European Commission
Directorate-General IV - Competition
Information, Communication, and Multimedia
Telecommunications, Posts,
Information Society Coordination.

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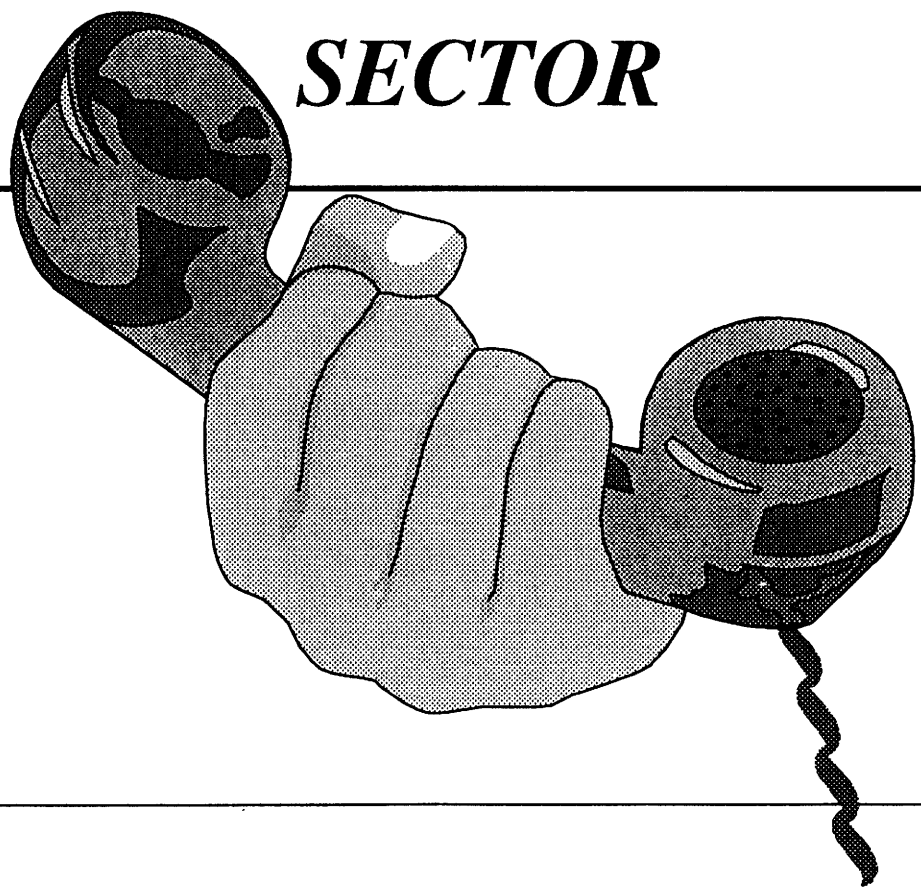
OFFICIAL DOCUMENTS COMMUNITY COMPETITION POLICY IN THE TELECOMMUNICATIONS SECTOR



March 1997 Addendum to July 1995 Edition (IV/D/356/97)

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This volume is an update of the full edition of "Official Documents - Community Competition Policy in the Telecommunications Sector" issued in July 1995 (IV/356/97). It should therefore be read together with the original documents.

Commission Directives, Regulations and Notices

Commission Actions, including Decisions under Regulation 17/62 (Art. 85/86) and under Regulation 4064/89 (Merger and Notices published in the Official Journal

Press Releases since July 1995

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Internet addresses

The enclosed websites provide up-to-date information on Community and national telecommunications legislation, also in other Community languages.

CAUTION : ONLY FOR INFORMATION : THIS LIST IS NOT EXHAUSTIVE AND MUST BE UPDATED REGULARLY

Major Website addresses

European Institutions : **http://europa.eu int.**

DG IV : **http://europa.eu.int/en/comm/dg04/dg4home.html**
i.e. Liberalisation Legislation : **http://europa.eu.int/en/comm/dg04/lawliber/libera.htm**
i.e. Speeches on telecom / post **: http://europa.eu.int/en/comm/dg04/speech/themef.htm**

Information Society Project Office **: http://www.ispo.cec.be**
Survey of telecommunications licensing regimes in European Union Member States :
http//www.ispo.cec.be/infosoc/promo/pubs/survey.html
The Bangemann Challenge : **http://www.ispo.cec.be/infosoc/promo/resconf/bchallenge.html**
The Global Inventory Project : **http://www.gip.int**
Community R&D Information Programme **: http://www.cordis/lu**

CEPT/ECTRA : **http://www.eto.dk/pages/decrec.htm**
European Telecommunications Office : **http://www.eto.dk**
European Radiocommunications Office : **http://www.ero.dk**

European Telecommunications Standards Institute : **http://www.etsi.fr**

International Telecommunication Union : **http://www.itu.ch**

Relevant Member States' Internet addresses

BE
Federal Internet sites : **http://mahler.belnet.be/belgium/Engels/411/411.htm**

DK
KonkurrenceRadet : **http://www.ks.dk**

D
Government & Ministries : **http://www.bundesregierung.de/inland/ministerien**
Telekommunikationsgesetz : **http://www.bundesregierung.de/inland/ministerien/post/tkg.html**
Entscheidungen zum Kartellrecht : **http://www.bmwi.de/bka_kartellrecht.html**

GR
Hellenic Ministry of Press and Mass Media : **http://web.ariadne-t.gr**

ES
Información del Boletín Oficial del Estado: **http://www.boe.es**

FR
Direction des postes et télécommunications **http://www.telecom.gouv.fr/francais/minister/**
L'Autorité de régulation des télécommunications (ART) :
http://www.telecom.gouv.fr/français/activ/telecom/artpres.htm
Conseil de la Concurrence : **http://www.finances.gouv.fr/concur/activites**

IRL
Irish Government : **http://www.irlgov.ie**
Department of Enterprise & Employment : **http://www.irlgov.ie./entemp.pub.htm**

IT
Autoritá garante della Concorrenza e del Mercato : **http://www.agem.it/b_welcome.html**
Italian National Agency for New Technology, Energy and the Environment :
http://www.sede.enea.it/menue.html

LUX
Le Grand-Duché de Luxembourg : **http://restena.lux/gover/**

NL
Ministerie van Verkeer en Waterstaat : **http://minvenw.nl/cend./dvo/telecom/index.html**
Ministerie van Economische Zaken : **http://minez.nl**

AU
Bundesministerium für Wissenschaft und Verkehr : **http://www.bmwf.gv.at/**

PT
SAPO/ Entidades Governamentais : **http://www.sapo.pt/culturais/governo/**

FI
Telecommunications Administration Centre (TAC) : **http://www.thk.fi/englanti.htm**

SW
Kommunikationsdepartementet
http://wwww.sb.gov.se/info_rosenbad/departement/kommunikation/kommunikation.html

UK
UK Government website : **http://www.open.gov.uk**
Oftel : **http://www.open.gov.uk/oftel/oftelhm.htm**
Oft : **http://www.open.gov.uk/oft/ofthome.htm**
UK Department of Trade and Industry : **http//www.dti.gov.uk**

Other Internet addresses

Iceland : the Icelandic Government : **http://www.stjr.is/en/stjren01.htm**

Norway : Official Documentation and Information : **http://odin.dep.no/html/english/**

Switzerland : Federal Office for Communications : **http://www.admin.ch/bakom/**

US : Federal Communications Commission : **http://www.fcc.gov**
US : Department of Justice : **http://infosector.com/thecapital/government/justice.htm**
US : Federal Trade Commission : **http://www.ftc.gov**
US National Telecommunications & Information Administration **: http://www.ntia.doc.gov/**

Canada : Bureau de la Concurrence : **http://data.ctn.nrc.ca/qc/content**
G7 Information Society Pilot Projects : **http///homer.ic.gc.ca/G7/**

Japan : Ministry of Posts and Telecommunications : **http://www.mpt.go.jp/index-e.html**
MTI Program for Advanced Information Infrastructure **: http://www.satu.glocom.ac.jp/NEWS/MITI-doc.html**

Austrialia : Australian Telecoms Authority : **http://www.austel.gov.au**
Telecom Policy Papers : **http://ftp.dca.gov.au/pub/docs**

WTO : **http://wto.org ;**
Legal texts and instruments : **http://wto.org/wto/Publications/wtopub.html**

Organisation for Economic Co-operaton and Development : **http://www.oecd.org** ;
Competition /Antitrust Policy Homepage : **http://www.oecd.org/dat/ccp**
Telecommunications & Information Services Policy : **http://www.oecd.org/dsti/tisp.html**

NAFTA : **http://www.nafta.net/ecedi.htm**

WorldBank : **http://www-esd.worldbank.org**

Intelsat **: http://www.intelsat.int**

Inmarsat **: http://www.inmarsat.org/inmarsat**

Susan Budavari, Maryadèle J. O'Neil (e. a.) 12th ed. 1996. ISBN 0-911910-12-3

Reshaping Greece's Energy Legislation: the Gradual Adjustment to EC Standards and Objectives. by Anna Papaioannou. Journal of Energy & Natural Resources Law. Vol. 14. N 1. February 1996

Öffentliche Unternehmen und die Beihilfeaufsicht der EU, Wie Subventionen von der Europäischen Kommission beurteilt verden, by Karl Soukup, MANZ, ISBN 3-214-08235-3

Coming up ....

The following publications are under preparation by DG IV; however, a budget has been allocated only for publications marked with an *:

EC Competition Policy Newsletter: autumn/Winter 1996

Competition law in the European Communities -volume 1B Explanation of rules applicable to undertakings.

Dealing with the Commission - notifications, complaints, inspections and fact-finding powers.

Competition law in the European Communities -volume 3A: International aspects of competition policy*

Competition law in the European Communities -Addendum to volume 2A: Rules applicable to State aid.

Actes Forum Européen de la Concurrence.(co-edition with J. Wiley) Catalog number: CV-88-95-985-EN-C*

L' application des articles 85/86 par les juridictions nationales*

Recueil des décisions sur les aides d'Etat*

Brochure sur la politique de la concurrence dans le Marché unique (concernant les art.85,86,90 et le règlement sur les concentrations)

Brochure sur la politique concernant les aides d'Etat

Brochure concernant des sujets présentant un intérêt pratique pour l'industrie de la Communauté et plus particulierement les PMEs

Video: Introduction to competition policy

Video: Dealing with the Commission - Notifications, complaints, inspections and fact-finding powers

Exchange of confidential Information Agreements and Treaties between the US and certain Member States

DG IV on the World Wide Web

Since the 25th of June 1996, DG IV has a home page on the Europa server available on the World Wide Web. Our address is ***http://europa.eu.int/en/comm/dg04/dg4home.htm.***

On the new homepage the following information can be found:

DG IV's Mission & Directory : Under this heading the user can find a brief description of the main areas of DG IV's activity and some introductury articles on European competition policy. DG IV's staff list is also available.

What is New : Most recent developments.

DG IV's areas of activity : for the main DG IV's areas of activity we already introduce (or plan to introduce in the near future) data for the following sub-headings:

Press releases issued during the past month : These documents are downloaded daily from the RAPID database; because of the updating procedure data is introduced with a delay of 2-3 working days.

Published in the Official Journal during the last 6 months : We plan to introduce the full text of important documents published in the Official Journal. Only the published version will be legally binding and data will

be introduced some days after publication.

Legislation in force : A full list by subject will be introduced. This sub-heading will in term contain an updated version of the legislation published in Vol IA: Rules applicable to undertakings; Vol IIA: Rules applicable to state aid; Vol IIIA: International dimension.

Commission Decisions on individual cases : A full list by year is already available for the antitrust and merger headings. A list of the most important decisions by subject year is also under preparation. We also plan at a later stage to introduce the text of the most important acts of the latest week, after their publication in the Official Journal.

Judgements of the European Court of Justice and the Court of First instance : According to preliminary information, the Court of Justice will inaugurate its own World Wide Web site later this year. By using extensive links we hope we will be able to provide : a) the schedule of the Court and the Court of First Instance; b) a full list of cases introduced; c) a full list of Judgments of the Court and the CFI by year and by subject; and d) the text of the most important acts of the latest week. Interested users can already find several comments and analyses drafted by DG IV officials and already published in the EC Competition Policy Newsletter.

Communications and important documents : this heading will eventually contain miscelaneous information of some importance (e.g. under the State Aid heading the reference rates used by the Commission to measure the aid element of state subsidies; under the Mergers heading the monthly and annual equivalences between the ECU and national currencies necessary for the calculation of the yearly turnover in ECUs)

Documentation, publications speeches and articles : This heading already contains all speeches of the Commissionner for Competition and of DG IV officials since 1993, as well as the Newsletter, the Annual Competition Report, the list of Community publications on Competition available to the public and what is coming up etc.

Special features : under the heading International Dimension the user will find links to the most important sites of national competition authorities. DG IV's publications are available in a portable document format (pdf) produced with the Adobe Acrobat® software. Interested users can download the documents but they will also need the Acrobat Reader® software to read them. This software is available free of charge and enables the user to read and print pdf documents on his/her printer without changing the initial format. In a certain way an exact facsimile "paper copy" of the original can be reproduced locally.

Finally, interested users should note that DG IV's pages are under construction. Members of DG IV's Cellule Information do their best - view the extremely limited resources available - to introduce data for each heading and we expect to cover all headings systematically as from September onwards. It goes without saying that your comments, ideas and corrections - even your positive feedback - are always welcome, preferably by e-mail (info4@dg4.cec.be). The site was set up since January 1996 by Gerald Messiaen, official at DG IV-01.

More Information ...

The Directorate General for Competition (DG IV) receives many requests with specific questions. It is in fact impossible, given the resources available, to investigate and reply individually to each one of them., so ***in the future we will answer only requests for the annual report and the Newsletter***. In order to better inform the public on Competition Policy, DG IV produces several publications, available through the Office for Official Publications of the European Union (see catalog under the heading Community Publications on Competition). We also publish three times a year the ***"EC Competition Policy Newsletter"***, available free of charge. Speeches by the Competition Commissioner and by officials from the Directorate General as well as general documentation will be systematically available through our WWW home pages. Please address your correspondence to :

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COMMISSION DIRECTIVE 95/51/EC

of 18 October 1995

amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 90 (3) thereof,

Whereas:

(1) Under Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services [1], as amended by Directive 94/46/EC [2], certain telecommunications services were opened to competition, and the Member States were requested to take the measures necessary to ensure that any operator was entitled to supply such services; as far as voice telephony services to the general public are concerned, the Council Resolution of 22 July 1993 [3] acknowledges that this exception can be terminated by 1 January 1998, with a transitional period for some Member States; the telex service, mobile communications and radio and television broadcasting to the public were specifically excluded from the scope of the Directive; satellite communications were included in the scope of the Directive through Directive 94/46/EC.

During the public consultation organized by the Commission in 1992 on the situation in the telecommunications sector, following the Communication of the Commission of 21 October 1992, the effectiveness of the measures liberalizing the telecommunications sector and in particular the liberalization of data communications, value added services and the provision of data and voice services to corporate users and closed user groups, was questioned by many service providers and users of such services.

(2) The regulatory restrictions preventing the use of alternative infrastructure for the provision of liberalized services, and in particular the restrictions on the use of cable TV networks, are the main cause of this continuing bottleneck situation. Potential service providers must now rely on transmission capacity — 'leased lines' — provided by the telecommunications organizations, which are often also competitors in the area of liberalized services. To remedy this problem, the European Parliament, in its Resolution of 20 April 1993 [4], called upon the Commission to adopt as soon as possible the necessary measures to take full advantage of the potential of the existing infrastructure of cable networks for telecommunications services and to abolish without delay the existing restrictions in the Member States on the use of cable networks for non-reserved services.

(3) Following that resolution the Commission completed two studies on the use of cable TV networks and alternative infrastructures for the delivery of those telecommunications services which have already been opened to competition under Community law: 'The effects of liberalization of satellite infrastructure on the corporate and closed user group market', Analysis, 1994 and 'L'impact de l'autorisation de la fourniture de services de télécommunications libéralisés par les câblo-opérateurs' by Idate, 1994. The basic findings of those studies emphasize the potential role for, amongst other things, cable TV networks, in meeting the concerns raised about the relatively slow pace of innovation and delayed development of liberalized services in the European Community. Opening such networks would help to overcome the problems of high pricing levels and lack of suitable capacity, which are largely due to current exclusive provision of infrastructure in most Member States. The networks operated by authorized cable TV providers indeed offer opportunities for the supply of an increasing number of services, apart from TV broadcasts, if additional investment is forthcoming. The example of the US market shows that new services combining image and telecommunications emerge when certain regulatory barriers are removed.

(4) Some Member States have therefore abolished previous restrictions on the provision of some data services and/or non-reserved telephone services on cable TV networks. One Member State permits voice telephony. Other Member States have, however, maintained severe restrictions on the provision of services other than the distribution of TV broadcasts on those networks.

[1] OJ No L 192, 24. 7. 1990, p. 10.
[2] OJ No L 268, 19. 10. 1994, p. 15.
[3] OJ No C 213, 6. 8. 1993, p. 1.
[4] OJ No C 150, 31. 5. 1993, p. 39.

(5) The current restrictions imposed by Member States on the use of cable TV networks for the provision of services other than the distribution of TV broadcasts aim to prevent the provision of public voice telephony by means of networks other than the public switched telephone network, to protect the main source of revenue of the telecommunications organizations.

Exclusive rights to provide public voice telephony were granted to most of the telecommunications organizations of the Community, to guarantee them the financial resources necessary for the provision and exploitation of a universal network, that is to say, one having general geographical coverage and provided to any service provider or user upon request within a reasonable period of time.

(6) Since those restrictions on the use of cable TV networks are brought about by State measures and seek, in each of the national markets where they exist, to favour telecommunications organizations, which the Member States own or to which they have granted special or exclusive rights, the restrictions must be assessed under Article 90 (1) of the EC Treaty. This Article requires Member States not to enact or maintain in force any measures regarding such undertakings which defeat the object of Treaty provisions, and in particular of the competition rules. It includes a prohibition on maintaining measures regarding telecommunications organizations which result in limiting the free provision of services within the Community or lead to abuses of a dominant position to the detriment of the users of a given service.

(7) The granting of exclusive rights to the telecommunications organizations to provide transmission capacity for the provision of telecommunications services to the public and the consequent regulatory restrictions on the use of cable TV networks for purposes other than the distribution of radio and television broadcasting programmes, in particular, for new services such as interactive television and video on demand as well as multimedia-services in the Community, which otherwise cannot be provided, necessarily limits the freedom to provide such services to or from other Member States. Such regulatory restrictions cannot be justified for public policy reasons or in terms of essential requirements, since the latter, and in particular the essential requirement of interworking networks wherever cable TV networks and telecommunications networks are interconnected, can be guaranteed by less restrictive measures, such as objective, non-discriminatory and transparent declaration or licensing conditions.

(8) The measures granting exclusive rights to the telecommunications organizations for the provision of transmission capacity and the consequent regulatory restrictions on the use of cable TV infrastructure for the provision of other telecommunications services already open to competition are therefore a breach of Article 90, read in conjunction with Article 59 of the Treaty. The fact that the restrictions apply without distinction to all companies other than the relevant telecommunications organizations is not sufficient to remove the preferential treatment of the latter from the scope of Article 59 of the Treaty. Indeed it is not necessary for all the companies of a Member State to be favoured in relation to the foreign companies. It is sufficient that the preferential treatment should benefit certain national operators.

(9) Article 86 of the Treaty prohibits as incompatible with the common market any conduct by one or more undertakings holding dominant positions that constitutes an abuse of a dominant position within the common market or a substantial part of it.

(10) In each relevant national market the telecommunications organizations hold a dominant position for the provision of transmission capacity for telecommunications services because they are the only ones with a public telecommunications network covering the whole territory of those States. Another factor in this dominant position concerns the peculiar characteristics of the market and in particular its highly capital-intensive nature. Taking account of the amount of investment needed to duplicate a network, there is a high reliance on use of existing networks. This enhances the structural dominance of the relevant telecommunications organizations and constitutes a potential barrier to entry. Thirdly, as a result of their market share, the telecommunications organizations further benefit from detailed information on telecommunications flows which is not available to new entrants. It includes information on subscribers' usage patterns,

necessary to target specific groups of users, and on price elasticities of demand in each market segment and region of the country. Finally, the fact that the relevant telecommunications organizations enjoy exclusive rights for the provision of voice telephony also contributes to their dominance in the neighbouring, but distinct, market for telecommunications capacity.

(11) The mere creation of a dominant position within a given market through the grant of an exclusive right is not, as such, incompatible with Article 86. A Member State is, however, not allowed to maintain a legal monopoly where the relevant undertaking is compelled or induced to abuse its dominant position in a way that is liable to affect trade between Member States.

(12) The prohibition of the use of other infrastructure, and in particular CATV networks, for the provision of telecommunications services has encouraged the telecommunications organizations to charge high prices in comparison with prices in other countries, whereas innovation in European corporate networking and competitive service provision as well as the implementation of applications proposed in the 'Report on Europe and the global information society', are critically dependent on the availability of infrastructure, in particular of leased circuits at decreasing costs. Tariffs for such high-capacity infrastructure are on average 10 times higher in the Community than equivalent capacity over equivalent distances in North America. In the absence of a justification, in the form of (for example) higher costs, these tariffs must be considered abusive within the meaning of point (a) of the second paragraph of Article 86.

Those high prices in the Community are a direct consequence of the restrictions imposed by Member States on the use of infrastructures other than those of the telecommunications organizations, and in particular of those of the cable TV operators, for the provision of telecommunications services. Such high prices cannot only be explained by the underlying costs, given the substantial differences in tariffs between Member States where similar cost structures could be expected.

(13) Moreover, the State measures preventing the CATV operators from offering transmission capacity in competition with the telecommunications organizations for the provision of liberalized services restrict the overall supply of capacity in the market and eliminate incentives for telecommunications organizations to quickly increase the capacity of their networks, to reduce average costs and to lower tariffs. The resulting high tariffs charged by the telecommunications organizations for, and the shortage of, the basic infrastructure provided by these organizations over which liberalized services might be offered by third parties have delayed widespread development of high-speed corporate networks, remote accessing of databases by both business and residential users and the deployment of innovative services such as telebanking, distance learning, computer-aided marketing, etc. (See communication to the European Parliament and the Council of 25 October 1994 'Green Paper on the liberalization of telecommunications infrastructure and cable television networks : Part One'). The networks of the telecommunications organizations currently fail to meet all potential market demand for transmission capacity for the provision of these telecommunications services, as emphasized by users and suppliers of such services ('Communication to the Council and the European Parliament on the consultation on the review of the situation in the telecommunications sector' of 28 April 1993, page 5, point 2; the findings made during the review thus showed that the mere obligation to provide leased lines on demand was not sufficient to avoid restrictions on access to the markets in telecommunications services and limits on user's freedom of choice).

The current restrictions on the use of CATV networks for the provision of such services therefore create a situation in which the mere exercise by the telecommunications organization of their exclusive right to provide transmission capacity for public telecommunications services limits, within the meaning of point (b) of the second paragraph of Article 86 of the Treaty, the emergence of, *inter alia*, new applications such as pay per view, interactive television and video on demand as well as multimedia-services in the Community, combining both audio-visual and telecommunications, which often cannot adequately be provided on the networks of the telecommunications organizations.

On the other hand, given the restrictions on the number of services which they may offer, cable TV operators often postpone investments in their networks and in particular the introduction of optical-fibre which could be profitable if they were to be spread over a larger number of services provided. Consequently, restrictions on the use of cable TV networks to provide services other than broadcasting also have the effect of delaying the development of new telecommunications and multimedia services, and thus holding back technical progress in this area.

(14) Lastly, as was recalled by the Court of Justice of the European Communities in its Judgment of 19 March 1991 in Case C-202/88, *France v. Commission* [1], a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured between the various economic operators. Reserving to one undertaking which markets telecommunications services the task of supplying the indispensable raw material — transmission capacity — to all companies offering telecommunications services proved, however, tantamount to conferring upon it the power to determine at will which service could be offered by its competitors, at which costs and in which time periods, and to monitor their clients and the traffic generated by its competitors, thereby putting that undertaking at an obvious advantage over its competitors.

(15) The exclusive rights granted to the telecommunications organization to provide transmission capacity for telecommunications services to the public and the resulting restrictions on the use of cable TV networks for the provision of liberalized services are therefore incompatible with Article 90 (1) in conjunction with Article 86 of the Treaty. Article 90 (2) of the Treaty provides for an exception to Article 86 in cases where the application of the latter would obstruct the performance, in law or in fact, of the particular tasks assigned to the telecommunications organizations. Pursuant to that provision, the Commission investigated the impact of liberalizing the use of the cable networks for the provision of telecommunications and multimedia services.

Pursuant to Directive 90/388/EEC, Member States may until a certain date continue to reserve the provision of voice telephony to their national telecommunications organization so as to guarantee sufficient revenues for the establishment of a universal telephone network. Voice telephony is defined in Article 1 of Directive 90/388/EEC as the commercial provision for the public of the direct transport and switching of speech in real time between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point. Where cable TV networks are transformed into switched networks providing voice telephony to any subscriber, such networks should likewise be considered to be public switched networks and their termination points as termination points of such networks. The relevant voice service would then become voice telephony, which according to Article 2 of Directive 90/388/EEC could further be prohibited on cable TV networks by the Member States.

It appears that such temporary prohibition of the provision of voice telephony on the cable TV network can be justified on the same grounds as for telecommunications networks. Conversely where switched voice services for closed user groups, and/or transparent transmission capacity in the form of leased lines, are provided on cable TV networks, those networks do not represent public switched networks and Member States should not restrict the relevant services, even when they involve the use of one connection point with the public switched telephone network.

Besides the case of voice telephony, no other restrictions for the provision of liberalized services is justified under Article 90 (2), particularly if regard is had to the small contribution made to the turnover of the telecommunications organizations by those services, currently provided on their own networks, which could be diverted towards the cable TV networks. It is recalled that the measures liberalizing the provision of voice telephony should take into account the need to finance a universal service including any development in the concept, see point V.2 in the Communication from the Commission to the Council and the European Parliament of 3 May 1995.

(16) Notwithstanding the abolition of the current restrictions on the use of cable TV networks, where the provision of services is concerned, the same licensing or declaration procedures could be laid down as for the provision of the same services on the public telecommunications networks.

(17) In addition, the distribution of audiovisual programmes intended for the general public via those networks, and the content of such programmes, will continue to be subject to specific rules adopted by Member States in accordance with Community law and is not, therefore, subject to the provisions of this Directive.

(18) Where Member States grant to the same undertaking the right to establish both cable TV and telecommunications networks, they put the undertaking in a situation whereby it has no incentive to attract users to the network best suited to the provision of the relevant service, as long as it has spare capacity on the other network. In that case, the undertaking has, on the contrary, an interest for

[1] [1991] ECR I-1271, paragraph 51.

overcharging for use of the cable infrastructure for the provision of non-reserved services, in order to increase the traffic on their telecommunications networks. The introduction of fair competition will often require specific measures that take into account the specific circumstances of the relevant markets. Given the disparities between Member States, the national authorities are best able to assess which measures are the most appropriate, and in particular to judge whether a separation of the activities is indispensable. In early stages of liberalization, detailed control of cross-subsidies and accounting transparency are essential. To allow the monitoring of any improper behaviour, Member States should therefore at least impose a clear separation of financial records between the two activities, though full structural separation is preferable.

(19) In order to allow the monitoring of any improper cross-subsidies between the broadcasting tasks of cable TV operators which are provided under exclusive rights in a given franchise area and their business as providers of capacity for telecommunications services, Member States should guarantee transparency as regards the use of resources from one activity which could be used to extend the dominant position to the other market. Given the complexity of the financial records of network providers, it is extremely difficult to detect cross-subsidies within it between the reserved activities and the services provided under competitive conditions. It is thus necessary to require those cable TV operators to keep separate financial records, and in particular to identify separately costs and revenues associated with the provision of the services supplied under their exclusive rights and those provided under competitive conditions once they achieve a significant turnover in telecommunications activities in the licensed area. For the time being, a turnover of more than ECU 50 million should be considered a significant turnover. Where such a requirement would constitute an excessive burden on the relevant undertaking, Member States may grant deferments for limited periods, subject to prior notification to the Commission of the underlying justifications.

The operators concerned should use an appropriate cost accounting system which can be verified by accounting experts and which ensures the production of recorded figures.

The above separation of accounts should, for this purpose at least, apply the principles set out in Article 10 (2) of Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines [1], as amended by Commission Decision 94/439/EC [2]. Hybrid services, made up of elements falling variously within the reserved and the competitive services, should distinguish between the costs of each element.

(20) In the event that, in the meantime, no competing home-delivery system is authorized by the relevant Member State, the Commission will reconsider whether separation of accounts is sufficient to avoid improper practices and will assess whether such joint provision does not result in a limitation of the potential supply of transmission capacity at the expense of the services providers in the relevant area, or whether further measures are warranted.

(21) Member States should refrain from introducing new measures with the purpose or effect of jeopardizing the aim of this Directive,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 90/388/EEC is hereby amended as follows:

1. Article 1 (1) is amended as follows:

(a) the fifth indent is replaced by the following:

'— "telecommunications services" means services whose provision consists wholly or partly in the transmission and/or routing of signals on a telecommunications network.'

(b) the following is added after the last indent:

'— "cable TV network" means any wire-based infrastructure approved by a Member State for the delivery or distribution of radio or television signals to the public.

This Directive shall be without prejudice to the specific rules adopted by the Member States in accordance with Community law, governing the distribution of audiovisual programmes intended for the general public, and the content of such programmes.'

[1] OJ No L 165, 19. 6. 1992, p. 27.
[2] OJ No L 181, 15. 7. 1994, p. 40.

2. In Article 4, the following is inserted after the second paragraph :

'Member States shall :

— abolish all restrictions on the supply of transmission capacity by cable TV networks and allow the use of cable networks for the provision of telecommunications services, other than voice telephony ;

— ensure that interconnection of cable TV networks with the public telecommunications network is authorized for such purpose, in particular interconnection with leased lines, and that the restrictions on the direct interconnection of cable TV networks by cable TV operators are abolished.'

Article 2

When abolishing restrictions on the use of cable TV networks, Member States shall take the necessary measures to ensure accounting transparency and to prevent discriminatory behaviour, where an operator having an exclusive right to provide public telecommunications network infrastructure also provides cable TV network infrastructure ; and in particular to ensure the separation of financial accounts as concerns the provision of each network and its activity as provider of telecommunication services.

Where an operator has an exclusive right to provide cable television network infrastructure in a given area Member States shall also ensure that the operator concerned keeps separate financial accounts regarding its activity as network capacity provider for telecommunications purposes as soon as it achieves a turnover of more than ECU 50 million in the market for telecommunications services other than the distribution of radio and broadcasting services in the relevant geographic area. Where such requirement would constitute an excessive burden on the relevant undertaking, Member States may grant deferments for limited periods, subject to prior notification to the Commission of the underlying justification.

Where a single operator provides both networks or both services as referred to in the first paragraph, the Commission shall, before 1 January 1998, carry out an overall assessment of the imapct of such joint provision in relation to the aims of this Directive.

Article 3

Member States shall supply to the Commission, not later than nine months after this Directive has entered into force, such information as will allow the Commission to confirm that Articles 1 and 2 have been complied with.

Article 4

This Directive shall enter into force on 1 January 1996.

Article 5

This Directive is addressed to the Member States.

Done at Brussels, 18 October 1995.

For the Commission

Karel VAN MIERT

Member of the Commission

CORRIGENDA

Corrigendum to Commission Directive 95/51/EC of 18 October 1995 amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services

(Official Journal of the European Communities No L 256 of 26 October 1995)

Page 53, Article 1 (1) point (b):

for: '— "cable TV network" means any wire-based infrastructure approved by a Member State for delivery or distribution of radio or television signals to the public.',

read: '— "cable TV network" means any mainly wire-based infrastructure approved by a Member State for delivery or distribution of radio or television signals to the public.'

COMMISSION DIRECTIVE 96/2/EC

of 16 January 1996

amending Directive 90/388/EEC with regard to mobile and personal communications

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 90 (3) thereof,

Whereas :

(1) In its communication on the consultation on the Green Paper on mobile and personal communications of 23 November 1994, the Commission set out the major actions required for the future regulatory environment necessary to exploit the potential of this means of communication. It emphasized the need for the abolition, as soon as possible, of all remaining exclusive and special rights in the sector through full application of Community on competition rules and with the amendment of Commission Directive 90/388/EEC of 28 June 1990 competition in the markets for telecommunications services [1], as last amended by Directive 95/51/EC [2], where required. Moreover, the communication considered removing restrictions on the free choice of underlying facilities used by mobile network operators for the operation and development of their networks for those activities which are allowed by the licences or authorizations. Such a step was seen as essential in order to overcome current distortions of fair competition and, in particular, to allow such operators control over their cost base.

(2) The Council Resolution of 29 June 1995 on the further development of mobile and personal communications in the European Union [3] gave general support to the actions required, as set out in the Commission's communication of 23 November 1994, and considered as one of the major goals the abolition of exclusive or special rights in this area.

(3) The European Parliament, in its Resolution of 14 December 1995 concerning the draft Commission Directive amending Directive 90/388/EEC with regard to mobile and personal communications [4], welcomed this Directive in both its principles and its objectives.

(4) Several Member States have already opened up certain mobile communications services to competition and introduced licensing schemes for such services. Nevertheless, the number of licences granted is still restricted in many Member States on the basis of discretion or, in the case of operators competing with telecommunications organizations subject to technical restrictions such as a ban on using infrastructure other than those provided by the telecommunications organization. Many Member States, for example, have still not granted licences for DCS 1800 mobile telephony.

In addition, some Member States have maintained exclusive rights for the provision of certain mobile and personal communications services granted to the national telecommunications organization.

(5) Directive 90/388/EEC provides for the abolition of special or exclusive rights granted by Member States in respect of the provision of telecommunications services. However, the Directive does not as yet apply to mobile services.

(6) Where the number of undertakings authorized to provide mobile and personal communications services is limited by Member States through the existence of special rights and *a fortiori* exclusive rights, these constitute restrictions which would be incompatible with Article 90 in conjunction with Article 59 of the Treaty whenever such limitation is not justified under specific Treaty provisions or the essential requirements, since these rights prevent other undertakings from supplying the services concerned, to and from other Member States. In the case of mobile and personal communication networks and services, the applicable essential requirements encompass the effective use of the frequency spectrum and the avoidance of harmful interference between radio-based, space-based or terrestrial technical systems. Consequently, provided that the equipment used to offer the services also satisfies these essential requirements, the current special rights and *a fortiori* exclusive

[1] OJ No L 192, 24. 7. 1990, p. 10.
[2] OJ No L 256, 26. 10. 1995, p. 49.
[3] OJ No C 188, 22. 7. 1995, p. 3.
[4] Resolution A4-0306/95.

rights on the provision of mobile services are not justified and therefore should be treated in the same way as the other telecommunications services already covered by Directive 90/388/EEC. The scope of application of that Directive should accordingly be extended so as to include mobile and personal communications services.

(7) When opening the markets for mobile and personal communications to competition Member States should give preference to the use of Pan-European standards in the area, such as GSM, DCS 1800, DECT and ERMES, in order to allow development and transborder provision of mobile and personal communications services.

(8) Certain Member States have currently granted licences for digital mobile radio-based services making use of frequencies in the 1 700 to 1 900 Mhz band, according to the DCS 1800 standard. The Commission communication of 23 November 1994 established that DCS 1800 is to be seen as part of the GSM system family. The other Member States have not authorized such services even where frequencies are available in this band, thereby preventing the cross-border provision of such services. This is also incompatible with Article 90 in conjunction with Article 59. To remedy this situation, Member States which have not yet established a procedure for granting such licences should do so within a reasonable time-frame. In this context, due account should be taken of the requirement to promote investments by new entrants in these areas. Member States should be able to refrain from granting a licence to existing operators, for example to operators of GSM systems already present on their territory, if it can be shown that this would eliminate effective competition in particular by the extension of a dominant position. In particular, where a Member State grants or has already granted DCS 1800 licences, the granting of new or supplementary licences for existing GSM or DCS 1800 operators may take place only under conditions ensuring effective competition.

(9) Digital European cordless telecommunications (DECT) services are also an essential element for the development towards personal communications. DECT provides an alternative to the current local loop access to the public switched telephone network. On 3 June 1991, the Council, by Directive 91/287/EEC, designated coordinated frequency bands for the introduction of DECT into the Community [1] to be implemented not later than 31 December 1991. Certain Member States are, however, preventing the use of these frequencies for such services by refusing to grant licences to companies which intend to start offering DECT services. Where telecommunications organizations were granted exclusive rights for the establishment of the public switched telephone network, the effect of such refusals is to strengthen their dominant position and also to delay the emergence of personal communications services and therefore restricts technical progress at the expense of the users contrary to Article 90 of the Treaty in conjunction with point (b) of Article 86. To remedy this situation Member States which have not yet established a procedure for granting such licences should also do so within a reasonable time-frame.

(10) Even where licences were granted to competing mobile operators, Member States have in certain cases granted to one of them, in a discretionary manner, special legal advantages which were not granted to others. In such a situation, these advantages may be counterbalanced by special obligations and do not, necessarily, preclude the latter from entering and competing in the market. The compatibility of these advantages with the Treaty must therefore be assessed on a case-by-case basis taking into account their impact on the effective freedom of other entities to provide, in an efficient manner, the same telecommunications service and their possible justifications regarding the activity concerned.

(11) The exclusive rights that currently exist in the mobile communications field were generally granted to organizations which already enjoyed a dominant position in creating the terrestrial networks, or to one of their subsidiaries. In such a situation, these rights have the effect of extending the dominant position enjoyed by those organizations and therefore strengthening that position, which, according to the case-law of the Court of Justice, constitutes an abuse of a dominant position contrary to Article 86 of the Treaty. The exclusive rights granted in the mobile and personal communications field are consequently incompatible with Article 90 read in conjunction with Article 86. These exclusive rights should consequently be abolished.

(12) Moreover, as regards new mobile services, given the difficulty of ensuring that telecommunications organizations in those Member States with less developed networks which would qualify for a transitional time period for the abolition of the exclusive rights for the establishment and use of infrastructures required for a given mobile service, would

[1] OJ No L 144, 8. 6. 1991, p. 45.

not use this position to extend it to the market of the relevant mobile service, the Member States should, in order to prevent abuses of dominant positions contrary to the Treaty, abstain from granting such telecommunications organization, or any associated organization, a licence for this mobile service. Where telecommunications organization, do not or no longer enjoy exclusive rights for the establishment and the provision of the public network infrastructure, they should, however, not *a priori* be excluded from such licensing procedures.

mobile network. This framework is without prejudice to the harmonization of the framework for licensing in the Community.

The number of licences may be limited only in the case of scarcity of the frequency resources. Conversely, licensing is not justified when a mere declaration procedure would suffice to attain the relevant objective.

(13) Exclusive rights not only limit access to the market, but they also have the effect of restricting or preventing, to the disadvantage of users, the use of mobile and personal communications on offer, thereby holding back technical progress in this area. The telecommunications organizations have, in particular, maintained higher tariffs for mobile radiophony in comparison with fixed voice telephony which hinders competition at the expense of their main source of revenues.

As regards airtime resale and other mere provision of services by independent service providers or directly by mobile network operators on already authorized mobile sytems, none of the applicable essential requirements would justify the introduction or maintenance of licensing procedures, given that such services do not consist of the provision of telecommunications services or the operation of a mobile communications network, but of the retail of authorized services, the provision of which is likely to be subject to conditions ensuring compliance with essential requirements or public service specifications in the form of trade regulations.

Where investment decisions are taken by undertakings in areas where they enjoy exclusive rights, these undertakings are in a position whereby they can decide to give priority to fixed network technologies, whereas new entrants may exploit mobile and personal technology even to compete with fixed services, in particular as regards the local loop. Thus, the exclusive rights imply that there is a restriction on the development of mobile and personal communications and this is incompatible with Article 90, read in conjunction with Article 86.

They could therefore, besides the application of national fair trade rules concerning all similar retail activities, only be subject to a requirement of a declaration of their activities to the National Regulatory Authority of the Member States where they choose to operate. Mobile network operators could on the other hand refuse to allow service providers to distribute their services, in particular where these service providers did not adhere to a code of conduct for service providers in conformity with the competition rules of the Treaty, as far as such code exists.

(14) In order to establish the conditions under which mobile and personal communications systems are to be provided, Member States may introduce licensing or declaration procedures to ensure compliance with the applicable essential requirements and public service specifications in the form of trade regulations, subject to the proportionality principle. Public service specifications in the form of trade regulations relate to conditions of permanence, availability, and quality of the service. Such conditions may include the obligation to give service providers access to airtime on terms at least as favourable as those available to a service provision business owned by, or with ownership links to, a

(15) In the context of mobile and personal communications systems radiofrequencies are a crucial bottleneck resource. The allocation of radiofrequencies for mobile and personal communications system by Member States according to criteria other than those which are objective, transparent and non-discriminatory constitutes a restriction incompatible with Article 90 in conjunction with Article 59 of the Treaty to the extent that operators from other Member States are disadvantaged in these allocation procedures. The development of effective competition in the telecommunications sector may be an objective justification to refuse the allocation of frequencies to operators already dominant in the geographical market.

Member States should ensure that the procedure for allocation of radiofrequencies is based on objective criteria and without discriminatory effects. In this context Member States should, with regard to future designation of frequencies for specific communications services, publish the frequency plans as well as the procedures to be followed by operators to obtain frequencies within the designated frequency bands. Current frequency allocation should be reviewed by the Member States at regular intervals. In cases where the number of licences was limited on the basis of spectrum scarcity, Member States should also review whether advances in technology would allow spectrum to be made available for additional licences. Possible fees for the use of frequencies should be proportional and levied according to the number of channels effectively granted.

(16) Most Member States currently oblige mobile operators to use the leased line capacity of telecommunications organizations for both internal network connections and for the routing of long distance portions of calls. As the charges for leased line rental represent a substantial proportion of the mobile operator's cost base, this requriement gives the supplying telecommunications organization, i.e. in many cases its direct competitor, a considerable influence on the commercial viability and cost structure of mobile operators. In addition, restrictions on the self-provision of infrastructure and the use of third party infrastructure is slowing down the development of mobile services, in particular because effective pan-European roaming for GSM relies on the widespread availability of addressed signalling systems, a technology which is not yet universally offered by telecommunications organizations throughout the Community.

Such restrictions on the provision and use of infrastructures constrain the provision of mobile and personal communications services by operators from other Member States and are thus incompatible with Article 90 in conjunction with Article 59 of the Treaty. To the extent that the competitive provision of mobile voice services is prevented because the telecommunications organization is unable to meet the mobile operator's demand for infrastructures or will only do so on the basis of tariffs which are not oriented towards the costs of the leased line capacity concerned, these restrictions inevitably favour the telecommunications organization's offering of fixed telephony services, for which most Member States still maintain exclusive rights. The restriction on the provision and use of infrastructure thus infringes Article 90, in conjunction with Article 86 of the Treaty. Accordingly, Member States must lift these restrictions and grant, if requested, the relevant mobile operators on a non-discriminatory basis access to the necessary scarce resources to set up their own infrastructure including radiofrequencies.

(17) Currently, the direct interconnection between mobile communications systems as well as between mobile communications systems and fixed telecommunications networks within a single Member State or between systems located in different Member States is restricted in mobile licences granted by many Member States without any technical justification. Furthermore, restrictions exist for the interconnection of such networks via networks other than the public telecommunications networks. In the Member States concerned, mobile operators are required to interconnect with other mobile operators via the telecommunications organization's fixed network. Such requirements result in additional costs and thus impede, in particular, the development of transborder provision of mobile communication services in the Community and therefore infringe Article 90, in conjunction with Article 59.

As in most Member States exclusive rights for the provision of voice telephony and public fixed network infrastructure are maintained, potential abuses of the relevant telecommunications organization's dominant position can be prevented only if Member States ensure that interconnection of public mobile communications systems is made possible at defined interfaces with the public telecommunications network of those telecommunications organizations and that the interconnection conditions are based on objective criteria, justified by the cost of providing the interconnection service, are transparent, non-discriminatory, published in advance and allow the necessary tariff flexibility, including the application of off-peak rates. In particular, transparency is required in respect of cost-accounting of operators providing both fixed networks and mobile telecommunications networks. Special and exclusive rights in respect of the establishment of cross-border infrastructure for voice telephony are not affected by this Directive.

In order to be able to ensure the full application of this Directive as regards interconnection, information on interconnection agreements must be available to the Commission on request.

The drawing up of such national procedures for licensing and interconnection, is without prejudice to the harmonization of the latter at Community level by European Parliament and Council Directives, in particular within the framework of Directives on open network provision (ONP).

(18) Article 90 (2) of the Treaty provides for an exception to the Treaty rules, and in particular to Article 86, in cases where the application of the latter would obstruct the performance, in law or in fact, of the particular tasks assigned to the telecommunications organizations. Pursuant to that provision, Directive 90/388/EEC allows exclusive rights to be maintained for a transitional period in respect of voice telephony.

Voice telephony is defined in Article 1 of Directive 90/388/EEC as the commercial provision for the public of the direct transport and switching of speech in real time between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point. The direct transport and switching of speech via mobile and personal communications networks is not implemented between two public switched termination points and is therefore not voice telephony within the meaning of Directive 90/388/EEC.

On the basis of Article 90 (2) of the Treaty, public service specifications in the form of trade regulations applicable to all authorized operators of mobile telecommunications services provided to the public, are, however, justified to ensure the fulfilment of objectives of general economic interest, such as ensuring geographical coverage or the implementation of Community-wide standards.

(19) In its assessment of current restrictions imposed on mobile operators concerning the establishment and use of their own infrastructure and/or the use of third party infrastructures, the Commission will further consider the need for additional transition periods for Member States with less developed networks as called for in the Council's Resolution of 22 July 1993 on the review of the situation in the telecommunications sector and the need for further development in that market [1] in addition to the Council's Resolution of 22 December 1994 on the principles and timetable for the liberalization of telecommunications infrastructures [2].

Although not covered by these resolutions there should be the possibility of requesting an additional transition period as regards the direct interconnection of mobile networks. The Member States which may request such an exception are Spain, Ireland, Greece and Portugal. However, only certain of these Member States do not allow GSM mobile operators to use own and/or third party infrastructures. A specific procedure should be provided in order to assess the possible justification for the maintenance of that regime for the provision of mobile and personal communications services for a transitional time period as set out in the said Council resolutions.

(20) This Directive does not prevent measures being adopted in accordance with Community law and existing international obligations so as to ensure that nationals of Member States are afforded equivalent treatment in third countries,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 90/388/EEC is amended as follows:

1. Article 1 (1) is amended as follows:

(a) the following indents are inserted after the ninth indent:

'— "mobile and personal communications services" means services other than satellite services whose provision consists, wholly or partly, in the establishment of radiocommunications to a mobile user, and makes use wholly or partly of mobile and personal communications systems,

— "mobile and personal communications systems" means systems consisting of the establishment and operation of a mobile network infrastructure whether connected or not to public network termination points, to support the transmission and provision of radiocommunications services to mobile users,';

(b) the thirteenth indent is replaced by the following:

'— "essential requirements" means the non-economic reasons in the public interest which may cause a Member State to impose conditions on the establishment and/or operation of telecommunications networks or the provision of telecommunications services. These reasons are the security of network operations, maintenance of network integrity, and where justified,

[1] OJ No C 213, 6. 8. 1993, p. 2.
[2] OJ No C 379, 31. 12. 1994, p. 4.

interoperability of services, data protection, the protection of the environment and town and country planning objectives as well as the efficient use of the frequency spectrum and the avoidance of harmful interference between radio-based telecommunications systems and other space-based or terrestrial technical systems.

Data protection may include protection of personal data, the confidentiality of information transmitted or stored as well as the protection of privacy.'

2. Article 1 (2) is replaced by the following:

'2. This Directive shall not apply to telex.'

3. The following Articles 3a to 3d are inserted:

'Article 3a

In addition to the requirements set out in the second paragraph of Article 2 Member States shall, in attaching conditions to licences or general authorizations for mobile and personal communications systems, ensure the following:

(i) licensing conditions must not contain conditions other than those justified on the grounds of the essential requirements and, in the case of systems for use by the general public, public service requirements in the form of trade regulation within the meaning of Article 3;

(ii) licensing conditions for mobile network operators must ensure transparent and non-discriminatory behaviour between fixed and mobile network operators in common ownership;

(iii) licensing conditions should not include unjustified technical restrictions. Member States may not, in particular, prevent combination of licences or restrict the offer of different technologies making use of distinct frequencies, where multistandard equipment is available.

As far as frequencies are available, member States shall award licences according to open, non-discriminatory, and transparent procedures.

Member States may limit the number of licences for mobile and personal communications systems to be issued only on the basis of essential requirements and only where related to the lack of availability of frequency spectrum and justified under the principle of proportionality.

Licence award procedures may consider public service requirements in the form of trade regulation within the meaning of Article 3, provided the solution which least restricts competition is chosen. The relevant conditions related to trade regulations may be attached to the licences granted.

Member States which are granted an additional implementation period to abolish the restrictions with regard to infrastructure as provided for in Article 3c, shall not during that period grant any further mobile or personal communications licence to telecommunications organizations in such Member States do not or no longer enjoy exclusive or special rights, within the meaning of points (b) and (c) of the first paragraph of Article 2, for the establishment and the provision of the public network infrastructure, they shall not *a priori* be excluded from such licensing procedures.

Article 3b

The designation of radiofrequencies for specific communication services must be based on objective criteria. Procedures must be transparent and published in an appropriate manner.

Member States shall publish every year or make available on request, the allocation scheme of frequencies reserved for mobile and personal communications services, according to the scheme set out in the Annex, including the plans for future extension of such frequencies.

This designation must be reviewed by Member States at regular appropriate intervals.

Article 3c

Member States shall ensure that all restrictions on operators of mobile and personal communications systems with regard to the establishment of their own infrastructure, the use of infrastructures provided by third and the sharing of infrastructure, other facilities and sites, subject to limiting the use of such infrastructures to those activities provided for in their licence or authorization, are lifted.

Article 3d

Without prejudice to the future harmonization of national interconnection rules in the context of ONP, Member States shall ensure that direct interconnection between mobile communications systems, as well as between mobile communications systems and fixed telecommunications networks, is allowed. In order to achieve this, restrictions on interconnection shall be lifted.

Member States shall ensure that operators of mobile communications systems for the public have the right to interconnect their systems with the public telecommunications network. To this end, Member States shall guarantee access to the necessary number of points of interconnection to the public telecommunications network in the licences for mobile services. Member States shall ensure that the technical interfaces offered at such points of interconnection are the least restrictive interfaces available as regards the features of the mobile services.

Member States shall ensure that interconnection conditions with the public telecommunications network of the telecommunications organizations are set on the basis of objective criteria, are transparent and non-discriminatory, and compatible with the principle of proprotionality. They shall ensure that, in case of appeal, full access to interconnection agreements is given to National Regulatory Authorities and that such information is made available to the Commission on request.'

4. In the first sentence of Article 4 the word 'fixed' is inserted before the words 'public telecommunications networks'.

Article 2

1. Without prejudice to Article 2 of Directive 90/388/EEC, and subject to the provision set out in paragraph 4 of this Article, Member States shall not refuse to allocate licences for operating mobile systems according to the DCS 1800 standard at the latest after adoption of a decision of the European Radiocommunications Committee on the allocation of DCS 1800 frequencies and in any case by 1 January 1998.

2. Member States shall, subject to the provision set out in paragraph 4, not refuse to allocate licences for public access/Telepoint applicaitons, including systems operation on the basis of the DECT standard as from the entry into force of this Directive.

3. Member States shall not restrict the combination of mobile technologies or systems, in particular where multistandard equipment is available. When extending existing licences to cover such combinations Member States shall ensure that such extension is justified in accordance with the provisions of paragraph 4.

4. Member States shall adopt, where required, measures to ensure the implementation of this Article taking account of the requirement to ensure effective competition between operators competing in the relevant markets.

Article 3

Member States shall supply to the Commission, not later than nine months after this Directive has entered into force, such information as will allow the Commission to confirm that Article 1 as well as Article 2 (2) have been complied with.

Member States shall supply to the Commission, not later than 1 January 1998, such information as will allow the Commission to confirm that Article 2 (1) has been complied with.

Article 4

Member States with less developed networks may request at the latest three months from the entry into force of this Directive an additional implementation period of up to five years, in which to implement all or some of the conditions set out in Article 3c and in Article 3d (1) of Directive 90/388/EEC, to the extent justifiable by the need to achieve the necessary structural adjustments. Such a request must include a detailed description of the planned adjustments and a precise assessment of the timetable envisaged for their implementation. The information provided shall be made available to any interested party on demand.

The Commission will assess such requests and take a reasoned decision within a time period of three months on the principle, implications and maximum duration of the additional period to be granted.

Article 5

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Communities.*

Article 6

This Directive is addressed to the Member States.

Done at Brussels, 16 January 1996.

For the Commission

Karel VAN MIERT

Member of the Commission

ANNEX

1. Frequency bands allocated to mobile systems.

   (specifying the number of channels, the service to which it is allocated and the review date of the allocation)

2. Frequency bands which will be made available for mobile systems during the next year.

3. Procedures envisaged to assign these frequencies to existing or new operators.

CORRIGENDA

Corrigendum to Commission Regulation (EC) No 252/96 of 9 February 1996 temporarily altering the export refunds on beef

(Official Journal of the European Communities No L 32 of 10 February 1996)

Page 18, Article 2:

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

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

It shall apply from 10 February until 31 March 1996 except in the case of amendment within this period.'

Corrigendum to Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications

(Official Journal of the European Communities No L 20 of 26 January 1996)

On page 64, in the last paragraph of the new Article 3a, fifth line:

for: '... telecommunications organizations in such Member States ...';

read: '... telecommunications organizations, or any associated organization. Where telecommunications organizations in such Member States ...'.

COMMISSION DIRECTIVE 96/19/EC

of 13 March 1996

amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 90 (3) thereof,

Whereas:

(1) According to Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services [1], as last amended by Directive 96/2/EC [2], telecommunications services, with the exception of voice telephony to the general public and those services specifically excluded from the scope of that Directive, must be open to competition. These services were the telex service, mobile communications and radio and television broadcasting to the public. Satellite communications were included in the scope of the Directive through Commission Directive 94/46/EC [3]. Cable television networks were included in the scope of the Directive through Commission Directive 95/51/EC [4], and mobile and personal communications were included in the scope of the Directive through Directive 96/2/EC. Under Directive 90/388/EEC, Member States must take the measures necessary to ensure that any operator is entitled to supply such services.

(2) Subsequent to the public consultation organized by the Commission in 1992 on the situation in the telecommunications sector (the 1992 Review), the Council, in its resolution of 22 July 1993 [5], unanimously called for the liberalization of all public voice telephony services by 1 January 1998, subject to additional transitional periods of up to five years to allow Member States with less developed networks, i.e. Spain, Ireland, Greece and Portugal, to achieve the necessary adjustments, in particular tariff adjustments. Moreover, very small networks should, according to the Council also be granted an adjustment period of up to two years where so justified. The Council subsequently unanimously recognized, in its resolution of 22 December 1994 [6], that the provision of telecommunications infrastructure should also be liberalized by 1 January 1998, subject to the same transitional periods as agreed for the liberalization of voice telephony. Furthermore, in its resolution of 18 September 1995 [7], the Council established basic guidelines for the future regulatory environment.

(3) Directive 90/388/EEC establishes that the granting of special or exclusive rights to telecommunications services to telecommunications organizations is in breach of Article 90 of the Treaty, in conjunction with Article 59 of the Treaty, since they limit the provision of cross-border services. As far as telecommunications services and networks are concerned such special rights were defined in that Directive.

According to Directive 90/388/EEC exclusive rights granted for the provision of telecommunications services are also incompatible with Article 90 (1) of the Treaty, in conjunction with Article 86 of the Treaty, where they are granted to telecommunications organizations which also enjoy exclusive or special rights for the establishment and the provision of telecommunications networks since their grant amounts to the reinforcement or the extension of a dominant position or necessarily leads to other abuses of such position.

(4) In 1990, the Commission, however, granted a temporary exception under Article 90 (2) in respect of exclusive and special rights for the provision of voice telephony, since the financial resources for the development of the network still derived mainly from the operation of the telephony service and the opening-up of that service could, at that time, threaten the financial stability of the telecommunications organizations and obstruct the performance of the task of general economic interest assigned to them, consisting in the provision and exploitation of a universal network, i.e. one having general geographic coverage, and that connection to it is being provided to any service provider or user upon request within a reasonable period of time.

Moreover, at the time of the adoption of Directive 90/388/EEC, all telecommunications organizations were also in the course of digitalizing their network to increase the range of services which could be

[1] OJ No L 192, 24. 7. 1990, p. 10.
[2] OJ No L 20, 26. 1. 1996, p. 59.
[3] OJ No L 268, 19. 10. 1994, p. 15.
[4] OJ No L 256, 26. 10. 1995, p. 49.
[5] OJ No C 213, 6. 8. 1993, p. 1.
[6] OJ No C 379, 31. 12. 1994, p. 4.
[7] OJ No C 258, 3. 10. 1995, p. 1.

provided to the final customers. Today, coverage and digitalization are already achieved in a number of Member States. Taking into account the progress in radio frequency applications and the on-going heavy investment programmes, optic fibre-coverage and network penetration are expected to improve significantly in the other Member States in the coming years.

In 1990, concerns were also expressed against immediate introduction of competition in voice telephony while price structures of the telecommunications organizations were substantially out of line with costs, because competing operators could target highly profitable services such as international telephony and gain market share merely on the basis of existing substantially distorted tariff structures. In the meantime efforts have been made to balance differences in pricing and cost structures in preparation for liberalization. The European Parliament and the Council have in the meantime recognized that there are less restrictive means than the granting of special or exclusive rights to ensure this task of general economic interest.

(5) For these reasons, and in accordance with the Council resolutions of 22 July 1993 and of 22 December 1994, the continuation of the exception granted with respect of voice telephony is no longer justified. The exception granted by Directive 90/388/EEC should be ended and the Directive, including the definitions used, amended accordingly. In order to allow telecommunications organizations to complete their preparation for competition and in particular to pursue the necessary rebalancing of tariffs, Member States may continue the current special and exclusive rights regarding the provision of voice telephony until 1 January 1998. Member States with less developed networks or with very small networks must be eligible for a temporary exception where this is warranted by the need to carry out structural adjustments and strictly only to the extent necessary for those adjustments. Such Member States should be granted, upon request, an additional transitional period respectively of up to five and of up to two years, provided it is necessary to complete the necessary structural adjustments. The Member States which may request such an exception are Spain, Ireland, Greece and Portugal with regard to less developed networks and Luxembourg with regard to very small networks. The possibility of such transitional periods has also been called for in the Council resolutions of 22 July 1993 and of 22 December 1994.

(6) The abolition of exclusive and special rights as regards the provision of voice telephony will in particular allow the current telecommunications organizations from one Member State to directly provide their service in other Member States as from 1 January 1998. These organizations currently possess the skills and the experience required to enter into the markets opened to competition. However, in almost all Member States, they will compete with the national telecommunications organizations which are granted the exclusive or special right to provide not only voice telephony but also to establish and provide the underlying infrastructure, including the acquisition of indefeasible rights of use in international circuits. The flexibility and the economies of scope which this allows will prevent this dominant position being challenged in the normal course of competition once the liberalization of voice telephony takes place. This will make it possible for the telecommunications organizations to maintain their dominant position on their home markets unless the new entrants in the voice telephony market were entitled to the same rights and obligations. In particular, if new entrants are not granted free choice as regards the underlying infrastructure to provide their services in competition with the dominant operator, this restriction would *de facto* prevent them from entering the market for voice telephony, including for the provision of cross-border services. The maintenance of special rights limiting the number of undertakings authorized to establish and provide infrastructure would therefore limit the freedom to provide services contrary to Article 59 of the Treaty. The fact that the restriction on establishing own infrastructure would apparently apply in the Member State concerned without distinction to all companies providing voice telephony other than the national telecommunications organizations would not be sufficient to remove the preferential treatment of the latter from the scope of Article 59 of the Treaty. Given the fact that it is likely that most new entrants will originate from other Member States such a measure would in practice affect foreign companies to a larger extent than national undertakings. On the other hand, while no justification for these restrictions appears to exist, less restrictive means such as licensing procedures would in any event be available to ensure general interests of a non-economic nature.

(7) In addition, the abolition of exclusive and special rights on the provision of voice telephony would have little or no effect, if new entrants would be obliged to use the public telecommunications

network of the incumbent telecommunications organizations, with whom they compete in the voice telephony market. Reserving to one undertaking which markets telecommunications services the task of supplying the indispensable raw material, i.e. the transmission capacity, to all its competitors would be tantamount to conferring upon it the power to determine at will where and when services can be offered by its competitors, at what cost, and to monitor their clients and the traffic generated by its competitors, placing that undertaking in a position where it would be induced to abuse its dominant position. Directive 90/388/EEC did not explicitly address the establishment and provision of telecommunications networks, as it granted a temporary exception under Article 90 (2) of the Treaty in respect of exclusive and special rights for the by far most important service in economic terms provided over telecommunications networks, i.e. voice telephony. However, the Directive provided for an overall review by the Commission of the situation in the whole telecommunications sector in 1992.

It is true that Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines, amended by Commission Decision 94/439/EC (1), harmonizes the basic principles regarding the provision of leased lines, but it only harmonizes the conditions of access and use of leased lines. The aim of that Directive is not to remedy the conflict of interest of the telecommunications organizations as infrastructure and service providers. It does not impose a structural separation between the telecommunications organizations as providers of leased lines and as service providers. Complaints illustrate that even in Member States which have implemented that Directive, telecommunications organizations still use their control of the access conditions to the network at the expense of their competitors in the services market. Complaints show that telecommunications organizations still apply excessive tariffs and that they use information acquired as infrastructure providers regarding the services planned by their competitors, to target clients in the services market. Directive 92/44/EEC only provides for the principle of cost-orientation and does not prevent telecommunications organizations to use the information acquired as capacity provider as regards subscribers' usage patterns, necessary to target specific groups of users, and on price elasticities of demand in each service market segment and region of the country. The current regulatory framework does not resolve the conflict of interest mentioned above. The most appropriate remedy to this conflict of interest is therefore to allow service providers to use own or third party telecommunications infrastructure to provide their services to the final customers instead of the infrastructure of their main competitor. In its resolution of 22 December 1994 the Council also approved the principle that infrastructure provision should be liberalized.

Member States should therefore abolish the current exclusive rights on the provision and use of infrastructure which infringe Article 90 (1) of the Treaty, in combination with Articles 59 and 86 of the Treaty, and allow voice telephony providers to use own and/or any alternative infrastructure of their choice.

(8) Directive 90/388/EEC states that the rules of the Treaty, including those on competition, apply to telex services. At the same time it establishes that the granting of special or exclusive rights for telecommunications services to telecommunications organizations is in breach of Article 90 (1) of the Treaty, in conjunction with Article 59 of the Treaty, since they limit the provision of cross-border services. However, it was considered in the Directive that an individual approach was appropriate, as a rapid decline of the service was expected. It the meantime it has become clear that the telex service will continue to coexist with new services like facsimile in the forseeable future, given that the telex network is still the only standardized network with worldwide coverage and providing legal proof in Court. It is therefore no longer justified to maintain the initial approach.

(9) As regards the access of new competitors to the telecommunications markets, only mandatory requirements can justify restrictions to the fundamental freedoms provided for in the Treaty. These restrictions should be limited to what is necessary to achieve the objective of a non-economic nature pursued. Member States may therefore only introduce licensing or declaration procedures where it is indispensable to ensure compliance with the applicable essential requirements and, with regard to the provision of voice telephony and the underlying infrastructure, introduce requirements in the form of trade regulations where it is necessary in order to ensure, in accordance with Article 90 (2) of the Treaty, the performance in a competitive environment of the particular tasks of public service assigned to the relevant undertakings in the telecommunications field and/or to ensure a contribution to the financing of universal service. Other public service requirements can be included by Member States in certain categories of licences, in line with the principle of proportionality and in conformity with Articles 56 and 66 of the Treaty.

(1) OJ No L 165, 19. 6. 1992, p. 27.

The provisions of Directive 90/388/EEC are therefore not to prejudice the applicability of provisions laid down by law, regulation or administrative action providing for the protection of public security and in particular the lawful interception of communications.

In the framework of the adoption of authorization requirements under Directive 90/388/EEC, it appeared that certain Member States were imposing obligations on new entrants which where not in proportion with the aims of general interest pursued. To avoid such measures being used to prevent the dominant position of the telecommunications organizations being challenged by competition once the liberalization of voice telephony takes place, thus making it possible for the telecommunications organizations to maintain their dominant position in the voice telephony and public telecommunications networks markets and thereby strengthening the dominant position of the incumbent operator, it is necessary that Member States should notify any licensing or declaration requirements to the Commission, before they are introduced, to enable the latter to assess their compatibility with the Treaty and in particular the proportionality of the obligations imposed.

(10) According to the principle of proportionality, the number of licences may only be limited where this is unavoidable to ensure compliance with essential requirements concerning the use of scarce resources. As the Commission stated in its communication on the consultation on the Green Paper on the liberalization of telecommunications infrastructure and cable television networks, the sole reason in this respect should be the existence of physical limitations, imposed by the lack of necessary frequency spectrum.

As regards the provision of voice telephony, public fixed telecommunications networks and other telecommunications networks involving the use of radio frequencies, the essential requirements would justify the introduction or maintenance of an individual licensing procedure. In all other cases, a general authorization or a declaration procedure suffices to ensure compliance with the essential requirements. Licensing is not justified when a mere declaration procedure would suffice to attain the relevant objective.

As regards the provision of packet- or circuit-switched data services, Directive 90/388/EEC allowed the Member States under Article 90 (2) of the Treaty to adopt specific sets of public service specifications in the form of trade regulations with a view to preserving the relevant public service requirements. The Commission has in the course of 1994 assessed the effects of the measures adopted under this provision. The results of this review were made public in its Communication on the status and the implementation of Directive 90/388/EEC. On the basis of that review, which also took account of the experience in most Member States where the relevant public service objectives were achieved without the implementation of such schemes, there is no justification to continue this specific regime and the current schemes should be abolished accordingly. However, Member States may replace these schemes by a declaration or a general authorization procedure.

(11) Newly authorized voice telephony providers will be able to compete effectively with the current telecommunications organizations only if they are granted adequate numbers to allocate to their customers. Moreover, where numbers are allocated by the current telecommunications organizations, the latter will be induced to reserve the best numbers for themselves and to give their competitors insufficient numbers or numbers which are commercially less attractive, for example, because of their length. By maintaining such power in the hands of their telecommunications organizations Member States would therefore induce the former to abuse their power on the market for voice telephony and infringe Article 90 of the Treaty, in conjunction with Article 86 of the Treaty.

Consequently, the establishment and administration of the national numbering plan should be entrusted to a body independent from the telecommunications organization, and a procedure for the allocation of numbers should, where required, be drafted, which is based on objective criteria, is transparent and without discriminatory effects. Where a subscriber changes service providers, telecommunications organizations should communicate, in the way and to the extent required by Article 86 of the Treaty, the information on his new number for a sufficient period of time to parties seeking to contact him under his old number. Subscribers changing service providers should also have the possibility of keeping their numbers in return for a reasonable contribution to the cost of transferring the numbers.

(12) As Member States are obliged by this Directive to withdraw special and exclusive rights for the provision and operation of fixed public telecommunications networks, the obligation set out in Directive 90/388/EEC to take the necessary measures to ensure objective, non-discriminatory and published access conditions should be adapted accordingly.

(13) Subject to reasonable compensation, the right of new providers of voice telephony to interconnect

their service for call completion purposes with the existing public telecommunications network at the necessary interconnection points, including access to customer databases necessary for the provision of directory information, is of crucial importance in the initial period after the abolition of the special and exclusive rights regarding voice telephony and telecommunications infrastructure provision. Interconnection should in principle be a matter for negotiation between the parties, subject to the application of the competition rules addressed to undertakings. Given the imbalance in negotiating power of new entrants compared with the telecommunications organizations whose monopoly position results from their special and exclusive rights, it is likely that, as long as a harmonized regulatory framework has not been established by the European Parliament and the Council, interconnection would be delayed by disputes as to terms and conditions to be applied. Such delays would jeopardize the market entry of new entrants and hence prevent the abolition of special and exclusive rights to become effective. The failure by Member States to adopt the necessary safeguards to prevent such a situation would lead to a continuation *de facto* of the current special and exclusive rights, which as set out above are considered to be incompatible with Article 90 (1) of the Treaty, in conjunction with Articles 59 and 86 of the Treaty.

In order to allow for effective market entry and to prevent the *de facto* continuation of special and exclusive rights contrary to Article 90 (1) of the Treaty, in conjunction with Articles 59 and 86 of the Treaty, Member States should ensure that, during the time period necessary for such entry by competitors, telecommunications organizations publish standard terms and conditions for interconnection to the voice telephony networks which they offer to the public, including interconnect price lists and access points, no later than six months before the actual date of liberalization of voice telephony and telecommunications transmission capacity. Such standard offers should be non-discriminatory and sufficiently unbundled to allow the new entrants to purchase only those elements of the interconnection offer they actually need. Furthermore, they may not discriminate on the basis of the origin of the calls and/or the networks.

(14) Moreover in order to allow the monitoring of interconnection obligations under competition law, the cost accounting system implemented with regard to the provision of voice telephony and public telecommunications networks should, during the time period necessary to allow for effective market entry, clearly identify the cost elements relevant for pricing interconnection offerings and, in particular for each element of the interconnection offered, identify the basis for that cost element, in order to ensure in particular that this pricing includes only elements which are relevant, namely the initial connection charge, conveyance charges, the share of the costs incurred in providing equal access and number-portability and of ensuring essential requirements and, where applicable, supplementary charges aimed to share the net cost of universal service, and provisionally, imbalances in voice telephony tariffs. Such cost accounting should also make it possible to identify when a telecommunications organization charges its major users less than providers of voice telephony networks.

The absence of a quick, cheap and effective procedure to solve interconnection disputes, and one which would prevent the telecommunications organizations causing delays or using their financial resources to increase the cost of available remedies under applicable national law or Community law, would make it possible for the telecommunications organizations to maintain their dominant position. Member States should therefore establish a specific recourse procedure for interconnection disputes.

(15) The obligation to publish standard charges and interconnection conditions is without prejudice to the requirement on undertakings in a dominant position, under Article 86 of the Treaty, to negotiate special or tailor-made agreements for a particular combination or use of unbundled public switched telephony network components and/or the granting of discounts for particular service providers or large users where these are justified and non-discriminatory. Any interconnection discounts should be justified on an objective basis and be transparent.

(16) The requirement to publish standard interconnection conditions is also without prejudice to the obligation of dominant undertakings under Article 86 of the Treaty to allow interconnected operators on whose network a call originates to remain responsible for setting the tariff for the customer between the calling and the called party and for routing its clients' traffic up to the interconnection point of its choice.

