed by BetaResearch is offset by the sale of a major share of Deutsche Telekom's broadband cable networks, the applicant submits that the timing and terms of that sale were not finalised at the time when the contested decision was adopted, and have still not been finalised.

— Findings of the Court

339 The applicant complains that the Commission did not impose a restriction concerning a possible link between Deutsche Telekom and BetaResearch.

340 In that regard it cannot but be noted, first, that this plea must be rejected because, in the application, the applicant merely criticises the Commission for having disregarded its suggestion to prohibit such a link without in any way discussing, much less demonstrating, why such a commitment is necessary to dispel the serious doubts expressed by the Commission regarding the notified concentration at issue.

341 Second, the Court finds that the Commission could not in any way give effect to the applicant's proposal, since it cannot accept a commitment imposed on a third party to the proposed concentration as part of a decision adopted under Regulation No 4064/89.

342 Third, according to its wording, the applicant's plea concerns the lack of prohibition of a possible link between Deutsche Telekom and BetaResearch. As stated in its reply, the applicant is referring in that connection to proceedings

brought before the German Bundeskartellamt in which Deutsche Telekom and BetaResearch plan to form a joint venture. It is clear that any competition problems which might be raised by those plans are totally unrelated to the contested decision and that the applicant's objections on this point must be addressed to the authority which is competent to rule thereon.

343 Fourth, in so far as the applicant appears also to be seeking to call in question, at the reply stage, Deutsche Telekom's current exclusive use of the technology developed by BetaResearch in its cable networks, the Court finds, first, that that plea is inadmissible because it is new or, at the very least, does not meet the requirements of Article 44(1)(c) of the Rules of Procedure of the Court of First Instance and, second, that Deutsche Telekom's decision to use BetaResearch's technology in its cable networks was adopted before the concentration which forms the subject-matter of the contested decision and is unrelated to it.

344 It follows from the foregoing that the plea must be rejected.

Lack of a commitment requiring the separation of programmes, technology and equipment

— Arguments of the parties

345 The applicant complains that the Commission did not accept its suggestion, first, to require the Kirch group to offer the d-box decoder to customers who wish to watch only programmes of third-party operators and do not wish to subscribe to

the pay-TV programmes offered by KirchPayTV, namely Premiere World, and, second, to allow customers to be able to receive Premiere World using equipment competing with the d-box. Those commitments would, in its view, put an end to the vertical integration existing in this case between the technology and the programmes.

346 The applicant submits that, if there is no separation between programmes, technology and equipment, operators who develop or supply technology competing with the d-box have little chance of success, since they are not in a position to secure broadcasting using their technology of the only complete pay-TV programme currently on the market, namely Premiere World. It points to the competition law disadvantages of the emergence or maintenance of dominance of the technological market, as recognised by the Commission in the decisions in Bertelsmann/Kirch/Premiere (recital 56 et seq.) and Deutsche Telekom/BetaResearch (recital 33 et seq.) concerning the impact of the d-box controlled by the Kirch group. It also observes that the Commission itself noted in the Notice on remedies that where, as in this case, the competition problem is created by control over key technology, divestiture of such technology is the preferable remedy (recitals 29 and 30).

347 It contests the Commission's argument that the separation between programmes, technology and equipment is already ensured by the commitments seeking to allow third parties access to Kirch's technical platform (commitment 1 to 3) and competing technical platforms access to KirchPayTV's pay-TV services (commitment 7). It submits that those commitments do not serve their stated purpose and refers to the criticisms directed at them. It refers in regard to commitment 7 to the considerable practical difficulties encountered by the FUN alternative technical platform in obtaining agreement from the Kirch group for access to Premiere World programming.

— Findings of the Court

348 The applicant maintains that the Commission should have provided for a commitment requiring Kirch, first, to offer the d-box decoder to customers who do not wish to take out a subscription for the pay-TV programmes offered by KirchPayTV and, second, to allow its subscribers to receive programmes using equipment other than the d-box.

349 In that regard the Court notes that commitments 1 to 3, which provide for access by third parties to Kirch's technical platform, on the one hand, and commitment 7, which provides for access to Kirch pay-TV services by other technical platforms, on the other, are specifically intended to ensure access by competing third parties. However, the applicant's complaints concerning the alleged insufficiency of those commitments in dispelling the serious doubts expressed by the Commission have already been rejected above.

