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Contents

I *Acts whose publication is obligatory*

- ★ **Commission Regulation (EC) No 386/96 of 1 March 1996 amending Regulation (EEC) No 220/91 laying down detailed rules for the application of Regulation (EEC) No 1360/78 on producer groups and associations thereof** 1
- ★ **Commission Regulation (EC) No 387/96 of 1 March 1996 amending Regulations (EEC) No 2698/93 and (EC) No 1590/94 and fixing the quantities available in the pigmeat sector for the period 1 April to 30 June 1996 under the Community tariff quotas provided for in the Europe Agreements pursuant to Council Regulation (EC) No 3066/95.....** 4
- ★ **Commission Regulation (EC) No 388/96 of 1 March 1996 correcting Regulation (EC) No 1600/95 laying down detailed rules for the application of the import arrangements and opening tariff quotas for milk and milk products** 12
- Commission Regulation (EC) No 389/96 of 1 March 1996 amending the export refunds on poultrymeat 13
- Commission Regulation (EC) No 390/96 of 1 March 1996 determining the percentage of quantities covered by applications for export licences for poultrymeat which may be accepted 15
- Commission Regulation (EC) No 391/96 of 1 March 1996 amending representative prices and additional duties for the import of certain products in the sugar sector 16
- Commission Regulation (EC) No 392/96 of 1 March 1996 establishing the standard import values for determining the entry price of certain fruit and vegetables 18

Commission

96/177/EC:

- ★ **Commission Decision of 19 July 1995 declaring a concentration to be incompatible with the common market and the functioning of the EEA Agreement (Case No IV/M.490 — Nordic Satellite Distribution) ⁽¹⁾ 20**

96/178/ECSC:

- ★ **Commission Decision of 18 October 1995 on State aid that Bavaria granted to the ECSC steel undertaking Neue Maxhütte Stahlwerke GmbH, Sulzbach-Rosenberg ⁽¹⁾..... 41**

96/179/EC:

- ★ **Commission Decision of 31 October 1995 enjoining the German Government to provide all documentation, information and data on the new investment projects of the Volkswagen Group in the new German Länder and on the aid that is to be granted to them (C 62/91 ex NN 75, 77, 78 and 79/91) ⁽¹⁾ 50**

⁽¹⁾ Text with EEA relevance

I

(Acts whose publication is obligatory)

COMMISSION REGULATION (EC) No 386/96

of 1 March 1996

amending Regulation (EEC) No 220/91 laying down detailed rules for the application of Regulation (EEC) No 1360/78 on producer groups and associations thereof

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 1360/78 on producer groups and associations thereof⁽¹⁾, as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular the second and third indents of Article 6(3) thereof,

Whereas Annex I(V)(C)(2)(a) of the Act of Accession of Austria, Finland and Sweden extends the scope of Regulation (EEC) No 1360/78 to cover the entire territory of Finland;

Whereas Commission Regulation (EEC) No 220/91⁽²⁾, as last amended by Regulation (EC) No 1755/95⁽³⁾, lays down detailed rules concerning the economic activity of producer groups and associations thereof; whereas these rules must be supplemented to take account of the extension of the scope of Regulation (EEC) No 1360/78 to include Finland;

Whereas minimum thresholds for conventional and organic production should be fixed, as should the number of members producer groups must have to achieve a sufficient concentration of supply; whereas, to ensure that associations of producer groups have adequate economic strength, it seems appropriate to fix the minimum number of members and territorial coverage of such associations;

Whereas a temporary reduction in the production of a group or association of groups as a result of natural disas-

ters should not entail automatic withdrawal of the recognition of that group or association because it no longer meets the minimum production thresholds;

Whereas the measures provided for in this Regulation are in accordance with the opinion of the Committee for Agricultural Structures and Rural Development,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EEC) No 220/91 is hereby amended as follows:

1. The following paragraph 4 is added to Article 2:

'4. A reduction in the volume of production of a group or association for a given year as a result of a natural disaster shall not automatically be taken to mean that the conditions for recognition set out in paragraph 1 are no longer met.

A standard calculation of production volume, based on average production over the three previous normal years, may be applied and notified in advance to the Commission to take account of natural disasters which have taken place during a year and which have substantially affected the volume of production of the group, in order to maintain the recognition of producer groups in areas specified by the Member States as having been affected by the natural disaster in question.

With regard to the value of the products supplied by members used to calculate the amount of the start-up aid provided for in Article 10(2)(a) of Regulation (EEC) No 1360/78, only production actually marketed may be taken into account.'

⁽¹⁾ OJ No L 166, 23. 6. 1978, p. 1.

⁽²⁾ OJ No L 26, 31. 1. 1991, p. 15.

⁽³⁾ OJ No L 170, 20. 7. 1995, p. 7.

2. The following subparagraph (i) is added to Article 3 (2):

- (i) In the case of Finland, associations must be made up of at least five recognized producer groups and must operate in at least two provinces. For the purposes of this paragraph, Åland shall be considered as a province. With regard to organic production, associations must meet the minimum requirements set out in point IXa of the Annex concerning production area, turnover, share in the national volume of organic production and number of recognized producer groups.'

3. In the Annex, Table IX for conventional production and Table IXa for organic production in the Annex to this Regulation are inserted before the footnotes, following on from Table VIII.

Article 2

This Regulation shall enter into force on the third day following its publication in the *Official Journal of the European Communities*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 1 March 1996.

For the Commission

Franz FISCHLER

Member of the Commission

ANNEX

IX. Producer groups in Finland (conventional production)

CN Code	Description	Producer groups	
		Production volume or turnover	Minimum number of members
Chapter 6	Live plants and cut flowers (*)	ECU 400 000	5
	Potatoes, fresh or chilled (*):		
0701 90 90	(a) ware	2 000 tonnes	10
0701 90 59	(b) new	300 tonnes	10
0701 90 51			
ex 1214	Hay	500 tonnes	15

IXa. Producer groups in Finland (organic production)

CN code	Description	Producer groups		Associations			
		Production volume or turnover	Minimum number of producers	Minimum area or equivalent	Turnover (in million ECU)	Share of the national organic production volume (%)	Minimum number of members
ex 0701	Potatoes, fresh or chilled (*):						
0701 90 90	(a) ware	500 tonnes	10	300 ha	1	25	5
1001 to 1004	Cereals	200 tonnes	20	1 000 ha	0,4	10	5'

COMMISSION REGULATION (EC) No 387/96

of 1 March 1996

amending Regulations (EEC) No 2698/93 and (EC) No 1590/94 and fixing the quantities available in the pigmeat sector for the period 1 April to 30 June 1996 under the Community tariff quotas provided for in the Europe Agreements pursuant to Council Regulation (EC) No 3066/95

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 3066/95 of 22 December 1995 establishing certain concessions in the form of Community tariff quotas for certain agricultural products and providing for the adjustment, as an autonomous and transitional measure, of certain agricultural concessions provided for in the Europe Agreements to take account of the Agreement on Agriculture concluded during the Uruguay Round Multilateral Trade Negotiations⁽¹⁾, and in particular Article 8 thereof,

Having regard to Council Regulation (EEC) No 2759/75 of 29 October 1975 on the common organization of the market in pigmeat⁽²⁾, as last amended by Regulation (EC) No 3290/94⁽³⁾, and in particular Article 22 thereof,

Whereas concessions for certain products in the pigmeat sector were granted under Commission Regulation (EEC) No 2698/93 of 30 September 1993 laying down detailed rules for the application in the pigmeat sector of the arrangements provided for in the Interim Agreements between the European Economic Community and the Republic of Poland, the Republic of Hungary and the former Czech and Slovak Federal Republic⁽⁴⁾, as last amended by Regulation (EC) No 2416/95⁽⁵⁾, and Commission Regulation (EC) No 1590/94 of 30 June 1994 laying down detailed rules for the application in the pigmeat sector of the arrangements provided for in the Interim Agreement between the Community and Bulgaria and Romania⁽⁶⁾, as last amended by Regulation (EC) No 2252/95⁽⁷⁾;

Whereas negotiations are currently under way with the countries concerned for the conclusion of Additional Protocols to the Europe Agreements; whereas 'interim'

Additional Protocols will cover solely the trade-related aspects of the Additional Protocols; whereas, because of the excessively tight deadlines, however, the interim Additional Protocols cannot enter into force on 1 January 1996; whereas it is therefore advisable to provide for the adjustment, as an autonomous and transitional measure, of the agricultural concessions provided for in the Europe Agreements; whereas the adjustment should apply from 1 January to 30 June 1996;

Whereas, in order to ensure that the quantities available are allocated fairly, account should be taken, firstly, of the quantities awarded already during the first quarter of 1996 and the new quantities and, secondly, of Council Decision 94/391/EC on the agreement in the form of an exchange of letters between the European Community and Bulgaria⁽⁸⁾ and Council Decision 94/392/EC on the agreement in the form of an exchange of letters between the European Community and Romania⁽⁹⁾;

Whereas import licences for the quantities available for the period 1 January to 31 March 1996 have been issued on the basis of Regulations (EEC) No 2698/93 and (EC) No 1590/94; whereas the quantities available for the period 1 April to 30 June 1996 should be fixed taking into consideration the quantities awarded and the quotas set for that period; whereas, in order to ensure a smooth switch-over to the new arrangements and in particular that the quantities imported from 1 January 1996 within the framework of the Regulations mentioned above qualify for the reduction in customs duties to 20 %, provision should be made for the reimbursement of amounts paid in excess;

Whereas new tariff quotas with fixed customs duties, falling within CN codes 1501 00 19 and 1601 00 91, have been granted under Regulation (EC) No 3066/95; whereas it is necessary therefore that the products concerned be inserted in Annex I to Regulation (EEC) No 2698/93;

Whereas the measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Pigmeat,

⁽¹⁾ OJ No L 328, 30. 12. 1995, p. 31.

⁽²⁾ OJ No L 282, 1. 11. 1975, p. 1.

⁽³⁾ OJ No L 349, 31. 12. 1994, p. 105.

⁽⁴⁾ OJ No L 245, 1. 10. 1993, p. 80.

⁽⁵⁾ OJ No L 248, 14. 10. 1995, p. 28.

⁽⁶⁾ OJ No L 167, 1. 7. 1994, p. 16.

⁽⁷⁾ OJ No L 230, 27. 9. 1995, p. 12.

⁽⁸⁾ OJ No L 178, 12. 7. 1994, p. 69.

⁽⁹⁾ OJ No L 178, 12. 7. 1994, p. 75.

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EEC) No 2698/93 is hereby amended as follows:

The first paragraph of Article 1 is replaced by the following:

'All imports into the Community under the arrangements provided for in Article 14 (2) and (4) of the Interim Agreements of products in groups 1, 2, 3, 4, H 1, H 2, 5, 6, 7, 8, 9, 10, 11, 12 and 13 referred to in Annex I to this Regulation shall be subject to the presentation of an import licence.'

Article 2

Annexes I and II to Regulation (EEC) No 2698/93 are replaced by Annexes I and II to this Regulation.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 1 March 1996.

Article 3

Annex I to Regulation (EC) No 1590/94 is replaced by Annex III to this Regulation.

Article 4

The quantities available for the products in groups 1, 2, 3, 4, H 1, H 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 referred to in Annex I to Regulations (EEC) No 2698/93 and (EC) No 1590/94 for the period 1 April to 30 June 1996 are shown in Annex IV to this Regulation.

Article 5

Amounts paid in excess in respect of products in groups 1, 2, 3, 4, H 1, H 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 imported under licences in use from the period 1 January 1996 shall be reimbursed to the operators concerned.

Article 6

This Regulation shall enter into force on the seventh day following its publication in the *Official Journal of the European Communities*.

It shall apply from 1 January to 30 June 1996.

For the Commission

Franz FISCHLER

Member of the Commission

ANNEX I

ANNEX I

A. Products originating in Hungary

(tonnes)

Group No	CN code	1 January to 30 June 1996	Rate of duty (¹)
1	1601 00 91	3 320	20 %
2	1602 49 15 1602 49 19 1602 41 10 1602 42 10 1602 49 11 1602 49 13 1602 49 30 1602 49 50	279	20 %
3	0210 11 11 0210 12 11 0210 19 40 0210 19 51	750	20 %
4	0203 11 10 0203 12 11 0203 12 19 0203 19 11 0203 19 13 0203 19 15 0203 19 55 (²) 0203 19 59 0203 21 10 0203 22 11 0203 22 19 0203 29 11 0203 29 13 0203 29 15 0203 29 55 (²) 0203 29 59	15 085	20 %
H 1	1501 00 19	1 200	ECU 164/t
H 2	1601 00 91	250	ECU 1 759/t

(¹) Percentage of conventional duty.(²) Excluding tenderloins presented alone.

B. Products originating in Poland

(tonnes)

Group No	CN code	1 January to 30 June 1996	Rate of duty (¹)
5	0210 11 11 0210 11 19 0210 11 31 0210 11 39 0210 12 11 0210 12 19 0210 19 10 0210 19 20 0210 19 30 0210 19 40 0210 19 51 0210 19 59 0210 19 60 0210 19 70 0210 19 81 0210 19 89	1 500	20 %

(tonnes)

Group No	CN code	1 January to 30 June 1996	Rate of duty (¹)
6	1601 00 91 1601 00 99	1 125	20 %
7	1602 41 10 1602 42 10 1602 49 11 1602 49 13 1602 49 15 1602 49 19 1602 49 30 1602 49 50	4 800	20 %
8	0103 92 19	700	20 %
9	0203 11 10 0203 12 11 0203 12 19 0203 19 11 0203 19 13 0203 19 15 0203 19 55 (²) 0203 19 59 0203 21 10 0203 22 11 0203 22 19 0203 29 11 0203 29 13 0203 29 15 0203 29 55 (²) 0203 29 59	4 900	20 %

(¹) Percentage of conventional duty.

(²) Excluding tenderloins presented alone.