(17) A number of Member States are currently still maintaining exclusive rights with regard to the establishment and provision of telephone directory and enquiry services. These exclusive rights are generally granted either to organizations which are

already enjoying a dominant position in providing voice telephony, or to one of their subsidiaries. In such a situation, these rights have the effect of extending the dominant position enjoyed by those organizations and therefore strengthening that position, which, according to the case-law of the Court of Justice of the European Communities, constitutes an abuse of a dominant position contrary to Article 86. The exclusive rights granted in the area of telephone directory services are consequently incompatible with Article 90 (1) of the Treaty, in conjunction with Article 86. These exclusive rights consequently have to be abolished.

(18) Directory information constitutes an essential access tool for telephony services. In order to ensure the availability of directory information to subscribers to all voice telephony services, Member States may include obligations for the provision of directory information to the general public within individual licences and general authorizations.

Such an obligation should not, however, restrict the provision of such information by new technological means, nor the provision of specialized and/or regional and local directories contrary to Article 90 (1) of the Treaty, in conjunction with point (b) of the second paragraph of Article 86 of the Treaty.

(19) In the case where universal service can be provided only at a loss or provided under costs falling outside normal commercial standards, different financing schemes can be envisaged to ensure universal service. The emergence of effective competition by the dates established for full liberalization would, however, be seriously delayed if Member States were to implement a financing scheme allocating too heavy a share of any burden to new entrants or were to determine the size of the burden beyond what is necessary to finance the universal service.

Financing schemes disproportionately burdening new entrants and accordingly preventing the dominant position of the telecommunications organizations being challenged by competition once the liberalization of voice telephony takes place, thus making it possible for the telecommunications organizations to entrench their dominant position, would be in breach of Article 90 of the Treaty, in conjunction with Article 86 of the Treaty. Whichever financing scheme they decide to implement, Member States should ensure that only providers of public telecommunications networks contribute to the provision and/or financing of universal service obligations harmonized in the framework of ONP and that the method of allocation amongst them is based on objective and non-discriminatory criteria and is in accordance with the principle of proportionality. This principle does not prevent Member States from exempting new entrants which have not yet achieved any significant market presence.

Moreover, the funding mechanisms adopted should seek only to ensure that market participants contribute to the financing of universal service, and not to other activities not directly linked to the provision of the universal service.

(20) As regards the cost structure of voice telephony, a distinction must be made between the initial connection, the monthly rental, local calls, regional calls and long distance calls. The tariff structure of voice telephony provided by the telecommunications organizations in certain Member States is currently still out of line with cost. Certain categories of calls are provided at a loss and are cross-subsidized out of the profits from other categories. Artificially low prices, however, impede competition since potential competitors have no incentive to enter into the relevant segment of the voice telephony market and are contrary to Article 86 of the Treaty, as long as they are not justified under Article 90 (2) of the Treaty as regards specific identified end-users or groups of end-users. Member States should phase out as rapidly as possible all unjustified restrictions on tariff rebalancing by the telecommunications organizations and in particular those preventing the adaptation of rates which are not in line with costs and increase the burden of universal service provision. Where this is justified, the proportion of net costs insufficiently covered by the tariff structure may be reapportioned among all parties concerned in a non-discriminatory and transparent manner.

(21) As re-balancing could make certain telephone service less affordable in the short term for certain groups of users, Member States may adopt special provisions to soften the impact of re-balancing. In this way, the affordability of the telephone service during the transitional period would be guaranteed while telecommunications operators would still be able to continue their re-balancing process. This is in line with the statement of the Commission concerning the Council resolution on universal service [1], which states that there should be reasonable and affordable prices throughout the territory for initial connection, subscription, periodic rental, access and the use of the service.

[1] OJ No C 48, 16. 2. 1994, p. 8.

(22) Where Member States entrust the application of the financing scheme of universal service obligations to their telecommunications organization with the right to recoup a share of it from competitors, the former will be induced to charge a higher amount than justified, if Member States would not ensure that the amount charged to finance universal service is made separate and explicit with respect to interconnection (connection and conveyance) charges. In addition, the mechanism should be closely monitored and efficient procedures for timely appeal to an independent body to settle disputes as to the amount to be paid must be provided, without prejudice to other available remedies under national law or Community law.

The Commission should review the situation in Member States five years after the introduction of full competition, to ascertain whether this financing scheme does not lead to situations which are incompatible with Community law.

(23) Providers of public telecommunications networks require access to pathways across public and private property to place facilities needed to reach the end users. The telecommunications organizations in many Member States enjoy legal privileges to install their network on public and private land, without charge or at charges set simply to recover incurred costs. If Member States do not grant similar possibilities to new licensed operators to enable them to roll out their network, this would delay them and in certain areas be tantamount to maintaining exclusive rights in favour of the telecommunications organization.

Moreover Article 90 of the Treaty, in conjunction with Article 59 of the Treaty, requires that Member States should not discriminate against new entrants, who generally will originate from other Member States, in comparison with their national telecommunications organizations and other national undertakings, which have been granted rights of way facilitating the roll out of their telecommunications networks.

Where essential requirements, in particular with regard to the protection of the environment or with regard to town and country planning objectives, would oppose the granting of similar rights of way to new entrants which do not already have their own infrastructure, Member States should at least ensure that the latter have, where it is technically feasible, access, on reasonable terms, to the existing ducts or poles, established under rights of way by the telecommunications organization, where these facilities are necessary to roll out their network. In the absence of such requirements the telecommunications organizations would be induced to limit access by their competitors to these essential facilities and thus abuse their dominant position. A failure to adopt such requirements would therefore be contrary to Article 90 (1) of the Treaty, in conjunction with Article 86 of the Treaty.

In addition, pursuant to Article 86, all public telecommunications network operators having essential resources for which competitors do not have economic alternatives are to provide open and non-discriminatory access to those resources.

(24) The abolition of special and exclusive rights in the telecommunications markets will allow undertakings enjoying special and exclusive rights in sectors other than telecommunications to enter the telecommunications markets. In order to allow for monitoring under the applicable rules of the Treaty of possible anti-competitive cross-subsidies between, on the one hand, areas for which providers of telecommunications services or telecommunications infrastructures enjoy special or exclusive rights and, on the other, their business as telecommunications providers, Member States should take the appropriate measures to achieve transparency as regards the use of resources from such protected activities to enter in the liberalized telecommunications market. Member States should at least require such undertakings once they achieve a significant turnover in the relevant telecommunications service and/or infrastructure provision market, to keep separate financial records, distinguishing between *inter alia*, costs and revenues associated with the provision of services under their special and exclusive rights and those provided under competitive conditions. For the time being, a turnover of more than ECU 50 million could be considered as a significant turnover.

(25) Most Member States also currently maintain exclusive rights for the provision of telecommunications infrastructure for the supply of telecommunications services other than voice telephony.

Under Directive 92/44/EEC, Member States must ensure that the telecommunications organizations make available certain types of leased lines to all providers of telecommunications servies. However,

the Directive provides only for such offer of a harmonized set of leased lines up to a certain bandwidth. Companies needing a higher bandwidth to provide services based on new high-speed technologies such as SDH (synchronous digital hierarchy) have complained that the telecommunications organizations concerned are unable to meet their demand whilst it could be met by the optic fibre networks of other potential providers of telecommunications infrastructure, in the absence of the current exclusive rights. Consequently, the maintenance of these rights delays the emergence of new advanced telecommunications services and therefore restricts technical progress at the expense of the users contrary to Article 90 (1) of the Treaty, in conjunction with point (b) of the second paragraph of Article 86 of the Treaty.

(26) Given that the lifting of such rights will concern mainly services which are not yet provided and does not concern voice telephony, which is still the main source of revenue of those organizations, it will not destabilize the financial situation of the telecommunications organization. There is consequently no justification to maintain exclusive rights on the establishment and use of network infrastructure for services other than voice telephony. In particular, Member States should ensure that all restrictions on the provision of telecommunications services other than voice telephony over networks established by the provider of the telecommunications service, the use of infrastructures provided by third parties and the sharing of networks, other facilities and sites are lifted as from 1 July 1996.

In order to take account of the specific situation in Member States with less-developed networks and in Member States with very small networks, the Commission will grant, upon request, additional transitional periods.

(27) Whilst Directive 95/51/EC lifted all restrictions with regard to the provision of liberalized telecommunications services over cable television networks, some Member States still maintain restrictions on the use of public telecommunications networks for the provision of cable television capacity. The Commission should assess the situation with regard to such restrictions in the light of the objectives of that Directive once the telecommunications markets approach full liberalization.

(28) The abolition of all special and exclusive rights which restrict the provision of telecommunications services and underlying networks by undertakings established in the Community is without regard to the destination or the origin of the communications concerned.

However, Directive 90/388/EEC does not prevent mesures regarding undertakings, which are not established in the Community, being adopted in accordance with Community law and existing international obligations so as to ensure that nationals of Member States are afforded comparable and effective treatment in third countries. Community undertakings should benefit from effective and comparable access to third country markets and enjoy a similar treatment in a third country as is offered by the Community framework to undertakings owned, or effectively controlled, by nationals of the third country concerned. World Trade Organization telecommunications negotiations should result in a balanced and multilateral agreement, ensuring effective and comparable access for Community operators in third countries.

(29) The process of implementing full competition in telecommunications markets raises important issues in the social and employment fields. These are referred to in the Commission's communication on the consultation on the Green Paper on the liberalization of telecommunications infrastructure and cable television networks of 3 May 1995.

Always remaining in line with a horizontal policy approach, efforts should now be undertaken to support the transition process to a fully liberalized telecommunications environment; responsibility for such measures rests mainly at Member State level, although Community structures, such as the European Social Fund, may also play a part. In line with existing initiatives, the Community should play a role in facilitating the adaptation and retraining of those whose traditional activities are likely to disappear during the process of industrial restructuring.

(30) The establishment of procedures at national level concerning licensing, interconnection, universal service, numbering and rights of way is without prejudice to the harmonization of the latter by appropriate European Parliament and Council legislative instruments, in particular in the framework of open network provision (ONP). The Commission should take whatever measures it considers appropriate to ensure the consistency of these instruments and Directive 90/388/EEC,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 90/388/EEC is amended as follows:

1. Article 1 is amended as follows:

(a) Paragraph 1 is amended as follows:

(i) The fourth indent is replaced by the following:

'— "public telecommunications network" means a telecommunications network used *inter alia* for the provision of public telecommunications services;

— "public telecommunications service" means a telecommunications service available to the public,'.

(ii) The 15th indent is replaced by the following:

'— "essential requirements" means the non-economic reasons in the general interest which may cause a Member State to impose conditions on the establishment and/or operation of telecommunications networks or the provision of telecommunications services. These reasons are security of network operations, maintenance of network integrity, and, in justified cases, interoperability of services, data protection, the protection of the environment and town and country planning objectives as well as the effective use of the frequency spectrum and the avoidance of harmful interference between radio based telecommunications systems and other, space-based or terrestrial, technical systems.

Data protection may include protection of personal data, the confidentiality of information transmitted or stored as well as the protection of privacy.'

(iii) The following indents are added:

'— "telecommunications network" means the transmission equipment and, where applicable, switching equipment and other resources which permit the conveyance of signals betweeen defined termination points by wire, by radio, by optical or by other electromagnetic means;

— "interconnection" means the physical and logical linking of the telecommunications facilities of organizations providing telecommunications networks and/or telecommunications services, in order to allow the users of one organization to communicate with the users of the same or another organization or to access services provided by third organizations.'

(b) Paragraph 2 is deleted.

2. Article 2 is replaced by the following:

'*Article 2*

1. Member States shall withdraw all those measures which grant:

(a) exclusive rights for the provision of telecommunications services, including the establishment and the provision of telecommunications networks required for the provision of such services; or

(b) special rights which limit to two or more the number of undertakings authorized to provide such telecommunications services or to establish or provide such networks, otherwise than according to objective, proportional and non-discriminatory criteria; or

(c) special rights which designate, otherwise than according to objective, proportional and non-discriminatory several competing undertakings to provide such telecommunications services or to establish or provide such networks.

2. Member States shall take the measures necessary to ensure that any undertaking is entitled to provide the telecommunications services referred to in paragraph 1 or to establish or provide the networks referred to in paragraph 1.

Without prejudice to Article 3c and the third paragraph of Article 4, Member States may maintain special and exclusive rights until 1 January 1998 for voice telephony and for the establishment and provision of public telecommunications networks.

Member States shall, however, ensure that all remaining restrictions on the provision of telecommunications services other than voice telephony over networks established by the provider of the telecommunications services, over infrastructures provided by third parties and by means of sharing of networks, other facilities and sites are lifted and the relevant measures notified to the Commission no later than 1 July 1996.

As regards the dates set out in the second and third subparagraphs of this paragraph, in Article 3 and in Article 4a (2), Member States with less developed networks shall be granted upon request an additional implementation period of up to five years and Member States with very small networks shall be granted upon request an additional implementation period of up to two years, provided it is needed to achieve the neces-

sary structural adjustments. Such a request must include a detailed description of the planned adjustments and a precise assessment of the timetable envisaged for their implementation. The information provided shall be made available to any interested party on demand having regard to the legitimate interest of undertakings in the protection of their business secrets.

3. Member States which make the supply of telecommunications services or the establishment or provision of telecommunications networks subject to a licensing, general authorization or declaration procedure aimed at compliance with the essential requirements shall ensure that the relevant conditions are objective, non-discriminatory, proportionate and transparent, that reasons are given for any refusal, and that there is a procedure for appealing against any refusal.

The provision of telecommunications services other than voice telephony, the establishment and provision of public telecommunications networks and other telecommunications networks involving the use of radio frequencies, may be subjected only to a general authorization or a declaration procedure.

4. Member States shall communicate to the Commission the criteria on which licences, general authorizations and declaration procedures are based together with the conditions attached thereto.

Member States shall continue to inform the Commission of any plans to introduce new licensing, general authorization and declaration procedures or to change existing procedures.'

3. Article 3 is replaced by the following:

'Article 3

As regards voice telephony and the provision of public telecommunications networks, Member States shall, no later than 1 January 1997, notify to the Commission, before implementation, any licensing or declaration procedure which is aimed at compliance with:

— essential requirements, or

— trade regulations relating to conditions of permanence, availability and quality of the service, or

— financial obligations with regard to universal service, according to the principles set out in Article 4c.

Conditions relating to availability can include requirements to ensure access to customer databases necessary for the provision of universal directory information.

The whole of these conditions shall form a set of public-service specifications and shall be objective, non-discriminatory, proportionate and transparent.

Member States may limit the number of licences to be issued only where related to the lack of availability spectrum and justified under the principle of proportionality.

Member States shall ensure, no later than 1 July 1997, that such licensing or declaration procedures for the provision of voice telephony and of public telecommunications networks are published. Before they are implemented, the Commission shall verify the compatibility of these drafts with the Treaty.

As regards packet- or circuit-switched data services, Member States shall abolish the adopted set of public-service specifications. They may replace these by the declaration procedures or general authorizations referred to in Article 2.'

4. In Article 3b, the following paragraph is added:

'Member States shall ensure, before 1 July 1997, that adequate numbers are available for all telecommunications services. They shall ensure that numbers are allocated in an objective, non-discriminatory, proportionate and transparent manner, in particular on the basis of individual application procedures.'

5. In Article 4, the first paragraph is replaced by the following:

'As long as Member States maintain special or exclusive rights for the provision and operation of fixed public telecommunications networks they shall take the necessary measures to make the conditions governing access to the networks objective and non-discriminatory and shall publish them.'

6. The following Articles 4a to 4d are inserted:

'Article 4a

1. Without prejudice to future harmonization of the national interconnection regimes by the European Parliament and the Council in the framework of ONP, Member States shall ensure that the telecommunications organizations provide interconnection to their voice telephony service and their public switched telecommunications network to other undertakings authorized to provide such services or networks, on non-discriminatory, proportional and transparent terms, which are based on objective criteria.

2. Member States shall ensure in particular that the telecommunications organizations publish, no later than 1 July 1997, the terms and conditions for interconnection to the basic functional components of their voice telephony service and their public switched telecommunications networks, including the interconnection points and the interfaces offered according to market needs.

3. Furthermore, Member States shall not prevent that organizations providing telecommunications networks and/or services who so request can negotiate interconnection agreements with telecommunications organizations for access to the public switched telecommunications network regarding special network access and/or conditions meeting their specific needs.

If commercial negotiations do not lead to an agreement within a reasonable time period, Member States shall upon request from either party and within a reasonable time period, adopt a reasoned decision which establishes the necessary operational and financial conditions and requirements for such interconnection without prejudice to other remedies available under the applicable national law or under Community law.

4. Member States shall ensure that the cost accounting system implemented by telecommunications organizations with regard to the provision of voice telephony and public telecommunications networks identifies the cost elements relevant for pricing interconnection offerings.

5. The measures provided for in paragraphs 1 to 4 shall apply for a period of five years from the date of the effective abolition of special and exclusive rights for the provision of voice telephony granted to the telecommunications organization. The Commission shall, however, review this Article if the European Parliament and the Council adopt a directive harmonizing interconnection conditions before the end of this period.

Article 4b

Member States shall ensure that all exclusive rights with regard to the establishment and provision of directory services, including both the publication of directories and directory enquiry services, on their territory are lifted.

Article 4c

Without prejudice to the harmonization by the European Parliament and the Council in the framework of ONP, any national scheme which is necessary to share the net cost of the provision of universal service obligations entrusted to the telecommunications organizations, with other organizations whether it consists of a system of supplementary charges or a universal service fund, shall:

(a) apply only to undertakings providing public telecommunications networks;

(b) allocate the respective burden to each undertaking according to objective and non-discriminatory criteria and in accordance with the principle of proportionality.

Member States shall communicate any such scheme to the Commission so that it can verify the scheme's compatibility with the Treaty.

Member States shall allow their telecommunications organizations to re-balance tariffs taking account of specific market conditions and of the need to ensure the affordability of a universal service, and, in particular, Member States shall allow them to adapt current rates which are not in line with costs and which increase the burden of universal service provision, in order to achieve tariffs based on real costs. Where such rebalancing cannot be completed before 1 January 1998 the Member States concerned shall report to the Commission on the future phasing out of the remaining tariff imbalances. This shall include a detailed timetable for implementation.

In any case, within three months after the European Parliament and the Council adopt a Directive harmonizing interconnection conditions, the Commission will assess whether further initiatives are necessary to ensure the consistency of both Directives and take the appropriate measures.

In addition, the Commission shall, no later than 1 January 2003, review the situation in the Member States and assess in particular whether the financing schemes in place do not limit access to the relevant markets. In this case, the Commission will examine whether there are other methods and make any appropriate proposals.

Article 4d

Member States shall not discriminate between providers of public telecommunications networks with regards to the granting of rights of way for the provision of such networks.

Where the granting of additional rights of way to undertakings wishing to provide public telecommunications networks is not possible due to applicable essential requirements, Member States shall ensure access to existing facilities established under rights of way which may not be duplicated, at reasonable terms.'

7. In the first paragraph of Article 7, the words 'numbers, as well as the' are inserted before the word 'surveillance'.

8. Article 8 is replaced by the following:

'Article 8

Member States shall, in the authorization schemes for the provision of voice telephony and public telecommunications networks, at least ensure that where such authorization is granted to undertakings to which they also grant special or exclusive rights in areas other than telecommunications, such undertakings keep separate financial accounts as concerns activities as providers of voice telephony and/or networks and other activities, as soon as they achieve a turnover of more than ECU 50 million in the relevant telecommunications market.'

9. Article 9 is replaced by the following:

'Article 9

By 1 January 1998, the Commission will carry out an overall assessment of the situation with regard to remaining restrictions on the use of public telecommunications networks for the provision of cable television capacity.'

Article 2

Member States shall supply to the Commission, not later than nine months after this Directive has entered into force, such information as will allow the Commission to confirm that points 1 to 8 of Article 1 are complied with.

This Directive is without prejudice to existing obligations of the Member States to communicate, no later than 31 December 1990, 8 August 1995 and 15 November 1996 respectively, measures taken to comply with Directives 90/388/EEC, 94/46/EC and 96/2/EC.

Article 3

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Communities*.

Article 4

This Directive is addressed to the Member States.

Done at Brussels, 13 March 1996.

For the Commission

Karel VAN MIERT

Member of the Commission

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 4 October 1995

concerning the conditions imposed on the second operator of GSM radiotelephony services in Italy

(Only the Italian text is authentic)

(95/489/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 90 (3) thereof,

Having given the Italian authorities, by letter of 3 January 1995, and Telecom Italia SpA, by letter of 30 January 1995, notice to submit their comments on the Commission's objections to the intitial payment imposed on Omnitel Pronto Italia,

Whereas :

THE FACTS

The national measure in question

(1) The Italian Government has imposed an initial payment for the grant of a second concession for the establishment and operation on Italian territory of a network for the provision of a public mobile radiotelephony service using the pan-European digital system, GSM (global system for mobile communications). This requirement was laid down in the specifications and does not apply to the public operator, Telecom Italia.

The undertaking and services concerned

(2) Telecom Italia SpA is controlled by the Società Torinese Esercizi Telefoni (STET), which owns 55 % of its capital. STET is in its turn controlled by the Istituto per la Ricostruzione Industriale (IRI) and thus by the Italian Government. Telecom Italia thus constitutes a 'public undertaking' within the meaning of Article 90 (1).

In terms of its turnover, Lit 26 700 billion, Telecom Italia is the sixth largest telecommunications operator in the world. It has a workforce of 101 000 employees and over 25 million subscribers.

When Telècom Italia was set up in August 1994, it took over the exclusive rights to operate the public telecommunications network and the voice telephony service granted to Società Italiana per l'Esercizio Telefonico (SIP) in 1984 for a period of 20 years.

(3) Cellular digital mobile telephony complying with the GSM standard has been developed recently in Europe and enables subscribers both to send and to receive calls anywhere in the Community, as well as in some other European countries. This system, which used digital technology, a compact telephone and a subscriber identity module card, has greater potential than traditional analogue radiotelephony systems. Digital technology provides higher quality, high-speed data transmission and encryption enhancing the confidentiality of communications, and is more economical in its use of frequencies than analogue systems. Furthermore, the GSM system is based on common Community standards regarding common frequency bands approved at Community level and, unlike analogue systems which are often incompatible from one Member State to another, has the makings of one

of the pan-European services, whose promotion is one of the main objectives of the Community's policy on telecommunications (1). Lastly, the emerging market for GSM services is particularly dynamic : according to some studies, the number of users in western Europe could grow from a little over 1 million in 1993 to 15 to 20 million in the year 2000 (2).

(4) The Council has adopted a directive reserving the 890 to 915 and 935 to 960 MHz frequency bands for the introduction of a common system of digital GSM radiotelephony (3). These common frequency bands allow several competing operators to coexist. The GSM service began operating commercially in the Community in late 1992 : since which time the great majority of the Member States (Belgium, Spain, Italy, the Netherlands, Finland, Denmark, Germany, France, Greece, Portugal and the United Kingdom) have each granted licences to two operators, while the other Member States (Austria and Ireland) have announced that they will follow the same path or have already initiated the necessary procedures to that effect. Sweden has granted three GSM licences. Germany, France, the Netherlands and the United Kingdom have authorized or decided to authorize a third operator to offer cellular digital radiotelephony services, on a higher frequency band, on the basis of the DCS 1800 specifications.

The European Conference of Postal and Telecommunications Administrations (CEPT), the forum for the national regulatory authorities of 36 countries (including Italy), has recommended that competition between operators of GSM services be actively encouraged and the regulatory barriers which are restricting such competition be abolished (4).

Background

(5) By letter of 29 July 1993, the Commission requested the Italian Government either to terminate the monopoly enjoyed by Telecom Italia (at that time, SIP) in GSM radiotelephony or to present arguments meeting the Commission's objections to that monopoly. In response, the Italian Government decided to put out to tender a second concession for 15 years for the operation of a GSM network. A notice to that effect was published in the *Gazetta Ufficiale della Repubblica Italiana*, No 294 of 16 December 1993. No provision was made for an initial payment.

On 29 January 1994, the Italian Government sent the specifications to the businesses which had responded. They state that tenders must indicate 'the lump sum, in billions of lire, which the tenderer will pay when the concession is granted' (Article 4.9.1, page 44). The specifications also indicate that that amount will constitute one of the selection criteria (p. 51), without mentioning the weighting to be attached to it. The deadline for submitting tenders was 1 March 1994 (Article 3.9, page 19).

The specifications were sent to the Commission only on 2 March 1994, after the expiry of the deadline. By letter of 1 April 1994, the Commission expressed its regret that the specifications for selecting a second operator imposed on the firm to be selected conditions less favourable than those enjoyed by SIP, in particular the requirement of an initial payment (the bid) and a minimum annual charge to be paid by the operator for the first five years irrespective of turnover, while for SIP this charge is only 3,5 % on the amount of its actual income.

The Commission then suggested to the Italian Government that these two requirements should be deleted and the bids of the two remaining consortia be considered solely in the light of the other criteria mentioned in the specifications — that is to say, qualitative criteria.

On 18 April 1994, the Italian Government officially announced the consortium selected, Omnitel Pronto Italia, together with the weighting used in making the selection. The tenderers did not know the weighting. The consortium selected obtained the better score on every one of the selection criteria.

In its letter of 11 May 1994, the Commission replied that it continued to have reservations concerning the initial payment. Since Omnitel had been successful on all the other selection criteria, the Commission requested that the intitial payment be reconsidered but without calling in question or delaying the start of the operator's service.

(1) Council recommendation 87/371/EEC of 25 June 1987 (OJ No L 196, 17. 7. 1987, p. 81).
(2) 'Scenario Mobile Communications up to 2010 — study on forecast developments and future trends in technical development and commercial provision up to the year 2010'. Eutelis Consult, October 1993.
(3) Council Directive 87/372/EEC of 25 June 1987 on the frequency bands to be reserved for the coordinated introduction of public pan-European cellular digital land-based mobile communications in the Community OJ No L 196, 17. 7. 1987, p. 85).
(4) 'Review of the Requirements for the Future Harmonization of Regulatory Policy Regarding Mobile Communications Services'. CEPT/ECTRA (92) 57, p. 17.

Since there was no reply to this letter, the Commission sent a reminder on 27 July 1994 pointing out that it could not terminate the infringement procedure before the licence had been formally granted and again inquired what the Italian Government's current intentions were concerning the initial payment. Given the lesser impact of the minimum annual charge imposed solely on the second operator as compared to the initial payment, the Commission decided to concentrate solely on this latter aspect, without, however, accepting the former.

By letter of 8 August 1994, the Italian authorities replied to this last point to the effect that the tenderers, and therefore the consortium selected, were well aware of that obligation since it was expressly included in the specifications, adding that in the course of meetings between officials of the Ministry of Posts and Telecommunications and senior management of Omnitel Pronto Italia, the problem appeared to have been resolved. On 31 October 1994, the Commission replied that the acceptance by the applicant second operator of the conditions for obtaining the licence had no effect on whether these conditions were discriminatory or not, and it continued to press its request for the views of the Italian Government.

On 3 January 1995, the Commission gave formal notice to the Italian Government either to annul the second operator's obligation to make an initial payment or to submit its comments on the Commission's arguments. The Italian authorities replied on 28 February, 17 May and 10 August 1995.

THE COMMISSION'S ASSESSMENT

Article 90 (1)

(6) Article 90 (1) of the Treaty provides that, in the case of public undertakings to which Member States grant special or exclusive rights, Member States must neither enact nor maintain in force any measure contrary to the rules contained in the Treaty, in particular those relating to competition.

Telecom Italia is a public undertaking which has been granted exclusive rights to operate the fixed telecommunications network and offer voice telephony (within the meaning of Article 1 of Commission Directive 90/388/EEC [1]) and mobile analogue radio telephony services. On 22 December 1994, the Italian Government also granted it the right to operate a GSM radiotelephony network, which qualifies as a special right, since the operator had been designated otherwise than according to objective and non-discriminatory criteria.

In accordance with the case-law of the Court of Justice [2], the compatibility of this monopoly with the Treaty must be assessed in the light of Article 90 and the provisions to which it refers — in this instance, Article 86.

Article 86

The relevant market

(7) The relevant market is the market for cellular digital mobile radiotelephony services. This should be distinguished from the market in voice telephony and that (or those) in other mobile telephone communications services.

(8) The Commission has defined the market in voice telephony in Directive 90/388/EEC. The Directive draws a distinction between 'services whose provision consists wholly or partly in the transmission and routing of signals on the public telecommunications network' and mobile radio telephony services, which are excluded from its scope.

(9) Voice telephony within the meaning of that Directive is the principal service provided on the fixed public network, meaning between given network termination points. These termination points are defined as 'all physical connections and their technical access specifications'. In mobile communications, on the other hand, the termination point is located at the radio interface between the base station of the mobile network and the mobile station, which means that there is no physical termination point. The definition of voice telephony services in Article 1 of the Directive therefore does not apply to mobile telephony services.

(10) According to the case-law of the Court of Justice, for a product to be regarded as forming a market which is sufficiently differentiated from other markets, it must be possible for it to be singled out by such special features distinguishing it from other products that it is only to a limited extent interchangeable with them and is only exposed to their competition in a way that is hardly perceptible [3].

[1] Commission Directive of 28 June 1990 on competition in the markets for telecommunications services (OJ No L 192, 24. 7. 1990, p. 10).

[2] See, for example, the judgment of 19 May 1993 in Case-320/91, Corbeau, paragraph 12.

[3] Case 27/76, United Brands v. Commission, [1978] ECR, p. 207, paragraph 22.

Clearly, there is very little interchangeability between mobile radiotelephony and telephony using the fixed network: users taking out a subscription for a carphone or portable telephone do not normally cancel their previous subscription for a telephone installed at their home or workplace. Therefore, mobile radiotelephony is indeed a new, additional service, not a substitute for traditional telephony.

This distinction is also reflected in a very significant price differential: according to a study conducted by the Organization for Economic Cooperation and Development (OECD) and based on a basket of services, the cost of mobile telephony to the user is, on average in the OECD area, four times that of the same services offered on the fixed network (1).

Admittedly, wider dissemination of mobile radiotelephony might ultimately lead to a single telecommunications system catering for markets that are for the time being separate. However, the conditions on which Article 86 is to apply must be assessed on the basis of present demand and not of developments that could take place at some unspecified time in the future.

(11) It having been established, for the above reasons, that mobile radiotelephony should not be regarded as forming part of the market voice-telephony services offered using the fixed network, it remains to be seen whether, and to what extent, there might be grounds for distinguishing between the cellular mobile radiotelephony services based on the GSM standard which are the subject of this Decision and cellular radiotelephony services using analogue technology.

The GSM system of cellular mobile radio telephony is more than just a technical refinement of the earlier analogue technology. In addition to the advantages offered by GSM in terms of the quality of voice reproduction and more efficient use of the available spectrum (thus accommodating substantially more users on a given frequency allocation), this service provides new facilities that cater for the needs of only some users of mobile radiotelephony:

(i) based as it is on a Community standard, GSM can become a pan-European service. Under 'roaming' agreements between network operators, the system permits any user to make calls from his phone outside the national territory of the operator with which he has taken out a subscription; this facility is available throughout the territory of the parties to the GSM Memorandum of Understanding in Europe and other parts of the world. Some users who, for business purposes, use mobile radiotelephony services only within the country or within a particular region, are not interested in this new feature. For others, however, this may be a reason for deciding to subscribe;

(ii) in addition to voice transmission, the GSM service can be used to transmit large quantities of data; again, this feature meets the specific needs of only some of the existing or potential customers for mobile radiotelephony services;

(iii) the digital coding of messages means that a far greater degree of security can be achieved than via the analogue system — again an advantage of interest to only some users (particularly business customers);

(iv) digital technology makes it possible to offer a whole range of advanced telecommunications services which are not available (or which can be made so only at considerably higher cost) via an analogue network;

(v) in the majority of the Member States, the tariffs applicable to GSM services currently remain higher than those for analogue mobile telephony.

In view of the above, the simple replacement of analogue radiotelephony by the GSM system is not generally envisaged, in the short term. On the contrary, it is likely that, even if there is a discernible drift of customers from one to the other, the two systems will continue to exist in parallel for several years to come, meeting largely different needs. It has been found that, even in countries where the GSM system is fully operational, some operators are continuing to invest in the analogue network.

(12) On the basis of the abovementioned considerations and the current circumstances, and taking into account the possible evolution of the market, GSM radiotelephony services should therefore probably be regarded as also constituting a market separate from the market for analogue mobile telephony.

(1) OECD study, published 24 February 1993.

In any event, the conclusions of the legal analysis would not be different, even if analogue mobile telephony and GSM constituted two segments of the same market.

(13) In accordance with judgments of the Court of Justice this market, which currently extends over the whole of Italy, is a substantial part of the common market.

The dominant position

(14) The Court of Justice has held that an undertaking which has a legal monopoly in the provision of certain services may occupy a dominant position within the meaning of Article 86 of the Treaty (1). This applies in the case of Telecom Italia and its subsidiary, Telecom Italia Mobile, created in July 1995, which together are the only undertakings permitted by law to offer the telecommunications networks for the public, voice telephony and analogue radiotelephony in Italy, three markets in which they therefore enjoy a dominant position.

The abuse of a dominant position

(15) The Court of Justice has ruled that 'a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators' (2).

Such equality of opportunity is particularly important for new entrants to a market in which a dominant operator on a related but separate market is in the course of establishing itself, like Telecom Italia and its subsidiary, Telecom Italia Mobile.

(16) Telecom Italia Mobile already enjoys the following major advantages for acquiring a dominant share of the market in GSM radiotelephony:

— a head start: it is already in a position to market its service while the second operator will not be ready until the second half of 1995,

— potential customers: Telecom Italia Mobile's analogue radiotelephony service, TACS, had more than 2,2 million subscribers (February 1995) and is acquiring 100 000 new subscribers each month.

However, this service will become less attractive in future in view of GSM's superior facilities. In addition, TACS operates in wavebands reserved to GSM radiotelephony. With time some TACS subscribers will therefore change to GSM. Accordingly, Telecom Italia Mobile already has potential customers for its GSM service,

— an existing distribution network: the network is known to the public, since Telecom Italia Mobile can market its GSM service through its TACS distributors,

— specific information: through its experience with TACS, it has specific information on the calling habits of Italian subscribers, by consumer categories and region. Moreover, since it also enjoys a monopoly in the supply of fixed links for the networks of GSM operators (3), it will continue to obtain important information on traffic flows,

— economies of scale for infrastructure: since it is at present the sole operator of fixed and analogue mobile telephony, it has available sites and aerials for establishing its GSM network which are not available to its competitor.

Telecom Italia would be unable to extend its dominant position on the market in wire telephony or analogue mobile telephony into the market in GSM radiotelephony by increasing the costs of its rival, for example by imposing interconnection charges which were not justified by the costs involved, without infringing Article 86 of the EC Treaty.

(17) Pursuant to Article 90 (1) of the EC Treaty, Italy must at the same time refrain from enacting measures which would, by increasing the costs of access of the sole rival of a public undertaking on a market newly opened to competition, significantly distort this competition. Given the additional financial burden imposed on its only competitor, Telecom Italia Mobile will indeed have the choice between two commercial strategies, of which each would be in breach of Article 90 (1) read in conjunction with Article 86 of the Treaty.

(1) Case 311/84, Centre belge d'études de marché — Telemarketing (CBEM) SA v. Compagnie luxembourgeoise de télédiffusion SA and Information publicité Benelux SA, [1985] ECR, p. 3261.

(2) Case C-202/88, France v. Commission, [1991] I, p. 1223, paragraph 51, p. 1271.

(3) Telecom Italia and its subsidiary Telecom Italia Mobile operate the fixed network and mobile services. On the other hand, Omnitel Pronto Italia can only establish radio links if it can show that Telecom Italia cannot provide it with the leased lines requested within a reasonable time.

(i) Extension of the dominant position (1) of the public undertaking

The initial payment of Lit 750 billion made by the second operator on this market will necessarily have to be covered by income. The second operator will therefore have difficulties in competing with the first operator through lower tariffs. The first operator, Telecom Italia Mobile, which must not depreciate the same payment and which moreover is aware of the second operator's cost structure through its monopoly of the infrastructure (2), could be encouraged by reducing its tariffs, to extend its current dominant position on the fixed infrastructure market and the analogue mobile telephony market into the market in GSM radiotelephony. It is a question of the extension of a dominant position thanks to the competitive advantange provided by the distortion of the cost structure due to the intitial payment, rendering the State measure contrary to Article 90, read in conjunction with Article 86.

(ii) Limitation of production, markets or of technical development within the meaning of Article 86 (b)

Moreover, the need to finance Lit 750 billion will also delay the investments of the new entrant, which will have to use part of its initial capital to cover the initial payment, which will therefore not be available for investment in the development of its network, quite apart from the capital needed for establishing its service in compliance wiht the minimum requirements set out in the licence. This will delay the development of the network and could also encourage Telecom Italia Mobile to delay marketing its GSM service (3). The TACS system is more attractive in that it guarantees Telecom Italia Mobile a definite income since the services are operated as a monopoly and moreover the bulk of the investments have already been amortized.

The Telecom Italia group, which, as has been pointed out, is aware of the second operator's cost structure through its infrastructure monopoly, would therefore be encouraged to retain higher tariffs for its GSM services than it would otherwise do, in the absence of the State measure in question. In so doing, it would limit production, output or technical development at the expense of the users within the meaning of Article 86 (b) as regards GSM, which involves a more advanced technology, so as to benefit the older analogue service.

In addition, this would delay the move towards personal communication combining mobile and fixed networks, which will only be possible if the tariffs for mobile communications fall substantially.

As the Court of Justice has held (4), Article 90 (1) precludes Member States from enacting measures likely to cause an undertaking to infringe the provisions to which it refers — in particular, in the case in point, those contained in Article 86.

In conclusion, on either hypothesis, the State measure concerned is therefore contrary to Article 90 (1), read in conjunction with Article 86 (b) of the Treaty.

(18) The responsibility of Member States pursuant to Articles 86 and 90 (1) of the Treaty only arises where the improper behaviour of the company in question is capable of affecting trade between Member States. Such a potential effect exists in this instance because the commercial activity of the Italian GSM operators may affect the residents of other Member States, who may acquire the 'SIM' cards in Italy just as in the territories of the other Member States, thanks to the roaming agreement with the operators covering those Member States.

(1) See, for example, judgment of the Court of Justice of 17 November 1992, Joined Cases C-271/90, C-281/90 and C-289/90, The Kingdom of Spain, the Kingdom of Belgium and the Italian Republic v. Commission, [1992] ECR I, p. 5833, paragraph 36.

(2) The specifications provide for a reduction of 50 % of the public tariff for lines leased by SIP to the second operator. Despite this reduction, the cost of leased lines for the second GSM operator in Italy remains three times higher than that applied by BT in the United Kingdom to cellular telephony operators.

(3) As the Commission has already emphasized in its letter of 29 June 1993, 'since the public undertaking holds a monopoly in the supply of mobile radiotelephony services, it has no great interest in introducing an alternative, the GSM service, quickly'.

(4) See, for example, Case C-41/90, Höfner v. Macrotron [1991] ECR I, p. 1979 as well as the judgments of 18 June 1991, Case C-260/89, Dimotiki Etairia Pliroforissis v. ERT, [1991] ECR I, p. 2925, and of 5 October 1994, Case C-323/93, Société civile agricole d'insémination de la Crespelle v. Coopérative d'élevage et d'insémination artificielle du département de la Mayenne [1994] ECR I, p. 5077.

The reply of the Italian authorities

(19) In its letter of 28 February 1995, the Italian Government emphasized that the initial payment had been one factor in selecting the second operator. The sum proposed by the second operator would therefore be determined as part of its strategic choice, since the specifications do not mention either a minimum or a maximum figure.

Moreover, the specifications allow the tenderer to propose further conditions, such as waiving the initial payment or spreading it over a number of years. In addition, the tenderers knew that Telecom Italia Mobile was not required to make an initial payment.

It was impossible to oblige Telecom Italia Mobile to make the same payment since it had already made its investments and thereore relied on amortizing them by operating the service as a monopoly.

By determining the amount of the initial payment which it would be prepared to make, the second operator of necessity took into account positive factors such as the investments already made by Telecom Italia Mobile and its right to use Telecom Italia Mobile network through national roaming.

It therefore denies that the dominant positions of Telecom Italia and its subsidiary Telecom Italia Mobile have been strengthened. It also denies that the initial payment produced a negative impact on investments or on the level of tariffs, in so far as the second operator's concession fixes specific obligations on this point.

Lastly, it refuses to abolish the initial payment. In its view, relinquishment of this criterion would mean that the selection procedure would have to be begun again if the principles of transparency and non-discrimination were to be respected. According to the Italian Government, the removal of an element such as the offer to pay a sum in order to enter the GSM market would necessarily lead to the opening of a new bidding process. Without the requirement of the initial payment, the competitors might well have made different bids. This argumentation was confirmed by the Italian authorities by letter of 10 August 1995.

(20) In its letter of 17 May 1995, the Italian Government distinguished between the question of the initial payment and the risk of extending the dominant position.

As far as the initial payment is concerned, the Italian Government maintains that, in the past, Telecom Italia Mobile has spent larger sums than that on developing the new service and that furthermore the opening up of the GSM service to competition has had a negative effect on the expected profits of Telecom Italia Mobile for running the service. Moreover, to reimburse the initial payment would allow the candidate who was not chosen to attrack Omnitel's concession, and the selection procedure would have to start again. On this point, the Italian Government reaffirmed that the abolition of the obligatory initial payment on the part of the second operator would necessitate the opening of a new selection process.

As for the risk of extending the dominant position of Telecom Italia and its subsidiary, Telecom Italia Mobile, the Italian Government emphasized that, following its intervention, agreements had been concluded between Telecom Italia and Omnitel relating to the interconnection of Omnitel's GSM network to the fixed telephone network of Telecom Italia, to experimental roaming of Omnitel's service via Telecom Italia Mobile's GSM network, to the distribution system of Telecom Italia Mobile's GSM and to the keeping of separate accounts for GSM and Telecom Italia's other activities.

The Commission's rebuttal

(21) The Commission has not challenged the Italian Government's decision to use two distinct procedures in awarding the GSM concessions. Nevertheless, it has repeatedly urged the Italian Government to ensure that the procedures used and the criteria adopted in granting the second licence should not have the effect of increasing the costs of access by the new entrant to the GSM market, as compared with those of the public operator.

The initial investment for establishing a GSM network in Italy amounts to about Lit 2 000 billion. The initial payment, when added to the initial investment, therefore increases the second operator's need for financing by more than one-third. Since Telecom Italia mobile does not have to make the same payment, it is wrong to say that the initial payment has not stengthened its position. It can use the money thereby saved to extend its distribution network or make special offers to potential subscribers.

Moreover, Telecom Italia Mobile possesses a temporal advantage to recoup the major sums invested for the development of GSM. When it puts its network at the disposal of the second national operator, in the context of national roaming, the latter will not benefit freely from this investment but will have to participate in financing it.

(22) The fact that applicants for the second licence were aware of the future distortion of competition on the GSM market in Italy in favour of Telecom Italia Mobile does not mean that there is any less of an imbalance here. Moreover, firms which did wish to enter the market had no choice but to take this handicap into account in their business plan.

It is therefore wrong to say that the initial payment will have no impact on prices charged or the coverage offered. The second operator's concession adopts the objectives which it has itself undertaken to attain after making allowance for the initial payment. The Italian Government itself concedes that, without the initial payment, tenderers 'could have modified their economic objectives for each of the valuation parameters'. Moreover, the mere fact that the specifications make provision for national roaming is certainly not sufficient compensation for the second operator's disadvantage. The Italian Government has not as yet informed the Commission of an agreement on this matter with the second operator.

(23) Lastly, the argument that, if the initial payment were waived, the tendering procedure would have to be repeated in order to comply with the principles of transparency and non-discrimination is not convincing.

Bearing in mind the fact that the consortium chosen submitted the better tender on all other selection criteria, the Commission, in its letter of 11 May 1994, determined that it was possible and necessary to reconsider this initial payment without calling in question or delaying the commencement of the second operator's service.

Moreover, the weighting of the various selection criteria was not communicated to the various applicants. The candidates could not therefore say that they would have made a better offer it they had known that the initial payment would be abandoned. The weighting attached to the initial payment could, in fact, have been very slight or zero.

In any case, in order not to interfere in a question which relates in part to the internal law of Italy, the Commission leaves to the Italian Government the choice of the means of remedying the breach, without expressly envisaging the reimbursement of the initial payment. Such reimbursement is not the only conceivable means of redressing the imbalance that it creates. The Italian Government could either impose an identical payment on Telecom Italia Mobile, or it could adopt corrective measures such as those mentioned in the context of contacts between the Commission and the Italian authorities, for example :

— a grant without delay to any operator of an unconditional right to establish its own infrastructure (the provision of the radio frequencies necessary for microware links) or to use the existing infrastructure of other undertakings such as the national railways, the motorways or ENEL (the national electricity agency),

— the effective application of the roaming agreement between the two GSM-radiotelephony operators, which from a technical and tariff standpoint would compensate for the second operator's delay,

— the grant of access to Telecom Italia's TACS 900 customer database, while maintaining the confidentiality of personal data,

— the revision of the tariff conditions for interconnection with Telecom Italia's switched telephone network,

— the grant to any operator of the right to apply alternative technologies such as DCS-1800 or DECT to provide its service.

The revocation of the concession already granted can in no circumstances be considered to be an appropriate remedy for the breach, bearing in mind that that would eliminate the only existing competitor to the public company Telecom Italia Mobile on the GSM market, and also bearing in mind the current monopoly of Telecom Italia as regards fixed telephony and GSM during the whole period necessary for the opening of a new call for offers, thus rendering competition even more difficult because of the additional time-lead.

(24) The Commission's objections to the initial payment imposed on the second operator but not on Telecom Italia Mobile are not based on Article 6 of the Treaty. In this procedure the issue is not the discrimination in itself but the effect of the State measure which is, as has been shown at points 17 and 18, to lead the telecommunications agency to extend its dominant position or to limit production, markets or technical development.

The aim of this procedure is to cause the Italian Government to take the necessary steps to preclude that effect; the most obvious would be a requirement that Telecom Italia Mobile make an identical payment.

(25) Likewise, if the Italian Government so requests, the Commission would be prepared to examine whether the infringement could be terminated by adopting other measures, provided that they offset properly the second operator's disadvantage.

It is incumbent upon the Italian Government to make proposals in this matter. The Italian Government should in any case provide figures for these proposals, showing that they properly offset the Lit 750 billion paid by Omnitel.

Article 90 (2)

(26) Article 90 (2) of the Treaty provides that undertakings entrusted with the operation of services of general economic interest are subject to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The Italian Government has not relied on this provision to justify imposing the initial payment on the second operator alone.

(27) The Commission considers for its part, that in this case Article 90 (2) does not apply, because there are no factors which would permit the conclusion that the initial payment is justified by the performance in law or in fact of a service of general economic interest.

CONCLUSION

(28) In view of the above the Commission considers that the competitive disadvantage in the form of the initial payment imposed on the second operator alone for its concession to operate a GSM network in Italy constitutes an infringement of Article 90 (1) of the Treaty, read in conjunction with Article 86,

HAS ADOPTED THIS DECISION:

Article 1

Italy shall take the steps necessary to abolish the distortion of competition resulting from the initial payment imposed on Omnitel Pronto Italia and to secure equal conditions for operators of GSM radiotelephony on the Italian market at the latest by 1 January 1996, by means of the following:

— a requirement that Telecom Italia Mobile make an identical payment, or

— the adoption, after receiving the agreement of the Commission, of corrective measures equivalent in economic terms to the payment made by the second operator.

The measures definitively adopted may not impair the competition created by the licensing of the second GSM operator on 2 December 1994.

Article 2

Italy shall inform the Commission within three months of notification of this Decision of the steps it has taken to comply therewith.

Article 3

This Decision is addressed to the Italian Republic.

Done at Brussels, 4 October 1995.

For the Commission

Karel VAN MIERT

Member of the Commission

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 27 November 1996

concerning the additional implementation periods requested by Ireland for the implementation of Commission Directives 90/388/EEC and 96/2/EC as regards full competition in the telecommunications markets

(Only the English text is authentic)

(Text with EEA relevance)

(97/114/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement establishing the European Economic Area,

Having regard to Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services [1], as last amended by Directive 96/19/EC [2], and in particular Article 2 (2) thereof,

Having regard to Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications [3], and in particular Article 4 thereof,

Having given notice [4] to interested parties to submit their comments in accordance with Article 2 (2) of Directive 90/388/EEC and Article 4 of Directive 96/2/EC,

Whereas:

A. THE FACTUAL BACKGROUND

I. The Irish request

(1) The Irish Government has, by letter of 15 May 1996, requested additional implementation periods:

— until 1 January 2000, regarding the abolition of the exclusive rights currently granted to Telecom Eireann as regards the provision of voice telephony and the underlying network infrastructure, instead of 1 January 1998 as provided in Article 2 (2) of Directive 90/388/EEC,

— until 1 July 1999, regarding the lifting of restrictions on the provision of already liberalized telecommunications services on:

(a) networks established by the provider of the telecommunications service,

(b) infrastructures provided by third parties, and

(c) the sharing of networks, other facilities and sites,

instead of 1 July 1996 as provided in Article 2 (2) of Commission Directive 90/388/EEC,

— until 1 January 2000, regarding the direct interconnection of mobile telecommunications networks, instead of immediately as provided in Article 3d of Directive 90/388/EEC.

[1] OJ No L 192, 24. 7. 1990, p. 10.
[2] OJ No L 74, 22. 3. 1996, p. 13.
[3] OJ No L 20, 26. 1. 1996, p. 59.
[4] OJ No C 169, 13. 6. 1996, p. 5.

This request is in line with Council resolutions 93/C213/01 of 22 July 1993 [1] and 94/C379/03 of 22 December 1994 [2].

(2) The Irish Government considers these additional implementation periods necessary for the following reasons:

2.1. Ireland has been carrying out major development of the telecommunications networks; this has required significant capital investment, involving high levels of debt; Telecom Eireann has been constrained in its ability to achieve the necessary structural adjustments, particularly of tariffs, because of those high debt levels, the high cost of delivering telecommunications services in Ireland and Telecom Eireann's high cost-structure.

2.2. Further structural adjustments are required in order to enable Telecom Eireann to function effectively in a fully competitive market, but in a way that ensures the maintenance of universal service, an increase in telephone density and reductions in Telecom Eireann's debt and cost structure; these adjustments involve:

(1) further development of Ireland's telecommunications networks,

(2) further adjustment of Telecom Eireann's tariff structure,

(3) transformation of Telecom Eireann, in particular, further development of its products and services for the home and international sectors, restructuring its cost base and completion of the management of its change into a market-driven and customer-focused organization.

With the assistance of a strategic partner this transformation which would otherwise take more time could be achieved before 1 January 2000.

2.3. Liberalization of infrastructure significantly in advance of the liberalization of voice telephony would enable providers of liberalized services to erode Telecom Eireann's customer base.

2.4. In relation to mobile interconnection, freedom of interconnection by mobile operators would enable them to bypass the Public Switched Telephone Network (PSTN) for trunk and international traffic and furthermore enable them to capture a significant share of Telecom Eireann's international call traffic, as a result of which Telecom Eireann's revenues would be seriously reduced and the structural adjustment programme disrupted.

2.5. The derogation sought will not impede the development of competition in other areas of the telecommunications sector in Ireland.

(3) The Irish Government provided a detailed description regarding the capital investments required for the development of the network, the tariff rebalancing planned, as well as the restructuring of Telecom Eireann in the annex to its letter of 15 May 1996.

(4) The Irish Government announced that, if this derogation was granted, it would in any case implement the amendments made to Directive 90/388/EEC by Directive 96/19/EC in national law according to the following time table:

— fourth quarter 1996: establishment on a fully stand-alone basis of a telecommunications regulatory authority with appropriate arrangements for industry funding,

— first quarter 1998: publication of proposed legislative changes to implement full competition and remove all restrictions by 1 January 2000, including proposals for funding universal services,

— third quarter 1998: target for achievement of legislative changes,

— fourth quarter 1998: communication to the Commission of draft licences for voice telephony and/or underlying network providers,

— first quarter 1999: publication of licensing conditions for all services and of interconnection charges as appropriate in accordance in both cases with relevant EU Directives,

— July-December 1999: award of licences and amendment of existing licences to enable competitive provision of voice telephony and unrestricted interconnection of mobile networks from 1 January 2000.

The request was delivered to the Commission services on Wednesday 15 May 1996.

II. The comments received

(5) Fourteen undertakings as well as the Irish Congress of Trade Unions provided comments following the notice published by the Commission on 13 June 1996.

[1] OJ No C 213, 6. 8. 1993, p. 1.
[2] OJ No C 379, 31. 12. 1994, p. 4.

(6) According to these comments:

— the Irish authorities have not established that the existing network is, in fact, so undeveloped that they require any derogation period before full liberalization. They have failed to satisfy the criteria established in Directive 90/388/EEC as amended, and in Article 2 (2) thereof in particular. A modern basic network is now in place and Telecom Eireann's real concern is not to shorten waiting lists but rather to 'encourage' demand,

— although Ireland's telecommunications networks have been less developed than those of some other EU Member States, much progress has been made in recent years. Some of this progress has been thanks to EU funding (in the order of ECU 65 to 70 million for the period 1989 to 1999). Telecom Eireann has been successfully increasing penetration: between 1 April 1994 and 31 March 1995 line connections increased by 6 % which represents a growth of new line connections of 22 %,

— Telecom Eireann's call tariffs have reduced by 34 % in real terms between 1986 to 1994; total traffic has increased by 7,4 % in 1994 to 1995,

— the commitments to tariff restructuring and to improving Telecom Eireann's cost structure are so vague and general that they lack credibility,

— the arguments put forward in the application relating to Telecom Eireann, particularly its indebtness, are greatly exaggerated and seriously misleading. The latest annual accounts for that company reveal that its financial position is in many respects surprisingly healthy,

— as regards the high cost of delivering services in Ireland, any competing operator would be affected by such costs,

— the projected investments of Telecom Eireann to complete universal telephone coverage (i.e. an increase of investment by approximately 43 %) are over estimated. These investments cannot be considered as necessary before liberalization, since Ireland concedes it already has a modern network, including Integrated Services Digital Network (ISDN) capabilities, which is as developed as the networks of other telecommunications organizations in Europe. These investments would aim at the establishment of nationwide fibre-optic Synchronous Digital Hierarchy (SDH) networks, implementation of non-hierarchical networks and establishment of low and high bandwidth copper access systems. To date none of the other EU countries have networks meeting such requirements. Moreover, some doubts were cast on the extent of the universal service obligation entrusted to Telecom Eireann. According to the Irish Telecommunications Act, Telecom Eireann is only obliged to satisfy user needs subject to its appreciation that such requests are 'reasonably practicable'. The fact that Telecom Eireann would want to improve the level of the telecommunications services it provides results from management decisions and not from a State measure,

— the introduction of a new partner, PTT Telecom/Telia, for Telecom Eireann, announced in June, should not be allowed to delay the introduction of competition,

— derogations would sanction Telecom Eireann's continuing dominance in the Irish telecommunications market, increasing the danger of abuse of such dominance. Telecom Eireann would actually discriminate against providers of liberalized services as regards for example volume discounts that are granted to other customers with a comparable volume of traffic; it would, moreover, underinvest in street payphones and delay the provision of competing companies,

— a market in which operators are able to construct alternative networks and provide value-added and data transmission services, will create a stable environment which will give incentive to Telecom Eireann to restructure its operations and complete its transition to a market-driven and customer-focused organization quickly and effectively. This environment will ensure that Telecom Eireann's voice telephony revenue streams are protected, and consequently that it can service its debt requirements fully. When full liberalization takes place, operators will be able to respond quickly to consumer needs as competing infrastructures will already have been developed,

— the derogation on the use of alternative infrastructure requested would in particular hurt cross-border traffic between Northern Ireland and Ireland. The derogation sought would prevent operators in Northern Ireland from being able to maintain margins on cross-border data services and closed user groups calls,

— the Irish Congress of Trade Unions fears that if Telecom Eireann is not ensured sufficient revenues to sustain the unavoidable increasing level of investments, the reducing of tariffs and remuneration of shareholders, the Irish Government will be faced with huge ongoing additional costs. This would damage the prospect of a new social partnership agreement coming up for negotiation in December and could, as a consequence, lead to the Union's withdrawal of cooperation with the liberalization process in this crucial strategic industry.

(7) By letter dated 29 July 1996, the Commission transmitted to the Irish authorities the 15 comments of these third parties, received on the occasion of the publication of the Commission's notice of 13 June 1996 opening the procedure.

In response to the abovementioned comments the Irish authorities by letter of 19 September 1996 stated *inter alia* that:

— Telecom Eireann is and will continue to be subject to all the normal European and Irish competition rules and any aggrieved party has available the normal remedies which apply. Any suggestion that a derogation would alter this is incorrect,

— Telecom Eireann's debt position, while it has improved, is still a serious constraint. The ratio of total debt to total equity (gearing) at the end of the fiscal year 1995/96 was 139,9 for Telecom Eireann compared to, for example 8,9 for British Telecom, 124,3 for Telefónica de España, 65,0 for Portugal Telecom, 39,4 for OTE, 59 for France Telecom, 242,5 for Belgacom, and 405,9 for Deutsche Telekom,

— ESAT Digifone would be at a particular advantage if it could run services other than GSM over its own infrastructure,

— telephone penetration rates are a simple measure of network development and universal service and these are clearly well behind EU averages. This gap cannot be completely eliminated before the year 2000. The gap is particularly evident outside the main urban areas where penetration rates remain low and the local access network, traditionally the most costly part of the network to develop, will require significant upgrading to enable connection and adequate quality of service,

— in the year ended 4 April 1996, total operating costs represented 55 % of total revenue. Staff costs in turn represented well over 50 % of operating costs. The main focus of cost reduction is on reducing the numbers of staff employed by the company. These staff severance schemes must be voluntary in nature and accordingly can only be implemented successfully over a period of years. The company is also actively examining the possibility of outsourcing in a number of areas but this must be managed carefully in conjunction with staff reduction programmes. For that reason a period of three years is required to make the necessary changes in the cost structure,

— connection and rental are loss-making for Telecom Eireann. This needs to be tackled on two fronts: revenue increase and cost reduction,

— apart from the average price levels for rentals and calls, the structure of prices needs to be revised. Two examples of possible change are:

(i) rental reductions for low-income or low-calling-rate users,

(ii) introduction of duration-based charges with no minimum fee, or low initial charge.

In both cases time is needed to alter structures to a more market-oriented system.

III. Application of the Article 90 (2) exception

(8) Article 90 (2) provides that undertakings entrusted with the operation of services of general economic interest are to be subject to the rules on competition in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The application of this provision in the telecommunications sector has been specified in Directive 90/388/EEC. Under this Directive, as amended by Directives 96/2/EC and 96/19/EC, the Commission shall grant, on request, to a number of Member States the right to maintain during additional time periods the exclusive rights granted to undertakings to which they entrust the provision of a public telecommunications network and telecommunications services, as well as restrictions on competition, in so far as these measures are necessary to ensure the performance of the particular tasks assigned to the undertakings benefiting from exclusive rights.

(9) As regards the provision of public telecommunications services and networks, it appears that Telecom Eireann is a telecommunication organization within the meaning of Article 1 of Directive 90/388/EEC, since it is entrusted with a service of general economic interest pursuant to Section 14 (1) of the Irish Postal and Telecommunications Services Act of 1983, requiring it:

(a) to provide a national telecommunications service within the State and between the State and places outside the State,

(b) to meet the industrial, commercial, social and household needs of the State for comprehensive and efficient telecommunications services and, so far as the company considers reasonably practicable, to satisfy all reasonable demands for such services throughout the State, and

(c) to provide such consultancy, advisory, training and contract service inside and outside the State as the company thinks fit.

(10) This provision in fact permits Telecom Eireann to refuse to provide telecommunications services where it is not reasonably practicable i.e. where it is not reasonably capable of being done or put into effect. According to the Irish Government, this exception to the general duty imposed by Section 14 (1) would have nevertheless been interpreted narrowly. Also relevant is Section 15 (1) (a) of the Act which imposes an obligation on the company to provide these services at minimal charges.

(11) Telecom Eireann operates on the basis that it shall meet all reasonable requests for telephone service within standard delivery terms, irrespective of location. In addition, the charges for connection to the telephone network, rental charges and call charges are levied on the same basis nationally. Telecom Eireann also provides and maintains uneconomic public pay phones and provides access to emergency services without charge to the caller. These tasks must be implemented irrespective of the specific situations or the degree of economic profitability of each individual operation.

(12) The question which falls to be considered is therefore the extent to which the requested temporary exclusion of all competition from other economic operators is necessary in order to allow the holder of the exclusive right to continue performing its task of general interest and in particular to have the benefit of economically acceptable conditions.

(13) The main starting point for such an examination must be the premise that the obligation on the part of the undertaking entrusted with that task to perform its services in conditions of economic equilibrium presupposes that it will be possible to offset less profitable sectors against the profitable sectors and hence justifies a restriction of competition from individual undertakings where the economically profitable sectors are concerned.

(14) Indeed, to authorize individual undertakings to compete with the holder of the exclusive rights in the sectors of their choice corresponding to those rights would make it possible for them to concentrate on the economically profitable operations and to offer more advantageous tariffs than those adopted by the holders of the exclusive rights since, unlike the latter, they are not bound for economic reasons to offset losses in the unprofitable sectors against profits in the more profitable sectors.

(15) However, the restrictions on competition are not justified as regards specific services dissociable from the service of general interest — i.e. voice telephony — which meet special needs of economic operators in so far as such specific services, by their nature and the conditions in which they are offered, such as the geographical area in which they are provided, do not compromise the economic equilibrium of the service of general economic interest performed by the holder of the exclusive right.

(16) Some comments mention that in practice new entrants could also contribute to the relevant tasks of general economic interest. In the short term, however, Telecom Eireann will continue to be the only undertaking able to deliver a universal telephone service to residential users in scarcely populated areas. For this reason, the Commission examined, regarding each of the additional implementation periods requested, whether their granting is necessary to allow Telecom Eireann to perform its task of general interest and to have the benefit of economically acceptable conditions.

B. LEGAL ASSESSMENT

I. Request for an additional implementation period regarding voice telephony and underlying network infrastructure

Assessment of the impact of the removal of the exclusive rights currently granted to Telecom Eireann

(17) Voice telephony is defined in Article 1 of Directive 90/388/EEC. The extent of this service has been specified in the Commission's communication 95/C275/02 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 (1) and in correspondence between the Commission and the Member States. Since the reservation of voice telephony services is an exception to the general rule of competition, it must be interpreted narrowly.

(18) Pursuant to the general principle of proportionality, any additional implementation period granted must be strictly proportional to what is necessary to achieve the necessary structural adjustment, mentioned by the Irish Government, with a view to the introduction of full competition, i.e.:

(i) further development of Telecom Eireann's telecommunications networks;

(ii) further adjustment of Telecom Eireann's tariff structure;

(iii) transformation of Telecom Eireann, in particular, further development of its products, restructuring of its cost base and completion of the management of its change into a market-driven and customer-focused organization.

(19) The purpose of the exclusive rights granted to Telecom Eireann was to ensure the provision of universal voice telephony and the establishment of a public telecommunications network. It allowed the latter not only to finance more cheaply — it could borrow under State guarantee and 2 % of its fiscal assets were financed by grants from the European Regional Development Fund — important investment in the digitalization of its network, but also to maintain higher tariffs and a less efficient cost structure — in particular due to overstaffing — than it would in a competitive environment. As one of the comments (2) points out, 'the legacy of over-staffing specifically in the flagged age group 35 to 44 was created by Telecom Eireann in carrying out their modernization programme in the early 1980s employing in-house staff as against having the work done by private contractors'.

(20) This shows that exclusive rights are not an adequate means to further the development of the telecommunications network. In its resolution of 22 July 1993, the Council in this regard acknowledged that the maintenance of these exclusive rights should be terminated by 1 January 1998, with a transitional period for those Member States requiring additional time to implement structural adjustments.

(21) The required structural adjustments must be examined in the light of the following circumstances:

— the need to further rebalance tariffs,

— the low telephone density,

— the high debt and cost structure of Telecom Eireann.

(a) Rebalancing of tariffs

(22) Ireland states that since 1990 all charges (excluding VAT and discounts) including rentals and local calls have fallen significantly in real terms. Despite this achievement, Ireland claims that Telecom Eireann still has a relatively high level of telephone prices and that certain prices are still out of alignment with costs. Telecom Eireann has set an objective of achieving price levels in the lowest quartile of OECD countries by 2000. Rebalancing by adjusting charges to bring prices closer still to underlying costs is still required also to achieve this objective. Ireland is proceeding with a gradual and flexible approach to tariff rebalancing, while maintaining safeguards for consumers in terms of price and quality of service. Due to the limits of the proposed price-cap regime, Telecom Eireann needs about five years to implement the increases of reduced-rate local calls, i.e. from 1996 to 2000. On the basis of the most likely forecasts, Ireland believes that Telecom Eireann would be in a strong enough position to survive liberalization in 2000.

(23) The following table, based on information in the Commission's possession (3), comparing certain telephone tariffs of Telecom Eireann and the equivalent figures for an operator which has already rebalanced its tariffs (4), supports the arguments of the Irish Government:

(1) OJ No C 275, 20. 10. 1995, p. 2.
(2) Coin and card technology (CCT), p. 4.

(3) Tarifica study implemented for European Commission — DG XIII.
(4) A direct comparison of the telephony tariffs of Telecom Eireann with the Community average (which is not a weighted average) would not be appropriate, given that the tariff structures of the 15 Community TO's are still widely divergent and in addition, given that they are currently in the process of rebalancing tariffs.

Tariffs in ecu on 1 January 1996	Telecom Eireann	British Telecom	Difference TE/BT (BT = 100)
Bi-monthly rental	29,57 (*)	19,53	151,4
Local calls, resp. 3/10 minutes	0,14 – 0,14	0,06 – 0,19	233,3 – 73,7
(Peak hours)	0,14 – 0,56	0,14 – 0,47	100 – 119,1
Trunk calls, resp. 3/10 minutes	1,12 – 3,37	0,35 – 1,16	320 – 290,5
Intra EC, resp. 3/10 minutes	1,80 – 6,00	1,29 – 4,31	139,5 – 139,2

(*) Social payments are provided to low-income customers

(24) Given that due to technical progress in the network, cost is increasingly less dependent on distance, cost orientation of tariffs means as a general rule that prices are adjusted such that revenues are rebalanced with costs, i.e.:

— connection and rental revenues cover fixed costs (plus a standard margin),

— local call revenues cover local call costs (plus a standard margin),

— trunk call revenues cover trunk calls (plus a standard margin),

— international call revenues cover international call costs (plus a standard margin).

Consequently telecommunications organizations must raise bi-monthly rental and local calls (or at least not decrease these charges) and reduce tariffs for long distance calls. Telecom Eireann has made some progress on rebalancing local charges, but needs additional time to decrease trunk and international charges.

(25) According to one comment (1), the overall level of the tariffs for the provision of telecommunications services is not relevant in assessing the extent to which tariff rebalancing has been achieved. But even using the methodology proposed in this comment, it still appears that in Denmark and the Netherlands, which decided to liberalize voice telephony in advance of 1 January 1998, imbalance between, on the one hand, rental and local call tariffs and, on the other hand, long distance and international calls is much further reduced than in Ireland.

(26) It is argued in the same comment that a high level of tariffs may indeed result from specific circumstances, such as a very low density of population which renders the provision of telecommunications services proportionately more expensive, when calculated *pro capita*. This might be the case. However, BT and MCL provide voice telephony from the UK to Ireland at prices which can be less than half those of Telecom Eireann (2). It is therefore reasonable to expect that if voice telephony were liberalized immediately, amongst others these companies would — at least in certain areas of Ireland — provide voice telephony at tariffs which are significantly lower (at least as regards trunk and international calls) than those of Telecom Eireann and thus either force the latter to reduce dramatically its tariffs in the relevant market segments which are the most profitable, or lose subscribers to the new entrants.

(27) The continuation of the gradual approach envisaged by Ireland for further tariff rebalancing seems therefore justified, in view of the rebalancing (bi-monthly rental and local charges) already achieved in 1993 and the firm commitments to complete the process by reducing trunk and international tariffs by the year 2000. Moreover, to accelerate the process of rebalancing tariffs would pose related political problems since, in this case, an increase in local communication tariffs would be necessary.

(b) Telephone density

(28) Telecom Eireann has achieved one of the fastest telephone penetration growths in the EU over the last five years. Today, Ireland nevertheless still has a

(1) Esat Telecom, p. 34, No 49.

(2) ITL, p. 8.

relatively low telephone penetration in comparison with most of the EU Member States. Some comments are rightly emphasizing that telephone penetration would improve as a result of competition. It may nevertheless be assumed that in a first stage new entrants in the market will concentrate mainly on high users to acquire sufficient profitability before focusing on new users. The argument of the Irish Government that enabling Telecom Eireann to pursue its development programmes to further improve telephone density will benefit the public seems therefore acceptable, even if the additional time given to Telecom Eireann will enable it to strengthen its position by improving its efficiency. This improvement will to a certain extent also benefit future new entrants since the more users connected to the public telecommunications networks, the more calls will be generated both for the incumbent and for the new entrants.

(29) In fact, the figures provided by the Irish Government also show that although telephone penetration is still low in Ireland, remaining demand is also limited. It appears in particular that waiting lists have dramatically decreased and this, notwithstanding State social welfare payments involving financial support for telephone rental and call charges for qualifying pensioners. Currently one in eight of all customers is already on such a scheme.

(30) The development programmes with a view to increasing penetration can therefore justify a continuation of the current exclusive privilege of Telecom Eireann for a limited duration. Taking into account a continuation of the past yearly increase of Telecom Eireann's density of 2 % during the coming years in 1999, Telecom Eireann would reach the penetration currently achieved in Member States, such as Italy or Belgium, which do not qualify for additional implementation periods. A longer additional implementation period would not be justified, even if the increase of Telecom Eireann's density slows down during the coming years. As mentioned, it is indeed possible that, due to a combination of amongst others demographic (1) and economic factors specific to Ireland, there is actually no demand for further telephone lines by households. Further market growth would then depend on the offer of new services, and the growth of business customers, which can best be accelerated by the introduction of competition and therefore would not justify any additional implementation period.

(c) Debt and cost structure

(31) Ireland emphasizes two liabilities of Telecom Eireann in a future competitive environment: its low productivity (one employee for 99 lines) and its level of debt (£ Irl 862 million at end of March 1995 giving a debt/equity ratio of 1,9). Between 1985 and 1995, Telecom Eireann had already significantly improved productivity, which is reflected in the reduction of its staff costs from 42 % of its turnover to 30 %. Staff numbers have been reduced from 18 000 to under 12 000. A low number of lines per employee seems, nevertheless, a necessary result of the low population density in Ireland. International comparisons show that operators in countries with low population density retain a smaller number of lines per employee even after competition is introduced and where digitalization is very advanced. The planned increase of telephone density over the next years will increase productivity expressed in numbers of lines per employee before 1999 up to the level currently achieved in Finland. Overstaffing is nevertheless a common feature of telecommunications organizations at the eve of their privatization. The Commission, however, considers that it could not justify any additional implementation period extending after 1 January 1999.

