JOINT VENTURES (BROADCASTING): THE BiB CASE

Subject: Joint ventures
Cooperative joint ventures
Exclusive supply agreements
Exclusivity ("first refusal")
Non-competition clauses
Market access
Pricing policy
Advertising restrictions
Exemption
Conditions of exemption

Industry: Broadcasting
(Some implications for other industries)

Parties: British Interactive Broadcasting (BiB – renamed Open)
BSkyB Ltd,
BT Holdings Ltd
Midland Bank plc
Matsushita Electric Europe (Headquarters) Ltd

Source: Commission Decision, published in the Official Journal of the European Communities, L.312, dated 6 December 1999

(Note. This decision has a number of interesting and unusual features. It concerns the creation of a joint venture in the field of digital interactive broadcasting: in addition to the legal interest of the case, there is a also a technical interest, which is both intelligible and in the long run probably important to the layman. Since there is, in the Commission's view, a risk of coordination between the parent companies, the joint venture is treated as cooperative and is therefore assessed under Article 81 of the EC Treaty and not as a concentration under the Mergers Regulation.

From a legal point of view, the decision covers a wide range of competitive issues. The matters referred to in the headnote above are listed in recital 145 of the decision ("the following contractual provisions and agreements restrict competition ..."). It will be noted that item 6 in this list refers to pricing policy; but the subsequent recitals do not fully develop this point. Nor, at least directly, do the conditions on the basis of which the Commission decided to exempt the agreements.

These conditions represent the most unusual and striking feature of the case. They are set out at length in the text of the decision itself - in Article 2 – and are detailed and complex. There are ten basic conditions: the report below summarises their content. The Commission explains, in recital 136, in the course of a brief review of third party observations, that the conditions take account of third party concerns and that, in the interests of legal certainty, the conditions have been spelled out in detail in the decision.

Much of the factual material in the early recitals is picked up in the Legal Assessment and is therefore omitted or summarised below. As is often the case in the factual recitals, the Commission itself omits sensitive material, so that those recitals are full of tantalising statements to the effect, for example, that the expected revenue of the joint venture will be [...]. There are even some of these incomplete statements in the Legal Assessment.)

Facts

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

(2) BIB is to provide a new type of service, digital interactive television services, to consumers in the United Kingdom. This involves putting in place the necessary infrastructure and services to allow companies, such as banks, supermarkets and travel agents, to interact directly with the consumer. An important element of this infrastructure is a digital set-top box. BiB wHl subsidise the retail selling price of digital satellite set-top boxes, satellite dishes and low-noise blocks (LNBs). (A low-noise block converter (LNB) detects she signal relayed from the feed, converts it to an electrical current, amplifies it and lowers its frequency.)

(3) The same infrastructure will be used by television companies, as it will allow them to integrate interactivity into their services: for instance, interactive advertisements and voting in quiz shows.

(4) BiB will also provide certain services direct to the consumer, such as e-mail, 'walled garden' Internet access (the parties use this term to describe access to a limited amount of Internet cnntent) and downloading of computer games. Its service is expected to begin in the autumn of 1999.

The Parties

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

(6) British Sky Broadcasting Ltd (BSkyB) is a wholly-owned subsidiary of British Sky Broadcasting Group plc. News Corporation owns 39.88% of the shares of BSkyB Group plc's shares.

(7) BSkyB is a broadcaster of analogue pay television ('pay-tv') services delivered by the ASTRA satellites for direct-to-home (DTH) and cable reception in the United Kingdom and Ireland. BSkyB operates at both retail and wholesale levels in these areas. It launched a digital satellite pay-tv service on 1 October 1998 using the digital set-top box, satellite dish and low-

noise block which BiB will subsidise. BSkyB Group is also active in the provision of conditional access services and other technical services necessary for pay television.