C. Products originating in the Czech Republic

(tonnes)

Group No	CN code	1 January to 30 June 1996	Rate of duty (¹)
10	0103 92 19 0203 11 10 0203 12 11 0203 12 19 0203 19 11 0203 19 13 0203 19 15 0203 19 55 (²) 0203 19 59 0203 21 10 0203 22 11 0203 22 19 0203 29 11 0203 29 13 0203 29 15 0203 29 55 (²) 0203 29 59	2 135	20 %
11	1602 41 10 1602 42 10 1602 49	355	20 %

(¹) Percentage of conventional duty.

(²) Excluding tenderloins presented alone.

D. Products originating in the Slovak Republic

(tonnes)

Group No	CN code	1 January to 30 June 1996	Rate of duty (⁽¹⁾)
12	0103 92 19	1 065	20 %
	0203 11 10		
	0203 12 11		
	0203 12 19		
	0203 19 11		
	0203 19 13		
	0203 19 15		
	0203 19 55 (⁽²⁾)		
	0203 19 59		
	0203 21 10		
	0203 22 11		
	0203 22 19		
	0203 29 11		
	0203 29 13		
	0203 29 15		
	0203 29 55 (⁽²⁾)		
	0203 29 59		
13	1602 41 10	105	20 %
	1602 42 10		
	1602 49		

(⁽¹⁾) Percentage of conventional duty.

(⁽²⁾) Excluding tenderloins presented alone.

ANNEX II

ANNEX II

Application of Regulation (EC) No 387/96

COMMISSION OF THE EUROPEAN COMMUNITIES	DG VI/D/3-Pigmeat sector
--	--------------------------

Application for import licences at reduced rate of customs duty:	Date	Period
--	------	--------

Member State:

Consignor:

Contact:

Telephone:

Fax:

Group No	Quantity requested
1	
2	
3	
4	
H 1	
H 2	
5	
6	
7	
8	
9	
10	
11	
12	
13'	

ANNEX III

ANNEX I

A. Products originating in Bulgaria

<i>(tonnes)</i>			
Group No	CN code	1 January to 30 June 1996	Rate of duty (¹)
14	0203 11 10 0203 29 55 (²)	114,6	20 %

(¹) Percentage of conventional duty.

(²) Excluding tenderloins presented alone.

B. Products originating in Romania

<i>(tonnes)</i>			
Group No	CN code	1 January to 30 June 1996	Rate of duty (¹)
15	1601 00 91 1601 00 99	510	20 %
16	1602 41 10 1602 42 10 1602 49 11 1602 49 13 1602 49 15 1602 49 19 1602 49 30 1602 49 50	1 021,5	20 %
17	0203 11 10 0203 12 11 0203 12 19 0203 19 11 0203 19 13 0203 19 15 0203 19 55 (²) 0203 19 59 0203 21 10 0203 22 11 0203 22 19 0203 29 11 0203 29 13 0203 29 15 0203 29 55 (²) 0203 29 59	7 235	20 %

(¹) Percentage of conventional duty.

(²) Excluding tenderloins presented alone.

ANNEX IV

(tonnes)	
Group No	Total quantity available for the period 1 April to 30 June 1996
HUNGARY:	
1	1 792,5
2	212,2
3	725
4	10 451
H 1	1 200
H 2	500
POLAND:	
5	1 500
6	941
7	4 451
8	700
9	4 900
CZECH REPUBLIC:	
10	2 135
11	355
SLOVAK REPUBLIC:	
12	1 065
13	105
BULGARIA:	
14	114,6
ROMANIA:	
15	510
16	960,1
17	7 235

COMMISSION REGULATION (EC) No 388/96**of 1 March 1996****correcting Regulation (EC) No 1600/95 laying down detailed rules for the application of the import arrangements and opening tariff quotas for milk and milk products**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 804/68 of 27 June 1968 on the common organization of the market in milk and milk products⁽¹⁾, as last amended by Commission Regulation (EC) No 2931/95⁽²⁾, and in particular Articles 13 (3) and 16 (1) and (4) thereof,

Whereas Article 15 of Commission Regulation (EC) No 1600/95⁽³⁾, as last amended by Regulation (EC) No 32/96⁽⁴⁾, provides that the period of validity of licences may not extend beyond 30 June following the date of issue; whereas there is an error in the Finnish translation of that provision; whereas it should be corrected with effect from 1 July 1995;

Whereas the measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Milk and Milk Products,

HAS ADOPTED THIS REGULATION:

Article 1

(Only concerns the Finnish language version).

Article 2

This Regulation shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

It shall apply with effect from 1 July 1995.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 1 March 1996.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ No L 148, 28. 6. 1968, p. 13.

⁽²⁾ OJ No L 307, 20. 12. 1995, p. 10.

⁽³⁾ OJ No L 151, 1. 7. 1995, p. 12.

⁽⁴⁾ OJ No L 8, 11. 1. 1996, p. 16.

COMMISSION REGULATION (EC) No 389/96
of 1 March 1996
amending the export refunds on poultrymeat

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Regulation (EEC) No 2777/75 of the Council of 29 October 1975 on the common organization of the market in poultrymeat ⁽¹⁾, as last amended by Regulation (EC) No 2916/95 ⁽²⁾, and in particular Article 8 (3) thereof,

Whereas the export refunds on poultrymeat were fixed by Commission Regulation (EC) No 273/96 ⁽³⁾, as last amended by Regulation (EC) No 308/96 ⁽⁴⁾;

Whereas it follows from foreseen criteria contained in Article 8 of Regulation (EEC) No 2777/75 to the informa-

tion known to the Commission that the export refunds at present in force should be altered to the amounts set out in the Annex hereto,

HAS ADOPTED THIS REGULATION:

Article 1

The export refunds on the products listed in Article 1 paragraph 1 of Regulation (EEC) No 2777/75, exported in the natural state, as fixed in the Annex to amended Regulation (EC) No 273/96 are hereby altered as shown in the Annex to this Regulation.

Article 2

This Regulation shall enter into force on 4 March 1996.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 1 March 1996.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ No L 282, 1. 11. 1975, p. 77.

⁽²⁾ OJ No L 305, 19. 12. 1995, p. 49.

⁽³⁾ OJ No L 36, 14. 2. 1996, p. 18.

⁽⁴⁾ OJ No L 43, 21. 2. 1996, p. 6.

ANNEX

to the Commission Regulation of 1 March 1996 altering the export refunds on poultrymeat

Product code	Destination of refund ⁽¹⁾	Amount of refund ⁽²⁾	Product code	Destination of refund ⁽¹⁾	Amount of refund ⁽²⁾
		ECU/100 units			ECU/100 kg
0105 11 11 000	01	1,60	0207 25 10 000	04	8,00
0105 11 19 000	01	1,60	0207 25 90 000	04	8,00
0105 11 91 000	01	1,60	0207 14 20 900	05	4,50
0105 11 99 000	01	1,60	0207 14 60 900	05	4,50
		ECU/100 kg	0207 14 70 190	05	4,50
0207 12 10 900	02	30,00	0207 14 70 290	05	4,50
	03	8,00	0207 27 10 990	04	12,00
0207 12 90 190	02	33,00	0207 27 60 000	04	6,50
	03	8,00	0207 27 70 000	04	6,50

⁽¹⁾ The destinations are as follows:

01 All destinations except the United States of America,

02 Angola, Saudi Arabia, Kuwait, Bahrain, Qatar, Oman, the United Arab Emirates, Jordan, Yemen, Lebanon, Iran, Armenia, Azerbaijan, Georgia, Russia, Uzbekistan and Tajikistan,

03 All destinations except the United States of America, Bulgaria, Poland, Hungary, Romania, Slovakia, the Czech Republic and those of 02 above,

04 All destinations except the United States of America, Bulgaria, Poland, Hungary, Romania, Slovakia and the Czech Republic,

05 All destinations except the United States of America, Bulgaria, Poland, Hungary, Romania, Slovakia, the Czech Republic, Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan, Ukraine, Lithuania, Estonia and Latvia.

⁽²⁾ Refunds on exports to the Federal Republic of Yugoslavia (Serbia and Montenegro) may be granted only where the conditions laid down in amended Regulation (EEC) No 990/93 and Regulation (EC) No 2815/95 are observed.

NB: The product codes and the footnotes are defined in amended Commission Regulation (EEC) No 3846/87.

COMMISSION REGULATION (EC) No 390/96**of 1 March 1996****determining the percentage of quantities covered by applications for export
licences for poultrymeat which may be accepted**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European
Community,

Having regard to Commission Regulation (EC) No
1372/95 of 16 June 1995 laying down detailed rules for
implementing the system of export licences in the poul-
trymeat sector⁽¹⁾, as last amended by Regulation (EC) No
180/96⁽²⁾, and in particular Article 3 (4) thereof,

Whereas Regulation (EC) No 1371/95 provides for
specific measures where applications for export licences
concern quantities and/or expenditure which exceed the
normal trade patterns or where there is a risk that they
will be exceeded, taking account of the limit referred to in
Article 8 (12) of Council Regulation (EEC) No 2777/75⁽³⁾,
as last amended by Commission Regulation (EC) No
2916/95⁽⁴⁾, and/or the corresponding expenditure during
the period in question;

Whereas the market for certain poultrymeat products is
affected by uncertainties; whereas the refunds currently
applicable for these products could lead to applications
being made for export licences for speculative purposes;
whereas there is a risk that the issue of certificates for the
quantities applied for from 26 to 28 February 1996 may
lead to the quantities corresponding to the normal trade
patterns for the products concerned being exceeded;
whereas applications for which export licences have not
yet been granted should be rejected for the products

concerned and acceptance coefficients applying to the
quantities requested should be fixed,

HAS ADOPTED THIS REGULATION:

Article 1

Applications for export licences for poultrymeat
submitted pursuant to Regulation (EC) No 1372/95 shall
be dealt with as follows:

1. for applications from 26 to 28 February 1996, 100 %
of the quantities applied for in the case of categories 5,
6 and 8 referred to in Annex I to the abovementioned
Regulation shall be accepted;
2. for applications from 26 to 28 February 1996, 54 % of
the quantities applied for in the case of categories 3
and 4 referred to in Annex I to the abovementioned
Regulation shall be accepted.
3. no further action shall be taken in respect of applica-
tions pending for certificates which should have been
issued from 4 March 1996 for category 7 referred to in
Annex I to the abovementioned Regulation.

Article 2

This Regulation shall enter into force on 4 March 1996.

This Regulation shall be binding in its entirety and directly applicable in all Member
States.

Done at Brussels, 1 March 1996.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ No L 133, 17. 6. 1995, p. 26.

⁽²⁾ OJ No L 25, 1. 2. 1996, p. 27.

⁽³⁾ OJ No L 282, 1. 11. 1975, p. 77.

⁽⁴⁾ OJ No L 305, 19. 12. 1995, p. 49.

COMMISSION REGULATION (EC) No 391/96

of 1 March 1996

amending representative prices and additional duties for the import of certain products in the sugar sector

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organization of the markets in the sugar sector ⁽¹⁾, as last amended by Regulation (EC) No 1101/95 ⁽²⁾,

Having regard to Commission Regulation (EC) No 1423/95 of 23 June 1995 laying down detailed implementing rules for the import of products in the sugar sector other than molasses ⁽³⁾, as amended by Regulation (EC) No 2528/95 ⁽⁴⁾, and in particular the second subparagraph of Article 1 (2), and Article 3 (1) thereof,

Whereas the amounts of the representative prices and additional duties applicable to the import of white sugar, raw sugar and certain syrups are fixed by Commission Regulation (EC) No 1568/95 ⁽⁵⁾, as last amended by Regulation (EC) No 379/96 ⁽⁶⁾;

Whereas it follows from applying the general and detailed fixing rules contained in Regulation (EC) No 1423/95 to the information known to the Commission that the representative prices and additional duties at present in force should be altered to the amounts set out in the Annex hereto,

HAS ADOPTED THIS REGULATION:

Article 1

The representative prices and additional duties on imports of the products referred to in Article 1 of Regulation (EC) No 1423/95 shall be as set out in the Annex hereto.

Article 2

This Regulation shall enter into force on 2 March 1996.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 1 March 1996.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ No L 177, 1. 7. 1981, p. 4.

⁽²⁾ OJ No L 110, 17. 5. 1995, p. 1.

⁽³⁾ OJ No L 141, 24. 6. 1995, p. 16.

⁽⁴⁾ OJ No L 258, 28. 10. 1995, p. 50.

⁽⁵⁾ OJ No L 150, 1. 7. 1995, p. 36.

⁽⁶⁾ OJ No L 51, 1. 3. 1996, p. 35.

ANNEX

to the Commission Regulation of 1 March 1996 amending representative prices and the amounts of additional duties applicable to imports of white sugar, raw sugar and products covered by CN code 1702 90 99

(ECU)

CN code	Amount of representative prices per 100 kg net of product concerned	Amount of additional duty per 100 kg net of product concerned
1701 11 10 ⁽¹⁾	24,14	4,23
1701 11 90 ⁽¹⁾	24,14	9,46
1701 12 10 ⁽¹⁾	24,14	4,04
1701 12 90 ⁽¹⁾	24,14	9,03
1701 91 00 ⁽²⁾	31,11	9,68
1701 99 10 ⁽²⁾	31,11	5,16
1701 99 90 ⁽²⁾	31,11	5,16
1702 90 99 ⁽³⁾	0,31	0,34

⁽¹⁾ For the standard quality as defined in Article 1 of amended Council Regulation (EEC) No 431/68 (OJ No L 89, 10. 4. 1968, p. 3).

⁽²⁾ For the standard quality as defined in Article 1 of Council Regulation (EEC) No 793/72 (OJ No L 94, 21. 4. 1972, p. 1).

⁽³⁾ By 1 % sucrose content.