(32) As regards the debt structure, the figures provided by the Irish Government show that, since 1993, the financial situation of Telecom Eireann has improved significantly. The submission states Telecom Eireann's debt at the end of the financial year 1995/1996 as £ Irl 700 million giving a debt/equity ratio of 1,4. Moreover, Telecom Eireann will receive a total of £ Irl 220 million of the proceeds of the sale. £ Irl 150 million will be injected on closing and the balance (£ Irl 70 million) in approximately three years' time on exercise of the option by the strategic partners or public offering. The balance of the funds over and above this £ Irl 220 million will be used by the State to reduce its liability to the pension fund. This will enable Telecom Eireann to use its own resources to further reduce its debt until the end of 1998. At this date the debt/equity ratio of Telecom Eireann will thus not be out of line with those of operators in coun-

(1) Household size in Ireland is, according to the Irish request, 3,2 people, e.g. larger than in most other EU Member States. This reduces the potential for additional residential penetration.

tries which will open their market to competition, for example the debt/equity ratios of Deutsche Telekom and Belgacom in 1995 were (1) respectively 2,5 and 1,4. Consequently, the debt of Telecom Eireann could not justify an additional implementation period extending over 1998.

Effect on trade

(33) The aim of the postponement of the liberalization of voice telephony is to delay the entry of competing carriers in the voice telephony market. Moreover, as pointed out by a comment (2), this will affect trade since large international players including AT&T, BT, C&W, Global One/Sprint and France Telecom are already present or interested in Ireland. The emergence of alternative Irish carriers will also be delayed, which will eventually reduce its possibilities to expand outside Ireland, given that in the mean time new entrants will enjoy a two-year head start in the other Member States which will liberalize their markets by 1 January 1998.

(34) Although the granting of a derogation to Ireland would foreclose the telecommunications market in Ireland for two years, the negative effect on trade in the Community will be reduced due to:

— the limited size of the Irish telecommunications market in comparison to the Community market. One could expect indeed that on 1 January 1998, massive investments will mainly occur in the more developed Member States, such as Germany, the Netherlands and France where a higher return on investment might be expected,

— the duration of the derogation requested: the establishment of new public telephony operators requires a preparation of many months. The harm done to potential investors by an additional implementation period of 24 months will be limited if, in the mean time, they can already plan investments, so as to be ready to be operational in advance of 1 January 2000.

(35) Such effect will further be reduced in the following circumstances:

— Telecom Eireann is not expanding its operation in Member States which have liberalized their markets. If this were the case, the derogation enabling Telecom Eireann to maintain higher prices on its domestic market could be used not only to achieve the necessary adjustments but also to cross-subsidize operations in foreign markets. This would obviously distort competition at the expense of the incumbents and of other new entrants in the relevant Member States and would be against the Community interest. In this regard, any involvement of Telecom Eireann alongside its strategic partners PTT Telecom and Telia, or Unisource, in investments outside Ireland should, during the additional time period, be achieved in a fully transparent way and at market conditions. This should be reviewed by an independent auditor,

— the Irish Government publishes the licensing conditions one year in advance of full liberalization and ensures that Telecom Eireann publishes in parallel the interconnection conditions to be applied to new entrants,

— the additional implementation period regarding the use of own/alternative infrastructures is reduced as mentioned below. This would allow potential new entrants to operate and provide already liberalized telecommunications services on such networks in preparation for full competition, and in particular to provide voice services to corporate networks and closed user groups via such networks,

— the Irish Government takes all measures necessary to ensure that Telecom Eireann does not make use of its additional statutory protection to extend its dominant position in neighbouring or ancillary markets such as the public payphone market or the cable TV industry,

— without prejudice to the impact assessment provided for in the third paragraph of Article 2 of Commission Directive 95/51/EC (3), the Irish Government ensures, in the short term, that Cablelink is managed at arm's length of Telecom Eireann as long as Telecom Eireann remains the controlling shareholder.

Conclusion

(36) On the basis of the above assessment, the Commission considers that the negative effects on trade which would result from the granting to Ireland of an additional implementation period until 1 January 2000 as regards the abolition of the exclusive rights currently granted to Telecom Eireann for the provision of voice telephony and public network infrastructure instead of 1 January 1998, pursuant to Article 2 (2) of Directive 90/388/EEC, are not incompatible with the interest of the Community, in so far as the circumstances set out above are fulfilled.

(1) Cable & Wireless, p. 4.
(2) Esat Telecom, p. 13.

(3) OJ No L 256, 26. 10. 1995, p. 49.

II. Request for an additional implementation period regarding the lifting of restrictions on the provision of already liberalized telecommunications services on own and alternative infrastructure

Assessment of the impact of the immediate lifting of restrictions

(37) Ireland states that the lifting of restrictions on the use of alternative infrastructure before 1 July 1999 would enable providers of liberalized services to offer customers speech calls and connect such calls with the public network in both directions. This practice would be indistinguishable from the provision of voice telephony, apart from minor differences such as numbering and interconnection charges. As a result Ireland fears that there would be effective competition for voice telephony, despite the voice telephony derogation.

(38) Ireland adds that such lifting of constraints may also cause Telecom Eireann losses of revenue contribution from leased lines. While not all such revenue would be lost, there would be a substantial impact in that those consumers remaining as Telecom Eireann's customers would expect lower prices. Ireland nevertheless acknowledges the need to advance the lifting of restrictions on alternative networks in order to ensure that future competitors can build and fund networks in sufficient time to allow for full competition by the time voice telephony is liberalized. Given the small size of Ireland and the concentrated nature of most profitable customers, Ireland considers that the liberalization of alternative infrastructures six months before voice telephony would not compromise the ability of new entrants to compete fully from 1 January 2000.

(39) Comments state that service-providers would be particularly affected if they were not allowed, as the second mobile operator is, to use alternative infrastructures to save significant leased-lines costs for the provision of their services. Conversely, the second GSM operator mentions that, given that it is not allowed to convey third-party traffic, the decision to establish a fully separate backbone network involves high sunk costs and substantial risks given that excess capacity cannot be leased to other providers of already liberalized services. If Ireland was granted the right to postpone the liberalization of alternative infrastructures, this would therefore also affect competition on the GSM markets.

(40) The argument that restrictions must be maintained on the provision of alternative network capacity for the provision of alternative infrastructures to prevent authorized providers of liberalized services to circumvent the voice telephony monopoly cannot be accepted. As a matter of fact, as the Commission stated in its Communication on the status and the implementation of Directive 90/388/EEC on competition in the markets for telecommunications services, such 'unofficial' by pass will not occur to any significant extent without being noticed by the relevant Member State. A service which is offered to the public must be, *ipso facto*, public knowledge.

In particular, given that any commercial offer would normally involve advertising (of the services available) or, at the very least, issuing price lists, contracts and invoices, such by pass should be evident from an early stage.

New operators generally have shown that they will respect the voice telephony monopoly. Service-providers do not want to take the risk of having their authorization revoked and not being able to fulfil their obligations towards their clients. Many service-providers did therefore, before starting their services, investigate first the matter with the national regulatory authorities or with the Commission services.

(41) The use of alternative networks for the provision of already liberalized services will not alter this state of affairs. Alternative networks must indeed be considered to be public switched telecommunications networks within the meaning of Directive 90/388/EEC, where they are upgraded to switched networks providing voice to any interested subscriber and are interconnected with the public switched telephone network of the telecommunications organizations. The termination points of such alternative networks should likewise be considered as termination points of public switched networks and voice provided to the public from or to such points would then become voice telephony, which according to Article 2 of that Directive can further be reserved to the telecommunications organization, in this case Telecom Eireann.

(42) Moreover, Ireland itself recognizes that by pass would be distinguishable from legal voice telephony, due to differences as regards numbering and interconnection charges. Since the amendment of Ireland's regulatory framework, and in particular the new independent regulatory authority, will only

be operational early next year, one could, however, not exclude that in the mean time, Ireland could face certain difficulties in the effective enforcement of the voice telephony monopoly. For this reason, an additional implementation period until the entry into force of this new regulatory framework, provided it is clearly delimited in time, could be justified.

(43) The second argument put forward by Ireland, i.e. that such lifting of constraints may also cause Telecom Eireann losses of revenue contribution from leased lines can also not be accepted. It is true that, under its exclusive privilege to provide network infrastructure, Telecom Eireann is enjoying guaranteed revenues from the provision of leased lines to end-users and providers of liberalized telecommunications services (except GSM mobile telephony, where the second operator prefers to establish its own links). However, as the Commission stated in its Green Paper on the liberalization of telecommunications infrastructure and cable television networks — part one — principles and timetable (COM(94) 440 final, 25.10.1994), Directive 92/44/EEC [1] requires in particular that leased lines must be offered on a cost-oriented basis. Given this obligation and given that Member States must comply with it, the opening of alternative supply is not expected to alter the market position of TO's in this area substantially.

(44) Although allowed in Directive 92/44/EEC, Ireland did not request any deferment in favour of Telecom Eireann for the implementation of the obligation of cost-orientation of leased lines. On the contrary, on 8 March 1996, Ireland informed the Commission pursuant to Article 4 of Directive 90/388/EEC that it had authorized Telecom Eireann to increase its leased lines tariffs as from 1 February 1996 as regards new circuits and to existing circuits at the next billing date after 31 March 1996. The justification given for this increase was that leased lines charges had not been adjusted for many years and that Telecom Eireann had been recording significant losses on its leased lines service. International comparisons show that Telecom Eireann's tariffs are, even after the increases, still less than the EU average (e.g. on 1 January 1996 monthly rental 50 km circuit: ECU 265 (EU average: ECU 380) and connection charge: ECU 489 in comparison with EU average of ECU 596 [2]). One can for this reason hardly expect that alternative network providers could offer much better tariffs, at least to the vast majority of customers of Telecom Eireann and that the latter would be forced to lower its prices substantially.

(45) It is true that charges for leased lines in Ireland are not yet fully rebalanced. A cost-based tariff proposal is being implemented on a phased basis and this business is loss-making overall. If an alternative infrastructure is available, Telecom Eireann would lose revenue to that alternative as customers would wish to diversify suppliers, thus increasing the loss on the business.

(46) Finally Ireland, while acknowledging the need to advance the lifting of restrictions on alternative networks in order to ensure that future competitors can build and fund networks in sufficient time to allow for full competition by the time voice telephony is liberalized, states that six months would suffice for this purpose. This argument is based on the small size of Ireland and the concentrated nature of the most profitable customers. As a matter of fact, since the main cable TV network in Ireland is controlled by Telecom Eireann, the ability of new entrants to compete fully from 1 January 2000 would be compromised in the absence of sufficient time to extend their network also in the 'local loop'.

Effect on trade

(47) As a consequence of its monopoly on the provision of public telecommunications infrastructures, Telecom Eireann is the sole supplier of leased lines and interconnection to providers of liberalized services. It therefore determines to a large extent the costs of its competitors in the liberalized services sector. This was illustrated *inter alia* by the abovementioned increase in leased lines tariffs in early 1996, which rendered the provision of certain liberalized services uneconomic. This potential knowledge by Telecom Eireann of the costs of its competitors will increasingly affect trade, since the Irish public operator will develop even further its own offer of liberalized services with the technical support, expert and managerial assistance, software and systems improvements provided by its strategic partners PTT Telecom and Telia, backed by their Unisource global partnership, which are among the world leaders in terms of quality and efficiency. Whereas Telecom Eireann could use its own infrastructure to provide

[1] OJ No L 165, 19. 6. 1992, p. 27.
[2] Data computed by Tarifica for the Commission — DG XIII.

such services, competitors providing global liberalized services, such as VPN or voice services to closed user groups, would thus be obliged to rely only on circuits leased from the operator they want to compete with. This situation would be aggravated by the fact that according to comments (1), although Telecom Eireann complies fully with current regulations under both EU and Irish law on this matter, currently it does not produce accounts to a sufficient degree of transparency to allow for adequate separation of its activities in the monopoly sector from those in the liberalized sector and there is no structural separation to prevent staff in the infrastructure side of Telecom Eireann passing information to colleagues selling liberalized services.

Conclusion

(48) There are less restrictive regulatory means to prevent bypass of the voice telephony monopoly until 1 January 2000 and such means could be implemented by the telecommunications regulatory authority which Ireland will set up, with appropriate arrangements for industry funding, during the first quarter of 1997. The granting of an additional implementation period which would extend after that date does not therefore seem justified.

(49) Moreover, since Telecom Eireann will be able to provide on its own network worldwide interconnection to Irish industry and business, backed by the resources of its strategic partners and their global interconnection via Unisource and Uniworld, such additional implementation period would distort competition in global services from and to Ireland at the expense of the other global alliances.

(50) For these reasons, the Commission considers that the negative effects on trade which would result from the granting to Ireland of an additional implementation period regarding the liberalization of alternative infrastructure will be incompatible with the interest of the Community once the new regulatory framework is in force and at the latest on 1 July 1997.

III. Request for an additional implementation period regarding the lifting of restrictions on the direct interconnection of mobile telecommunications networks

Assessment of the impact of the immediate lifting of restrictions

(51) Ireland considers an additional implementation period as regards the direct international interconnection of mobile networks necessary to avoid undermining the provision of national and international voice telephony.

(52) Ireland states that if mobile networks were permitted to interconnect freely, it would be possible for a GSM operator in Ireland to connect to a fixed network or mobile network in another State and to obtain delivery prices for international calls close to the local interconnection rates applying in that country. Similarly, the Irish GSM operator could offer to deliver incoming international traffic at prices closely related to national interconnect rates in Ireland. The GSM operator could therefore offer very low tariffs to customers and could expect to obtain a substantial share of incoming international traffic. The public network would, as a result, lose a substantial part of the customer revenue and a large part of the incoming settlements, offset only partially by increased national interconnect income.

(53) Ireland acknowledges that to a certain extent, this situation already exists for medium and large companies, as resellers active in the Irish market already bypass the settlement regime. Ireland expects that the grant of full interconnection rights to mobile operators would immediately expose another large segment of international revenue to competition.

(54) Comments emphasize that the mobile telephone market is a new growing market and that the restrictions on international connection will therefore affect additional mobile traffic, generated by the mobile operators, from which Telecom Eireann already derives additional revenues from call-completion of calls originated from mobile phones. Moreover, the second GSM operator argued that in the absence of the right to interconnect directly with foreign networks, it is unrealistic to suggest that Telecom Eireann could offer acceptable international interconnect rates without recourse to the available judicial remedies.

(55) In practice, two issues must be considered: (i) the level of substitutability between mobile and fixed telephone services and (ii) the risk of bypass of the voice telephony monopoly via services consisting in calling a mobile number to be switched to a foreign fixed-voice telephony network.

(1) See in particular, Cable & Wireless, p. 2.

(56) As regards the latter risk, the argument cannot be taken into account, since there are other regulatory means to deal with such by pass of the legal privilege of Telecom Eireann (see Commission communication 95/C275/02).

(57) As regards the substitutability between fixed and mobile telephone services, the Commission has, in recent cases, discovered that such substitutability is not substantial, given that these services respond to different categories of demand, which are reflected *inter alia* in the higher tariffs of GSM-mobile telephony in comparison with voice telephony.

(58) In Ireland, the main market-segment for GSM-operators is the segment of domestic calls. Moreover it appears that at least half the costs of mobile operators in handling calls are traffic-insensitive costs. It can therefore not be excluded that a mobile operator, in order to increase overall turnover, usage of its network and market share would allot a higher share of these traffic-insensitive costs to domestic calls and offer international tariffs which are at the same level as the current international tariffs of Telecom Eireann. As stressed in one comment (1), BT and MCL provide voice telephony from the UK to Ireland at prices which can be less than half those of Telecom Eireann. By directly interconnecting with the networks of those British public telecommunications operators, Irish GSM operators could offer similar rates to Telecom Eireann without selling below cost. Moreover, the offer of international mobile calls at the fixed-network tariffs would be a powerful marketing tool to convince new subscribers to acquire and use GSM mobile telephony.

(59) On the basis of the current differences between tariffs for calls from Ireland to the UK and for calls from the UK to Ireland, the risk of substitution of fixed international telephone calls by GSM calls can thus not be ruled out. This would affect one of two voice-telephony market segments which are currently the most profitable for Telecom Eireann and could reduce its overall profitability to such an extent that it was no longer able to provide a universal service under economically acceptable conditions.

(60) This risk will however decrease as Telecom Eireann reduces its international tariffs. Although the argument of the Irish Government can thus be accepted, the additional implementation period requested is too long in view of the justifications provided. Taking into account the planned tariff rebalancing, the threat of substitution of fixed by GSM calls might only justify a derogation until at the latest the end of 1998, which is the date at which international tariffs of Telecom Eireann must be sufficiently reduced to rule out substitution by GSM-mobile calls. A liberalization of international interconnection of mobile networks at least one year in advance of the full liberalization of voice telephony will furthermore provide a strong incentive in favour of timely implementation of the gradual rebalancing envisaged.

Effect on trade

(61) The effects of the delayed liberalization of direct international interconnection of mobile operators will fall on the second GSM-operator and provided they are licensed in time, the future DCS-1800-operators. The possibility to interconnect directly with other operators would be a significant factor in facilitating their establishment and development in the Irish market. Moreover, the additional implementation period will also affect foreign carriers, since it will make more cumbersome and costly the handing-over of traffic for call termination by the Irish mobile operators.

(62) This negative effect on trade between Member States would nevertheless be reduced if the Irish Government were to ensure that Telecom Eireann provides specific and volume discounts, to be applied to mobile operators, which would, as in other Member States, take into account the fact that contrary to volume discounts granted to large users, mobile operators are generating new traffic.

Conclusion

(63) The immediate lifting of restrictions on the direct interconnection of mobile telecommunications networks pursuant to Article 3d of Directive 90/388/EEC as inserted by Directive 96/2/EC with regard to mobile and personal communications would put at risk the substantial international traffic revenues of Telecom Eireann and threaten its ability to further ensure the universal provision of voice telephony in Ireland in economically acceptable conditions. The effect on trade could, moreover be limited if tariff reductions, similar to those in other Member States, are provided in interconnect agreements entered into between Telecom Eireann and the mobile operators. The Commis-

(1) ITL, p. 8.

sion therefore considers that the limited negative effects on trade which would result from the granting to Ireland of an additional implementation period until 31 December 1998 at the latest as regards the lifting of restrictions on direct interconnection of mobile networks with foreign networks, is balanced by the certainty that universal service will not be affected and it is therefore for the time being not incompatible with the interest of the Community,

HAS ADOPTED THIS DECISION:

Article 1

Ireland may postpone until 1 January 2000 the abolition of the exclusive rights currently granted to Telecom Eireann as regards the provision of voice telephony and the establishment and provision of public telecommunications networks provided that the conditions set out in Article 4 are implemented according to the timetable laid down therein.

Article 2

Ireland may postpone until 1 January 1999 the lifting of restrictions on the direct interconnection of mobile telecommunications networks with foreign networks provided that the conditions set out in Article 4 are implemented according to the timetable laid down therein.

Article 3

Ireland may postpone until 1 July 1997 the lifting of restrictions on the provision of already liberalized telecommunications services on:

(a) networks established by the provider of the telecommunications service,

(b) infrastructures provided by third parties, and

(c) the sharing of networks, other facilities and sites.

Article 4

By way of derogation from the deadlines set out for this purpose in Directive 90/388/EEC, as amended by Directive 96/19/EC, the Irish Government shall inform the Commission of the implementation in national law of the following obligations according to the following timetable:

— no later than 1 April 1997 instead of 1 July 1996: publication of all measures necessary to lift restrictions on the provision of already liberalized telecommunications services on:

(a) networks established by the provider of the telecommunications service,

(b) infrastructures provided by third parties, and

(c) the sharing of networks, other facilities and sites,

— before 1 April 1998: publication of proposed legislative changes to implement full competition and remove all restrictions by 1 January 2000, including proposals for the funding of universal services,

— before 1 November 1998: adoption of those legislative changes,

— no later than 1 January 1999 instead of 1 January 1997: notification to the Commission of draft licences for voice telephony and/or underlying network providers,

— no later than 1 April 1999 instead of 1 July 1997: publication of licensing conditions for all services and of interconnection charges as appropriate in accordance in both cases with relevant EU Directives,

— no later than 1 November 1999: award of licences and amendment of existing licences to enable competitive provision of voice telephony and unrestricted interconnection of mobile networks from 1 January 2000 instead of 1 January 1998.

The Irish Government shall moreover inform the Commission at the latest three months after notification of this Decision of the measures taken to:

— achieve transparency as regards any involvement of Telecom Eireann alongside its strategic partners PTT Telecom and Telia, or Unisource, in investments outside Ireland during the additional time period granted pursuant to Article 1,

— ensure that Telecom Eireann does not make use of its additional statutory protection to extend its dominant position in the public payphone market or the cable TV industry and in the short term ensure that Cablelink is managed at arm's length of Telecom Eireann as long as Telecom Eireann remains the controlling shareholder.

Article 5

This Decision is addressed to Ireland.

Done at Brussels, 27 November 1996.

For the Commission

Karel VAN MIERT

Member of the Commission

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 18 December 1996

concerning the conditions imposed on the second operator of GSM radiotelephony services in Spain

(Only the Spanish text is authentic)

(97/181/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 90 (3) thereof,

Having given the Spanish authorities, by letter of 23 April 1996, and Telefónica de España SA, by letter of 30 May 1996, notice to submit their comments on the Commission's objections to the initial payment imposed on Airtel Móvil SA,

Whereas:

THE FACTS

The national measure in question

(1) The Spanish Government has imposed an initial payment for the grant of a second concession for the establishment and operation on Spanish territory of a network for the provision of a public mobile radiotelephony service using the pan-European digital system, GSM (global system for mobile communications) ('GSM service').

That requirement is laid down in Articles 9 (4) and Article 16 of the tendering criteria which were approved by Ministerial Decision (*Orden*) of 26 September 1994 [1]. That requirement does not apply to the public operator, Telefónica de España.

The undertaking and services concerned

(2) Telefónica de España is a Spanish public undertaking as defined in Article 2 of Commission Directive 80/723/EEC of 25 June 1980 concerning the transparency of financial relations between Member States and public undertakings [2].

The Spanish Government has decisive influence over Telefónica de España for three reasons:

(i) The Spanish State is the single largest shareholder in Telefónica de España. When the Commission opened this case, the Spanish State held 31,8 % of the issued share capital. It currently holds 21,16 % of the issued share capital. The remaining shares are divided between approximately 300 000 shareholders.

(ii) The Spanish Government has the right to appoint a representative with the right of veto over the decisions of the board of directors of Telefónica de España. Under Article 2 (9) of Royal Decree Law (*Real Decreto-Ley*) 6/1996 of 7 June 1996 [3], this post will only be abolished from 1 January 1998.

[1] Boletín Oficial del Estado (BOE) No 231, 27. 9. 1994, p. 29778.
[2] OJ No L 195, 29. 7. 1980, p. 35.
[3] BOE No 139, 8. 6. 1996, p. 18 975.

(iii) By virtue of the concession contract of 26 December 1991 ('Concession Contract') (1), the Spanish Government has the right directly to appoint 25 % of the members of the board of directors of Telefónica de España. As a result of this and the fact that the Spanish State is the largest shareholder, the Spanish Government appointed 18 out of the 25 current members of the board of directors including the president.

The shares of Telefónica de España are listed on the Spanish stock exchanges as well as in New York, London, Frankfurt and Tokyo. In terms of its turnover (PTA 1 740 500 million in 1995) and its reults (PTA 133 200 million in 1995), Telefónica de España is among the ten largest telecommunications operators in the world. It has a workforce of 69 570 employees and over 16 million subscribers.

Telefónica de España thus constitutes a public undertaking or an undertaking to which Member States grant special or exclusive rights within the meaning of Article 90 (1) of the EC Treaty.

(3) Telefónica de España provides 'transmission', 'final' and 'value added' telecommunications services throughout Spain by virtue of Telecommunications Act (*Ley de Ordenación de las Telecomunicaciones*) 31/1987 of 18 December 1987 (2) ('LOT') and the Concession Contract. Telefónica de España has been the monopoly provider of some of these services (such as voice telephony services falling within the meaning of Article 1 of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (3)), whereas there is limited competition for other services (such as GSM services). Telefónica de España has been also granted special rights together with Ente Publico Retevisión ('Retevisión') and the Organismo Autónomo de Correos y Telégrafos, both public undertakings, to provide transmission capacity for telecommunication services.

On 7 June 1996, by Royal Decree Law 6/1996 the monopoly on voice telephony and the oligopoly on corresponding infrastructures were formally abolished. The Spanish Government is now able to grant concessions to new national or regional operators. Retevisión will transfer its telecommunication assets to a new entity which has been licensed to provide full telecommunications services and has been mandated to sell 80 % of its shares in a restricted tender. However, it is not expected that the new entity will be operational before mid-1997.

Under the LOT and its Concession Contract, Telefónica de España has been able to provide GSM services without having taken part in any tendering procedure. This is more fully described in point 7 below. Telefónica de España has been authorized by the Spanish Government to transfer its licence for the provision of mobile telephone services — analogue and GSM — to Telefónica Servicios Móviles, S.A. ('Telefónica Servicios Móviles'), a wholly owned subsidiary of Telefónica de España. All references in this Decision are to Telefónica de España because the licence to operate GSM radiotelephony services was originally granted to this company.

(4) Cellular digital mobile telephony complying with the GSM standad has been developed recently in Europe and enables subscribers both to send and receive calls anywhere in the Community, as well as in some other European countries. This system, which uses digital technology, a code and a subscriber identity module card, has greater potential than traditional analogue radiotelephony systems. Digital technology provides higher quality, high-speed data transmission and encryption enhancing the confidentiality of communications and is more economical in its use of frequencies than analogue systems. Furthermore, the GSM system is based on common Community standards regarding common frequency bands approved at Community level and, unlike analogue systems which are often incompatible from one Member State to another, has the makings of one of the pan-European services, whose promotion is under Council Recommendation 87/371/EEC of 25 June 1987 (4), one of the main objectives of the European Union's policy on telecommunications. Lastly, the emerging market for GSM services is particularly dynamic: according to some studies, the number of users in Western Europe could grow from a little over 1 million in 1993 to 15-20 million in the year 2000 (5).

(5) The Council has adopted Directive 87/372/EEC of 25 June 1987 on the frequency bands to be reserved for the coordinated introduction of public

(1) BOE No 20, 23. 1. 1992, p. 2 132.
(2) BOE No 303, 19. 12. 1987, amended, *inter alia*, by Act 32/1992 of 3 December 1992.
(3) OJ No L 192, 24. 7. 1990, p. 10.
(4) OJ No L 196, 17. 7. 1987, p. 81.
(5) 'Scenario Mobile Communications up to 2010 — study on forecast developments and future trends in technical development and commercial provision up to the year 2010', Eutelis Consult, October 1993.

pan-European cellular digital land-based mobile communications in the Community (1) which reserves the 890-915 and 935-960 MHz frequency bands for the introduction of a common system of digital GSM radiotelephony. These common frequency bands allow several competing operators to coexist. The GSM service began operating commercially in the Community in late 1992; since then, every Member State except Luxembourg has granted licences to two operators, while Luxembourg has announced that it will follow the same path. Sweden has granted three GSM licences.

The European Conference of Postal and Telecommunications Administrations (CEPT), the forum for the national regulatory authorities of 36 countries (including Spain), has recommended that competition between operators of GSM services be actively encouraged and the regulatory barriers which are restricting such competition be abolished (2).

(6) Germany, Greece, France, the Netherlands and the United Kingdom have authorized or decided to authorize a third operator to offer cellular digital radiotelephony services, on a higher frequency band, on the basis of the DCS 1800 specifications. Under Article 2 of Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications (3), Member States must grant licences for operating mobile systems according to the DCS 1800 standard by 1 January 1998 at the latest. Further, Member States may not restrict the combination of mobile technologies or systems and in all circumstances must take account of the requirement to ensure effective competition between the operators competing in the relevant markets.

Background

(7) Following amendments to the LOT by Act 32/1992 of 3 December 1992, the market for the provision of GSM services was liberalized as from 31 December 1993. Therefore, the provision of GSM services is no longer regarded as a 'final' service for which special and exclusive rights can be granted. GSM services are now considered as 'value added' services which should be provided in competition.

Following this amendment to the LOT, the Spanish Government adopted Royal Decree 1486/1994 of 1 July 1994 (4) ('the Royal Decree'), which approves the technical regulation (*Reglamento Técnico*) for the provision of 'value added' mobile automatic telecommunication services. Article 2 of the technical regulation (Annex to the Royal Decree) states that GSM services are to be provided in competition. Article 4 of the technical regulation states that GSM services are to be provided by Telefónica de España and one competing licensee. The first Transitional Provision of the technical regulation indicates the procedure for Telefónica de España to obtain a licence without going through a tendering procedure.

The Royal Decree does not expressly provide for an initial payment for the GSM licence. However, Article 4, fourth paragraph, subparagraph (a), of the technical regulation states that one of the factors to be taken into account when assessing the application of the second operator for a licence is the 'maximization of financial contributions'.

(8) By Ministerial Decision of 26 September 1994 (5) the Spanish Government adopted the tendering criteria and opened the tendering procedure for a second operator's licence for the provision of GSM services. The second operator's concession is for 15 years with an extension envisaged for five years thereafter. The other terms of the concession are listed in the tendering criteria.

Articles 9 and 16 of the tendering criteria provided for a minimum initial payment to the Treasury of PTA 50 095 billion. Some indication of the relative weight that would be attached to the different tendering criteria was given. The effect of the last paragraph of Article 16 was that offers of less than PTA 50 000 million would automatically be eliminated.

The Ministry of Public Works, Transport and Environment awarded the second operator's concession by Ministerial Decision of 29 December 1994 (6) to Airtel Móvil SA (at that time known as 'Alianza Internacional de Redes Telefónicas, SA') in spite of the fact that the initial payment of PTA 85 000 million was not the highest initial payment offered (the highest initial payment offer being PTA 89 000 million).

(1) OJ No L 196, 17. 7. 1987, p. 85.
(2) *Review of the Requirements for the Future Harmonization of Regulatory Policy Regarding Mobile Communication Services*, CEPT/ECTRA (92) 57, p. 17.
(3) OJ No L 20, 26. 1. 1996, p. 59.
(4) BOE No 168, 15. 7. 1994, p. 22 672.
(5) BOE No 231, 27. 9. 1994, p. 29 779.
(6) BOE No 4, 5. 1. 1995, p. 464.

In accordance with Article 9 of the tendering criteria, Airtel Móvil had to make the initial payment when it formally obtained the licence by signing the concession contract on 3 February 1995. On the same day Telefónica de España was simultaneously granted a corresponding GSM licence without making any such payment.

(9) By letter of 6 February 1995 the Commission expressed its resevations about the procedure which had been adopted for the selection of a second operator which had included less favourable conditions for the second operator than for Telefónica de España.

By letter of 20 April 1995 the Spanish Government replied to the Commission setting out the circumstances of the licensing process which according to the Spanish Government compensated for the initial payment made by Airtel Móvil.

On 1 July 1995 Telefónica de España began operating its GSM services commercially.

By its letter of 18 July 1995 the Commission asked the Spanish Government for clarification on the right to use alternative telecommunication networks, on the right to interconnect directly with leased line networks and on the methodology that would be used to revise the interconnection tariffs with the fixed network. This was so that the Commission could assess whether those factors would give the second operator benefits which would outweigh the competitive disadvantage established by the imposition of the initial payment.

On 3 October 1995, Airtel Móvil began its operations.

By its letter of 27 November 1995 the Spanish Government replied to the Commission stating that the second operator could establish its own infrastructure, and also use Retevisión and Correos y Telégrafos infrastructure as an alternative to the Telefónica de España network, that no request for direct interconnection had been received by the Spanish Government and that the issue of tariff reductions would be examined in 1996.

At a meeting on 16 January 1996 between the Spanish Government and the Commission, the Spanish Government stated that it would be impossible to redress the imbalance between Telefónica de España and the second operator by imposing a similar initial payment fee of PTA 85 000 million on Telefónica de España. The Spanish Government proposed that a possible solution would be to reduce the interconnection tariffs over the 15-year period of the concession. The reduction would apply to both Telefónica de España and to the second operator. It stated that this would be finalized in September 1996 and would amount to a 25 % reduction in these tariffs.

The Commission remained of the view that this proposal would not affect the imbalance between the two operators.

By letter of 23 April 1996 the Commission gave formal notice to the Spanish Government either:

(i) to reimburse the initial payment to the second operator or adopt other corrective measures; or

(ii) to submit its comments on the Commission's arguments.

By letter of 30 May 1996 the Commission asked Telefónica de España for observations on its letter of 23 April 1996 to the Spanish Government. A copy of the letter of formal notice of 23 April 1996 was enclosed.

At a meeting on 28 April 1996 between the Spanish Government and the Commission, the Spanish Government proposed that the imbalance between Telefónica de España and the second operator could be corrected if Telefónica de España transferred the cost of operating the 'TRAC' project ('Tecnología Rural de Acceso Celular' or Cellular Rural Access Technology) to its mobile telephone branch, Telefónica Servicios Móviles. Under that service, Telefónica de España charges customers in sparsely populated upland regions fixed telephony rates for connections to the public fixed telephone network using mobile analog technology and infrastructure. The Commission investigated that proposal further and, by letters of 29 April 1996 and 10 May 1996 requested further information to complete its assessment of the proposal. Having received no reply to either of its letters, the Commission sent a reminder on 3 June 1996. By its letter of 7 June 1996, the Spanish Government provided some of the information requested. However, the information provided did not contain sufficient data on the real cost of the TRAC system to Telefónica Servicios Móviles. Consequently, the Commission could not assess the extent to which that proposal would redress the balance between the two GSM operators.

At a meeting with the Spanish Government on 9 July 1996, the Commission emphasized that the matter had not been resolved and that the Spanish

Government should put forward a new proposal. To date, no reply has been received by the Commission to its letter of formal notice of 23 April 1996, no observations have been submitted by Telefónica de España on the letter of formal notice of 23 April 1996 and no further proposals have been made by the Spanish Government.

THE COMMISSION'S ASSESSMENT

Article 90 (1)

(10) Article 90 (1) provides that, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States must neither enact nor maintain in force any measure contrary to the rules contained in the Treaty, in particular those relating to competition.

Telefónica de España is a public undertaking which has been granted exclusive rights to operate the fixed telecommunications network and offer voice telephony and mobile analog radiotelephony services. The Concession Contract also grants Telefónica de España the right to operate a GSM radiotelephony network, which qualifies as a special right to the extent that this operator was designated otherwise than according to objective and non-discriminatory criteria.

The imposition of the initial payment on the second operator is a State measure within the meaning of Article 90 (1).

Article 86

The relevant market

(11) The relevant market is that for cellular digital mobile radiotelephony services. It should be distinguished from the market in fixed voice telephony and from the market for all other mobile telephone communications services.

(12) The Commission has defined the market in voice telephony in Directive 90/388/EEC. The Directive draws a distinction between 'services whose provision consists wholly or partly in the transmission and routing of signals on the public telecommunications network' and mobile radiotelephony services, which are excluded from its scope.

(13) Voice telephony within the meaning of that Directive is the principal service provided on the fixed public network, that is between given network termination points. These termination points are defined as 'all physical connections and their technical access specifications'. In mobile communications, on the other hand, the termination point is located at the radio interface between the base station of the mobile network and the mobile station, which means that there is no physical termination point. The definition of voice telephony services in Article 1 of the Directive therefore does not apply to mobile telephony services.

(14) According to the case-law of the Court of Justice of the European Communities [1], for a product to be regarded as forming a market which is sufficiently differentiated from other markets, it must be possible for it to be singled out by such special features distinguishing it from other products that it is only to a limited extent interchangeable with them and is only exposed to their competition in a way that is not significant.

Clearly, there is very little interchangeability between mobile radiotelephony and telephony using the fixed network: users taking out a subscription for a carphone or portable telephone do not normally cancel their previous subscription for a telephone installed at their home or workplace. Therefore, mobile radiotelephony is indeed a new, additional service, not a substitute for traditional telephony. This distinction is also reflected in a significant price differential.

Admittedly, wider dissemination of mobile radiotelephony might ultimately lead to a single telecommunications system serving markets that are for the time being separate. However, the conditions on which Article 86 is to apply must be assessed on the basis of present demand and not on developments that could take place at some unspecified time in the future.

(15) It having been established, for the above reasons, that mobile radiotelephony should not be regarded as forming part of the market in voice telephony services offered using the fixed network, it remains to be seen whether, and to what extent, there might be grounds for distinguishing between the cellular mobile radiotelephony services based on the GSM standard which are the subject of this Decision (in Spain given the brandname *Movistar* by Telefónica de España) and cellular radiotelephony services using analogue technology (in Spain given the brandname *Moviline* by Telefónica de España).

The Commission notes that the GSM system of cellular mobile radiotelephony is more than just a technical refinement of the earlier analog techno-

[1] Case 27/76, *United Brands v. Commission*, [1978] ECR 207.

logy. In addition to the advantages offered by GSM in terms of the quality of voice reproduction and more efficient use of the available spectrum (thus accommodating substantially more users on a given frequency allocation), this service provides new facilities that cater for the needs of only some users of mobile radiotelephony:

(i) based as it is on a Community standard, GSM can become a pan-European service. Under 'roaming' agreements between network operators, the system permits any user to make calls from his phone outside the national territory of the operator with which he has taken out a subscription; this facility is available throughout the territory of the parties to the GSM Memorandum of Understanding in Europe and other parts of the world. Some users who, for business purposes, use mobile radiotelephony services only within the country or within a particular region, are not interested in this new feature. For others, however, this may be a reason for deciding to subscribe,

(ii) in addition to voice transmission, the GSM service can be used to transmit large quantities of data; again, this feature meets the specific needs of only some of the existing or potential customers for mobile radiotelephony services,

(iii) the digital coding of messages means that a far greater degree of security can be achieved than via the analogue system, again an advantage of interest to only some users (particularly business customers),

(iv) digital technology makes it possible to offer a whole range of advanced telecommunications services which are not available (or which can be made so only at considerably higher cost) via an analogue network. These include sophisticated call-line identification, voice mail (including short message services ('SMS')) and call-security services.

In view of the above, the simple replacement of analogue radiotelephony by the GSM system is not envisaged, in the short term. On the contrary, it is likely that, even if there is a discernible drift of customers from one to the other, the two systems will continue to exist in parallel for several years to come [1], meeting largely different needs. It has been found that, even in countries where the GSM system is fully operational, some operators are continuing to invest in the analogue network. These factors draw a distinction between the GSM and analogue markets.

(16) On the basis of the abovementioned considerations and the current circumstances, and taking into account the possible evolution of the market, GSM radiotelephony services should therefore probably be regarded as also constituting a separate market from the market for analogue mobile telephony.

In any event, the conclusions of the legal analysis would not be different, even if analogue mobile telephony and GSM constituted two segments of the same market. As will be seen below (paragraph 21), this would only imply a slightly different formulation of the first hypothesis of abuse.

(17) In accordance with the case-law of the Court of Justice, this market, which currently extends over the whole of Spain, is a substantial part of the common market.

The dominant position

(18) In accordance with the case-law of the Court of Justice, an undertaking which has a legal monopoly in the provision of certain services may occupy a dominant position within the meaning of Article 86 of the Treaty [2]. This applies in the case of Telefónica de España and its wholly owned subsidiary, Telefónica Servicios Móviles, which until recently were the only undertakings legally able to offer the telecommunications networks for the public, voice telephony and analog radiotelephony in Spain. These are therefore three markets in which they enjoy a dominant position. As stated above, the recent authorization granted to Retevisión to operate in the market for voice telephony and underlying infrastructures will not have any significant impact on the market share enjoyed by Telefónica de España for some time.

The abuse of a dominant position

(19) The Court of Justice has ruled that 'a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators' [3].

Such equality of opportunity is particularly important for new entrants to a market in which a dominant operator on a related but separate market is in the course of establishing itself, like Telefónica de España and its subsidiary, Telefónica Servicios Móviles.

[1] Ministerial Decision of 13 March 1995, BOE No 101, 28. 4. 1995, p. 12 573.

[2] Case 311/84, *Centre belge d'études de marché - Telemarketing (CBEM) v. Compagnie luxembourgeoise de télédiffusion and Information publicité Benelux*, [1985] ECR 3261.

[3] Case C-202/88, *France v. Commission*, [1991] ECR I-1223, paragraph 51, p. 1271.

(20) Telefónica de España already enjoys the following major advantanges for acquiring a dominant share of the market in GSM radiotelephony:

(i) a head start: it began developing its network before the second operator and can therefore offer better geographical cover; it began its service on 1 July 1995 while the second operator began its services on 3 October 1995;

(ii) potential customers: Telefónica de España's analog radiotelephony service, Moviline, had 1 235 690 subscribers in October 1996 and is acquiring 10 000 to 20 000 new subscribers each month;

existing subscribers to Moviline, the analog service, may be seen as a potential customer base for Movistar, the GSM service;

(iii) an existing distribution network: the network is known to the public, since Telefónica de España can market its GSM service on a shared basis with its Moviline distributors;

(iv) specific information: through its experience with Moviline, it has specific informatin on the calling habits of Spanish subscribers, by consumer categories and region. Moreover, since it also enjoys a dominant position in the supply of fixed links for the networks of GSM operators, it will continue to obtain important information on traffic flows. In reality there is currently no realistic alternative for the second operator other than the Telefónica de España network;

(v) economies of scale for infrastructure: Telefónica de España was until June 1996 the sole licensee of fixed voice telephony services and is currently the sole operator active in that market. Telefónica de España was also until 3 October 1995 the sole operator of mobile telephony. As a result of this, Telefónica de España has had sites and aerials available for establishing its GSM network which are not available to its competitor. In addition, certain autonomous communities subsidise the development of the analog radiotelephony network in those areas where there is an insufficient wire network (via the TRAC-project).

Contrastingly, the second operator is, as described, operating under more onerous constraints than Telefónica de España as a result of the initial payment mentioned above.

If Telefónica de España extended its dominant position on the market in wire telephony or analog mobile telephony into the market in GSM radiotelephony by increasing the costs of its rival (for example by imposing interconnection charges which were not justified by the costs involved), that would infringe Article 86. The same analysis would apply if there is one market for all mobile radiotelephony services and Telefónica de España strengthened its position in that market in the same way.

(21) Under Article 90 (1) of the EC Treaty, Spain must refrain from enacting measures which would, by increasing the costs of access of the sole rival of a public undertaking on a market newly opened to competition, significantly distort this competition. Given the additional financial burden imposed on its only competitor, Telefónica de España will have the choice between two commercial strategies of which each would be a violation of Article 90 (1) read in conjunction with Article 86. Those commercial strategies are: either (i) to extend or strengthen its dominant position; or (ii) to limit production, markets or technical development within the meaning of Article 86 (b).

(i) Extension [1] or strengthening of the dominant position of the public undertaking

The initial payment of PTA 85 000 million made by the second operator on this market will necessarily have to be covered from income. The second operator will therefore have difficulties in competing with the first operator through lower tariffs. The first operator, Telefónica de España, which does not have to make the same payment and which, moreover, is aware of the second operator's cost structure through its current dominance in the market for infrastructure, could be encouraged to extend its current dominant position on the fixed infrastructure market and the analogue mobile telephony market into the market in GSM radiotelephony by reducing its tariffs. If there is only one market for radiotelephony services, instead of an extension there would be a strengthening of Telefónica de España's dominant position in this market.

Moreover, Telefónica de España could use the PTA 85 000 million saving made to extend its distribution network, to price its services aggres-

[1] See, for example, the Judgment of the Court of Justice in Joined Cases C-271/90, C-281/90 and C-289/90, *Kingdom of Spain, Kingdom of Belgium and Italian Republic v. Commission*, [1992] ECR I-5833, paragraph 36.

sively in the GSM market where it faces competition from the second operator, to make special offers to potential subscribers and/or to conduct intensive advertising campaigns for example. The choice of this strategy induced by the State measure could threaten the economic viability of the second operator.

Thus, Telefónica de España is in a position where it could extend or strengthen its dominant position thanks to the competitive advantage provided by the distortion of the costs structure resulting from the initial payment. This renders the State measure contrary to Article 90 read in conjunction with Article 86.

(ii) Limitation of production, markets or of technical development within the meaning of Article 86 (b)

The need to finance PTA 85 000 million will delay the investments of the new entrant, which will have to use part of its initial capital to cover the initial payment, which will therefore not be available either for appropriate investment in the development of its network or for tariff reductions. The second operator was indeed obliged to increase its capital by some PTA 40 000 million in February 1996 in order to be able to follow its investment plan.

That might also encourage Telefónica de España to delay the development of the GSM radiotelephony network and to concentrate its efforts on the Moviline analog system. The Moviline system is more attractive since the bulk of the investments have already been amortized and it has better coverage.

The initial investment for establishing a GSM network in Spain amounts to about PTA 250 000 million. The initial payment, when added to the initial investment, therefore increases the second operator's need for financing by more than one-third. The fact that applicants for the second concession were aware of the future distortion of competition on the GSM market in Spain in favour of Telefónica de España does not affect the existence of an imbalance. Undertakings which wished to enter the market had no choice but to take this handicap into account in their business plan.

In the second hypothesis, Telefónica de España which, as has been pointed out, is aware of the second operator's cost structure through its dominant position in the infrastructure market, might be encouraged to retain higher tariffs for its GSM services than it would in the absence of the State measure in question. It could limit production, markets or technical development within the meaning of Article 86 (b) as regards GSM, which involves a more advanced technology, to the benefit of the older analogue service. This would delay the move towards personal communications combining mobile and fixed networks, which will only be possible if the tariffs for mobile communications fall substantially.

The fact that Telefónica de España could behave in this way would be a consequence of the fact that, on the one hand, it benefits from a favourable position as a result of its monopoly over the Moviline system and is granted sufficient wavebands to continue this service, and, on the other, the Spanish Government has financially penalized the only undertaking authorized to establish a competing GSM service. The delayed roll-out of the GSM and the resulting limitation of technical progress to the detriment of consumers would therefore be caused by the State measure in question, that is the imposition of the PTA 85 000 million fee on the second operator alone.

The Commission has adopted a similar analysis in a case involving an initial payment in Italy. Having demanded corrective measures without result, the Commission adopted Decision 95/489/EC addressed to Italy under Article 90 (3) of the EC Treaty [1]. The Commission has since been informed that such corrective measures have been taken or are in the process of being taken.

In accordance with the case-law of the Court of Justice [2], Article 90 (1) precludes Member States from enacting measures likely to cause an undertaking to infringe the provisions to which it refers, in particular, in the case in point, those contained in Article 86.

In conclusion, under either hypothesis, the State measure concerned is contrary to Article 90 (1) read in conjunction with Article 86 of the Treaty.

[1] OJ No L 280, 23. 11. 1995, p. 49.
[2] See, for example, Case C-41/90, *Höfner v. Macrotron*, [1991] ECR I-1979, Case C-260/89, *Elliniki Radiophonia Tileorassi Anonimi v. Dimotiki Etairia Pliroforissis and Others*, [1991] ECR I-2925, and Case C-323/93, *Société civile agricole d'insémination de la Crespelle/Coopérative d'élevage et d'insémination artificielle du département de la Mayenne*, [1994] ECR I-5077.

(22) Member States are liable pursuant to Article 90 (1) and Article 86 of the Treaty only where the behaviour of the company in question is capable of affecting trade between Member States. Trade between Member States could be affected here for the following reasons:

Any extension or strengthening of Telefónica de España's dominant position as well as any limitation of production, markets or technical development in relation to GSM is likely to delay the process of progressive reduction of tariffs for GSM telephony. In fact, in the absence of the initial payment of PTA 85 000 million imposed on the second operator, price competition would have been stronger since the introduction of GSM services in Spain and GSM tariffs would have fallen more quickly:

— if GSM tariffs do not fall as quickly as they would have done in the absence of the State measure in question, residents in other Member States will be less likely to take out subscriptions with Spanish operators as an alternative to other national or foreign operators. By way of illustration, a business or individual based in France will not be encouraged to purchase a Spanish SIM card and to make calls using the card under the roaming agreements between operators, because Spanish tariffs are not as low as they would have been had the second operator been able to use the initial payment of PTA 85 000 million to reduce its tariffs,

— any delay in the process of reducing tariffs would in turn delay the development of mobile telephony services such as improved subscription terms and conditions and more advanced technical services described above. This would discourage new investments in the Spanish telecommunication services markets by undertakings established in other Member States where there is effective competition and where new services have emerged,

— any delay in the process of steadily reducing tariffs may reduce generally the level of international telephone traffic from Spain. Undertakings and individuals with large mobile telecommunications needs will tend to subscribe to foreign operators or to use 'call back' systems in order to take advantage of lower tariffs in other Member States,

— any limitation of production, markets or of technical development within the meaning of Article 86 (b) may reduce the level of imports from other Member States of technical equipment required for investment in the mobile telephony market and for development of an effective and efficient infrastructure.

The reply of the Spanish authorities

(23) The Spanish Government has made the following submissions to the Commission:

— under the terms of the concession granted by the Spanish Government to Telefónica de España in 1991, Telefónica de España obtains a GSM concession without any further payment. Therefore, the Spanish Government cannot impose an initial payment of PTA 85 000 million on Telefónica de España. Further the Spanish Government argued, whilst rejecting the principle of compensation, that the relevant figure for the initial payment was PTA 50 095 000 million rather than PTA 85 000 million. It argued that Airtel Móvil had raised the original fee requested from PTA 50 095 000 million to PTA 85 000 million itself without an obligation to do so. The minimum initial payment imposed by law was PTA 50 095 000 million and that was the figure to be taken into account,

— the Spanish Government considered that a possible solution would be a reduction in the interconnection tariffs for the duration of the 15-year licence,

— finally, the Spanish Government also proposed to transfer to Telefónica Servicios Móviles the cost of the TRAC project.

The Commission's assessment

(24) Although the second operator itself offered a fee of PTA 85 000 million, the Commission disagrees with the argument that the initial payment was voluntary since it was one of the selection criteria in the tendering procedure [1]. Each tenderer had to offer the highest initial payment possible under its business plan to have a chance of winning the

[1] Case C-272/91, *Commission v Italy*, [1994] ECR I-1409, paragraph 11.

concession. Only some indication as to the relative weight that would be attached to the different selection criteria was given. The most clear indication was given with respect to the minimum initial payment. The initial payment was thus one of the selection criteria under the tendering procedure and it was payable on the date that the concession was signed. It is, therefore, clearly a State measure.

The selection procedure for the second GSM operator was not in reality a tendering procedure as such. The selection procedure in Spain was a hybrid combining the characteristics of comparative bids and a tender. One of the criteria compared was the initial payment which the applicant offered to pay on obtaining the second concession. It was therefore difficult to know which of the criteria were essential. The fact that the concession was awarded in the absence of any clear indication implies that any of them could have been of importance.

(25) The Commission does not accept that the reduction in interconnection tariffs proposed by the Spanish Government would restore the level playing field, because the Spanish Government refused to consider an asymmetric tariff reduction in favour of the second operator alone.

(26) The solution offered by the Spanish Government whereby investments in the TRAC project would offset the second operator's initial payment cannot be accepted in the present circumstances.

Apart from the fact that the information provided by the Spanish authorities does not allow a proper evaluation of the real impact of such investments, and that it is not possible to ensure that this solution is anything more than a pure accounting operation, the solution cannot be accepted at this stage since the provision of a universal service by Telefónica de España, including the service in remote areas, is in the current circumstances balanced out by the exclusive or special rights granted to Telefónica de España. Moreover, in implementing the TRAC system, Telefónica de España has benefited from public subsidies including ERDF aids.

(27) The Commission considers that in this case the obligation imposed on the second Spanish operator alone to make the initial payment of PTA 85 000 million is incompatible with Article 90 (1) together with Article 86.

(28) The aim of this procedure is to cause the Spanish Government to take the necessary steps to remove the distortion of competition; the most obvious step would be to reimburse sum paid by Airtel Móvil.

If the Spanish Government so requests, the Commission would be prepared to examine whether the infringement could be terminated by adopting other corrective measures, provided that they properly balance out the disadvantage suffered by the second operator.

It is incumbent upon the Spanish Government to make proposals in this respect. The Spanish Government should in any case provide figures for such proposals, showing that they properly offset the PTA 85 000 million paid by the second operator.

However, imposing on Telefónica Servicios Móviles an identical payment would not be considered an adequate compensatory measure in the present circumstances, in particular as long as no cost accounting is implemented serving to ensure that the burden of such payment is allocated to Movistar only.

(29) Certain corrective measures have already been mentioned during bilateral talks with the Spanish Government:

(i) granting Airtel Móvil access to Telefónica de España's TACS 900 customer database, while maintaining the confidentiality of personal data;

(ii) revision of the tariff conditions on an asymmetrical basis for interconnection with Telefónica de España's switched telephone network;

(iii) non-discriminatory access by both Telefónica Servicios Móviles GSM service and Airtel Móvil to the same number of GSM frequencies including the acceleration of the liberalization of the GSM frequencies currently used by Telefónica de España for its analog service;

(iv) extending the duration of Airtel Móvil's concession in line with the recent Spanish decision regarding the cable television licences.

Moreover, the revocation of the concession already granted to Airtel Móvil can in no circumstances be considered to be an appropriate remedy for the breach. It would eliminate the only existing competitor to Telefónica Servicios Móviles on the GSM market and the monopoly enjoyed by Telefónica de España for analog mobile telephony and

GSM services during the period necessary for a new tendering procedure would render competition even more difficult as a result of the extra time advantage.

Article 90 (2)

(30) Article 90 (2) of the Treaty provides that undertakings entrusted with the operation of services of general economic interest are subject to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The Spanish Government has not relied on this provision to justify imposing the initial payment on the second operator alone.

The Commission considers, for its part, that in this case a derogation under Article 90 (2) is not warranted, because there are no factors to support the conclusion that the initial payment is justified by the performance in law or in fact of a service of general economic interest.

CONCLUSION

(31) In view of the foregoing, the Commission considers that the competitive disadvantage in the form of the initial payment imposed on the second operator alone for its concession to operate a GSM network in Spain constitutes an infringement of Article 90 (1) of the Treaty read in conjunction with Article 86,

HAS ADOPTED THIS DECISION:

Article 1

Spain shall take the steps necessary to remove the distortion of competition resulting from the initial payment imposed on Airtel Móvil SA and to secure equal conditions for operators of GSM radiotelephony on the Spanish market by 24 April 1997 at the latest by:

(i) reimbursing the initial payment imposed on Airtel Móvil, or

(ii) adopting, after receiving the agreement of the Commission, corrective measures equivalent in economic terms to the obligation imposed upon the second GSM operator.

The measures finally adopted shall not undermine the competition resulting from the authorization of the second GSM operator on 29 December 1994.

Article 2

Spain shall inform the Commission within three months following notification of this Decision of the steps it has taken to comply with it.

Article 3

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 18 December 1996.

For the Commission

Karel VAN MIERT

Member of the Commission

Communication by the Commission 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

(95/C 275/02)

(Text with EEA relevance)

I. INTRODUCTION

The purpose

Commission Directive 90/388/EEC was published on 28 June 1990 (hereafter referred to as either 'the Services Directive' or 'the Directive'). It has come to be identified as a cornerstone of the EU framework for liberalizing the European telecommunications market. The Council, in its resolution of 22 July 1993 (1) emphasized the importance of rapid implementation. The resolution noted that 'there is a need for rapid and effective implementation of the current regulatory environment, in particular Directive 90/388/EEC'.

It is within this context that the Commission submits this communication on the status and implementation of the Directive (2).

The communication has three related purposes (3):

(i) description and explanation of the current state of implementation;

(ii) identification and clarification of central issues;

(iii) placing the Directive in the context of the package of reforms focused on the 1998 deadline, according to the 1993 Council resolution which 'supports the Commission's intention to prepare, before 1 January 1996, the necessary amendments to the Community regulatory framework in order to achieve liberalization of all public voice telephony services by 1 January 1998'.

The context

The Services Directive set down four dates by which specific provisions had to be implemented:

— 31 December 1990, for the opening up to competition of telecommunications services other than voice telephony and the simple resale of capacity,

— 1 July 1991, for putting in place an independant body responsible for the granting of licences and the surveillance of usage conditions,

— 30 June 1992, for the notification of any licensing or declaration procedures for the provision of packet or circuit-switched data services for the public,

— 31 December 1992, for the opening up to competition of the simple resale of capacity (4).

Parliament resolution A3-0113/93 of 20 April 1993 called on the Commission to prepare the liberalization of both intra-Community as well as domestic voice telephony and to adopt as soon as possible the necessary measures to take full advantage of the potential of the existing infrastructure of cable networks for telecommunications services and to abolish without delay the existing restrictions on the use of cable networks for non-reserved services as well as to adopt measures to obtain optimum utilization of the cross-border telecommunications networks of railway operators and electricity producers (5).

Council resolution 93/C 213/01 set out a timetable for the development of telecommunications and confirmed the date of

— 1 January 1998 for the liberalization of voice telephony services for the general public (6).

(1) Council resolution 93/C231/01.

(2) This communications does not cover related subjects of EU telecommunication policy such as the application of open network provision to leased lines. These subjects are covered extensively in other recent communications. See Green Paper on the Liberalization of telecommunications infrastructure and cable television networks, Part I/II, COM(94) 440; COM(94) 682 and communication on Present status and future approach for open access to telecommunications networks and services (open network provision), COM(94) 513.

(3) It should be noted that this communication does not replace in any way the formal procedures foreseen under the Treaty to ensure the full implementation of Community Law.

(4) The Directive also foresaw the possibility of granting deferment, until 1 January 1996, of the date for prohibition on the simple resale of capacity in those Member States in which the network for the provision of the packet or circuit switched services was not yet sufficiently developed.

(5) OJ No C 150, 31. 5. 1993, p. 42.

(6) Although some Member States with less developed networks (i.e. Spain, Ireland, Greece and Portugal) are granted an additional transition period of up to five years. Very small networks (Luxembourg) can also, where justified, be granted a period of up to two years.

On 17 November 1994 the Council adopted a further resolution confirming the date of

— 1 January 1998 also for the liberalization of telecommunications infrastructure (7).

Following the Commission's action plan of 19 July 1994, published under the title 'Europe's way to the information society, an action plan' (8), the Union is now profoundly engaged in the policy of implementing the information society. These resolutions, the conclusions of the European Council at Corfu (9) as well as the communication by the Commission on the consultation on the Green Paper on Mobile and personal communications (10) and the results of the ongoing consultation on the Green Papers on Infrastructure (part I/II) (11) will set a framework for carrying forward the further amendments to the services Directive towards the full liberalization of the telecommunications sector. In this context, ongoing review of the actual situation in the Member States will be increasingly important in the years leading up to the deadline.

II. CURRENT STATUS OF IMPLEMENTATION

(a) General comment

Member States were required to implement the provisions of the Directive and to communicate to the Commission the relevant measures adopted, by 31 December 1990, 1 July 1991 and 31 December 1992 (12). All Member States, but two, complied with the notification requirements (13). In order to assess effective implementation of Directive 90/388/EEC in the various Member States however, a checklist identifying the essential constituent elements was established. Although this does not represent an exhaustive list, progress in effective implementation can best be measured against the following issues (14):

— definition of 'voice telephony' for which currently exclusive and special rights can still be maintained according to the provisions of the Directive (15),

— continuation of any other exclusive rights;

access by service providers to transmission/routing on PSTN and leased lines;

conditions imposed via any licensing or declaration scheme in existence;

transparency and openness of procedure for granting authorization,

— conditions for simple resale of leased capacity for data communications;

notification (within deadline) of any special licensing regime regarding such resale;

justification of any special regime (16),

— conditions of open access to public networks (formal and effective);

availability of leased lines within a reasonable time;

justification for usage restrictions (if any) on leased lines,

— justification for any restrictions on the processing of data (before or after public network transmission (17);

ensurance by the Member States of non-discrimination in usage conditions and charges between service providers (including the TO),

— separateness and independence of effective and operational regulatory body;

inclusion within its tasks of: granting licences, surveying usage conditions; control of type ap-

(7) With derogations as above, see Council resolution of 22 December 1994 on the principles and timetable for the liberalization of telecommunications infrastructures, (94/C 379/03); OJ No C 379, 31. 12. 1994, p. 4.

(8) COM(94) 347.

(9) Conclusions of the European Council, Corfu, 24-25 June 1994.

(10) Towards the personal communications environment: Green Paper on a Common approach in the field of mobile and personal communications in the European Union (COM(94) 145 final).

(11) Op. cit.

(12) As mentioned, the exceptions to the 31. 12. 1990 deadline relate to (a) specifications regarding simple resale of data services, 31. 12. 1992; and (b) the setting up of an independent regulator, 1. 7. 1991.

(13) Italy (provisions only included in the *Legge Comunitaria* 1994 are incomplete), and Greece (measures necessary to render the independent regulatory authority operational have still not been notified).

(14) For the issues listed see in particular Articles 1, 2, 3, 4, 5, 6 and 7 of the Directive.

(15) Subject to the time deadlines set by the Council resolution of 22 July 1993.

(16) i.e. by the provisions set down in Articles 2 and 3.

(17) They must be demonstrated as necessary for essential requirements or public policy.

proval and mandatory specifications, and allocation of frequencies.

On the basis of these points the Commission has found that the extent to which the Directive has been effectively implemented [18] throughout the Union still varies significantly between the Member States. Various Member States will need to undertake further measures before the Commission may consider the Directive correctly implemented [19].

(b) Formal procedures

As far as is possible the Commission has sought to deal with remaining implementation issues via bilateral communication and negotiation with the Member States concerned. This has proved particularly efficient (for both parties) where information requested is prompt and transparent, and where the will to find a workable solution rapidly is evident.

Where implementation problems cannot be solved by informal negotiation within a reasonable timeframe, the Commission is obliged to commence with the formal procedure for non-implementation of a Directive, as provided for by Article 169 of the Treaty [20].

Currently, a number of formal procedures are underway. Two concern Member States' failure to notify all required national implementing legislation [21]. A further two concern incorrect application of the Directive in Member States [22].

(c) Extension to the European Economic Area and central and eastern European States

In accordance with the EEA Agreement, the Services Directive (including amendments) also applies to the EEA Member States as of 1 July 1994 [23].

Since the Services Directive only specifies the application of Article 90 in conjunction with Articles 59 and 86 of the Treaty and the Europe Agreements and Interim Agreements which the Union has signed with six central and eastern European countries contain similar provision, the general principles of this Directive (and any amendments) are also of relevance to these countries.

III. SPECIFIC IMPLEMENTATION ISSUES

Five main areas have emerged during the implementation of the Directive as requiring specific attention:

(a) general issues related to voice services;

(b) enforcement of the voice telephony monopoly;

(c) corporate networks and closed user groups (GUGs);

(d) data services for the public;

(e) the separation of operation and regulation.

(a) General issues related to voice services

Although the Directive defines in detail the concept of 'voice telephony' [24], various issues have arisen [25] over just what is considered to be 'voice telephony' in the

[18] Official notification does not necessarily mean effective implementation.

[19] Section III of this communication goes into this in more detail. Comments on the individual Member States' progress is provided in the Annex.

[20] Article 169 of the EC Treaty deals with failure to fulfil an obligation under the rules of the Treaty, including the implementation of Directives.
Under Article 169 of the Treaty, the procedure is as follows:
(i) The Commission sets out the points at issue by letter of 'formal notice' and invites the relevant Member State to submit its observations.
(ii) If the Member State does not put an end to the infringement, the Commission gives a (non-binding) reasoned opinion explaining its views and inviting the Member States to take the appropriate measures within a fixed period.
(iii) If the Member State does not comply with the reasoned opinion within the given period, the Commission may bring the matter before the European Court of Justice.

[21] Italy and Greece.

[22] Germany and Spain.

[23] Under the Competition Annex (XIV) of the Agreement, Article 90 (3) Directives in the telecommunications field i. e. the Services Directive and the Terminals Directive (88/301/EEC) became applicable to the EEA Member States on 1 July 1994, as well as subsequent amending Directives, e. g. amending Directive 94/46/EEC with regard to satellite communications.

[24] According to Article 1 of the Directive 'voice telephony means the commercial provision for the public of the direct transport and switching of speech in real-time between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point'.

[25] See also European Court decision ECR-I 5833 which has guided the Commission in the elaboration of the definition of exclusive and special rights (see below).

individual Member States and, hence, the degree to which special or exclusive rights ([26]) on voice services had to be abolished ([27]).

According to the Services Directive, the Member States ensure the abolition of special and exclusive rights for the provision of telecommunication services other than the voice telephony service. In each case it has to be examined on the basis of the criteria set out below whether a given service is a voice telephony service. In order to allow the relevant national regulatory authorities to assess the envisaged service, the service providers may be required to provide all the necessary information ([28]).

A regulatory approach that identifies only a limited set of permissible, non-reserved services does not conform to the requirements of the Directive.

A voice service may be reserved under national legislation only if it includes all of the elements of the Community voice telephony definition, i. e. it must be provided on a commercial basis to the public for the purpose of direct transport and switching of speech in real time between public switched network termination points.

It is useful to consider the significance of each of these elements:

'Commercial'

This requires that the simple technical non-commercial provision of a telephone connection between two users should be authorized. 'Commercial' should be understood in the common sense of the word, i. e. provided against payment and with the intention of making a profit (or at least of covering all variable costs and making a contribution to existing fixed costs). A leased line, for example, made available on a cost-sharing basis between one or more users would only be considered a commercial activity if additional capacity were leased specifically to allow resale.

It also means that companies should be free to pool resources, i. e. to rent leased lines and benefit from the flat rate rental. This permits a more efficient use of the telephone network and, in particular, benefits small and medium-sized enterprises (SMEs) ([29]).

'for the public'

The term 'for the public' is not defined in the Directive and must be understood in its common sense: a service for the public is a service available to all members of the public on the same basis.

Particular examples of services which should not be considered 'for the public', and thus should not be made subject to special or exclusive rights, are those provided over corporate networks and/or to closed user groups. Corporate networks and closed user groups (CUGs) cover a number of telecommunications services, both voice and data. They are fundamental to the Services Directive particularly because they fall outside the scope of the voice service which Member States may reserve to their telecommunications organizations.

The particular issues associated with liberalization of these services are discussed in more detail below (IIIc).

([26]) According to Article 2 of amending Directive 94/46/EC (see Section IV):

'exclusive rights' means the rights that are granted by a Member State to one undertaking through any legislative, regulatory or administrative instrument, reserving it the right to provide a telecommunications service or undertake an activity within a given geographical area,

'special rights' means the rights that are granted by a Member State to a limited number of undertakings through any legislative, regulatory or administrative instrument which, within a given geographical area:

— limits to two or more the number of undertakings authorized to provide a service or undertake an activity, otherwise than according to objective, proportional and non-discriminatory criteria, or

— designates, otherwise than according to such criteria, several competing undertakings as being authorized to provide a service or undertake an activity, or

— confers on any undertaking(s), otherwise than according to such criteria, legal or regulatory advantages which substantially affect the ability of any other undertaking to provide the same telecommunications service or to undertake the same activity in the same geographical area under substantially equivalent conditions.

([27]) According to Article 2 of the Directive, 'Member States shall withdraw all special or exclusive rights for the supply of telecommunications services other than voice telephony ...'

([28]) This will in particular be the case concerning the provision of voice services to closed user groups on leased lines networks connected at different ends to the public switched network. In this case some national regulatory authorities request detailed information, such as clients targeted, draft advertisements, envisaged tariffs ..., to assess the nature of the envisaged service.

([29]) A disadvantage for SMEs existed previously because they do not generally use the switched telephone service sufficiently intensively to make it worthwhile for them to pay the (high) flat rate rentals for leased lines. As a consequence, leased lines were, in practice, reserved to larger companies.

'from and to public switched network termination points'

'From and to public switched network termination points' means that, to be reserved, the voice service has not only to be offered commercially and to the public, but also to connect two network termination points of the switched network ([30]) at the same time. As long as each customer of the service provider is connected via a dedicated leased line, it is possible to offer a commercial service which terminates on the public network ([31]). The aim is, again, to ease technical restrictions on the use of leased lines. In this way lines may be used for voice telephony offered to non-CUGs, as long as there is no commercial offer of 'simple resale' of the switched telephone service ([32]). On the other hand, 'simple resale' may be legitimate when the service is not offered to the public, but, for instance, is provided to a closed user group ([33]).

'direct transport and switching of speech in real time'

This part of the definition excludes any store and forward or voice mail applications from being reserved. Least cost routing of telephone calls by a service provider on the public switched network or credit card telephony, whereby access is given to the voice telephony service of a TO in the framework of a financial transaction service, are further examples of liberalized voice services as these do not constitute 'direct transport'.

Since the reservation of voice services is an exception to the general rule of competition, it must be interpreted narrowly. When new voice services and features are introduced and meet demand which is not satisfied by the current telephone service, they should normally be considered non-reserved. If they are defined as reserved, the burden of proof, as always should fall to the Member State to justify such a restriction ([34]).

Calling card services offer a specific example of services, which can, from the point of view of the users, be considered to be different from the reserved voice telephony service. They fall outside the definition in as much as the calling card service matches important needs which the (normal) voice telephony does not meet, for example as a result of additional features such as payment via credit or debit card, least cost routing, destination speed dialling etc. Where additional features such as these, rather than possible lower tariffs, are decisive in prompting users to use the calling card service instead of voice telephony, the service should be considered liberalized. The fact that a calling card market is emerging, although tariffs are in most cases higher than those of voice telephony ([35]), is evidence that there is a calling card market which is distinct from the voice telephony one. Calling card providers have developed this new market tailoring the services to the customers and billing them accordingly. This evolution creates new opportunities for the users in the Union and should not be delayed by restrictions aimed at preserving the traditional voice telephony market.

The prohibition of leased line routing for the provision of calling card services would put providers of calling card services at a competitive disadvantage in this market relative to calling card providers with own facilities. In the absence of the routing facility they are merely resellers of voice telephony and would have no

([30]) The public switched network is not formally defined in the Directive. It must be given its common meaning, i. e., the public switched telephone network (PSTN) which is the collection of switching and transmission facilities used by the telecommunications organization to provide the normal telephony service.

([31]) i. e. as long as they are connected via a dedicated leased line, customers of a liberalized voice service do not necessarily need to demonstrate a pre-existing legal or economic relationship with the recipients of their calls. This is often referred to as 'dial-out' service or 'one-ended' service.

([32]) 'Simple resale' refers to the situation where the call is both originated and terminated on the public switched network. It is, in this sense, offered to the general public since the local call may originate from any user of the public switched network and the customer itself is not connected by the service provider via a dedicated leased line.

([33]) Such a service may, indeed, include features requiring bypass such as teleworking, out of office hours calls diversion, paging, Centrex services or when small business units, whose call volume does not justify use of leased lines, need to communicate with each other.

([34]) To allow the relevant national regulatory authorities to assess the envisaged service, the applicants may be required to provide them with all the necessary information, including draft advertisements and envisaged tariffs lists, if any.

([35]) 'contrary to widespread belief, cost saving is not the main driver (for the development of calling card services). Indeed, calling card and international direct dial (IDD) tariff comparisons for calls originating from the EC reveal that convenience is the main driving factor for a service essentially targeted at business users'. See: New forms of competition in voice telephony services in the European Community, BIS Strategic Decisions, October 1993, study carried out for the European Commission.