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

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

The relevant markets

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

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

[Paragraphs 10 ff identify the following additional product markets]

(a) Digital Interactive Television Services
(b) Pay Television
(c) Wholesale supply of films and sports channels for pay television
(d) Technical services for digital interactive television services and pay television
(e) customer access infrastructure market for telecommunications and related services

[Subsequent paragraphs - 40 ff - consider the geographical market; this is, almost exclusively, the United Kingdom]

Third Party Observations

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

- the restrictions on competition between the participants in BiB are not indispensable;

- the duration of the exemption;
- the Commission should continue to monitor the joint venture over a number of years in particular in the field of access to the local loop if there were a risk that BT might have an incentive to slow the development of broadband services in the UK because of its stake in BiB;
- BSkyB should be required to enter into negotiations with other interactive service providers who wish to add interactive enhancements to BSkyB programming.

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

(137) In addition, the Commission considered it necessary, as a result of third-party observations, to extend the scope of the condition on the availability of a clean-feed. The condition imposed in this Decision allows more flexibility to companies which distribute BSkyB's movies and/or sport programming with interactive applications. The distributor's option to remove or keep all of the icons is extended, subject to an agreement for the carriage of BiB or BSkyB's services, to allow a situation where some of the icons remain on the screen whilst some of the icons are removed.

Legal Assessment

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

(139) The joint venture has to be assessed under Regulation No 37 because there is a risk of coordination between the parent companies in the market of the joint venture and in neighbouring markets such as video-on-demand entertainment services.

Article 81(1)

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

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

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

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

(144) BSkyB is also a potential competitor in the provision of digital interactive television services. BSkYB has extensive experience in running a popular mass market television service. It is the digitisation of such services which allows digital interactive television services to be introduced. There are significant common costs in the technical services and infrastructure required for both. In the absence of BiB, BSkyB would have required a digital set-top box for its own pay-television business and would have subsidised its retail selling price itself (ONdigital is subsidising the retail selling ptice of the digital set-top boxes necessary for its service). The marginal cost increase in producing a set-top box capable of allowing interactivity is relatively small in comparison with the overall cost of the set-top box - the parties have estimated the marginal cost to be approximately [...] Given the common infrastructure costs, and given that subsidisation of set-top boxes is BiB's largest single cost over the first [...] years of its operation, the marginal cost increase of establishing an interactive service once the decision has been made to launch a digital television service is relatively small.

Applicability of Article 81(1) to contractual provisions

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

- The non-competition provision between the parties contained in Clause 3.3 of the joint venture agreement, as amended at the demand of the Commission.
- The parties' agreement that a shareholder who wishes to provide digital interactive television services by means of a broadband system may do so only where it has given BiB a right of first refusal to provide such a service and BiB has not agreed to provide such a service on terms at least as favourable as those offered by a third party within six months of the offer or 31 March 1999, whichever is the later.

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

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

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

(148) The fact that the non-competition clause continues to apply to a shareholder for a period of 12 months after that shareholder loses joint control provided that the loss occurs within three years of the date on which this Decision takes effect; is justified as a protection for the joint venture and for the investors against a parent company withdrawing from the joint venture and taking unfair advantage of the know-how acquired during its participation in the joint venture in order to compete in the same market.

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

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

(151) Both a transaction management system and merchant acquiring services are essential parts of the infrastructure necessary for BiB Platform Co's service. Midland was willing to bear the full cost of developing the software necessary for the transaction management system, in return for a fee equivalent to a percentage of each transaction. This allowed BiB to reduce its initial capital requirements and to match its payments to income in an economically efficient manner. The financial risk of the development costs remains with Midland. However, a period of exclusivity allows Midland the opportunity to recoup its initial investment, with no guarantee that it will do so. In terms of merchant acquiring services, Midland has undertaken to provide the services at an advantageous fixed rate to help with the establishment of BiB. Midland, on the other hand, requires a guarantee that BiB will not change suppliers once it is established. Moreover, neither agreement prevents other providers of digital interactive services from seeking transaction management or merchant acquiring services from companies other than Midland. The exclusive agreements, which will play with regard to content providers and end-users using the BiB platform or contracting BiB services, thus constitute the necessary quid pro quo for Midland's willingness to incur up-front capital costs for the benefit of the operation of the joint venture. They are thus crucial to its participation in BiB and cannot be considered in isolation from the joint venture

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

Effect on trade between Member States

(153) An agreement which may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States meets the criterion of effect on trade between Member States (see for example Case 42/84, *Remia v Commission*).