COMMISSION REGULATION (EC) No 392/96

of 1 March 1996

establishing the standard import values for determining the entry price of
certain fruit and vegetables

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,

Having regard to Commission Regulation (EC) No 3223/94 of 21 December 1994 on detailed rules for the application of the import arrangements for fruit and vegetables⁽¹⁾, as last amended by Regulation (EC) No 2933/95⁽²⁾, and in particular Article 4 (1) thereof,

Having regard to Council Regulation (EEC) No 3813/92 of 28 December 1992 on the unit of account and the conversion rates to be applied for the purposes of the common agricultural policy⁽³⁾, as last amended by Regulation (EC) No 150/95⁽⁴⁾, and in particular Article 3 (3) thereof,

Whereas Regulation (EC) No 3223/94 lays down, pursuant to the outcome of the Uruguay Round multilateral trade negotiations, the criteria whereby the Commis-

sion fixes the standard values for imports from third countries, in respect of the products and periods stipulated in the Annex thereto;

Whereas, in compliance with the above criteria, the standard import values must be fixed at the levels set out in the Annex to this Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

The standard import values referred to in Article 4 of Regulation (EC) No 3223/94 shall be fixed as indicated in the Annex hereto.

Article 2

This Regulation shall enter into force on 2 March 1996.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 1 March 1996.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ No L 337, 24. 12. 1994, p. 66.

⁽²⁾ OJ No L 307, 20. 12. 1995, p. 21.

⁽³⁾ OJ No L 387, 31. 12. 1992, p. 1.

⁽⁴⁾ OJ No L 22, 31. 1. 1995, p. 1.

ANNEX

to the Commission Regulation of 1 March 1996 establishing the standard import values for determining the entry price of certain fruit and vegetables

(ECU/100 kg)			(ECU/100 kg)		
CN code	Third country code ⁽¹⁾	Standard import value	CN code	Third country code ⁽¹⁾	Standard import value
0702 00 15	052	43,7	0805 30 20	052	51,5
	060	80,2		204	88,8
	064	59,6		220	74,0
	066	41,7		388	67,5
	068	62,3		400	61,2
	204	84,5		512	54,8
	208	44,0		520	66,5
	212	83,1		524	100,8
	624	161,5		528	85,1
	999	73,4		600	78,9
0707 00 15	052	125,6	0808 10 51, 0808 10 53, 0808 10 59	624	61,0
	053	156,2		999	71,8
	060	61,0		052	64,0
	066	53,8		064	78,6
	068	121,6		388	105,8
	204	144,3		400	73,2
	624	156,5		404	69,3
	999	117,0		508	68,4
0709 10 10	220	369,6		512	87,7
	999	369,6		524	57,4
0709 90 73	052	134,9		528	97,9
	204	77,5		624	86,5
	412	54,2		728	107,3
	624	241,6		800	78,0
	999	127,1		804	21,0
0805 10 01, 0805 10 05, 0805 10 09	052	46,4	0808 20 31	999	76,5
	204	41,1		039	103,0
	208	58,0		052	86,3
	212	47,7		064	72,5
	220	47,1		388	88,3
	388	40,5		400	111,9
	400	42,2		512	69,3
	436	41,6		528	67,8
	448	36,4		624	79,0
	600	75,3		728	115,4
	624	49,4		800	55,8
	999	47,8		804	112,9
				999	87,5

⁽¹⁾ Country nomenclature as fixed by Commission Regulation (EC) No 3079/94 (OJ No L 325, 17. 12. 1994, p. 17). Code '999' stands for 'of other origin'.

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 19 July 1995

declaring a concentration to be incompatible with the common market and the functioning of the EEA Agreement

(Case No IV/M.490 — Nordic Satellite Distribution)

(Only the English text is authentic)

(Text with EEA relevance)

(96/177/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

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

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

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

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

Whereas:

- (1) The procedure under consideration concerns the proposed setting up, by Norsk Telekom AS ('NT'), Tele Danmark A/S ('TD') and Industriförvaltnings

AB Kinnevik ('Kinnevik') of a joint venture under the name of Nordic Satellite Distribution ('NSD').

- (2) By decision dated 13 March 1995, the Commission ordered the suspension of the concentration as a whole, pursuant to Article 7 (2) and Article 18 (2) of Regulation (EEC) No 4064/89 (hereinafter: 'the Merger Regulation'), until it took a final decision.
- (3) By decision of 24 March 1995, the Commission found that the notified concentration raised serious doubts as to its compatibility with the common market. The Commission accordingly initiated proceedings in this case, pursuant to Article 6 (1) (c) of the Merger Regulation.

I. THE PARTIES

- (4) NT, TD and Kinnevik have set up a joint venture called Nordic Satellite Distribution (NSD) for the provision of satellite transmission services and distribution services via cable networks or direct-to-home broadcasts for television programmes in the Nordic region (Denmark, Sweden, Norway and Finland).
- (5) NT is a Norwegian company controlled by Telenor AS, which is in turn owned by the Norwegian State. Telenor AS is the principal provider of telephone services in Norway and owns and/or leases transponder capacity from the satellites Thor,

⁽¹⁾ OJ No L 395, 30. 12. 1989, p. 1.

⁽²⁾ OJ No L 257, 21. 9. 1990, p. 13.

⁽³⁾ OJ No C 63, 2. 3. 1996, p. 3.

Intelsat and TV-Sat, situated at 1 degree West. NT owns through Telenor Avidi AS a large cable network in Norway. Finally, NT also provides television distribution services to the direct-to-home market in Norway, Sweden and Finland and in Denmark through its subsidiary Telenor CTV.

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

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

- satellite television broadcasting (to direct-to-home and cable subscribers) of commercial channels (TV 3, TV G, TV 6, Z-TV) and pay-TV channels (TV 1000, Film Max and TV 1000 Cinema),
- distribution of satellite television (through its subsidiaries Viasat Sweden, Viasat Norway and Viasat Denmark),
- Conditional Access Systems,
- radio broadcasting.

In addition, Kinnevik has a 23 % shareholding in the commercial television channel TV 4 (a Swedish channel) and (...) ⁽¹⁾.

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

II. THE OPERATION

- (8) The operation involves the creation, by NT, TD and Kinnevik, of the joint venture Nordic Satellite Distribution AS (NSD) which will be in the busi-

ness of providing transponder capacity and the transmission and distribution of satellite TV channels to the Nordic market.

- (9) It is the aim of NSD to establish an attractive satellite position for transmission of TV signals to the Nordic countries.
- (10) NSD will provide satellite TV channels to cable TV operators and to direct-to-home households.
- (11) It is the intention that the distribution of satellite TV channels to direct-to-home users and to cable TV networks provided by NSD shall take place through the parents' distribution companies Viasat and Telenor CTV and through the parents' cable TV operators.

III. COMMUNITY/EEA DIMENSION

- (12) NT, TD and Kinnevik have a combined aggregate worldwide turnover of ECU 5 260 million. TD and Kinnevik have a Community-wide turnover of more than ECU 250 million, of which not more than two-thirds is achieved in one and the same Member State. The operation therefore has a Community dimension.
- (13) At the same time, since the combined turnover of the undertakings concerned in the territory of the EFTA States equals more than 25 % of their total turnover in the EEA territory, the operation is also a cooperation case in accordance with Article 58 and Protocol 24 of the EEA Agreement.

IV. THE STRUCTURE AND TECHNOLOGY OF THE INDUSTRY

- (14) The provider of a TV channel, whether this is a public, advertising based, mini-pay or pay-TV, is called a broadcaster.
- (15) If the channel is to be transmitted via satellite from the studio, the TV signals are sent to an up-link station. Up-link is the process of sending a TV signal from an earth station to a satellite. The TV signals can be broadcast in clear or encrypted form.
- (16) From the up-link station the TV signals are sent to the satellite that retransmits them. Satellites used for TV are placed in a geostationary orbit position and are therefore able to maintain a constant beam on a given territory. Each satellite contains several transponders that are elements on a satellite used to receive and transmit TV signals. The geographical area where the TV signals transmitted by a transponder can be received by direct-to-home customers having standard receiving equipment is called the footprint. As a rule, with the present techno-

⁽¹⁾ In the published version of the decision, some information has hereinafter been omitted, pursuant to the provisions of Article 17 (2) of Regulation (EEC) No 4064/89 concerning non-disclosure of business secrets.

- logy (analogue), each transponder will have a capacity to transmit one TV channel. The introduction of digital technology is expected to increase the capacity of each transponder five to ten times.
- (17) The TV signal is received by a satellite dish on the ground. The receivers can be (1) direct-to-home households with (normally) smaller dishes; (2) cable TV operators with one or more much larger dishes; or (3) SMATV operators ⁽¹⁾.
- (18) A special technical infrastructure is required to operate pay-TV. This technical infrastructure is called a conditional access system, and is required to ensure that only authorised viewers, i.e. subscribers to the particular encrypted channel(s), can receive the channel(s). Pay-TV are invariably encrypted. In the Nordic area all channels broadcasted by satellite are encrypted in contrast to other parts of Europe. When encryption takes place a datastream is inserted along with the TV signal for use by the conditional access system. A conditional access system consists essentially of (1) an adaptor for decryption (decoder), (2) a subscriber management system (SMS), (3) a Subscriber Authorization System (SAS) and, finally, (4) an encryption system.
- (19) To receive encrypted TV signals a consumer needs a decoder equipped with a decryption facility and a security processor. The decoder decrypts the television picture, which is encrypted when the TV signal is transmitted.
- (20) The conditional access system requires the transmission of a data stream together with the TV-signal, containing information on the channels or packages of channels subscribed to and on the entitlement of the subscribers to receive the programmes. If an open encryption system is used (see below) a 'personal' smart card is made available to the viewer which is inserted into the decoder to scan through the datastream that comes along with the TV signal to find out if its identity is present. If the smart card finds its 'unique key', the decoder decrypts the TV signal and passes it on to the TV set.
- (21) The conditional access system is based on the use of an encryption system in which the messages are encrypted. A broadcaster needs an agreement with a supplier giving him the right to encrypt and decode TV channels in a given encryption system. However, this is not the case for cable TV operators, since it is possible for cable operators to develop and use their own encryption system. An encryption system can either be closed or open.
- (22) A closed system implies that only broadcasters signing an agreement with the owner of the system are allowed to encrypt in this system. Normally, such an agreement includes a right for a particular operator to administrate the SMS and, thus, prevents other operators from using the system. The use of a closed system makes it necessary for the consumer to purchase or hire a special decoder to receive TV channels encrypted in this system. This means that the households have to buy or rent an additional decoder if they want to receive TV channels which are encrypted in another system.
- (23) An open system means that decoders are available from many sources and that the consumer can, with the same decoder, receive TV channels in different open systems by using different smart cards. Normally, any broadcaster for a minor payment can acquire the right from the owner to use such an open system.
- (24) Nearly all European encryption systems are closed; for example Videocrypt (used by BSkyB and Adult Channel in the UK and by Multichoice in more than 30 European countries including the Nordic countries) and Syster/Nagravision (used by Canal + in France and Spain, Premiere in Germany and Austria and Teleclub in Switzerland). However, as a rule, open encryption systems are used in the Nordic countries.
- (25) In addition to the decoder base and access to an encryption system a subscriber management system ('SMS') and a subscriber authorization system ('SAS') are also needed. SMS is the computer system in charge of managing the subscriber base (the billing and collection of subscriptions, telephone answering, statistics, etc.). SAS is a software designed to open or close the authorization of the individual subscriber to receive pay-TV channels. Control of the SMS, which contains vital information about the customers, would be especially important for a pay-TV broadcaster or a cable TV operator. It must be assumed that such operators would be very reluctant to let a competitor take over their SMS.
- ⁽¹⁾ The SMATV segment consists of entities receiving the TV signals using a satellite master antenna and retransmitting the signal within a smaller network. Normally the SMATV operators have no system for operating pay-TV and, if they do, it is carried in the network on the basis of collective payment from all residents. The SMATV operators will rarely contract directly with the broadcasters, but will normally be customers of local cable operators.

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

V. CONCENTRATION

JOINT CONTROL

- (27) NSD is to be owned 33,3 % by each of NT, TD and Kinnevik. Its board of directors will consist of four directors: each party will nominate one director and one independent director who is to be nominated subject to agreement between the parties shall also be the chairman of the board.
- (28) According to Article 5.2 of NSD's Shareholders' Agreement, board resolutions will be adopted by a majority of directors, except for a number of matters for which unanimity is required. These matters include:
- (...).
- (29) The chairman of the board of directors shall (...).
- (30) As a result of the above, it can be concluded that NSD will be jointly controlled by its three parent companies.

FULL FUNCTION JOINT VENTURE

- (31) NSD's main activities will be the following:
- to negotiate and enter into agreements with programme providers (broadcasters) for distribution of television channels via satellite,
 - to establish a leading satellite position (named by the parties as a Nordic 'Hot Bird') for the Nordic market by leasing satellite capacity in the orbital positions 1 °W and 5 °E,
 - to create a programme strategy based on a new package of television channels adapted to the Nordic countries,

- to distribute such a package via satellite to the cable television (cable TV), master antenna television (SMATV) and direct-to-home markets in the Nordic countries. This will include offering Subscriber Management Services, distributing smart cards and operating a Subscriber Access System,
- to promote and implement a digital transmission standard and a joint Nordic encryption system to be used for cable TV, SMATV and direct-to-home,
- to develop new products and services related to the activities of the company. (... indication of services not to be provided by NSD).

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

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

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

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

- for the lease of satellite transponder capacity and satellite network services from Telenor,
 - for the provision of satellite capacity and satellite network services to third parties wishing to broadcast in the Nordic countries who had initially approached Telenor.
- (36) Telenor has a right of first refusal to provide NSD or its affiliates with all the transponder capacity and satellite network services they may need. In the case of excess capacity in the satellite network service leased by NSD, Telenor is entitled to use this capacity (...).