Additional features, such as billing and usage convenience (no local currency required, operator speaking the same language) seem to be the main driving factor for this service.

control over their main costs. They could therefore hardly compete with the telecommunications operators (TOs). TOs have a further advantage in that they can offer their customers both voice telephony and calling card services and develop their card service by building on their database of high volume users.

Such a state of affairs would promote possible scenarios whereby national TO's offering calling card services would limit their offer to residents of their national territory without entering neighbouring geographic markets.

An individual assessment of the envisaged calling card service may, however, be necessary, in particular of the additional features offered, in order to determine the nature of the service and upon which market it will be offered. The criteria used should be the degree of functional interchangeability between the services and the possible barriers to substitution. Such assessment must take into account the specific circumstances of the markets concerned.

(b) Enforcement of the voice telephony monopoly in a liberalized environment

Since certain categories of voice services have been opened up to competition, and since such categories may not be defined in a rigidly technical sense, certain Member States feared that service providers would offer what is in effect 'voice telephony' and thereby by-pass the monopoly. In fact, experience has shown that such fears were not founded. The main reason is that such 'unofficial' by-pass will not occur to any significant extent without being noticed by the relevant Member State. A service which is offered to the public must be, *ipso facto*, public knowledge.

In particular, given that any commercial offer would normally involve advertising (of the services available) or, at the very least, issuing price lists, contracts and invoices, such by-pass should be evident from an early stage. Furthermore, any breach leading to a substantial diversion of traffic on to a competitor's network is rapidly detected by the public operator providing the competitor's leased line capacity. The TO would clearly have an interest in bringing the situation to the attention of the appropriate national regulatory authority.

In the framework of the licensing or declaration procedures, various Member States, however, still request the applicant to provide a description of the intended service. Where networks are connected to the public switched telephony network (PSTN), for example in the case of voice services provided on leased lines, Member States often require evidence of how the applicant will prevent dial-in and dial-out facilities being available at the same time. It should be noted that, under Article 4 of the Directive, technical restrictions may not be imposed on the service provider. It suffices that the service provider clearly sets out in the contracts, signed with its clients, the extent of services authorized.

New operators generally have shown that they will respect the voice telephony monopoly. Service providers do not want to take the risk of having their authorization revoked or having the national regulatory authority requesting the disconnection of the relevant leased lines and not being able to fulfil their obligations towards their clients. Many service providers did therefore, before starting their services, investigate first the matter with the national regulatory authorities or with the Commission services.

(c) Corporate networks and closed user groups

As mentioned, the special issue of corporate networks and/or closed user groups (CUGs) has been of particular importance amongst the issues encountered in the course of implementation of the Directive.

Effective liberalization of corporate networks and CUG services is, without doubt, critical for the development of advanced business communications and therefore the competitiveness of EU industry *vis-à-vis* its conterparts in Japan and the United States. It is, thus, a central goal of the Directive. The economics of competition, and markets themselves are becoming increasingly global. Where business is denied the clear benefits of lower cost, and increased quality and choice which competition ensures, it will ultimately either suffer from the competitive disadvantage this implies, or, where possible, will seek to relocate to a less restrictive environment.

In this context, the goals of the Directive have still not been achieved in a number of Member States. Two reasons for this are:

(i) disputes as to the extent of allowed 'membership' of CUGs, which are broader than strict corporate networks. This has led to lack of full or effective implementation of the Directive;

(ii) bottlenecks in the supply of capacity of the new service providers caused by restrictions on use of alternative infrastructure (this will addressed more fully in Section V).

The Commission has considered the cases where Member States have issued provisions under the Directive for authorizing the provision of voice to CUGs. Various definitions have emerged (36). On the basis of experience gained, the Commission will use the following definitions (37).

'corporate networks'

those networks generally established by a single organization encompassing distinct legal entities, such as a company and its subsidiaries or its branches in other Member States incorporated under the relevant domestic company law,

'closed user groups':

those entities, not necessarily bound by economic links, but which can be identified as being part of a group on the basis of a lasting professional relationship among themselves, or with another entity of the group, and whose internal communications needs result from the common interest underlying this relationship. In general, the link between the members of the group is a common business activity.

Examples of activities likely to fall into this category are fund transfers for the banking industry, reservation systems for airlines, information transfers between universities involved in a common research project, re-insurance for the insurance industry, inter-library activities, common design projects, and different institutions or services of intergovernmental or international organizations.

Services provided concerning such categories of networks or entities are fully liberalized according to the definition of 'voice telephony' in Article 1 of the Directive. Some Member States did, however, only authorize such services after further discussions with the Commission.

(36) For country by country information, see Annex.

(37) The Commission has acknowledged these definitions in its 'Green Paper on the liberalization of telecommunications infrastructure and cable television networks, Part I, Principles and Timetable', COM(94) 440 final, Brussels, 25. 10. 1994, p. 27.

(d) **Data services for the public (38)**

Article 10 of the Services Directive provides that the Commission shall assess the effects of the measures adopted by the Member States regarding simple packet or circuit-switched data services under Article 3 of the Directive in 1994, to see whether any amendments need to be made to the provisions of that Article, particularly in the light of technological evolution and the development of trade within the Community.

During the consultation on the 1987 Green Paper, various Member States stressed the need for a special regime for basic switched data network services such as X.25 (39). No justification could be found for the maintenance of exclusive rights as regards the provision of such services *per se*. The Commission, however, acknowledged that developed data switching networks might have a structural effect on investments and regional planning, and could therefore qualify for a specific regime, set out in Article 3 of the Directive, in particular the application of public service specifications in the form of trade regulations relating to conditions of permanence, availability, and permanence of service.

Moreover, given the substantial difference between charges for use of the data transmission service on the switched network and charges for use of leased lines at the time of adoption of the Directive, Article 3 allowed that exclusive rights for data services which represented 'simple resale of capacity' (40) could be maintained until 31 December 1992, with possible additional deferments until 1 January 1996 for those countries where the relevant network for the provision of the packet or circuit switched services were not yet sufficiently developed (41). The aim was to allow that equilibrium in such charges would be achieved gradually. Two Member States (42) initially requested such an extension of deadline, although in neither case the request was maintained.

(38) Article 1 defines 'packet and circuit-switched data services' as 'the commercial provision for the public of direct transport of data between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point'.

(39) X.25 is a standard protocol for packet switched networks. Another advanced protocol for high speed data transfer is frame-relay.

(40) The Directive defines the latter as 'the commercial provision on leased lines for the public of data transmission as a separate service, including only such switching, processing, data storage or protocol conversion as is necessary for the transmission in real time to and from the public switched network'.

(41) Recital 11 of the Directive.

(42) Greece and Spain.

As regards the special regime, only three Member States (43) notified draft specifications to the Commission before the deadline provided in the Directive, i.e. 30 June 1992. The Commission has assessed with the Member States concerned, whether the planned specifications were objective, non-discriminatory, transparent and proportionate to the aim pursued. These bilateral discussions were very useful and provided a basic experience of how a liberalized service can be regulated to guarantee certain public service objectives, without restricting competition. It appeared in particular that, given the different starting positions of incumbent operators and potential new entrants, special attention should be given to avoid burdening the latter in a way which could constitute a barrier to entry and which would confirm the market power of the dominant operator. In such cases Member States should not necessarily impose the same conditions on new entrants as imposed on the dominant public operator.

Over the last years, rapid technological evolution and, in particular, the development alongside the traditional X.25 of ATM (44), has undermined the traditional justifications for the current specific regime for basic data services. One can assume that in the near future X.25 public backbone networks will continue to co-exist with frame-relay-networks and the new emerging ATM-backbones. Applying the same service-specific regulation to such different technologies will prove difficult. It could delay new offers of virtual private networks and value-added services and thus limit technical progress in the area. Moreover the rationale behind quality or coverage obligations decreases with the increasing differentiation of the offer. The emergence of new services requires a degree of flexibility which cannot be steered by regulation.

The current specific schemes in force in three Member States also have an impact on trade between Member States. The limited number of applicants for authorizations under the current schemes in the three Member States can, in part, be explained by the fact that many providers of the relevant service prefer to limit their offer to CUG's instead of having to apply for a licence under these circumstances.

On the basis of its assessment, given that most of the Member States have not deemed it necessary to adopt specific schemes for data services, without noticeable negative effect as regards the public interest objectives pursued by these schemes, the Commission considers, that the requirement for applying specific public service specifications with regard to data services should be reviewed in the framework of the general adjustment of the telecommunications regulatory framework to be presented before 1 January 1996 according to Council Resolution 93/C 213/01, and that the termination of the current specific schemes for data services should be considered (45).

(e) The separation of operation and regulation

The separation of the regulation of the telecommunications sector from the operation of the national telecommunications oganization was, without doubt, the most fundamental condition for achieving reform and liberalization of the EU telecommunications markets. Whatever institutional, legal or structural means may be used to achieve it, Article 7 (46) of the Directive requires that the Member States must separate telecommunications regulatory and operational functions.

(43) Three Member States (Belgium, France and Spain) have adopted additional licensing conditions for the provision of simple resale for packet or circuit-switched services. In Spain, for example, there is a scheme regulating the granting of concessions for the provision of packet or circuit switched data services which does not tie in completely with the Commission's comments concerning this area. The scope of the Spanish scheme is too broad, since it applies to data services between 'network termination points' instead of 'termination points of the public switched network'.

Italy was also considering the adoption of additional conditions, but failed to implement the Directive within an appropriate timescale. Given that under the direct effect of Articles 2 and 3 of the Directive simple resale of capacity was liberalized in Italy without any further restrictions, the Italian government shall have to provide appropriate justifications for the reintroduction of any additional restrictions in that respect.

(44) ATM: 'Asynchronous Transfer Mode', advanced high speed communications. See also Green Paper on the Liberalization of telecommunications infrastructure and cable television networks, *op. cit.*

(45) However, such schemes may be required as regards the provision of voice telephony for the public, once liberalized. See licensing criteria proposed for licensing mobile and personal communications networks, as well as for fixed networks (Green Paper for Mobile and personal communications, Green Paper on the Liberalization of telecommunications infrastructure and cable television networks, *op. cit.*).

(46) Article 7 requires Member States to ensure that 'from 1 July 1991 the grant of operating licences, the control of type approval and mandatory specifications, the allocation of frequencies and surveillance of usage conditions are carried out by a body independent of the telecommunications organizations'.

Whilst National Regulatory Authorities (NRAs) now formally exist in most Member States, the Commission considers that the degree of separation between these and those of the operator functions is still not sufficiently clear in at least five Member States (47).

This issue of the independence of the national regulatory authorities was raised in a number of preliminary referrals to the Court of Justice relating to Article 6 of Directive 88/301/EEC (the 'Terminals Directive'), which required Member States, as of 1 July 1989, to ensure that the fixing of technical standards as well as supervision of type approval, were carried out by bodies independent from public or private undertakings involved in the marketing of telecommunications equipment. In its judgments of 27 October 1993 (48), the Court found that this requirement had been infringed in France where, at that time, departments in the same Ministry were responsible for the commercial exploitation of the public network, and the fixing of technical standards, the supervision of conformity and the approval of terminal equipment.

Article 7 of the Services Directive to a large extent mirrors the wording of Article 6 of the Terminals Directive. The implementation by the Member States of the former must be considered in view of this past judgment. A mere legal or administrative separation between the functions — such as that between two services of a Ministry — would only be sufficient to comply with Article 7 under the following conditions:

— it must be shown that there is a 'real' separation,

— in particular, there must be financial independence of one from the other,

— any movement of personnel from the regulatory body to the operational body should be subject to special supervision.

Forms of structural separation offering a reasonable guarantee that such conditions would be upheld, include:

(i) the granting of the regulatory functions to a department of the relevant Ministry when the telecommunications undertaking is itself controlled by private shareholders; or

(ii) the granting of the relevant regulatory functions to a body, which is independent from the relevant Ministry (except for the contol of its accounts and the legality of its decisions) when the latter is also acting as sole or dominant shareholder of the operator or where a considerable State shareholding in the operator remains.

Alongside the legal guarantees and general rules implied by the Directive, actual practice and spirit are an important test of compatibility with Article 7. How 'independence' is actually achieved institutionally will therefore vary, to a certain degree, according to the legal tradition and experience in each Member State.

IV. INCLUSION OF SATELLITE NETWORKS AND SERVICES DIRECTIVE 94/46/EC

On 13 October 1994, the Commission adopted Directive 94/46/EC. This Directive extends the Terminal Directive (49) to include satellite earth station equipment and extends the Services Directive to include satellite communications services (50).

(47) For example, in the Netherlands, the regulation is carried out by the Ministry for Transport and Public Works through the Directorate-General for Post and Telecommunications. The Ministry is, however, also the majority shareholder of KPN which has still the exclusive right to install, maintain and operate the telecommunications infrastructure, and provides the mandatory services to each applicant.

Some questions have also been raised about how distinct a separation of powers exists between regulator and operator in Belgium, Spain and Greece. The Belgian Government has, however, stated its intention to respect the complete autonomy of the public operator Belgacom in the area of non-reserved services in response to Commission concerns. In Spain, the Director-General for Telecommunications (responsible for regulation) is also the Government Delegate on the Board of directors of Telefónica, although such a delegate could legally come from another Ministry.

In Greece, while functions have been fomally separated, the continuous movement of personnel from the operational body to the regulatory body makes the practical separation of these bodies unclear.

(48) The cases Decoster et al (C-69/91) and Taillandier (C-46/90).

(49) Commission Directive of 16 May 1988 on competition on the markets in telecommunications terminal equipment 88/301/EEC (OJ No L 131, 27. 5. 1988, p. 73).

(50) Directive 94/46/EC constitutes the central measure for implementing the liberalization objectives for the satellite sector, set forth by Council resolution 92/C 8/01 (based on the Green Paper on Satellite communications, COM(90) 490).

Other measures in this field are Council Directive 93/97/EEC of 29 October 1993, relating to mutual recognition of type approval for satellite terminals and the proposal for a European Parliament and Council Directive on a policy for the mutual recognition of licences and other national authorizations for the provision of satellite network services and/or satellite communications services, COM(93) 652, 4. 1. 1994.

(a) The significance of the amending Directive

The aim of the Union's policy in the area of satellite communications, shared by the Council and the Commission, is to stimulate without delay greater use of satellite communications in the EU. This is particularly important given the widening gap between the delay in development of EU business satellite communications compared to that which its major competitors enjoy.

The Directive requires the abolition of all exclusive rights granted for the provision of satellite services, and the abolition of all special rights ([11]) to provide any telecommunications service covered by the Directive.

(b) Voice telephony

The amended Directive does not affect restrictions on offering voice telephony for the public via satellite network. However, this must not lead to technical restrictions. While recital 16 states that 'in the case of direct transport and switching of speech via satellite earth station networks, commercial provision for the public in general can take place only when the satellite earth station network is connected to the public switched network', this is merely a guide as to what is normally the case. It should not be understood as allowing technical restrictions to protect the voice telephony monopoly. The burden of proof that the new service actually constitutes 'voice telephony' rests with the regulator.

In fact, the provision of voice for closed user groups will often involve such connections with the public switched network, since some members of such groups will not be connected to the network via satellite stations ([12]).

(c) Broadcasting services

The status of broadcasting services are also unaffected by Directive 94/46/EC. One has, however, to distinguish between the content and the technical provision of broadcasting services. As mentioned in recital 17, the provision of satellite network services for the conveyance of radio and television programmes is, by its very nature, also a telecommunications service and there is therefore no justification for treating it differently from any other telecommunications service. The Directive, thus, makes a distinction between:

— the services provided by the carrier (transmission, switching and other activities) necessary for the conveyance of the signals, which are telecommunications services liberalized under the Directive, and

— the activities of those bodies which control the contents of the messages to be broadcasted, which are broadcasting activities falling outside the scope of this Directive.

Satellite broadcasting services wich should now be liberalized under this Directive therefore include services provided over telecommunications operator's feeder links from studios/events to uplink sites, as well as uplink services for point to point, point to multipoint, direct-to-home (DTH) satellite broadcast services and services to cable-head ends.

(d) Access to space segment

Member States are required by the Directive to abolish all restrictions on the offer of space-segment capacity on their territory.

This means that the Member States now must ensure that:

— any regulatory prohibition or restrictions on the offer of space segment capacity to any authorized satellite earth station network operator are abolished,

— any space segment supplier is authorized to verify within its territory that the satellite earth station network for use in connection with the space segment of the supplier in question, is in conformity with the published conditions for access to his space segment capacity.

([11]) Special rights is defined in the Directive as 'limiting the number of undertakings authorized to provide telecommunications services otherwise than according to objective, proportional and non-discriminatory criteria or designating otherwise than to such criteria several competing undertakings to provide such services'.

([12]) According to the definition given, closed user groups are indeed not to be defined technically, by the network to which their members are connected and which should not be accessible by third parties, but sociologically by the economic or professional relationship among their members.

In its communication of 10 June 1994 on satellite communications relating to the provision of — and access to — space segment capacity (13), the Commission announced its intention to use the competition rules to remove all national restrictions within the European Union on access to space segment. The discovery procedures set out in Article 3 of the Directive will, in particular, be implemented to gather the necessary information to achieve this purpose.

(e) International satellite organizations

The new obligations related to space segment do not directly affect the position of the telecommunications organizations as signatory of international organizations. However, Member States are obliged to ensure that there are no restrictive provisions in their national regulations which would have the effect of preventing the offer of space segment capacity in their territory by either another signatory of the relevant organizations or by independent systems. Similarly Member States are obliged to ensure that there are no regulatory or non-regulatory restrictions preventing space segment capacity already leased by a licensed operator in one Member State from being freely accessed from any other Member State. Such restrictions include those preventing parties other than the signatory in the Member State(s) concerned from verifying the technical and operations specifications of satellite earth stations.

Article 3 of Directive 94/46/EC requires Member States to communicate to the Commission, at its request, the information relating to international satellite organizations they possess on any measure that could prejudice in particular compliance with the competition rules of the EC Treaty. Recital 21 explains that this provision aims amongst others to monitor the review which is underway within these international organizations to improve access.

Article 3 of Directive 94/46/EC does therefore also not directly affect the position of the signatories. However, if it appeared that signatories continue to maintain mechanisms dissuading multiple access and thus favouring market sharing for the provision of space segment, the Commission would have to assess whether action should be taken under the competition rules of the Treaty against the relevant signatories.

The coupling of investment obligations and utilization could constitute such a dissuasive mechanism, where it dissuades signatories to market space segment by the threat of having to bear an increased investment share. Which international organizations, and in particular Eutelsat, operating in increasingly competitive markets, the current investment requirements will therefore, if they are not amended, have to be thoroughly assessed under the Competition rules.

(f) Time table for implementation

The Directive gives Member States nine months to inform the Commission of the measures taken to transpose the Directive into national law. The Member States should thus communicate to the Commission before 8 August 1995, a copy of the measures taken to abolish the current restrictions on the provision of satellite services, and of any licensing or delcaration procedure which is currently in force or is being drafted for the operation of satellite networks. The aim is to allow the Commission to assess whether these conditions are necessary with a view to satisfying essential requirements. The information provided to the Commission should include possible fees imposed as part of these authorization procedures as well as the criteria upon which these fees are based.

Recital 22 which mentions that the Commission will also take into account the situation of those Member States in which the terrestrial network is not yet sufficiently developed must be seen in the framework of this notification requirement. Member States which would deem necessary a deferment of the date of full application of the abovementioned provisions (14) should request it formally and with the necessary justification within the time period provided for the communication of the implementation measures of the Directive, i.e. before 8 August 1995. The Commission will then assess whether it should refrain from insisting on the immediate liberalization of the relevant satellite services. This would, however, not prevent possible actions in national courts brought by third parties in these Member States.

Given the wide variety of satellite services, the motivation given should, in the first place, include the list of satellite network services for which the deferment is requested, accompanied by estimates of the markets concerned.

It should further explain which services of the national telecommunications organizations would be affected, and on the basis of the turnover of these services and their contribution to the financing of the public network, a potential negative impact on the future development of the public network should be demonstrated.

The Commission will apply to the proportionality principle. The Commission will in any case insist on, for example, the liberalization of services which are economically insignificant.

(13) COM(94) 210 final.

(14) This derogation can apply up to 1 January 1966 at the latest.

V. FUTURE EVOLUTION IN THE CONTEXT OF SERVICES AND INFRASTRUCTURE LIBERALIZATION

While major attention will have to continue to be paid to the full effective implementation of the Services Directive, the future development of the Directive must be considered within the overall context, which was determined by the review carried out according to the provisions of the Directive during 1992, leading to Council resolution 93/C 213/01 of 22 July 1993 on full service liberalization by 1 January 1998, now supplemented by Council resolution 94/C 379/03 of 22 December 1994, integrating infrastructure liberalization into this time schedule.

According to Council resolution 93/C 213/01 the Commission should

'... prepare, before 1 January 1996, the necessary amendments to the Community regulatory framework in order to achieve liberalization of all public voice telephony services by 1 January 1998.'

Given its central role in lifting the restrictions to competition and ensuring fair market conditions, amendments to the Services Directive will represent a focal point of these measures.

As set forth in the Green Paper (Part I) on telecommunications infrastructure liberalization ([55]):

under the Directive 90/388/EEC on competition in the markets for telecommunications services, the provision of all telecommunications services was opened to competition, subject to four significant exceptions:

— satellite services,

— mobile telephony and paging services,

— radio and TV broadcasting services to the public, and

— voice telephony services to the general public.

Directive 90/388/EEC in its original form did not address the use of alternative infrastructures and cable TV networks for the provision of liberalized services. Directive 90/388/EEC only required the removal of restrictions on the use of a single source of infrastructure, namely leased lines provided by the TOs, for the provision of liberalized services.

As regards the exceptions set out above, the following applies:

— Commission Directive 94/46/EC ([56]), amending Directive 88/301/EEC (telecommunications terminal equipment) and 90/388/EEC (telecommunications services) in particular with regard to satellite communications, adopted on 13 October 1994 has lifted the exception with regard to satellite services. As set out under IV, Member States are given nine months to communicate implementation measures taken.

— On 21 December 1994, the Commission adopted, for consultation, a draft amending Directive concerning the liberalization of the use of cable TV networks for the services already liberalized according to the Services Directive, providing for substantial opening of the further development of these networks, particularly with regard to multi-media.

— The Commission communication on the consultations following the Green Paper on Mobile and personal communications was published on 23 November 1994 ([57]). It proposed the lifting of all special and exclusive rights with regard to mobile services by 1 January 1996. The corresponding amendments to the Services Directive will have to be considered.

Finally, a major issue will be the adjustment of the telecommunications regulatory framework to the objectives of the Council resolutions of 22 July 1993 and 22 December 1994, integrating the date of 1 January 1998 for full liberalization (with additional transition periods for certain Member States), to be proposed before 1 January 1996. As set forth in the Infrastructure Green Paper (Part II) ([58]), such an approach must aim at creating the optimal environment for the future development of the European Union's telecommunications sector by combination of both competition policy and sector specific regulation.

([55]) Op. cit.

([56]) See Section IV.

([57]) COM(94) 492 final: communication to the European Parliament and the Council on the Consultation on the Green Paper on Mobile and personal communications.

([58]) Op. cit.

Besides the adjustment of the existing harmonization Directives in the telecommunications sector (such as ONP Directives) and the working out of proposals for maintaining universal service and ensuring interconnection, as well as the review of the institutional arrangements for regulating the sector, this will in particular require further adjustment of the Services Directive.

At the Council of 17 November, the Commission has welcomed the agreement on the date of 1998 as the deadline for the liberalization of infrastructure for all telecommunication services. It has also taken note of the concerns of a number of Member States expressed at this Council, to undertake early measures for the liberalization of alternative infrastructures for services already liberalized according to the Services Directive. This aspect will need further consideration.

VI. CONCLUSION

Commission Directive 90/388/EEC represents the most significant legislative measure for liberalizing EU telecommunications to date. The Commission will ensure that maximum effort and resources are directed towards solving identified problems and filling gaps in implementation.

The 1992 Review revealed that the effectiveness of the measures liberalizing the telecommunications sector (concerning at that stage, in particular the liberalization of data communications, value-added services and the provision of data and voice services to corporate users and closed user groups) was questioned by many service providers and users of such services. It has also been understood that implementation of the Services Directive is hampered by the non-availability of infrastructure under reasonable conditions.

In particular, high tariffs for and lack of availability of the basic infrastructure over which liberalized services are operated or provided to third parties have delayed the widespread development of high speed corporate networks in Europe, remote accessing of databases by both business and residential users and the deployment of innovative services such as telebanking and distance learning. Additionally, the regulatory restrictions in many Member States still prevent the use of alternative infrastructure operated by third parties, such as cable TV-networks and networks owned by energy companies, railways, or motorways to meet their internal communications needs. Many user associations and companies have stressed that European business is less competitive, that innovative services are more slowly deployed and that the creation and development of pan-European networks and services is being delayed as a result.

The importance of effective and affordable infrastructure is increasingly recognized in political debate within the Member States themselves. The European Parliament has called on the Commission to adopt, as soon as possible, the necessary measures.

The continued bottleneck situation has been emphasized as a key obstacle to the development of the European information infrastructure in the report on Europe and the global information society. The action plan towards the European information society adopted by the Commission in response has set a general framework.

Further emphasis on effective implementation of the telecommunications Services Directive and its future evolution will take account of these general objectives. It is with this intention in mind, that the Commission transmits this communication to the European Parliament and to the Council.

ANNEX I

MEMBER STATE IMPLEMENTATION OF DIRECTIVE 90/388/EEC

The following represents a short overview of the state of implementation of the Directive in individual Member States. Given the rapid development in this field, reference should be made to national regulatory authorities for more detailed information.

The overview does not include information with regard to implementation in the European Economic Area.

BELGIUM

The Directive is implemented in Belgium by the law of 21 March 1991 (*). With regard to telecommunications it transforms the *Régie des Télégraphes et des Téléphones/Regie van Telegraaf en Telefoon* (RTT) into the public autonomous company Belgacom.

As regards the definition of the reserved service in the Belgian law, Article 68 defines the 'Telephone Service' as the telecommunications service intended for the direct carrying and real time switching of vocal signals at the start and at the destination of the connection points, including the services necessary for its operation. In letters of July 1991 and June 1993 the Belgian Government confirmed that it interprets the law in the way intended by the Directive.

Where a provider wishes to supply liberalized services, a list of non-reserved services can be established by Royal Decree which, by derogation, would automatically be authorized providing that the applicant informs the IBPT of the service. Thus far, however, the Commission is not aware of such a list. In its absence, the applicant must give the IBPT two months prior notice of its intention during which time the IBPT can oppose the provision of the service if it deems it contrary to the 1991 law. Article 89 (5) states that the IBPT must provide a reasoned decision if it refuses to authorize the provision of a service.

Belgium is one of three Member States to have adopted additional licensing conditions for the provision of packet or circuit-switched data services for the public. This is allowed under Article 3 of the Directive as long as the Commission approves the conditions, which it did in July 1993.

Under Article 85 of the 1991 Belgian Law, Belgacom can only refuse a user access to a leased line on the basis of the essential requirements recognized by Community Law. Further, as defined in the management contract (Article 21(3)), Belgacom must satisfy at least 90 % of the registered applications for ONP-leased lines within three months unless otherwise agreed with the customer.

With respect to the issue of the independence of Belgacom from the regulatory authority as required by Article 7 of the Directive, under the 1991 law regulatory powers are assigned to the Minister responsible (assisted by the national regulatory authority, *Institut Belge des Services Postaux et des Télécommunications*, IBPT). The Belgian Government has stated that it will respect the complete autonomy of Belgacom in the area of non-reserved services.

DENMARK

The Directive has been implemented in Denmark by Law No 743 of 14 November 1990 and the Consolidating Order No 398 of 13 May 1992.

Under the Act, the Minister of Communications can grant a concession to TeleDanmark on the establishment and operation in relation to public radio and fixed services as well as of voice telephony, text and data communication, provision of leased lines, mobile communications and satellite services, and transmission of radio and TV programmes.

(*) *Moniteur Belge*, 27 March 1991, p. 6155 and corrigendum in *Moniteur Belge* 20 July 1991. The same law also implements the Directive on competition in the markets for telecommunications terminal equipment, Commission Directive 88/301/EEC.

An area of concern, and indeed the issue which led to the commencement of infringement proceedings against Denmark, was the definition of 'voice telephony' which is reserved to TeleDanmark. The initial law reserved all of the non-public transmission of traffic to TeleDanmark with the sole exception of voice telephony over leased lines between different legal entities (i.e. shared use). This clearly left too many restrictions on the usage conditions of leased lines in place, in contravention of the Directive.

The Commission closed its proceedings after the adoption by the Danish Government of Order No 905 of 2 November 1994 which allows anyone to provide domestic public voice telephony without requiring any form of authorization or declaration. As regards international calls, a license is required where calls originating from the PSTN are carried via leased lines and then returned back to the PSTN. Such licence is only granted for traffic to countries which have liberalized voice telephony.

The Order was adopted under Article 3 of the 1990 Danish Act, which entitles the Minister to issue regulations for the establishment and operation of services which are not covered by TeleDanmark's concession or special rights.

The rules to be applied to packet and circuit-switched data services after 31 December 1992 were stated in the Danish Order of December 1992. There is a slight discrepancy between the scope of these rules, and that intended by Article 3 of the Directive since the Order covers all data communications services.

GERMANY

Two German laws adopted on 8 June 1989 define the legal framework for the provision of telecommunications services: the *Postverfassungsgesetz* (PVG), which delimits the organization and tasks of the Ministry for Post and Telecommunications and of *Deutsche Bundespost Telekom*; and an amendment of the *Fernmeldeanlagegesetz* (FAG), defining among other things, the monopoly retained by the State. The legal framework was substantially amended by the Law of 14 September 1994 *(Postneuordnungsgesetz — PTNeuOG)*, which came into force on 1 January 1995.

The new Act did not however alter the definition of the 'voice telephony' reserved to the DBP Telekom, although the Commission had in April 1994 drawn the attention of the German Government to the fact that it is broader than that in the Directive. Essentially three issues arise. Firstly, the definition uses the wording 'for third parties' as opposed to 'for the public'. As a consequence, the switching of voice for closed user groups is part of the monopoly. Secondly, the terms 'switching of voice' in the Law are interpreted in practice as including also mixed telecommunications (voice combined with data or images) in the monopoly, when the exchange of speech can technically be dissociated from data communication as is the case as regards videophony on ISDN. Finally, the definition covers all switching of voice, without distinguishing whether the voice both originates in and is switched to the public switched network. According to the Directive the switching of voice originating in a leased line network or switched to such a leased line network should not be reserved.

Following bilateral contacts, the first issue was provisionally settled to a large extent. The German Law (FAG) reserves voice telephony for third parties, which is more than voice telephony 'for the public' as allowed according to the Directive. To restore conformity between German and Community Law, the German Ministry for Post and Telecommunications, instead of changing the Law, used its licensing powers to allow by order *(Verfügung)* No 1/1993, of 6 January 1993 and 8/1993 of 13 January 1993, private companies to provide telephony to closed user groups. The order established a class license *(Allgemeingenehmigung)* for the provision of the service to entities which are economically integrated.

As regards Article 6 of the Directive, Section 29 TKV provides that a connection licence *(Anschalteerlaubnis)* is required for terminal equipment for connection to the network termination of transmission lines. The Commission views such a restriction as contrary to Article 6 of the Directive since it delays the use of equipment, already type approved, used in the switching and processing of signals (such as concentrators) to connect leased lines networks with the public switched telecommunications network. The issue has been raised with the German authorities which will abolish the relevant provision. In the meantime, the Ministry has granted a class connection licence (Vfg 269/1994).

The powers referred to in Article 7 of the Directive were until 31 December 1994 exercised by The Minister for Posts and Telecommunications. Under the new regime, the Ministry will be assisted by a Regulation Council *(Regulierungsrat)*, including representatives of the *Länder* and the Federal Parliament *(Bundestag)*. On the other hand, the government share in DBP Telekom, which was transformed into a joint stock company, will now be managed by a distinct office: the *Bundesanstalt für Post und Telekommunikation (BAnst PT)*.

GREECE

Greece implemented the Directive by means of Law No 2075/92 of 21 July 1992, which has never been brought fully into effect as the Greek government failed to adopt the order setting out the internal working rules of the independent regulatory body set up by the Act. On 20 October 1994, this law was replaced by Law No 2246/94. The legislation does also not provide a complete regulatory framework and will necessitate further secondary legislation which has not yet been adopted.

Given the failure of the Greek Government to adopt timely implementation measures of the Services Directive the Commission has started proceedings before the Court of Justice under Article 169 of the Treaty.

Article 2 (15) of Law No 2246/94 defines 'voice telephony' using the same wording as the Directive. However, Article 3 (2) of the Law states as principle that voice telephony is reserved and acknowledges only in a second stage that all other services are liberalized. Consequently, there is a threat of a broader definition of the reserved voice telephony in Greece. Moreover, this Article makes the liberalization of these services subject to the condition that their provision is compatible with the proper fulfilment of the mission assigned to the public operator OTE.

Liberalized services are, according to this Article 3 (2), subject to either an individual licence or to a declaration, depending on the limit of the capacity of leased lines used. The threshold has not yet been established.

As regards simple resale of packet — and circuit — switched data transmission, Greece applied by letter of 7 February 1992 for the derogation until 1 January 1996 under Recital 11 of the Directive. After the adoption of Law No 2075/92, which did not distinguish packet and cricuit-switched data transmission from other liberalized telecommunications services, Greece confirmed by letter of 27 May 1993, that it did no longer seek such a derogation and that packet and circuit-switched data transmission was liberalized.

According to Law No 2246/94, the independent regulatory authority referred to in Article 7 of the Directive, is the National Telecommunications Commission (EET), under the supervision of the Minister of Transport and Communications. The EET is the relevant authority for frequency allocation, numbering, licensing and type approval, as well as for ensuring compliance with national and EEC Treaty competition rules. It is not yet operational. In the mean time, the Ministry exercises its competence.

SPAIN

The *Ley de Ordenación de las Telecomunicaciones*, Law No 31/1987 of 18 December 1987, ('LOT') is the legislation in force relating to telecommunications activities in Spain. In light of the Directive, the LOT has been amended by Law No 32/1992 of 3 December 1992, which limited the reserved services to the basic telephone service, telex and telegrams, and a Royal Decree 804/1993 of 28 May 1993 implementing Article 3 of the Directive as regards basic data switching services.

As has been the case in some other Member States, the major issue in the Directive's implementation has concerned the definition of voice telephony and, hence, the reserved area. The LOT defines 'basic voice telephony', in paragraph 15 of its Annex, in terms identical to the definition of 'voice telephony' in the Directive. However, following a complaint to the Commission, it seems that the Spanish authorities' understanding of this definition was not so clear and that, although defined in the Law, an administrative order would be required to define further Telefónica's basic voice telephony monopoly. This definition is not yet adopted.

Spain originally requested an extension period for exclusive rights for simple resale, as allowed under Recital 11 of the Directive, although such a request was not maintained. As regards the grant of concessions for the provision of packet or circuit switched data services, a scheme for its regulation was created by the Royal Decree of 28 May 1993. The draft had been notified to the Commission, but the text adopted did not take account of all the Commission's remarks. Issues relevant to this, particularly regarding the scope of the scheme, are being further discussed with the Spanish authorities.

The regulatory powers referred to in Article 7 of the Directive are the responsibility of the Directorate-General for Telecommunications (DGT). The DGT was created by Royal Decree of 19 June 1985. It grants concessions, authorizations and administrative licences for equipment and services. The Director-General for telecommunications is, however, also the Government Delegate on the Board of Directors of Telefónica. He has the right to veto decisions of the Board on grounds of public policy. Moreover, Article 15 of the LOT allows for the appointment by the Government of five other members of the Board.

FRANCE

The French government has implemented the Directive mainly through the adoption of Law No 90-1170 of 29 December 1990 on the regulation of telecommunications. This Law is a modification of the *Code des Postes et Télécommunications* (the Code) which gives France Telecom an exclusive right to establish telecommunications network infrastructures open to the general public.

Article L.34 specifies that only services provided to the public are covered by the Law. Article L.32-7 of the Code defines reserved voice telephony as the commercial provision of a system of direct, real-time voice transmissions between users connected to termination points of a telecommunications network. All other services provided to the public are liberalized subject to a declaration procedure or, for services of 5 mbits/second or more, to a licensing procedure (**).

According to Article L.34-2, France Telecom is authorized to supply any bearer service (this is how the French regulation qualifies the provision of simple resale of packet or circuit-switched services). Other providers need a licence. France has adopted additional licensing conditions for the provision of such bearer-service. A final draft Decree for the application of Article L.34.2 relating to bearer-services was transmitted to the Commission which decided, on 26 November 1992, not to object to its entry into force. The Decree was formally adopted on 30 December 1993 and published in the French Official Journal of 31 December 1993 (p. 18276). This decree sets out a number of conditions relating to:

— the essential requirements,

— the measurement and the publication of the characteristics and the area of coverage of the service (Article 2),

— the respect of technical constraints concerning access to the service (Article 3),

— the interconnection with other bearer services (Article 4),

— national defence and public security as regards the encryption of data (Article 5),

— fair competition.

The authorization of France Telecom to provide this service, cannot be transferred to its subsidiaries. Transpac, which is a subsidiary of the Compagnie Générale des Communications (Cogecom), itself a 100 % subsidiary of France Telecom, had therefore to request a licence which was granted by order of 15 July 1993 (French Official Journal of 8 August 1993, p. 11224).

As regards the separation of regulation and operation (Article 7), the Minister for Industry, Posts and Telecommunications and Foreign Trade ensures that the regulations are respected by the public operators and, furthermore, that the regulation of the telecommunications sector on the one hand, and the operation of networks and the provision of telecommunications services on the other hand, are performed independently. He exercises his rights through the 'Direction Générale des Postes et Télécommunications' (DGPT).

IRELAND

Ireland has adopted specific regulations to give effect to the Directive. These are contained in 'Statutory Instrument S.I. No 45 of 1992, European Communities (Telecommunications Services) Regulations 1992' which have amended the Postal and Telecommunications Services Act, 1983.

(**) The following companies were granted a licence: SITA, BT, Sprint, Sligos, GSI, EDT and Esprit Telecom.

In the area of voice telephony, the definition of 'public voice telephony' expressed in S.I. No 45 mirrors that in the Directive. The exclusive right granted to Telecom Eireann under Section 87 of the 1983 Act is restricted to offering, providing and maintaining the public telecommunications network and offering, providing and maintaining voice telephony services under Regulation 3 (1) of S.I. No 45. Value-added licences can be obtained under Article 111 of the Act of 1983 for provision of any other service, including voice for closed user groups or voice services making use of only one connection point between leased lines and the public switched network. By end 1994, 20 such licences were granted.

Statutory Instrument No 45 of 1992 sets out the rights of these licensees as regards access to and use of the public telecommunications network. The conditions applied must be objective, non-discriminatory and published. Similarly, under Regulation 4 (3) of the S.I., requests for leased lines have to be met within a reasonable period, and there should be no restrictions on their use other than to ensure non-provision of telephone services, the security of network operations, the maintenance of network integrity and, in justified cases, the interoperability of services and data protection.

With respect to Article 7 of the Services Directive, The Minister for Transport, Energy and Communications is responsible for surveillance of Telecom Eireann according to Regulation 5 of S.I. No 45.

ITALY

The Directive has been included in Law No 142 of 19 February 1992, *Legge Comunitaria* for 1991 (LC 1991), which delegated to the Government the power to issue, within one year after its coming into force (i.e. by 5 March 1993), a number of legislative decress for the implementation of the EEC Directives listed in Annexes A and B, including the Services Directive. The legislative decree implementing the Services Directive was, however, not adopted within this deadline. Subsequently, the Italian Government included the Services Directive in Article 54 of Law No 146 of 22 February 1994 (*Legge Comunitaria* 1993).

This Article repeats the specific principles and criteria to be followed in the preparation of the legislative decree implementing the Directive, which were mentioned in LC 1991. Consequently it still provides for a specific licensing procedure for the supply of packet or circuit-switched data services although the deadline set out in Article 3 of the Service Directive for the introduction of such scheme had already elapsed. Given that under the direct effect of Articles 2 and 3 of the Directive simple resale of capacity was liberalized in Italy without any further restrictions, the Italian government shall have to provide appropriate justifications for the reintroduction of any additional restrictions in that respect.

The legislative decrees have not been adopted yet, and the Commission is considering taking Italy to the Court of Justice for failure to notify the implementation measures of the Services Directive.

In the meantime, Article 1 of the Italian Postal Code of 1973, stating that 'telecommunication services ... exclusively pertain to the State' remains applicable although Article 2 of the Directive implies that this Article, as well as all other provisions setting out the state monopoly for telecommunications services, should be changed to allow private operators the right to provide all telecommunications services excluding well defined areas reserved to the State. According to the Italian legal framework, only value added services listed in Article 3 (paragraph 2) of the National Regulatory Plan for Telecommunications, enacted by a Ministerial Decree of 6 April 1990, may be provided.

However, in a decision of 10 January 1995, the Italian Antitrust Authority *(Autorità Garante)* stated, disregarding the mentioned Italian regulation, that a refusal of Telecom Italia to provide leased lines to a private company wanting to offer voice services liberalized under the Directive is an abuse of dominant position and requested Telecom Italia (*) to present, within 90 days, the actions taken in order to remove the restrictions to competition in the market for voice services for corporate networks/closed user groups, including virtual private networks. The Antitrust Authority bases this decision on the direct effect of Articles 1 and 2 of the Services Directive in Italy. Telecom Italia has appealed against the decision.

(*) Telecom Italia was created on 18 August 1994 out of a merger between SIP, Italcable, IRITel, Telespazio and SIRM.

With the implementation of Act 58/92 on the reorganization of the telecommunications sector, regulatory and operational functions were, in principle, separated by transferring the operating bodies of the Ministry, namely ASST, to Iritel, a company of the IRI Group. A bill on 'Public Utility Services Regulatory Authorities' (No 359) is currently pending at the Italian Parliament, which will, if adopted, create, *inter alia*, a regulatory body for post and telecommunications. However, no date is yet anticipated for its adoption.

LUXEMBOURG

Two legislative acts were adopted in 1990 in order to implement the Directive, the Regulation *(Règlement grand-ducal)* of 3 August 1990 establishing the general rules applicable to public telecommunications services and the regulations of 8 October 1990 concerning public telephone service, telecommunications leased lines, public 'luxpac' service, public alarm transmission service and public automatic telephone service — Serviphone.

The Luxembourg authorities have, by letter of 22 October 1991, declared their intention to amend the definition of 'basic telephonic service' in the Regulation and add the term 'to the public'.

The Law of 20 February 1992 transformed the former *Administration des P&T* into a public undertaking with a separate legal identity, to comply with the requirement of Article 7 of the Directive to separate regulatory and operational functions. The Minister for Posts and Telecommunications exercises all regulatory responsibility in respect of the establishment and operation of the telecommunications networks.

NETHERLANDS

The basic telecommunications legislation in the Netherlands (Act No 520 on the telecommunications facilities *(Wet op de Telecommunicatievoorzieningen)* ('WTV') of 26 October 1988, which came into force on 1 January 1989, was drafted before the publication of the Commission Green Paper of 1987. It therefore uses a terminology which is substantially different from the terminology used in the Directive.

Reserved voice telephony is defined in Article 2 of Decree No 551 of 1 December 1988 which lists the mandatory services of KPN (Koninklijke PTT Netherlands). According to the definition, the reserved service is not limited to a service which is provided on a commercial basis. Secondly, it does not limit the monopoly to voice telephony 'for the public'. Thirdly, it does not take into account whether the provision of the service implies the use of two connection points of the relevant leased lines. These issues have been discussed in bilateral contacts between the Dutch authorities and the Commission services. The Dutch authorities have subsequently published a notice on 30 May 1994 allowing voice services to closed user groups. However, the issue of voice services provided on leased lines and using only one connection with the public switched network is still under discussion.

The Ministry for Transport and Public Works *(Verkeer en Waterstaat)* is the body entrusted with regulatory responsibilities for telecommunications and it may give detailed instructions to KPN concerning the execution of the general Directives (BART) and the obligations relating to mandatory services. This ministerial responsibility includes general tariff policy for public telecommunications services (which, in application, is similar to 'price capping' in the UK).

AUSTRIA

Austria implemented the Directive mainly through its Telecommunications Act *(Fernmeldegesetz)* Nr 908/1993, which entered into force on 1 April 1994. Austria has however not yet notified the implementing decrees of this law, nor the general usage conditions of the public network.

The reserved telephone service is defined in Articles 44(2) and 2(6) of the Act. This definition does not fully correspond to the definition in the Directive. However, no licenses are required for the provision of liberalized services. Conditions for access to the public network and use of leased lines will, under Article 44(6) of the Act be laid down in the general usage conditions *(Geschäftsbedingungen)*.

The public telecommunications operator is the *Post und Telegraphenverwaltung* (PTV). The law entrusts the regulatory tasks to the Ministry of Public Economy and Communications.

PORTUGAL

As in the case of the Netherlands, the regulatory framework for telecommunications in Portugal predates the adoption of the Directive. The 'Basic Law on the Establishment, the Management and the Exploitation of Telecommunications Infrastructures and Services', Law 88/89, ('Basic Law') was adopted on 11 September 1989 before the adoption of the Directive. This explains in part why the terminology used often differs markedly from that of the Directive. This explains in part why the terminology used often differs markedly from that of the Directive. The Basic Law, and in particular the distinction between complementary and value added services, is technology-based rather than services-based.

On the issue of reserved services, the Portuguese legislation does not define services whose provision is reserved to public carriers as narrowly as the Commission Directive. Firstly, Article 2 (2) of the Basic Law defines 'telecommunications for public use' as all services which are designed to meet the generic collective requirements for transmitting and receiving messages and information. This is a broader definition than the concept of public in the Directive. It is true that the Basic Law lists telecommunications for private use in Article 2 (3) and that this list encompasses at point (h) 'other communications reserved for the use of specific public or private entities by means of an authorization granted by the government under the terms of treaties or international agreements or special legislation'. However, since the entry into force of the law, the Portuguese government has not adopted the necessary legislation to liberalize voice telephony or telex services provided for closed user groups. In September 1991, the Portuguese government announced the adoption of a ministerial order (diploma) on private networks to resolve this issue. By letter of 18 November 1993, the Portuguese authorities confirmed that they were still studying the issue and, in a subsequent bilateral meeting on 31 January 1994, no more precise undertaking on timing could be given.

Secondly, under Portuguese legislation voice telephony is defined more broadly than in the Directive. The Basic Law does not define voice telephony. The definition is included in Article 1 of the former Regulation of the Public Telephone Service annexed to the Decree *(Decreto-Lei)* 199/87 of 30 April 1987. The Basic Law refers to the technical operation of a fixed subscriber access system (which it defines as the set of transmission means located between a termination point and the first concentration, switching or processing node) without distinguishing between the situation, where this 'access system' is a leased line or the PSTN; nor does it take into consideration the number of connections to the leased line which may be used.

A third issue is the licensing conditions. According to the Directive, Member States may make the supply of telecommunications services subject to a licensing scheme, but only to warrant compliance with the essential requirements listed in the Directive. However, the Portuguese licensing scheme encompasses other obligations.

The liberalized services are divided in two categories: 'complementary telecommunications services' and 'value added services' according to a technical criterion: the use of own infrastructure, and in particular, concentration, processing and switching nodes. Therefore, most liberalized services come within the fixed complementary services category. The two types of services each have their own licensing conditions.

Article 4 (2) of the Directive require Member States to ensure that there are no restrictions on the use of leased lines except those justified by essential requirements or the existence of the voice telephony monopoly. Article 14 of the Basic Law appears more restrictive as it allows only the use of leased lines voice traffic to the suscriber's own use or to the provision of complementary and value added services, and even requires a licence for the shared use of leased circuits.

Portugal claims that its complementary services scheme (*Portaria* 930/92) is in accordance with Article 3 of the Directive. This issue is however not settled.

Portugal separated regulatory and operational functions in 1989. According to the Basic Law, the Ministry is responsible for supervising and monitoring telecommunications. This includes the planning and coordination of the national public infrastructure and services which are considered essential.

In practice the regulatory functions are delegated to the Institute for Communications of Portugal (ICP), leaving the Ministry to supervise the ICP and approve directives proposed by the ICP.

FINLAND

The basic regulatory framework of telecommunications is the Telecommunications Act 87/183 *(Teletoimintalaki)*, which was amended in 1988, 1990 and 1992.

Under this framework, there are no more special or exclusive rights for the provision of telecommunications services, including voice telephony, in Finland. The whole telecommunications sector has been opened to competition. Public telecommunications networks are operated by organizations with an operating licence granted by the Government.

Article 10 of the Act sets out the rights and duties of subscribers and in particular the right to lease lines as well as to use them to provide telecommunications services or to sub-lease them to others.

Public switched data communications are subject to notification only (Article 5 (2) of the Act). In 1994, there were 63 organizations with operating licences and 13 notified organizations operating public switched data communications.

Articles 18 to 23 of the Act entrust the Ministry of Transport and Communications with the general supervision and promotion of telecommunications. The day to day enforcement of the Telecommunications Act is, however, entrusted to the Telecommunications Administration Centre, which is an agency under the Ministry of Transport and Communications. In principle the costs of the centre are covered by licence and inspection fees.

Telecom Finland is 100 % state-owned but operates at arms length from the Ministry of Transport and Communications, although the members of its board as well as the top executives are appointed by the Government.

SWEDEN

There has never been a legal telecommunications monopoly in Sweden. The *de facto* monopoly of Telia ('Televerket' at the time) was the result of a commercial process.

The current regulatory framework of telecommunications is set out in the Telecommunications Act (Telelagen) of 1993. Under this Act there are no exclusive rights to provide telecommunication services (Article 2.1 and 4). Any operator has the right to obtain a licence and to supply telecommunications services. Reasons are given in case of refusals and Article 37 of the Act states that appeals against such refusals may be lodged with the administrative court of Appeal.

Licences are required only for the operation of public networks and the provision of leased lines. Other services are subject only to a registration procedure.

There are no restrictions on the processing of signals before or after transmission via the public network (Article 6.1), nor is there any discrimination in the conditions of use or in the charges payable (Article 6.2).

As regards the separation of regulation and operation (Article 7 of the Directive), the *Telestyrelsen* (telecom agency) is responsible for ensuring that regulations are respected by all operators. The agency was set up on 1 July 1992. Its functioning is laid down in Förording 1992:895. The agency may adopt sanctions, including the revocation of licences, against operators which do not comply with their obligation.

The agency is headed by a Director-General, under the supervision of a board, which is appointed by the Government. *Telestyrelsen* has responsibilities also in the defence area. The agency is financed through fees levied on the basis of gross turnover of licencees and parties which registered.

The main telecommunication operator in Sweden is Telia, which was incorporated as a private limited liability company on 1 January 1993 according to Law 1992:100. It is a 100 % publicly owned company, supervised by the Ministry of Transport and Communications.

UNITED KINGDOM

The legislation in force applying to telecommunications services is the 1984 Telecommunications Act which predates the Commission's Green Paper and Directive. The Act has been extended by a new policy building on the 1991 White Paper comprising amendments to existing licences, extensions of cable licenees to include the provision of voice telephony services and the issuing of new licences.

UK legislation has generally preceded the Commission's Directive. For example, the exclusive rights of BT to provide the telecommunications services covered by Article 2 of the Directive were abolished in the UK by Section 2 of the Telecommunications Act of 1984. Section 5 requires all persons who run telecommunications systems to have a licence (which may be an individual or class licence).

As regards the provisions of Article 4 of the Directive, no precise definition of infrastructure, such as exists in Germany or the Netherlands has been set down. Section 4 of the TA instead defines a 'telecommunications system' as: a system for the conveyance, through the agency of electric, magnetic, electro-magnetic, electro-chemical or electromechanical energy, of

— speech, music and other sounds,

— visual images,

— signals serving for the impartation (whether as between persons and persons, things and things or persons and things) of any matter otherwise than in the form of sounds or visual images, or

— signals serving for the actuation or control of machinery or apparatus.

The Secretary of State designates certain of these systems as 'public telecommunications systems'. Operators of public telecommunications systems are authorized by individual licences and are generally granted PTO status. Around twenty public fixed link operators have been granted such licences, as well as 126 cable TV franchisees.

The 1984 Telecommunications Act, in conjunction with the Wireless Telegraphy Act 1949 also ensures that the regulatory functions specified in Article 7 are carried out independently of the Telecommunications Operators. This is largely through the work of Oftel, a non-ministerial government department under the Director General of Telecommunications who, for the duration of his appointment, is independent of ministerial control.

ANNEX II

LIST OF NATIONAL REGULATORY AUTHORITIES IN THE FIELD OF TELECOMMUNICATIONS

The survey of the national regulatory framework of the Member States in Annex I has been drafted on the basis of the information officially notified to the Commission.

For more detailed information, interested persons should contact directly the national regulatory authorities of the Member States. The full address of these authorities were published in the *Official Journal of the European Communities* No C 277/9 of 15 October 1993.

België/Belgique	Belgisch Instituut voor Postdiensten en Telecommunicatie (BIPT)/ Institut belge des services postaux et des télécommunications (IBPT) Astronomielaan/Avenue de l'Astronomie 14 B-1000 Brussel/Bruxelles
Danmark	Telestyrelsen Holsteingade 63 DK-2100 Kopenhagen Ø

Deutschland	Bundesministerium für Post und Telekommunikation Postfach 80 01 D-53005 Bonn
Ελλάδα	Ministry of Transport Sygrou 49 GR-Athen
España	Dirección General de Telecomunicaciones 5a. planta Plaza de Cibeles S/N E-28701 Madrid
France	Direction générale des postes et télécommunications 20, avenue de Ségur F-75700 Paris
Ireland	Department of Transport, Energy and Communications Scotch Hause, Hawkins Street IRL-Dublin 2
Italia	Ispettorato generale delle telecomunicazioni Viale Europa 190 I-00144 Roma
Luxembourg	Ministère des communications 18, montée de la Pétrusse L-2945 Luxembourg
Nederland	Ministerie van Verkeer en Waterstaat Hoofddirectie telecommunicatie en Post Postbus 20901 NL-2500 EX 's-Gravenhage
Österreich	Bundesministerium für öffentliche Wirtschaft und Verkehr Kelsenstraße 7 A-1030 Wien
Portugal	ICP Av. José Malhoa, Lote 1683 P-1000 Lisboa
Suomi	Telehallintokeskus Vattuniemenkatu 8 A PL 53 FIN-00211 Helsinki
Sverige	Telestyrelsen (Telecom Agency) Box 5398 S-10249 Stockholm
United Kingdom	DTI 151 Buckingham Palace Road UK-London SW1 9SS

REQUEST FOR TRANSITION PERIOD

Greece

(96/C 257/03)

(Text with EEA relevance)

(Article 90 (2) of the Treaty establishing the European Community)

Commission notice to Member States and other interested parties concerning the additional implementation period requested by Greece

Pursuant to Article 2 (2) of Directive 90/388/EEC as modified by Directive 96/19/EC, the Greek Government, by letter of 25 June 1996, has requested transition periods:

— until 1 January 2003 as regards the abolition of the exclusive rights currently granted to OTE as regards the provision of voice telephony and the underlying network infrastructure which under Article 2 (2) of Directive 90/388/EEC as modified by Directive 96/19/EC had to be implemented before 1 January 1998,

— until 1 July 2001 as regards the lifting of restrictions on the provision of already liberalized telecommunications services on:

(a) networks established by the provider of the telecommunications service;

(b) infrastructures provided by third parties; and

(c) the sharing of networks, other facilities and sites,

which under Article 2 (2) of Commission Directive 90/388/EEC on competition in the markets for telecommunications services as modified by Article 1 (2) of Directive 96/19/EC regarding the implementation of full competition in telecommunications markets had to be implemented before 1 July 1996.

The Greek Government considers the above five year transition periods to be indispensable for the following reasons:

1. Greece is currently carrying out a programme for digitalization and general modernization of OTE's infrastructure which requires significant capital investment. The constraints on Greece's financial resources, the high cost and the size of OTE's modernization programme, aggravated by the considerable expense of delivering telecommunications services throughout the Greek territory (given its particular topography), necessitate a gradual pace of modernization. Even though advanced services are gradually being introduced over the already digitalized parts of the network, OTE's revenue will for several years continue to depend heavily on voice telephony.

   OTE's substantial investment programme (exceeding Dr 1,1 trillion in the years to 2003) for digitalization and modernization would be prejudiced if full competition was introduced in 1998; this would deprive OTE of revenue needed both to finance the modernization of Greece's telecommunications infrastructure and to provide universal service to dispersed customers in remote areas of Greece.

   The process of digitalization did not begin in Greece until 1990 due to the lack of necessary financial resources. The size of the investment required for digitalization of the network dictates the pace of modernization of OTE's services. Of the abovementioned total expenditure approximately 29 % will be spent on the modernization of the urban networks and 14 % on the digitalization of the exchanges.

2. In 1993 Greece started to implement a policy of adjusting tariffs to costs, which has resulted in increases in local call rates and reductions (in real terms) in long distance rates. However, despite the progress achieved, the current tariff structure is still marked by a considerable gap between tariffs for local and long-distance calls. Further rebalancing of tariffs in the transition period will need to ensure OTE's financial stability and revenues (which are indispensable to the completion of digitalization and modernization). The pace of adjustment of tariffs to costs will depend, *inter alia*, upon further modernization of OTE's networks, the introduction of analytical cost-accounting systems and customer's acceptance of tariff increases.

3. Structural adjustments are carried out in order to transform OTE into a commercial organization, including the adaptation of its personnel in the environment of modern telecommunications technology, services, management and marketing methods.

4. Liberalization of alternative infrastructure cannot take place in Greece significantly in advance of the liberalization of voice telephony and public telecommunications networks. Were this to happen, providers of telecommunications services over such infrastructure would be able to circumvent the derogation for voice telephony and consequently deprive OTE of significant revenue which is crucial for the modernization of the public telecommunications networks and services in Greece.

The Greek Government will, if this derogation is granted, implement Directive 96/19/EC in national law according to the following calendar:

— first half of 1997: proposals for the introduction of appropriate legislation in order to introduce full competition,

— second half of 1997: publication of proposed legislative changes to implement full competition and remove all restrictions on the provision of voice telephony and public telecommunications networks, and alternative infrastructure by 1 January 2003 and 1 July 2001 respectively, and consultation with interested parties,

— 1999: target for achievement of legislative changes,

— second half of 1999: publication of licensing conditions for all services and of interconnection charges as appropriate in accordance in both cases with relevant European Union directives,

— end 2000: target for the award of new licences and amendment of existing licences to enable competitive provision of voice telephony and for the establishment of telecommunications networks.

The Commission will assess this request in the light of the detailed description provided by the Greek Government regarding the capital investments required for the development of the network, the tariff rebalancing planned as well as the restructuring of OTE together with the timetable envisaged for implementation. These elements are attached to the letter of the Greek Government of 25 June 1996.

The Commission hereby gives the other Member States and other parties concerned notice to submit their comments on the measures in question within one month of the publication of this notice. The Commission, when taking its decision on the request of the Greek Government, will take into account any information provided within this time limit.

The comments will be communicated to Greece.

In this context, under the Directive mentioned above, the information provided by the Greek Government shall be made available to any interested party on demand, except data which should be withheld due to the need for business secrecy.

Member States or other interested parties seeking access to the file, should request this in writing to the address below within three weeks of the publication date of this notice. In the case of requests from parties other than Member States, this request should contain a description of the interest involved. Access shall only be granted on the premises of DG IV.

European Commission,
DG IV — C.1,
Rue de la Loi/Wetstraat 200,
C-158 3/48,
B-1049 Brussels.
Fax: (32-2) 296 98 19.

REQUEST FOR TRANSITION PERIOD

Luxembourg

(96/C 257/04)

(Text with EEA relevance)

(Article 90 (2) of the Treaty establishing the European Community)

Commission notice to Member States and other interested parties concerning the additional implementation period requested by Luxembourg

Pursuant to Article 2 (2) of Directive 90/388/EEC on competition in the markets for telecommunications services, as amended by Directive 96/19/EC, the Luxembourg Government, by letter of 28 June 1996, has requested transition periods:

— until 1 January 2000 in respect of the exclusive rights currently granted to Luxembourg's postal and telecommunications service provider Entreprise des Postes et Télécommunications (EPT) for the provision of voice telephony and the underlying network infrastructure, which — in accordance with Article 2 (2) of Directive 90/388/EEC, as amended by Directive 96/19/EC — are due to be abolished by 1 January 1998,

— until 1 July 1998 in respect of restrictions on the provision of already liberalized telecommunications services on:

(a) networks established by the provider of the telecommunications service;

(b) infrastructures provided by third parties; and

(c) shared networks, other facilities and sites,

which — under Article 2 (2) of Commission Directive 90/388/EEC on competition in the markets for telecommunications services, as amended by Article 1 (2) of Directive 96/19/EC — were due to be lifted by 1 July 1996.

The Luxembourg Government considers these additional transition periods to be necessary for the following reasons:

1. Liberalization of the telecommunications market (consequent upon the immediate transposal of the Directive) before a suitable regulatory framework has been put in place and the necessary structural changes made would expose Luxembourg to the risks of an unregulated market. The derogation requested will not impede the development of competition in the other areas of the telecommunications sector in Luxembourg. Once the new law on telecommunications enters into force, firms will be invited to bid for a licence to operate the second national GSM network. The selection procedure will be open and objective, and the licence will be granted to the firm that best meets the published qualitative criteria.

2. EPT currently charges its customers a single, standard rate, but a reform of the tariff structure is planned. The considerable imbalance between current charges is a major factor hampering liberalization in Luxembourg. The new independent supervisory body now being set up (the ICL) will oversee the ongoing process of adjusting charges in Luxembourg.

3. The ICL will also be responsible for laying down the accounting rules and the rules for cost-based charging that will apply to EPT.

   In Luxembourg the liberalization process entails disproportionate commitments, particularly in terms of human resources, for the ministry responsible, the ICL and EPT.

4. In 1995 international calls accounted for 71 % of the overall telephony turnover of Lfrs 6 346 million. Over 50 % of those calls were made by 960 business customers based in the city of Luxembourg. Outgoing calls accounted for 62 % of international calls. Opening up the Luxembourg market before a suitable regulatory framework has been put in place and the necessary structural changes made would leave telecommunications companies based in other countries free to offer international telephony services to Luxembourg firms and to divert business away from EPT's network. This could pose a serious threat to the viability of the national operator's infrastructure and to its future development in a competitive market.

The regulatory framework needed to avert such a threat is currently being adopted, and the transition period requested would enable it to be put in place.

5. Luxembourg recently placed its postal and telecommunications administration on a commercial footing. EPT devotes an annual budget of Lfrs 32 million to equipping its staff with the skills they need in order to work in a commercial environment. At the beginning of 1995, EPT commissioned an independent firm of consultants to undertake a thorough review of its organizational structure. The restructuring process, which entails introducing business accounting methods and adjusting the tariff structure, will not be completed before 1 January 1998.

The Commission will assess this request in the light of the detailed description provided by the Luxembourg Government in the annex to its letter of 28 June 1996.

The Commission hereby gives the other Member States and interested parties notice to submit their comments on the measures in question within one month of the publication of this notice. When taking its decision on the request by the Luxembourg Government, the Commission will take into account any information provided before that deadline.

Any comments submitted will be passed on to Luxembourg.

In accordance with the Directive mentioned above, the information provided by the Luxembourg Government will be made available to any interested party on request, with the exception of material that is commercially sensitive.

Member States or other interested parties wishing to have access to this information should submit a written request to the address below within three weeks of the publication date of this notice. Interested parties other than Member States must explain why they require access. The information will be available for consultation only on DG IV's premises. Any additional information that the Commission might request from the Luxembourg Government will likewise be made available, as soon as it is received, to parties which express an interest within the deadline mentioned above.

European Commission,
DG IV — C 1,
Rue de la Loi/Wetstraat 200,
C-158, 3/48,
B-1049 Brussels.
Fax: (32-2) 296 98 19.

REQUEST FOR IMPLEMENTATION PERIODS

Spain

(97/C 4/03)

(Text with EEA relevance)

(Article 90 (2) of the Treaty establishing the European Community)

Commission notice to Member States and other interested parties concerning the additional implementation periods requested by Spain

Pursuant to Commission Directive 90/388/EEC, as last amended by Directive 96/19/EC, and in particular Article 2 (2) thereof, the Spanish Government, in a bilateral meeting of 9 October 1996 and further confirmed by letters of 8 and 26 November 1996, has requested the following additional implementation periods concerning Articles 3 and 4a (2) of this Directive:

— until 1 January 1998 (instead of 1 January 1997), as regards the notification to the Commission of licensing schemes for the provision of voice telephony and the establishment of public telecommunications networks, and of the details of the national scheme envisaged to share the net cost of the provision of universal service obligations,

— until 1 August 1998 (instead of 1 July 1997), as regards the publication and entry into force of declaration and licensing procedures for the provision of voice telephony and public telecommunications networks, including the scheme to share the net cost of the provision of universal service obligations,

— until 30 November 1998 (instead of 1 July 1997) to ensure that adequate numbers are available for all operators of telecommunications services in order to give full effect to the liberalization of the Spanish market.

The Spanish Government considers these additional implementation periods necessary for the following reasons:

1. the introduction of competition on 1 January 1998 will oblige Telefónica to speed up the rebalancing of its tariffs which will affect significantly its profit margin up to end 1998;

2. the introduction of competition also requires further capital investment in Telefónica's network, in particular to implement the new numbering plan allowing the granting of adequate numbers to all new entrants. In order to allow Telefónica to spread the required efforts in time, it is necessary to grant it a time period of at least 10 months between the interconnection of the first operators which will be licensed early January 1998 and the interconnection of all other new operators in the voice telephony market.

As confirmed in its letter of 8 November 1996, the Spanish Government will nevertheless:

— grant early January 1998 a third nation-wide licence to operate voice telephony and public telecommunications networks, in addition to the license which will be granted in the course of 1997 to a second operator,

— authorize cable operators, who apply for it in compliance with the conditions set out in the applicable law and regulations, to provide voice telephony from the beginning of January 1998 onwards, including the possibility to interconnect their networks for this purpose.

The Spanish Government does not seek any derogation for the lifting of restrictions on the provision of already liberalized telecommunications services on:

(a) networks established by the provider of the telecommunications service;

(b) infrastructures provided by third parties;

(c) the sharing of networks, other facilities and sites;

on 1 July 1996 as provided in Article 2 (2) of Directive 90/388/EEC. Consequently such networks can be provided without restrictions.

In addition Spain will abolish foreign ownership requirements in the conditions for licensing telecommunications operators, in line with the Community position in the WTO.

Finally, the Spanish Government confirmed that it would ensure that on 30 November 1998, licenses are granted

effectively, without further conditions, for the provision of voice telephony and public telecommunications networks to all undertakings which applied in the course of August 1998, in compliance with the conditions set out in the law and its implementing regulations.

The Commission will assess the request for additional implementation periods in the light of the argumentation provided by the Spanish Government regarding the investment requirements of Telefónica.

The Commission hereby gives the Member States and other interested parties notice to submit their comments on the measures in question within one month of the publication of this notice.

The comments will be communicated to Spain.

In this context, under the abovementioned Directive, the information provided by the Spanish Government shall be made available to any interested party on demand, except data which should be withheld due to the need for business secrecy.

Member States or other interested parties seeking access to the file, should request this in writing to the address below within three weeks of the publication date of this notice. Interested parties other than Member States must explain why they require access. The file will be available for consultation only in DG IV's premises.

European Commission,
DG IV — C.1,
Rue de la Loi/Wetstraat 200,
C-158 3/48,
B-1049 Brussels,
Fax: (32 2) 296 98 19.

Communication from the Commission on the application of the competition rules to access agreements in the telecommunications sector — framework, relevants markets and principles

(97/C 76/06)

(Text with EEA relevance)

The Commission approved a draft notice on the application of the competition rules to access agreements in the telecommunications sector.

The Commission intends to adopt the notice after having heard any comments from interested parties.

The Commission invites interested parties to submit their possible observations they may have on the draft notice published hereunder.

Observations must reach the Commission not later than two months following the date of this publication. Observations may be sent to the Commission by fax (No (32-2) 296 98 19) or by mail to the following address:

European Commission,
Directorate-General for Competition (DG IV),
Directorate C,
Office 3/48,
Avenue de Cortenberg/Kortenberglaan 150,
B-1040 Brussels.

e-mail: access.notice@dg4.cec.be

PREFACE

In the telecommunications industry, access agreements are central in allowing market participants the benefits of liberalization.

The purpose of this notice is threefold:

— to set out access principles stemming from EU competition law as shown in a large number of Commission decisions in order to create greater market certainty and more stable conditions for investment and commercial initiative in the telecommunications and multimedia sectors,

— to define and clarify the relationship between competition law and sector specific legislation under the Article 100A framework (in particular this relates to the relationship between competition rules and open network provision (ONP) legislation),

— to explain how competition rules will be applied in a consistent way across the converging sectors involved in the provision of new multimedia services, and in particular to access issues and gateways in this context.

This draft notice is now published for public consultation only. The final version of the notice will be adopted only once the ONP interconnection Directive has been finally approved by Parliament and Council. This will guarantee complete coherence between the ONP interconnection framework and the application of the competition rules as set out in this draft notice, and the taking into account of the final version of the ONP interconnection Directive, in order to create market certainty before the 1 January 1998 liberalization deadline.

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Introduction

1. The timetable for full liberalization in the telecommunications sector has now been established, and Member States are to remove the last barriers to the provision of telecommunications services in a competitive environment to consumers by 1 January 1998 (1). As a result of this liberalization a second set of related products or services will emerge as well as the need for access to facilities necessary to provide these services. In this sector, interconnection to the public switched telecommunications network is a typical example of such access. The Commission has stated that it will define the treatment of access agreements under the competition rules (2). This notice, therefore, addresses the issue of how competition rules and procedures apply to access agreements in the context of harmonized EU and national regulation in the telecommunications sector.

2. The regulatory framework for the liberalization of telecommunications consists of the liberalization directives issued under Article 90 of the EC Treaty and the open network provision (ONP) framework. The ONP framework provides harmonized rules for access and interconnection to the telecommunications networks and the voice telephony services. The legal framework provided by the liberalization and harmonization legislation is the background to any action taken by the Commission in its application of the competition rules. Both the liberalization legislation (3) and the harmonization legislation (4) are aimed at ensuring the attainment of the objectives of the Community as laid out in Article 3 of the EC Treaty, and specifically, the establishment of 'a system ensuring that competition in the internal market is not distorted' and 'an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital'.

3. The Commission has published guidelines on the application of EEC competition rules in the telecommunications sector (OJ No C 233, 6. 9. 1991, p. 2). The present notice is intended to build on those guidelines, which do not deal explicitly with access issues.

4. In the telecommunications sector, liberalization and harmonization legislation permit and simplify the task of Community firms in embarking on new activities in new markets and consequently allow users to benefit from increased competition. These advantages must not be jeopardized by restrictive or abusive practices of undertakings: the Community's competition rules are therefore essential to ensure the completion of this development. New entrants must in the initial stages be ensured the right to have access to the networks of incumbent telecommunications operators (TOs). Several authorities, at regional, national and Community levels, have a role in regulating this sector. If the competition process is to work well in the internal market, effective coordination between these institutions must be ensured.