350 Moreover, it must be noted that the applicant has not established, or even discussed, how, given the different measures for opening up the markets resulting from all of the commitments comprised in the contested decision, it would also have been necessary to add the commitment proposed by it.

351 It follows that the applicant has not established that the Commission committed a manifest error of assessment and that the plea must be rejected.

352 That conclusion cannot be called in question by the argument put forward by the applicant in its reply that FUN's technical platform encounters difficulties in obtaining access from Kirch to Premiere World, its pay-TV programmes. In fact the commitments provide in detail for an arbitration procedure enabling inter alia

the adoption of binding measures to resolve problems of this kind and, if, following such proceedings, it were to appear that Kirch is failing to perform its commitments, the Commission would have the possibility of revoking the contested decision pursuant to Article 8(5) of Regulation No 4064/89.

353 It follows from all of the foregoing that the third plea must be rejected.

4. *Fourth plea: alleged procedural irregularity resulting from failure to initiate the procedure under Article 6(1)(c) of Regulation No 4064/89*

Arguments of the parties

354 The applicant submits that, in accordance with Article 6(2) of the Merger Regulation, read with the eighth recital of Regulation No 1310/97, the Commission may accept commitments during the first phase of the merger control procedure only when the competition problems are readily identifiable and can be easily remedied, and that it is only then that the Commission may decide not to initiate the procedure under Article 6(1)(c) of the Merger Regulation.

355 In that connection it observes that in the contested decision the Commission expressed serious doubts as to the compatibility of the notified concentration with the common market (see in particular recital 51 and 80). It also refers to its arguments concerning the very great complexity both of the competition problems raised by the notified concentration and of the commitments proposed

and the manifestly inappropriate nature of the commitments accepted. It therefore submits that the competition problems raised in this case were not readily identifiable and could not be easily remedied and that, consequently, the Commission was not entitled to decide not to initiate the procedure under Article 6(1)(c) of the Merger Regulation.

356 The applicant submits that the failure to initiate the procedure in question constitutes a procedural irregularity.

357 In support of its argument, it also refers to Case T-46/97 *SIC* v *Commission* [2000] ECR II-2125. It states that in that case, which involved State aid, the Court of First Instance annulled a Commission decision declining to categorise as State aid financing challenged by the applicant, without initiating the formal procedure provided for in Article 88(2) EC. It notes that, in support of that finding, the Court of First Instance pointed to the serious difficulties inherent in that categorisation and to the fact that a refusal to initiate the formal procedure deprived the applicant of the opportunity to submit its comments and thereby participate in the procedure. The applicant considers that the problem raised in the present case, whilst it comes within the field of merger control and not State aid, is essentially comparable to that case and is even considerably more complex; it submits that, accordingly, it was all the more indispensable in this case to initiate the procedure.

358 It notes that the interpretation of Article 6(1)(c) of the Merger Regulation proposed by KirchPayTV does not take account of the eighth recital of Regulation No 1310/97 and the manifestly inappropriate nature of the commitments accepted in this case.

359 In response to KirchPayTV's argument concerning the irrelevance of *SIC* v *Commission*, cited above, owing in particular to the differences between the procedure for State aid and that governing merger control, the applicant states

that the failure to initiate the procedure under Article 6(1)(c) of the Merger Regulation had the effect of depriving it of the extended procedural rights under Article 18(4) of that regulation.

360 The Commission and the interveners submit that the plea should be rejected.

Findings of the Court

361 The applicant puts forward three arguments in support of its plea that the Commission was required to open the second phase of the procedure.

362 As regards, first, the argument that the Commission found that the proposed concentration raised serious doubts, the Court notes that Article 6(1)(c) of the Merger Regulation, which provides that the Commission is required to initiate the procedure if it finds that the notified concentration raises serious doubts as to its compatibility with the common market, expressly provides that that obligation is without prejudice to Article 6(2). Article 6(2) specifically empowers the Commission to decide not to initiate the abovementioned procedure and to declare the concentration compatible with the common market if it finds that, as a result of modifications accepted by the parties, the concentration no longer raises serious doubts.