- (37) In addition, Kinnevik and TD have entered into lease agreements with the Swedish satellite operator Nordiska Satellitaktiebolaget (NSAB) for the lease of (...) transponders situated at 5 °E. On this position, NSAB owns the Sirius satellite and the Tele-X satellite, each with five transponders. (...) details on the transponder lease agreements and the special rights of Kinnevik and TD with respect to the NSAB satellites on 5 °E).
- (38) NSD will offer an integrated satellite transmission service to programme providers. The fact that NSD will sublease satellite transponder capacity and network services from Telenor or TD/Kinnevik does not put into question its full-function character at this level, since NSD will control the use of this transponder capacity for a long time. Lease contracts for satellite transponder capacity are usually concluded for a long period (7 to 10 years) which normally coincides with the life of the satellite itself. NSD will therefore be able to develop its own commercial strategy on a lasting basis.
- (39) NSD will develop a new package of television channels which will be specifically adapted to the Nordic audience in terms of programme mix and language.
- (40) Regarding the direct-to-home distribution of TV channels as stated above, before the setting-up of NSD both NT and Kinnevik offered television distribution services in the Nordic countries. NSD will now grant to the Viasat companies the exclusive right to distribute. NSD's television channels to the direct-to-home and SMATV households in Denmark and to the direct-to-home, SMATV and cable TV households in Sweden. Viasat Sweden will continue to be 100 % owned by Kinnevik, but Viasat Denmark will be owned by Kinnevik and TD (51 % — 49 %). TD has a conditional option to acquire an additional (...) % of the share capital in Viasat Denmark in 1998.
- (41) In Norway NSD will have, for the time being, two representatives: Viasat Norway (100 % owned by Kinnevik) and Telenor CTV. It is foreseen (...).
- (42) As the exclusive distributor of NSD, the Viasat companies will have:
- the right and obligation to distribute the TV channels provided by NSD,
 - the possibility to distribute other television channels subject to NSD's approval. The only limitation (...).
- (43) The price to subscribers of the individual channels included in NSD's package will be decided by (...). According to NSD's Programme Strategy, NSD's distributors shall prepare every year a marketing budget per channel or package of channels, which shall reflect the agreements entered into between NSD and the broadcaster. These programme budgets shall be presented to and approved by NSD, and any deviations from them shall be approved by NSD.
- (44) The fact that, as stated above, Viasat's and Telenor CTV's agreements with broadcasters will be transferred to NSD with effect from NSD's start of operations, and that NSD itself will negotiate and enter into any new agreements shows that NSD will take up all responsibilities with respect to distribution. Although the Viasat companies and Telenor CTV will not be owned by NSD (except for Viasat Finland), they will carry out NSD's strategic decisions on distribution, on the basis of (...) and budget approved by NSD.
- (45) NSD shall provide and control its subscriber access system (SAS). Viasat and Telenor CTV will keep the subscriber management system (SMS), and will therefore make available smart cards to customers, and carry out the administration of subscriptions and payments, but they shall pay a monthly fee per smart card for the SAS services provided by NSD. NSD also intends to develop a new SAS for digital services (...).
- (46) With respect to cable distribution, NT and TD's cable operators will be appointed NSD's representatives for the procurement and sale of TV channels on the cable TV market and a part of the SMATV market. This implies that:
- NT and TD's cable operators shall have the right and obligation to procure the sale of satellite TV channels provided by NSD within their respective geographic areas, but NSD is entitled to sell any channel to other cable or antenna operators within the same area,
 - the two cable operators shall be able to distribute a TV channel which NSD cannot provide subject to NSD's prior approval,
 - NSD shall have (...).
- (47) In a similar way as that agreed with Viasat, NT and TD's cable operator's agreements with broadcasters shall be transferred to NSD with effect from NSD's start of operations subject to the approval of the broadcasters. NSD will therefore assume the full responsibility for the provision of satellite TV channels to the cable networks owned by the parties.

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

COOPERATIVE ASPECTS

- (49) NSD's parent companies are currently competitors mainly at the distribution level, since in the direct-to-home segment in Norway, Denmark and Sweden NT, through Telenor CTV, competes with Kinnevik's Viasat companies and in some regions there is competition between Viasat and the cable operators of TD and NT.
- (50) In the direct-to-home distribution market (...) Viasat (...) will become the exclusive distributor of NSD's package of TV channels in these countries. In the meantime, the transfer of all distribution contracts to NSD and the exclusive right to negotiate new ones prevents the parent companies from providing direct-to-home distribution services on their own and from developing a distribution strategy to pursue their individual interests.
- (51) The parties' cable operators and Viasat will continue operating in the same areas, but they will all act as NSD's representatives offering as a general rule the same package of satellite TV channels. As for the direct-to-home segment, the transfer of the cable operators' contracts as well as the right to negotiate to NSD prevents the parent companies from providing these services on their own.
- (52) There is also competition at present between NT and TD in a very marginal market in economic terms: TV up-linking services to the satellite (see (56)). Both parents currently provide these services from their respective countries, but the insignificance of this market in economic terms clearly shows that the operation has neither the object or the effect of coordinating the activities of these two parent companies with respect to up-linking services.
- (53) Finally, the activities of NSD's parent companies in upstream or downstream markets are not likely to lead to any coordination of their competitive beha-

viour. NT does not compete as a satellite operator with TD or Kinnevik. Kinnevik will broadcast its pay-TV and commercial channels through NSD, but none of the other parties are broadcasters.

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

VI. RELEVANT PRODUCT MARKETS

- (55) The operation involves the following three product markets:
- (i) provision of satellite TV transponder capacity and related services to broadcasters;
 - (ii) distribution of pay-TV and other encrypted TV channels to direct-to-home households;
 - (iii) operation of cable TV networks (see (165)).
- (i) **Provision of satellite TV transponder capacity and related services to broadcasters**
- (56) Several companies are in the business of providing satellite transponder capacity. These companies — satellite operators — launch and operate satellites and lease transponders to broadcasters for transmissions of TV signals. According to the parties, around 250 transponders are available for transmission of TV signals to Europe (turnover approximately ECU 625 Million). The most important satellite TV channels in the Nordic countries are currently being provided by Astra, Thor, Intelsat 702 and Sirius. These transponders are normally leased to broadcasters who through licensing arrangements deliver their TV channels to the distributors of cable-TV and direct-to-home consumers.
- (57) Distribution of TV signals via satellite (transponders) is a market distinct from TV distribution by terrestrial links, since considerable differences exist between the two modes of distribution both technically and financially (see Decision IV/M.469 — MSG Media Service). The NSD operation will result in a reorganization of existing transponder capacity and will not lead to an enlargement of satellite transponder capacity suitable for Nordic viewers.

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

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

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

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

(iii) **Operating cable-TV networks**

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

(62) From the point of view of the viewer there are considerable differences between the possible transmission routes — terrestrial, direct-to-home satel-

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

(million households)

	Denmark	Sweden	Norway	Finland
Households	2,3	3,9	1,9	1,9
of which connected to:				
— cable TV	1,05	1,9	0,565	0,78
— SMATV	0,25	0,3	0,120	0,10

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

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

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

VII. RELEVANT GEOGRAPHIC MARKET

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

- (65) A broadcaster wishing to transmit to a specific area needs a transponder with a footprint (the geographical area where the TV signals distributed by a satellite can be received by direct-to-home households having standard receiving equipment) that covers the relevant geographical area.
- (66) Technically, it is possible for the households in the Nordic countries to receive signals from all European satellites. Quality of reception depends on the size of the receiving dish and on the strength of the transponder signal. However, economic and aesthetic considerations will limit the dish size generally used and, as a rule, the Nordic direct-to-home households will only have equipment which is adequate to receive signals from certain satellite positions. For cable TV operators the situation is quite different, since, as they are not faced with the same economics and aesthetic restrictions as the direct-to-home households, they will be able to receive signals from nearly all European satellite positions.
- (67) For transmission to direct-to-home households, one way of defining the geographical scope of transponders is to consider the size of the dish necessary to receive good quality signals from the transponders in question. According to technical information (...), Société Européenne des Satellites (SES), which owns the Astra satellites, has specified its main markets to be areas where signals can be received by dishes of up to 60 cm in diameter. On the basis of a 60 cm dish size, the Nordic satellites (Intelsat702/Thor/TV-Sat and Sirius/Tele-X), the Astra satellites and the Eutelsat satellites are relevant for Nordic viewers.
- (68) The transponders on the Nordic satellites have a footprint which enables all Nordic viewers with a 60 cm dish to receive the signals from the transponders. Astra and Eutelsat are also relevant for the Nordic area since direct-to-home households in the whole of Denmark and in the southern parts of Norway and Sweden with a 60 cm dish could

receive signals from some of Eutelsat and Astra's transponders. Astra cannot be received in Finland with a 60 cm dish.

- (69) From a technical point of view, for a broadcaster who wants to target only Denmark the transponders on Astra and Eutelsat would be as relevant as the Nordic transponders. However, a broadcaster who wants to operate on a Nordic basis, transponders which only cover parts of the Nordic market will not be considered as an attractive alternative. For such a broadcaster there will be imperfect substitution between NSD's transponders and the transponders on Astra and Eutelsat. This is supported by information (...) in which it is stated that prior to the establishment of the Nordic satellite positions there was no transponder capacity with an ideal foot-print for the Nordic countries.
- (70) Furthermore, it has to be borne in mind that compared to the Nordic satellites, Astra and Eutelsat are international businesses with a Central European scope. Information (...) indicates that the fee for leasing a transponder on Astra or Eutelsat will be (...) higher than the fee will be for leasing a Nordic satellite transponder. If NSD maintains a considerable price difference, transponders on Astra and Eutelsat will not be an alternative for a broadcaster who wants to be a competitive player in the Nordic area.
- (71) However, in this case, technical questions relating to footprints and size of dishes, and the prices of transponders are not determinant for the definition of the relevant geographic market since the operation will create such barriers to entry for providers of transponder capacity suitable for Nordic viewers that the operation in itself will lead to the creation of a separate Nordic market. As will be shown in the assessment, through its control over the transponder capacity and the links to Kinnevik as an important broadcaster and distributor of Nordic TV channels, and through the links to TD and NT as important cable operators, NSD will be in a position to foreclose other satellite operators from leasing transponders to broadcasters wanting to target Nordic viewers.
- (ii) **Distribution of satellite pay-TV and other encrypted TV channels to direct-to-home households**
- (72) Direct-to-home distribution is a retail operation with direct local contact with the viewer, FilmNet, Kinnevik and NT operate national companies providing these services. Marketing of the services is national. Furthermore, the operation itself will foreclose the Nordic region for new distribution

companies, since it will in effect be impossible for a potential entrant to create a smart card with an attractive programme package (see (138) to (141)). The market is likely to be national, but it will not change the assessment whether the market is defined as national or Nordic and therefore this question can be left open.

(iii) Operation of cable TV networks

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

VIII. ASSESSMENT

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

- A. provision of satellite TV transponder capacity and related services to broadcasters;
- B. operation of cable TV networks;
- C. distribution of satellite pay-TV and other encrypted TV channels to direct-to-home households.

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

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

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

A.1. Market structure and capacity

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

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

- Thor with five transponders (... number of transponders to be used by NSD...),
- Intelsat with 10 transponders (... number of transponders to be used by NSD...),
- TV-Sat with five transponders (... number of transponders to be used by NSD...),
- Sirius, owned by the Swedish State-owned company NSAB, with five transponders (... number of transponders to be used by NSD...),
- Tele-X, owned by NSAB, with five transponders (... number of transponders to be used by NSD...).

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

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

(b) *Competition from Astra and Eutelsat*

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

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

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

(i) *the importance of Kinnevik's TV channels*

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

(ii) *the link to Kinnevik as a major distributor*

Getting onto the Viasat package of satellite TV channels will be vital for broadcasters aiming at the Nordic DTH market, because of the pulling power of the popular Kinnevik channels being offered there. By the operation, Viasat will exclusively distribute these channels

available from the NSD satellites. Therefore, it will be vital for broadcasters to be on the NSD satellites so as to be on the Viasat distribution package;

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

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

(iv) *the price difference*

(...);

(v) *no capacity on Astra and Eutelsat*

All transponder capacity on Astra and Eutelsat is currently occupied.

(i) *The importance of Kinnevik's TV channels*

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

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

- (82) It appears that following the operation Astra will not be a major provider of satellite TV channels to the Nordic market. Currently, five transponders on Astra are used for Nordic TV channels and no Nordic TV channels are transmitted from Eutelsat. Four of the five Nordic transponders on Astra are leased by Kinnevik and used for its channel TV3 Denmark, TV3 Sweden, TV3 Norway and TV1000. Because of the operation, (...).
- (83) Kinnevik's four transponders on Astra (...).
- (84) Furthermore, NSD will also provide Astra's most popular foreign language TV channels in the Nordic countries: Eurosport, Discovery, Children's Channel, CNN Int., MTV Europe. (...) will be transmitted in a more attractive Nordic version in NSD's package. (...), other international channels are also considering Nordic versions of their channels which will be subtitled or dubbed. It is most likely that these channels will also be transmitted from NSD's satellites. NT has exclusive rights to distribute (...) in the Nordic area. Undoubtedly, such rights will be transferred to NSD and it is likely that NSD will be able to get exclusive rights to other popular channels.
- (85) Based upon the abovementioned, it appears that broadcasters will stop transmitting the Nordic channels on Astra and that Astra will not have many popular foreign language channels to offer to Nordic viewers which they cannot get from the Nordic satellites, some even in a Nordic version.
- (86) The position of NSD is likely to be further strengthened by the fact that the national broadcasters in Denmark are planning to launch satellite channels as supplements to their terrestrially distributed channels. It appears that NSD is the only realistic distribution possibility for these companies. Furthermore, the inclusion of these companies in NSD will take away strong potential broadcasters for potential competitors to NSD seeking to distribute satellite television to the Nordic area.
- (87) The parties do not deny the strength of Kinnevik's channels. On the contrary, they consider those channels a decisive element in the operation. Information provided by the parties shows that they concur with the Commission's expectation that, after and as a result of the operation, most dishes in the area will be turned towards 1° W or 5° E.
- (88) The parties' acceptance that most dishes in the area (70 % of which are presently directed at Astra) will be turned towards the Nordic satellites as soon as TV3 moves to them from Astra, seems to lead to the conclusion that TV3 is by far the most important satellite TV channel to most Nordic direct-to-home households, and to confirm the 'pulling power' of the Kinnevik channels mentioned earlier.
- (89) The parties state that TV channels carried by Astra and Eutelsat will still be attractive for Nordic direct-to-home households and mention the fact that it is possible for households to receive signals from more than one satellite position by using certain equipment. Such equipment includes motorized dishes and fixed dishes with side-feeds. If the wish to, households can also buy another fixed dish.
- (90) However, it seems clear that there are several problems with such equipment. There are aesthetic and planning concerns raised by the large size of the dishes required to fit side-feeds. They are also costly. The high cost of the motorized and second dish solutions also militates against them. A ratio of 2:1 in price difference between side-feed and standard equipment has been mentioned by (...). Motorized dishes are even more expensive, and the cost of buying two standard dishes is obvious.
- Furthermore, even if such solutions were inexpensive and easy to integrate into a household, it seems likely that a consumer receiving (15 to 30) TV channels from NSD using standard equipment will be reluctant to spend money on other equipment so as to receive additional channels from Astra or Eutelsat.
- (91) It is clear, therefore, that, because of the operation, very few Nordic direct-to-home households will direct their dishes towards Astra, Eutelsat or other satellite operators and, therefore, broadcasters wanting to target Nordic viewers will not see these satellites as alternatives to NSD.
- (ii) The link to Kinnevik as a major distributor
- (92) A broadcaster transmitting from Astra or Eutelsat will be excluded from NSD's package of satellite TV channels. In the Nordic countries satellite TV channels are sold in packages and by the operation NSD will offer very attractive packages. To be excluded from NSD's packages of channels will put a broadcaster in a very disadvantaged position compared to NSD's broadcasters. It is very unlikely that such broadcasters could develop new packages which could compete with NSD's package of channels. Another option would be to get onto Film-Net's packages of channels. However, compared to

what NSD's packages can offer (i.e. The Kinnevik channels including TV3, the Nordic versions of other channels (see (80) to (84)) FilmNet's package (see (135)) will not be an attractive choice for a broadcaster. Besides, Filmnet's position as a significant player on this market will be undermined because of the operation (see (143)).