5. Part I of the notice sets out the legal framework and details how the Commission intends to achieve its intention of avoiding unnecessary duplication of procedures while safeguarding the rights of undertakings and users under the competition rules. In this context, the Commission's efforts to encourage decentralized application of the competition rules by national courts and national authorities aim at achieving remedies at a national level, unless a significant Community interest is involved in a particular case. In the telecommunications sector, specific procedures in the ONP framework likewise aim at resolving access problems in the first place at a decentralized, national level, with a further possibility for conciliation at Community level. Part II defines the Commission's approach to market definition in this sector. Part III details the principles that the Commission will follow in the application of the competition rules: it aims to help telecommunications market participants shape their access agreements by explaining the competition law requirements.

6. The notice is based on the Commission's experience in several cases (5), and certain studies in this area carried out on behalf of the Commission (6).

7. This notice does not in any way restrict the rights conferred on individuals or undertakings by Community law, and is without prejudice to any interpretation of the Community competition rules that may be given by the Court of First Instance or the European Court of Justice.

PART I

FRAMEWORK

1. Competition rules and sector specific regulation

8. Access problems in the broadest sense of the word (e.g. provision of leased lines, interconnection to networks, access to data concerning subscribers to voice telephone services) can be dealt with at different levels and on the basis of a range of legislative provisions, of both national and Community origin. A service provider faced with an access problem such as a TO's unjustified refusal to supply (or on reasonable terms) a leased line needed by the applicant to provide services to its customers could therefore contemplate a number of routes to seek a remedy. Generally speaking, aggrieved parties will experience a number of benefits, at least in an initial stage, in seeking redress at a national level. At a national level, the applicant has two main choices namely, firstly, specific national regulatory procedures now established in accordance with Community law and harmonized under open network provision (see footnote 4) and, secondly, an action under national and/or Community law before a national court or national competition authority (7).

Complaints made to the Commission under the competition rules in the place of or in addition to national courts, national competition authorities and/or to national regulatory authorities under ONP procedures will be dealt with according to the priority which they deserve in view of the urgency, novelty and transnational nature of the problem involved and taking into account the need to avoid duplicate proceeding (see below, points 13 *et seq.*).

9. The Commission recognizes that national regulatory authorities (NRAs) (8) have different tasks, and operate in a different legal framework to the Commission. First, the NRAs operate under national law, albeit often implementing European law. Secondly, that law, based as it is on considerations of telecommunications policy has objectives different to, but consistent with, the objectives of Community competition policy. The Commission cooperates as far as possible with the national regulatory authorities, and invites the national regulatory authorities to cooperate as far as possible between themselves. Under Community law, national authorities, including regulatory authorities and competition authorities, have a duty not to approve a practice or agreement contrary to Community competition law.

10. Community competition rules are not sufficient to remedy the various problems in the telecommunications sector. NRAs therefore have a significantly wider ambit and a significant and far-reaching role in the regulation of the sector. It should also be noted that as a matter of Community law, the NRAs must be independent (9).

11. It is also important to note that the ONP framework imposes certain obligations on national telecommunications operators that go beyond those that would normally be imposed by Article 86 of the EC Treaty. NRAs may require strict standards relating to transparency, obligations to supply and pricing practices. These obligations can be enforced by the national regulatory authorities, which also have jurisdiction to take steps to ensure effective competition (10).

12. This notice is written, for convenience, in most respects as if the law was conceived with only one telecommunications operator controlling the only nationwide public switched telecommunications network in each Member States. This will not necessarily be the case: new telecommunications networks offering increasingly wide coverage will develop progressively. These alternative telecommunications networks may ultimately be large and extensive enough to be partly or even wholly substitutable for the existing national networks, and this should be kept in mind.

13. Given the Commission's responsability for the Community's competition policy, the Commission must serve the Community's general interest. The administrative resources at the Commission's disposal to perform its task are necessarily limited and cannot be used to deal with all the cases brought to its attention. The Commission is therefore obliged, in general, to take all organizational measures necessary for the performance of its task and, in particular, to establish priorities (11).

14. The Commission has therefore indicated that it intends, in using its decision-making powers, to concentrate on notifications, complaints and own-initiative proceedings having particular political, economic or legal significance for the Community (12). Where these features are absent in a particular case, notifications will not normally be

dealt with by means of a formal decision, but rather a comfort letter (subject to the consent of the parties), and complaints should, as a rule, be handled by national courts or other relevant authorities. In this context, it should be noted that the competition rules are directly effective [13] so that EC competition law is enforceable in the national courts. Even where other Community legislation has been respected, this does not remove the need to comply with the Community competition rules [14].

15. Other national authorities, in particular national regulatory authorities acting within the ONP framework, have jurisdiction over certain access agreements (which must be notified to them). However, notification of an agreement to an NRA does not make notification of an agreement to the Commission unnecessary. The national regulation authorities must ensure that actions taken by them are consistent with EC competition law [15], this duty requires them to refrain from action that would undermine the effective protection of Community law rights under the competition rules [16]. Therefore, they may not approve arrangements which are contrary to the competition rules [17]. If the national authorities act so as to undermine those rights, the Member State may itself be liable in damages to those harmed by this action [18]. In addition, national regulatory authorities have jurisdiction under the ONP Directives to take steps to ensure effective competition [19].

16. Access agreements in principle regulate the provision of certain services between independent undertakings and do not result in the creation of an autonomous entity which would be distinct from the parties to the agreements. Access agreements are thus generally outside the scope of the Merger Regulation [20].

17. Under Regulation 17 [21], the Commission could be seised of an issue relating to access agreements by way of a notification of an access agreement by one or more of the parties involved [22], by way of a complaint against a restrictive access agreement or against the behaviour of a dominant company in granting or refusing access [23], by way of a Commission own-initiative procedure into such a grant or refusal, or by way of a sector inquiry [24]. In addition, a complainant may request that the Commission take interim measures in circumstances where there is an urgent risk of serious and irreparable harm to the complainant or to the public interest [25]. It should, however, be noted in cases of great urgency that procedures before national courts can usually result more quickly in an order to end the infringements than procedures before the Commission [26].

18. There are a number of areas where agreements will be subject to both the competition rules and national or European sector specific regulation, most notably internal market regulation. In the telecommunications sector, the ONP Directives aim at establishing a regulatory regime for access agreements. Given the detailed nature of ONP rules and the fact that they may go beyond the requirements of Article 86, undertakings operating in the telecommunications sector should be aware that compliance with the Community competition rules does not absolve them of their duty to abide by obligations imposed in the ONP context, and vice versa.

2. Commission action in relation to access agreements [27]

19. Access agreements taken as a whole are of great significance, and it is therefore appropriate for the Commission to spell out as clearly as possible the Community legal framework within which these agreements should be concluded. Access agreements having restrictive clauses will involve issues under Article 85. Agreements which involve dominant, or monopolist, undertakings involve Article 86 issues: concerns arising from the dominance of one or more of the parties will generally be of greater significance in the context of a particular agreement than those under Article 85.

20. In applying the competition rules, the Commission will build on the ONP framework, and the national regulatory authorities act within that framework. Where agreements fall within Article 85 (1), they must be notified to the Commission if they are to benefit from an exemption under Article 85 (3). Where agreements are notified, the Commission intends to deal with one or more notifications by way of formal decisions, following appropriate publicity in the Official Journal, and in accordance

with the principles set out below. Once the legal principles have been clearly established, the Commission then proposes to deal by way of comfort letter with other notifications raising the same issues.

3. Complaints ([28])

21. Natural or legal persons with a legitimate interest may, under certain circumstances, submit a complaint to the Commission, requesting that the Commission by decision require that an infringement of Article 85 or Article 86 of the EC Treaty be brought to an end. A complainant may additionally request that the Commission take interim measures where there is an urgent risk of serious and irreparable harm ([29]). A prospective complainant has other equally or even more effective options, such as an action before a national court. In this context, it should be noted that procedures before the national courts can offer considerable advantages for individuals and companies, such as in particular ([30]):

— national courts can deal with and award a claim for damages resulting from an infringement of the competition rules,

— national courts can usually adopt interim measures and order the termination of an infringement more quickly than the Commission is able to do,

— before national courts, it is possible to combine a claim under Community law with a claim under national law,

— legal costs can be awarded to the successful applicant before a national court.

Furthermore, the specific national regulatory principles as harmonized under ONP principles can offer recourse both at the national and if necessary at Community level.

3.1. *Use of national and ONP procedures*

22. As referred to above ([31]) the Commission will take into account the Community interest of each case brought to its attention. In evaluating the Community interest, the Commission examines:

'... the significance of the alleged infringement as regards the functioning of the common market, the probability of establishing the existence of the infringement and the scope of the investigation required in order to fulfil, under the best possible conditions, its task of ensuring that Articles 85 and 86 are complied with' ([32]).

Another essential element in this evaluation is the extent to which a national judge is in a position to provide an effective remedy for an infringement of Article 85 or 86. This may prove difficult, for example, in cases involving extra-territorial elements.

23. Article 85 (1) and Article 86 of the EC Treaty produce direct effects in relations between individuals which must be safeguarded by national courts ([33]). As regards actions before the national regulatory authority, the ONP Directive provides that such an authority has power to intervene and order changes in relation to both the existence and content of access agreements. National regulatory authorities must take into account 'the need to stimulate a competitive market' and may impose conditions on one or more parties, *inter alia*, 'to ensure effective competition' ([34]).

24. The Commission may itself be seized of a dispute either pursuant to the competition rules, or pursuant to an ONP conciliation procedure. Multiple simultaneous proceedings might lead to unnecessary duplication of investigative efforts by the Commission and the national authorities. Where complaints are lodged with the Commission under Article 3 of Regulation 17 while there are related actions before a relevant national or European authority or court, the Directorate-General for competition will generally not initially pursue any investigation as to the existence of an infringement under Article 85 or 86 of the EC Treaty. This is subject, however, to the following points.

3.2. *Safeguarding complainant's rights*

25. Undertakings are entitled to effective protection of their Community law rights ([35]). These rights would be undermined if national proceedings were allowed to lead to an excessive delay of the Commission's action, without a satisfactory

resolution of the matter at a national level. In the telecommunications sector, innovation cycles are relatively short, and any substantial delay in resolving an access dispute would in practice be equivalent to a refusal of access, thus prejudging the proper determination of the case.

26. The Commission therefore takes the view that an access dispute before a national regulatory authority should be resolved within a reasonable period of time, normally speaking not extending beyond six months of the matter first being drawn to the attention of that authority or after initiation of ONP procedures, including the conciliation procedures (36). This resolution could take the form of either a final determination of the action or another form of relief which would safeguard the rights of the complainant. If the matter has not reached such a resolution then, *prima facie,* the rights of the parties are not being effectively protected, and the Commission would in principle, upon request by the complainant, begin its investigations into the case in accordance with its normal procedures, after consultation and in cooperation with the national authority in question.

3.3. *Interim measures*

27. As regards any request for interim measures, the existence of national proceedings is relevant to the question of whether there is a risk of serious and irreparable harm. Such proceedings should, *prima facie,* remove the risk of such harm and it would therefore not be appropriate for the Commission to grant interim measures in the absence of evidence that the risk would nevertheless remain.

28. The availability of and criteria for injunctive relief is an important factor which the Commission must take into account in reaching this *prima facie* conclusion. If injunctive relief were not available, or if such relief was not likely adequately to take into account the complainant's rights under Community law, the Commission would consider that the national proceedings did not remove the risk of harm, and would therefore commence its investigation of the case.

4. Own-initiative investigation and sector inquiries

29. If it appears necessary, the Commission will open an own-initiative investigation. It can also launch a sector inquiry, subject to consultation of the Advisory Committee of Member State competition authorities.

5. Fines

30. The Commission may impose fines of up to 10 % of the annual worldwide turnover of undertakings which intentionally or negligently breach Article 85 (1) or Article 86 (37). Where agreements have been notified pursuant to Regulation 17 for an exemption under Article 85 (3), no fine may be levied by the Commission in respect of activities described in the notification (38) for the period following notification. However, the Commission may withdraw the immunity from fines by informing the undertakings concerned that, after preliminary examination, it is of the opinion that Article 85 (1) of the Treaty applies and that application of Article 85 (3) is not justified (39).

31. The ONP interconnection Directive has two particular provisions which should be taken into account with respect to the question of fines under the competition rules. First, it provides that interconnection agreements must be communicated to the relevant national regulatory authorities and made available to interested third parties, with the exception of those parts which deal with the commercial strategy of the parties (40). Secondly, it provides that the national regulatory authority must have a number of powers which it can use to influence or amend the interconnection agreements (41). These provisions ensure that appropriate publicity is given to the agreements, and provide the national regulatory authority with the opportunity to take steps, where appropriate, to ensure effective competition on the market.

32. Where an agreement has been notified to a national regulatory authority, but has not been notified to the Commission, the Commission does not consider it would be generally appropriate as a matter of policy to impose a fine in respect of the agreement, even if the agreement ultimately proves to contain conditions in breach of Article 85. A fine would, however, be appropriate in some cases, for example where:

(a) the agreement proves to contain provisions in breach of Article 86; and/or

(b) the breach of Article 85 is particularly serious.

The size of the fine will depend on the gravity and duration of the infringement.

33. Notification to the NRA is not a substitute for a notification to the Commission and does not limit the possibility for interested parties to submit a complaint to the Commission, or for the Commission to begin an own-initiative investigation into access agreements. Nor does such notification limit the rights of a party to seek damages before a national court for harm caused by anti-competitive agreements (42).

PART II

RELEVANT MARKETS

34. In the course of investigating cases within the framework set out in Part I above, the Commission will base itself on the following approach to the definition of relevant markets in this sector.

35. Firms are subject to three main sources of competitive constraints; demand substitutability, supply substitutability and potential competition, with the first constituting the most immediate and effective disciplinary force on the suppliers of a given product or service. Demand substitutability is therefore the main tool used to define the relevant product market on which restrictions of competition for the purposes of Articles 85 (1) and 86 can be identified.

36. Supply substitutability is generally not used to define relevant markets. In practice it cannot be clearly distinguished from potential competition. Supply side substitutability and potential competition are used for the purpose of determining whether the undertaking has a dominant position or whether the restriction of competition is significant within the meaning of Article 85, or whether there is elimination of competition.

37. In assessing relevant markets it is necessary to look at developments in the market in the short term.

1. Relevant product market

38. Section 6 of Form A/B defines the relevant product market as follows:

'A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'.

39. The ending of the legal monopolies in the telecommunications sector, whereby third parties can provide services to end-users, will lead to the emergence of a second type of market, related to the market for provision of services, that of access to facilities which are currently necessary to provide these services. In this sector, interconnection to the public switched telecommunications network would be a typical example of such access. Without interconnection, it will not be commercially possible for third parties to provide, for example, comprehensive voice telephony services.

40. It is clear, therefore, that in the telecommunications sector there are at least two types of relevant product markets to consider — that of a service to be provided to end users and that of access to those facilities necessary to provide that service to end users (information, physical network, etc.). In the context of any particular case, it will be necessary to define the relevant access and services markets, such as interconnection to the public telecommunications network, and provision of public voice telephony services, respectively.

41. When appropriate, the Commission will use the test of a relevant market which is made by asking whether, if all the suppliers of the services in question raised their prices by 5 to 10 %, their collective profits would rise. According to this test, if their profits would rise, the market considered is a separate relevant market.

42. The Commission considers that the principles under competition law governing these markets remain the same regardless of the particular market in question. Given the pace of technological change in this sector, any attempt to define particular product markets in this notice would run the risk of rapidly becoming inaccurate or irrelevant. The definition of particular product markets is best done in the light of a detailed examination of an individual case.

1.1. *Services market*

43. This can be broadly defined as the provision of any telecommunications service to a user. Different telecommunications services will be considered substitutable if they show a sufficient degree of interchangeability for the end-user, which would mean that effective competition can take place between the different providers of these services.

1.2. *Access to facilities*

44. For a service provider to provide services to end-users it will often require access to one or more (upstream or downstream) facilities. For example, to deliver physically the service to end-users, it needs access to the termination points of the telecommunications network to which these end-users are connected. This access can be achieved at the physical level through dedicated or shared local infrastructure, either self provided or leased from a local infrastructure provider. It can also be achieved either through a service provider who already has these end-users as subscribers, or through an interconnection provider who has access directly or indirectly to the relevant termination points.

45. In addition to physical access, a service provider may need access to other facilities to enable it to market its service to end users: for example, a service provider must be able to make end users aware of its services. Where, as is often the case, for example, with directory information, the facility can only be obtained from the telecommunications operator, similar concerns arise as with physical access issues.

46. In many cases, the Commission will be concerned with physical access issues, where what is necessary is interconnection to the network of the telecommunications operator ([43]).

47. Some incumbent telecommunications operators may be tempted to resist providing access to third-party service providers or other network operators, particularly in areas where the proposed service will be in competition with a service provided by the telecommunications operator itself. This resistance will often manifest itself as a reluctance to allow access or a willingness to allow it only under disadvantageous conditions. It is the role of the competition rules to ensure that these prospective access markets are allowed to develop, and that incumbent operators are not permitted to use their control over access to stifle developments on the services markets.

It should be stressed that in the telecommunications sector, liberalization can be expected to lead to the development of new, alternative networks which will ultimately have an impact on access market definition involving the incumbent telecommunications operator.

2. **Relevant geographic market**

48. Relevant geographic markets are defined in Form A/B as follows:

'The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.'

49. As regards the provision of telecommunication services and access markets, the relevant geographic market will be the area in which the objective conditions of competition applying to service providers are similar. It will therefore be necessary to examine the possibility for these service providers to access an end-user in any part of this area, under equivalent and economically viable conditions. Regulatory conditions such as the terms of licences, and any exclusive or special rights owned by competing local access providers are particularly relevant ([44]).

PART III

PRINCIPLES

50. The Commission will apply the following principles in cases before it.

51. The Commission has recognized that:

'Articles 85 and 86 ... constitute law in force and enforceable throughout the Community. Conflicts should not arise with other Community rules because Community law forms a coherent regulatory framework ... it is obvious that Community acts adopted in the telecommunications sector are to be interpreted in a way consistent with

competition rules, so as to ensure the best possible implementation of all aspects of the Community telecommunications policy ... This applies, *inter alia*, to the relationship between competition rules applicable to undertakings and the ONP rules' ([45]).

52. Thus, competition rules continue to apply in circumstances where other Treaty provisions or secondary legislation are applicable. In the context of access agreements the internal market and competition provisions of Community law are both important and mutually reinforcing for the proper functioning of the sector. Therefore in making an assessment under the competition rules, the Commission will seek to build as far as possible on the principles established in the harmonization legislation. It should also be borne in mind that a number of the competition law principles set out below are also covered by specific rules in the context of the ONP framework. Proper application of these rules should often avoid the need for the application of the competition rules.

53. As regards the telecommunications sector, attention should be paid to the cost of universal service obligations. Article 90 (2) of the EC Treaty may justify exceptions to the principles of Articles 85 and 86 of the EC Treaty. The details of universal service obligations are a regulatory matter. The field of application of Article 90 (2) has been specified in the Article 90 Directives in the telecommunications sector, and the Commission will apply the competition rules in this context.

54. Articles 85 and 86 of the EC Treaty apply in the normal manner to agreements or practices which have been approved or authorized by a national authority ([46]), or where the national authority has required the inclusion of terms in an agreement at the request of one or more of the parties involved.

55. However, if a national regulatory authority were to require terms which were contrary to the competition rules, the undertakings involved would in practice not be fined, although the Member State itself would be in breach of Articles 3 (g) and 5 of the EC Treaty ([47]) and therefore subject to challenge by the Commission under Article 169 of the EC Treaty. Additionally, if an undertaking having special or exclusive rights within the meaning of Article 90, or a state-owned undertaking, were required or authorised by a national regulator to engage in behaviour constituting an abuse of its dominant position, the Member State would also be in breach of Article 90 (1) and the Commission could adopt a decision requiring termination of the infraction ([48]).

56. National regulatory authorities may require strict standards of transparency, obligations to supply and pricing practices on the market, particularly where this is necessary in the early stages of liberalization. When appropriate, legislation such as the ONP framework will be used as an aid in the interpretation of the competition rules ([49]). Given the duty resting on national regulatory authorities to ensure that effective competition is possible, application of the competition rules is likewise required for an appropriate interpretation of the ONP principles. It should also be noted that many of the issues set out below are also covered by rules under the full competition Directive and the existing and proposed ONP, licensing and data protection Directives: effective enforcement of this regulatory framework should prevent many of the competition issues set out below from arising.

1. Dominance (Article 86)

57. In order for an undertaking to provide services in the telecommunications services market, it will need to obtain access to various facilities. For the provision of telecommunications services, for example, interconnection to the public switched telecommunications network will usually be necessary. Access to this network will almost always be in the hands of a dominant telecommunications operator. As regards access agreements, dominance stemming from control on facilities will be the most relevant to the Commission's appraisal.

58. Whether or not a company is dominant does not depend only on the legal rights granted to that company. The mere ending of legal monopolies does not put an end to dominance. Indeed, notwithstanding the liberalization Directives, the development of effective competition from alternative network providers with adequate capacity and geographic reach will take time.

59. In the telecommunications sector, the concept of 'essential facilities' will in many cases be of direct relevance in determining the duties of dominant telecommunications operators. The phrase essential facility is used to describe a facility or infra-

structure which is essential for reaching customers and/or enabling competitors to carry on their business, and which cannot be replicated by any reasonable means ([50]).

A company controlling the access to an essential facility enjoys a dominant position within the meaning of Article 86. Conversely, a company may enjoy a dominant position pursuant to Article 86 without controlling an essential facility.

The following facilities could at present be expected to constitute essential facilities in the telecommunications sector: for example, the public telecommunications networks for voice and/or data services, leased circuit or and related network terminating equipment, basic data regarding subscribers to the public voice telephony service, numbering schemes and other customer or technical information.

1.1. *Services market*

60. One of the factors used to measure the market power of an undertaking are the sales attributable to that undertaking, expressed as a percentage of total sales in the market for substitutable services in the relevant geographic area. As regards the services market, the Commission will assess, *inter alia*, the turnover generated by the sale of substitutable services, excluding the sale or internal usage of interconnection services and the sale or internal usage of local infrastructure ([51]), taking into consideration the competitive conditions and the structure of supply and demand on the market.

1.2. *Access to facilities*

61. The concept of 'access' as referred to above in point 45 can relate to a range of situations, including the availability of leased lines enabling a service provider to build up its own network, and interconnection problem in the strict sense, i.e. interconnecting two telecommunication networks, e.g. mobile and fixed. In relation to access, incumbent operators often occupy a monopoly position, and even in areas where liberalization of the legal framework has begun, it is probable that the incumbent will remain dominant in the future. The incumbent operator, which controls the facilities, is often also the largest service provider, and they have in the past not needed to distinguish between the conveyance of telecommunications services and the provision of these services to end-users. Today, an operator who is also a service provider does not require its downstream operating arm to pay for access, and therefore it is not easy to calculate the revenue to be allocated to the facility. In a case where an operator is providing both access and services it is necessary to separate so far as possible the revenues for the two markets before using revenues as the basis for the calculation of the company's share of whichever market is involved. Article 8 (2) of the proposed interconnection Directive should be helpful in this context as it calls for separate accounting for 'activities related to interconnection — covering both interconnection services provided internally and interconnection services provided to others — and other activities'.

62. The economic significance of obtaining access also depends on the coverage of the network with which interconnection is sought. Therefore, in addition to using turnover figures, the Commission will, where this is possible, also take into account the number of customers who have subscribed to services comparable with those which the service provider requesting access intends to provide. Accordingly, market power for a given undertaking will be measured partly by the number of subscribers who are connected to termination points of the telecommunications network of that undertaking expressed as a percentage of the total number of subscribers connected to termination points in the relevant geographic area.

Supply-side substitutability

63. As stated above (see point 37), supply-side substitutability is also relevant to the question of dominance. A market share of over 50 % ([52]) is usually sufficient to demonstrate dominance although other factors will be examined. For example, the Commission will examine the existence of other network providers, if any, in the relevant geographic area to determine whether such alternative infrastructures are sufficiently dense to provide competition to the incumbent's network and the extent to which it would be possible for new access providers to enter the market.

Other relevant factors

64. In addition to market share data, and supply-side substitutability, in determining whether an operator

is dominant the Commission will also examine whether the operator has privileged access to facilites which cannot be duplicated, either for legal reasons or because it would cost too much.

65. As competing access providers appear and challenge the dominance of the incumbent, the scope of the rights they receive from Member States' authorities, and notably their territorial reach, will play an important part in the determination of market power. The Commission will closely follow market evolution in relation to these issues and will take account of any altered market conditions in its assessment of access issues under the competition rules.

1.3. *Joint dominance*

66. The wording of Article 86 makes it clear that the Article applies when more than one company shares a dominant position. The circumstances in which a joint dominant position exists, and in which it is abused, have not yet been fully clarified by the case law of the Community Courts or the practice of the Commission, and the law is still developing.

67. The words of Article 86 ('abuse by one or more undertakings') describe something different from the prohibition on anti-competitive agreements or concerted practices in Article 85. To hold otherwise would be contrary to the usual principles of interpretation of the Treaty, and would render the words pointless and without practical effect. This does not, however, exclude the parallel application of Articles 85 and 86 to the same agreement or practice, which has been upheld by the Commission and the Court in a number of cases ([53]), nor is there anything to prevent the Commission from taking action only under one of the provisions, when both apply.

68. Two companies, each dominant in a separate national market, are not the same as two jointly dominant companies. National public voice telephony telecommunications operators are not likely to become jointly dominant until after liberalization in the Community. For two or more companies to be in a joint dominant position, they must together have substantially the same position *vis-à-vis* their customers and competitors as a single company has if it is in a dominant position. With specific reference to the telecommunications sector, joint dominance could be attained by two telecommunications infrastructure operators covering the same geographic market.

69. In addition, for two or more companies to be jointly dominant it is necessary, but not sufficient, for there to be no effective competition between the companies on the relevant market. This lack of competition may in practice be due to the fact that the companies have links such as agreements for cooperation, interconnection or roaming agreements. The Commission does not, however, consider that either economic theory or Community law implies that such links are legally necessary for a joint dominant position to exist ([54]). It is a sufficient economic link if there is the kind of interdependence which often comes about in oligopolistic situations. There does not seem to be any reason in law or in economic theory to require any other economic link between those companies. This having been said, in practice such links will often exist in the telecommunications sector where national telecommunication operators nearly inevitably have links of various kinds with one another.

70. To take as an example acess to the local loop, in some Member States this could well be controlled in the near future by two operators — the incumbent telecommunications operator and a cable operator. In order to provide particular services to consumers, access to the local loop of either the telecommunications operator or the cable television operator is necessary. Depending on the circumstances of the case and in particular on the relationship between them, neither operator may hold a dominant position: together, however, they may hold a joint monopoly of access to these facilites.

2. Abuse of dominance

2.1. *Refusal to grant access to essential facilities and application of unfavourable terms*

71. A refusal to give access may be prohibited under Article 86 if the refusal is made by a company which is dominant because of its control of facilities, as incumbent telecommunications operators will usually be for the foreseeable future. A refusal may have:

'the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition' ([55]).

A refusal will only be abusive if it affects competition. Service markets in the telecommunications sector will initially have few competitive players and refusals will therefore generally affect competition on those markets. In all cases of refusal, any justification will be closely examined to determine whether it is objective.

72. Broadly there are three relevant scenarios:

(a) a refusal to grant access for the purposes of a service where another operator has been given access by the access provider to operate on that services market;

(b) a refusal to grant access for the purposes of a service where no other operator has been given access by the access provider to operate on that services market;

(c) a withdrawal of supply of access from an existing customer.

73. As to the first of the above scenarios, it is clear that a refusal to supply a new customer in circumstances where a dominant facilities owner is already supplying one or more customers operating in the same downstream market would constitute discriminatory treatment which, if it would restrict competition on that downstream market, would be an abuse. Where network operators offer the same, or similar, retail services as the party requesting access, they may have both the incentive and the opportunity to restrict competition and abuse their dominant position in this way. There may, of course, be justifications for such refusal — for example *vis-à-vis* applicants which represent a potential credit risk. In the absence of any objective justifications, a refusal would usually be an abuse of the dominant position on the access market.

74. In general terms, the dominant company's duty is to provide access in such a way that the goods and services offered to downstream companies are available on terms no less favourable than those given to other parties, including its own corresponding downstream operations.

75. As to the second of the above situations, the question arises as to whether the access provider should be obliged to contract with the service provider in order to allow the service provider to operate on a new service market. Where capacity constraints are not an issue and where the company refusing to provide access to its facility has not provided access to that facility, either to its downstream arm or to any other company operating on that services market, then it is not clear what other objective justification there could be.

76. If there were no commercially feasible alternatives to the access being requested, then unless access is granted, the party requesting access would not be able to operate on the service market. Refusal in this case would therefore limit the development of new markets, or new products on those markets, contrary to Article 86 (b). In the transport field ([56]), the Commission ruled that a firm controlling an essential facility must give access in certain circumstances ([57]). The same principles apply to the telecommunications sector.

77. The principle obliging dominant companies to contract in certain circumstances will often be relevant in the telecommunications sector. Currently, there are monopolies or virtual monopolies in the provision of network infrastructure for most telecom services in the EU. Even where restrictions have already been, or will soon be, lifted, competition in downstream markets will continue to depend upon the pricing and conditions of access to upstream network services that will only gradually reflect competitive market forces. Given the pace of technological change in the telecommunications sector, it is possible to envisage situations where companies would seek to offer

new products or services which are not in competition with products or services already offered by the dominant access operator, but for which this operator is reluctant to provide access.

78. The Commission must ensure that the control over facilities enjoyed by incumbent operators is not used to hamper the development of a competitive telecommunications environment. A company which is dominant on a market for services and which commits an abuse contrary to Article 86 on that market may be required, in order to put an end to the abuse, to supply access to its facility to one or more competitors on that market. In particular, a company may abuse its dominant position if by its actions it prevents the emergence of a new product or service.

79. The starting point for the Commission's analysis will be the identification of an existing or potential market for which access is being requested. In order to determine whether access should be ordered under the competition rules, account will be taken of a breach by the dominant company of its duty not to discriminate (see below) or of the following elements, taken cumulatively:

(a) access to the facility in question is generally essential in order for companies to compete on that related market ([58]).

The key issue here is therefore what is essential. It will not be sufficient that the position of the company requesting access would be more advantageous if access were granted — but refusal of access must lead to the proposed activities being made either impossible or seriously and unavoidably uneconomic.

Although, for example, alternative infrastructure may as from 1 July 1996 be used for liberalized services, it will be some time before this is in many cases a satisfactory alternative to the facilites of the incumbent operator. Such alternative infrastructure does not at present offer the same dense geographic coverage as that of the incumbent telecommunications operator's network.

(b) there is sufficient capacity available to provide access.

(c) the facility owner fails to satisfy demand on an existing service or product market, blocks the emergence of a potential new service or product, or impedes competition on an existing or potential service or product market;

(d) the company seeking access is prepared to pay the reasonable and non-discriminatory price and will otherwise in all respects accept non-discriminatory access terms and conditions.

(e) there is no objective justification for refusing to provide access.

Relevant justifications in this context could include an overriding difficulty of providing access to the requesting company, or the need for a facility owner which has undertaken investment aimed at the introduction of a new product or service to have sufficient time and opportunity to use the facility in order to place that new product or service on the market. However, although any justification will have to be examined carefully on a case-by-case basis. It is particularly important in the telecommunications sector that the benefits to end-users which will arise from a competitive environment are not undermined by the actions of the former state monopolists in preventing competition from emerging and developing.

In determining whether an infringement of Article 86 has been committed, account will be taken both of the factual situation in that and other geographic areas, and, where relevant the relationship between the access requested and the technical configuration of the facility.

80. The question of objective justification will require particularly close analysis in this area. In addition to determining whether difficulties cited in any particular case are serious enough to justify the refusal to grant access, the relevant authorities must also decide whether these difficulties are sufficient to outweigh the damage done to competition if access is refused or made more difficult and the downstream service markets are thus limited.

81. Three important elements relating to access which could be manipulated by the access provider in order, in effect, to refuse to provide access are timing, technical configuration and price.

82. Dominant telecommunications operators have a duty to deal with requests for access efficiently: undue and unexplained delays in responding to a request for access may constitute an abuse. In particular, however, the Commission will seek to compare the response to a request for access with:

(a) the usual time-frame and conditions applicable when the responding party grants access to its facilities to its own subsidiary or operating branch;

(b) responses to requests for access to similar facilities in other Member States;

(c) the explanations given for any delay in dealing with requests for access.

83. Issues of technical configuration will similarly be closely examined in order to determine whether they are genuine. In principle, competition rules require that the party requesting access must be granted access at the most suitable point for the requesting party, provided that this point is technically feasible for the access provider. Questions of technical feasibility may be objective justifications for refusing to supply — for example, the traffic for which access is sought must satisfy the relevant technical standards for the infrastructure — or questions of capacity restraints, where questions of rationing may arise ([59]).

84. Excessive pricing for access, as well as being abusive in itself ([60]), may also amount to an effective refusal to grant access.

85. There are a number of elements of these tests which require careful assessment. Pricing questions in the telecommunications sector will be facilitated by the obligations un ONP Directives to have transparent cost-accounting systems.

86. As to the third of the situations referred to in point 72 above, some previous Commission decisions and the case-law of the Court have been concerned with the withdrawal of supply from downstream competitors (the third case, above). In Commercial Solvents, the Court held that:

'an undertaking which has a dominant position on the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of Article 86.' ([61])

87. Although this case dealt with the withdrawal of a product, there is no difference in principle between this case and the withdrawal of access. The unilateral termination of access agreements raises substantially similar issues to those examined in relation to refusals. Withdrawal of access from an existing customer will usually be abusive. Again, objective reasons may be provided to justify the termination. Any such reasons must be proportionate to the effects on competition of the withdrawal.

2.2. *Other forms of abuse*

88. Refusals to provide access are only one form of possible abuse in this area. Abuses may also arise in the context of access having been granted. An abuse may occur *inter alia* where the operator is behaving in a discriminatory manner or the operator's actions otherwise limit markets or technical development. The following are non-exhaustive examples of abuses which can take place.

Network configuration

89. Network configuration by a dominant network operator which makes access objectively more difficult for service providers ([62]) could constitute an abuse unless it were objectively justifiable. One objective justification would be where the network configuration improves the efficiency of the network generally.

Tying

90. This is of particular concern where it involves the tying of services for which the telecommunications operator is dominant with those for which it is exposed to competition ([63]). Where the vertically integrated dominant network operator obliges the party requesting access to purchase one or more services ([64]) without adequate justifications, this may exclude rivals of the dominant access provider

from offering these elements of the package independently. This requirement could thus constitute an abuse under Article 86.

Pricing

91. Pricing problems in connection with access for service providers to a dominant operator's (essential) facilities will often revolve around excessively high prices (65): in the absence of another viable alternative to the facility to which access is being sought by service providers, the dominant or monopolistic operator my be inclined to charge excessive prices.

The problem of unfairly low prices could arise in the context of competition between different telecommunications infrastructure networks, where a dominant operator may tend to charge unfairly low prices for access in order to eliminate competition from other (emerging) infrastructure providers, in violation of Article 86 (a). In general a price is abusive if it is below the dominant company's average variable costs or if it is below average total costs and part of an anti-competitive plan (66).

If a case arises, the ONP rules concerning accounting requirements and transparency will help to ensure the effective application of Article 86 in this context.

92. Where the operator is dominant in the product or services market, the margin between the price charged to all competitors on the downstream market (including the dominant company's own downstream operations, if any) for access and the price which the network operator charges in the downstream market must be large enough to allow a reasonably efficient service provider in the downstream market to obtain a normal profit unless the dominant company can show that its downstream operation is exceptionally efficient (67). If this is not the case, competitors on the downstream market are faced by a 'price squeeze' which could force them out of the market.

Discrimination

93. A dominant access provider may not discriminate between different access agreements where such discrimination would restrict competition. Any differentiation based on the use which is to be made of the access rather than differences between the transactions for the access provider itself, if the discrimination is sufficiently likely to restrict or distort actual or potential competition, would be contrary to Article 86. This discrimination could take the form of imposing different conditions, including the charging of different prices, or otherwise differentiating between access agreements, except where such discrimination would be objectively justified, for example on the basis of cost or technical considerations or the fact that the users are operating at different levels. Such discrimination could be likely to restrict competition in the downstream market on which the company requesting access was seeking to operate, in that it might limit the possibility for that operator to enter the market or expand its operations on that market (68).

94. With regard to price discrimination, Article 86 (c) prohibits discrimination by a dominant firm between customers of that firm (69), including discriminating between customers on the basis of whether or not they agree to deal exclusively with that dominant firm.

95. Discrimination without objective justification as regards any aspects or condition of an access agreement may constitute an abuse. Discrimination may relate to elements such as pricing, delays, technical access, routing (70), numbering, restrictions on network use exceeding essential requirements and use of customer network data. However, the existence of discrimination can only be determined on a case by case basis. Discrimination is contrary to Article 86 whether or not it results from or is apparent from the terms of a particular access agreement.

96. There is, in this context, a general duty on the network operator to treat independent customers in the same way as its own subsidiary or downstream service arm. The nature of the customer and its demands may play a significant role in determining whether transactions are comparable. Different prices for customers at different levels (e.g. wholesale and retail) do not necessarily constitute discrimination.

97. Discrimination issues may arise in respect of the technical configuration of the access, given its importance in the context of access.

The degree of technical sophistication of the access: restrictions on the type or 'level' in the network hierarchy of exchange involved in the access or the technical capabilities of this exchange are of direct competitive significance. These could be the facilities available to support a connection or the type of interface and signalling system used to determine the type of service available to the party requesting access (e.g. intelligent network facilities).

The number and/or location of connection points: the requirement to collect and distribute traffic for particular areas at the switch which directly serves that area rather than at a higher level of the network hierarchy may be important. The party requesting access incurs additional expense by either providing links at a greater distance from its own switching centre or being liable to pay higher conveyance charges.

Equal access: the possibility for customers of the party requesting access to obtain the services provided by the access provider using the same number of dialled digits as are used by the customers of the latter is a crucial feature of competitive telecommunications.

Objective justification

98. These could include factors relating to the actual operation of the network owned by the access provider, or licensing restrictions consistent with, for example, the subject matter of intellectual property rights.

2.3. *Abuses of joint dominance*

99. In the case of joint dominance (see above, points 65 *et seq.*) behaviour by one of several jointly dominant companies may be abusive even if others are not behaving in the same way.

100. In addition to remedies under the competition rules, if no operator was willing to grant access, and if there was no technical or commercial justification for the refusal, one would expect that the national regulatory authority would resolve the problem by ordering one or more of the companies to offer access, under the terms of the ONP Directive or under national law.

3. Access agreements (Article 85)

101. Restrictions of competition stemming from access agreements may have two distinct effects: to restrict competition between the two parties to the access agreement, or to restrict competition from third parties, for example through exclusivity for one or both of the parties of the agreement. In addition, where one party is dominant, conditions of the access agreement may lead to a strengthening of that dominant position, or to an extension of that dominant position to a related market, or may constitute an unlawful exploitation of the dominant position through the imposition of unfair terms.

102. Access agreements where access is in principle unlimited are not likely to be restrictive of competition within the meaning of Article 85 (1). Exclusivity obligations in contracts providing access to one company are likely to restrict competition because they limit access to infrastructure for other companies. Since most networks have more capacity than any single user is likely to need, this will normally be the case in the telecommunications sector.

103. Access agreements can have significant pro-competitive effects as they can improve access to the downstream market. Access agreements in the context of interconnection are essential to interoperability of services and infrastructure, thus increasing competition in the downstream market for services, which is likely to involve higher added value than local infrastructure.

104. There is, however, obvious potential for anti-competitive effects of certain access agreements or clauses therein. Access agreements may, for example:

(a) serve as a means of coordinating prices;

(b) or market sharing;

(c) have exclusionary effects on third parties ([71]);

(d) lead to an exchange of commercially sensitive information between the parties.

105. The risk of price coordination is particularly acute in the telecommunications sector since interconnection charges often amount to 50 % or more of the total cost of the services provided, and where interconnection with a dominant operator will usually be necessary. In these circumstances, the scope for price competition is limited and the risk (and the seriousness) of price coordination correspondingly greater.

106. Furthermore, interconnection agreements between network operators may under certain circumstances be an instrument of market sharing between the network operator providing access and the network operator seeking access, instead of the emergence of network competition between them.

107. In a liberalized telecommunications environment, the above types of restrictions of competition will be monitored by the national authorities and the Commission under the competition rules. The right of parties who suffer from any type of anti-competitive behaviour to complain to the Commission is unaffected by national regulation.

Clauses falling within Article 85 (1)

108. The Commission has identified certain types of restriction which would potentially infringe Article 85 (1) of the EC Treaty and therefore require individual exemption. These clauses will most commonly relate to the commercial framework of the access.

109. In the telecommunications sector, interconnecting parties may wish to exchange, customer and traffic information. This exchange is likely to influence the competitive behaviour of the undertakings concerned, and could easily be used by the parties for collusive practices, such as market sharing ([72]). Safeguards will therefore be necessary to ensure that either confidential information is only disclosed to those parts of the companies involved in making the interconnection agreements, or to ensure that the information is not used for anti-competitive purposes.

110. Exclusivity arrangements, for example where traffic would be conveyed exclusively through the telecommunications network of one or both parties rather than to the network of other parties with whom access agreements have been concluded will similarly require analysis under Article 85 (3). If no justification is provided for such routing, such clauses will be prohibited.

111. Access agreement that have been concluded with an anti-competitive object are extremely unlikely to fulfil the criteria for an individual exemption under Article 85 (3).

112. Furthermore, access agreements may have an impact on the competitive structure of the market. Local access charges will often account for a considerable portion of the total cost of the services provided to end-users by the party requesting access, thus leaving limited scope for price competition. Because of the need to safeguard this limited degree of competition, the Commission will therefore pay particular attention to scrutinizing access agreements in the context of their likely effects on the relevant markets in order to ensure that such agreements do not serve as a hidden and indirect means for fixing or co-ordinating end-prices for end-users, which constitutes one of the most serious infringements of Article 85 of the EC Treaty ([73]).

113. In addition, clauses involving collective discrimination leading to the exclusion of third parties are similarly restrictive of competition. The most important is discrimination with regard to price, quality or other commercially significant aspects of the access to the detriment of the party requesting access, which will generally aim at unfairly favouring the operations of the access provider.

4. Effect on trade between Member States

114. The application of both Article 85 and Article 86 requires an effect on trade between Member States.

115. In order for an agreement to have an effect on trade between Member States, it must be possible for the Commission to:

'foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.' ([74]).

It is not necessary for each of the restrictions of competition within the agreement to be capable of affecting trade ([75]), provided the agreement as a whole does so.

116. As regards access agreements in the telecommunications sector, the Commission will consider not only the direct effect of restrictions of competition on inter-state trade in access markets, but also the effects on inter-state trade in downstream telecommunications services. The Commission will also consider the potential of these agreements to foreclose a given geographic market which could prevent undertakings already established in other Member States from competing in this geographic market.

117. Telecommunications access agreements will normally affect trade between Member States as services provided over a network are traded throughout the EU and access agreements may govern the ability of a service provider or an operator to provide any given service (74). Even where markets are mainly national, as is generally the case at present given the stage of development of liberalisation, abuses of dominance will normally speaking affect market structure, leading to repercussions on trade between Member States.

118. Cases in this area involving issues under Article 86 will relate either to abusive clauses in access agreements, or a refusal to conclude an access agreement on appropriate terms or at all. As such, the criteria listed above for determining whether an access agreement is capable of affecting trade between Member States would be equally relevant here.

Conclusions

119. The Commission considers that competition rules and sector specific regulation form a coherent set of measures to ensure a liberalized and competitive market environment for telecommunications markets in the EU.

120. In taking action in this sector, the Commission will aim to avoid unnecessary duplication of procedures, in particular, competition procedures and national/EU regulatory procedures as set out under the ONP framework,

121. Where competition rules are invoked the Commission will consider which markets are relevant and will apply Article 85 and 86 in accordance with the principles set out above.

(1) According to Directive 96/19/EC and 96/2/EC, certain Member States may request a derogation from full liberalization for certain limited periods. See Commission Decision of 27 November 1996 concerning the additional implementation periods requested by Ireland for the implementation of Commission Directives 90/388/EEC and 96/2/EC as regards full competition in the telecommunications markets. This notice is without prejudice to such derogations, and the Commission will take account of the existence of any such derogation when applying the competition rules to access agreements, as described in this notice.

(2) Communication by the Commission to the European Parliament and the Council, Consultation on the Green Paper on the liberalization of telecommunications infrastructure and cable television networks, COM(95) 158 final, 3 May 1995.

(3) Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment (OJ No L 131, 27. 5. 1988, p. 73); Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ No L 192, 24. 7. 1990, p. 10); Commission Directive 94/46/EC of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications (OJ No L 268, 19. 10. 1994, p. 15); Commission Directive 95/51/EC of 18 October 1995 amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services (OJ No L 256, 26. 10. 1995, p. 49); Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications (OJ No L 20, 26. 1. 1996, p. 59); Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in the telecommunications markets (OJ No L 74, 22. 3. 1996, p. 13).

(4) Interconnection agreements are the most significant form of access agreement in the telecommunications sector. A basic framework for interconnection agreements is set up by the rules on open network provision (ONP), and the application of competition rules must be seen against this background: Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (OJ No L 192, 24. 7. 1990, p. 1); Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines (OJ No L 165, 19. 6. 1992, p. 27); European Parliament and Council Directive 95/62/EC of 13 December 1995 on the application of open network provision to voice telephony (OJ No L 321, 30. 12. 1995, p. 6); Common position for a European Parliament and Council Directive on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision (ONP) (OJ No C 220, 29. 7. 1996, p. 13); Proposal for a European Parliament and Council Directive amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications, COM(95) 543 final, 14. 11. 1995.

(5) In the telecommunications area, notably Commission Decision of 18 October 1991, Eirpage (OJ No L 306, 7. 11. 1991, p. 22), and Commission Decisions of 17 July 1996, Atlas and Phoenix (OJ No L 239, 19. 9. 1996, p. 23 and 57). There are also a number of pending cases involving access issues.

(6) Competition aspects of interconnection agreements in the telecommunications sector, June 1995; Competition aspects of access by service providers to the resources of telecommunications operators, December 1995. See also Competition aspects of access pricing, December 1995.

(7) In the case of the ONP leased line directive, ONP foresees the first stage which allows the aggrieved user to appeal to the national regulatory authority. This can offer a number of advantages. In the telecommunications areas where experience has shown that companies are often hesitant to be seen as complainants against the TO on which they heavily depend not only with respect to the specific point of conflict but also a much broader and far-reaching sense, the procedures foreseen under ONP are an attractive option. ONP procedures furthermore can cover a broader range of access problems than could be approached on the basis of the competition rules. Finally, these procedures can offer users the advantage of proximity and familiarity with national administrative procedures; language is also a factor to be taken into account.
Under ONP procedures, if matters cannot be resolved at the national level, a second stage is organized at the European level (conciliation procedure). Pursuant to the ONP leased line Directive, an agreement between the parties involved must then be reached within two months, with a possible extension of one month if the parties agree.
It should be noted that in the proposed ONP interconnection Directive, as opposed to the leased line Directive, a conciliation procedure is foreseen for transfrontier cases only, that is interconnection disputes in which more than one national regulatory authority is involved. If the national regulatory authorities dealing with an interconnection problem do not reach a solution to the problem, then one of them may notify the Commission thereof and invoke the conciliation procedure (Article 17 of the proposed Directive).

(8) National regulatory authority is a sector specific national telecommunications regulatory created by a Member State in the context of the Services Directive as amended, and the ONP framework.

(9) Article 7 of the Services Directive (Commission Directive 90/388/EEC, referred to above in footnote 3), and the Commission's communication 95/C 275/02 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 (OJ No C 275, 20. 10. 1995, p. 9 *et seq.*). See also Case C-91/94, Thierry Tranchant and Telephones Stores Sarl, Judgment of the Court of Justice, 9 November 1995, not yet reported.

(10) Proposed ONP interconnection Directive cited in footnote 4, Article 9 (3).

(11) Case T-24/90, Automec v. Commission, 1992 ECR II-2223, paragraph 77; and Case T-114/92, BEMIM v. Commission, 1995 ECR-II 147.

(12) Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EC Treaty (OJ No C 39, 13. 2. 1993, p. 6, paragraph 14); draft notice on cooperation between national competition authorities and the Commission (OJ No 262, 10. 9. 1996, p. 5).

(13) Case 127/73, BRT v. Sabam, 1974 ECR 51.

(14) Case 66/86, Ahmed Saeed, 1989 ECR 838.

(15) They must not, for example, encourage or reinforce or approve the results of anti-competitive behaviour: Ahmed Saeed, above footnote 14; Case 153/93, Federal Republic of Germany v. Delta Schiffahrts, 1994 ECR-I 2517; Case 267/86, Van Eycke, 1988 ECR 4769.

(16) Case 13/77, GB-Inno-BM/ATAB, 1977 ECR 2115, paragraph 33: 'while it is true that Article 86 is directed at undertakings, nonetheless it is also true that the Treaty imposes a duty on Member States not to adopt or maintain in force any measure which could deprive the provision of its effectiveness.'

(17) For further duties of national authorities see Case 103/88, Fratelli Costanzo SpA, 1989 ECR 1839.
See Ahmed Saeed, above footnote 14: 'Articles 5 and 90 of the EC Treaty must be interpreted as (i) prohibiting the national authorities from encouraging the conclusion of agreements on tariffs contrary to Article 85 (1) or Article 86 of the Treaty, as the case may be; (ii) precluding the approval by those authorities of tariffs resulting from such agreements'.

(18) Joined Cases C-6 and 9/90, Francovich, 1990-I ECR 5357; Joined Cases C-46/93, Brasserie de Pêcheur SA v. Germany and Case C-48/93, R v. Secretary of State for Transport *ex parte* Factortame Ltd and others, judgment of 5 March 1996, not yet reported.

(19) For example, recital 18 of the leased line Directive referred to in footnote 4 and Article 9 (3) of the draft ONP interconnection Directive.

(20) Council Regulation No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ No L 395, 30. 12. 1989, p. 1).

(21) Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty (OJ No 13, 21. 12. 1962, p. 204/62), as amended.

(22) Articles 2 and 4 (1) of Regulation 17.

(23) Article 3 of Regulation 17.

(24) Articles 3 and 12 of Regulation 17.

(25) Case 792/79 R, Camera Care v. Commission, 1980 ECR 119. See also Case T-44/90, La Cinq v. Commission, 1992 ECR II-1.

(26) See point 16 of the notice on cooperation between national courts and the Commission cited above in footnote 12.

(27) Article 2 or 4 (1) of Regulation 17.

(28) Article 3 (2) of Regulation 17.

(29) Camera Care and La Cinq, referred to above in footnote 25.

(30) Notice on cooperation between national courts and the Commission cited above in footnote 12, point 16.

(31) Paragraph 14.

(32) See Automec, footnote 11 above, paragraph 86.

(33) BRT v. Sabam, footnote 13 above.

(34) Articles 9 (1) and 9 (3) of the proposed ONP interconnection Directive.

(35) Case 14/83, Von Colson, 1984 ECR 1891.

(36) Telecommunications: open network provision (ONP) for leased lines; Conciliation procedure; 94/C 214/04 (OJ No C 214, 4. 8. 1994, p. 4).

(37) Article 15 (2) of Regulation 17.

(38) Article 15 (5) of Regulation 17.

(39) Article 15 (6) of Regulation 17.

(40) Article 6 (c) of the proposed ONP interconnection Directive.

(41) *Inter alia*, in Article 9 of the proposed ONP interconnection Directive.

(42) See footnote 18 above.

(43) Interconnection is defined in Directive 96/19/EC as:
'... the physical and logical linking of the telecommunications facilities of organisations providing telecommunications networks and/or telecommunications services, in order to allow the users of one organization to communicate with the users of the same or another organization or to access services provided by third organizations.'
In the full liberalization Directive and ONP Directives, telecommunications services are defined as:
'services, whose provision consists wholly or partly in the transmission and/or routing of signals on a telecommunications network.'
It therefore includes the transmission of broadcasting signals and CATV networks. A telecommunications network is itself defined as:
'... the transmission equipment and, where applicable, switching equipment and other resources which permit the conveyance of signals between defined termination points by wire, by radio, by optical or by other electromagnetic means.'

(44) Eurotunnel (OJ No L 354, 31. 12. 1994, p. 66).

(45) Guidelines on the application of the competition rules in the telecommunications sector, see point 3 above, paragraphs 15 and 16.

(46) Commission Decision 82/896/EEC BNIC/AROW (OJ No L 379, 31. 12. 1982, p. 1).

(47) See footnote 15 above.

(48) Joined Cases C-48/90 and C-66/90, Netherlands and others v. Commission, 1992 ECR I-565.

(49) See Ahmed Saeed, footnote 14 above, where internal market legislation relating to pricing was used as an aid in determining what level of prices should be regarded as unfair for the purposes of Article 86.

(50) See also the definition included in the 'Additional commitment on regulatory principles by the European Communities and their Member States' used by the Group on basic telecommunications in the context of the World Trade Organisation (WTO) negotiations:
'Essential facilities mean facilities of a public telecommunications transport network and service that:
(a) are exclusively or predominantly provided by a single or limited number of suppliers; and
(b) cannot feasibly be economically or technically substituted in order to provide a service.'

(51) Case 6/72 Continental Can, 1973 ECR 215.

(52) It should be noted in this context that under the ONP framework an organization may be notified as having significant market power. The determination of whether an organization does or does not have significant market power depends on a number of factors, but the starting presumption is that an organization with a market share of more than 25 % will normally be considered to have significant market power. The Commission will take account of whether an undertaking has been notified as having significant market power under the ONP rules in its appraisal under the competition rules.

(53) Case 85/76 Hoffmann-La Roche, 1979 ECR 461; Racal Decca, Commission Decision of 21 December 1988 (OJ No L 43, 15. 2. 1989, p. 27).

(54) Nestlé/Perrier, Commission Decision of 22 July 1992 (OJ No L 356, 5. 12. 1992, p. 1).

(55) Case 85/76 Hoffmann-La Roche, 1979 ECR 461.

(56) Commission Decision 94/19/EC, Sea Containers v. Stena Sealink (OJ No L 15, 18. 1. 1994, p. 8); Commission Decision 94/119/EC, re access to facilities of Port Rødby (OJ No L 55, 26. 2. 1994, p. 52).

(57) See also (among others): Judgments of the Court: Cases 6 and 7/73, Commercial Solvents v. Commission, 1974 ECR 223; Case 311/84, Télémarketing, 1985 ECR 3261; Case C-18/88 RTT v. GB-Inno, 1991 ECR I-5941; Case C-260/89, Elliniki Radiophonia Teleorassi, 1991 ECR I-2925; Cases T-69, T-70 and T-76/89, RTE, BBC and ITP v. Commission, 1991 ECR II-485, 535, 575; Case C-271/90, Spain v. Commission, 1992 ECR I-5833; Cases C-241 and 242-91P, RTE and ITP Ltd v. Commission (Magill), 1995 ECR I-743.
Commission Decisions: 76/185/EEC — National Carbonizing Company (OJ No L 35, 10. 2. 1976, p. 6); 88/589/EEC — London European — Sabena (OJ No L 317, 24. 11. 1988, p. 47); 92/213/EEC — British Midland v. Aer Lingus (OJ No L 96, 10. 4. 1992, p. 34); B&I/Sealink, (1992) 5 CMLR 255; EC Bulletin, No 6 — 1992, point 1.3.30.

(58) Community law protects competition and not competitors, and therefore it would be insufficient to demonstrate that one competitor needed access to a facility in order to compete in the downstream market. It would be necessary to demonstrate that access is necessary for all except exceptional competitors in order for access to be made compulsory.

(59) As noted above in paragraph 80.

(60) See paragraph 91 below.

(61) Case 6/73 and 7/73, Commercial Solvents, 1974 ECR 223.

(62) That is to use the network to reach their own customers.

(63) This is also dealt with under the ONP framework: see Article 7 (4) of the Interconnection Directive, Article 12 (4) of the voice telephony Directive and Annex II of the ONP framework Directive.

(64) That is including those which are superfluous to the latter, or indeed those which may constitute services the access requester itself would like to provide for its customers.

(65) The Commission communication on assessment criteria for national schemes for the costing and financing of universal service and guidelines for the operation of such schemes will be relevant for the determination of the extent to which the universal service obligation can be used to justify the prices charged. See also the reference to the universal service obligation in paragraph 53 above.

(66) See AKZO, Case C-62/86, [1991] ECR-3359.
However, the average variable cost rule cannot be applied in many situations in the telecommunications sector, since the variable costs of providing access to an already existing network are almost zero. Accordingly, the test which the Commission considers should be applied is whether a company charges a price for goods and services — other than in the context of a new product or service — which although above the average variable cost of providing the specific goods or services for which the price in question is paid is so low that the overall revenues for all the goods or services in question would be less than its average total costs of providing them if it sold the same proportion of its output at the same price on a continuing basis, even where no intent to exclude a competitor is proved.

(67) Commission Decision 88/518/EEC, Brown Napier/British Sugar (OJ No L 284, 19. 10. 1988, p. 41): the margin between industrial and retail prices was reduced to the point where the wholesale purchaser with packaging operations as efficient as those of the wholesale supplier could not profitably serve the retail market. See also National Carbonizing, footnote 57 above.

(68) However, when infrastructure capacity is under-utilised, charging a different price for access depending on the demand in the different downstream markets may be justified to the extent that such differentiation permits a better utilisation of the infrastructure and a better development of certain markets, and where such differentiation does not restrict or distort competition. In such a case, the Commission will analyse the global effects of such price differentiation on all of the downstream markets.

(70) Case C-310/93 P, BPB Industries plc and British Gypsum Ltd v. Commission [1995] ECR I-865, 904, applying to discrimination by BPB among customers in the related market for dry plaster.

(71) That is to a preferred list of correspondent network operators.

(72) Commission Decision 94/663/EC, Night Services (OJ No L 259, 7. 10. 1994, p. 20); Commission Decision 94/894/EC, Eurotunnel (OJ No L 354, 31. 12. 1994, p. 66).

(73) Case T-34/92, Fiatagri UK Ltd and New Holland Ford Ltd v. Commission; Case T-35/92, John Deere Ltd v. Commission; Both on appeal to the ECJ; Appealing against Commission decision, UK Agricultural Tractor Registration Exchange (OJ No L 68, 13. 3. 1992, p. 19).

(74) Case 8/72 Vereniging van Cementhandelaaren v. Commission [1972] ECR 977; Case 123/83 Bureau National Interprofessionnel du Cognac v. Clair [1985] ECR 391.

(75) Case 56/65, STM, 1966 ECR 235 at 249.

(76) Case 193/83, Windsurfing International Inc v. Commission, 1986 ECR 611.

(77) See telecommunications guidelines, point 3 above.

Non-opposition to a notified concentration

(Case No IV/M.859 — Generali/Prime)

(97/C 76/07)

(Text with EEA relevance)

On 18 December 1996, the Commission decided not to oppose the above notified concentration and to declare it compatible with the common market. This decision is based on Article 6 (1) (b) of Council Regulation (EEC) No 4064/89. The full text of the decision is available only in Italian and will be made public after it is cleared of any business secrets it may contain. It will be available:

— as a paper version through the sales offices of the Office for Official Publications of the European Communities (see list on the last page),

— in electronic form in the 'CIT' version of the Celex database, under document number 396M0859. Celex is the computerized documentation system of European Community law; for more information concerning subscriptions please contact:

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Notice pursuant to Article 19 (3) of Council Regulation No 17 (1) concerning a request for negative clearance or an exemption pursuant to Article 85 (3) of the EC Treaty

(Case No IV/35.296 — Inmarsat-P)

(95/C 304/06)

(Text with EEA relevance)

I. INTRODUCTION

On 11 November 1994 the International Maritime Satellite Organization, which, in December 1994, changed its name to the International Mobile Satellite Organization (Inmarsat), notified to the Commission the creation of an affiliate, I-CO Global Communications Ltd (ICO), to finance, construct and operate the Inmarsat-P world-wide mobile satellite-based telecommunications system. ICO was actually incorporated as a UK company with limited liability on 16 December 1994 after an extraordinary meeting of the Inmarsat Assembly decided to go ahead with it. The Inmarsat assembly also decided that signatories of Inmarsat would be free to decide whether or not to invest in ICO. A large number of signatories subsequently expressed an interest in doing so, and, finally, 38 of them decided to invest during a meeting held on 17 to 20 January 1995 providing ICO with more than the financial support initially expected. In June 1995, ICO was restructured; it consists now of three entities, a holding company and an operating company registered in the Cayman Islands and a management services company registered in the United Kingdom.

ICO and the Inmarsat-P system are at a early stage of development. The first satellite of the system will only be launched on 31 July 1999 and the full operability of the system is foreseen for 31 December 2000. In addition, no radio frequencies have yet been allocated to Inmarsat-P and some of the required technologies still remain under development or have not yet been applied in systems directly analogous to Inmarsat-P.

II. PARTIES

1. **Inmarsat** is an international inter-governmental organization which provides mobile satellite communications world-wide. Established in 1979 to serve the maritime community, Inmarsat has since envolved into the major provider of mobile satellite communications for commercial and distress and safety applications at sea, in the air and on land.

Inmarsat 'space segment' consists of four geostationary second generation satellites located two over the Atlantic Ocean, one over the Pacific Ocean and one over the Indian Ocean. A third generation of satellites is currently being built and its expected to become operational in 1996.

The services offered by Inmarsat include direct-dial telephone, telex, facsimile, electronic mail and data connections for maritime applications, flight-deck voice and data, automatic position and status reporting and direct-dial passenger telephone for aircraft, two-way data exchange, position reporting, electronic mail and fleet management to land transport. Inmarsat is also used for emergency communications at times of human disaster and natural catastrophe. In addition, Inmarsat offers several different mobile communication systems: in 1991 Inmarsat launched its Inmarsat-C low-data rate text and data services and in 1993 its Inmarsat-M portable satellite phone. By the end of 1993 there were 3 790 Inmarsat-C and 333 Inmarsat-M terminals in use.

Inmarsat had been developing the Inmarsat-P concept for the last few years.

Any country in the world is entitled to be an Inmarsat member. At the third quarter of 1994, there were 75 member countries. Member countries designate a national entity to be its signatory, usually the (international) telecommunications operator or the satellite service provider. Signatories have an investment share in Inmarsat which is proportional to the use they make of the system. This principle has been abandoned for the setting-up of ICO.

Inmarsat has invested $ 150 million in ICO corresponding to a 10,7 % of the ordinary shares of the company and entitling it to 15 % of the voting rights. In addition, Inmarsat has received 700 000 B shares in exchanges for its in-kind contribution (2). In-kind contributions by Inmarsat to ICO have been paid

(1) OJ No 13, 21. 2. 1962, p. 204/62.

(2) In-kind contributions refer to expenditures made by Inmarsat attributable to the development of Inmarsat-P and to compensations to Inmarsat for benefiting from its experience in the satellites communications market, for the use of Inmarsat's logo and trademarks and for the compromise by Inmarsat not to procure a separate space segment designed for the purpose of providing hand held services other than from ICO.

for in shares in accordance with an independent valuator. The B shares will be immediately convertible into ordinary shares, provided that if Inmarsat does so prior to 1 January 2002, it cannot exceed 15 % of the voting rights for more than 90 days.

2. 37 signatories (or subsidiaries of signatories) of Inmarsat, all of them telecommunications and/or satellite(s) operators, freely decided to join ICO and have signed subscription agreements with ICO. None of them controls more than 6,7 % of the ordinary shares of ICO. ICO's shares are split the following way: 38,7 % of the shares are in the hands of Asian signatories, 12,2 % are in the hands of Arabic signatories, 9,4 % are in the hands of Latin-American signatories, 6,7 % are in the hands of the US signatory, 3,9 % are in the hands of non-EU European signatories (3), 1,7 % are in the hands of African signatories and 0,1 % belong to Australia.

EU companies account for 16,9 % of the ordinary shares. Of the six companies so involved, five are incumbent telecommunications operators: Telefónica de España (Spain, 2,2 %), Telecom Finland (Finland, 0,1 %), OTE (Greece, 3,9 %), CPRM (Portugal, 1,8 %) and PTT Telecoms (4) (the Netherlands, 2,2 %); the sixth is Detemobil, the mobile subsidiary of Deutsche Telekom (6,7 %).

This repartition of the shares clearly differs from the current structure of Inmarsat itself; where 75 % of the shares are controlled by European and North-American signatories.

This structure could be modified in the near future, as it is foreseen that ICO's board may issue additional equity of up to US $ 600 million that will be offered to strategic investors, including companies other than Inmarsat and its signatories, i.e. the spacecraft suppliers and handset manufacturers (5).

Investors in ICO will be granted rights and opportunities to operate elements of the Inmarsat-P ground segment and to act as wholesalers and/or retailers for the distribution of the services to be provided through the system.

3. ICO

ICO hasd been established for the provision of an Intermediate Circular Orbit space segment (i.e. the satellites over which the service will be provided) and associated ground infrastructure for the delivery of Inmarsat-P hand-held and other ancillary telecommunications services. ICO will then be offering what is called a world-wide satellite-personal communications system (S-PCS) (6). ICO will mainly be a network provider. However, it can require wholesalers to provide a minimum set of services of a standard quality in order to ensure global interconnectivity.

ICO is obliged to follows a number of principles included in the memorandum of association:

(i) it shall serve all areas where there is a need for the services;

(ii) it shall act exclusively for peaceful purposes, and

(iii) it shall not discriminate in service provision on the basis of nationality, provided that geographic price differentiation should be permitted based on costs, competition or similar considerations.

ICO will be managed by a Board of Directors (BOD) made of 13 members (including the CEO). Ten of its members are elected by cumulative voting. The first BOD has been elected for a two-year term. Thereafter BOD members (other than the CEO and the two directors appointed by Inmarsat) will serve for one-year terms. After the initial meeting of shareholders held on 24 January 1995, three directors belonging to EU shareholders have been elected to the BOD. The BOD will delegate certain executive authority to the management team of the company, which will be led by the CEO, to be elected by the BOD. The management will be responsible for carrying out the directions of the

(3) Swiss Telecom (2,2 %), Cyprus Telecomms (0,1 %), Telemalta (0,1 %), Polish Telecom (1,4 %) and Morsviasputnik of Russia (0,1 %).

(4) It is worth noting that three out of four members of Unisource are involved, together accounting for $ 94 million, or 6,7 % of the shares.

(5) As regards the former, ICO has finally chosen Hughes as the manufacturer of the satellites. Hughes will also become a strategic partner of ICO; whereas ABB, Ericsson and Nokia among the latter have maintained contacts with Inmarsat.

(6) The term 'S-PCS system' is synonymous with the terms 'Big LEO/MEO' or 'Mobile Satellite Systems (MSS)' commonly seen in the press and used by ITU. S-PCS has been the term used by the Commission in the 'Communication from the Commission and proposal for a Council resolution on satellite personal communications', COM(93) 171, 27 April 1993.

BOD and for informing them of progress in the company's development and business.

Decisions by the BOD will be adopted by simple majority, although some important matters will require a two-thirds majority (i.e. nomination and dismissal of the chairman of the BOD and of the CEO). In view of the above, and given that the powers of the general assembly do not seem to be very substantial, it would seem that the company will be controlled by the BOD.

III. THE INMARSAT-P SYSTEM

1. The network

The system will consist of the following elements: the space segment, including satellites and tracking, telemetry and control stations (TT & C) (7); several network control stations (NCS) (8) directed by a network control centre (NCC); the user handheld terminals; the P-net of interconnected satellite access nodes (SAN); and the gateways connected to the P-net.

A majour feature of the system is its integration of mobile satellite communications capability with public land mobile networks and public switched telephone networks. So, the system will route calls from land networks through SANs which will select a satellite through which the call will be connected to a handheld terminal (and vice versa).

The space segment will consist of a constellation of 10 satellites to be deployed in intermediate circular orbit (10 335 km above the Earth's surface). The satellites will be arranged in two planes of five satellites each. The system will also include two spare satellites in the same orbit, bringing the total number of satellites to 12. This configuration has been designed to provide optimal coverage of the entire surface of the Earth at all times, so that more than one satellite will nearly always be available at the same time to any user, which increases the likelihood of successful and uninterrupted calls.

The system will use a frequency in the range of 1,9/2,2 GHz (9) for user links (that is links between the satellites and the user terminals).

The satellites will be linked to a ground backbone network (the P-net) consisting of 12 interconnected SANs located throughout the world. SANs will comprise earth stations with multiple antennas for communicating with satellites and associated switching equipment and databases. They will be the primary interface with the satellites for coordinating and routing traffic and maintaining certain subscriber data. SANs will be owned by ICO but installed and operated by 'qualified operators' (10). The P-net will be managed by the NCC. In order to provide global roaming, the P-net will include a system for management of user mobility which will be based upon existing digital cellular standards such as GSM.

Gateways are switches which will serve as the link between the SANs and the public terrestrial networks. The most likely gateway implementation is an incremental hardware and software modification to existing switches. They will be owned by third party operators which will be responsible for the implementation and maintenance of these facilities in conformity with ICO's technical and operational requirements. It is expected that, in reality, most gateway owners will be wholesalers, retailers and/or signatories of Inmarsat and/or ICO shareholders. In this respect, the parties have stated that the terms and conditions of the wholesaler and/or retailer authorizations will not include any form of provision binding them not to compete with competitors of ICO or giving it preferred market access. Furthermore, existing or planned EC regulation will be applicable to the operation of gateways, in particular as regards access.

The total system's implementation costs are estimated at nearly US $ 3 billion.

Finally, hand sets will be produced by major manufacturers of equipment, benefitting from terrestrial

(7) TT & C stations will track the movements of the satellites and adjust their orbits to maintain the constellation. In addition they will monitor the general conditions of the satellites. There would be five TT & Cs.

(8) The NCSs, acting through TT & Cs and SANs, will control the transponder linkages between the feeder and service antennas on the satellites.

(9) This frequency is different from those reserved by the WARC-92 conference for user links in S-PCS systems (1 610-1 626,5/2 483,5-2 500 MHz) and allocated in the United States by the Federal Communications Commission (FCC) of the US to five US-based S-PCS systems, including Iridium, Globalstar and Odyssey, on 31 January 1995.

(10) ICO will select SAN operators on commercial grounds. However, it will give consideration to favouring direct investors in ICO with preferential rights to operate SANs.

cellular technologies. Most hand sets will be capable of dual-mode operation with both satellite and terrestrial cellular (including GSM systems), so that they will be able to select, either automatically or under user control, satellite or terrestrial modes of operation.

2. Distribution of the services

The available information concerning the future distribution of the ICO services is limited to the broad principles contained mainly in the information memorandum included in the notification and detailed below. This is not supported by the relevant agreements that, according to the parties, have not been drafted yet.