363 It follows that the fact that the Commission found that the concentration raised serious doubts does not mean that it was required to open the second phase of the procedure, since the parties offered commitments which enabled those doubts to

be dispelled. Indeed, the Commission found in recital 94 of the contested decision that the commitments offered by the parties removed the serious doubts.

364 Second, the applicant's arguments that the Commission was not entitled to accept the commitments during the first phase because the competition problems were not readily identifiable and, also, that the commitments did not eliminate the serious doubts raised by the concentration, have already been rejected in the examination of the second and third pleas, respectively.

365 Lastly, it cannot but be noted that the third argument based on a comparison with *SIC* v *Commission* is unfounded because examination procedures by the Commission under Article 6 of the Merger Regulation cannot be equated with those conducted under Article 88 EC.

366 In particular, it is appropriate to note, first of all, that, as regards the preliminary phase of State aid proceedings, interested third parties have no right to participate in the proceedings. Next, the Court notes that if the Commission finds, in the course of the examination provided for under Article 88 EC, that the proposal constitutes aid within the meaning of Article 87(1) EC and that there are therefore doubts as to its compatibility with the common market, it is required to initiate the formal procedure, whereas, as discussed above, if the Commission finds that a notified concentration raises serious doubts, it is not required to initiate the second phase if the modifications to the concentration or the commitments offered by the undertakings concerned enable those doubts to be dispelled.

367 It follows from all of the foregoing that the fourth plea must be rejected.

5. Fifth plea: unacceptable curtailment of the rights of third parties to participate in the procedure

Arguments of the parties

368 The applicant maintains that the Commission infringed the right of third parties to participate in the procedure by accepting the commitments offered by the parties to the concentration so late that the applicant was unable to make its views known in due time.

369 The applicant observes that Article 18(1) of Regulation No 447/98 provides that commitments proposed to the Commission by the undertakings concerned, in accordance with Article 6(2) of Regulation No 4064/89, which are intended by the parties to form the basis for a decision pursuant to Article 6(1)(b) of that Regulation, must be submitted to the Commission within a period of three weeks from the date of receipt of the notification.

370 It interprets that provision as requiring that all commitments which the parties concerned wish to put forward must necessarily be submitted to the Commission within three weeks from the date of receipt of the notification. Only minor and easily identifiable modifications may still be considered acceptable after that time.

371 It relies on three arguments in support of that interpretation.

372 First, it observes that Article 10(6) of the Merger Regulation provides that where the Commission has not taken a decision in accordance with Article 6 (1)(b) within six weeks, the notified concentration is to be deemed compatible with the common market. It infers therefrom that, if it were to be accepted that the undertakings concerned by a notified concentration may freely modify their commitments after the expiry of the period of three weeks provided for in Article 18(1) of Regulation No 447/98 concerning notifications, they would be able to propose substantial modifications shortly before the expiry of the six-week period and thus coerce the Commission into granting the authorisation by default under Article 10(6) of the Merger Regulation.

373 Second, the interpretation proposed is justified in the light of the eighth recital of Regulation No 1310/97, according to which the Commission may accept commitments during the first phase of the procedure only when the competition problem is readily identifiable and can be easily remedied. In that regard the applicant also refers to the Notice on remedies, in which the Commission states in point 37 that, given that remedies during the first phase of the merger control procedure are designed to provide a straightforward answer to a readily identifiable competition concern, only limited modifications can be accepted.

374 In that regard the applicant refutes KirchPayTV's argument that the modifications intended to take account of third parties' comments are not an indication that the competition problems raised by the concentration are not readily identifiable or cannot be remedied easily. The Commission may take third parties' comments into account in order to require modifications to the proposed commitments only when those comments give it cause to doubt the appropriateness of a declaration that the notified concentration is compatible with the common market. Substantial and frequent modifications proposed following comments from third parties are thus a reflection of major difficulties raised by the notified concentration.

375 Third, the interpretation suggested is corroborated by the fact that Article 18(1) of Regulation No 447/98, concerning notifications, does not give the Commission the power to extend the time-limit for submitting commitments, unlike Article 18(2), which concerns commitments proposed during the second phase.