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

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

(iv) The price difference

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

(v) No capacity on Astra and Eutelsat

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

(c) *Potential competition from future capacity*

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

(i) Astra/Eutelsat

- (97) The parties claim that Astra has plans to launch a new satellite in 1995 which will increase its transponder capacity from 64 to 82 and, in 1996, a further satellite will increase Astra's capacity to 102 transponders. Other satellite operators with European coverage, for example Eutelsat, will also launch new satellites in the near future and thereby increase the total transponder capacity.
- (98) Undoubtedly, Astra, Eutelsat and other satellite operators have plans to (and will) increase the capacity of transponders in the coming years by launching new satellites. However, according to information currently available to the Commission, transponders will not be available for Nordic broadcasters in the next three to four years at least. Besides, even if transponders for Nordic viewers were to be available there would not be so many that it would be possible to create a package that could compete commercially with NSD's.

(ii) NSAB

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

(iii) New players using new satellites

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

(iv) New players using second-hand satellites

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

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

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

(d) *Digitalization*

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

channels in both digital and analogue transmission and therefore a need for more capacity than before digitalization.

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

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

A.2. Conclusion

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

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

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

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

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

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

B. OPERATION OF CABLE TV NETWORKS

B.1. Market structure

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

network tends to have relatively few connections. However, a few large operators with many units control about 80 % of all connections in the Nordic area.

(a) *Denmark*

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

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

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

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

(118) It should be noted, that Stofa A/S, a private Danish cable TV operator, has filed a complaint with the Commission concerning Danish legislation on cable TV. The Commission has questioned⁽¹⁾ the Danish Government on the points raised by Stofa. In particular, the Commission has asked the Danish authorities to lift the current provisions prohibiting private companies from owning cable TV networks and to ensure that companies other than TD are allowed to transmit signals across municipal borders in Denmark.

(b) *Norway*

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

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

(121) Although NT is the market leader, the Norwegian cable TV market consists of three competitors of almost equal strength and NT probably does not

have a dominant position at present. According to the Norwegian competition authority, direct competition between cable TV operators is to a large extent possible since about two-thirds of all connected households have the possibility of choosing an alternative cable TV supplier. Furthermore, the Norwegian cable TV market is expected to grow by 2 to 3 % per year and the penetration is expected to reach a level of 40 to 50 % of the total amount of households.

(c) *Sweden*

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

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

(d) *Finland*

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

⁽¹⁾ Commission letter of 23 December 1994 to the Danish Government.

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

favour of the cable operators owned by the parents or in favour of its direct-to-home operations.

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

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

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

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

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

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

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

B.3. Conclusion

Denmark

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

- (i) NSD will be able to discriminate in favour of TD when offering channels to Danish cable operators;
- (ii) NSD's monopolist position as regards provision of programming will mean that the terms offered to cable operators will be those most favourable to TD, rather than to others;
- (iii) Cable operators in competition with TD will have to negotiate with TD as an NSD partner.

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

Sweden, Norway and Finland

- (133) The parties control or influence about 18 % and 30 % of the cable and SMATV connections in Norway and Sweden respectively and nothing in Finland. Because of NSD's dominance of the transponder market, the arguments in point (i) to (iii) above will apply to the competitive situation between the parties' cable operators in Norway and Sweden.
- (134) However, because of the relative strength of competitors in Norway and Sweden it seems unlikely that dominant positions of the parties in Norway and Sweden will be created as a result of the operation.

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

C.1. Market structure

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

- FilmNet's card contains its own pay-TV channel FilmNet Plus, The Complete Movie Channel and BBC. In Denmark the card only contains FilmNet Plus and/or FilmNet The Complete Movie Channel,
- Telenor CTV markets the CTV card which includes MTV, Eurosport Nordic, Discovery,

Children's Channels, CNN and FilmNet The Complete Movie Channel. In Sweden (and planned for Denmark) the card also includes FilmNet Plus,

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

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

(Number of cards sold)

Denmark	
Viasat	> 100 000
FilmNet	> 25 000
Telenor CTV	< 10 000
Norway	
Viasat	> 100 000
FilmNet	> 25 000
Telenor CTV	> 25 000
Sweden	
Viasat	> 250 000
FilmNet	> 25 000
Telenor CTV	> 25 000
Finland	
Viasat	0
FilmNet	< 10 000
Telenor CTV	> 10 000
Nordic Total	
Viasat	> 500 000
FilmNet	> 100 000
Telenor CTV	> 50 000

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

- (137) The FilmNet/Telenor agreement: FilmNet is currently being broadcast from the Thor satellite. FilmNet's lease of a transponder on the Thor satellite and its distribution company Multichoice's distribution of Telenor's CTV package in Sweden is based on an agreement with Telenor AS dated October 1992. FilmNet saw the NSD operation as

a threat to its interest as a distributor of pay-TV in the Nordic countries and has filed a complaint with the Commission concerning the proposed operation. In addition, Nethold (the owner of FilmNet and Multichoice) has initiated arbitration against Telenor for alleged breaches of the above-mentioned agreement. In December 1994 the Norwegian Court granted an injunction against Telenor by which Telenor, among others, was forbidden to implement the agreement with the Viasat companies by which Viasat could sell Telenor's CTV package. The Court decision would have blocked the NSD operation and made it necessary for the parties to negotiate a settlement with Nethold. By an agreement between Nethold and Telenor dated 29 March 1995) (...).

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

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

- (i) By its control of Nordic transponder capacity and its link to Kinnevik as a broadcaster, NSD will be the dominant provider of TV channels to Nordic viewers;
- (ii) as discussed above (see 126 to 131), NSD will, to a large extent, control access to the Nordic cable sector, by means of its parental links to cable operators.

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

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

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

(141) Furthermore, it is highly unlikely that NSD will lease transponders to broadcasters without making

the lease dependent on a distribution agreement between the broadcaster and Kinnevik's distribution company. It is clear from information made available by the parties that NSD's transponders first and foremost are a means to develop a Nordic satellite TV distribution system. To lease transponders to broadcasters who do not want to be distributed by NSD would counteract the purpose of the operation. Furthermore, in a period with shortage of supply of transponders it is not necessary for NSD to lease transponders to such broadcasters. The attempt of the parties to confirm its 'open' lease-policy by referring to the new agreement with FilmNet is not convincing: The FilmNet agreement is the outcome of a negotiated settlement. Through a court decision in Norway FilmNet blocked parts of the NSD operation and it was necessary for Telenor to reach a settlement with FilmNet. Before the court decision it was not the intention of the parties to reach such a settlement with FilmNet.

C.3. Conclusions

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

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

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

D. ECONOMIC AND TECHNICAL PROGRESS

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

- (146) The Commission cannot share this reasoning: the establishment of NSD will not in the short to medium term lead to an improved distribution of satellite TV to the Nordic region, since NSD does not add any new transponder capacity. Consequently, the number of satellite TV channels offered to Nordic viewers in the short term will not be affected by the operation. The Commission recognizes that it is necessary for a satellite operator to be able to promote its satellite position, but in view of the Commission the vertical integration of the operation is not necessary in order to do so. Rather the operation is likely to affect the way in which available transponder capacity is allocated to broadcasters.
- (147) In the long term, with the introduction of digital technology, the parties will use NSD to create an integrated infrastructure for the distribution of satellite TV and other related services.
- (148) According to the parties, in the digital environment it is the intention to (...) implement a joint Nordic system for encryption to be used for the direct-to-home, SMATV and cable TV market. This implies that the individual TV households will only need one decoder box irrespectively whether they receive the signals from cable or via a satellite dish antenna. This means that the SMS and SAS systems of DTH, SMATV, and cable TV networks can be integrated. Furthermore, cable TV networks could have considerable cost savings by not having to decode and encode signals in each of their head-ends. According to the parties the system will allow independent cable TV operators to use NSD as a supplier and at the same time still be able to run their own SMS systems. Furthermore, the system will provide SMATV networks with improved possibilities for reception of pay-TV and even allow them to run their own SMS, which is basically not possible today.
- (149) Because of NSD's dominant position as provider of TV channels from Nordic transponders, the Commission considers that it is most likely that the majority of direct-to-home households and independent cable operators in the Nordic countries will be forced to use an encryption system used by NSD. Broadcasters who want to target Nordic viewers will have to lease NDS's system. Thus, if the plans are carried through, NSD's joint Nordic encryption system would become the dominant system in the Nordic region.
- (150) The Commission recognizes the long-term economic benefits of having an integrated system for transmission of satellite TV (...). Thus, it is impossible to assess to what degree NSD's plans for a joint Nordic encryption system would enable NSD to exclude broadcasters from transmitting TV channels to Nordic viewers. A closed encryption system could make the new infrastructure highly anticompetitive. The same applies to an open system if the system becomes dominant and third parties cannot get access to such a system. (...).
- (151) The Commission considers that an infrastructure as described by the parties could be highly efficient and beneficial to consumers. However, it must be an open infrastructure accessible for all interested parties. In particular the Commission takes the view that the participation of such a strong broadcaster as Kinnevik in NSD means that there is a high risk that this will not be case. Therefore, it is likely that the operation will lead to less variety in the offer to Nordic TV households in the future. Furthermore, in the opinion of the Commission the vertically integrated nature of the proposed operation is not necessary in order to create such an integrated infrastructure.
- (152) Consequently, the arguments made by the parties with regard to technical and economic progress cannot be accepted since the conditions of Article 2 (1) (b) of the Merger Regulation are not met.
- E. UNDERTAKINGS PROPOSED BY THE PARTIES**
- (153) By letter of 7 July 1995 the parties proposed giving a series of undertakings in order to remove the doubts against the proposed concentration. The proposed undertakings relate to the following points:
- Tele Danmark and Norsk Telekom waive all rights to interfere with the use of Kinnevik's transponders on Astra,
 - Tele Danmark and Kinnevik will waive their (special) rights (...) for transponders on the Swedish satellite position 5°E,
 - They will make two of their existing transponders available for other broadcasters on commercial terms on the day of clearance. (...) The other transponder is leased from NSAB and any contract awarded concerning this transponder will be subject to NSAB's approval. The undertaking shall cease to have effect if the transponders have not been leased by third parties within six months from the day of clearance of NSD,

- NSD will dispose freely of the first (...) transponders transferred to NSD at 1°W. The parties will establish a procedure through which (...) of (...) additional NSD transponders will be made available for broadcasters not related to NSD. NSD undertakes to communicate to the market with not more than 180 days and not less than 60 days notice when new capacity will become available. Third parties will then be given the opportunity to place a binding offer for lease of capacity. NSD is free to dispose of transponders which have not been leased by third parties as part of the procedure,
 - NSD shall not acquire exclusive distribution rights for (...) specified Nordic and international channels. The undertaking shall only apply for (...) years and only for analogue, and not for digital transmissions,
 - If Kinnevik offers its channels free of charge to a cable TV operator in a given country, it will likewise offer the channel(s) concerned to any cable operator free of charge, as long as this operator is willing to give the channel free distribution. If Kinnevik introduces payment, the channels will still be offered on non-discriminatory terms provided the cable operator is willing to give the channel concerned free distribution. (...) These undertaking will be valid for (...) years,
 - The parties undertake to agree that all commercial relations between NSD and its shareholders shall be based on arm's length principles.
- (154) In the Commission's view, these undertakings are insufficient to avoid the abovementioned creation or strengthening of dominant positions. The three first mentioned undertakings will have only a minor short term effect on the availability of transponders to third parties: the first undertaking that TD and NT waive all rights to interfere with the use of Kinnevik's four Astra transponders is unlikely to have any effect of relevance since Kinnevik will be free to dispose of these transponders. The second undertaking to waive their (special) rights (...) for transponders on the Swedish satellite position will have no short term effects since the parties would still control (...) of a total of ten transponders on this position. In addition, the undertaking does not exclude NSD from leasing additional transponders on the Swedish position if such becomes available. Anyway, the (special) rights (...) are non-ancillary and constitute only an additional element reinforcing the Commissions conclusions (see 112). The third undertaking to make two of their existing transponders available for other broadcasters will have only a minor short term effect. (...) Furthermore, the price and other terms are decided by NSD.
- (155) The undertaking that NSD will make (...) out of additional (...) transponders available for broadcasters not related to NSD does not contain a time limit and, therefore, it is unclear when additional transponders will be available. Furthermore, the fact that NSD itself will distribute these (...) transponders will make it extremely difficult to control whether the price and other leasing terms are fair and on-discriminatory.
- (156) The undertaking that NSD shall not acquire exclusive distribution rights to (...) satellite TV channels is too limited in scope. (...) of the (...) TV channels are owned by Kinnevik and the (...) channels do not include three of the most popular international TV channels (...), to which NT has exclusive rights. In addition, the undertaking shall only apply for (...) years and only for analogue, not for digital transmission. (...) Furthermore, this undertaking would be difficult to enforce.
- (157) The undertaking that Kinnevik will offer its TV channels to cable TV operators is ambiguous. The undertaking contains several conditions and it seems to deprive the cable operator of the right to choose or maintain its own programme policy and marketing strategy. It would be very difficult to enforce this undertaking.
- (158) The last mentioned undertaking in which the parties agree to base all commercial relations on arm's length principles is very difficult to enforce.
- (159) All in all, the undertakings are not sufficient to solve the competition problems identified above. They are too limited in scope, mostly behavioural and would be very difficult to control and enforce.
- (160) The Advisory Committee on Concentrations agrees with the Commission that the proposed undertakings offered by the parties are not sufficient to make the setting up of the joint venture compatible with the common market and the EEA Agreement. This view is also taken by third parties which the Commission has asked for comments on the undertakings offered by the parties.