Although nothing prevents ICO from supplying services, it is essentially to be considered as a network provider. It will, nevertheless, prescribe a minimum set of services and/or features to be offered in all territories in order to ensure global interconnectivity. In addition, ICO could adopt guidelines for retailers. According to the parties, such guidelines, if adopted, will not cover pricing or other competitive conditions.

The actual telecommunication services will be provided to end-users through a network of wholesalers and retailers, responsible over one or more national markets, which will provide the services at their own risk and according to terms agreed independently between them. Such retail agreements do not exist yet.

A. *Wholesalers*

Any investor which has invested at least $ 20 million in ICO has an option to become a service wholesaler in its nation. In case that it accepts to become wholesaler, it shall agree to meet specific performance requirements to be defined by ICO.

Appointment of wholesalers for territories where no investor has exercised its option or where there is no investor will be awarded the biggest bid in an auction. Each investor will receive a voucher for every $ 1 of investment. Vouchers are the currency used in the auction to obtain wholesaler rights over different territories. At the discretion of ICO's board, these territories can be awarded on a national or regional basis.

On the other hand, the board is entitled to nominate more than one wholesaler in one territory if necessary to meet strategic requirements, if the original wholesaler fails to achieve its performance requirements or if required by applicable national laws or regulatory authority.

In many cases, wholesalers will own and operate gateways and possibly they will also be the SAN operators.

As indicated above, where no wholesaler is authorized, Inmarsat itself will be entitled to act as a non-exclusive wholesaler.

The terms and conditions of the wholesalers authorizations are to be developed by the management and Board of ICO.

The number of wholesalers and their respective territories are not known yet.

Wholesalers will arrange for all aspects of the provision of the services within their territor(y)(ies). They will purchase Inmarsat-P services from ICO (basically air time) and resell it to retailers. They will be responsible for arranging installation and operation of gateways, for links between the P-net and the gateways, for interconnection to the public networks and for establishing satellite-cellular integration within their countries. In addition, they, together with retailers, will be responsible for the provision of value added and supplementary services (voice messaging, call waiting and forwarding and so on) on top of the mobile voice service the Inmarsat-P system is designed for. In summary, they will perform within their territories a role similar to that of a cellular network operator.

B. *Retailers*

Retailers will be responsible for marketing and retail sale of the services and terminals and will have primary contact with end-users within one country. They will also be responsible for all aspects of account management and customer care including customer credit, billing, accounting and related administration.

Retailers will be appointed by wholesalers consistent with guidelines provided by ICO. They will purchase services only from authorized wholesalers.

All Inmarsat signatories have the right to become non-exclusive retailers. Apart from that, the nomination of retailers will be at the discretion of wholesalers.

It is envisaged that retailers will be free to sub-contract some or all of their services to resellers, distributors and dealers.

Retailers will perform a role similar to that of an air-time reseller in cellular terrestrial mobile services.

C. *Tariff structure*

ICO will set the structure and level of prices for services provided to the national services wholesalers. The latter, in turn, are expected to have discretion in the level and structure of prices charged to retailers. Retailers for their part will also have price discretion in charging end-customers. In respect of any customer, ICO (11) will bill wholesalers, which then will bill retailers, which in their turn would finally bill resellers or end-customers.

End-customers will have to pay a connection fee, a monthly fee and a tariff per voice minute traffic.

It is expected that end-customers will, in principle, be registered in one out of two categories: global customers, usually highly mobile international business travellers, will be charged higher tariffs, as their use of the system is likely to entail more extensive use of the system's elements. National customers will be charged lower tariffs, but they will only have access to the SANs covering their home country. Customers will have the option of changing from one category to the other as desired and subject to commercial considerations.

3. **Relationships between Inmarsat and ICO** will be governed by a services contract and the subscription agreement entered into by the two parties. Pursuant to the services contract Inmarsat will provide ICO the services that the latter needs to put in place and operate the Inmarsat-P syswtem. The services contract will last until 30 April 1998, although it can be renewed for a further three year period. Pursuant to that agreement, all contracts relating to equipment, facilities, services and other common activities provided by Inmarsat to ICO will be negotiated at arm's length and paid on a fully allocated costs basis plus a reasonable fee of 6,5 % of the actual total costs incurred by Inmarsat in fulfilling the specific task (Articles 1.17 and 4.1 respectively).

Also as part of the services contract both parties have agreed that ICO will buy a minimum level of services from Inmarsat during the operational life of the agreement (Articles 4.3 and 4.4).

In addition to its involvement with ICO, Inmarsat will continue to provide its existing geostationary orbit (GEO) satellite-based mobile satellite communications and allied services, although it has agreed, subject to certain conditions, not to procure a separate space segment designated for the purpose of providing handheld services other than through ICO (point 2, schedule 2 of the Inmarsat share subscription agreement).

In exchange for Inmarsat's ownership of a 10,7 % of the ordinary shares of ICO, Inmarsat will have the right to appoint two members of the ICO's board of directors. These directors are required to act in the 'best interest' of [ICO].

Also, as part of its investor benefits, Inmarsat will have the right to act globally as an exclusive wholesaler for maritime and aeronautical services provided to non-hand-held terminals so long as Inmarsat maintains 15 % of the voting rights in ICO and, in addition, Inmarsat shall have the right to be appointed non-exclusive wholesaler in any country or region where no investor is interest in becoming wholesaler.

Finally, a consultation mechanism will be established between Inmarsat and ICO in respect of the harmonization and evolution of their respective range of services, and in respect of the use or sharing of each other services or facilities (point 4, schedule 2, Inmarsat's share subscription agreement). According to the parties, it aims at reinforcing the certainty that Inmarsat's public service duties will not be jeopardized by the launching of Inmarsat-P. The precise form of this mechanism has not been formulated yet.

IV. RELEVANT MARKET

1. **Product market**

The term S-PCS is used to denote a network used to provide satellite personal communications services, usually on a worldwide basis. At least some of the

(11) SAN operators will bill ICO for their activity on the basis agreed in their operating contracts.

relevant technologies were developed in the framework of R & D military programs in the US. AS-PCS system encompasses a constellation of LEO (low earth orbit), MEO (medium earth orbit) or GEO (geostationary earth orbit) satellites ([12]), their control earth stations and a number of gateway earth stations through which access will be provided to terrestrial fixed or mobile networks. Such a configuration will support full user mobility and identification by a single number anywhere in the world, using 'intelligent' features, similar to those of digital terrestrial cellular systems (such as GSM), that will be located either in earth stations or in the satellites themselves. Substantial efforts are being devoted by equipment manufacturers to develop light hand-held portable terminals capable of either satellite-only or of dual coverage (terrestrial when within cellular terrestrial coverage, and satellite when outside it). It is expected that voice service will be the primary application for these networks, but other significant segments will involve low rate data transmission, positioning, tracking and paging.

S-PCS represent the ability to maximize mobility of users, by providing global seamless coverage, in particular in remote areas where terrestrial services may be uneconomic. 'Global seamless coverage' means not only that the user can move anywhere, but also that the communications system can 'move' to serve new fixed or 'stationary' users: the system is never out of range. S-PCS is expected to act as complement and/or substitute for wireless terrestrial mobile technologies (including GSM ([13]) and digital cordless telephony within a fixed radius — DECT). In this respect, it will be offered by terrestrial cellular mobile network operators (such as GSM in the European Union) as an additional feature priced at a premium rate. In addition, it is expected to act as a complement and even a substitute for the public switched fixed telephone network, enhancing service coverage in remote areas of low population density and/or where the terrestrial infrastructure is very poor. Another important use of S-PCS will be as a substitute for cellular mobile telephony in areas where the cellular network has failed to penetrate (i.e. rural parts of the developed world and both urban and rural parts of lower income countries).

In this respect, Commission studies ([14]) predict that the greatest potential by far in the S-PCS market in terms of numbers of subscribers will be for communities in less developed regions of the world as a substitute for 'fixed service' where fixed networks have yet to be rolled out or are very poor. Central and Eastern Europe represent an important customer base in this context, which could be accessed from gateways within the EU.

In any event, major users of S-PCS in the EU will be international business travellers using their dual terminals in the terrestrial mode where within a given network and switching to satellite in areas outside terrestrial coverage or with incompatible networks.

A feature of these S-PCS systems is that they pose a number of unresolved regulatory issues in particular for the EU:

— contrary to what the situation is in the US, where the Federal Communications Commission (FCC) granted frequencies to five S-PCS in January 1995, the EU has not yet adopted a coordinated approach to the licensing of these systems ([15]).

— S-PCS regulation requires solving a number of additional questions; first, the criteria (technical and above all financial) to select S-PCS providers, and second, the licensing (on a national or supra-national basis) of gateway operators.

2. Geographical market

As to the geographic market, notwithstanding the particular commercial arrangements that could be offered in the future to precise categories of potential customers, the Inmarsat-P system to be managed by ICO is aiming at a global coverage, and so the relevant

([12]) LEO satellites are located around 900 km over the Earth. Full coverage of the Earth's surface would require a minimum of 48 LEO satellites.

MEO satellites are located around 10 000 km over the Earth. Full coverage of the Earth's surface would require a minimum of 10 MEO satellites. The Intermediate Circular Orbit (ICO) to be used by ICO belongs to this category.

GEO satellites are located at 36 000 km over the Earth. Full coverage of the Earth's surface would require only three GEO satellites.

([13]) It is expected that the price differential for dual-mode (satellite and GSM) versus single-mode (GSM only) will be as low as 10 %.

([14]) See 'Satellite Personal Communications and their consequences for European Telecommunications, Trade and Industry'. Report to the European Commission (DG XIII) by KPMG Peat Marwick, March 1994.

([15]) In addition, the International Telecommunications Union's (ITU) 1995 World Radiocommunication Conference (WRC-95) held in October 1995 focussed on frequency issues relating to satellite communications.

geographical market to be considered is worldwide in scope.

3. Competition in the future worldwide S-PCS market

A number of alternative projects are known to be trying to offer hand-held telecommunication services through satellite, some of them (the so-called 'little LEOs') have a more limited product (usually they will not provide voice services) and/or geographical coverage, others (the so-called 'big LEOs') are aiming at the same relevant market as ICO. Generally speaking, with the only major exception of ICO itself, most planned S-PCS systems are US-led initiatives. As of now, there is no prospect of a European-led world-wide S-PCS system. However, many European companies are substantially involved in several of the announced S-PCSs. The most important competitors of ICO (14) will be:

— *Iridium*

Motorola, a major US telecommunications equipment manufacturer, plays the leading role in the Iridium consortium for a LEO S-PCS system. A number of European companies are participating by way of partnership agreements and/or investment. These include STET (the Italian state holding company, majority owner of Telecom Italia) and Vebacom (subsidiary of the major German conglomerate VEBA AG).

Motorola Satellite Communications is in charge of spacecraft construction but Iridium itelf will own and operate the system once in place. Lockheed Corp. (USA) is contracted to build 125 LEO satellites for Iridium by the year 2003. Other partners/investors include Krunichev Enterprise (Russia) which will launch the satellites with Proton rockets, Scientific Atlanta Inc (USA) which will develop and manufacture the hand-held units as well as the satellite earth terminals, and Sprint, the third United States long-distance telecommunication carrier. The total cost of the system is estimated at US $ 3,8 billion.

Iridium plans to be operational with a limited number of satellites by 1997 to 1998, and expects 1,5 million subscribers by the year 2000. It will offer voice, paging and data services.

— *Globalstar*

Globalstar intends to put in place a S-PCS system using 48 LEO satellites. The Globalstar consortium is led and sponsored by the Loral Corporation, a leading United States defence electronics and space company. Partners/contractors include the European aerospace companies Alcatel (France), Aeorospatiale (F), Alenia (I), Deutsche Aerospace (D) and Tesam, a joint venture created by Alcatel and France Télécom. The total cost of the system is estimated at US $ 2 billion.

Globalstar expects to be operational in the US around 1999 to 2000 and globally, around five years later. Globalstar will also be offering voice and data, as well as tracking services.

— *Odyssey*

The Odyssey S-PCS system is supported by the US aerospace company TRW and the Canadian telecommunications operator Teleglobe Inc. Odyssey will consist of 12 MEO satellites and will be operational by 1999.

S-PCS systems offering global mobile communications using hand-held terminals represent a market which is expected to result in revenues of ECU 10 to 20 billion during the next decade. Due to the scarcity of frequencies, the very heavy financial implications involved in launching and operating the large number of satellites needed for such systems, and the high level of market uncertainty, however, it appears to be unlikely that there will be more than a few major players, at least at the world-wide level.

V. THE NOTIFIED AGREEMENTS

At the time of the notification, only the memorandum and articles of association of ICO had been drafted. They were included in the notification together with the information memorandum that was made available to potential investors in ICO. Later on, as part of the reply to a formal request for information, the parties submitted on 6 March 1995 copies of (i) the standard share subscription agreement signed by all investors; (ii) the (non-exclusive, irrevocable, non-transferable, worldwide) intellectual property rights licence between Inmarsat and ICO and (iii) the (non-exclusive) service mark licence between Inmarsat and ICO; together with an addendum to the information memorandum. Finally, on 26 April

(14) The Commission has commenced investigations at its own initiative on Iridium and Globalstar (see IP/95/549 of 7 June 1995).

1995, the parties submitted the services contract between Inmarsat and ICO. With these agreements, information regarding the implementation and operation of ICO is now complete.

However, a number of agreements and relevant pieces of information are still missing concerning the distribution of ICO's services once the system is operational. These at least include the nomination of wholesalers and territories granted to them, the terms and conditions of the wholesaler authorizations, the guidelines to be adopted by ICO for the appointment of retailers, the terms of the retailer authorizations as agreed with wholesalers and the agreements to be signed with cellular terrestrial operators for the joint offering of terrestrial/satellite services (and terminals) to customers. In their absence, it is not yet possible to take a final position in respect of the aspects of ICO affected by the missing information.

The Commission intends to take a favourable view pursuant to Article 85 of the EC Treaty and Article 53 of the EEA Agreement towards the creation of ICO and the relationship between Inmarsat and ICO as described in the present notice. Before doing so, it invites interested third parties to send their observations within one month of the publication of this notice to the following address, quoting the reference 'IV/35.296 — Inmarsat-P':

Commission of the European Union,
Directorate-General for Competition (DG IV),
Directorate C,
Rue de la Loi/Wetstraat 200,
B-1049 Brussels.

Recapitulation of current tenders, published in the *Supplement to the Official Journal of the European Communities*, financed by the European Community under the European Development Fund (EDF) or the European Communities budget

(week: 7 to 11 November 1995)

(95/C 304/07)

Invitation to tender No	Number and date of 'S' Journal	Country	Subject	Final date for submission of bids
4079	S 212, 7. 11. 1995	Niger	NE-Niamey: vehicles, motorcycles	6. 2. 1996
4066	S 214, 9. 11. 1995	Zimbabwe	ZW-Harare: vehicles and tractors	2. 1. 1996
4079	S 214, 9. 11. 1995	Niger	NE-Niamey: vehicles, motorcycles *(additional information)*	6. 2. 1996

Notice pursuant to Article 19 (3) of Council Regulation No 17 (1) and Article 3 of Protocol 21 of the European Economic Area Agreement concerning a request for negative clearance or an exemption pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement

Case No IV/35.337 — Atlas

(95/C 337/02)

(Text with EEA relevance)

INTRODUCTION

1. Atlas was notified to the Commission on 16 December 1994. This transaction brings about a joint venture owned 50 % by France Telecom (FT) and 50 % by Deutsche Telekom (DT). Atlas is also the instrument of DT and FT's participation in a second transaction, named Phoenix, with Sprint Corporation (2). In the course of the procedure before the Commission, FT and DT agreed to modify both the Atlas and the Phoenix agreements. The latter, notified on 29 June 1995, are described in a separate notice pursuant to Article 19 (3) of Regulation No 17, published in this edition of the *Official Journal of the European Communities.*

2. The Atlas venture will be structured at two levels. A holding company established in Brussels, Atlas SA, will be incorporated as a *société anonyme* under the laws of Belgium. Atlas SA will have three operating subsidiaries, namely one in France (Atlas France), one in Germany (Atlas Germany), and one for the rest of Europe. Atlas France and Atlas Germany will initially provide technical and sales support to FT and DT, i.e. the French and German distributors of Atlas and Phoenix products. After full liberalization of the telecommunications infrastructure and services markets in France and Germany, scheduled to occur by 1 January 1998, DT's subsidiary for the provision of standardized low-level packet-switched X.25 data communications, Datex-P, will be merged with Atlas Germany while FT's subsidiary for the provision of standardized low-level packet-switched X.25 data communications, Transpac France, will be merged with Atlas France.

A. THE PARTIES

3. Deutsche Telekom AG (DT) and France Telecom (FT) are the public TO in Germany and France. Both supply telephone exchange lines to homes and businesses; local, trunk and international communications to and from their respective home country. World-wide turnover in 1994 was ECU 31,8 billion, a 4,3 % increase over 1993, for DT and ECU 21,7 billion, a 1,8 % increase over 1993, for the FT group.

B. THE RELEVANT MARKET

1. Product markets

4. Atlas will address the markets for the provision of value-added telecommunications services to corporate users both Europe-wide and nationally. Atlas will target two separate product markets for value-added services, namely:

5. *The market for advanced telecommunications services to corporate users*

This market comprises mostly customized combinations of a range of existing telecommunications services, mainly data communications and liberalized voice services including voice communication between members of a closed group of users (virtual private network (VPN) services), high-speed data services and outsourced telecommunications solutions specially designed for individual customer requirements. The market for advanced telecommunications services to corporate users, enhanced by features such as tailored capacity allocation, billing, 24h/24h technical service, etc., is currently changing and evolving rapidly. Whether each of these services constitutes a separate product market can be left open for the purpose of this case, as Atlas and its competitors usually offer customized packages of such services in combination with individual enhanced features.

These services are provided over high-speed large-capacity leased lines linking sophisticated equipment on customer premises to the service provider's nodes. Alternatively, other means of transmission, e.g. satellite or mobile radio capacity, can be used to ensure the

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) Notification announced in OJ No C 184, 18. 7. 1995, p. 11.

geographic coverage demanded from time to time. Such services employ advanced state-of-the-art standards, data compression techniques, equipment and software. In this market, Atlas is expected to offer a portfolio of services including the following:

— data services: high speed packet-switched and Frame Relay services; pre-provisioned, managed and circuit-switched bandwidth,

— value-added application services: value-added messaging and video-conferencing services,

— voice VPN services,

— intelligent network services,

— integrated very small aperture satellite (VSAT) network services, and

— outsourcing: customers are offered to transfer responsibility and ownership of their networks to Atlas. In this connection, Atlas may integrate into its own offerings third-party products already owned by customers who wish to keep such offerings, as the case may be.

6. Due to the high cost of building and operating the networks needed to provide advanced corporate services, such services can be commercially viable only if provided to large businesses and other large telecommunicatic users who generate continued high traffic volumes (3). Customers for advanced services targeted by Atlas are multinational corporations, extended enterprises, and other intensive users of telecommunications and notably the largest among these customers. Many of these potential customers have huge telecommunication needs and have often acquired expertise in managing own internal networks; they are not likely to switch to service providers such as Atlas unless doing this proves to be cost-effective. Finally, given their knowledge of the market these customers are in a position to request offers from different competitors.

7. The market for standardized low-level packet-switched data communications services

Atlas will also be active on a separate market for packet-switched data communications services. The Commission considers data communications services a distinct telecommunications product market, without prejudice to the existence of narrower markets (4). One narrower market is that for packet- and circuit-switched services (5). Packet switching is a means to improve network capacity utilization and consists of splitting data sequences into 'packets', feeding these and other 'packets' into the network optimizing utilization of available capacity, switching the 'packets' to the desired destination and rearranging the 'packets' to obtain the data sequences sent. The most common standard used for the provision of packet-switched data services is the 'X.25' standard.

Packet-switched data communications services constitute a distinct product market because they are provided over basic terrestrial network infrastructure and based on more mature technology. These services are provided to different customer segments within the same product market, namely:

1. On the one hand, customers who generate mostly erratic and geographically widespread traffic. These features are due either to the specific type of use (e.g. banks operating cash machines nationwide, networks of points-of-sale in shops) or to the size of such customers, i.e. small and medium-sized enterprises (SMEs). Such services are billed according to published tariffs that are proportional to the actual time of use of the network.

   All incumbent Member State TOs including DT and FT operate dense public data networks with nationwide coverage providing packet-switched data communications services to this customer segment. In each Member State there is only one public data network built by the respective incumbent TO under a public service obligation before market liberalization.

2. On the other hand, larger corporate customers and other extended users generate more substantial and regular traffic. The requirements of these users justify that either third-party service providers or the potential customer itself assume the high cost of creating customized leased lines circuits to meet individual service demand. Packet-switched data communications services to such users are billed according to negotiated rates that take account of the individual demand features of a particular customer.

(3) See Commission decision in Case No IV/34.857 (BT-MCI) of 27 July 1994 (OJ No L 223, 27. 8. 1994).

(4) Commission's Guidelines on the application of EC competition rules in the telecommunications sector (OJ No C 233, 6. 9. 1991, p. 2, paragraph 27).

(5) As defined in Article 1 (1), 9th indent of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ No L 192, 24. 7. 1990, p. 10), (the 'Services Directive').

8. Virtually all companies active in each individual Member State of the European Union are potential if not actual customers for national standardized low-level packet-switched data communications services. These services are also required by SMEs, albeit in smaller volumes and possibly less regularly than by larger users. Seldom will such volumes justify that service providers invest in leased lines with the specific purpose of reaching these SMEs, which are therefore in a weak negotiating position and hardly capable to date of switching from the current provider, typically the incumbent TO, to a competitor.

9. Standardized low-level packet-switched data communications may also be offered as one service combined with advanced corporate service offerings. However, even as part of such combined offerings packet-switched data communications services are provided over standard terrestrial infrastructure. At the national level, choice' from a wider range of offerings than merely standardized low-level packet-switched data communications services may also be available to larger customers that are not using the TO's public data networks but are served over customized leased-line circuits. However, most existing customers for standardized low-level packet-switched data communications currently generate annual turnover of far below ECU 10 000 each and are not therefore potential users of advanced corporate network services. Therefore, packet-switched data communications offered by Atlas constitute a product market separate from the advanced network services market equally targeted by Atlas.

2. **Geographic markets**

The markets for advanced telecommunications services to corporate users

10. Given that price differences are quite substantial, demand for these services exists in at least three distinct geographic markets, namely at a global, a cross-border regional and a national level. Atlas will provide advanced telecommunications services to corporate users Europe-wide and nationally. Through Phoenix, advanced telecommunications services offered by Atlas will also have global 'connectivity', i.e. the technical option to extend a given service offering beyond Europe by linking a customer's premises worldwide over the Phoenix 'Global Backbone Network'.

11. Given the considerable costs involved advanced services are today mainly demanded by large multinational corporations, extended enterprises,, as well as major national and other intensive users of telecommunications. The requirements of such users, that extend to all products or corporate services provided by Atlas, were discussed in detail in the BT-MCI decision (*). Essentially, customers demand a customized package of sophisticated telecommunications and information services offered by one single provider. This provider is expected to take full responsibility for all services contained in the package from 'end to end'. Accordingly, DT and FT intend to offer such customers through Atlas what existing technology allows to offer from time to time within the applicable regulatory framework. In this regard, the parties have indicated that Atlas will eventually extend to international voice traffic and other basic services, regulation permitting.

12. Due to the cost structure of advanced corporate services, notably the cost of leasing the required infrastructure, prices of such services are related to geographic coverage, as is the cost of additional features (e.g. one-stop-billing, help-desk and technical assistance around the clock, customized billing). There is indication that increasing availability of trans-European networks will ultimately blur the distinction between national and cross-border or ultimately Europe-wide advanced corporate services. However, certain national sophisticated value-added services (e.g. national voice VPN services as well as data communications services based on Asynchronous Transfer Mode (ATM) or equivalent switching technology) currently available from DT and FT in Germany and France respectively will not be integrated into the Atlas offerings. This circumstance illustrates that a distinction between national and cross-border advanced network services remains valid to date.

The markets for standardized low-level packet-switched data communications services

13. Price differences may be less acute than for advanced corporate services. However, a national, cross-border regional and global geographic level can be distinguished for standardized low-level packet-switched data communications services. In terms of traffic volumes, supply and demand of standardized low-level packet-switched data communications services are mostly national. For instance, in Germany DT's existing Datex-P packet-switched data communications services division hardly ever provides such services across the border while FT's German subsidiary Info AG, in spite of appertaining to FT's seamless cross-border Transpac

(*) See footnote 3 above.

network, only provides one fifth of its packet-switched data communications services across the border. This assessment was confirmed by interested third parties who submitted observations further to the Commission's notice on the Atlas notification (').

14. At a global and Europe-wide level, low-level data services and advanced network services may be partly converging to the extent that large customers of the latter do not require separate provision of standardized low-level packet-switched data communications services once such services are available as part of service combinations offered over advanced networks. Accordingly, large European telecommunications users demand services with global 'connectivity', i.e. that may be extended beyond Europe if so required. DT and FT have moved to meet this demand in entering the Phoenix agreements with Sprint. Along with increased availability of advanced cross-border network infrastructure, the market is generally expected to overcome distinctions along national borders in the medium term. However, separate national geographic markets subsist to date for standardized low-level packet-switched data communications services and advanced network services respectively.

C. MARKET SHARES OF ATLAS

The markets for advanced corporate telecommunications service

15. The parties estimate the European corporate telecommunications services markets (exclusive of data communications services) to be worth approximately ECU 505 million (1993 figures). Of this total, end-to-end services accounted for approximately ECU 15,1 million, VPN services for approximately ECU 220,6 million, VSAT services for approximately ECU 173,2 million and outsourcing services for approximately ECU 96,4 million. According to the notification DT and FT's aggregate market shares (1993 figures) in the European Union were 25 % in the end-to-end services market, 27 % in the VPN services market and 2,3 % in the outsourcing services market. Market shares for VSAT services are difficult to calculate given that TOs mostly use VSAT terminals either as back-up facilities for other services or to extend the geographic scope of services despite terrestrial infrastructure shortcomings; however DT and FT taken together operated 10 907 VSAT terminals by June 1994, equivalent to 29 % of the total installed base of interactive, data one-way or business television VSAT terminals in the European Economic Area.

As to different segments of the advanced corporate services market at the national level, DT and FT's aggregate market shares in France and Germany respectively are 93 % in the French VPN market (where DT has no presence) against 0 % in the German VPN market, and 60 % in the French market for end-to-end services against 35 % in the equivalent German market. DT and FT's outsourcing joint venture, Eunetcom BV, achieved 36 % of total outsourcing turnover generated in France and 29 % of total outsourcing turnover generated in Germany. As for VSAT services, DT has installed approximately 25 % of all VSAT terminals in Germany; this Member State accounts for 18 % of the total installed base of such terminals in the EEA.

The market for standardized low-level packet-switched data communications services

16. DT and FT estimate the European market for data communications services to be worth approximately ECU 2,8 billion (1993 figures). According to the notification DT and FT's aggregate shares (1993 figures) of this market were 35 %. Among national markets, Atlas will have a particularly strong position in France and Germany. DT and FT's aggregate market share for all data communications services is 79 % in Germany and 77 % in France, of which approximately half accounts for services provided by DT's Datex-P division and FT's Transpac France subsidiary, both of which remain outside the scope of Atlas until the French and German telecommunications infrastructure and services markets are fully liberalized as scheduled for 1 January 1998.

D. MAIN COMPETITORS OF ATLAS

The markets for advanced corporate telecommunications services

17. Since the Commission's BT-MCI decision many players, acting alone or jointly with partners, have entered or are entering the market for international value-added services. Among the most important of these players, albeit with disparate geographic scope and target customers, are: AT&T WorldPartners, Concert, IBM-Stet, International Private Satellite Partners, Unisource or Uniworld. Some of the above are mere projects of strategic alliances between TOs, others are awaiting regulatory approval. However, all of the above share the aim to position the respective partners in view of the full liberalization to come.

(') Notification of a joint venture (Case No IV/35.337 — Atlas) (OJ No C 377, 31. 12. 1994, p. 9).

The market for standardized low-level packet-switched data communications services

18. The market for standardized low-level packet-switched X.25 data communications services features a substantially larger number of players than that for customized offerings comprising advanced corporate services. Among the global players in this market are the alliances mentioned at paragraph 17 above competing with providers such as EDS, FNA, Infonet, SITA or SWIFT and operating subsidiaries of large global companies such as AT&T Istel, Cable & Wireless Business Networks, DEC's Easynet, or GEIS.

In addition, a large number of smaller players compete at a cross-border regional or national level in the EEA. For instance, FT's indirect German subsidiary Info AG, that provides most of its data communications services within Germany, is DT's second-largest competitor in the German national market for standardized low-level packet-switched data communications services. None of these smaller players can compare with large alliances in terms of reach, access to transmission capacity and financial backing.

E. THE TRANSACTION

19. The Atlas transaction notified to the Commission comprises a set of agreements whose main features are described below.

1. Agreements as originally notified

(a) The *Atlas Joint Venture Agreement* (JV Agreement) is the main agreement providing for the establishment of the Atlas joint venture.

(b) The *Intellectual and Industrial Property Transfer and Licence Agreements* will be concluded by each of FT and DT with Atlas SA. Under these agreements FT and DT make available to Atlas SA the intellectual property rights (IPRs) needed to operate the Atlas business.

(c) The *Services Agreements* will be framework agreements setting forth the basic terms and conditions with respect to the supply by DT and FT of certain services to Atlas SA and the supply by Atlas SA of certain services to FT and DT.

(d) The *Distribution Agreements:* two substantially similar distribution agreements with FT and DT respectively will lay out, for the home countries (France and Germany respectively), the marketing and sale of Atlas products.

(e) The *Agency Agreements* under which each parent appoints Atlas SA non-exclusive worldwide agent for the sale of DT and FT's international leased lines (half-circuits) with the territorial exception of Germany as regards DT's half-circuits.

2. Contractual provisions

20. In particular, the above agreements provide for the following:

1. Structure of the Atlas venture

Atlas SA will be created as a joint venture between FT and DT, each owning half the share capital. The management structure of Atlas SA will be as follows:

(a) *Shareholders' meeting:* Prior approval of the shareholders' meeting is necessary for matters such as the amendment of the articles of association, modification of capital, issuance of shares, mergers, sale of all or a substantial part of the assets, and liquidation.

(b) *Strategic Board:* It is envisaged that the Strategic Board of Atlas SA will have two co-chairmen and eight members, one half appointed by each parent, who may be freely removed and shall meet at least twice a year. The Strategic Board has a quorum of a majority of its members, including at least two members appointed by each party; the co-chairmen do not have a tie-breaking vote. Prior approval by the Strategic Board is required for matters such as the entry into a joint venture or other strategic alliance with a third party, any significant modification of the scope of Atlas's business and such matters as may from time to time be submitted to it by a vote of one half of the members of the Board of Directors. The Strategic Board shall also review all strategic plans of Atlas SA.

(c) The *Board of Directors:* It is envisaged that Atlas SA's Board of Directors will have nine members, four elected by each of DT and FT and one by Sprint. Prior approval by the Board of Directors is required for a number of important decisions such as the approval of business plans and annual budgets and changes in the scope of Atlas, the conclusion of important contracts, etc. Decisions on changes in the Atlas business, management appointments, and the approval of the business plan, the annual operating plan, and the budget require that at least two directors nominated by

each party vote with the majority. Matters on which the Board of Directors fails to reach agreement shall be brought before the Strategic Board.

(d) *Chief Executive Officers* (CEOs): It is envisaged that Atlas SA will have two CEOs, one nominated by FT among its representatives in the Board of Directors, the other by DT among its representatives in the Board of Directors. The CEOs shall be jointly responsible for day-to-day operations and the management of the business and affairs of Atlas. Approval of both co-CEOs is required for all important decisions including the hiring or dismissal of key employees.

The parties will contribute to Atlas their existing European assets outside France and Germany (as well as some assets in France and Germany) used for the provision of services coming within the scope of Atlas.

2. *Purpose and activities of Atlas*

The Atlas venture is to provide seamless national and international end-to-end services to corporate customers (i.e. to multinational companies (MNCs) and SMEs alike). The portfolio of Atlas services comprises data network services, international end-to-end services (managed links), voice VPN services, customer-defined networks, outsourcing and VSAT services. These services are fully liberalized in the European Union and are widely liberalized worldwide. Atlas will have the responsibility for the services portfolio mentioned above outside of France and Germany.

In France and Germany, Atlas will be providing sales support to FT and DT's sales forces as regards all services mentioned in the Atlas portfolio, with the exception of public X.25 packet-switched network services within France and Germany, which will be provided by FT's Transpac France subsidiary and DT's Datex-P subsidiary respectively until the telecommunications infrastructure and services markets are fully liberalized in France and Germany, as scheduled for 1 January 1998.

Each acting as an exclusive distributor, DT will sell Atlas services in Germany, while FT will sell Atlas services in France. Atlas products will be sold in France and Germany under the common globally used Atlas/Phoenix brands. Passive sales of Atlas services by DT in France, by FT in Germany and by any Atlas operating entity in both Member States will be allowed. Outside France and Germany, Atlas products will be sold by the Atlas operating entity for the rest of Europe.

It is planned that there will be a balancing payment by DT at each closing to equalize the respective contribution values of the two parties. It is further envisaged that certain adjustment payments will be made on the respective net worth of the entities concerned at the time of contribution to Atlas. A separate adjustment payment may be made between FT and DT if the actual performance of the FT contributed businesses in France or the DT contributed businesses in Germany falls significantly short of projections in 1995 (and possibly 1996).

3. *Provisions concerning dealings with/by Atlas*

Mutual service provision between Atlas and FT/DT will be the object of two Services Agreements pursuant to which dealings between FT/DT and Atlas shall be transparent, non-discriminatory and at arm's length.

As for services generally offered by DT or FT, the prices and other terms which DT or FT generally apply from time to time to their customers shall equally apply for Atlas. As for services not generally offered by FT or DT, market prices and terms shall apply and be negotiated between the Parties in good faith at arm's length. Consequently, Atlas will purchase such services from DT or FT at the same prices and conditions that any third party generally offering such services would apply under the same circumstances. If information on relevant market prices is not available, the prices applicable for Atlas shall be determined on the basis of a calculation model that is used, within FT, to make offers to customers with special requests and, within DT, to calculate intra-group transfer prices. Prices resulting from such calculation shall cover, for the relevant period, all costs as well as a reasonable profit margin.

4. *Non-compete provisions*

Pursuant to Article XIII of the Atlas JV Agreement, FT and DT will not engage anywhere in the production of services that are substantially the same or compete directly with the Atlas services, and will not engage outside of France and Germany in the marketing, sale or distribution of services that are substantially the same or compete directly with the Atlas services. Furthermore, FT will not market or distribute Atlas services in Germany and DT will not market and distribute Atlas services in France; passive sales are however permitted by FT outside of France, by DT outside of Germany and by Atlas in both France and Germany.

5. *Provisions relating to intellectual and industrial property*

FT and DT will each conclude an Intellectual and Industrial Property Transfer and Licence Agreement with Atlas SA under which the parties make available to Atlas SA the intellectual property rights ('IPRs') which are needed to operate the Atlas business in accordance with the following principles:

(a) IPRs owned by, or licensed to, the parties that are used exclusively for the Atlas business shall be transferred to Atlas SA;

(b) IPRs owned by, or licensed to, the parties that are used predominantly for the Atlas business shall also be transferred to Atlas SA, and a sub-licence shall be granted to the parties (Grant Back Licence sub-licence); and

(c) IPRs owned by, or licensed to, the parties that are used predominantly for the parties' business are (sub-)licensed to Atlas SA.

F. CHANGES MADE AND UNDERTAKINGS GIVEN FURTHER TO THE COMMISSION'S INTERVENTION

21. Certain features of the Atlas transaction as notified appeared to be incompatible with Community competition rules. Consequently, the Commission by letter of 23 May 1995 informed the parties of its concerns. In the course of the notification procedure the parties have amended the original agreements and given undertakings to the Commission.

1. Contractual changes

22. *Non-appointment of Atlas SA as an agent for international half-circuits.* Further to the Commission's letter of 23 May 1995, DT and FT abolished the Agency Agreements and amended the original Service Agreements to take account of the non-appointment of Atlas SA as a non-exclusive agent for DT and FT's half-circuits.

23. *Non-integration of French and German public data networks before full liberalization of the telecommunications infrastructure and services markets.* Atlas SA shall not acquire legal ownership or control within the meaning of Article 3 of Council Regulation 4064/89 (*) of the French and German public X.25 packet-switched data networks, Transpac France and Datex-P respectively, before the telecommunications infrastructure and services markets are fully liberalized in France and Germany, as is scheduled to occur by 1 January 1998. Until then, it is envisaged that:

1. Transpac SA will be split into Transpac France and Transpac Europe;

2. Transpac Europe will be contributed to Atlas;

3. Transpac France will be a wholly owned subsidiary of FT;

4. DT's Datex-P services division will be incorporated as a separate company under German law and become a wholly owned subsidiary of DT;

5. DT and FT's outsourcing joint venture, Eunetcom BV, will be fully contributed to Atlas SA; and

6. Atlas SA will create a subsidiary in France and Germany (Atlas France and Atlas Germany respectively) to provide the following services:

   (i) sales support regarding Atlas products to distributors in France and Germany; and

   (ii) services within the scope of Atlas other than X.25 packet-switched data network services including:

   — VSAT services,

   — international end-to-end services,

   — voice VPN services,

   — customer-defined solutions (excluding national X.25 data communications services in France and Germany), and

   — outsourcing services.

Provided the telecommunications infrastructure and services markets are fully liberalized in France and Germany on 1 January 1998, Transpac France and Datex-P will be contributed to Atlas on that date in such a way that Atlas France and Atlas Germany will be merged with Transpac France and Datex-P respectively.

24. *Technical cooperation.* Ahead of full liberalization of the telecommunications infrastructure and services markets in France and Germany, scheduled to occur by 1 January 1998, DT and FT will cooperate in the development of common technical network elements. This cooperation will comprise only the following areas:

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

product divisions of Info AG that shall be divested, advanced network services for multinational clients whose headquarters are outside Germany may be transferred to Atlas.

28. DT and FT have also given the additional undertakings described below.

1. *Use of DT and FT's public data networks*

Each of FT and DT will as of 1 January 1996 establish and thereafter maintain third-party access to their public switched data networks in France and Germany respectively. Non-discriminatory, open and transparent access will be granted to all data services providers that offer X.25 packet-switched data communications services. To ensure non-discriminatory access to their national public X.25 packet-switched data networks, FT and DT shall:

(a) establish and maintain standardized X.75 interfaces to access their national public X.25 packet-switched data networks; this interconnection is suitable for the provision of end-to-end services based on X.25 specifications for end-user access speeds up to 64 kbps; and

(b) offer such access on non-discriminatory terms, including price, availability of volume or other discounts and the quality of interconnection provided.

FT and DT shall further ensure non-discriminatory access by making publicly available the standard terms and conditions for such X.75 interface standards, including, if any, volume and other discounts, as of 1 January 1996. FT and DT will make available for inspection by the Commission any agreements relating to such X.75 interfaces, including all specifically agreed terms. Until such time as Transpac France and Datex-P are integrated into Atlas, neither Transpac France nor Datex-P shall disclose to Atlas any such specifically agreed terms that are identified and maintained as confidential by the party obtaining interconnection through such X.75 interfaces. Finally the above obligations shall likewise apply to any generally used CCITT-standardized interconnection protocol that may modify, replace or co-exist as a standard related to the X.75 standard and is used by FT and DT.

Proprietary interfaces may be retained or established among Transpac France, Datex-P and Atlas; such interfaces are defined by the particular type of technology, hardware and software that a network operator uses to provide advanced or customized services. Atlas will be allowed to access the Transpac France and Datex-P public packet-switched data networks through these proprietary interfaces, also for the provision of X.25 data communications services, provided access granted to Atlas through such interfaces is economically equivalent to third-party access to the Transpac France and Datex-P networks.

2. *Cross-subsidization*

DT and FT shall not engage in cross-subsidization within the meaning of the Commission's competition guidelines for the telecommunications sector (*) in connection with the Atlas venture. To avoid that Atlas benefits from cross-subsidies stemming from the operation of public telecommunications infrastructure and of reserved services by either DT or FT, all entities formed pursuant to the Atlas venture will be established as distinct entities separate from DT and FT.

Atlas SA, Datex-P and Transpac France shall obtain their own debt financing on their own credit, provided that FT and DT:

(a) may make capital contributions or commercially reasonable loans to such entities as required to enable Atlas SA, Datex-P and Transpac France to conduct their respective business;

(b) may pledge their venture interests in such entities, in connection with non-recourse financing for such entities; and

(c) may guarantee any indebtedness of such entities, provided that FT and DT may only make payments pursuant to any such guarantee following a default by such entities in respect of such indebtedness.

Atlas SA, Datex-P and Transpac France shall not allocate directly or indirectly any part of their operating expenses, costs, depreciation, or other expenses of their business to any parts of FT or DT's business units (including without limitation the proportionate costs based on work actually performed that are attributable to shared employees or sales or marketing of Atlas products and services by DT or FT employees), provided however that nothing shall

(*) Guidelines on the application of EEC Competition Rules in the Telecommunications Sector (OJ No C 233, 6. 9. 1991, paragraph 102 *et seq.*).

1. FT and DT will cooperate in the development of common products and common technical network elements (i.e. such products and elements that share the same features, yet separately built and owned); such cooperation will extend to the French and German public X.25 packet-switched data communications networks. Only the following functions will be managed by Atlas SA for Transpac France and Datex-P respectively:

(a) product management and development, provided that product branding and pricing as well as product implementation in the network will be managed by Transpac France and Datex-P respectively;

(b) certain network planning functions; and

(c) information systems, provided that central information system functions (e.g. billing information and statistics) will be operated by Transpac France and Datex-P respectively.

The above areas of cooperation shall in no case be tantamount to a *de facto* integration of the French and German public switched data networks, which will be controlled by two separate network management centres; and

2. Atlas may subcontract certain operational functions to Transpac France and Datex-P respectively.

25. *Non-integration of assets of FT's indirect German subsidiary.* The assets of FT's German corporate telecommunications services provider Info AG shall not be integrated into Atlas save as indicated at paragraph 27 below. Moreover, FT shall divest Info AG.

2. Non-discrimination

26. In order to provide the services described under paragraph 5 above, Atlas or any other service provider is dependent on the public switched telecommunications network (PSTN) and reserved services (*). In France and Germany, only FT and DT provide both access to the PSTN and reserved services. Given that FT and DT are indirect shareholders of Atlas it is essential for the safeguarding of fair competition between Atlas and other existing or future telecommunications services providers to eliminate the risk that the former are granted more favourable treatment regarding access and use of the French and German PSTN and reserved services.

The Commission, set out in its notice on the Infonet joint venture (*) how prohibition to discriminate must be understood in detail. Accordingly, to ensure the absence of discrimination, the Commission intends to decide that DT, FT and Atlas shall comply with the following:

1. *Terms and conditions:* The terms and conditions applied by DT and FT to Atlas for access to the PSTN and for the provision of reserved services (e.g. provision of leased lines) in connection with the services described under paragraph 5 above shall be similar to the terms and conditions applied to other providers of similar services. This requirement covers availability price, quality of service, usage conditions, delays for installation of requested facilities, and repair and maintenance services among other services.

2. *Scope of services available.* Atlas shall not be granted terms and conditions, or be exempt from any usage restrictions regarding the PSTN and reserved services, which would enable it to offer services which competing providers are prevented from offering.

3. *Technical information:* DT and FT shall not discriminate between Atlas and any other service provider competing with Atlas in connection with access to the PSTN or reserved services or the disclosure of any other technical information relating to the operation of the PSTN.

4. *Commercial information.* DT and FT shall not discriminate between Atlas and other providers of services as described under paragraph 5 above as regards the disclosure of certain commercial information. This means that DT and FT shall not provide Atlas with systemized and organized customer information derived exclusively from the operation of the PSTN or the provision of reserved services if such information would confer a substantial competitive advantage and is not readily and equally available elsewhere by service providers competing with Atlas.

3. Undertakings given by the parties

27. *Divestiture of Info AG.* FT shall divest of its interest in Info AG. To the extent separable from the

(*) Reserved services are services which are provided pursuant to special or exclusive rights granted by the EU Member States to their respective TOs in compliance with EC law.

(*) Notice pursuant to Article 19 (3) of Council Regulation No 17 concerning Case No IV/33 361 — Infonet, OJ No C 7, 11. 1. 1992, p. 3, at paragraph 91.

prevent Atlas SA, Datex-P and Transpac France from billing DT or FT for products and services provided to DT or FT by such entities on the basis of the same price charged third parties (in the case of products or services sold to third parties in commercial quantities) or full cost reimbursement or other arm's length pricing method (in the case of products and services not sold to third parties in commercial quantities).

Atlas SA, Datex-P and Transpac France shall keep separate accounting records that identify payments or transfers to or from DT and FT. Moreover, Atlas SA, Datex-P and Transpac France shall not receive any material subsidy (including forgiveness of debt) directly or indirectly from DT or FT, or any investment or payment from DT or FT that is not recorded in the books of such entities as an investment in debt or equity.

DT, FT and Atlas shall comply with the above until the telecommunications infrastructure and services markets in France and Germany are fully liberalized, as is scheduled to occur by 1 January 1998.

3. *Auditing*

Atlas SA (which includes its consolidated subsidiaries), Transpac Franc and Datex-P shall be audited on a regular and customary basis, and such audit shall confirm from an accounting viewpoint that the transactions between these entities, on the one hand, and FT and DT, on the other hand, have been conducted at arm's length. This obligation shall remain in force until the telecommunications infrastructure and services markets in France and Germany are fully liberalized, as is scheduled to occur by 1 January 1998.

4. *Recording and reporting*

To allow the Commission to monitor compliance with the undertakings the parties have agreed the following:

(a) *Recording obligations.* DT, FT and Atlas each undertake to keep records and documents suitable to prove compliance with the terms of the above undertakings ready for inspection by the Commission.

(b) *Inspection of records.* For the purpose of ascertaining and ensuring compliance by DT, FT or Atlas with the above undertakings, DT, FT or Atlas shall, on reasonable notice, during office hours, and without a need for the Commission to invoke the powers of inspection pursuant to Regulation No 17, give the Commission's Directorate-General for Competition access to DT, FT or Atlas's business premises to inspect records and documents covered by the above recording obligations and to receive oral explanations relating to such documents.

(c) *Reporting obligations.* DT, FT and Atlas also undertake to provide the Commission's Directorate-General for Competition, for the purpose of ascertaining whether DT, FT and Atlas comply with the requirements of the above undertakings, with:

— any records and documents in the possession or control of DT, FT or Atlas necessary for that determination, and

— oral or written complementary explanations.

These recording and reporting obligations will remain in force until the telecommunications infrastructure and services markets in France and Germany are fully liberalized, as is scheduled to occur by 1 January 1998.

29. In so far as related to existing obligations under national or Community law, the above is intended to ensure the parties' firm commitment to comply with the applicable legal framework.

G. THE REGULATORY SITUATION

30. In letters sent to the Commission, the French and German Governments have undertaken to take the necessary steps to liberalize alternative infrastructure for the provision of liberalized telecommunications services by 1 July 1996 and to liberalize the voice telephony service and all telecommunications infrastructure fully by 1 January 1998. The availability of alternative telecommunications infrastructure in Germany and France render competitors of Atlas independent of DT and FT's infrastructure for the purposes of creating trunk network infrastructure to provide liberalized services.

Early alternative infrastructure liberalization in France and Germany adds to a regulatory framework in the home countries of the Atlas partners that is designed to ensure a level playing field in the telecommunications markets.

1. France

1. *Separation of regulatory and operative functions*

Pursuant to French law, the minister for telecommunications shall ensure that regulation of the telecommunications markets is undertaken separately of service provision in these markets. A specific national regulatory authority (NRA), the Direction Générale des Postes et Télécommunications (DGPT), is competent for licensing providers of telecommunications networks and services in France based on objective and transparent criteria. The DGPT shall survey FT's market behaviour and approve FT's tariffs for (i) reserved services and leased lines and (ii) such liberalized services that are not in fact provided by a third party active in the French market.

2. *Non-discriminatory access*

Further to the adoption of the Commission's Services Directive and the ONP Framework Directive (*) Article L. 32-1-4° of the French Law of 29 December 1990 grants all users equal access to the public network on objective, transparent and non-discriminatory conditions. FT is under an obligation to effectively grant such access and must publish information on the network (e.g. technical features, tariffs and usage conditions) and on leased line offerings. The DGPT may verify FT's compliance with these obligations and investigate complaints filed against FT for non-compliance with these obligations. The DGPT shall further ensure compliance with FT's obligation to share available transmission capacity for liberalized services with competitors and shall publish annual statistical reports on FT's compliance with these obligations.

3. *Prevention of cross-subsidies*

To allow the DGPT to supervise FT's market behaviour, FT is under the legal obligation to keep an analytical accounting system that relates costs to each individual FT service. Where an offering comprises the provision of both reserved and liberalized services, FT must separate each kind of service in the contract and in the invoice. In this connection, FT's data communications services are already provided by a separate legal entity.

(*) Council Directive of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (OJ No L 192, 24. 7. 1990, p. 1).

2. Germany

1. *Separation of regulatory and operative functions*

Pursuant to the German 1989 Poststrukturgesetz, the 1994 Postneuordnungsgesetz and the 1994 Post- und Telekommunikation Regulierungsgesetz, regulatory competencies are assigned to a Federal agency created under the Federal Ministry of Post and Telecommunications (BMPT) while telecommunications operations are undertaken by DT, a fully State-owned joint stock corporation. Regulatory obligations of DT are policed by independent bodies, so-called regulatory chambers.

2. *Non-discriminatory access*

Under the current and future German regulatory framework, DT shall provide third parties with both access to monopoly infrastructure and reserved or mandatory services on a non-discriminatory and transparent basis according to objective criteria. Upon application, DT shall supply state-of-the-art leased lines over service-neutral access points without delay. With the only restriction of voice telephony service provision, leased lines may be freely interconnected and used for any service. Leased lines must meet market demand and DT must publish data concerning availability and quality of such lines.

3. *Prevention of cross-subsidies*

The BMPT (i) shall approve both tariffs and other price-sensitive contractual terms for DT's reserved services and (ii) may object to DT's tariffs for mandatory services. The BMPT may also seize DT's profits stemming from tariffs in excess of the approved amount and take any measure necessary to reestablish a fair competitive environment jeopardized by unlawful cross-subsidization. Moreover, DT's subsidiaries and affiliates shall use reserved services for the provision of competitive services under the same terms as DT's customers and must use such terms to account internal services transfer.

THE COMMISSION'S INTENTIONS

31. On the basis of the foregoing, the Commission intends to take a favourable position on the notified transactions under the competition rules of the EC Treaty and under Article 53 of the EEA Agreement and to grant Atlas an individual exemption pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement. Before doing so, the Commission invites interested third parties to send their observations within six weeks from the publication of this notice to the following address, quoting the reference 'IV/35.337 — Atlas':

European Commission,
Directorate-General for Competition (DG IV),
Directorate for Information, Communication and Multimedia,
Rue de la Loi/Wetstraat 200,
B-1049 Brussels.
Fax: (32-2) 296 98 19.

Notice pursuant to Article 19 (3) of Council Regulation No 17 (1) and Article 3 of Protocol 21 of the European Economic Area Agreement concerning a request for negative clearance or an exemption pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement

Case No IV/35.617 — Phoenix

(95/C 337/03)

(Text with EEA relevance)

INTRODUCTION

1. The Phoenix transaction was notified to the Commission on 29 June 1995. The Phoenix transaction is linked to a separate transaction bringing about a joint venture, Atlas, owned 50 % by France Telecom (FT) and 50 % by Deutsche Telekom (DT), given that Atlas is a parent to the joint venture entities created pursuant to the Phoenix agreements. The Atlas agreements, notified on 16 December 1994, are described in a separate notice published in this *Official Journal of the European Communities.*

2. The Phoenix agreements comprise two main transactions involving two European Union telecommunications organizations (TO) and one US telecommunications operator:

(i) each of FT and DT is to acquire an equity stake of approximately 10 % in Sprint worth US$ 4,2 billion. Both FT and DT will obtain proportionate board representation and investor protection as minority shareholders in Sprint; as detailed below, provisions have been included in the Investment Agreement to prevent DT and/or FT, either separately or jointly, from controlling or influencing Sprint; and

(ii) Atlas and Sprint are to create a joint venture, Phoenix, for the provision of enhanced and value-added global telecommunications services and other telecommunications services to corporate users, carriers and consumers. The Phoenix joint venture will be structured into several operational entities under the strategic supervision of a Global Venture Board (collectively referred to as the 'Phoenix entities'). One such entity will provide Phoenix services worldwide except in Europe and the United States (the 'Rest of World (ROW) entity'), a second entity will provide Phoenix services in Europe except in France and Germany (the 'Rest of Europe (ROE) entity') and a third entity will operate the global backbone network of Phoenix (the 'Global Backbone Network (GBN) entity'). The Global Venture Board shall take decisions on matters of policy only and will not engage in the management of individual operational entities created pursuant to the Phoenix agreements.

A. THE PARTIES

3. Deutsche Telekom AG (DT) and France Telecom (FT) are the German and French public TO respectively. DT is the world's second-largest and FT the world's fourth-largest telecommunications carrier in terms of revenue. Details of both undertakings are provided in the notice on the Atlas venture published in this issue of the Official Journal.

(1) OJ No 13, 21. 2. 1962, p. 204/62.

4. Sprint Corporation (Sprint) is a holding company in the United States. The Sprint group of companies is a diversified telecommunications group providing global voice, data and video-conferencing services and related products. Sprint's main subsidiaries provide local (US) exchange, cellular wireless as well as domestic (US) and international long-distance telecommunications services. Other Sprint subsidiaries engage in wholesale distribution of telecommunications products and the publishing and marketing of white and yellow page telephone directories. Worldwide turnover for Sprint in 1994 was ECU 10,9 billion; Sprint is the world's 11th largest telecommunications carrier in terms of revenues.

B. THE RELEVANT MARKET

1. Creation of the Phoenix entities

5. The Phoenix entities will address several product and geographic markets, namely (i) the markets for value-added telecommunications network services to corporate users both globally and regionally, (ii) the market for traveller services and (iii) the market for so-called carrier's carrier services.

1. Product markets

The markets for value-added telecommunications network services

6. The Phoenix entities will be active on the same markets for both advanced telecommunications services to corporate users and standardized low-level packet-switched data communications services described in the separate notice on the Atlas venture published in this issue of the Official Journal.

The market for traveller services

7. The market for traveller telecommunications services comprises offerings that meet the demand of individuals who are away from their normal location, either at home or at work. Among the most relevant of these offerings are those offered by the Phoenix entities, namely calling cards (i.e. prepaid cards with or without a code and postpaid cards), including those in combination with credit cards and other branded service cards ('affinity cards').

8. Customers for traveller services include both business travellers and other travellers. In the card business targeted by Phoenix, the former are by far the largest group of buyers. Business travellers are generally intensive card users, the main incentive for card usage being the possibility to avoid paying hotel telephone surcharges.

The market for carrier's carrier services

9. The market for carrier's carrier services comprises the lease of transmission capacity and the provision of related services to third-party telecommunications traffic carriers. Along with liberalization and globalization of telecommunications markets, demand for efficient, high-quality traffic transportation capacity has risen among old and new carriers. In this connection, the traditional model of separate arrangements with other individual carriers is increasingly challenged by players with global network infrastructure that offer carriers an array of services. The most relevant of such services are:

(a) switched transit, i.e. transport of traffic over bilateral facilities between the originating carrier, the transit carrier and the terminating carrier; neither the originating carrier nor the terminating carrier need bilateral facilities between themselves, but only with the transit carrier;

(b) dedicated transit, i.e. transport of traffic over permanent, dedicated facilities through the domestic network of the transit carrier; facilities used for this purpose may include discrete voice circuits or a high-bandwidth digital circuit that can be used for both voice and data services; and

(c) traffic hubbing offerings, where the provider takes care of all or part of international connections; these offerings are typically designed for emerging carriers, who are interconnected with the provider over bilateral facilities and whose international traffic is merged with other traffic on the provider's global network.

As international telecommunications markets are deregulated, demand for carrier's carrier services is increasingly driven by alternative carriers concerned with entrusting the incumbent TO with their international traffic, for reasons such as technical dependency and commercial sensitivity of customer information.

10. Purchasers of carrier's carrier services include established and emerging carriers. Both groups of clients have substantial bargaining power and are highly competition-sensitive. Among the latter group, one may distinguish facilities-based carriers that provide telecommunications services over alternative infrastructure or cable television networks seeking greater efficiency in the transport of international client traffic, while non facilities-based carriers seek to preserve a competitive advantage by avoiding dependence on a local TO for international client traffic.

2. Geographic markets

11. Along the lines of the Commission's findings in its BT-MCI decision (1), the geographic scope of certain markets targeted by the Phoenix entities as well as the market that must be considered in respect of the investment of DT and FT in Sprint is international and even global. Although national borders subsist for many services, strategic alliances like Phoenix are built not only in anticipation of a market unaffected by national boundaries but even with the express purpose to offer large global telecommunications users seamless end-to-end services anywhere by overcoming the difficulties inherent in the current market structure split along national borders. However, the service offerings of the Phoenix entities will be relevant to different existing geographic markets.

The markets for value-added telecommunications network services

12. As described in the separate Atlas notice, demand by corporate users for advanced services exists in at least three distinct geographic markets, namely at a global, a cross-border regional and a national level. Phoenix services will have global reach given that each of DT, FT, Sprint and the ROE and ROW entities will be interconnected over the Phoenix global backbone network. In the global market for advanced telecommunications services to corporate users, the Phoenix venture will therefore create competition for instance for BT and MCI's existing Concert venture. In the European Union, the ROE entity will cooperate with DT, FT and ATLAS to provide advanced telecommunications services to corporate users at the cross-border regional level; these services will have 'global connectivity', i.e. allow for an extension beyond the European Union if a customer so requires.

13. Standardized low-level packet-switched data communications services in each geographic market mentioned in the previous paragraph are a part of the Phoenix offerings portfolio. However, such services will be provided at the national level only if so decided by the regional Phoenix operating entity. Therefore, the ROE entity will provide Europe-wide packet-switched data communications services, that will initially be based on the existing Transpac and Sprint networks. The extent to which the ROE entity will provide such services in national markets within the EEA will depend on the coordination between Atlas and the ROE entity as the competent Phoenix entity in that region.

The market for traveller services

14. Along with the globalization of the economy the market for traveller services appears to be increasingly global; worldwide travellers demand offerings which include a single bill and integrated functions such as voice messaging, voice response and information systems. Geographic limitations of current traveller service offerings are generally due to technical shortcomings set to be overcome in the near future, such as the incompatibility of mobile communications systems or differences in prepaid cards without an individual user code. As illustrated at paragraph 7 above, none of the services targeted by the Phoenix entities is affected by these shortcomings; however, the geographic scope of the traveller services offered by Phoenix can be left open for the purposes of this case, as the finding of narrow geographic markets would not affect the assessment of the parties' competitive position.

The market for carrier's carrier services

15. Both supply of and demand for carrier's carrier services are by nature international. Geographic proximity between purchaser and supplier of switched transit capacity is hardly relev - for switched transit which carriers use either as a s stitute for operating own international lines or to deal with peak traffic on such lines. Likewise, dedicated transit services offer cable- or satellite-based routing capacity across third countries. Finally, using hubbing services is an alternative to entering into an undetermined number of bilateral agreements with individual carriers.

2. DT and FT's investment in Sprint

16. The acquisition by DT and FT of new equity equivalent to an approximate 20 % stake in Sprint aims at consolidating a strategic alliance to enter the global telecommunications markets, which serves the parties best interest to improve and extend service in new market segments. Telecommunications markets are developing quickly and there is uncertainty about what they will look like in a few years' time: the prospect of full liberalization is pushing TO's to take positions, in order to be in the best possible situation when full liberalization comes. As shown by the BT-MCI alliance, investment in a US carrier offers one efficient way to address multinational companies, i.e. the largest target customer group for global value-added telecommunications network services, notably in the United States.

(1) Commission decision of 27 July 1994 (OJ No L 223, 27. 8. 1994, p. 36).

C. MARKET SHARES OF PHOENIX

The markets for advanced telecommunications services to corporate users

17. *Global market.* The parents estimate the global value-added telecommunications network services market addressed by Phoenix (exclusive of data communications services) to be worth approximately ECU 4,8 billion (1993). Of this total, end-to-end services accounted for approximately ECU 37,6 million, VPN services for approximately ECU 2,8 billion, VSAT services for approximately ECU 1,4 billion and outsourcing services for approximately ECU 527 million. In 1993, the aggregate turnover of DT, FT and Sprint in the different market segments amounted to approximately ECU 3,8 million for end-to-end services, approximately ECU 576 million for VPN services and approximately ECU 6 million for outsourcing services, giving Phoenix a theoretical market share of 11,8 % in the global market for advanced telecommunications services to corporate users.

18. *Cross-border regional market.* Services in the European Union (exclusive of data communications services) accounted for approximately ECU 505 million in 1993. According to the notification the Phoenix parents' aggregate market shares in the European Union in 1993 were [...] % (') in the end-to-end services market, [...] % (') in the VPN services market [...] % (') in the outsourcing services market and [...] % (') in the VSAT market. However, market shares for VSAT services are difficult to calculate given that TOs mostly use VSAT terminals as back-up facilities for other services or to extend the geographic scope of services despite terrestrial infrastructure shortcomings.

19. *National markets.* National markets for advanced telecommunications services to corporate users within the EEA are discussed in the notice on the Atlas venture, published in this issue of the Official Journal. In this regard, Sprint has a significant share of total outsourcing turnover generated in Member States such as the Netherlands [...] % (') and the United Kingdom [...] % (°), where DT and FT's outsourcing joint venture, Eunetcom BV, has a lesser presence (5 % of total turnover in both Member States). As for France and Germany, adding Sprint to DT and FT brings Phoenix's fictional aggregate share of total turnover generated by outsourcing services to [...] % (') in France and to [...] % (°) in Germany, compared with 31 % in France and 33 % in Germany for the second-largest provider, Concert's Syncordia, in both these national markets.

The market for standardized low-level packet-switched data communications services

20. The global market for standardized low-level packet-switched data services was worth approximately ECU 5,3 billion in 1993, while DT, FT and Sprint's aggregate sales were [...] (") or [...] % (¹²) worldwide. The European market for data communications services is discussed in the separate notice on the Atlas transaction, published in this issue of the Official Journal. Sprint's turnover for standardized low-level packet-switched data services was [...] in 1993, bringing DT, FT and Sprint's aggregate shares of that market to [...] % ('³). As for national markets, Sprint achieved its highest turnover in France, Germany, Italy and the United Kingdom. Neither DT nor FT have a significant market presence in the latter two Member States, where Sprint has [...] % ('⁴) and [...] % ('⁵) market share respectively. In turn, Sprint's turnover in France (ECU [...] ('⁶)) and Germany (ECU [...] ('⁷)) equals market shares in these Member States of only [...] % and [...] % respectively ('⁸).

The market for traveller services

21. Total calling card revenue in the European Union was approximately ECU 120,5 million in 1994, most of which generated by national dialling. In 1993, DT had issued 200 000 cards (all of which in Germany), equivalent to 2,1 % of the total card subscriber base in the European Union; FT had issued 1,5 million cards (all of which in France), equivalent to 15,7 % of the card subscriber base in the European Union; and Sprint had issued 12 million cards worldwide, of which 500 000 (equivalent to a 5,2 % market share) in the European Union. The aggregate market shares of the parents would therefore make Phoenix the largest calling-card services provider in the European Union (23 % market share) in terms of subscriber numbers, ahead of AT&T and BT with 21 and 17,8 % market share respectively.

(') Business secret (less than 30 %).
(') Business secret (less than 30 %).
(') Business secret (less than 5 %).
(°) Business secret (less than 25 %).
(') Business secret (less than 10 %).
(°) Business secret (less than 10 %).
(°) Business secret (less than 45 %).
(°) Business secret (less than 40 %).
(") Business secret.
('²) Business secret (less than 25 %).
('³) Business secret (less than 40 %).
('⁴) Business secret (less than 5 %).
('⁵) Business secret (less than 5 %).
('⁶) Business secret.
('⁷) Business secret.
('⁸) Business secret (less than 5 % respectively)

In terms of calling card traffic within the European Union, the aggregate market shares of FT (21 %) and DT (3 %) are equal to BT's market share of 24 %.

The market for carrier's carrier services

22. The market for global switched transit services is estimated to be worth approximately ECU 301,1 million, equivalent to 1 500 million minutes of international traffic or approximately 3 % of the world's international telephony traffic. Of this total, approximately ECU 165,6 million are services provided by European carriers, of which approximately ECU 30,1 million to other European carriers. Within the global switched transit market (1994), with 5-6 % annual growth, DT had a turnover of ECU [...] (19), FT of ECU [...] (20) and Sprint of ECU [...] (21). The aggregate market shares of DT, FT and Sprint make Phoenix the third largest global switched transit provider behind AT&T and BT (20,2 % each).

D. MAIN COMPETITORS OF THE PHOENIX ENTITIES

The market for value-added telecommunications network services

23. The situation in these markets is discussed in the separate notice on the Atlas venture published in this issue of the Official Journal.

The market for traveller services

24. More than one third of calling cards in Europe are issued by US operators. AT&T is estimated to have 2 million postpaid card customers in Europe, equivalent to 21 % of all cards issued there. These customers generate 59 % of calling card traffic initiated in Europe on the US route. MCI is estimated to have 1 million postpaid card customers in Europe (10,5 %), which generate 27 % of calling card traffic initiated in Europe on the US route. Executive Telecard International (ETI) markets calling cards in Europe through agreements with local operators or credit card companies; ETI's market position is similar to that of MCI.

(19) Business secret (market share less than 10 %).
(20) Business secret (market share less than 15 %).
(21) Business secret (market share less than 5 %).

The market for carrier's carrier services

25. Major players in the market for carrier's carrier services and notably global switched transit services competing in the EEA include AT&T, BT (each holding approximately one fifth of the market), Cable & Wireless, MCI and Teleglobe Canada. Along with the increasing proliferation of new carriers that seek to be independent of the incumbent TO for their international traffic, new suppliers of such services, some with substantial infrastructure resources, are emerging in the market, e.g. Hermes Europe Railtel.

E. THE TRANSACTION

26. The transaction notified to the Commission comprises a set of agreements whose main features are described below.

1. Agreements as originally notified

1. *Agreements regarding the Phoenix joint venture*

The parties have to date submitted one final agreement: the *Phoenix Joint Venture Agreement* (the 'JV Agreement'), that sets out the parties' essential commitments and business objectives. Attached as annexes to the JV Agreement are detailed term sheets for all agreements described below, which will be submitted upon closing of the Phoenix transaction. These term sheets detail the agreed content of the following agreements:

(a) the *Transfer Agreements* will provide for the transfer by Sprint, FT, DT, and Atlas (collectively referred to as the 'parents') of certain basic and related businesses to the relevant ROE, ROW, and GBN entities.

(b) The *Intellectual Property and Trademark Licence Agreements* will concern the grant by the parents and certain affiliates to the Phoenix entities of non-exclusive, non-transferable licences to use certain of the parents' technical information and trademarks.

(c) The *Services Agreements* will specify the terms and conditions of trading relationships among Sprint, Atlas, and the ROE and ROW entities, including the supply and support services needed to provide Phoenix services worldwide.

2. *Agreements regarding FT and DT's investment in Sprint*

(a) The *Investment Agreement* will provide for the purchase by each of FT and DT of approximately 10 % of the common stock of Sprint.

(b) The *Standstill Agreement* will bind FT and DT for a period of 15 years not to acquire additional shares in Sprint which would increase their combined aggregate voting rights to more than 20 %.

(c) The *Registration Rights Agreement* is required in order for each party to consummate the transactions contemplated by the Investment Agreement.

2. **Main Contractual Provisions**

1. *Concerning the Phoenix Entities*

(a) *Structure of the Phoenix venture*

The JV Agreement provides for the creation of the following operating entities: Phoenix Rest of Europe (ROE), Phoenix Rest of the World (ROW) end Global Backbone Network (GBN). The ROE entity will conduct the Phoenix business within the 'rest of Europe' region (i.e. outside of France and Germany), while the ROW entity will conduct the Phoenix business within the 'rest of the world' region (i.e. outside Europe and the United States). The GBN entity will own and operate a global transmission network over which Phoenix services and other traffic will be routed.

FT and DT will each be the exclusive distributor of Phoenix services in France and Germany respectively; however, FT and DT will meet unsolicited customer requests for services regardless of the customer's location. Moreover, the French and German subsidiaries of Atlas will provide FT and DT with (i) sales support services regarding Phoenix products to distributors in France and Germany; and (ii) services within the scope of Phoenix other than X.25 packet-switched data network services.

A new, wholly-owned subsidiary of Sprint (the 'Sprint Subsidiary') and Atlas will each initially own 50 % of the outstanding voting equity of each of the parent entities of the ROW entity and the GBN entity. The Sprint Subsidiary and Atlas will initially own 33⅓ and 66⅔ %, respectively, of the voting equity of the parent entity of the ROE entity.

A Global Venture Board will be established to set global policies and monitor compliance of the operating groups with their business plans. Any initiative of the Global Venture Board will generally require a unanimous vote.

Day-to-day operations will be the responsibility of the chief executive officers of the operating entities, who are under the supervision of the governing board of the relevant parent entity of either the ROE, ROW, or GBN entity. Most decisions of each governing board will be adapted by simple majority vote of the members present. Unanimous consent is however required for a number of important decisions including final approval of business plans, certain changes in structure and capitalization, and certain decisions on technology and investments.

(b) *Purposes and activities of Phoenix entities*

The business of the joint venture will initially consist of the provision of (i) global international data, voice, and video business services for multinational companies and business customers; (ii) international services for consumers, initially based on card services for travellers, and (iii) carrier services providing certain transport services for the parents and other carriers. The Phoenix entities may also offer telecommunications equipment and invest in national operations.

To market these services the Phoenix joint venture will be responsible for the planning and management functions of operations, as well as marketing and customer support, including the following:

(i) central coordination of product development and management to ensure seamless global services; the Phoenix entities shall notably define functionality, technical standards, and service level requirements for Phoenix services;

(ii) implementation of a common global network and information systems platform rationalizing and integrating the currently

separate international data, voice, and overlay networks of the parents; the GBN will link overlay and backbone networks in each operating area (i.e. ROE and ROW) while proprietary interfaces will allow provision of seamless services; within its first few years of operating, Phoenix will begin to deploy the next generation of Asynchronous Transfer Mode (ATM) technology, comprising any and all of transmission, switching, signalling, network intelligence, and service management elements;

(iii) integration and development of information systems for coordinated billing, customer support, and other back-office functions, supporting national distributors; and

(iv) development of a sales presence in the ROE and ROW territories either directly or through distribution arrangements using a common 'masterbrand'; in particular, national service operations will be established or consolidated in each major country, and will be responsible for distributing Phoenix services within that country; in addition, regional sales offices will be established to provide technical and sales support, including identification of potential customers and assisting in preparation of customer proposals.