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

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

(156) However, even if this is not the case, the agreement affects the competitive structure for the provision of digital interactive television services throughout the United Kingdom (Cases 6 and 7/73 *Commercial Solvents v Commission*, paragraphs 30 to 35). As a result of this

operation entry in the relevant market in the United Kingdom is made more difficult to other possible Community competitors. The latter is also applicable to the prohibition to the BiB's parent companies in the non-competition provision. of holding more than a 20% interest in a competing company. Potential entrants in the digital interactive television services market in the United Kingdom cannot rely on the investments of BiB's parent companies. Finally, by establishing a prime mover with substantial advantages, BiB is likely to procure certain services from other non-British content providers. There will thus be an effect on the flow of trade.

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

Article 81(3)

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

1 Improvement in distribution of goods and technical and economic progress

(159) In developing the BiB joint venture, the parties have overcome the current technological limitations of both satellite broadcast technology and narrowband telecommunications customer access infrastructure. The former is, for the time being, capable of only one-way communication and could not alone provide interactive services of the type envisaged by BiB. The latter, while capable of the two-way communication inherent in telephony is not, at the moment, suitable for services which require a higher bandwidth. In combination, however, their use enables provision of a new form of service which had not been offered yet, available to the vast majority of consumers in the United Kingdom. Retailers of goods and services also obtain a new outlet for their products. The creation of the joint venture, therefore, contributes to an improvement in the distribution of goods and technical and economic progress (see Commission Decisions 98/536/EEC (*Film purchased by Gernior television stations*) (OJ L 284, 3.10.1989, p. 36, recital 49); and 90/25EEC (*Concordato Incendio)* (OJ L 15,19.1.1990, p.25, recital 25).

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

(161) The digital interactive services could also be provided by upgrading BT's copper network. If the medium term effect of BT's participation in the joint venture were to be a reduction in its economic incentive in upgrading its narrowband telecommunications

customer access infrastructure, the Commission's positive assessment of BiB's impact on technical and economic progress would require reconsideration in the light of the broader developments in the market. As was explained in recital 86, BT owns the only such nation-wide infrastructure and has a very high market-share of fixed residential lines in use. If upgraded, it would provide an alternative national transmission mechanism for the provision of broadband interactive services. In addition, it could carry other services, such as video telephony, broadband internet access and video-on-demand. One telecommunications operator in the United Kingdom has already upgraded its network and it is being used for provision of BiB-type services. BT itself is conducting trials.

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

2 *Benefit to consumers*

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

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

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

3 *Indispensability*

(166) BT and BSkyB have the necessary expertise to provide some form of interactive services individually. However, by cooperating together in BiB they are able to provide a better service

and to do so more quickly. Their participation, together with Midland Bank and Matsushita, is thus indispensable to the creation of BiB, and to its ultimate establishment on a new market. BT has gained skills and experience in the course of its past interactive television trials in the development and integration of interactive multimedia services which it contributes to the joint venture. This is in addition to its expertise in the provision of telecommunications services which have been vital to the operation of the BiB telecommunications return path and its connections with the servers. BSkyB contributes its experience in set-top box design and operation, together with its knowledge of consumer demand for pay-television. Midland contributes expertise in the area of merchant acquiring and transaction management, and the integration of these services into the BiB infrastructure. Finally, Panasonic contributes its technical expertise, particularly in the area of set-top box design.

(167) The prohibition on holding more than a 20% interest in a competing company is indispensable for this operation. The success of BiB would be jeopardised in case of a transfer to a competitor of the unique ideas and strategies, which are being developed by the parties in BiB.