F. CONCLUSION

- (161) As a result of the operation, NSD will acquire a dominant position on the market for satellite TV transponder services suitable for Nordic viewers.
- (162) NSD's dominant position on transponders will strengthen TD's dominant position on the cable TV market in Denmark.
- (163) Viasat will obtain a dominant position on the market for distribution of pay-TV and other encrypted channels to direct-to-home households as a result of the operation.
- (164) The vertical integration of NSD means that the positions of the parties in various markets reinforce each other. Particularly it should be noted that the positions of the parties in the downstream markets (cable TV networks and distribution) reinforce the dominant position on transponders by deterring potential competitors from broadcasting from other transponders to the Nordic area.
- (165) Apart from the three markets analysed in this Decision the Commission has investigated four other areas — pay-TV, other commercial TV channels, up-link services and provision of encryption systems — in which the parties are active. The Commission has found that, as to these activities, the parties will not obtain or strengthen a dominant position due to the operation,

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

This Decision is addressed to:

1. Norsk Telekom AS,
Keyzersgate 15,
N-0165, Oslo;
2. TeleDanmark A/S,
Kannikegade 16,
DK-8000, Aarhus C;
3. Industriförvaltnings AB Kinnevik,
Skeppsbron, 18,
S-10313, Stockholm.

Done at Brussels, 19 July 1995.

For the Commission

Karel VAN MIERT

Member of the Commission

COMMISSION DECISION

of 18 October 1995

on State aid that Bavaria granted to the ECSC steel undertaking Neue Maxhütte
Stahlwerke GmbH, Sulzbach-Rosenberg

(Only the German text is authentic)

(Text with EEA relevance)

(96/178/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 4 (c) thereof,

Having regard to Commission Decision No 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry⁽¹⁾,

Having given notice, in accordance with Article 6 (4) of that Decision, to the other Member States and the parties concerned to submit their comments,

Having regard to the comments received,

Whereas:

I

On 30 November 1994 the Commission decided to initiate the procedure provided for in Article 6 (4) of Decision No 3855/91/ECSC (Steel Aid Code) with respect to a series of loans totalling DM 49,825 million (ECU 26,53 million) which Bavaria granted between March 1993 and August 1994 to Neue Maxhütte Stahlwerke GmbH (hereinafter referred to as 'NMH'). The Commission concluded, on the basis of the information provided by the German Government, that the loans granted to the company were not to be regarded as a genuine provision of risk capital according to usual investment practice in a market economy and might therefore represent State aid that would be incompatible with the provisions of the Steel Aid Code and the Treaty establishing the European Coal and Steel Community (hereinafter referred to as 'the ECSC Treaty').

The Commission informed the German Government, by letter dated 12 December 1994, of its decision to initiate proceedings and requested its comments and any additional information it might consider relevant to the case. The reply of the German authorities dated 13 January 1995 contained some additional information concerning Bavaria's reasons for granting the loans, the other share-

holders' reasons for not participating completely in the financing of the company and the use of the loans (for a full description of the German Government's position see section III). The German Government also referred to its communications of 15 July 1994, 14 September 1994 and 9 December 1994, submitted in the framework of the procedure concerning the intended financial measures to assist NMH and Lech-Stahlwerke GmbH (hereinafter referred to as 'LSW') under the privatization plan of Bavaria, and stressed that the loans should be seen solely in relation to that plan. The Commission decided on 4 April 1995⁽²⁾ that the intended loss compensation of DM 125,7 million (ECU 67,81 million) and the contribution for investment of DM 56 million (ECU 29,78 million) in favour of NMH as well as the intended loss compensation of DM 20 million (ECU 10,63 million) for LSW represented State aid incompatible with the Steel Aid Code and that Bavaria should consequently not grant this aid. The measures were planned in connection with the intended privatization sale of the 45 % share of Bavaria in NMH and its 19,734 % share in LSW to the Aicher group. The German Government filed an application for annulment of this decision with the Court of Justice of the European Communities (Case C-158/95)⁽³⁾. NMH filed an application for annulment of this decision with the Court of First Instance of the European Communities (Case T-129/95)⁽⁴⁾.

The letter by which the Commission informed the German authorities of its decision to initiate the current procedure and inviting the other Member States and interested third parties to submit their comments was published in the Official Journal⁽⁵⁾.

It should be recalled that the Commission decided on 19 July 1995 to initiate a second procedure covering shareholders' loans totalling DM 24,1125 million (ECU 12,82 million) which Bavaria granted to NMH in four tranches between July 1994 and March 1995⁽⁶⁾. At the time when the present procedure was initiated the Commission was

⁽²⁾ See *Bulletin EC 5-1995*, point 1.3.55.

⁽³⁾ OJ No C 208, 12. 8. 1995, p. 4.

⁽⁴⁾ OJ No C 229, 2. 9. 1995, p. 21.

⁽⁵⁾ OJ No C 173, 8. 7. 1995, p. 3.

⁽⁶⁾ Not yet published in the Official Journal, see IP(95) 780.

⁽¹⁾ OJ No L 362, 31. 12. 1991, p. 57.

not aware of these loans. The loans may constitute illegal State aid because none of the other shareholders of the company participated in this financing of the company so that the behaviour of the State may be considered not to be in line with normal market investors' behaviour.

As part of the present proceedings the Commission received the following comments:

- the government of one Member State stated that it considered the loans to represent State aid that would distort competition within the Community to the direct detriment of the competitors of NMH in its territory. It pointed out that the behaviour of the private shareholders in NMH and the financial situation of NMH strongly indicated that the State loans were not consistent with normal investment practice in a market economy and therefore constituted State aid,
 - the government of another Member State considered that the loans granted to NMH were also liable to favour the tube producer Rohrwerke Neue Maxhütte GmbH (hereinafter referred to as 'RNM'), in which NMH holds a share of 85 %. It pointed out that the European market for tubes is suffering severe overcapacity,
 - a European steel producers association expressed its opinion that no private investor would have been prepared to grant liquidity to a company in a financial situation comparable to that of NMH. It concluded that the loans constituted State aid and asked the Commission to issue a final decision requiring the recovery of the aid,
 - a national steel producers association pointed out that it is a basic tenet of Community State aid case law that in the case of undertakings with mixed State and private ownership, such as NMH, the action of the private investor is a key indicator of whether the State's involvement can be construed as normal market practice in a market economy. In further underlined that the participation of the Aicher group in the lending had certain unusual characteristics. At around the time of the loans the group was in negotiations with Bavaria for the acquisition of NMH. The final agreement, having been subsequently announced in March 1994, provided for important financial support by Bavaria in favour of NMH. Aicher therefore, in the view of the association, had a significant motive for participating directly in the third loan that was different from that of a normal private investor, because the loans would in effect be redeemed by the Bavarian Government on disposal of NMH and LSW. While this made commercial sense for Aicher, it is, in the opinion of the association, not appropriate to use this participation as an indicator of the private investor principle,
 - a major European steel company stressed that a prudent lender would, given the well-known fact that the financial results of steel companies are especially cyclical in nature, require an assurance of re-payment from profit or from cash flow throughout the economic cycle. The company would therefore not regard a condition of the loans which requires repayment only if NMH achieved a profit as normal investment practice in a market economy. It urged the Commission, if its investigations concluded that the loans had in fact been made in order to sustain the unprofitable operations of NMH, to issue a decision requiring Bavaria to recover the aid,
 - another European steel company pointed out that the loans granted by the State to NMH already distorted competition in the sectors in which it competes with NMH,
 - a national steel tube association supported the initial view of the Commission that the loans granted by Bavaria to NMH may constitute State aid contrary to the ECSC Treaty and the Steel Aid Code and requested the Commission to issue a decision requiring Bavaria to recover the aid, even if it resulted in the company having to go into liquidation as would a private business without such aid being available,
 - a law firm acting on behalf of a producer of steel tubes competing with the NMH subsidiary RNM, analysed the financial measures of Bavaria on the basis of the information given in the publication in the *Official Journal of the European Communities* and concluded that these measures represented State aid that would be incompatible with the Steel Aid Code. It pointed out that the aid would indirectly also favour RNM so that the direct competitor of its client would be unduly subsidized,
 - another producer of steel tubes, pointing out the possibility that its competitor RNM could benefit from any financial assistance to NMH, stressed that the loans were granted on condition that NMH would have to repay only if it made profits in the preceding year. Since NMH had never made profits since its establishment, the State could not expect to receive any repayment. Therefore, the loans should be regarded as aid incompatible with the common market.
- The comments were communicated to the German Government by letter dated 22 August 1995 with the request that it submit its reaction. By letter dated 18 September 1995, the German authorities submitted their remarks concerning the comments of other Member

States and third parties as requested. They repeated their opinion that the loans should be seen exclusively in connection to the privatization plan of the Bavarian Government. The loans were granted, according to the German Government, to maintain the company in operation until the privatization plan of the Bavarian Government could finally be implemented. Since the Commission decided in April 1995 that the financial measures of the State necessary for the privatization were prohibited as illegal State aid, the privatization plan may be implemented only after the annulment of this decision by the Court of Justice, of which the German Government is certain. In order not to jeopardize the possible privatization of the shares of Bavaria in NMH and LSW after the expected annulment of the Commission's decision, the German authorities requested the Commission, if it were to conclude that the loans represented State aid, to postpone its decision on the recovery of these loans until after the final decision of the Court of Justice.

II

On the basis of the information received, the relevant facts appear to be as follows:

On 16 April 1987, formal bankruptcy proceedings concerning Eisenwerk-Gesellschaft Maximilianshütte mbH ('Maxhütte') were initiated. The administrator in bankruptcy decided to continue operations in order to prepare a restructuring plan. In mid-1990, two newly created companies, NMH, covering the ECSC products range of Maxhütte (in liquidation) and RNM, covering the tube production, took over the activities of Maxhütte. NMH is an 85 % shareholder of RNM, the remaining 15 % being held by Kühnlein, Nuremberg, the main sales agency for the tubes produced.

The initial shareholders of NMH were Bavaria (45 %), Thyssen Edelstahlwerke Ag (5,5 %), Thyssen Stahl AG (5,5 %), LSW (11 %), Krupp Stahl AG (11 %), Klöckner Stahl GmbH (11 %) and Mannesmann Röhrenwerke AG (11 %). In order to enable LSW to participate in NMH, Bavaria took over a 19,734 % share in LSW in 1988. By Decision dated 26 July 1988, the Commission concluded that the participation of the State in both companies did not contain State aid elements⁽¹⁾.

In August 1992, the German authorities notified the Commission of the intention of the Bavarian Government to grant a loan totalling DM 10 million (ECU 5,3 million) to NMH. The Commission decided that the loan would not constitute State aid because all private shareholders were prepared to grant similar loans under the same

conditions in line with their participation. Bavaria was thus acting like the private shareholders of the company. The German authorities were informed of this decision⁽²⁾ and the reasoning underlying it by letter dated 2 February 1993.

By agreement dated 7 December 1992 and 3 March 1993, Klöckner Stahl GmbH transferred its shares in NMH to Annahütte Max Aicher GmbH & Co KG, Hammerau (hereinafter referred to as 'Annahütte'), for a purchase price of DM 1 (ECU 0,53). On 14 June 1993, Krupp Stahl AG, Thyssen Stahl AG and Thyssen Edelstahlwerke AG transferred their shares in NMH to LSW for a purchase price totalling DM 200 000 (ECU 106 382). The German Government informed the Commission in its letter dated 9 December 1994 that the transfer of the shares had become effective regardless of whether or not the creditors agreed. In its letter dated 18 September 1995 the German authorities informed the Commission that the transfer of the shares of these four shareholders to the two companies of the Aicher group had become formally valid only on 21 March 1994 after the Bavarian Government had given its assent, which was necessary according to the partnership agreement.

The present shareholding situation therefore appears to be as follows:

Bavaria:	45 %,
LSW:	33 %,
Annahütte:	11 %,
Mannesmann Röhrenwerke AG:	11 %.

LSW and Annahütte are controlled by the entrepreneur Mr Aicher.

NMH produces some 299 kilotonnes per year (kt/y) of crude steel (capacity: 444 kt/y), 81 kt/y of semi-finished products and some 85 kt/y of light and heavy sections (capacity: 258 kt/y). Its subsidiary RNM produces some 70 kt/y of tubes (capacity: 136 kt/y). NMH currently employs 1 040 persons, RNM employs 560 persons. NMH has never made profits since its establishment in mid-1990. The total losses up to the end of 1994 were established at DM 156,4 million (ECU 83,19 million). In 1993, the company suffered losses of approximately DM 88 million (ECU 46,8 million) and had a turnover of DM 216 million (ECU 114,9 million). 25 % of the losses of around DM 44 million (ECU 23,4 million) and had a turnover of DM 284 million (ECU 151 million). Around one third of these losses were related to the profit and loss transfer agreement with RNM.