376 In the light of those considerations, the applicant concludes that the Commission was no longer entitled to take into account modifications to the commitments proposed after the expiry of the time-limit provided for in Article 18(1) of Regulation No 447/98, in this case 29 February 2000.

377 The applicant observes that the Commission none the less took account after that date of two modifications to the package of commitments which are substantial in nature and which, for obvious tactical reasons, were submitted only very shortly before the expiry of the six-week time-limit provided for in Article 10(1) of Regulation No 4064/89.

378 It considers that, in so doing, the Commission unacceptably curtailed the rights of third parties to participate in the procedure. It submits that this is confirmed by the fact that it was given barely 24 hours to submit comments on the first modification to the commitments and did not have an opportunity to submit comments on the second modification.

379 The applicant explains that it is not pleading an infringement of the right of a third party to be heard. Accordingly, it is contesting the relevance of the Commission's and KirchPayTV's arguments which question whether the applicant has such a right. On the same grounds, it also contests the relevance of the reference made by KirchPayTV to Article 16(1) of Regulation No 447/98 and the argument to the effect that no time-limit is provided in Article 18(4) of Regulation No 4064/89 for third parties to be heard.

380 The applicant also submits that *Kaysersberg* v *Commission* relied on by the Commission in support of its argument about the very limited rights of third parties in merger control proceedings, is not relevant because it relates to facts dating from prior to the entry into force of Regulation No 447/98 and therefore Article 18(1) thereof, which fixes a time-limit within which commitments may be proposed. The applicant observes that the Court of First Instance expressly noted in paragraph 141 of that judgment that, in the absence of a specific provision imposing a time-limit the Commission could not refuse to examine commitments proposed, even if they were late. It infers therefrom that the converse conclusion should be reached in the present case.

381 The Commission, supported by KirchPayTV, submits that the applicant's arguments under this plea should be rejected.

Findings of the Court

382 It should be borne in mind that the parties to the concentration effected complete notification of the proposed concentration on 7 February 2000 and submitted commitments to the Commission on 29 February 2000, and two modified versions thereof on 14 and 16 March 2000.

383 It should be noted that, in the words of Article 18(1) of Regulation No 447/98:

'Commitments proposed to the Commission by the undertakings concerned pursuant to Article 6(2) of Regulation... No 4064/89 which are intended by the parties to form the basis for a decision pursuant to Article 6(1)(b) of that

Regulation shall be submitted to the Commission within not more than three weeks from the date of receipt of the notification.'

384 In the present case, the notification was declared complete by the Commission on 7 February 2000. Accordingly the time-limit for proposing commitments to the Commission during phase I expired on 29 February 2000, pursuant to the calculation method laid down in Articles 6 to 9 and 18(3) of Regulation No 447/98. Thus the initial version of the commitments was lodged with the Commission within the time-limits fixed by Article 18(1) of Regulation No 447/98.

385 It is, however, common ground that the initial version of the commitments is not the same as the final version accepted by the Commission in the contested decision and that both the modified version of the commitments and the final version were lodged by the parties after 29 February 2000. It is thus appropriate to examine whether the Commission was entitled to accept those commitments.

386 In that regard the Court of First Instance has held that Article 18(1) of Regulation No 447/98 must be interpreted as meaning that, whilst the parties to a concentration cannot oblige the Commission to take account of commitments and modifications thereto submitted after the time-limit of three weeks, the Commission must nevertheless be able, where it considers that it has the time necessary to examine them, to authorise the concentration in light of those commitments even if modifications are made after expiry of the three-week time-limit (*Royal Philips Electronics* v *Commission*, paragraph 239).

387 It follows from the foregoing that the Commission was entitled to accept the modified version and the final version of the commitments beyond the three-week time-limit provided for in Article 18(1) of Regulation No 447/98, since it was not bound by that time-limit.

388 It is true that in point 37 of the Notice on remedies the Commission stated as follows:

'Where the assessment shows that the commitments offered are not sufficient to remove the competitive concerns raised by the merger, the parties will be informed accordingly. Given that phase I remedies are designed to provide a straightforward answer to a readily identifiable competition concern, only limited modifications can be accepted to the proposed commitments. Such modifications, presented as an immediate response to the result of the consultations, include clarifications, refinements and/or other improvements which ensure that the commitments are workable and effective.'