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

(168) Companies other than BiB, notably the various cable operators, have plans to launch digital interactive television services. The BiB parties have estimated that a subscriber base of at least one million subscribers is necessary to achieve the necessary scale for the provision of digital interactive television services. Following the consolidation in the United Kingdom cable industry, the cable networks of Cable & Wireless Communications, NTL and Telewest each have a reach of more than one million homes. NTL has already launched a commercial trial. Cable operators have an advantage in the provision of such services as their cable networks have two-way capability. This allows them alone, or in cooperation with third parties, to use the network for interactive services. Other companies also have plans to introduce digital interactive television services, in particular WebTV and Videonet.

(169) However, both BSkyB and BT have very important positions in the United Kingdom, in markets neighbouring and closely related to that in which the BiB joint venture will be active. Their positions in these markets are safeguarded, at least in the medium term, by the existence of barriers to entry. Both therefore possess a degree of market power which is central to the legal assessment of the impact of the elimination of potential competition between BT and BSkyB as a result of the creation of the BiB joint venture.

(170) Accordingly, the Commission considered that the combination of the very significant market power of BT, and in particular of BSkyB in related markets, with that in which BiB will be active such as the customer access infrastructure market, the technical services for pay-television and digital interactive services, the pay-television market and the market for the wholesale supply of film and sport channels for pay-television, risked eliminating a substantial part of competition on the markets for digital interactive television services. The conditions set out in this Decision should ensure that this risk does not materialise and, in particular, that competition to BT comes from the cable networks, that third parties are ensured sufficient access to BiB's subsidised set-top boxes and to BSkyB's films and sport channels and that set-top boxes other that BiB's set-top box can be developed in the market, so that the digital interactive television services remain open to competition..

(171) Even given the prohibition in the non-competition clause, preventing BiB's parent companies from holding more than a 20% interest in a competing company, there is no chance that competition will be eliminated as a result of the creation of BiB. The conditions imposed upon the parties ensure that the relevant market will remain open and that BiB will face significant competition. The conditions imposed on the parties can be summarised as follows.

(a) Competition from the cable networks

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

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

(173) BiB is to subsidise the set-top box which will be used both for its own service and for BSkyB's digital pay-television service. BSkyB and BiB together control the access of competing digital interactive television services and pay-television operators to those boxes. BSkyB's control is ensured by its position on the technical services market - that is, by the supply of conditional access and access control services. BiB controls access by means of the operation of the subsidy recovery mechanism which requires all providers of encrypted services to contribute to its historic and ongoing subsidy costs as part of their conditional access and access control payments.

(174) Third party access to BiB-subsidised set-top boxes is important because of the market position of BSkyB. BSkyB has a market share of some [...]% in the pay-television market. In theory, competitors to BiB and BSkyB which wished to provide services using digital satellite could launch a competing set-top box. However, the capital costs of establishing a competing infrastructure, combined with the general reluctance of consumers to acquire more than one set-top box, makes this unlikely. This conclusion is reinforced by BSkyB's control of film and sports. In practice, therefore, they are more likely to seek access to BiB/BSkyB's existing set-top box infrastructure (see *Bertelsmann/Kirch/Premiere*, recital 56). This has been the case in respect of analogue pay-television services in the United Kingdom. There is no reason to

presume that it will be different in respect of digital services, where the investment costs of establishing a set-top box infrastructure are even larger.

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

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

(177) The Commission has imposed a condition on the operation of the subsidy recovery mechanism which seeks to ensure that it is transparent and non-discriminatory. The operation of the subsidy recovery mechanism also falls to be regulated by the United Kingdom authorities pursuant to Directive 95/47/EC and to national measures. The Commission considers that compliance with the condition will be presumed where the parties comply with the British arrangements.