⁽¹⁾ See: *18th Report on Competition Policy (1988)*, point 198, p. 163.

⁽²⁾ Commission Decision of 23 December 1992, see *Bulletin EC 12-1992*, point 1.3.78.

As from March 1992, when Thyssen, Krupp and Klöckner informed their fellow shareholders that they had decided to withdraw from their participation, Bavaria was looking for a viable privatization and restructuring plan. The Bavarian entrepreneur Max Aicher, participating in NMH through LSW, proposed a restructuring of the company based on traditional blast furnace technology using the synergy advantages of a grouping of the Bavarian steel companies NMH, Annahütte and LSW. The costs of this plan to Bavaria were estimated at around DM 200 million (ECU 106,4 million). Manfred Kühnlein, the Nuremberg tube trader holding 15 % in RNM, proposed a plan called MARS, in which a group of fourteen partners would have implemented a new technology designed by Voest Alpine AG and Mercedes Benz AG for the recycling of car frames. The costs of this plan to Bavaria were finally estimated at about DM 280 million (ECU 148,9 million). Later in 1993, the US recycling specialist WMX Technologies Inc. with its German subsidiary WASTE Management GmbH started feasibility studies concerning the car recycling plan. In early 1994, WASTE concluded that the recycling plan was not viable. The Bavarian Government decided in March 1994 to honour the proposal of Aicher. In May 1994, the German Government notified the Commission of Bavaria's intended financial measures in connection with the Aicher plan.

Bavaria and Max Aicher GmbH & Co agreed by contract dated 27 January 1995 that Bavaria would sell its 45 % share in NMH to Max Aicher GmbH & Co for DM 3 (ECU 1,59). They further agreed that Bavaria would pay 80,357 % of the losses accumulated by NMH up to the end of 1994. The losses were finally fixed at DM 156,4 million (ECU 83,19 million), so that the payment of Bavaria under the contract would amount to DM 125,7 million (ECU 67,81 million). The shareholders' loans granted by Bavaria could, according to the contract, be off-set against the intended contribution once the contract entered into force. The parties to the said contract further agreed that Bavaria should pay up to DM 56 million (ECU 29,78 million) to cover costs of investments. The Bavarian State and Mr Aicher agreed in a second contract dated 27 January 1995 that Bavaria would sell its 19,734 % share in LSW to Mr Aicher for DM 1 (ECU 0,53) and that the State should pay a 'countervailing payment' of DM 20 million (ECU 10,63 million) to LSW.

The German Government notified the Commission of the intended financial measures as described above. The Commission decided on 4 April 1995 that these measures constituted State aid and should therefore not be granted.

The contracts consequently did not enter into force because they were concluded on condition that the Commission approved.

The German Government informed the Commission that Bavaria granted the following loans to Neue Maxhütte Stahlwerke GmbH:

Date of contract	Amount in DM
25/29 March 1993	720 000
17/18 August 1993	6 400 000
20/29 December 1993	4 500 000
28 January/3 February 1994	4 200 000
24/28 February 1994	12 800 000
31 March/7 April 1994	7 000 000
5/9 May 1994	3 100 000
31 May/6 June 1994	5 000 000
July 1994	2 300 000
August 1994	3 875 000
Total	49 895 000

The loans were granted for ten years at an interest rate of 7,5 % *per annum*. NMH was supposed to make annual repayments, but only if it achieved profits during the preceding year.

The first three loans in the above list were accompanied by loans granted by other shareholders of NMH and RNM under the same conditions. The first loan was accompanied by a DM 176 000 loan granted by LSW, which at that time held 11 % of the shares in NMH, and a DM 54 000 loan granted by Kühnlein, a 15 % shareholder of RNM. The second loan was accompanied by a DM 1,5 million loan granted by LSW, which at that time still formally held 11 % of the shares of NMH but had already agreed on 14 June 1993 to take over an additional 22 % from Thyssen and Krupp, and a DM 270 000 loan granted by Kühnlein. The third loan was accompanied by a DM 1,1 million loan from Annahütte which at that time had already agreed, by contract concluded in March 1993, to take over the 11 % share of Klöckner Stahl GmbH (which is now called Stahlwerke Bremen GmbH) without formally being a shareholder at that time. The other shareholders of NMH did not participate in the financing of the company through shareholders' loans after February 1993. The remaining seven loans granted by Bavaria were granted without any parallel loan from other shareholders of the company.

III

The German Government submitted their comments concerning the Commission's decision to initiate the procedure and replied to the comments received from other Member States and third parties. The German Government is of the opinion that the loans in question should be seen exclusively in connection with the privatization and restructuring plan and should therefore not be regarded as aid.

The German authorities explained that Bavaria decided in 1992 to terminate its participation in NMH and to find an industrial solution for the future of the company. The Bavarian authorities conducted difficult negotiations with several potential industrial partners throughout the year 1993 and up until March 1994. In May 1994, they notified the Commission of the intended financial measures related to the Aicher plan. The loss-making NMH would not have survived this period without liquidity being provided by its shareholders. The loans made available by Bavaria were granted to hedge the intended privatization of the shares of Bavaria. Since Bavaria was the major shareholder (45 %) in NMH, the German authorities consider the financing of NMH to be in line with the normal behaviour of a solvent partner in a social market economy, even in a situation in which the other shareholders, holding the majority of shares, are not prepared to participate in the financing.

The German Government referred to their communications during the procedure covering the intended financial measures in connection with the privatization and restructuring plan in which they reported some cases which they considered to support their opinion that private investors would have behaved in a comparable way. They referred in particular to the example of the private Schörghuber group in the case of Heilit & Woerner Bau AG⁽¹⁾.

As regards the behaviour of the other shareholders of NMH during the period March 1993 to August 1994, the German authorities are of the opinion that it should not be taken as an indicator for normal market investors' behaviour.

In March 1992, Thyssen, Krupp and Klöckner decided to withdraw from their participation in NMH after having granted a finale shareholders' loan of DM 1,1 million (ECU 0,58 million) each. After this decision they did not consider themselves to be obliged to participate in the financing of the loss making operations of NMH any more.

The shareholders Kühnlein and Aicher group terminated their participation in the financing of NMH in August

and December 1993 respectively because, according to the German Government, of the uncertainty regarding the possibility of implementing their plans for the future of the company. Mannesmann was, according to the German Government, interested only in RNM and therefore was not prepared to participate in the financing of NMH.

The German authorities are of the opinion that in such a situation of financing of NMH by its major shareholder Bavaria was in line with the normal behaviour of any private investor who has sufficient financial means to provide the company with liquidity to continue its operations.

In addition, the German Government stressed that any assessment of the financing of NMH should take into account the low share of the company in the European steel market, which is reported by the German authorities to be at around 0,2 %.

IV

Neue Maxhütte Stahlwerke GmbH is a company falling within Article 80 of the ECSC Treaty because it produces products listed in Annex I to the ECSC Treaty, so that the provisions of the ECSC Treaty and the Steel Aid Code are applicable.

State aid within the meaning of Article 4 (c) of the ECSC Treaty is any transfer of State resources to public or private steel firms, in the form of acquisitions of shareholdings or provision of capital or similar financing, if the financial transfer is not a genuine provision of risk capital according to usual investment practice in a market economy, allowing for a prospect of future return on investment or other revenue⁽²⁾.

Bavaria's loans totalling DM 49,895 million (ECU 26,53 million) to NMH constituted a transfer of State resources to a steel firm. It is to be established whether this transfer of State resources may be considered as a genuine provision of risk capital according to usual investment practice in a market economy allowing for a prospect of future repayment or other revenue.

The Commission has always focused on the behaviour of private investors that are exactly in the same situation as the State when establishing whether a given public provision of capital corresponded to normal market practice. The private shareholders of the relevant company would only consider the particular economic situation of the

⁽¹⁾ For a detailed description of this case, see the Commission Decision of 23 December 1992, *Bulletin EC 12-1992*, point 1.3.78.

⁽²⁾ See Court of Justice, Case C-40/85, *Belgium v. Commission*, [1986] ECR 2321, p. 2345; Case C-303/88, *Italy v. Commission*, [1991] ECR I 1433, p. 1476, Commission Decision No 3855/91/ECSC of 27 November 1991, OJ No L 362, 31. 12. 1991, p. 57, fifth paragraph under II and the Commission Communication to Member States concerning public undertakings, OJ No C 307, 13. 11. 1993, p. 3, paragraphs 10-21.

company when assessing whether a provision of financial resources was economically responsible. A private shareholder would not be prepared to provide financial liquidity to a company in difficulties if its fellow shareholders were not prepared to contribute in line with their participation in the equity.

German law provides for shareholders' loans which were granted or not redeemed when the company was in a financial situation calling for liquidation or the additional provision of risk capital by its shareholders to be treated similarly to the injection of risk capital in the event of later bankruptcy (*'eigenkapitalersetzende Darlehen'*, see §§ 32a, 32b *Gesetz betreffend die Gesellschaften mit beschränkter Haftung*, hereinafter referred to as 'the GmbHG'). Due to this legal situation, shareholders' loans granted to avoid illiquidity and subsequent bankruptcy of a company are in general considered to be comparable to the injection of risk capital.

The GmbHG refers in § 26 paragraph 2 to the general principle that shareholders would provide additional risk capital only if the fellow shareholders also provided new risk capital in line with the percentage of their share in the company. A shareholder, however, is in principle not liable to effect further contributions to the equity of a private limited company (§ 707 of the Civil Code) even if it would otherwise become insolvent.

Between March 1993 and August 1994, Bavaria, the 45 % shareholder of NMH, provided 94,15 % of the liquidity available by shareholders to maintain the loss-making NMH in operation. Only during the period March 1993 to December 1993 did one other shareholder of NMH (LSW), a shareholder of its subsidiary RNM (Kühnlein) and Annahütte grant loans under the same conditions as Bavaria. Kühnlein, a 15 % shareholder in RNM, granted 5,7 % of the total loan made available at the end of March 1993 and 3,3 % of the total loan made available in August 1993. LSW and Annahütte, both companies of the Aicher group provided 18,5 % and 18,4 % of the total loans granted in March and August 1993 respectively and 19,6 % of the loans granted in December 1993. During this time LSW was formally only an 11 % shareholder and Annahütte was formally not yet a shareholder, since the assent of the Bavarian Government concerning the transfer of the shares of Klöckner, Thyssen and Krupp was given only on 21 March 1994.

Both Kühnlein and Aicher group were during the time when they granted these loans negotiating plans for the takeover of the majority of shares in NMH. Both submitted plans in which Bavaria would *inter alia* have covered past losses of NMH, providing aid of between DM 200 and 280 million. The Aicher plan as notified to

the Commission provided for a loss compensation covering around 80 % of the total losses accumulated by NMH since it outset. Bavaria would have waived its claims based on shareholders' loans entirely and would have granted additional liquidity which would, *inter alia*, have allowed the company to pay back loans from other shareholders. Bavaria made clear during the negotiations that repayment on its shareholders' loans would not be expected in order not to contribute to the survival of the company. In this situation, Kühnlein and Aicher had a significant reason for participating in the granting of the first three loans between March and August or December 1993. Both expected to become majority shareholders of NMH after the loans had in effect been redeemed by the Bavarian government on disposal of its shares in NMH.

Aicher group, through LSW and Annahütte, granted in March, August and December around 20 % of the total amount of loans. The decision that LSW and Annahütte would contribute to the financing of NMH was not related to the actual or expected percentage of shares of these companies in NMH but reflected the position of the Aicher group that 80 % of the debts of NMH accumulated before privatization should be borne by Bavaria which led to the calculation of the expected loss compensation in the framework of the privatization and restructuring plan as described above. This ratio was also used to explain the proposed loss compensation for NMH, which was rejected by the Commission by its Decision of 4 April 1995. When the first two loans of March and August 1993 were granted, LSW was formally still only an 11 % shareholder. At the time of the second loan, it had already agreed with Krupp and Thyssen to take over an additional 22 % of the shares in NMH. When the third loan was granted in December 1993, Annahütte was formally not a shareholder of NMH and had no other relation to this company except that it had already agreed with Klöckner to take over an 11 % share in NMH. It appears therefore that this behaviour of the Aicher group was mainly motivated by the expected future implementation of its plan for the takeover of the majority of NMH and its wish to show during the negotiations with the Bavarian Government its readiness to provide liquidity for NMH to an extent reflecting the proposed future share of the State in the loss coverage for NMH. The Aicher group terminated its participation in the financing of NMH at the beginning of 1994, immediately before the Bavarian Government finally decided to implement the Aicher plan, and did not take up its provision of liquidity after having been chosen to become the future majority shareholder of NMH, relying on the State's readiness to maintain NMH in operation, to await the Commission's approval for the injection of further public resources by Bavaria.

Kühnlein terminated its participation in the financing of NMH when it became evident that its plan would finally not be implemented.

It may therefore be concluded that the behaviour of both Kühnlein and the companies of the Aicher group was not motivated by the shareholding in NMH but by the negotiations with Bavaria with a view to the subsidized takeover of the majority of the shares in NMH. Their behaviour cannot therefore be considered appropriate normal behaviour of a private investor in a market economy in assessing the behaviour of the State as regards the financing of NMH between March and December 1993.

The former private shareholders of NMH (Krupp, Klöckner, Thyssen) decided in March 1992 to terminate their participation in NMH, not to provide further liquidity and to dispose of their shares. They were not prepared to inject additional capital on top of what they already agreed. Their behaviour was a normal operation to terminate a loss-making commitment with the lowest possible economic disadvantage.

Mannesmann Röhrenwerke AG, still a shareholder of NMH, was not prepared to grant any financial contribution to allow the restructuring of NMH. The desire to retain the industrial leadership in RNM may explain the fact that it did not behave in the same way as Krupp, Thyssen and Klöckner but does not prove that the behaviour of the State is in line with normal investors' behaviour in a market economy. If shareholders' loans to NMH had been economically reasonable and profitable, the private company Mannesmann would have granted them.