(c) *Provisions concerning dealings with/by Phoenix entities*

Pursuant to the JV Agreement, transactions among the Phoenix entities, on the one hand, and FT, DT, and Atlas, on the other, will generally be conducted on the most favourable terms and conditions that are offered to third parties. If products, services, or facilities relevant to these transactions are not commercially available, such transactions shall be conducted in accordance with an arm's length pricing method, using full-cost reimbursement or such other arm's length pricing method as may be agreed on by the parties. The parents shall have the first right to offer to supply certain products, services, and facilities to the Phoenix entities. Notwithstanding, each Phoenix entity may purchase from a third party which, on otherwise comparable terms and conditions, offers lower prices, either once the parties have been given the opportunity to match such terms and conditions or if a customer so requires.

Each of the Phoenix entities and their parents have the first right to offer to perform in their respective territory any facilities or services required by another party to the Phoenix agreements. Such services may be obtained from a third party at a lower price under comparable terms and conditions, or where a customer so requires. In accordance with this principle, the ROE and ROW entities will be required to purchase telecommunications network transmission capacity from the GBN entity to the extent available.

(d) *Non-compete provisions; distribution*

Pursuant to the JV Agreement as originally notified, albeit subject to various exceptions, no party or affiliate of a party may distribute any international telecommunications services which are either provided by the Phoenix entities or substitutable for such services. Likewise, no party or affiliate of a party may invest in any entity that offers such services. Moreover, no party or any of its affiliates may offer national long-distance services in competition with either a national operation of Phoenix or a public telephone operator affiliated with Phoenix (e.g. a national distributor of Phoenix). Nor may any party or any of its affiliates make investments in any entity offering such competing national long distance services or in any national operation allied with a major competitor of Phoenix.

Outside the parents' home countries exclusivity will be granted to distributors on a case-by-case basis. Passive sales by one distributor to customers in the respective sales territory of any other distributor will be allowed in the EEA.

(e) *Licences to be granted to Phoenix entities*

Under the Intellectual Property Agreements, each parent will grant each of the Phoenix

entities non-exclusive, non-transferable licences to use certain technical information of that parent in the respective territories of such entities to conduct the Phoenix business. Each Phoenix entity shall have the right to sub-license the rights granted to any other Phoenix entity or any affiliated national operation or local partner, to the extent such sub-licence is necessary to conduct the Phoenix business. Likewise, each Phoenix entity shall on request also sub-license such rights to any parent or affiliate of such parent, to the extent such sub-licence is necessary to conduct the Phoenix business.

Royalties shall be payable as customary in the market and negotiated by the parties on an arm's-length basis. Licence rights granted to a party under the Intellectual Property Agreements will continue in the event of either termination of the Phoenix venture or transfer of such party's interest in the Phoenix venture.

Similarly, pursuant to the Trademark Licence Agreement each parent grants each of the Phoenix entities non-exclusive, non-transferable rights to use certain trademarks owned by or licensed to such parent in connection with the marketing or sale of certain authorized products and services in the respective territories of such entity.

2. *Concerning FT and DT's investment in Sprint*

(a) *Restrictions on transfer of shares by FT or DT and limitis on increases of their shareholding in Sprint*

Pursuant to the Investment Agreement, neither FT or DT may dispose of its shares in Sprint for five years after the closing date. Thereafter restrictions apply to large transfers, which would in most circumstances give Sprint the rights of first refusal.

Pursuant to the Standstill Agreement, FT and DT shall each have the right to acquire additional Sprint shares to reach and maintain a 10 % shareholding, but shall not for 15 years after the closing date acquire additional shares that would increase their aggregate voting rights to more than 20 %. Once this initial 'standstill' period has expired, FT and DT may acquire additional shares, but may not increase their aggregate voting rights above 30 % nor conduct certain activities intended at taking control of Sprint.

(b) *Consent rights and board representation of FT and DT*

FT and DT have the right to elect directors to the Sprint board in proportion to their shareholding, provided that each has the right to elect at least one director. Neither FT or DT may have access to confidential, competitive information on Sprint's activities in the EEA through their representation on Sprint's board. Nor may these representatives provide Sprint with confidential information that FT or DT may have obtained from US competitors through correspondent relationships.

As the sole holders of Sprint's class A common stock, FT and DT have been granted substantial consensual rights with respect to certain corporate actions of Sprint, which nevertheless fall considerably short of control. These actions include major equity issuances, disapproval of investments in Sprint by major competitors, participation rights in transactions involving change of control, and other bilateral corporate transactions. FT and DT have a right of first offer with respect to long-distance assets of Sprint for a fixed period of time.

F. CHANGES MADE AND UNDERTAKINGS GIVEN FURTHER TO THE COMMISSION'S INTERVENTION

27. Some features of the agreements as notified appeared to be incompatible with the Community competition rules. In the course of the notification procedure the parties have amended certain clauses in their agreements and given undertakings to the Commission.

1. Contractual changes

28. *Non-appointment of Phoenix as an agent for international half-circuits.* Following an announcement made in the Phoenix notification, which did not yet reflect the parties commitments regarding Atlas further to the Commission's intervention, DT, FT, Atlas and Sprint have deleted FT and DT's 'international private lines', i.e. FT and DT's international half-circuits, from the list of products that Phoenix would distribute as agent.

29. . *Non-compete provisions.* The parties have not yet sought an exemption pursuant to Articles 85 (3) of the EC Treaty and 53 (3) of the EEA Agreement for any specific agreements regarding national long-distance services. The non-compete clause in the original JV Agreement has therefore been amended: the parties are now obliged to refrain only from either (i) competing with or (ii) investing in a competitor of entities providing long-distance services provided such entities are controlled by Phoenix.

2. **Non-discrimination**

30. Just as DT and FT shall be prohibited from discriminating in favour of the joint venture, as described in the separate notice on the Atlas transaction, the Commission intends likewise to prohibit DT and FT from discriminating in favour of the Phoenix entities. The same is true for the specific elements covered by this requirement (").

3. **Undertakings given by the parties**

31. *Carrier's carrier services.* Neither Atlas, Phoenix, DT, FT, Sprint or any affiliate of these entities shall make a particular telecommunications operator's ability to use Phoenix international carrier services conditional upon use or distribution by that telecommunications operator of services provided by Atlas, Phoenix, FT, DT or Sprint. Neither shall Atlas, Phoenix, DT, FT, Sprint or any affiliate of these entities make its commercial dealings (i.e. terms, conditions, price, discounts) with any telecommunications operator conditional upon use or distribution by that telecommunication's operator of services provided by Atlas, Phoenix, FT, DT or Sprint.

32. DT, FT and Sprint have also given further undertakings that mirror the undertakings given in connection with the Atlas notification; reference is therefore made to the separate notice on the Atlas transaction published in this issue of the Official Journal.

1. *Cross-subsidization*

As in the context of the Atlas transaction, DT and FT shall not engage in cross-subsidization within the meaning of the Commission's competition guidelines for the telecommunications sector (") in connection with the Phoenix venture. To avoid that the Phoenix entities or their distributors benefit from cross-subsidies stemming from the operation of both public telecommunications infrastructure and reserved services by either DT or FT, all entities formed pursuant to the Phoenix venture will be established as distinct entities separate from DT and FT.

The ROE and ROW entities will obtain their own debt financing on their own credit, provided that Sprint, FT and DT:

(a) may make capital contributions or commercially reasonable loans to such entities as required to enable the ROE and ROW entities to conduct the Phoenix business;

(b) may pledge their venture interests in such entities in connection with non-recourse financing for such entities; and

(c) may guarantee any indebtedness of such entities, provided that Sprint, FT and DT may only make payments pursuant to any such guarantee following a default by such entities in respect of such indebtedness.

The ROE and ROW entities shall not allocate directly or indirectly any part of their operating expenses, costs, depreciation, or other expenses of their businesses to any parts of DT of FT's business units (including without limitation the proportionate costs based on work actually performed that are attributable to shared employees or sales or marketing of Phoenix products and services by DT or FT employees). However, nothing shall prevent such Phoenix entities from billing DT or FT for products and services provided to DT or FT by such entities on the basis of the same prices charged to third parties (in the case of products or services sold to third parties in commercial quantities) or full cost reimbursement or other arm's length pricing method (in the case of products and services not sold to third parties in commercial quantities).

The ROE and ROW entities shall keep separate accounting records that identify payments or transfers to or from DT and FT. The ROE and ROW entities shall not receive any material subsidy (including

(") See notice pursuant to Article 19 (3) of Council Regulation No 17 concerning Case No IV/33.361 — Infonet (OJ No C 7, 11. 1. 1992, p. 3, at paragraph 9).

(") Guidelines on the application of EEC Competition Rules in the Telecommunications Sector (OJ No C 233, 6. 9. 1991, p. 2, paragraph 102 *et seq.*).

forgiveness of debt) directly or indirectly from DT or FT, or any investment or payment from DT or FT that is not recorded in the books of such entities as an investment in debt or equity.

2. *Recording and reporting*

The same undertakings apply as described in the notice on the Atlas transaction published in this issue of the Official Journal.

33. In so far as related to existing obligations under national or Community law, the above is intended to ensure the parties' firm commitment to comply with the applicable legal framework.

G. THE REGULATORY SITUATION

34. The regulatory situation in France and Germany is described in the notice on the Atlas transaction. As for the United States, pursuant to the 1934 Communications Act, Sprint shall publish tariff schedules and contracts describing its network arrangements and services. Furthermore, the 1934 Communications Act, enforced by the Federal Communications Commission (FCC), prohibits Sprint from providing services that unjustly or unreasonably discriminate against Sprint's competitors or foreign correspondents, which may lodge a formal complaint before the FCC if Sprint does not comply with these obligations.

35. While the European Commission was assessing the Phoenix notification under Community law, the US Department of Justice have concluded a procedure under US anti-trust law by entering a consent decree. This consent decree spells out undertakings by the parties that largely resemble those described in this notice.

THE COMMISSION'S INTENTIONS

36. On the basis of the foregoing, the Commission intends to take a favourable position on the notified transaction under the competition rules of the EC Treaty and under Article 53 of the EEA Agreement and to grant Phoenix an individual exemption pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement. Before doing so, the Commission invites interested third parties to send their observations within six weeks from the publication of this notice to the following address, quoting the reference 'IV/35.617 — Phoenix':

European Commission,
Directorate-General for Competition (DG IV),
Directorate for Information, Communication and Multimedia,
Rue de la Loi/Wetstraat 200,
B-1049 Brussels.
Fax: (32 2) 296 98 19.

COMMISSION DECISION

of 17 July 1996

relating to a proceeding under Article 85 of the EC Treaty and Article 53 of the EEA Agreement

(Case No IV/35.337 — Atlas)

(Only the English, French and German texts are authentic)

(Text with EEA relevance)

(96/546/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular Articles 2, 6, and 8 thereof,

Having regard to the application for negative clearance and the notification for exemption submitted, pursuant to Articles 2 and 4 of Regulation No 17, on 16 December 1994,

Having regard to the summary of the application and notification published pursuant to Article 19 (3) of Regulation No 17 and to Article 3 of Protocol 21 of the EEA Agreement [2],

After consultation with the Advisory Committee for Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

A. INTRODUCTION

(1) The Atlas venture was notified to the Commission on 16 December 1994. This transaction brings about a joint venture owned as to 50 % by France Télécom (FT) and as to 50 % by Deutsche Telekom AG (DT). The notification of Atlas replaces the notification on 3 June 1993 [3] of a joint venture formed by FT and DT (at the time Deutsche Bundespost Telekom) under the name of Eunetcom to which this Decision extends. Atlas is also the instrument of DT and FT's participation in a second transaction, notified under the name of Phoenix, with Sprint Corporation (Sprint) [4]. Phoenix, since renamed as GlobalOne, is the object of a separate Decision pursuant to Article 85 (3) of the EC Treaty [5].

(2) Atlas is structured at two levels. A holding company established in Brussels, Atlas SA, incorporated as a *société anonyme* under the laws of Belgium, has three operating subsidiaries, namely Atlas Télécommunications SA (Atlas France) in France, Telekom Internationale Telekommunikationsdienste GmbH (Atlas Germany) in Germany, and one for the rest of Europe. Atlas France and Atlas Germany will initially provide technical and sales support to FT and DT, being the French and German distributors of Atlas and GlobalOne products. After full and effective liberalization of the telecommunications infrastructure and services markets in France and Germany, scheduled to occur by 1 January 1998, DT's subsidiary for the provision of X.25 packet-switched data communications, T-Data Gesellschaft für Datenkommunikation mbH (T-Data) [6], will be merged with Atlas Germany while FT's subsidiary for the provision of X.25 packet-switched data communications, Transpac France, will be merged with Atlas France.

B. THE PARTIES

(3) Deutsche Telekom AG (DT) and France Télécom (FT) are the public telecommunications organizations (TOs) in Germany and France. Both

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No C 337, 15. 12. 1995, p. 2.
[3] OJ No C 175, 26. 6. 1993, p. 11.
[4] OJ No C 184, 18. 7. 1995, p. 11.
[5] See p. 57 of this Official Journal.
[6] The parties have submitted that T-Data is the new name of DT's former Datex-P division for the provision of X.25 packet-switched data communications services, incorporated after publication of the Commission notice pursuant to Article 19 (3) of Council Regulation No 17 and Article 3 of Protocol 21 of the European Economic Area Agreement in this case; OJ No C 337, 15. 12. 1995, p. 2 (hereinafter the 'Article 19 (3) notice').

supply telephone exchange lines to homes and businesses; local, trunk and international communications to and from their respective home country. Worldwide turnover in 1994 was ECU 31,8 billion, a 4,3 % increase over 1993, for DT and ECU 21,7 billion, a 1,8 % increase over 1993, for the FT group.

C. THE RELEVANT MARKET

1. Product markets

(4) Atlas will address the markets for the provision of non-reserved telecommunications services to corporate users both Europe-wide and nationally. Atlas will target two separate product markets for non-reserved services, namely:

(5) *The market for customized packages of corporate telecommunications services*

This market comprises mostly customized combinations of a range of existing telecommunications services, mainly liberalized voice services including voice communication between members of a closed group of users (virtual private network (VPN) services), high-speed data services and outsourced telecommunications solutions specially designed for individual customer requirements. The market for customized packages of corporate telecommunications services, enhanced by features such as tailored capacity allocation, billing, a 24-hour technical service, etc., is currently changing and evolving rapidly. Customers demand such packages of sophisticated telecommunications and information services offered by one single provider. That provider is expected to take full responsibility for all services contained in the package from 'end to end'. Accordingly, DT and FT intend to offer such customers through Atlas whatever services existing technology allows them to offer from time to time within the applicable regulatory framework. In this regard, the parties have indicated that Atlas will eventually extend to international voice traffic and other basic services, regulations permitting.

These services are provided over high-speed, large-capacity leased lines linking sophisticated equipment on customer premises to the service provider's nodes. Alternatively, other means of transmission, such as satellite or mobile radio capacity, can be used to ensure the geographic coverage demanded from time to time. Such services employ advanced state-of-the-art protocols, data compression techniques, equipment and software. In this market, Atlas is expected to offer a portfolio of services including the following (the 'Atlas services'):

— data services: high- and low-speed packet-switched, Frame Relay, Internet Protocol (IP) services,

— value-added application services: value-added messaging, video-conferencing and electronic document interchange (EDI) services,

— voice VPN services,

— value-added leased lines offerings: pre-provisioned, managed and circuit-switched bandwidth,

— very small aperture satellite (VSAT) network services, and

— outsourcing: customers are invited to transfer responsibility and ownership of their networks to Atlas. If they agree, Atlas may integrate into its own offerings any third-party products already owned by customers who wish to keep such offerings, as the case may be.

Of the above, some services will remain with DT and FT and therefore not be Atlas services. These services are: (i) those national receive-only VSAT services in France which provide a single channel per carrier ('receive-only SCPC'); (ii) national messaging and EDI services in Germany; (iii) data network services using Asynchronous Transfer Mode (ATM) technology in France, Germany and any third country; and (iv) national VPN services in France and Germany. The integration into Atlas of any such service and/or its underlying network as well as of any broadband transmission capacity operated by DT and/or FT necessitates separate notification to the Commission.

(6) Due to the high cost of building and operating the networks needed to provide customized packages of corporate telecommunications services, such services can be commercially viable only if provided to multinational corporations, extended enterprises, and other intensive users of telecommunications and in particular the largest among those customers generating continuous high traffic volumes [7]. Many of those potential customers have complex and specific needs and have often acquired expertise in managing own internal networks. Whether each of the services listed above constitutes a separate product market can be left open for present purposes, since a separate analysis would not affect the Commission's conclusions.

[7] See Commission Decision 94/579/EC of 27 July 1994 in Case No IV/34.857 — BT-MCI; OJ No L 223, 27. 8. 1994, p. 36.

(7) However, this Decision relates only to Atlas' range of products and its business scope as notified. Any substantial change of products or business scope, and in particular (i) the integration into Atlas of broadband transmission capacity (such as Asynchronous Transfer Mode (ATM) networks) in France and Germany and (ii) the offering by Atlas of public basic telecommunications services (such as voice telephony services([8])) will require a new notification.

(8) *The market for packet-switched data communications services*

Atlas will also be active on a separate market for packet-switched data communications services. The Commission considers data communications services to be a distinct telecommunications product market, without prejudice to the existence of narrower markets([9]). One narrower market is that for packet-switched data communications services([10]). Packet switching is a means to improve network capacity utilization and consists of splitting data sequences into 'packets', feeding these and other packets into the network optimizing utilization of available capacity, switching the packets to the desired destination and rearranging the packets to obtain the original data sequences. One standard used for the provision of packet-switched data communications services is the X.25 protocol. Packet-switched data services using this protocol (the 'X.25 data services') are slower than packet-switched data communications services using protocols such as Frame Relay, Asynchronous Transfer Mode (ATM) or Internet Protocol (IP), given that X.25 data services rely on smaller packets and require switches which allow charging per packet.

(9) Packet-switched data communications services can be divided into different customer segments within the same product market.

1. On the one hand, some customers generate mostly erratic and geographically widespread demand for low-speed, low-volume applications. These features are due either to the specific type of use (such as banks operating cash machines nationwide, networks of points-of-sale in shops) or to the size of such customers, as with small and medium-sized enterprises (SMEs). Such services are billed by volume sent, according to published tariffs. All incumbent Member State TOs including DT and FT operate dense public networks with nationwide coverage providing X.25 data services to this customer segment (the 'public packet-switched data networks'). There is only one public packet-switched network in each Member State, built by the incumbent TO under a public service obligation before market liberalization.

2. On the other hand, larger corporate customers and other extended users generate more substantial and regular traffic. Often the requirements of these users make it worthwhile for either third-party service providers or the potential customer itself to assume the high cost of creating customized leased lines circuits (for example, to set up VPNs) to meet individual service demand. This demand is therefore increasingly met either by packet-switched services using protocols other than X.25, notably Frame Relay and ATM (for VPN applications) and IP (for both public and VPN applications) or by switched services (PSTN or ISDN services). Packet-switched data communications services to such users are billed according to negotiated rates that take account of the individual demand features of a particular customer.

(10) Virtually all companies active in each individual Member State of the European Community are potential if not actual customers for national packet-switched data communications services. Such services are also required by SMEs, albeit in smaller volumes and possibly less regularly than by larger users. Seldom will such volumes make it worthwhile for service providers to invest in leased lines with the specific purpose of reaching these SMEs, which are therefore in a weak negotiating position and hardly capable to date of switching from the current provider, typically the incumbent TO, to a competitor.

(11) Packet-switched data communications may also be offered as one service in a customized package of corporate services. However, even as part of such an arrangement, packet-switched data communications services are based on mature internationally standardized technology and provided over standard terrestrial infrastructure. At the national level, choice from a wider range of packet-switched data communications offerings

([8]) Defined in the seventh indent of Article 1 of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services; OJ No L 192, 24. 7. 1990, p. 10, hereinafter 'Services Directive', as last amended by Directive 96/19/EC; OJ No L 74, 22. 3. 1996, p. 13.

([9]) Commission's Guidelines on the application of Community competition rules in the telecommunications sector, OJ No C 233, 6. 9. 1991, p. 2, at paragraph 27.

([10]) Defined as 'packet- and circuit-switched services' in the ninth indent of Article 1 (1) of the Services Directive — see footnote 8.

than merely X.25 data services is available to larger customers that are not served over the TO's public packet-switched data networks but over customized leased-line circuits. However, most existing customers for packet-switched data communications currently generate annual turnover of far below ECU 10 000 each and are not therefore potential users of customized packages of corporate telecommunications services. Therefore, packet-switched data communications services offered by Atlas constitute a product market separate from the market for customized packages of corporate telecommunications services equally targeted by Atlas.

2. Geographic markets

The markets for customized packages of corporate telecommunications services

(12) Given that cost and price differences are quite substantial, demand for customized packages of corporate telecommunications services exists in at least three distinct geographic markets, namely at a global, at a cross-border regional and at a national level. Atlas will provide such packages to large users Europe-wide and nationally. Through GlobalOne, customized packages of corporate telecommunications services offered by Atlas will also have global 'connectivity' — the technical option of extending a given service offering beyond Europe by linking a customer's premises worldwide over Phoenix 'Global Backbone Network' ([11]). Given the considerable costs involved, customized packages of corporate telecommunications services are today mainly demanded by large multinational corporations, extended enterprises, as well as major national and other intensive users of telecommunications. The Commission has discussed the requirements of such users in its Decision 94/579/EC (BT-MCI) ([12]).

(13) Due to the cost structure of providing customized packages of corporate telecommunications services, notably the cost of leasing the required infrastructure, prices of such services are related to geographic coverage, as is the cost of additional features (for example, one-stop-billing, help-desk and technical assistance around the clock, customized billing). There is evidence that increasing availability of trans-European networks will ultimately blur the distinction between national and cross-border or ultimately Europe-wide provision of non-reserved telecommunications services. However, certain sophisticated national non-reserved services currently available from DT and FT in Germany and France respectively will not be Atlas services, including DT and FT's national data network services based on ATM or equivalent packet-switching technology (Datex-M and Transrel respectively) and the national services mentioned at recital 5. This demonstrates that a distinction between national and cross-border provision of customized packages of corporate telecommunications services remains valid to date.

The markets for packet-switched data communications services

(14) Price differences for these services may be less than for customized packages of corporate telecommunications services. However, a national, cross-border regional and global geographic level can be distinguished for packet-switched data communications services. In terms of traffic volumes, supply and demand of packet-switched data communications services are mostly national. For instance, in Germany DT's existing T-Data packet-switched data communications services division hardly ever provides such services across the border while FT's German subsidiary Info AG, in spite of appertaining to FT's seamless cross-border Transpac network, only provides one fifth of its packet-switched data communications services across the border. This assessment was confirmed by interested third parties further to the Commission's notice on the Atlas notification ([13]).

(15) At a global and Europe-wide level, X.25 data services and customized packages of corporate telecommunications services may be partly converging to the extent that large customers of the latter do not require separate provision of X.25 data services once such services are available as part of service combinations offered over advanced networks. Accordingly, large European telecommunications users demand services with global 'connectivity', meaning that they may be extended beyond Europe if so required. DT and FT have moved to meet this demand in entering the GlobalOne agreements with Sprint. Along with increased availability of advanced, cross-border network infrastructure, the market is generally expected to overcome distinctions along national borders in the medium term. However, separate national geographic markets subsist to date for packet-switched data communications services and for the provision of customized packages of corporate telecommunications services respectively.

([11]) See Phoenix Decision in Case No IV/35.617, at recital 27.
([12]) See footnote 7.
([13]) Notification of a joint venture (Case No IV/35.337 — Atlas), OJ No C 377, 31. 12. 1994, p. 9 and the Article 19 (3) notice (see footnote 6 and recitals *et seq.*).

D. MARKET SHARES OF ATLAS

The market for customized packages of corporate telecommunications services

(16) The parties estimate the European markets for non-reserved corporate telecommunications services (exclusive of data communications services) to be worth approximately ECU 505 million (1993 figures). Of this total, end-to-end services accounted for approximately ECU 15,1 million, VPN services for approximately ECU 220,6 million, VSAT services for approximately ECU 173,2 million and outsourcing services for approximately ECU 96,4 million. According to the notification DT and FT's aggregate market shares (1993 figures) in the European Community were 25 % in the end-to-end services market, 27 % in the VPN services market and 2,3 % in the outsourcing services market. Market shares for VSAT services are difficult to calculate given that TOs mostly use VSAT terminals either as back-up facilities for other services or to extend the geographic scope of services despite terrestrial infrastructure shortcomings; however, DT and FT taken together operated 10 907 VSAT terminals by June 1994, equivalent to 29 % of the total installed base of interactive, data one-way or business television VSAT terminals in the European Economic Area.

As to the national market for customized packages of corporate telecommunications services in France and Germany respectively, DT and FT's aggregate market shares for individual non-reserved corporate telecommunications services are 93 % in the French VPN market (where DT has no presence) against 0 % in the German VPN market, and 60 % in the French market for end-to-end services against 35 % in the equivalent German market. DT and FT's outsourcing joint venture, Eunetcom B.V., achieved 36 % of total outsourcing turnover generated in France and 29 % of total outsourcing turnover generated in Germany. As for VSAT services, DT has installed approximately 25 % of all VSAT terminals in Germany; this Member State accounts for 18 % of the total installed base of such terminals in the EEA.

In third-country national markets, including all EEA member countries, DT and FT's presence is to date negligible or non-existent.

The market for packet-switched data communications services

(17) DT and FT estimate the European market for data communications services to be worth approximately ECU 2,8 billion (1993 figures). According to the notification DT and FT's aggregate shares (1993 figures) of this market were 35 %. Among national markets, Atlas will have a particularly strong position in France and Germany. DT and FT's aggregate market share for all data communications services is 79 % in Germany and 77 % in France, of which approximately half relates to services provided by DT's X.25 data services subsidiary (now incorporated as T-Data) and FT's Transpac France subsidiary. Both subsidiaries will remain outside the scope of Atlas until the French and German telecommunications infrastructure and services markets are fully and effectively liberalized, as is scheduled for 1 January 1998 (see recital 24).

E. MAIN COMPETITORS OF ATLAS

The markets for customized packages of corporate telecommunications services

(18) Since the BT-MCI Decision several players, acting alone or jointly with partners, have entered or are entering the international markets providing non-reserved corporate telecommunications services. The most important of these players, albeit with disparate geographic scope and target customers, include: AT&T WorldPartners, Concert, IBM-Stet, International Private Satellite Partners([14]), Unisource([15]) or Uniworld([16]). Some of these strategic alliances are merely projects while others are awaiting regulatory approval. However, all of the above share the aim of positioning the respective partners in anticipation of the full liberalization.

The market for packet-switched data communications services

(19) The market for packet-switched data communications services features a substantially larger number of players than that for customized packages of corporate telecommunications services. Among the global players in this market are the alliances mentioned at recital 18 competing with providers such as EDS, FNA, Infonet, SITA or Swift and operating subsidiaries of large global companies such as AT&T Istel, Cable & Wireless Business Networks, DEC's Easynet, or GEIS. In addition, a large number of smaller players competes at a cross-border regional or national

([14]) See Commission Decision 94/895/EC of 15 December 1994 (Case No IV/34.768 — International Private Satellite Partners); OJ No L 354, 31. 12. 1994, p. 75.

([15]) Notification of a joint venture (Case No IV/35.830 — Unisource/Telefónica); OJ No C 94, 30. 3. 1996, p. 5.

([16]) Notification of a joint venture (Case No IV/35.738 — Uniworld); OJ No C 276, 21. 10. 1995, p. 9.

level in the EEA. For instance, FT's indirect German subsidiary Info AG, which provides most of its data communications services within Germany, is DT's second-largest competitor in the German national market for packet-switched data communications services. None of these smaller players can compare to large alliances in terms of reach, access to transmission capacity and financial backing.

F. THE TRANSACTION

(20) The Atlas transaction notified to the Commission comprises a set of agreements whose main features are described below.

1. Agreements as originally notified

(a) The Atlas Joint Venture Agreement (JV Agreement) is the main agreement providing for the establishment of the Atlas joint venture.

(b) The Intellectual and Industrial Property Transfer and Licence Agreements were concluded by FT and DT respectively, with Atlas SA; under these agreements FT and DT make available to Atlas SA the intellectual property rights (the IPRs) needed to operate the Atlas business.

(c) The Framework Services Agreements are framework agreements setting forth the basic terms and conditions with respect to the supply by DT and FT of certain services to Atlas SA and the supply by Atlas SA of certain services to FT and DT.

(d) The Distribution Agreements are two substantially similar distribution agreements between Atlas SA and FT and DT respectively, regarding the marketing and sale of Atlas products in France and Germany respectively.

(e) The Agency Agreements under which each parent appoints Atlas SA as non-exclusive worldwide agent for the sale of DT and FT's international leased lines (half-circuits), with the territorial exception of Germany as regards DT's half-circuits.

2. Contractual Provisions

(21) In particular, the above agreements provide for the following:

1. *Structure of the Atlas venture*

Atlas SA is created as a joint venture between FT and DT, each owning half the share capital. The management structure of Atlas SA is as follows:

(a) Shareholders' meeting: Prior approval by the shareholders' meeting is necessary for matters such as the amendment of the articles of association, changes of capital, issuance of shares, mergers, sale of all or a substantial part of the assets, and liquidation.

(b) The board of directors: Atlas SA's board of directors has eleven members, five apiece being elected by DT and FT and one by Sprint. Prior approval by the board of directors is required for a number of important decisions such as the approval of business plans and annual budgets and changes in the scope of Atlas, the conclusion of important contracts, etc. Decisions on changes in the Atlas business, management appointments, and the approval of the business plan, the annual operating plan, and the budget require that at least two directors nominated by each party vote with the majority [17].

(c) Chief executive officers (CEOs): It is envisaged that Atlas SA will have two CEOs, one nominated by FT from among its representatives in the board of directors, the other by DT from among its representatives in the board of directors. The CEOs shall be jointly responsible for day-to-day operations and the management of the business and affairs of Atlas. Approval of both co-CEOs is required for all important decisions including the hiring or dismissal of key employees.

The parties will contribute to Atlas their existing European assets outside France and Germany (as well as some assets in France and Germany) used for the provision of services coming within the scope of Atlas.

2. *Purpose and activities of Atlas*

The Atlas venture is to provide seamless national and international non-reserved services to corporate customers (that is, to multinational companies (MNCs) and SMEs alike). The portfolio of Atlas services comprises data network services, international end-to-end services (managed links), voice VPN services, customer-defined networks, outsourcing and VSAT services. These services are fully liberalized in the European Community and are widely liberalized worldwide. Atlas will have the responsibility for the services portfolio mentioned above, outside France and Germany.

[17] The originally envisaged Strategic Board of Atlas SA, described in the Article 19 (3) notice (footnote 6) at paragraph 20 (b), was deleted from the final Atlas Agreements.

In France and Germany, Atlas will provide sales support to FT and DT's sales forces as regards all services mentioned in the Atlas portfolio, with the exception of public packet-switched data network services within France and Germany, which will be provided by FT's Transpac France subsidiary and DT's T-Data subsidiary respectively until the telecommunications infrastructure and services markets are fully and effectively liberalized in France and Germany, as scheduled for 1 January 1998.

Each acting as an exclusive distributor, DT will sell Atlas services in Germany, while FT will sell Atlas services in France. Atlas products will be sold in France and Germany under the common globally used Atlas/GlobalOne brands. Passive sales of Atlas services by DT in France, by FT in Germany and by any Atlas operating entity in both Member States will be allowed. Outside France and Germany, Atlas products will be sold by the Atlas operating entity for the rest of Europe.

Pursuant to the JV Agreement, a balancing payment was made by DT at closing to equalize the respective contribution values of the two parties. DT or FT will make a further balancing payment upon contribution of T-Data and Transpac to Atlas to offset any difference in the valuation of T-Data and Transpac respectively.

3. *Provisions concerning dealings with/by Atlas*

Mutual service provision between Atlas and FT/DT is the subject of two Framework Services Agreements pursuant to which dealings between FT/DT and Atlas must be transparent, non-discriminatory and at arm's length.

As for services generally offered by DT or FT, the prices and other terms which DT or FT generally apply from time to time to their customers are to apply equally for Atlas. As for services not generally offered by FT or DT, market prices and terms apply and are negotiated between the Parties in good faith and at arm's length. Consequently, Atlas will purchase such services from DT or FT at similar prices and on similar conditions to those that any third party generally offering such services under equivalent circumstances would allow. If information on relevant market prices is not available, the prices applicable for Atlas are to be determined on the basis of a calculation model that is used, within FT, to make offers to customers with special requests and, within DT, to calculate intra-group transfer prices. Prices resulting from such calculation will cover, for the relevant period, all costs as well as a reasonable profit margin.

4. *Anti-competition provisions*

Pursuant to Article XIII of the Atlas JV Agreement, FT and DT will not engage anywhere in the production of services that are substantially the same or compete directly with the Atlas services, and will not engage outside France and Germany in the marketing, sale or distribution of services that are substantially the same or compete directly with the Atlas services. Furthermore, FT will not market or distribute Atlas services in Germany and DT will not market and distribute Atlas services in France; passive sales are, however, permitted by FT outside France, by DT outside Germany and by Atlas in both France and Germany.

5. *Provisions relating to intellectual and industrial property*

The parents each concluded an Intellectual and Industrial Property Transfer and Licence Agreement with Atlas SA under which DT, FT, T-Data and Transpac France (the 'IPR holders') are to make available to Atlas SA the IPRs which are needed to operate the Atlas business in accordance with the following principles:

(a) IPRs owned by, or licensed to, the IPR holders that are used exclusively for the Atlas business will be transferred to Atlas SA;

(b) IPRs owned by, or licensed to, the IPR holders that are used predominantly for the Atlas business shall be transferred to Atlas SA, and a sub-licence will be granted to the Parties (Grant-Back Licence sub-licence); and

(c) IPRs owned by, or licensed to, the IPR holders that are used predominantly for the IPR holders' business are (sub-)licensed to Atlas SA.

G. CHANGES MADE FURTHER TO THE COMMISSION'S INTERVENTION AND CONDITIONS ATTACHED TO THIS DECISION

(22) Certain features of the Atlas transaction as notified appeared to be incompatible with Community competition rules. Consequently, the Commission by letter of 23 May 1995 informed the Parties of its concerns. In the course of the notification

procedure the Parties have amended the original Agreements and given undertakings to the Commission.

1. Contractual changes

(23) Non-appointment of Atlas SA as an agent for international half-circuits

Further to the Commission's letter of 23 May 1995, DT and FT abolished the Agency Agreements and amended the original Service Agreements to take account of the non-appointment of Atlas SA as a non-exclusive agent for DT and FT's half-circuits.

(24) Non-integration of French and German public packet-switched data networks before full and effective liberalization of the telecommunications infrastructure and services markets

Atlas SA will not acquire legal ownership or control within the meaning of Article 3 of Council Regulation (EEC) No 4064/89 [18] of the French and German public packet-switched data networks, Transpac France and T-Data respectively, before the telecommunications infrastructure and services markets are fully and effectively liberalized in France and Germany, as is scheduled to occur by 1 January 1998. Meanwhile:

1. FT has split Transpac SA into Transpac France and Transpac Europe;

2. FT has yielded Transpac Europe to Atlas;

3. FT will keep Transpac France as a wholly owned subsidiary;

4. DT has incorporated DT's X.25 data services division as a separate company under German law and a wholly owned subsidiary of DT;

5. DT and FT have fully contributed their outsourcing joint venture, Eunetcom B.V., to Atlas SA; and

6. Atlas SA has created a subsidiary in France and Germany (Atlas France and Atlas Germany respectively) to provide the following services:

   (i) sales support regarding Atlas products to distributors in France and Germany; and

   (ii) services within the scope of Atlas other than packet-switched data network services including:

   — VSAT services,

   — international end-to-end services,

   — voice VPN services,

   — customer-defined solutions (excluding national X.25 data services in France and Germany), and

   — outsourcing services,

   and excluding the services described in the last paragraph of recital 5.

Once the telecommunications infrastructure and services markets are fully and effectively liberalized in France and Germany, Transpac France and T-Data will be contributed to Atlas in such a way that Atlas France and Atlas Germany will be merged with Transpac France and T-Data respectively. For the purposes of such contribution, Transpac France and T-Data shall be read as comprising only the public packet-switched data networks for the provision of packet-switched data communications services based on the X.25, IP, SNA and Frame Relay protocols respectively.

(25) Technical cooperation

Ahead of full and effective liberalization of the telecommunications infrastructure and services markets in France and Germany, DT and FT will cooperate in the development of common technical network elements. This Decision is subject to the condition that DT and FT's cooperation in this field will, until the date set in Article 2, comprise the following areas only:

1. FT and DT will cooperate in the development of common products and common technical network elements (namely such products and elements as share the same features, whilst being separately built and owned); such cooperation will extend to the French and German public packet-switched data networks. Only the following functions will be managed by Atlas SA for Transpac France and T-Data respectively:

   (a) product management and development, namely: (i) product definition (definition of *inter alia* speed, terms and availability of interconnection and other technical and commercial features), (ii) product marketing, (iii) product life cycle management, (iv) specification of product requirements, (v) technical specifications and developments of the products and (vi) technical development of the products (hardware and software), provided that product branding and pricing as well as product implementation in the network is managed by Transpac France and T-Data respectively;

[18] OJ No L 395, 30. 12. 1989, p. 1 (corrected version in OJ No L 257, 21. 9. 1990, p. 13); as amended by the Act of Accession of Austria, Finland and Sweden.

(b) certain network planning functions, namely: (i) central network engineering and optimization of the common transmission network so as to avoid an unreasonable duplication of resources, (ii) engineering and optimization of the networks for the various service platforms so as to ensure seamless services and (iii) central planning regarding the implementation of new network nodes (such as timing); and

(c) information systems, namely: (i) definition of the information system architecture (for example, development of common technical features for future information systems), (ii) specification of information system requirements and applications, (iii) technical development of hardware and software for information systems and (iv) central implementation planning of hardware and software, provided that central information system functions (for example, billing information and statistics) will be operated by Transpac France and T-Data respectively.

The above areas of cooperation are on no account to be tantamount to a *de facto* integration of the French and German public packet-switched data networks, which will be controlled by two separate network management centres. The restriction of DT and FT's technical cooperation to the elements set out above is attached to this Decision as a condition within the meaning of Article 8 (1) of Regulation No 17.

2. Atlas may subcontract certain operational functions to Transpac France and T-Data respectively.

(26) Non-integration of assets of FT's indirect German subsidiary

The assets of FT's German corporate telecommunications services provider Info AG shall not be integrated into Atlas save as indicated in the following undertaking:

'To meet the requirement of the European Commission that competition is not eliminated on the German telecommunications services market, France Télécom (FT) undertakes that it will irrevocably make available for sale, as a going business, Transpac's German subsidiary Info AG, or execute alternative remedies if such sale should not occur.

Scope of the divestiture

FT will divest of all assets as well as contracts of Info AG. Multinational clients whose headquarters are outside Germany to whom Info AG to date provides advanced network services as part of the Transpac network may be transferred to Atlas, to the extent to which the Commission is satisfied that such services are separable from the German activities of Info AG ("Info AG's business") without significantly lessening the value of those activities.

The two parts of Info AG's business (i.e. Disaster Recovery Services (DRS) and Network Services (NWS)) will be sold separately if no purchaser can be found for Info AG's business as a whole. For the purposes of this undertaking, the sale of Info AG will be considered as the sale of both the DRS and the NWS parts of Info AG's business.

Obligations of France Télécom

1. With regard to Info AG's present operations in respect of customers whose headquarters are located outside Germany, FT will, before the sale of Transpac's shares in Info AG to the party purchasing such shares (the 'purchaser'), try to bring about a service agreement between Info AG and Transpac. Pursuant to such agreement, Transpac will continue providing for Info AG such services as Transpac is currently providing to Info AG.

2. The services covered by the agreement referred to in the preceding paragraph shall be provided so as not to impair Info AG's remaining business as presently conducted. Conclusion of such agreement with the purchaser is not a condition and cannot be required by FT for the purposes of complying with this undertaking.

3. FT also agrees to provide the purchaser with any assistance (e.g. licences and know-how) relating to the provision of Info AG's services to the extent possible under existing contractual obligations, as the case may be. FT may charge the purchaser a market-based fee for any such licence and know-how. The market-based fee shall be that normally obtainable on the market at the time that any licence or know-how is provided.

4. FT recognizes the Commission's objectives to (i) maintain the viability, marketability and competitiveness of Info AG's current business and (ii) to provide sufficient management and other resources for this purpose. To achieve these objectives, FT undertakes the following:

(a) to ensure that (i) Info AG's business is legally kept separate from both

Transpac and T-Data and maintained as a distinct and saleable business; (ii) the value of Info AG's assets and of its business in every respect is maintained, pursuant to good business practice, at their current level, unless a change in the assets is necessary, in which case FT shall not make any significant change without prior consultation with and approval of the European Commission; and (iii) all agreements necessary to maintain Info AG's business are entered into or continued according to their terms, consistent with past practice and the ordinary course of business; this notably includes all agreements and arrangements related to leased line capacity and interconnection with T-Data and/or Deutsche Telekom;

(b) to keep all administrative and management functions relating to Info AG which have been carried out at all levels within FT and/or Transpac to maintain the viability, marketability and competitiveness of Info AG until divestiture is completed or until the trustee advises FT that such functions are no longer necessary, whichever occurs earlier;

(c) as soon as is practical and in any event no later than by 10 July 1996, to appoint a trustee (the 'trustee'), such as an investment bank, subject to approval by the Commission (such approval shall not be withheld without good cause), provided that, subject to approval by the Commission (such approval shall not be withheld without good cause), FT may (i) terminate the trustee agreement should FT decide at any time after the appointment that the trustee does not perform its duties properly, and (ii) replace the previously appointed trustee by another trustee also approved by the Commission;

(d) to give such trustee an irrevocable mandate to sell Info AG, on best possible terms and conditions, to an available purchaser making an offer before [. . .] ([19]); and

(e) to establish and facilitate the management structure agreed with the trustee in the framework of the divestiture negotiations.

5. When the trustee is appointed to sell Info AG, FT shall comply with the requirements of the trustee to maintain the value of Info AG's assets, to the extent legally permissible, unless a change in the assets is necessary, in which case FT shall not make any significant change without prior consultation with and approval of the European Commission. FT shall in particular ensure that all services provided by FT or any of FT's subsidiaries to Info AG continue to be provided efficiently and satisfactorily and that no increase is made in the charge (if any) made to Info AG for any service. FT shall not, except with the consent of the trustee, employ or offer employment to any employee or officer of Info AG until after the sale of Info AG.

Obligations of the trustee

6. Pursuant to the agreement between FT and the trustee appointed with the Commission's consent, the trustee shall:

(a) advise FT and Transpac on the best management structure to ensure the continued viability, marketability and competitiveness of Info AG's business. The trustee shall notably give advice on how to undertake any restructuring of Info AG in a way that guarantees Info AG's viability, marketability and competitiveness;

(b) advise FT and Transpac with regard to the satisfactory operation and management of Info AG to ensure the continued viability, marketability and competitiveness of Info AG's business as well as supervise, monitor and control the implementation of the advice by Info AG. For the purposes of and to the extent necessary for such monitoring, the trustee shall have complete access to Info AG's personnel and facilities as well as to documents, books and records of both FT and Transpac, including such personnel, facilities, books and records which, even if not directly related to Info AG,

([19]) Business secret.

may have an impact on the conduct of Info AG's operations;

(c) act as FT's investment banker in conducting good faith negotiations with interested third parties with a view to selling Info AG within [...][20] of the first closing date of the Atlas transaction as defined therein, i.e. before [...][21] (the 'target date'). In the event that the trustee at any time prior to the target date but at least two months before that date determines together with the Commission that it is not possible to identify an acceptable purchaser for Info AG exclusive of the customers whose headquarters are located outside of Germany, the trustee, FT and the Commission will discuss appropriate alternatives to the proposed divestiture of Info AG, notably an extended divestiture;

(d) provide a written report before a binding contract is signed and in any event every month on all developments in its negotiations with third parties interested in purchasing Info AG; such reports, with supporting documentation, shall be furnished to the Commission with copy to FT;

(e) provide the Commission, with copy to FT, with a written report every two months concerning the monitoring of the operations and management of Info AG;

(f) at any other time upon the Commission's request provide the Commission with a written or oral report on any aspect of the duties and activities of the trustee in relation to Info AG and its possible purchasers. FT shall receive a copy of such written reports and shall be informed of the content of oral reports; and

(g) cease to perform its duties as trustee for the purpose of this undertaking when the sale of Info AG or any alternative remedy within the meaning of paragraph 6 (c) above becomes effective.

7. The trustee shall be remunerated by FT. The trustee's remuneration shall provide incentives for a prompt divestiture, so that the trustee uses its best efforts in arranging a prompt and value-maximizing sale of Info AG.

8. FT undertakes to give all reasonable assistance requested by the trustee to sell Info AG by the target date. FT shall be deemed to have complied with its divestiture undertaking if by such date it has entered into a binding letter of intent or a binding contract for the sale of Info AG to a purchaser agreed by the Commission, provided that such sale is completed within a reasonable time limit, after the signing of such binding letter of intent or binding contract, agreed by the Commission.

9. The Commission may, upon FT's request and good cause provided, extend the period granted to FT for divestiture of Info AG by an additional six months after the target date (the 'extended target date').

10. The reports referred to in subparagraphs (6) (d) and (f) above shall indicate whether a proposed purchaser would be able to ensure that Info AG remains a competitive participant in the German telecommunications market and whether negotiations with such proposed purchaser should continue. If within 10 working days of the receipt of such indications from the trustee the Commission does not formally disagree with the trustee's favourable assessment of a proposed purchaser, negotiations with such proposed purchaser may proceed. The Commission may disagree with the trustee's assessment of a proposed purchaser if the proposed purchaser were in the Commission's view unlikely to compete effectively with T-Data, Atlas Germany and GlobalOne respectively.

11. The [...][22] period up to the target date and the six-month period up to the extended target date, as the case may be, are suspended in cases where the sale of Info AG is suspended due to a notification to a competition authority until such authority adopts its final decision with regard to the sale of Info AG.

12. Any dispute between FT and the purchaser(s) of Info AG with respect to FT's undertaking to divest of the Info AG business will be subject to arbitration by an independent third party. During such arbitration, the [...][23] period up to the target date will be suspended.

13. If the sale of Info AG's business does not seem likely to occur by the date stated in paragraph (4) (d), FT shall, at least two

[20] Business secret.
[21] Business secret.
[22] Business secret.
[23] Business secret.

months before that date, submit alternative remedies sufficiently satisfactory to safeguard actual competition in the German market. These alternative remedies must be executed by the date stated in paragraph (4) (d).'

The Commission makes this Decision conditional on FT's compliance with the terms of the above undertaking. Where they are separable from the product divisions of Info AG that are to be divested, multinational clients to whom Info AG now provides network services as part of the Transpac network and whose headquarters are located outside Germany may be transferred to Atlas.

(27) FT, DT, Atlas and GlobalOne have given separate undertakings not to compete, for one year after the closing date of the sale of Info AG, with the purchaser for the provision of telecommunications services to customers of Info AG whose headquarters are located within Germany (the 'transferred customers') at the specific locations which Info AG served, except where such transferred customers decline in good faith to deal with the purchaser of Info AG. The Commission makes this Decision conditional on compliance by FT, DT, Atlas and GlobalOne comply with the requirements of this undertaking.

2. Non-discrimination condition

(28) In order to provide the services described under recital 5, Atlas or any other service provider is dependent on access to the public switched telecommunications network (PSTN), the integrated services digital network (ISDN) and to other essential facilities, and also on reserved services [24]. Until there is full and effective liberalization of infrastructure and services in France and Germany, as is scheduled to occur by 1 January 1998, only FT and DT provide access to the PSTN and the ISDN as well as reserved services. However, even when all telecommunications facilities and services are non-reserved, FT and DT will at least for a number of years remain indispensable suppliers of building blocks for the relevant services in France and Germany. Given that FT and DT are shareholders of Atlas it is essential for the safeguarding of fair competition between Atlas and other existing or future telecommunications services providers to eliminate the risk that the former might be granted more favourable treatment regarding the following facilities-related telecommunications services provided by FT and DT to Atlas in France and Germany respectively, pursuant to the Framework Services 'Agreements: (i) leased lines services, in particular international leased lines (half-circuits) and domestic leased lines, including any discounts, as the case may be; and (ii) PSTN/ISDN services including both access to such networks (namely analogue access; basic ISDN access; ISDN access to the public packet-switched data networks; special access from the public packet-switched data networks to ISDN (X.75 interface); and national and international voice VPN and VPN interconnection services) and traffic over such networks. Likewise, Atlas is not to be granted more favourable treatment than third parties in connection with other reserved facilities and services and with such facilities and services which remain an essential facility after full and effective liberalization of telecommunications infrastructure and services in France and Germany. Thus:

1. Terms and conditions

The terms and conditions applied by DT and FT to Atlas for the abovementioned services covered by the Framework Services Agreements and for the provision of other reserved and/or essential services (for example, provision of leased lines, allocation of numbers, addresses and names) in connection with the services described under recital 5 shall be similar to the terms and conditions applied to other providers of similar services. This requirement covers *inter alia* availability, price, quality of service, functionality, usage conditions, timetable for installation of requested facilities, connection of apparatus, or repair and maintenance services.

2. Scope of services available

Atlas is not to be granted terms and conditions, or to be exempted from any usage restrictions regarding the abovementioned services covered by the Framework Services Agreements and other reserved and/or essential services, which would enable it to offer services which competing providers are prevented from offering.

3. Technical information

DT and FT is not to discriminate between Atlas and any other service provider competing with Atlas in connection with either a decision to substantially modify technical interfaces for the access to reserved and/or essential facilities or services or the disclosure of any other technical

[24] Reserved services are services which are provided pursuant to special or exclusive rights granted by the EU Member States to their respective TOs.

information relating to the operation of the PSTN/ISDN. Competitors will, in particular, have access to technical information to which they can adapt lest their quality of services be reduced, such as signalling software information for the provision of voice services.

4. Commercial information

DT and FT is not to discriminate between Atlas and other providers of services as described under recital 5 as regards the disclosure of certain commercial information (for example, systemized and organized customer information derived exclusively from the operation the PSTN/ISDN or the provision of reserved and/or essential services) if such information would confer a substantial competitive advantage and is not readily and equally available elsewhere by service providers competing with Atlas.

To ensure the absence of third-party discrimination, this Decision in application of Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement is to be valid only on condition that DT, FT and Atlas comply with the following additional conditions.

3. Other conditions attached to this Decision

(29) DT and FT have also entered into certain additional commitments. Where these commitments are too general or insufficient, the Commission has specified and supplemented the behavioural constraints imposed on the parents. Compliance with the constraints described below will be a condition for the validity of this Decision within the meaning of Article 8 (1) of Regulation No 17.

1. Access to DT and FT's public packet-switched data networks

DT and FT have given the following undertaking:

'Each of FT and DT will as of 1 January 1996 establish and thereafter maintain third-party access to their public switched data networks in France and Germany respectively. Non-discriminatory, open and transparent access will be granted to all data services providers that offer X.25 packet-switched data communications services. To ensure non-discriminatory access to their national public X.25 packet-switched data networks, FT and DT shall:

(a) establish and maintain standardized X.75 interfaces to access their national public X.25 packet-switched data networks; this interconnection is suitable for the provision of end-to-end services based on X.25 specifications for end-user access speeds up to 64 kbps; and

(b) offer such access on non-discriminatory terms, including price, availability of volume or other discounts and the quality of interconnection provided.

FT and DT shall further ensure non-discriminatory access by making publicly available the standard terms and conditions for such X.75 interface standards, including, if any, volume and other discounts, as of 1 January 1996. FT and DT will make available for inspection by the Commission any agreements relating to such X.75 interfaces, including all specifically agreed terms. Until such time as Transpac France and T-Data are integrated into Atlas, neither Transpac France nor T-Data shall disclose to Atlas any such specifically agreed terms that are identified and maintained as confidential by the party obtaining interconnection through such X.75 interfaces. Finally, the above obligations shall likewise apply to any generally used CCITT-standardized interconnection protocol that may modify, replace or co-exist as a standard related to the X.75 standard and is used by FT and DT.

Proprietary interfaces may be retained or established among Transpac France, T-Data and Atlas; such interfaces are defined by the particular type of technology, hardware and software that a network operator uses to provide advanced or customized services. Atlas will be allowed to access the Transpac France and T-Data public packet-switched data networks through these proprietary interfaces, also for the provision of packet-switched data communications services, provided access granted to Atlas through such interfaces is economically equivalent to third-party access to the Transpac France and T-Data networks.'

The Commission makes this Decision subject to the condition that Transpac France, T-Data and eventually Atlas grant third-party access to the French and German public packet-switched

data networks on non-discriminatory transparent terms and conditions which must be economically equivalent to the terms and conditions of Atlas' access to such networks.

2. Access to DT and FT's other networks and facilities

This Decision is conditional on DT's and FT's granting to any third party that operates a telecommunications facility ('telecommunications operator') and applies for the interconnection of such facility or systems facilities with DT or FT's networks, such as PSTN, ISDN or ATM networks and related broadband capacity, as the case may be, such interconnection on non-discriminatory terms vis-à-vis Atlas. Such terms must enable the telecommunications operator to provide telecommunications services or provide its telecommunications facilities without limitation in any respect within the reasonable capabilities of the telecommunications operator concerned.

3. Cross-subsidization

DT and FT have undertaken not to engage in cross-subsidization in connection with the Atlas venture. To prevent Atlas from benefiting from cross-subsidies stemming from the operation of public telecommunications infrastructure and of reserved services by either DT or FT, all entities formed pursuant to the Atlas venture will be established as distinct entities separate from DT and FT.

Atlas SA, T-Data and Transpac France shall obtain their own debt financing on their own credit, provided that FT and DT:

(a) may make capital contributions or commercially reasonable loans to such entities as are required to enable Atlas SA, T-Data and Transpac France to conduct their respective businesses;

(b) may pledge their venture interests in such entities, in connection with non-recourse financing for such entities, and

(c) may guarantee any indebtedness of such entities, provided that FT and DT may only make payments pursuant to any such guarantee following a default by such entities in respect of such indebtedness.

Compliance with the above undertaking is a condition for the validity of this Decision under Article 8 (1) of Regulation No 17. The Commission extends the following conditions as to conduct to cover all entities created pursuant to the Atlas agreement, T-Data and Transpac France. Such entities are not to allocate directly or indirectly any part of their operating expenses, costs, depreciation, or other expenses of their business to any parts of FT or DT's business units (including without limitation the proportionate costs based on work actually performed that are attributable to shared employees or sales or marketing of Atlas products and services by DT or FT employees); however, nothing is to prevent Atlas SA, T-Data and Transpac France from billing DT or FT for products and services provided to DT or FT by such entities on the basis of the same price charged third parties (in the case of products or services sold to third parties in commercial quantities) or full cost reimbursement or other arm's length pricing method (in the case of products and services not sold to third parties in commercial quantities).

4. Accounting

The Commission imposes a condition on T-Data, Transpac France (including all subsidiaries) and all entities created pursuant to the Atlas agreements which operate in the EEA to keep separate accounting records (including profit and loss account and balance sheet or statement of capital employed) using international accounting standards for each service they provide in any country.

These accounting records will notably identify all services provided to such entities by DT and FT and payments or transfers to or from DT and FT; moreover, no entity created pursuant to the Atlas Agreement, nor T-Data or Transpac France will receive any material subsidy (including forgiveness of debt) directly or indirectly from DT or FT, or any investment or payment from DT or FT that is not recorded in the books of such entities as an investment in debt or equity.

The Commission also imposes a condition on DT and FT (including all subsidiaries) to keep separate accounting records of all services provided to any entity created pursuant to the Atlas Agreements operating in the EEA. To that end, DT and FT are to implement within one year from the date of the exemption pursuant to Article 1 of this Decision an accounting system which identifies detailed cost accounting data for any such service.

The records mentioned in the previous two subparagraphs will detail the following:

(a) the cost standard used;

(b) the accounting conventions used for the treatment of costs;

(c) the full allocation and attribution of expenses or costs, revenues, assets and liabilities shared between such entities and their parents; and

(d) the attribution method chosen.

5. Bundling.

The Commission imposes a condition on DT and FT to sell DT and FT services respectively under contracts separate from the contracts for the sale of Atlas services concluded as distributors of Atlas in Germany and France respectively. Each separate contract will set out the terms and conditions of each individual service sold thereunder and notably attribute any quantity or other discounts to a particular service, as the case may be.

4. Obligations attached to this Decision

(30) The Commission attaches the following obligations within the meaning of Article 8 (1) of Regulation No 17 to this Decision, pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement. These obligations will remain in force for the duration of the exemption. In so far as related to existing obligations under national or Community law, the obligations described below are intended to ensure the Parties' firm commitment to comply with the applicable legal framework. Pursuant to Article 8 (3) (b) of Regulation No 17, the Commission may revoke this Decision where the parties breach any such obligation.

1. Auditing

Atlas SA (which includes its consolidated subsidiaries), Transpac France and T-Data are to be audited every year; such audit will confirm from an accounting viewpoint that:

(a) the transactions between these entities, on the one hand, and FT and DT, on the other hand, have been conducted at arm's length;

(b) these entities have adhered to the accounting procedures chosen within the framework set out under recital 29 (4); and

(c) the calculation numbers are accurate.

The first auditing reports, covering the 12-month period starting on the date on which this Decision comes into force, will be submitted to the Commission within 15 months of that date. This obligation will remain in force for the duration of this Decision.

2. Recording obligations

DT, FT and all entities created pursuant to the Atlas Agreements will each keep records and documents suitable to prove compliance with the terms of the above conditions ready for inspection by the Commission.

3. Inspection of records

For the purpose of ascertaining and ensuring compliance by DT, FT or Atlas with the above conditions, DT, FT and all entities created pursuant to the Atlas Agreements will, on reasonable notice, during office hours, and without a need for the Commission to invoke the powers of inspection pursuant to Regulation No 17, give the Commission access to DT, FT or Atlas's business premises to inspect records and documents covered by the above recording obligations and to receive oral explanations relating to such documents.

4. Reporting obligations

T-Data, Transpac France, DT, FT and all entities created pursuant to the Atlas Agreements will provide the Commission, for the purpose of ascertaining whether DT, FT and Atlas comply with the above obligations, with:

(a) any records and documents in the possession or control of DT, FT or an entity created pursuant to the Atlas agreements necessary for that determination; in particular, every six months, starting one year after the date of the exemption pursuant to Article 1 of this Decision with unaudited accounting data as specified in recital 29 (4); and

(b) oral or written complementary explanations.

H. THE REGULATORY SITUATION

(31) In letters sent to the Commission, the French and German Governments have undertaken to take the necessary steps to effectively allow the use of alternative infrastructure for the provision of liberalized telecommunications services by 1 July 1996 and to liberalize the voice telephony service and all telecommunications infrastructure fully and effectively by 1 January 1998. The availability of alternative telecommunications infrastructure in Germany and France renders competitors of Atlas

independent of DT and FT's infrastructure for the purposes of creating trunk network infrastructure to provide liberalized services.

Early alternative infrastructure liberalization in France and Germany adds to a regulatory framework in the home countries of the Atlas partners that is designed to ensure a level playing field in the telecommunications markets.

1. France

1. *Separation of regulatory and operative functions*

Pursuant to French Law, the Minister of Telecommunications shall ensure that regulation of the telecommunications markets is undertaken separately of service provision in these markets. A specific national regulatory authority (NRA), the Direction Générale des Postes et Télécommunications (DGPT), is competent for licensing providers of telecommunications networks and services in France based on objective and transparent criteria. The DGPT shall survey FT's market behaviour and approve FT's tariffs for (i) reserved services and leased lines and (ii) such liberalized services that are not in fact provided by a third party active in the French market.

2. *Non-discriminatory access*

Further to the adoption of the Commission Services Directive and Council Directive 90/387/EEC ('ONP Framework Directive')[25], Article L 32-1-4° of the French Law of 29 December 1990 grants all users equal access to the public networks on objective, transparent and non-discriminatory conditions. FT is under an obligation to effectively grant such access and must publish information on the network (such as technical features, tariffs and usage conditions) and on leased line offerings. The DGPT may verify FT's compliance with these obligations and investigate complaints filed against FT for non-compliance with these obligations. The DGPT is, further, to ensure compliance with FT's obligation to share available transmission capacity for liberalized services with competitors and shall publish annual statistical reports on FT's compliance with these obligations.

3. *Prevention of cross-subsidies*

To allow the DGPT to supervise FT's market behaviour, FT is under the legal obligation to keep an analytical accounting system that relates costs to each individual FT service. Where an offering comprises the provision of both reserved and liberalized services, FT must separate each kind of service in the contract and in the invoice. In this connection, FT's data communications services are already provided by a separate legal entity.

2. Germany

1. *Separation of regulatory and operative functions*

Pursuant to the German 1989 Poststrukturgesetz, the 1994 Postneuordnungsgesetz and the 1994 Post- und Telekommunikation-Regulierungsgesetz, regulatory competencies are assigned to a Federal agency created under the Federal Ministry of Post and Telecommunications (BMPT) while telecommunications operations are undertaken by DT, a fully State-owned joint stock corporation. Regulatory obligations of DT are policed by independent bodies, so-called regulatory chambers.

2. *Non-discriminatory access*

Under the current and future German regulatory framework, DT is to provide third parties with both access to monopoly infrastructure and reserved or mandatory services on a non-discriminatory and transparent basis according to objective criteria. Upon application, DT will supply state-of-the-art leased lines over service-neutral access points without delay. With the only restriction of voice telephony service provision, leased lines may be freely interconnected and used for any service. Leased lines must meet market demand and DT must publish data concerning availability and quality of such lines.

3. *Prevention of cross-subsidies*

The BMPT (i) will approve both tariffs and other price-sensitive contractual terms for DT's reserved services and (ii) may object to DT's tariffs for mandatory services. The BMPT may also seize DT's profits stemming from tariffs in excess of the approved amount and take any measure necessary to reestablish an effectively competitive environment jeopardized by unlawful cross-subsidization. Moreover, DT's subsidiaries and affiliates are to use reserved

[25] Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision; OJ No L 192, 24. 7. 1990, p. 1.

services for the provision of competitive services under equivalent terms as DT's customers and must use such terms to account internal services transfer.

I. THIRD-PARTY OBSERVATIONS

(32) Following the publication of a notice pursuant to Article 19 (3) of Regulation No 17 and to Article 3 of Protocol 21 of the EEA Agreement[26], 10 interested third parties submitted comments to the Commission. These comments approved of the structural changes made by DT and FT to the original project, whilst suggesting that a swift divestiture of FT's indirect German subsidiary Info AG was crucial. Third parties also contributed to the Commission's definition of the relevant markets emphasizing the indispensability of (i) an effective liberalization of alternative infrastructure in France and Germany, namely actual access to alternative sources of infrastructure in these countries, before Atlas is exempted from Articles 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement and (ii) surveillance of technical cooperation between DT and FT lest it extend to sales, marketing and pricing.

(33) As for proposed behavioural restraints to be imposed on DT and FT, third parties submitted that obligations and conditions should remain in place until there was effective competition in France and Germany. Finally, third-party observations also pointed to the relevance of appropriate accounting systems and interconnection terms, including technically equivalent interfaces for the joint-venture companies and third parties, to ensure that Atlas's competitors are not harmed by cross-subsidies or discriminatory practices.

(34) The Commission carefully reviewed all comments received and concluded that most concerns expressed therein had already been raised by the Commission and discussed in detail with DT and FT, who had provided adequate answers and safeguards. Those comments have not therefore affected the Commission's substantive position outlined in the Article 19 (3) notice as regards the notified agreements. However, in the interests of legal certainty the Commission has spelled out in more detail in this Decision the scope and duration of some conditions and obligations imposed on DT and FT.

(35) Subsequent to third-party observations the Commission also requested that FT, DT, Atlas and GlobalOne give the undertakings reproduced under recitals *et seq.* and decided to attach as an additional condition to this Decision that DT and FT sell own products unbundled from Atlas products (see recital 29 (5)).

II. LEGAL ASSESSMENT

A. ARTICLE 85 (1) OF THE EC TREATY AND ARTICLE 53 (1) OF THE EEA AGREEMENT

1. Structural cooperative joint venture

The Atlas joint venture is structural and cooperative in nature.

(36) Potential competition in markets for Europe-wide and national telecommunications services

Atlas will initially combine and develop products largely based on DT and FT's existing products, in respect of which DT and FT will act as exclusive distributors within their respective domestic markets. Although certain services transferred to Atlas in third-country national markets and Europe-wide remain with DT and FT in their respective home markets (see recital 5), interconnection allows the extension of any such service from the national home market into another geographic market. FT for instance provides an international extension to its domestic and international VPN services offerings. For both offerings this extension may include Germany where DT's national VPN services remain outside the scope of Atlas. Moreover, DT and FT will keep a residual staff presence at all their current foreign locations and continue to provide international leased lines, which are the 'building blocks' of self-provided private networks.

In this connection, Atlas will undertake own R+D activities but also award important R+D contracts to DT and FT. The parents will therefore keep and increase their proficiency and know-how in respect of the technologies required to stay in (or to re-enter) the relevant markets while keeping control of the necessary infrastructure in the single largest Member State telecommunications markets. Moreover, although Atlas may own new

[26] See footnote 2.

developments (see recital 21 (5)) it is on the whole more likely that such ownership will revert to the developing parent. In any event, Atlas will license back to the respective parent most technology developed from IPRs contributed by DT or FT.

The Commission concludes that DT and FT remain potential competitors for Atlas services and other services in neighbouring and upstream (transmission capacity) markets.

(37) Structural joint venture

Atlas combines DT and FT's activities in a range of Europe-wide and third-country markets for liberalized telecommunications services and is set to develop and take over new services in these markets. This venture entails major changes in the structures of DT and FT as two undertakings with very limited presence outside their respective home countries. Through Atlas the parents pool a significant number of assets in connection with the provision and marketing of telecommunications services. Atlas will employ 2 500 people across Europe.

2. **Applicability of Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement to the creation of Atlas**

The agreements between DT and FT fall within Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement as they restrict competition and affect trade between Member States. The Commission cannot therefore give negative clearance to the Agreements as the Parties requested in their application.

(38) The Atlas venture eliminates actual and potential competition between DT and FT both in Germany and France and Europe-wide. DT and FT were already competing in some segments of the market for Europe-wide if not global provision of customized packages of corporate telecommunications services to corporate users described at recitals 12 *et seq.*: prior to the implementation of their Eunetcom joint venture DT and FT tendered individually for outsourcing contracts, offering similar corporate services. As any European TO, DT and FT also competed on features and prices for the location of telecommunication hubs of international users[27]. While currently targeting only large businesses, this competition was set to intensify along with further liberalization and ultimately extend to private households. With the exception of outsourcing services and in spite of substantial market shares in their respective home markets, the parents were actual competitors for Europe-wide services only in Germany (see below).

(39) In creating Atlas, DT and FT each abandon their own developments and activities in the relevant markets for cross-border and ultimately Europe-wide telecommunications services. In the case of FT, such activities were substantial to the point that FT's existing Transpac network is the starting base for Atlas' envisaged European backbone network. As for national services, the large numbers of providers of liberalized services, including FT's Transpac, in all European countries targeted by Atlas shows that the parents have the financial and technological capabilities required to address national markets across Europe on their own.

(40) The elimination of competition between the parents is substantial as the Atlas venture is created by two internationally active TOs and covers the joint development and provision of services throughout the European Economic Area. DT and FT's respective dominant positions in the two single largest Member State telecommunications markets is reinforced by a legal infrastructure monopoly until such markets are fully and effectively liberalized, as is scheduled to occur by 1 January 1998, and will continue to rely on a dominant position for terrestrial transmission capacity for years thereafter. Current prices for infrastructure access — leased lines tariffs or interconnection rates — together with DT and FT's strengthened joint market position impair competitors' ability to create a competitive network of similar scope and density to DT and FT's in these countries[28].

[27] BT-MCI Decision (footnote 7), at recital 41.

[28] See Commission Decision 93/49/EEC of 23 December 1992 — Ford/Volkswagen, OJ No L 20, 28. 1. 1993, p. 14, at recitals 18 to 21; Decision 94/322/EC of 18 May 1994 — Exxon/Shell, OJ No L 144, 9. 6. 1994, p. 20, at recitals 42 *et seq.*; and Decision 94/896/EC of 16 December 1994 — Asahi/Saint Gobain, OJ No L 354, 31. 12. 1994, p. 87, at recitals 16 to 22.

3. **Application of Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement to contractual provisions**

(41) The following individual provisions are restrictive of competition:

1. the anti-competition provision as regards the activities of Atlas (Article XII JV Agreement as amended and Article VII of both Distribution Agreements);

2. the obligation on DT and FT acting as distributors to obtain from Atlas all requirements for Europe-wide products (Article VII of both Distribution Agreements); and

3. the appointment of DT and FT as exclusive distributors of Atlas products in the respective parent's home market (Article IV of both Distribution Agreements).

(42) The Commission considers the anti-competition provision and DT and FT's obligation to obtain all requirements for global products from Atlas to be ancillary to the creation and operation of Atlas. Therefore, these restrictions are not assessed under Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement separately from the joint venture as such. DT and FT chose creating Atlas as a way to strengthen their presence in the relevant cross-border and ultimately Europe-wide markets and as a first step towards entering the global markets for customized packages of corporate telecommunications services. In this respect, both the anti-competition provision and the exclusive purchasing obligation are different expressions of DT and FT's same commitment to the other parent and to their joint venture. Atlas requires both restraints to successfully establish itself in the emerging market for customized packages of global corporate telecommunications services given the uncertainty and risks associated with such market entry, the level of investment required, and competition from similar ventures.

1. Anti-competition obligation

Given DT and FT's substantial investment in Atlas, this clause ensures that DT and FT concentrate their efforts in the relevant markets on Atlas lest parallel activities, perhaps in cooperation with other TOs, jeopardize Atlas' successful establishment in the market.

2. Exclusive purchasing obligation

This restraint on DT and FT as exclusive distributors of Atlas services aims at ensuring Atlas a steady stream of funds and at increasing its credibility and market reputation. Were the parents free to obtain such products from other suppliers, notably in cases where Atlas is in a position to meet a particular demand requirement, this would affect Atlas' credibility and financial position alike. Inversely, Atlas is not under an obligation to obtain all its requirements for telecommunications and other products and services from the parents.

The Commission usually accepts ancillary provisions for a limited period of time only. In this case, however, given the particular features of the market in which Atlas will operate, notably the substantial investment required and the risks associated to such investment, the Commission accepts both the anti-competition clause and DT and FT's obligation to obtain all provisions for Europe-wide services from Atlas as ancillary restraints for the entire duration of this exemption Decision.