389 However, that notice must be interpreted in the light of Article 18(1) of Regulation No 447/98.

390 It follows that the Commission, if it considers that it has sufficient time to examine the modifications to the commitments beyond that time-limit, must be able to authorise the concentration in light of the modified commitments.

391 In any event, the Court finds that the modifications accepted in this case by the Commission after the three-week time-limit were, in any event, limited within the meaning of point 37 of the Notice on remedies, that is to say, they were 'presented as an immediate response to the result of the consultations, [and] include clarifications, refinements and/or other improvements which ensure that the commitments are workable and effective'.

392 First of all, the applicant did not demonstrate or even indicate in its observations or during the oral procedure which substantial modifications

were made after the three-week time-limit, but merely stated that such modifications were made.

393 In general terms, it is apparent from a comparison of the initial version of the commitments, lodged within the three-week time-limit, with the first modification of those commitments and the final version of the commitments as accepted by the Commission that neither the Commission's overall approach aimed at opening up access to the market nor the substance of each of the commitments was altered. In addition, it appears that the modified version and the final version of the commitments seem to be an 'improvement' over the initial version, with a view precisely to taking account of the comments formulated by third parties, and in particular the applicant.

394 In regard to the changes made to the initial version by the modified version, concerning the first three commitments relating to third-party access to Kirch's platform, these consist inter alia in enlarging the category of addressees of such commitments to all interested third parties, no longer limiting that category to television operators and in specifying more clearly the obligation of cooperation by which the relevant Kirch company is bound vis-à-vis the offeree, which includes the obligation to disclose information relating to the conditional access system and to technical services within one month of the request in writing from the interested third party.

395 As regards the fourth commitment relating to the access to Kirch's d-box system for third-party applications, the changes made by the final version consisted principally in making access to the d-box operating system via the Application Programming Interface, known as DVB Multimedia Home Platform (MHP) (hereinafter 'API') subject to agreement being reached between Kirch and third parties on fair, reasonable and non-discriminatory terms. In addition, the new provisions relating to the tests to which third parties may subject their applications do not modify the scope of the commitment.

396 Accordingly, the Court finds that the substance of the commitment which consists in further opening up access for third parties to Kirch's d-box remains unchanged and that the modifications made are improvements for the purposes of point 37 of the Notice on remedies.

397 In regard to the fifth commitment concerning interoperability of applications through the intermediary of the API, the changes made in the final version merely modify the time-limit within which that interoperability is to be operational and guarantee that no additional licence for the development of applications compatible with MHP may be requested.

398 In regard to the sixth commitment relating to the interoperability of competing platforms, the final version of the commitment merely specifies in further detail the conditions which Kirch will apply to its offer to conclude Simulcrypt arrangements with all suppliers of digital conditional access systems. Kirch thus undertakes to endeavour as far as possible to ensure that the Simulcrypt arrangements are operational as soon as possible and no longer within a period of 12 months. In addition, the performance of that commitment is contingent on the supplier of a conditional access system and Kirch cooperating 'fully'. These are modifications which alter neither the nature nor the substance of the commitment.

399 In regard to the seventh commitment, concerning access to Kirch pay-TV services by other technical platforms, the Court finds that the addition, to Kirch's obligation to sell its pay-TV services directly to subscribers, of the requirement not to discriminate between subscribers who capture the television signals via Kirch's technical platform and subscribers who capture the signals via other platforms is an improvement over the initial version of that commitment but does not modify its scope or nature.

400 As regards the modifications to the eighth commitment relating to the use of the d-box system technology by other, competing platforms, the Court finds that the modifications to the initial version are an improvement to that commitment in so far as the conditions relating to guarantees that third parties were to offer have been replaced by the grant of a licence on reasonable and non-discriminatory terms to any interested third party who requests it.