The other shareholders of NMH, private steel companies, have no longer participated in the financing of the loss-making NMH since March 1992. Only Kühnlein and Aicher group, competing for the subsidized takeover of a majority of NMH, granted loans of small amounts in the period between March 1993 and August or December 1993.

On the basis of the above it must be concluded that Bavaria could never have expected to receive any repayment on the loans totalling DM 49,895 million (ECU 26,53 million). In the event of bankruptcy of NMH, the loans would have been treated similarly to an injection of risk capital, so that the State would only have received repayment after the paying-off of all other creditors, a

highly unlikely prospect. Bavaria, in addition, was always prepared to waive the claims based on these loans to allow the privatization of its shares in NMH and thereby to safeguard the jobs in the structurally weak region of Oberpfalz.

The German Government is of the opinion that the loans granted by Bavaria to NMH were intended to allow the drafting and implementation of a privatization and restructuring plan that would finally allow a self-sustained viable future for the company. This financing was considered to be the normal behaviour of a solvent shareholder acting in a social market economy from the point of view of an entrepreneurially as well as socially responsible transfer of a company into solely private responsibility.

The Commission considered these aspects in particular in the light of the decisions of the Court of Justice in Case C-303/88, cited above, and Case C-305/89⁽¹⁾. In these judgments, the Court pointed out, *inter alia*, that where the injection of public capital disregarded any prospect of profitability, even in the long term, such injection must be regarded as aid. Considering also the other aspects of possible private investors' behaviour, addressed in the decisions of the Court of Justice in Cases C-303/88 and C-305/89, the injection of capital by Bavaria is incompatible with normal private investors' behaviour. There was no prospect of any future economic advantage, even indirect or intangible, arising from these injections. The circumstances of the present case show clearly that there was never any prospect of profitability, be it in the short term or the long term, for the financing by Bavaria. The loans were intended to cover the operating losses to avoid illiquidity and therefore insolvency during a period in which the subsidized privatization was being prepared. It was not regarded as possible, nor was it intended, to claim back the contributions necessary to maintain NMH in operation during the period between March 1993 and August 1994.

The Commission, acting within the scope of application of the EC Treaty, assesses cases of such contributions to maintain a company in operation during the drafting and negotiating of a restructuring plan under the Community Guidelines on State aid for rescuing and restructuring firms in difficulty⁽²⁾. It should, however, be noted that these Guidelines are not applicable to companies falling

⁽¹⁾ *Italy v. Commission*, [1991] ECR I-1603 ('Alfa Romeo').

⁽²⁾ OJ No C 368, 31. 12. 1994, p. 12.

under Article 80 of the ECSC Treaty as rescue and restructuring aid cannot be deemed compatible with the common market under the Steel Aid Code.

The behaviour of Bavaria as regards the loans in question is therefore not the normal behaviour of a private investor in a market economy. The examples of private companies referred to by the German Government do not indicate the contrary. The Commission explained in detail in its decision of 4 April 1995 that these examples are such as to show that a private investor would be ready to provide liquidity without having at least a reasonable chance of receiving an economic advantage in return. In this context it should be recalled that the Court of Justice in Case C-303/88, referred to above, stated that '... when injections of capital by a public investor disregard any prospect of profitability, even in the long term, such provision of capital must be regarded as aid.'

Nor does the particular example of the private Bavarian Schörghuber group, transferring its shares in Heilit & Woerner Bau AG to Walter Bau AG after a final loss compensation, indicate that private investors would be prepared to keep a loss-making company in operation merely to comply with alleged altruistic obligations in a social market economy. It is true that private companies, as well as private natural persons, may from time to time chose to dispose of their finances in a benevolent, charitable or public-spirited way. Such behaviour, however, is very different from the behaviour of investors in a private market economy and therefore cannot be relevant for the comparison of the behaviour of the State with the typical behaviour of a private investor in a market economy.

The behaviour of Bavaria in the case at issue may be motivated by the wish of its government to avoid social difficulties in a structurally weak region, the wish to avoid being held responsible by public opinion for the bankruptcy of a company and the aim of allowing an ailing company to restore its viability. Such motives are the typical motives for States to grant subsidies. They do not prove that the financial support made available based on these motives does not represent aid within the meaning of Article 4 (c) of the ECSC Treaty and Article 1 of the Steel Aid Code.

It must consequently be concluded that the shareholders' loans totalling DM 49,895 million (ECU 26,53 million), granted by Bavaria to Neue Maxhütte Stahlwerke GmbH between March 1993 and August 1994 constituted State

aid. The aid element of these loans is not inherent in any preferential treatment as regards the level of interest, but in the capital provided itself.

The loans are to be regarded as being comparable to a direct injection of risk capital because the lender, Bavaria, would have received redemption, to be paid annually, only if the company made profits during the preceding year. This is the normal result of the injection of risk capital. Bavaria has no reasonable chance of ever receiving any repayment on the capital-replacing loans. Therefore, the value of the loans itself is comparable to injected risk capital being made available by a shareholder of an ailing private limited company.

Any State aid to steel companies is prohibited under Article 4 (c) of the ECSC Treaty. The Steel Aid Code, adopted with the unanimous assent of the Council under Article 95 of the ECSC Treaty, provides that certain categories of aid may be deemed compatible with the common market, such as aid for research and development (Article 2), aid for environmental protection (Article 3), aid for closures (Article 4) and aid under general regional investment aid schemes in certain territories of the Community (Article 5). The aid granted to NMH does not fall under one of these categories. Rescue and restructuring aid cannot be deemed compatible with the common market under the provisions of the Steel Aid Code.

V

The Commission therefore concludes that an amount of DM 49,895 million (ECU 26,53 million), granted as loans by Bavaria to the ECSC steel undertaking Neue Maxhütte Stahlwerke GmbH between March 1993 and August 1994 constituted State aid incompatible with the ECSC Treaty and the Steel Aid Code.

Any State aid granted unlawfully is, in principle, to be recovered from the recipient firm. Repayment must be made in accordance with the procedures and provisions of German law with interest, based on the interest rate used as reference rate in the assessment of regional aid schemes, starting to run on the date on which the aid was granted.

The fact that NMH has only a small share in the European steel market is not relevant to the question of whether or not unlawful aid has to be reimbursed. Any State aid to companies in the ECSC sector that has not been authorized by the Commission under the provisions

of the ECSC Treaty or the Steel Aid Code is unlawful regardless of whether or not the distortive effect of the aid is relatively small due to the size of the company concerned.

There is no legal basis for a suspension of the order to recover aid that was granted unlawfully without awaiting the prior decision of the Commission as to whether or not the aid was compatible with the common market. The provisions of the ECSC Treaty and the Steel Aid Code apply equally to all European ECSC steel undertakings, and no undertaking should benefit from the readiness of the State to transfer public resources to it in breach of its obligation under Article 6 (2) of the Steel Aid Code.

There is no reason to suspend the order to recover the aid that has been granted unlawfully in the present case until after the decision of the Court of Justice and the Court of First Instance in Cases C-158/95 and T-129/95. An action against a Commission decision that certain intended financial measures in favour of a steel company represent aid and must therefore not be granted has no suspensive effect. The company which is to be the beneficiary of such financial measures may not receive State aid to allow the continuation of its operations until the final decision of the Courts. The fact that the Commission and a Member State are of different opinions concerning the question of whether or not an intended financial measure constitutes aid does not render the company concerned eligible for operating aid that is in all other cases prohibited for companies in the ECSC steel sector,

HAS ADOPTED THIS DECISION:

Article 1

The amount of DM 49,895 million granted as loans by Bavaria in ten tranches between March 1993 and August

1994 to the ECSC steel undertaking Neue Maxhütte Stahlwerke GmbH, Sulzbach-Rosenberg, constitutes State aid incompatible with the common market and prohibited under the provisions of the ECSC Treaty and Decision No 3855/91/ECSC.

Article 2

Germany shall recover the aid from the recipient company. Repayment shall be made in accordance with the procedures and provisions of German law with interest, based on the interest rate used as reference rate in the assessment of regional aid schemes, starting to run on the date on which the aid was granted.

Article 3

Germany shall inform the Commission, within two months of being notified of this Decision, of the measures taken to comply therewith.

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 18 October 1995.

For the Commission

Karel VAN MIERT

Member of the Commission

COMMISSION DECISION

of 31 October 1995

enjoining the German Government to provide all documentation, information and data on the new investment projects of the Volkswagen Group in the new German Länder and on the aid that is to be granted to them

(C 62/91 ex NN 75, 77, 78 and 79/91)

(Only the German text is authentic)

(Text with EEA relevance)

(96/179/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Articles 5, 92 and 93 thereof,

Having regard to the Agreement establishing the European Economic Area, and in particular Articles 61 and 62 thereof,

Whereas:

- (1) On 18 December 1991 the Commission took the decision to open a procedure provided for in Article 93 (2) of the EC Treaty with respect to various State aid projects for the benefit of the VW Group in Thüringen and Sachsen⁽¹⁾. By letter dated 29 January 1992, Germany agreed to suspend further payments of aid until the closure of the Article 93 (2) procedure.

According to the Commission's information the total aid paid illegally to VW in the form of grants allegedly for the projects Mosel II and Chemnitz II in October and December 1991 amounts to DM 360.8 million (ECU 191,2 million). Furthermore, VW Sachsen has obtained corporation tax refunds to the amount of DM 11,4 million (ECU 6,1 million) and special depreciation on its investments in 1991, where the amount still remains to be determined.

- (2) On 27 July 1994 the Commission took a final decision within that procedure on the restructuring aid to Sächsische Automobilbau GmbH for its car end engine plants in Mosel (Mosel I) and Chemnitz (Chemnitz I) and the cylinder head plant in Eisenach.

At the time of this final decision Germany informed the Commission that the VW Group

would finalize its plans on its new investment projects in Mosel and Chemnitz (Mosel II and Chemnitz II) at the end of 1994, so that at that time the relevant information on these projects would be transmitted to the Commission in order for it to assess the proposed regional aid. Before the final decision on the restructuring aid in 1994, the revised plans of VW were presented to the Commission in a preliminary form. The plant layout was to be changed and the investment would only start at the end of 1994. Furthermore, the aid contracts had been revised, so that the grants were reduced to DM 646,8 million for Mosel II and to DM 167,3 million for Chemnitz II. The corporation tax refunds would also fall to DM 106,8 million for Mosel II and to DM 31,9 million for Chemnitz II. This is due to the fact that eligible investment in Mosel II has been reduced to DM 2 812,9 million and to DM 758,8 million in Chemnitz, while projected employment fell to 2 843 in Mosel II and 786 in Chemnitz.

- (3) At the end of 1994, as well as in the following months, Germany informed the Commission that the investment plans by VW had not been finalized.

- (4) By letter dated 12 April 1995 the Commission requested Germany to provide VW's plans for the new plants. No reply was received to that letter.

- (5) By letter dated 4 August 1995, the Commission urgently requested the necessary information, threatening an injunction and eventually a final decision on the basis of the available information in case of non-compliance. In reaction to this letter the German Government informed the Commission by letter dated 22 August 1995 that VW's investment plans were still not finalized. It also stated that under German law a reimbursement of aid would be necessary if VW did not fully execute its investment or employment plans.

⁽¹⁾ OJ No C 68, 17. 3. 1992, p. 14.

(6) Under these conditions the Commission concludes that Germany has not submitted the necessary information for the Commission to assess the compatibility of the State aid to the VW Group for its projects Mosel II and Chemnitz II with Article 92 of the EC Treaty. Of this aid, grants to the amount of DM 360,8 million (ECU 191,2 million), corporation tax refunds to the amount of DM 11,4 million (ECU 6,1 million) and special depreciation on its investments in 1991, where the amount still remains to be determined, have already been paid. The fact that the aid or part of it might have to be reimbursed under German law, if the company did not fully execute its investment or employment plans, is not relevant for the assessment of the compatibility of the aid.

(7) In view of the above, and as the Court of Justice has acknowledged in its judgment of 14 February 1990 in Case C-301/87 (*France v. Commission*) and later confirmed in its judgment of 13 April 1994 in Joined Cases C-324/90 and C-342/90⁽¹⁾, where an infringement of Article 93 (3) of the EC Treaty has been committed, the Commission is entitled to take an interim decision requiring the Member State in question, in this case Germany, to suspend payment of the aid and to provide the Commission with all the documents, information and particulars necessary for examining the compatibility of the aid measures with the common market. The Commission takes note that in reaction to the opening of procedure Germany has confirmed by letter dated 29 January 1992 that it would suspend payment of the aid.

Furthermore, pursuant to existing case law, should Germany fail to comply with this Decision by not providing all relevant information for the assessment of the compatibility of the abovementioned aid within the deadline of six weeks of the notification of this Decision, the Commission could take a final decision on the basis of the currently available information. Such final decision could include a demand for reimbursement of the aid including interest charged on the amount of aid paid to the company concerned from the date of payment at the percentage value on that date of the reference

rate used for the calculation of the net grant equivalent of the various types of aid in that Member State. Such a measure would be necessary in order to restore the *status quo*⁽²⁾ by removing all of the financial benefit that has been improperly enjoyed by the recipient of illegal aid since the date that it received the aid,

HAS ADOPTED THIS DECISION:

Article 1

Germany shall, within six weeks of the notification of this Decision, provide all appropriate information, documentation and data allowing the Commission to assess the compatibility with Article 92 of the EC Treaty of the aid to the Volkswagen Group for its investment in the Mosel II and Chemnitz II plants in the new Länder of Germany. This information shall include in particular a detailed breakdown of the investment already realized at Mosel II and Chemnitz II, the detailed revised investment, capacity and production plans for both plants as well as all necessary information on the handicaps faced by VW in the new Länder through these projects.

Furthermore, it must include the current aid plans and a detailed quantification of all aid paid so far in connection with the projects. It may also include any further information that Germany considers useful for the assessment of the case.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 31 October 1995.

For the Commission

Karel VAN MIERT

Member of the Commission

⁽¹⁾ *Germany and Pleuger v. Commission*, [1994] ECR p. I-1205.

⁽²⁾ Judgment of the Court of Justice of 21 March 1990 in Case C-142/87, *Belgium v. Commission*, [1990] ECR p. I-959.