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

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

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

(181) Secondly, downstream service providers which wish to use BiB-subsidised set.top boxes, and those which do use the boxes, require information about the technical specifications of the set-top box, including proposed changes to the specifications. In the absence of such information, they would be unable to develop their own services and to continue to up-date them in response to any changes to the specifications of the set-top box.

The Commission has therefore imposed a condition that such information be provided to interested parties. (The parties have raised with the Commission as a possible means of complying with this condition the use of a website, parts or all of which may be password protected, for the provision of the non-disclosure agreement and/or the supplemental technical agreement and/or the technical information. The Commission considers that this is one of the ways in which the parties could fulfil this condition. However, the choice of mechanism is a matter appropriately left to the parties.). It now appears likely that the majority of the relevant information will be held by BSkyB. However, this position may change. To ensure that there is no gap in the parties' duty to provide relevant information to third parties, information provision conditions are imposed on both BSkyB and BIB McCo.

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

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

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

(184) It is, therefore, necessary to impose a condition on BSkyB's wholesale supply of its film and sports channels to its cable and digital terrestrial competitors. BSkyB will be obliged to offer to distribute its film and sports channels either with or without ('clean-feed') interactive applications, at the choice of the purchaser on a nondiscriminatory basis. This prevents BSkyB from bundling interactivity at the wholesale supply level with its channels to the detriment of both competitors to BiB on the digital interactive television services market and its own competitors in pay-television. BiB's competitors would not be able to integrate their own interactive services into these channels. However, they would be able to do so in respect of channels which are not owned by BSkyB... it would also be possible for BiB's competitors to negotiate agreements for the use of their different interactive services in respect of film pay. per-view services. Thus competition with BiB will not be eliminated.

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

(185) It is a condition of exemption that BSkyB limits the exercise of its veto rights in the joint venture agreement to the extent that it will be obliged in certain circumstances to support any proposal to subsidise other set-top boxes as part of an agreement for carriage of the BiB service on cable and/or digital terrestrial television. Given that companies requesting BiB to subsidise other set-top boxes would in practice be competitors of BSkyB on its core market, this condition is intended to address BSkyB's conflict of interest in its decisions as a BiB

shareholder and its interests as a pay-television operator. This should ensure that BiB as a commercial company is free to take decisions in relation to BSkyB's competitors on commercial grounds, and is not limited by BSkyB's other commercial interests.

(e) *Anti-avoidance*

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

Conclusion

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

[After paragraphs 188 to 194, which consider the duration of the exemption, the formal text of the Decision is set out as follows]

Article 1

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

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

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

Article 2

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

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

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

Condition No 3: (Availability of a clean feed)

Condition No 4: (Divestiture of cable)

Condition No 5: (Veto rights)

Condition No 6: (Conditional access and Simulcrypt)

Condition No 7: (Subsidy recovery)

Condition No 8: (Provision of information by McCo)

Condition No 9: (Provision of information by BskyB)

Condition No 10: (Anti-avoidance)

[The full text of the conditions, running to many pages of detail, forms part of Article 2]

Article 3

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

(a) such breaches have been clear and serious; or

(b) such breaches have had serious and material adverse affects on a third party; or

(c) such breaches have resulted in irreparable and serious damage to a third party; or

(d) although the individual breaches are minor, there have been several breaches demonstrating a persistent failure properly to comply, provided that, if a breach is shown to exist in a contractual term used in more than one contract or in a commonly used commercial practice, only one breach shall be considered to have occurred, irrespective of the number of such contracts or examples of such practice; or

(e) where such breaches relate to interested parties who are currently providing services using BiB boxes, the breaches have been of long duration, no regard being made to the duration of any dispute resolution procedure, and provided that in the case of a breach shown to exist in a contractual term, time shall run for the purpose of this indent only when the circumstances to which the term relates have arisen and for so long as they continue.

Article 4

(Definitions - Annex II)

Article 5

(Addressees of Decision)

[Annex I comprises a list of all the notified agreements; Annex II a list of definitions] ■