401 As regards the ninth commitment relating to the production of 'multiple system' boxes, the modifications made consisted in specifying in greater detail the scope of Kirch's commitment and made third-party access easier. In the modified version of that commitment Kirch undertook not to prevent manufacturers from introducing a conditional access system into such decoders and not to refuse to supply its pay-TV services to subscribers on the sole ground that they wish to use a d-box system with that capacity. The final version adds that Kirch undertakes not to impose on manufacturers other restrictions which would prevent them from manufacturing decoders containing supplementary conditional access systems.

402 The only commitments added were 10 and 11, relating to the transition from analogue system to digital system and the limitation of additional cable capacity, respectively. However, when compared with the nine other commitments, they cannot be deemed to be a substantial modification, since they merely strengthen access by third parties to the various markets concerned, which is specifically the goal pursued by the first nine commitments.

403 The commitment relating to the transition from analogue system to digital system, which is intended to avoid a situation where the activities of interested third parties in the pay-TV or digital interactive services market are impeded because consumers' use of analogue decoders are not suitable for those activities,

cannot be viewed as a substantial modification but, on the contrary, as an improvement which offers even greater access for third parties to Kirch's system.

404 Likewise, Kirch's last commitment not to apply for further digital cable capacity until 31 December 2000, which is aimed at avoiding a situation where Kirch's pay-TV supply is in a position of strength compared to services supplied by third parties, cannot be viewed as a substantial modification but, on the contrary, as an improvement to the initial version of the commitments intended to make them workable and effective.

405 For all of the reasons given above, the modified version and the final version of the commitments may be considered as limited modifications within the meaning of point 37 of the Notice on remedies and may be accepted by the Commission beyond the time-limit provided for by Article 18(1) of Regulation No 447/98.

406 Furthermore, the applicant reiterated on several occasions in its observations that the modifications in question were 'tactical, incessant modifications of commitments already totally inadequate in their initial form'. Those assertions lead to the conclusion that the applicant is in reality opposed to the initial commitments and not to the modifications made thereto following comments from third parties with a view to making them effective and workable, and that neither the nature nor the scope of those commitments were altered.

407 It follows from the foregoing that the modifications made to the initial commitments were limited within the meaning of point 37 of the Notice on remedies.

408 None the less, it is appropriate to examine whether, as the applicant alleges, the Commission's acceptance of the modifications to the initial commitments after the three-week time-limit infringed the applicant's procedural rights.

409 In that regard it should be stated, first, that, before being informed by the Commission on 29 February 2000 of the proposed commitments by BSkyB and Kirch, the applicant, in its capacity as a third party, was associated with the procedure and received a request for information from the Commission dated 11 January 2000, in which it was asked to submit its comments on the effects of the proposed concentration on competition. Those comments were lodged on 14 and 21 January 2000 and were followed by a discussion with the Directorate General for Competition on 9 February 2000.

410 The Court also notes that, at the request of the Commission, the applicant informed it by letter of 22 February 2000 of the requirements, conditions or public contractual commitments which in its view were necessary, in regard to competition law.

411 The Court further notes that, as stated in its observations, the applicant was invited to express its views on the initial commitments within a period of a little less than 48 hours, and on the first set of modifications thereto within a period of 24 hours.

412 Thus, in its correspondence of 2 March 2000, the applicant criticised the fact that the commitments initially proposed by the parties to the proposed concentration were nothing more than a promise not to abuse KirchPayTV's dominant position.

The applicant again reiterated its position that, even when more extensive commitments were taken into account, the proposed concentration was not compatible with Community law.

413 The applicant was also given the opportunity to submit its comments on the first set of modifications in its letter dated 15 March 2000. Once again, it reiterated its concern about the strengthening of Kirch's dominant position in the pay-TV market in Germany and about the creation of a quasi-monopoly in the supply of technical platforms and services. It also sought modifications to details of the commitments with a view to further opening up access to the market in the set-top boxes other than the d-boxes and to opening up Kirch's system for the MHP standard, without time-limit requirements or discriminatory commercial terms and conditions.

414 In the light of the foregoing, the Court finds that the Commission heard third parties during the first phase of the procedure, including the applicant.

415 Accordingly, the Court finds that the applicant was indeed in a position to make known its position on the scope and nature of the commitments which, in its view, ought to be undertaken by the parties to the concentration and imposed by the Commission by way of terms or conditions.

416 In *Kaysersberg* v *Commission*, cited above, the Court found, in paragraph 119, that the legitimate interest of third parties, such as the applicant, in making known their views on the harmful effects of the concentration on competition is fully safeguarded where they are placed in a position, on the basis of all information communicated to them by the Commission during the procedure initiated under Article 6(1)(c) of Regulation No 4064/89 and, in particular, of the offers of commitments submitted by the undertakings concerned, to make known their views on the planned amendments to the proposed concentration with a

view to removing the serious doubts existing as to its compatibility with the common market. In such a case, there is a sufficient guarantee that the considerations put forward by the competing third parties can, if appropriate, be taken into account by the Commission in determining whether the concentration is compatible with Community law and, in particular, whether the commitments proposed by the undertakings concerned appear to it to be sufficient for that purpose.

417 As to the fact that the applicant had only slightly under 24 hours to comment on the first modifications to the initial commitments, suffice it to note that Article 18(4) of Regulation No 4064/89 and Regulation No 447/98 do not lay down any specific obligation in regard to the length of the time-limit set by the Commission. As the Court held, in *Kaysersberg* v *Commission*, cited above:

'... the mere fact that the applicant had only a period of two working days within which to make its observations on the amendments proposed by [the parties] to the plan is not, in the present case, such as to show that the Commission failed to have regard for its right to be heard under Article 18(4) of Regulation No 4064/89. That interpretation is all the more called for since, although the legitimate interest of qualifying third parties to be heard may require them to be allowed a sufficient period for that purpose, such a requirement must, nevertheless, be adapted to the need for speed, which characterises the general scheme of Regulation No 4064/89 and which requires the Commission to comply with strict time-limits for the adoption of the final decision, failing which the operation is deemed compatible with the common market'.

418 For the same reasons, and a fortiori because it is a decision taken by the Commission during phase I, the fact that the applicant had just under 24 hours to comment on modifications to the initial commitments of which it was aware cannot affect the legality of the decision.

419 In addition, the applicant does not adduce any evidence to show how a longer time-limit would have afforded it the opportunity to formulate further observations on the first set of modifications to the commitments proposed by BSkyB and Kirch in such a way as to make plain its position on the sufficiency or insufficiency of the commitments. It merely criticises the Commission for the insufficiency of the time allowed. In that regard it is noteworthy that the applicant's criticisms before the Court are substantially the same as those put forward during the administrative procedure.

420 It follows that the complaint relating to the insufficiency of the time granted to the applicant to submit its comments on the commitments proposed by the parties to the concentration and the modifications thereto is unfounded.

421 As regards the complaint to the effect that the applicant was not informed of the second set of modifications and that it was therefore not in a position to make observations on those modifications to the initial commitments, the Court observes, first, as set out above, that the applicant was able to make its position known on the scope and nature of the commitments which, in its view, ought to be undertaken by the parties to the concentration and imposed by the Commission by way of terms or conditions in order for the concentration to be considered compatible with the common market.

422 In addition, it is apparent from *Kaysersberg* v *Commission* (paragraph 120) that in Phase II the Commission is not required under Article 18(4) of Regulation No 4064/89 to send to qualifying third parties, for their prior comment, the final terms of the commitments given by the undertakings concerned on the basis of the objections raised by the Commission as a result, inter alia, of the comments received from third parties in regard to the proposed commitments offered by the undertakings in question.

423 This is all the more so in the case of a Commission decision taken at the end of phase I.

424 Likewise, in regard to the applicant's complaint concerning the insufficiency of the time allowed for submitting its comments, the applicant does not adduce any matter evidencing the comments which it might have made on the second set of modifications.

425 It follows that the fifth plea is unfounded.

426 It follows from all the foregoing considerations that the application must be dismissed in its entirety.

Costs

427 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay, in addition to its own costs, those of the Commission and of the interveners KirchPayTV and BSkyB, as applied for in their pleadings.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber),

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay its own costs and those of the Commission and the interveners KirchPayTV and BSkyB.**

Jaeger Lenaerts Azizi

Delivered in open court in Luxembourg on 30 September 2003.

H. Jung K. Lenaerts

Registrar President

Table of contents