(43) Exclusive distribution

DT and FT's exclusive distributorship in their respective home countries is caught by Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement because it has the object or effect of isolating Germany and France against imports of Atlas services from other EEA Member States. This may adversely affect the conditions of competition within the EEA. Unlike the other restrictive provisions, the Commission cannot consider DT and FT's exclusive distributorship to be ancillary to the creation of the joint venture, as non-exclusive forms of distribution are possible which would not impair the performance or marketing of Atlas services. Given that Germany and France taken together account for more than 40 % of all telecommunications revenues in the European Community, the restriction is appreciable.

4. **Effect on trade between Member States**

(44) Pursuant to the Commission's telecommunications guidelines, agreements concerning non-reserved services, equipment and space segment

infrastructure potentially affect trade between Member States([29]). The creation of Atlas has an effect on inter-Member State trade in that Atlas will provide non-reserved services between any two Member States and within any Member State. The exclusive distribution provision caught by Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement protect the parents within their respective home market and contribute to dividing the single market along national borders. Therefore, this non-ancillary provision affects trade among Member States and between Member States and the EFTA countries. The Commission concludes that the loss of two powerful independent and potentially competing service providers in the relevant markets generally and in France and Germany in particular has a considerable impact on trade.

B. ARTICLES 85 (3) OF THE EC TREATY AND ARTICLE 53 (3) OF THE EEA AGREEMENT

(45) DT and FT pursue different aims in entering this set of transactions. DT was for a long time restricted to domestic investments and additionally burdened with a programme of infrastructure modernization in the former German Democratic Republic territories. DT has little presence elsewhere in Europe and aims at becoming an international telecommunications services provider worldwide, albeit seeing European markets as a priority. Cooperating with a major European player present in all of DT's target markets is particularly important for DT to achieve its objectives, notably a sufficiently broad European base to justify an extension of its business into the United States market, where 40 % of multinational companies are located.

(46) FT's main interest is to maintain its competitive position as a cross-border provider of business telecommunications services in Europe while addressing increasing customer demand for global services. The increasing presence of BT and MCI's Concert venture in Europe convinced FT of the need for wide coverage in Europe before adding a global dimension to its services; given that the scope of business of Infonet, in which FT held a stake, was limited compared to the range of envisaged Atlas services, FT opted for an alliance with another TO. DT and FT's joint aim now is to become leading providers of non-reserved telecommunications services in Europe. This requires a substantial investment in creating seamless networks in Europe, where DT and FT face strong competition from Concert and possibly from Uniworld([30]).

(47) The notified agreements, to the extent caught by Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement, satisfy the conditions for an exemption set out in Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement, for the following reasons:

1. Technical progress

(48) DT and FT will in the framework of Atlas implement a seamless Europe-wide network by adding value to basic transmission capacity purchased from local TOs. To that end, Atlas will not preserve the features of each national network involved but will instead implement harmonized technical features, own switching systems, call processing/routing, signalling and databases as well as software applications, notably fully compatible interfaces. This approach has substantial advantages over most existing international services that are provided by interconnecting national networks which are usually incompatible in terms of structure, software, hardware and management systems. Consequently, the number and features of services available is determined by the least sophisticated national network involved. The creation of a seamless trans-European network will allow the technical performance already requested by large business customers across Europe, which competitors such as Concert are also aiming at through distribution agreements and ventures.

(49) Under the conditions attached to this Decision, the harmonized joint DT and FT network will also improve the level of services provided by competitors of Atlas which may: (i) interconnect with the public packet-switched data networks operated by Transpac France and T-Data and eventually by Atlas in France and Germany over X.75 interfaces; (ii) access these public packet-switched data networks from other networks, notably the public switched telecommunications network (PSTN) and the integrated services digital network (ISDN); and (iii) interconnect with DT and FT's other networks, notably the PSTN. The latter

([29]) Footnote 9, at paragraph 39.

([30]) See notice published in OJ No C 276, 21. 10. 1995, p. 9.

is indispensable for the viability of competitive voice services offerings. Third parties shall be offered access to the public packet-switched data networks, the PSTN and the ISDN on terms technically and commercially non-discriminatory with regard to Atlas. Any service provider who wishes to make applications for interconnection to DT and FT will be able to rely on a substantive non-discrimination duty attached to this Decision as a separate condition.

(50) The combination of FT and DT's technology will enable Atlas from the outset to offer new services, albeit initially based largely on parents' existing services. By joining their R+D in the framework of the joint venture DT and FT will enable Atlas to provide more advanced features than either parent would be capable of providing independently within the same time frame. Jointly, DT and FT will also be able to make the substantial investment required to create a large seamless state-of-the-art trans-European network. This is a major improvement over the current situation in Europe, where many modern networks exist, but can only be interconnected at the price of a loss of features. At present, the most relevant example of shortcomings of interconnection is data transmission over state-of-the-art networks. Most advanced features of packet-switched data communications services, for example reverse charging, closed user group definition or end-to-end management, are lost as soon as several data communications networks are interconnected unless the respective technical specifications and interfaces are harmonized. As the Commission acknowledged in its BT-MCI Decision, successful implementation of trans-European networks will allow Europe's major undertakings to chose from international telecommunications services improved to levels of quality which are currently available only nationally or even locally. Availability of international state-of-the-art telecommunications services is critical to face increasingly global competition stemming from parts of the world where advanced telecommunications technology and services are already widely available.

2. Economic progress

(51) DT and FT jointly intend to undertake the investment necessary to bring about a qualitative improvement of European telecommunications which Atlas will also make available to SMEs. As the Commission acknowledged in its BT-MCI Decision, this requires a costly and time consuming effort. DT and FT will implement investment plans amounting to a total of ECU 5 billion linked to the creation or enhancement of services. Further to the Commission's preliminary position on the proposed alliance as expressed on 23 May 1995 the parties have: (i) changed their agreements in respect of Atlas' rôle outside France and Germany; and (ii) entered into a global alliance with a United States operator. A sizeable presence across the EEA is one requirement for the provision of such non-reserved services as targeted by Atlas. DT and FT have submitted data showing their commitment to substantial investment in Europe. Moreover, DT and FT have changed the original balance between Atlas' own services and services outsourced to the parents in Atlas' favour. Another requirement if service offerings are to progress beyond what is already available in the European market is the global extension of services as needed by multinational companies, so-called global connectivity of services. Atlas meets this requirement as a parent of the Phoenix alliance.

(52) Given the current cost of leased line infrastructure, Atlas' investment will initially be driven by the large multi-national companies (MNCs) with most complex requirements in countries other than France and Germany. However, as a result of operating a single high-speed network architecture Atlas will allow economies of scale at both the technological and operational level, i.e. reduce the cost per channel. Atlas is further likely to reduce infrastructure costs in respect of interconnection agreements with other TOs by generating larger traffic volumes which allow lowest-cost routing. The effects of economies of scale along with increased availability of infrastructure further to the implementation of recent Community legislation [31] will eventually allow service offerings with sophisticated technical features to develop and become widely available.

3. Benefits to consumers

(53) Atlas will shorten the time required by the parents individually for marketing new telecommunications

[31] Commission Directive 96/19/EC of 13. 3. 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in the telecommunications markets; OJ No L 74, 22. 3. 1996, p. 13.

services in a rapidly changing technological and commercial market environment. Business customers will benefit, more rapidly than if DT and FT acted separately, from both the provision of a larger product portfolio of newly developed services and lower pricing. Increased choice of telecommunications services and related cost benefits will spill over to other segments of the telecommunications market and economic sectors. Atlas will also provide an alternative option for the supply of customized offerings which cover the complete range of liberalized business telecommunications services.

(54) Through its global alliance with Sprint, Phoenix, Atlas will also offer European customers an expanded geographic reach of its customized packages of corporate telecommunications services. The possibility for European customers to reach remote locations worldwide either ad hoc or permanently without a loss of quality or technical features and without changing supplier is a major advantage for such customers, for example European companies endeavouring to establish a worldwide presence in an increasingly global economy. Customers have the advantages of seamless cross-border services through Atlas in Europe and through Phoenix worldwide at their convenience. Only global alliances can offer global connectivity of services. While the scope of Atlas is not in itself global, DT and FT's investment plans through Atlas ensure that a substantial number of European business customers will have the option of global scope.

(55) The exclusive distributorship in Germany and France combined with the agreements concerning IPR licensing and grant-back licensing will provide an incentive for DT and FT to share with the joint venture any technical progress made in markets related to the relevant markets. This is an additional benefit for large non-reserved telecommunications services users in DT and FT's home countries, i.e. two of the Member States with a substantial number of potential customers for Atlas services.

4. **Indispensability**

(56) The creation of Atlas

Creating Atlas is indispensable for the parents to bring about the benefits within the meaning of Article 85 (3) of the EC Treaty and 53 (3) of the EEA Agreement discussed above. Compared to individual market entry or other forms of cooperation with a lesser level of integration, the degree of cooperation between DT and FT in the framework of Atlas is necessary to provide the relevant services. Atlas will shorten the time DT and FT would have required to compete with other providers of cross-border and Europe-wide services and substantially reduce the costs and risks borne by each parent. In rapidly changing markets FT is forced to update its Transpac network and DT to establish itself as a European player. Last, Atlas is a means to quickly overcome the inadequacies of most services and features currently available by creating a major trans-European network which offers what multinationals and other large international users need.

(57) Exclusive distribution

Pursuant to the Distribution Agreements, each parent is the exclusive distributor for Atlas products in its own home market. The exclusive distribution provisions are indispensable in that:

1. exclusivity together with the grant-back licensing provisions in the Intellectual and Industrial Property and Licence Agreements in respect of technology Atlas receives from each parent protects DT and FT's technology against third parties and against the other parent respectively; and

2. using one such network instead of several is technically easier and therefore allows more efficient distribution. Atlas as a provider of Europe-wide services relies on national distribution networks with broad geographic coverage. The alternative to using the TO's distribution networks is either distribution by several smaller distributors or the construction of an own nationwide network in the parents' home countries. Both would deprive European telecommunications markets of the benefits of a technical harmonization of Europe's two largest existing public packet-switched data networks.

(58) Atlas will use Transpac-France and T-Data as national distribution networks in France and Germany. Thus, DT or FT will provide the national services required and use Atlas to provide all cross-border and third-country connections needed. In the light of this, other distribution arrangements would be less protective of the parents intellectual property rights and less adequate to the importance

of services DT and FT will initially provide to Atlas. The Commission therefore concludes that the exclusive distribution arrangement is indispensable within the meaning of Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement.

5. Non-elimination of competition

(59) The conditions imposed on DT and FT and the general regulatory framework in the European Community will improve the environment for competition in FT and DT's home countries. This applies notably to the conditions regarding: (i) interconnection to the public packet-switched data networks on terms non-discriminatory and economically equivalent to those available to Atlas in France and Germany; (ii) non-discriminatory interconnection to the PSTN and the ISDN in France and Germany; and (iii) the prohibition on DT and FT to take advantage of their market position in distributing Atlas' services and own services through joint contracts.

(60) The condition described in recital 29 (5) requiring DT and FT to sell Atlas products under separate contracts from the sale of own products will ensure that possible differences in calculation are verifiable and thus that non-discriminatory interconnection works in practice. The outsourcing and value-added ('managed') leased lines services provided by Atlas are open to competition and returns on these services are relatively low. Given the legal monopoly and eventually the dominant position for infrastructure provision enjoyed by DT and FT for the duration of this Decision, DT and FT could eliminate competition by using discounts on reserved services (such as leased lines) to attract their clients to use Atlas' non-reserved services.

The sale of packages of different services under one single contract is common commercial practice in the telecommunications sector known as 'bundling.' In liberalized telecommunications markets, dominant providers are usually prohibited both from tying sales of different services and from granting discounts on packages of services without specifying: (i) the terms and conditions of each individual 'unbundled' service; and (ii) the individual service(s) subject to a discount. Also, dominant providers are under an obligation to publish all tariffs and must prove that discounts on packages of services are justified by savings specifically due to the offering of a package of services. However, given: (i) the imbalance between DT and FT's ubiquitous monopoly networks on the one side and the small presence and reliance on interconnection of new market entrants on the other; and (ii) the lack of sufficient regulatory transparency requirements for the relevant services, allowing DT and FT to negotiate single contracts for both liberalized and reserved services would at this stage effectively impair market entry by competitors in Germany and France. DT and FT could *inter alia* grant quantity discounts or more favourable conditions in respect of combined packages of such services in a way which would make individual pricing and notably justification of any discounts non-transparent. The requirement to sell such services under separate contracts would in itself be insufficient unless terms and conditions are set out for each particular service sold.

(61) Moreover, the conditions and obligations imposed on DT and FT to keep and supply detailed accounting information ensures that the entities created pursuant to the Atlas Agreements and Atlas' parents gather sufficient information to allow the Commission a verification of their competitive behaviour. Accounting-related requirements attached to this Decision will also make it possible for national courts to order discovery of evidence of breaches of the substantive conditions attached to this Decisions and of any alleged anti-competitive behaviour where third parties seek remedies against such behaviour before the national courts. The Commission concludes that Atlas will not afford the parents the possibility of eliminating competition in respect of the envisaged set of services. In reaching this conclusion the Commission has taken into account the following elements.

Markets for cross-border and ultimately Europe-wide services

(62) Competitors in the marketplace

Atlas is one of several alliances between TOs and/or other undertakings in the relevant markets. Several alliances have obtained regulatory clearance and are already active in the market ([32]). DT and FT will also face competition, at least for certain non-reserved services that will integrate Atlas' Europe-wide packages of corporate telecommunications services. Competitors range from

([32]) In addition to BT-MCI's Concert (footnote 7), the Commission has granted regulatory approval in Case No IV/M.595 — BT/VIAG, OJ No C 15, 20. 1. 1996, p. 4; Case No IV/M.618 — Cable & Wireless/VEBA, OJ No 23, 5. 9. 1995, p. 3, and Case No IV/M.689 — ADSB/Belgacom (Decision of 29 February 1996; OJ No C 194, 5. 7. 1996, p. 4).

computer and data processing companies, for example IBM, DEC and EDS, to information services companies such as GEIS and Compuserve. However, most of these competitors have small market shares and are dependent on a substantive change in current competitive conditions to develop their presence in the non-reserved corporate telecommunications services markets. As for the provision of cross-border and ultimately Europe-wide services from and into Germany and France, these conditions will change as soon the two main elements of competition are available, namely: (i) alternatives to using DT and FT's infrastructure; and (ii) access to DT and FT's networks on transparent and non-discriminatory terms.

Both elements are of particular relevance to innovative offerings of non-reserved corporate telecommunications services which require state-of-the-art, high-speed lines and distribution networks whose use does not entail a loss of features. The mere presence of competing providers of cross-border and ultimately Europe-wide services has had little impact in that market yet. For both economic and geographic reasons, service provision into or across Germany and France is key to competition in the markets for Europe-wide non-reserved corporate telecommunications services. DT and FT will not eliminate competition if prevented from abusing their market positions and from preventing effective market entry. The Commission concludes that the following conditions are indispensable to that end.

(63) Availability of alternative infrastructure

Alternative infrastructure options and competitive pressure on leased-line rates will be possible in Germany and France when at least two infrastructure licences for the provision of liberalized telecommunications services are awarded, as is scheduled to occur by 1 July 1996. Given the existence of several infrastructure operators in both Member States and given the chance these operators have had to prepare for early infrastructure liberalization, the award of at least two alternative infrastructure licences in Germany and France should mean choice of infrastructure there. Only from that moment will other telecommunications services providers be in a position to compete with Atlas without depending on Atlas' parents for their leased-line requirements.

(64) Interconnection on non-discriminatory technical terms

Atlas, as any of its competitors, must: (i) create an own leased-line network to provide cross-border services; and (ii) interconnect to the public packet-switched data networks, the PSTN or the ISDN in France and Germany for final distribution of the Atlas services to customers. The use of DT and FT's networks as distribution networks will also be possible for competitors from the date of the exemption by interconnecting to such networks over X.75 interfaces. As to voice and sophisticated data services, DT and FT respectively must make available upon request adequate technical information relevant for PSTN or ISDN interconnection. This enables third-party competitors to provide services from and into DT and FT's home countries offering essential advanced features such as reverse charging, closed user group definition or end-to-end management. DT and FT's packet-switched ATM networks are not integrated into the Atlas venture; as was stated at recital 7, such integration would require a new notification. Atlas must therefore interconnect to such networks if so required for certain high-speed data communications services. The condition imposed on DT and FT not to discriminate between Atlas and third-party competitors as regards technical information on DT and FT's networks, such as full data on DT and FT's implementation of the Signalling System 7 (SS7)([33]) for voice services interconnection to the PSTN, will ensure that technical performance options for Atlas' non-reserved services involving interconnection with DT and FT's networks are similar for any competitor([34]).

([33]) Major digital protocol/signalling system for managing and transmitting control and routing information in networks.

([34]) The Commission has decided similarly in previous cases featuring similar market structures and problems, e.g. Decision 93/403/EEC of 11 June 1993 — EBU/Eurovision System, OJ No L 179, 22. 7. 1993, p. 23, at recital 82; Decision 94/594/EC of 27 July 1994 — ACI, OJ No L 224, 30. 8. 1994, p. 28, at recital 66; and Decision 94/663/EC of 21 September 1994 — Night Services, OJ No L 259, 7. 10. 1994, p. 20, at recitals 80 and 82.

(65) Interconnection on non-discriminatory economic terms

DT and FT are constrained under their respective national regulations not to discriminate against third parties and to comply with Open Network Provision (ONP) obligations such as providing a minimum set of lines at cost oriented and transparent tariffs([35]). More importantly, the exemption of the Atlas transaction is conditional upon DT and FT *inter alia* granting transparent and non-discriminatory terms of interconnection and implementing an accounting system which discloses the fully allocated costs of each service in anticipation of the ONP Interconnection Directive([36]). While the existing legal framework already provides for transparency, the Commission considers the additional conditions imposed on DT and FT as to separation and auditing of accounts, exclusion of cross subsidies and economically equivalent rates for interconnection to the German and French public packet-switched data networks are indispensable to ensure that the use of DT or FT's PSTN, Transpac-France in France and/or T-Data in Germany as distribution networks will be possible for Atlas and its competitors under equivalent conditions.

(66) No privileged information

Atlas will not have a competitive advantage over competitors as regards access to DT and FT's privileged commercial information. The parents have also deleted from the Atlas Agreements those clauses originally notified that appointed Atlas as DT and FT's agent for half-circuits. Given that such international leased lines are sought either by service providers competing with Atlas or by MNCs and other private network operators which are potential clients for Atlas' outsourcing services, the agency agreement would have given Atlas a competitive information advantage over competitors.

(67) Consumer bargaining power

MNCs or other large companies have the choice between either building their own private network solutions across national borders or purchasing them from service providers such as Atlas; they are not likely to choose the latter option unless this is cost-effective. Given their knowledge of the market these customers are in a position to request offers from different competitors. This gives MNCs considerable bargaining power, reflected in competition between the suppliers. This may equally apply to SMEs when lower infrastructure prices allow small suppliers to reach the scale necessary to enter the market.

French and German markets for packet-switched data communications services

(68) DT and FT have substantial market presence in their respective home countries, where they own the only existing nationwide, packet-switched data communications networks. Actual competition existed in Germany and will not be eliminated, thanks to the divestiture of FT's indirect German subsidiary Info AG. However, the restriction of potential competition between FT and DT in France and Germany has a substantial impact on the respective markets for packet-switched data communications services. More than 80 % of customers for this service in France and Germany are SMEs, which would not have sufficient bargaining power to counterbalance the strengthening of DT and FT's market position through the creation of a joint public packet-switched data network.

(69) For the purposes of this assessment the Commission defines two different albeit partly overlapping customer segments in the market for packet-switched data communications services, namely: (i) customers demanding casual, low-speed, low-volume applications, which are provided over the public packet-switched data networks in each Member State and billed by volume sent according to published tariffs (recital 9 (1)); and (ii) customers that generate more substantial and regular demand traffic, which service providers meet increasingly by packet-switched services using protocols such as Frame Relay, ATM and IP or by switched services and bill according to individual demand features (recital 9 (2)).

The choice of alternative infrastructure is not in itself sufficient to provide competitive alternatives to X.25 data services T-Data and Transpac France offer in Germany and France respectively to the first customer segment described above. These services require dense networks with wide

([35]) Articles 7 and 10 of Council Directive 92/44/EC of 5 June 1992 on the application of open network provision to leased lines, OJ No L 165, 19. 6. 1992, p. 27.

([36]) See Articles 6 and 7 of the modified proposal for a European Parliament and Council Directive on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision (ONP), OJ No C 178, 21. 6. 1996, p. 3.

geographic coverage, which DT and FT's competitors will continue to lack for some time. This conclusion is based on two considerations. First, all alternative infrastructure currently available in Germany and France taken together amounts to only one third of total infrastructure owned by DT and FT respectively. Secondly, the market for X.25 data services is characterized by low margins. Consequently, investment in alternative infrastructure with nationwide coverage as required to serve the first customer segment described in the previous recital will not begin to narrow the gap with the incumbent TO's infrastructure until new infrastructure can carry any telecommunications service and thus provide a better return on investment. The legal and administrative framework necessary to provide such new infrastructure is scheduled to be in place in France and Germany by 1 January 1998.

(70) Competitive alternatives

No adequate competitive alternative to Atlas would exist in Germany and France for customers in the first segment described at recital 9 (1) if DT and FT were to integrate their respective nationwide, public packet-switched data networks before at least two competing nationwide carriers are licensed in each of these Member States to provide public telecommunications services. The integration of these public packet-switched data networks into Atlas would reinforce Transpac France and T-Data's existing dominant position in the French and German markets for national packet-switched data communications services (more than 70% market share respectively). With hardly any competitive alternative yet for national services, Atlas would at this stage lock in existing Transpac France and T-Data customers with restrictive effects in the cross-border and ultimately Europe-wide geographic market as the Single Market develops. Keeping the French and German public packet-switched data networks separate from Atlas and prohibiting FT and DT from selling own services and Atlas services in the same contract, customers have the possibility to: (i) compare Transpac France and T-Data's national X.25 data services to emerging competitive alternatives such as more advanced packet-switched data communications and switched services (see below), for which FT and DT face stronger competition; and (ii) choose between Atlas and its competitors for separate provision of cross-border and ultimately Europe-wide X.25 data services if their requirements exceed the national scope.

Generally, competitive alternatives must be effectively available to have an appreciable impact on market conditions. However, as regards the French and German telecommunications markets, the Commission envisages that competitive conditions will already change substantially once telecommunications services and networks are fully and effectively liberalized and first nationwide carrier licences granted, as is scheduled to occur by 1 January 1998, and develop quickly thereafter. To reach this conclusion, the Commission has taken into consideration: (i) the decreasing relevance of public packet-switched data networks using the X.25 protocol for the provision of corporate packet-switched data communications services; (ii) the outstanding economic importance and attraction of the French and German telecommunications markets to telecommunications operators; (iii) the existence of operational expandable alternative infrastructure there and (iv) the positioning of a number of strong competing alliances ahead of full and effective liberalization of telecommunications networks and services in France and Germany by 1 January 1998 (see recital 18).

Ahead of full and effective liberalization of the French and German telecommunications markets it is possible in Germany to provide nationwide X.25 data services using the ISDN 'D' channel. Several of T-Data's competitors use this alternative to direct interconnection with DT's public packet-switched data networks (see next recital) at a total investment cost of approximately ECU 1,1 million. The ISDN 'D' channel is accessible in France using Transpac France as a transit network and direct access will be possible by the end of 1996. The Commission considers that increasing availability of the ISDN might eventually offer a competitive alternative for the provision of X.25 data services in the German customer segment described at recital 9 (1). As for France however, the Commission concludes from the density of Transpac France's public packet-switched data networks that using the ISDN is unlikely to prove a sufficiently competitive alternative.

(71) Economically equivalent interconnection terms

Any third party can obtain non-discriminatory interconnection with T-Data and Transpac-France

(before these entities are integrated into Atlas) or Atlas Germany and Atlas France (after T-Data and Transpac France have been integrated into Atlas) in Germany and France over X.75 interfaces. Services provided over two or more networks interconnected through X.75 interfaces are an alternative to using own networks in the market for packet-switched data communications services. This alternative is competitive only for service provision to customers in the second segment described at recital 9 (2), albeit demand for X.25 data services in this segment is decreasing quickly. In this segment, most value is added to services provided over customized networks, and service providers rely on interconnection merely to relay customer data communications to third parties unconnected to the customized network (call termination).

While Atlas may use proprietary interfaces to interconnect with T-Data and Transpac France, non-discriminatory third-party access to T-Data and Transpac France via X.75 interfaces is sufficient to prevent Atlas from eliminating competition in the market for packet-switched data communications services. For instance, to date T-Data interconnects to most third-party networks over interfaces which use the X.75 protocol and do not therefore support certain advanced features. DT and FT's tariffs for interconnection to their public packet-switched data communications networks must disclose the mark-up on the fully allocated costs of providing such interconnection. Third-party interconnection must be non-discriminatory compared to interconnection conditions for Atlas, *inter alia* as regards availability of ancillary services, provisioning time, repair and maintenance levels or technical information required. In the light of the above, the Commission concludes that the elimination of potential competition between T-Data and Transpac France in Germany and France respectively will not allow the parents to foreclose their home markets for the provision of standardized packet-switched data communications services.

Markets for national services in countries other than France and Germany

(72) At the third-country national level, Atlas is set to develop into a significant competitor for incumbent TOs: Atlas aims at becoming the second player on the data communications services markets of all major European markets with the exception of the UK. In respect of these services, the parents' submitted market share target for Atlas in all major national markets other than France and Germany is 20 %. Atlas is therefore set to offer an alternative to dominant incumbent TOs rather than to eliminate actual competition in third countries.

Markets outside the scope of the Atlas venture

(73) The liberalized services subject to cooperation within Atlas contribute less than 10 % to DT and FT's respective turnover. Even some liberalized services such as national VPN services and all data communications involving the use of DT and FT's ATM networks are not Atlas services and therefore subject to competition between the parents, while Atlas may purchase these services and access these networks under equivalent non-discriminatory, transparent conditions and at the same interconnection rates as third-party competitors. The condition attached to this Decision restricting the exchange of sensitive information between DT, FT and Atlas limit the potentially negative effects of the joint venture both on competition between the parents acting as Atlas distributors and on overall competition between the parents.

Exclusive distribution arrangements in France and Germany

(74) In allowing passive sales the Distribution Agreements provide an opening for customers with bargaining power to exploit margins for competition between the Atlas parent acting as exclusive distributor in its home country and the other parent that may offer the same Atlas service at a lower price. More importantly, the restrictive effects of the exclusive distribution agreements are likely to be increasingly balanced by the availability of alternative infrastructure and the non-discriminatory terms of interconnection with T-Data and Transpac-France's networks, which will induce competition for Atlas and for DT and FT acting as Atlas distributors.

6. Conclusion

(75) It is the Commission's conclusion that all conditions for an individual exemption pursuant to

Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement are met in respect of the creation of Atlas and in respect of the individual restrictions discussed above.

C. DURATION OF THE EXEMPTION, CONDITIONS AND OBLIGATIONS

(76) Pursuant to Article 8 of Regulation No 17 and to Protocol 21 of the EEA Agreement respectively, a decision in application of Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement shall be issued for a specified period and conditions and obligations may be attached thereto. Pursuant to Article 6 of Regulation No 17, the date from which such a decision takes effect cannot be earlier than the date of notification. In that respect, in the present case the Decision, in so far as it grants exemption, shall take effect:

(a) as regards the creation of Atlas and related agreements as described above, except for the integration of Transpac France and T-Data into a joint venture, for five years from the date on which the second new infrastructure licence comes into force in both Germany and France authorizing the licensee to operate infrastructure for the provision of liberalized services in competition with the respective parent and the respective first licensee; and

(b) as regards the integration of Transpac France and T-Data into a joint venture company, from the date on which licences to new applicants for the provision of nationwide infrastructure and national and international voice telephony services which provide two alternatives to DT and FT in a substantial part of Germany and France respectively come into force in both Germany and France to the expiry of the five-year period specified in the preceding recital.

(77) This exemption Decision shall be subject to the conditions described in recitals 25 to 30 (1). This exemption Decision shall further impose on DT, FT and the entities created pursuant to the Atlas agreements the obligations described in recital 30. These conditions are indispensable to prevent an elimination of competition in the relevant markets by the largest TOs in the EEA. The Commission will, upon the parties request, review the need for any particular condition or obligation attached to this Decision if circumstances change substantially before the period of exemption expires.

The most crucial behavioural requirements to safeguard competition in the EEA are attached as conditions rather than obligations to this Decision, given the need to prevent an elimination of effective competition. Strict compliance with these requirements is so important that the Commission must ensure immediate consequences in the event of a breach. Given the legal consequences of such breach of a condition, national courts can adequately and swiftly contribute to a decentralized policing of compliance and thus ensure that the competition rules will be respected for the benefit of private individuals ([37]). However, the principle of proportionality requires that far-reaching legal, financial and commercial consequences do not ensue from occasional or individual mistakes whose effects on the market are negligible. Therefore, violations of the prohibitions on cross-subsidization, discrimination and bundling cannot be considered to breach a condition attached to this Decision unless such violations have a substantial impact on market conditions, for instance if practices are committed systematically or repeatedly.

The condition relating to non-discriminatory treatment of Atlas and its competitors (recital 28) will also allow DT and FT to compete against each other at the distribution level, albeit through passive sales. Such competition is possible because the same Atlas service may be sold from either end of the requested circuits, namely from Germany or from France. To limit the potentially negative effects of the joint venture on overall competition between the parents, the Commission considers it appropriate to impose restrictions on the exchange of sensitive information between the parents and Atlas (recital 28 (4)).

(78) This Decision is without prejudice to the applicability of Article 86 of the EC Treaty and Article 54 of the EEA Agreement,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement and subject to Articles 2 to 5 of this Decision, the provisions of

([37]) See Commission notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, OJ No C 39, 13. 2. 1993, p. 6.

Articles 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement are hereby declared inapplicable, for a period of five years from the date on which two or more licences for the construction or ownership and control of alternative infrastructure for the provision of liberalized telecommunications services take effect in both Germany and France, to:

(a) the creation of the Atlas joint venture by Deutsche Telekom AG ('DT') and France Télécom ('FT'), as notified to the Commission, including the ancillary obligations imposed on DT and on FT:

  (i) to obtain from Atlas all requirements for global products under Article VII of both Distribution Agreements; and

  (ii) not to compete with the joint venture for the provision of Atlas services under Article XIII of the Joint Venture Agreement and Article VII of both Distribution Agreements; and to

(b) the appointment of DT as the exclusive distributor for Atlas in Germany and of FT as the exclusive distributor for Atlas in France under Article IV of both Distribution Agreements.

Article 2

Pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement and subject to Articles 3, 4 and 5 of this Decision, the provisions of Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement are hereby declared inapplicable to the integration into Atlas of the German and French public packet-switched data networks, provided that only networks providing packet-switched data communications services using the X.25, Frame Relay, SNA or Internet protocols shall be integrated, from the date on which both Germany and France have:

(a) removed all legal prohibitions on entities other than DT and FT and their subsidiaries to:

  (i) build, own or control both national and international telecommunications infrastructure and use such infrastructure to provide any telecommunications service, and

  (ii) provide a national and international voice telephony service; and

(b) granted and made effective at least two licences to applicants other than DT and FT for

  (i) the construction or ownership, and control, of telecommunications infrastructure and either separately or in combination,

  (ii) the provision of national and international voice telephony services, provided that such licences provide two suitable alternatives to DT and FT respectively to serve all or a substantial part of the territory of Germany and France,

until the expiry of the five-year period specified in Article 1.

Article 3

Until the date specified in Article 2 of this Decision, the exemption from Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement set out in Article 1 of this Decision is subject to the condition that cooperation between DT and FT in developing common technical network elements comprise the following areas only:

(a) the following product management and development tasks:

  (i) product definition,

  (ii) product marketing,

  (iii) product life-cycle management,

  (iv) specification of product requirements,

  (v) technical specifications and development of the products, and

  (vi) technical development of the products;

(b) the following network planning functions:

  (i) central network engineering and optimization of the common transmission network so as to avoid an unreasonable duplication of resources,

  (ii) engineering and optimization of the networks for the various service platforms so as to ensure seamless services, and

  (iii) central planning regarding the implementation of new network nodes; and

(c) the following aspects of information systems:

  (i) definition of the information system architecture,

  (ii) specification of information system requirements and applications,

  (iii) technical development of hardware and software for information systems, and

  (iv) central implementation planning of hardware and software.

Until the date specified in Article 2, all other aspects and functions of each of the French and the German public packet-switched data networks shall be controlled by two separate network management centres.

Article 4

The exemption from the application of Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement set out in Articles 1 and 2 of this Decision is subject to the following conditions:

(a) Divestiture of Info AG

(1) FT shall:

(i) sell Transpac's shares in Info AG before [...][38]. The Commission may extend the period granted to FT for divestiture of Info AG by an additional six months after that date; FT shall be deemed to have complied with this condition by [...][39] if it has entered into a binding letter of intent or a binding contract for the sale of Info AG to a purchaser agreed by the Commission, provided that such sale is completed within a reasonable time limit, after the signing of such binding letter of intent or binding contract, agreed by the Commission;

(ii) appoint a trustee subject to approval by the Commission to advise on the management and to sell Info AG, provided that, subject to approval by the Commission, FT may

— terminate the trustee agreement should FT decide at any time after the appointment that the trustee is not performing its duties properly, and

— replace the previously appointed trustee by another trustee also approved by the Commission;

(iii) give the trustee an irrevocable mandate to sell Info AG, on best possible terms and conditions, to any available purchaser making an offer before [...][40];

(iv) remunerate the trustee providing incentives for a prompt divestiture;

(v) give all reasonable assistance requested by the trustee to sell Info AG by the target date;

(vi) establish and facilitate the management structure agreed with the trustee in the framework of the divestiture negotiations;

(vii) provide the purchaser of Info AG with any licences and know-how relating to the provision of Info AG's services to the extent possible under existing contractual obligations, if any. FT may charge the purchaser a market-based fee for any such licence and know-how;

(viii) keep all administrative and management functions relating to Info AG which have been carried out at all levels within FT and/or Transpac, so as to maintain the viability, marketability and competitiveness of Info AG until divestiture is completed or until the trustee advises FT that such functions are no longer necessary, whichever occurs earlier.

(2) FT shall at all times use its best efforts to maintain the value of Info AG and of its business in every respect and, when the trustee is appointed to sell Info AG, shall consider the advice of the trustee to maintain this value. FT shall in particular ensure that all services provided by FT or any of FT's subsidiaries to Info AG continue to be provided efficiently and satisfactorily and that no increase is made in the charge (if any) made to Info AG for any such service. FT shall not, except with the consent of the trustee, employ or offer employment to any employee or officer of Info AG until after the sale of Info AG.

(3) The trustee appointed by FT shall:

(i) advise FT and Transpac on the best management structure to ensure the continued viability, marketability and competitiveness of Info AG's business, also in the event of a restructuring of Info AG;

(ii) advise FT and Transpac with regard to the satisfactory operation and management of Info AG, so as to ensure the continued viability, marketability and competitiveness of Info AG's business, and shall supervise, monitor and control the implementation of the advice by Info AG; for these purposes the trustee shall have complete access to Info AG's personnel and facilities as well as to documents, books and records of both FT and Transpac, including such personnel, facilities, books and records which, even if not directly related to Info AG, may have an impact on the conduct of Info AG's operations;

(iii) act as FT's investment banker in conducting bona fide negotiations with interested third parties with a view to selling Info AG. In the event that the trustee at any time prior to the target date determines together with the Commission that it is not possible to identify an acceptable purchaser for the business of Info AG other than the customers whose headquarters are located outside Germany,

[38] Business secret.
[39] Business secret.
[40] Business secret.

the trustee, FT and the Commission shall discuss appropriate alternatives to the proposed divestiture of Info AG, notably an extended divestiture;

(iv) provide the Commission with a written report before a binding contract is signed and in any event every month on all developments in its negotiations with third parties interested in purchasing Info AG;

(v) provide the Commission with a written report every two months concerning the monitoring of the operations and management of Info AG;

(vi) at any other time upon the Commission's request, provide the Commission with a written or oral report on any aspect of the duties and activities of the trustee in relation to Info AG and its possible purchasers, indicating whether a proposed purchaser would be able to ensure that Info AG remains a competitive participant in the German telecommunications market and whether negotiations with such proposed purchaser should continue; and

(vii) cease to perform its duties as trustee for the purpose of this condition when the sale of Info AG or any alternative remedy within the meaning of point (iii) becomes effective.

(4) Multinational clients to whom Info AG has so far provided network services as part of the Transpac network and whose headquarters are located outside Germany may be transferred to Atlas on condition that the Commission is satisfied that these services can be separated from the German activities of Info AG without significantly lessening the value of those activities.

(5) With immediate effect from the date of notification of this Decision and until one year after the date of signature of the agreements between Transpac and the purchaser of Info AG, neither DT, FT, Atlas nor GlobalOne shall compete with Info AG for the provision of telecommunications services to customers of Info AG whose headquarters are located within Germany except where such customers decline to deal with Info AG.

(6) If the sale of Info AG's business does not seem likely to occur by the date stated in point (1) (i), FT shall, at least two months before that date, submit alternative remedies sufficiently satisfactory to safeguard actual competition in the German market. These alternative remedies must be executed by the date stated in point (1) (i).

(b) Non-discrimination

(1) DT and FT shall not grant to any entity created pursuant to the Atlas Agreements terms and conditions dissimilar to the terms and conditions applied to other providers of similar services, nor exempt such entity from any usage restrictions which would enable such entity to offer services which competing providers are prevented from offering with regard to the following facilities-related telecommunications services provided by FT and DT in France and Germany respectively:

(i) leased lines services, in particular international leased lines (half-circuits) and domestic leased lines, including any discounts, as the case may be; and

(ii) PSTN/ISDN services including both access to such networks (namely analogue access; basic ISDN access; ISDN access to the public packet-switched data networks; special access from the public packet-switched data networks to ISDN; and national and international voice VPN and VPN interconnection services) and traffic over such networks.

Atlas shall not be granted more favourable treatment than third parties in connection with reserved facilities and services and with such facilities and services which remain an essential facility after full and effective liberalization of telecommunications infrastructure and services in France and Germany.

(2) DT and FT shall grant any entity created pursuant to the Atlas Agreement and any third party operating a telecommunications facility that apply for the interconnection of such facility with DT or FT's networks such interconnection on non-discriminatory terms that enable such entity or person to provide telecommunications services or provide its telecommunications facilities without limitation in any respect within the reasonable capabilities of the operator concerned.

(3) DT and FT shall not in any way discriminate between any entity created pursuant to the Atlas Agreements and any other service provider competing with such entity in connection with:

(i) either a decision substantially to modify technical interfaces for the access to reserved services and/or essential facilities or services, or the disclosure of any other technical information relating to the operation of the PSTN/ISDN; competitors shall in particular have access to such software and interface information as is

indispensable for maintaining the technical features of voice services where such competitors interconnect to the German or French PSTN/ISDN; and

(ii) the disclosure of any commercial information that would confer a substantial competitive advantage and is not readily and equally available elsewhere by service providers competing with such entity.

(4) Breaches of the requirements set out in points 1, 2 and 3 shall not be considered to infringe this condition unless such breaches have a substantial impact on the market.

(c) Interconnection to DT and FT's public packet-switched data networks

(1) FT and DT shall immediately:

(i) establish and maintain standardized X.75 interfaces to access their national public packet-switched data networks;

(ii) offer such access on non-discriminatory terms, including price, availability of volume or other discounts and the quality of interconnection provided; and

(iii) publish the standard terms and conditions for such X.75 interface standards, including, if any, volume discounts and other discounts and make any agreements relating to such X.75 interfaces, including all specifically agreed terms, available for inspection by the Commission.

(2) Transpac France and T-Data shall, until such time as Transpac France and T-Data are integrated into Atlas, not disclose to any entity created pursuant to the Atlas Agreement any such specifically agreed terms as are identified and maintained as confidential by the party obtaining interconnection through standardized X.75 interfaces to access the French or German national public packet-switched data networks.

(3) The conditions set out in points (1) and (2) shall likewise apply to any generally used CCITT-standardized interconnection protocol that may modify, replace or co-exist as a standard related to the X.75 standard and is used by FT and DT.

(4) Any entity created pursuant to the Atlas Agreements may access the French and German public packet-switched data networks through proprietary interfaces, even for the provision of data communications services, provided that access granted to such entity through such interfaces is economically equivalent to third-party access to those networks.

(5) Breaches of the requirements set out in points 1 to 4 shall not be considered to infringe this condition unless such breaches have a substantial impact on the market.

(d) Interconnection to DT and FT's other networks and facilities

(1) DT and FT shall grant to any third party that operates a telecommunications facility ('telecommunications operator') and applies for the interconnection of such facility or systems facilities with DT or FT's networks, such interconnection on non-discriminatory terms as compared to the terms applied to Atlas. Such terms shall enable the telecommunications operator to provide telecommunications services or provide its telecommunications facilities without limitation in any respect within the reasonable capabilities of the telecommunications operator concerned.

(2) Breaches of the requirements set out in point 1 shall not be considered to infringe this condition unless such breaches have a substantial impact on the market.

(e) Cross-subsidization

(1) All entities created pursuant to the Atlas Agreements shall be established as distinct entities separate from DT and FT.

(2) Atlas SA, T-Data and Transpac France shall obtain their own debt financing on their own credit, provided that FT and DT:

(i) may make capital contributions or commercially normal loans to Atlas SA, T-Data and Transpac France, to enable them to conduct their respective businesses;

(ii) may pledge their venture interests in such entities, in connection with non-recourse financing for such entities; and

(iii) may guarantee any indebtedness of such entities, provided that FT and DT may only make payments pursuant to any such guarantee following a default by such entities in respect of such indebtedness.

(3) All entities created pursuant to the Atlas Agreement, T-Data and Transpac France shall not allocate directly or indirectly any part of their operating expenses, costs, depreciation, or other expenses of their business to any parts of FT or DT's business units (including without limitation the proportionate costs based on work actually performed that are attributable to shared employees or sales or marketing of Atlas products and services by DT or FT employees).

These undertakings may bill DT or FT for products and services supplied to DT or FT by such undertakings at:

(i) the same price charged third parties in the case of products or services sold to third parties in commercial quantities; or

(ii) on the basis of the full cost reimbursement or other arm's length pricing method in the case of products and services not sold to third parties in commercial quantities.

(4) Breaches of the requirements set out in points 1, 2 and 3 shall not be considered to infringe this condition unless such breaches have a substantial impact on the market.

(f) Bundling

(1) DT and FT shall sell their services under contracts separate from the contracts for the sale of Atlas services concluded as distributors of Atlas in Germany and France respectively. Each separate contract shall set out the terms and conditions of each individual service sold thereunder and notably attribute any quantity or other discounts to a particular service, as the case may be.

(2) Breaches of the above requirements shall not be considered to infringe this condition unless such breaches have a substantial impact on the market.

(g) Accounting

(1) T-Data, Transpac France (including all their subsidiaries) as well as all entities created pursuant to the Atlas Agreements which are operating in the EEA shall keep separate accounting records using international accounting standards for each service they provide in any country. DT and FT (including all subsidiaries) shall keep separate accounting records using international accounting standards for each service they provide to any entity created pursuant to the Atlas Agreements, operating in the EEA.

(2) DT and FT shall, within one year of the date defined in Article 1, implement an accounting system which generates sufficiently detailed records of the services covered by point (1). Those records shall detail the following:

(i) the cost standard used;

(ii) the accounting conventions used for the treatment of costs;

(iii) the allocation and attribution of expenses or costs, revenues, assets and liabilities shared between any entity created pursuant to the Atlas Agreements and DT and/or FT; and

(iv) the attribution method chosen.

(3) The accounting records referred to in points (1) and (2) shall identify all services provided to any entity created pursuant to the Atlas Agreements by DT and FT or transfers to or from DT and FT.

(4) No entity created pursuant to the Atlas Agreement, nor T-Data or Transpac France shall receive any material subsidy directly or indirectly from DT or FT, nor any investment or payment from DT or FT that is not recorded in the books of such entities as an investment in debt or equity.

Article 5

The exemption granted under this Decision is subject to the following obligations:

(a) Auditing

(1) Atlas SA and any consolidated subsidiary of Atlas SA, Transpac France and T-Data shall be audited by an independent external auditor every 12 months, provided that such audit shall certify from an accounting viewpoint that:

(i) all transactions between those undertakings, on the one hand, and FT and DT, on the other hand, have been conducted at arm's length;

(ii) the undertakings have adhered to the accounting procedures; and

(iii) the calculation numbers are accurate.

(2) The first auditing report and certificate complying with point (1), covering the 12-month period starting on the date on which this Decision takes effect, shall be submitted to the Commission within 15 months of that date.

(b) Other obligations

DT, FT, T-Data, Transpac France and all entities created pursuant to the Atlas Agreements shall each, for the purpose of ascertaining and ensuring compliance by these undertakings with the conditions set out in Article 4:

(1) keep all detailed records and documents necessary to prove complete compliance with the terms of the conditions set out in Article 4 ready for inspection by the Commission and to

enable the Commission to verify the correctness of the audit certificate referred to in point (a) (2);

(2) give the Commission access to their business premises to inspect records and documents covered by the obligations set out under heading (a) and to receive oral explanations relating to such documents on reasonable notice, during office hours, and without the need for the Commission to invoke the powers of inspection pursuant to Regulation No 17; and

(3) provide the Commission with:

(i) any records and documents in the possession or control of those undertakings necessary for that determination;

(ii) unaudited accounting data as specified in points (1) and (2) every six months, starting one year after the commencement date of the exemption pursuant to Article 1; and

(iii) further oral or written explanations.

Article 6

This Decision is addressed to:

Deutsche Telekom AG,
Friedrich-Ebert-Allee 140,
D-53105 BONN;

France Télécom,
Place d'Alleray,
F-75505 PARIS.

Done at Brussels, 17 July 1996.

For the Commission
Karel VAN MIERT
Member of the Commission

COMMISSION DECISION

of 17 July 1996

relating to a proceeding under Article 85 of the EC Treaty and Article 53 of the EEA Agreement

(Case No IV/35.617 — Phoenix/GlobalOne)

(Only the English, French and German texts are authentic)

(Text with EEA relevance)

(96/547/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular Articles 2, 6, and 8 thereof,

Having regard to the application for negative clearance and the notification for exemption submitted, pursuant to Articles 2 and 4 of Regulation 17, on 29 June 1995,

Having regard to the summary of the application and notification published pursuant to Article 19 (3) of Regulation 17 and to Article 3 of Protocol 21 of the EEA Agreement [2],

After consultation with the Advisory Committee for Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

A. INTRODUCTION

1. The Phoenix transaction was notified to the Commission on 29 June 1995. The notifying parties announced a new name, GlobalOne, at the signature of the agreements on 5 March 1996. This transaction is linked to a separate transaction creating a joint venture, Atlas, owned as to 50 % by France Télécom (FT) and as to 50 % by Deutsche Telekom (DT), given that Atlas is a parent to the joint venture entities created pursuant to the Phoenix agreements. A separate Decision in Case IV/35.337 ('the Atlas Decision') [3] exempts the Atlas agreements, notified on 16 December 1994, from the application of Articles 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement.

2. The Phoenix agreements consist of two main transactions involving two Community telecommunications organizations (TOs) and one United States telecommunications operator:

   (i) FT and DT each acquired an equity stake of approximately 10 % in Sprint, worth United States $3,7 billion. Both FT and DT obtained proportionate board representation and investor protection as minority shareholders in Sprint; as detailed below, provisions have been included in the investment agreement to prevent DT and/or FT, either separately or jointly, from controlling or influencing Sprint; and

   (ii) Atlas and Sprint created a joint venture, Phoenix, for the provision of non-reserved global telecommunications services and other telecommunications services to corporate users, carriers and consumers. The Phoenix joint venture is structured into groups of operational entities under the strategic supervision of a Global Venture Board (collectively referred to as the 'Phoenix entities'). One group of entities provides Phoenix services worldwide except in Europe and the United States (the 'Rest Of World (ROW) entities'), a second group of entities provides Phoenix services in Europe except in France and Germany (the 'Rest of Europe (ROE) entities'). The ROW and ROE entities also manage Phoenix's global backbone network until the parties reach agreement on management by an already created third entity (the 'Global Backbone Network (GBN) entity'). The Global Venture Board shall take decisions on matters of policy only and not engage in the

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No C 337, 15. 12. 1995, p. 13.
[3] See p. 23 of this Official Journal.

management of individual operational entities created pursuant to the Phoenix agreements.

B. THE PARTIES

3. Deutsche Telekom AG (DT) and France Télécom (FT) are respectively the German and French public TOs. Details of both undertakings are provided in the Decision on the Atlas venture published in this issue of the Official Journal.

4. Sprint Corporation (Sprint) is a holding company in the United States. The Sprint group of companies is a diversified telecommunications group providing global voice, data and video-conferencing services and related products. Sprint's main subsidiaries provide local (United States) exchange, cellular wireless as well as domestic (United States) and international long-distance telecommunications services. Other Sprint subsidiaries engage in wholesale distribution of telecommunications products and the publishing and marketing of white and yellow page telephone directories. Worldwide turnover for Sprint in 1994 was ECU 10,9 billion; Sprint is the world's 11th largest telecommunications carrier in terms of revenues.

C. THE RELEVANT MARKET

1. *Creation of the Phoenix entities*

5. The Phoenix entities address several product and geographic markets, namely: (i) the markets for non-reserved corporate telecommunications services both globally and regionally, (ii) the market for traveller services and (iii) the market for so-called carrier services.

(1) *Product markets*

The markets for non-reserved corporate telecommunications services

6. The Phoenix entities target the same markets for both customized packages of corporate telecommunications services and packet-switched data communications services (jointly referred to as 'non-reserved corporate telecommunications services') described in the separate Atlas Decision. Pursuant to the joint venture agreement, the offerings of Phoenix include the following services:

— corporate voice services: global virtual private network (VPN), international toll free, selected card and simple resale services and switched digital,

— data communications services using *inter alia* the X.25, Frame Relay and IP protocols,

— dedicated transmission for voice and data services: managed bandwidth and VSAT,

— custom network solutions: systems/equipment procurement, tailored and managed services and outsourcing,

— platform-based enhanced services: messaging including access to telex, local area network (LAN) interconnection, electronic document interchange (EDI), video-conferencing and audio-conferencing.

7. Phoenix provides voice simple resale services under Sprint's licence in the United Kingdom and under FT's licence in Sweden. This Decision relates only to Phoenix's range of products and business scope as notified. Any substantial change of products or business scope, notably (i) the contribution to Phoenix of broadband transmission capacity (such as Asynchronous Transfer Mode (ATM) networks) in France and Germany and (ii) the offering by Phoenix of public basic telecommunications services (such as voice telephony services[4]) requires a new notification.

The market for traveller services

8. The market for traveller telecommunications services comprises offerings that meet the demand of individuals who are away from their normal location, either at home or at work. Among the most relevant of these offerings are those offered by the Phoenix entities, namely (i) calling card services (prepaid cards with or without a code and postpaid cards), including those in combination with credit cards and other branded service cards ('affinity cards'), (ii) specialized voice services (such as equal access and code-based authorization services), and (iii) selected data and enhanced platform (that is to say, communications system software) services.

9. Customers for traveller services include both business travellers and other travellers. In the card business targeted by Phoenix, the former are by far the largest group of buyers. Business travellers are generally intensive card users, the main incentive for card usage being the ability to avoid paying hotel telephone surcharges.

The market for carrier services

10. The market for carrier services comprises the lease of transmission capacity and the provision of related

[4] Defined in the seventh indent of Article 1 of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, OJ No L 192, 24. 7. 1990, p. 10.

services to third-party telecommunications traffic carriers and service providers. Along with liberalization and globalization of telecommunications markets, demand for efficient, high-quality traffic transportation capacity has risen among old and new carriers. In this connection, the traditional model of separate arrangements with other individual carriers is increasingly challenged by players with global network infrastructure that offer an array of services. The most relevant of such services are:

(a) switched transit, meaning transport of traffic over bilateral facilities between the originating carrier, the transit carrier and the terminating carrier; neither the originating carrier nor the terminating carrier need bilateral facilities between themselves, but only with the transit carrier;

(b) dedicated transit, meaning leased line offerings for the transport of traffic through the domestic network of the transit carrier; leased line facilities used for this purpose may include discrete voice circuits or a high-bandwidth digital circuit that can be used for both voice and data services;

(c) traffic hubbing offerings, where the provider takes care of all or part of international connections; these offerings are typically designed for emerging carriers, who are interconnected with the provider over bilateral facilities and whose international traffic is merged with other traffic on the provider's global network; and

(d) reseller services for service providers without international telecommunications facilities of their own.

As international telecommunications markets are deregulated, demand for carrier services is increasingly driven by alternative carriers concerned with assigning to the incumbent TO their international traffic, for reasons such as technical dependency and commercial sensitivity of customer information.

11. Purchasers of carrier services include established and emerging carriers. Both groups of clients are sophisticated purchasers. Among the emerging carriers, one may distinguish facilities-based carriers that provide telecommunications services over alternative infrastructure or cable television networks seeking greater efficiency in the transport of international client traffic, while non facilities-based carriers and service providers seek to preserve a competitive advantage by avoiding dependence on a local TO for international client traffic.

(2) *Geographic markets*

12. Along the lines of the Commission's findings in its Decision *94/579/EC*[5] (BT-MCI), the geographic scope of certain markets targeted by the Phoenix entities, as well as the market that must be considered in respect of the investment of DT and FT in Sprint, is international and even global. Although national borders subsist for many services, strategic alliances like Phoenix are built not only in anticipation of a market unaffected by national boundaries but even with the express purpose of offering large global telecommunications users seamless end-to-end services anywhere by overcoming the difficulties inherent in the current market structure split along national borders. However, the service offerings of the Phoenix entities attain different existing geographic markets.

The markets for non-reserved corporate telecommunications services

13. As described in the Atlas Decision, demand from large users for customized packages of corporate telecommunications services exists in at least three distinct geographic markets, namely at a global, a cross-border regional and a national level. Phoenix services have global reach given that DT, FT, Sprint and the ROE and ROW entities each interconnect over the Phoenix global backbone network. In the global market for customized packages of corporate telecommunications services the Phoenix venture therefore creates competition, for instance for BT and MCI's existing Concert venture. In the Community, the ROE entities will cooperate with DT, FT and Atlas to provide customized packages of corporate telecommunications services at the cross-border regional level; these services will have global 'connectivity' — that is, they will allow for an extension beyond the Community and ultimately worldwide if a customer so requires.

14. Packet-switched data communications services in each geographic market mentioned in the previous recital are a part of the Phoenix offerings portfolio. However, the regional Phoenix operating entity decides whether to provide such services at the

[5] Commission Decision of 27 July 1994 in Case No IV/34.857 — BT-MCI, OJ No L 223, 27. 8. 1994, p. 36.

national level. Therefore, the ROE entities provide Europe-wide packet-switched data communications services initially based on the network that results from merging the existing Transpac and Sprint networks. The extent to which the ROE entities will provide such services in national markets within the European Economic Area (EEA) will depend on the coordination between Atlas and the ROE entities as the competent Phoenix entities in the EEA.

The market for traveller services

15. Along with the globalization of the economy the market for traveller services appears to be increasingly global; travellers demand offerings which include a single bill and integrated functions such as voice messaging, voice response and information systems everywhere. Geographic limitations of current traveller service offerings are generally due to technical shortcomings due to be overcome in the near future, such as the incompatibility of mobile communications systems or differences in prepaid cards without an individual user code. As illustrated at recital 8 above, none of the services targeted by the Phoenix entities is affected by these shortcomings; however, the geographic scope of the traveller services offered by Phoenix can be left open for the purposes of this case, as the finding of narrow geographic markets would not affect the assessment of the parties' competitive position.

The market for carrier services

16. Both supply of and demand for carrier services are by nature international. Geographic proximity between purchaser and supplier of switched transit capacity is hardly relevant for switched transit which carriers use either as a substitute for operating own international lines or to deal with peak traffic on such lines. Likewise, dedicated transit services offer cable- or satellite-based routing capacity across third countries. Finally, using hubbing services is an alternative to entering into an undetermined number of bilateral agreements with individual carriers.

2. *DT and FT's investment in Sprint*

17. The acquisition by DT and FT of new equity amounting to an approximate 20 % stake in Sprint aims at consolidating a strategic alliance to enter the global telecommunications markets and extending service into new market segments. As the BT-MCI alliance showed, investment in a United States carrier offers one efficient way of addressing multinational companies, being the largest target customer group for global non-reserved corporate telecommunications services.

D. MARKET SHARES OF PHOENIX

The markets for customized packages of corporate telecommunications services

18. *Global market*

The parents estimate the global market for customized packages of corporate telecommunications services market addressed by Phoenix (exclusive of data communications services) to be worth approximately ECU 4,8 billion (1993). Of this total, end-to-end services accounted for approximately ECU 37,6 million, VPN services for approximately ECU 2,8 billion, VSAT services for approximately ECU 1,4 billion and outsourcing services for approximately ECU 527 million. In 1993, the aggregate turnover of DT, FT and Sprint in the different market segments amounted to approximately ECU 3,8 million for end-to-end services, approximately ECU 576 million for VPN services and approximately ECU 6 million for outsourcing services, giving Phoenix a theoretical market share of 12,2 % in the global market for customized packages of corporate telecommunications services.

19. *Cross-border regional market*

Services in the Community (exclusive of data communications services) accounted for approximately ECU 505 million in 1993. According to the notification the Phoenix parents' aggregate market shares in the Community in 1993 were [. . .] % (6) in the end-to-end services market, [. . .] % (7) in the VPN services market, [. . .] % (8) in the outsourcing services market and [. . .] % (9) in the VSAT market. However, market shares for VSAT services are difficult to calculate given that TOs mostly use VSAT terminals as back-up facilities for other services or to extend the geographic scope of services despite terrestrial infrastructure shortcomings.

20. *National markets*

National markets for customized packages of corporate telecommunications services within the EEA are discussed in the Atlas Decision. In this regard, Sprint has a significant share of total outsourcing turnover generated in Member States

(6) Business secret (less than 30 %).
(7) Business secret (less than 30 %).
(8) Business secret (less than 5 %).
(9) Business secret (less than 30 %).

such as the Netherlands ([. . .] % [10]) and the United Kingdom ([. . . % [11]), where DT and FT's outsourcing joint venture, Eunetcom BV, has a lesser presence (5 % of total turnover in both Member States). As for France and Germany, adding Sprint to DT and FT brings Phoenix's aggregate share of total turnover generated by outsourcing services to [. . . % [12] in France and to [. . . % [13] in Germany, compared with 31 % in France and 33 % in Germany for the second-largest provider there, Concert's Syncordia.

The market for packet-switched data communications services

21. The global market for packet-switched data services was worth approximately ECU 5,3 billion in 1993, while DT, FT and Sprint's aggregate sales were [. . .] [14] or [. . .] % [15] worldwide. The European market for data communications services is discussed in the Atlas Decision. Sprint's turnover for packet-switched data services was [. . .] [16] in 1993, bringing DT, FT and Sprint's aggregate shares of that market to [. . .] % [17]. As for national markets, Sprint achieved its highest turnover in France, Germany, Italy and the United Kingdom. Neither DT nor FT have a significant market presence in the latter two Member States, where Sprint has a [. . .] % [18] and [. . .] % [19] market share respectively. In turn, Sprint's turnover in France (ECU [. . .] [20]) and Germany (ECU [. . .] [21]) equals market shares in these Member States of only [. . .] % and [. . .] % respectively [22].

The market for traveller services

22. Total calling card revenue in the Community was approximately ECU 120,5 million in 1994, most of which was generated by national dialling. In 1993, DT had issued 200 000 cards (all of them in Germany), equivalent to 2,1 % of the total card subscriber base in the Community; FT had issued 1,5 million cards (all of them in France), equivalent to 15,7 % of the card subscriber base in the Community; and Sprint had issued 12 million cards worldwide, of which 500 000 (equivalent to a 5,2 % market share) were issued in the Community. The aggregate market shares of the parents would therefore make Phoenix the largest calling card services provider in the Community (23 % market share) in terms of subscriber numbers, ahead of AT&T and BT with a 21 % and 17,8 % market share respectively. In terms of calling card traffic within the Community, the aggregate market shares of FT (21 %) and DT (3 %) are equal to BT's market share of 24 %.

The market for carrier services

23. The market for global switched transit services is estimated to be worth approximately ECU 301,1 million and generates 1 500 million minutes of international traffic or approximately 3 % of the world's international telephony traffic. Of this total, approximately ECU 165,6 million are services provided by European carriers, of which in turn approximately ECU 30,1 million goes to other European carriers. Within the global switched transit market (1994), which grows at an annual rate of 5 to 6 %, DT had a turnover of ECU [. . .] [23], FT of ECU [. . .] [24] and Sprint of ECU [. . .] [25]. The aggregate market shares of DT, FT and Sprint make Phoenix the third largest global switched transit provider behind AT&T and BT (20,2 % each).

E. MAIN COMPETITORS OF THE PHOENIX ENTITIES

The markets for non-reserved corporate telecommunications services

24. The situation in these relevant markets is discussed in the Atlas Decision. The parties include the following players among their competitors: AT&T/Worldpartners, Cable and Wireless plc, Concert, IBM, Kokusai Denshin Denwa Company Ltd. (KDD), Nippon Telegraph and Telephone Corporation (NTT), Unisource and the United States regional Bell operating companies (RBOCs).

The market for traveller services

25. More than one-third of calling cards in Europe are issued by United States operators. AT&T is estimated to have 2 million postpaid card customers in Europe — 21 % of all cards issued there. These customers generate 59 % of calling card traffic from Europe to the United States. MCI has an estimated 1 million postpaid card customers in Europe (10,5 %), which generate 27 % of calling card traffic from

[10] Business secret (less than 10 %).
[11] Business secret (less than 10 %).
[12] Business secret (less than 45 %).
[13] Business secret (less than 40 %).
[14] Business secret.
[15] Business secret (less than 25 %).
[16] Business secret.
[17] Business secret (less than 40 %).
[18] Business secret (less than 5 %).
[19] Business secret (less than 10 %).
[20] Business secret.
[21] Business secret.
[22] Business secret (less than 5 % respectively).
[23] Business secrets (market share less than 10 %).
[24] Business secrets (market share less than 15 %).
[25] Business secrets (market share less than 5 %).

Europe to the United States. Executive Telecard International (ETI) markets calling cards in Europe through agreements with local operators or credit card companies; ETI's market position is similar to that of MCI.

The market for carrier services

26. Major players in the market for carrier services and notably global switched transit services competing in the EEA include AT&T, BT (each holding approximately one fifth of the market), Cable & Wireless, MCI and Teleglobe Canada. Along with the growing numbers of new carriers that seek to be independent of the incumbent TO for their international traffic, new suppliers of such services, some with substantial infrastructure resources, are emerging or active in the market, an example being Hermes Europe Railtel([26]).

F. THE TRANSACTION

27. The transaction notified to the Commission comprises a set of agreements the main features of which are described below.

1. *Agreements as originally notified*

(1) *Agreements regarding the Phoenix joint venture*

The parties have submitted the following agreements:

(a) the Phoenix joint venture agreement (the 'JV agreement') sets out the parties' essential commitments and business objectives;

(b) the transfer agreements provide for the transfer by Sprint, FT, DT, and Atlas (collectively referred to as the 'parents') of certain basic and related businesses to the relevant ROE, ROW entities;

(c) the intellectual property and trademark licence agreements concern the grant by the parents and certain affiliates to the Phoenix entities of non-exclusive, non-transferable licences to use certain of the parents' technical information, trademarks and intellectual property rights (IPRs);

(d) the services agreements specify terms and conditions of trading relationships among Sprint, Atlas, and the ROE and ROW entities, including the supply and support services needed to provide Phoenix services worldwide.

(2) *Agreements regarding FT and DT's investment in Sprint*

(a) The investment agreement provides for the purchase by each of FT and DT of approximately 10 % of the common stock of Sprint.

(b) The standstill agreement binds FT and DT for a period of 15 years not to acquire additional shares in Sprint which would increase their combined aggregate voting rights to more than 20 %.

(c) The registration rights agreement is required in order for each party to consummate the transactions contemplated by the investment agreement.

(d) The investor confidentiality agreements between Sprint and DT, and Sprint and FT, respectively, provide for the maintenance of the confidentiality of all Sprint proprietary information received by DT and FT as a result of the investment agreement and in particular by the DT and FT representatives on the Sprint board of directors, which may be used by DT and FT only for the purposes of exercising their rights under such agreement.

2. *Main contractual provisions*

(1) *Concerning the Phoenix entities*

(a) **Structure of the Phoenix venture**

The JV agreement provides for the creation of two groups of operating entities, namely Phoenix Rest of Europe (ROE) and Phoenix Rest of the World (ROW). Each group consists of the following entities: a sales entity, a clearing-house entity and a holding entity, which is in turn held by an entity able to be bound for the purposes of the Consent Decree entered by the United States Department of Justice. Each of the above entities within the ROE group (the 'ROE parent entities') has a board of six members, with Atlas having the right to nominate four members and Sprint two. Each of the above entities within the ROW group (the 'ROW parent entities') has a board of four members, with each of Atlas and Sprint having the right to nominate two members.

([26]) Commission Decision in Case No IV/M.683; OJ No 157, 1. 6. 1996, p. 13.

The ROE parent entities conduct the Phoenix business within the 'rest of Europe' region (that is, outside France and Germany), while the ROW parent entities conduct the Phoenix business within the 'rest of the world' region (outside Europe and the United States). The ROE entities and the ROW entities will initially own and operate a global transmission network over which Phoenix services and other traffic will be routed: Phoenix's global backbone network. The parties have, however, created a Global Backbone Network (GBN) entity, a limited liability holding company, which is due eventually to take over the relevant global backbone network assets and functions.

Pursuant to section 2.1 of the operating entities services agreement, FT, DT and their respective subsidiaries each are exclusive distributors of Phoenix services in France and Germany respectively, while Sprint is pursuant to section 2.2 (b) the exclusive distributor of Phoenix services in the United States. However, any parent, Phoenix and their respective affiliates will meet unsolicited customer requests for Phoenix services regardless of the customer's location. Moreover, the French and German subsidiaries of Atlas provide FT, DT and their respective subsidiaries with (i) sales support services regarding Phoenix products to the distributors in France and Germany; and (ii) services within the scope of Phoenix other than X.25 packet-switched data network services in France and Germany.

A new, wholly-owned subsidiary of Sprint (the 'Sprint subsidiary') and Atlas each initially owns 50 % of the outstanding voting equity of each of the parent entities of the ROW entity and the GBN entity. The Sprint subsidiary and Atlas initially owns 33⅓ % and 66⅔ %, respectively, of the voting equity of the parent entity of the ROE entity.

A Global Venture Board was established to set global policies and monitor compliance of the operating groups with their business plans. Any initiative of the Global Venture Board generally requires a unanimous vote.

Day-to-day operations are the responsibility of the chief executive officers of the operating entities, who are under the supervision of the governing board of the relevant parent entity of either the ROE, ROW, or eventually GBN entity. Most decisions of each governing board are adopted by simple majority vote of the members present. Unanimous consent is however required for a number of important decisions including final approval of business plans, certain changes in structure and capitalization, and certain decisions on technology and investments.

(b) **Purposes and activities of Phoenix entities**

The business of the joint venture initially is provision of (i) global international data, voice, and video business services for multinational companies and business customers; (ii) international services for consumers, initially based on card services for travellers; and (iii) carrier services providing certain transport services for the parents and other carriers. The Phoenix entities may also offer telecommunications equipment and invest in national operations.

To market these services Phoenix is responsible for the planning and management functions of operations, as well as marketing and customer support, including the following:

(i) central coordination of product development and management to ensure seamless global services; the Phoenix entities notably defines functionality, technical standards, and service level requirements for Phoenix services;

(ii) implementation of a common global network and information systems platform rationalizing and integrating the international data, voice, and overlay networks of the parents which are currently separate; the GBN will link overlay and backbone networks in each operating area (i.e. ROE and ROW) while proprietary interfaces will allow provision of seamless services; within its first few years of operation, Phoenix will begin to deploy the next generation of ATM packet-switching technology, comprising any and all of transmission, switching, signalling, network intelligence, and service management elements;

(iii) integration and development of information systems for coordinated billing, customer support, and other back-office functions, supporting national distributors; and

(iv) development of a sales presence in the ROE and ROW territories either directly or through distribution arrangements using a common 'masterbrand'; in particular, national service operations will be established or consolidated in each major country to distribute Phoenix services

there; in addition, regional sales offices will be established to provide technical and sales support, including identification of potential customers and assisting in preparation of customer proposals.

(c) **Provisions concerning dealings with/by Phoenix entities**

Pursuant to the JV agreement, transactions among the Phoenix entities, on the one hand, and FT, DT, and Atlas, on the other, shall generally be conducted on the most favourable terms and conditions that are offered to third parties. If products, services, or facilities relevant to these transactions are not commercially available, such transactions shall be conducted in accordance with an arm's length pricing method, using full-cost reimbursement or such other arm's length pricing method as may be agreed on by the parties. The parents have the first right to offer to supply certain products, services, and facilities to the Phoenix entities. Notwithstanding, each Phoenix entity may purchase from a third party which, on otherwise comparable terms and conditions, offers lower prices, either once the parties have been given the opportunity to match such terms and conditions or if a customer so requires.

Each of the Phoenix entities and their parents have the first right to offer to perform in their respective territory any facilities or services required by another party to the Phoenix agreements. Such services may be obtained from a third party at a lower price under comparable terms and conditions, or where a customer so requires. In accordance with this principle, the ROE and ROW entities will be required to purchase telecommunications network transmission capacity from the GBN entity, to the extent available, once that entity becomes operational.

(d) **Anti-competition provisions; distribution**

Pursuant to the JV agreement as originally notified, albeit subject to various exceptions, no party or affiliate of a party may distribute any international telecommunications services which are either provided by the Phoenix entities or substitutable for such services. Likewise, no party or affiliate of a party may invest in any entity that offers such services. Moreover, no party or any of its affiliates may offer national long-distance services in competition with either a national operation of Phoenix or a public telephone operator affiliated to Phoenix (such as a national distributor of Phoenix). Nor may any party or any of its affiliates make investments in any entity offering such competing national long-distance services or in any national operation allied with a major competitor of Phoenix.

Sprint is under an obligation to cease competing actively in Germany and France by selling its data and card business to DT's subsidiary T-Data Gesellschaft für Datenkommunikation mbH ('T-Data') and to FT's subsidiary Transpac France respectively. Outside the parents' home countries exclusivity will be granted to distributors on a case-by-case basis. Passive sales by any one distributor to customers in the respective sales territory of any other distributor are allowed in the EEA.

(e) **Licences to be granted to Phoenix entities**

Under the technical information licence and access master agreement and agreements implementing the framework applicable to IPRs (the 'IPR agreements'), each parent grants each of the Phoenix entities non-exclusive, non-transferable licences to use certain technical information of that parent in the respective territories of such entities to conduct the Phoenix business. Each Phoenix entity has the right to sub-license the rights granted to any other Phoenix entity or any affiliated national operation or local partner, wherever such a sub-licence is necessary to conduct the Phoenix business. Likewise, each Phoenix entity must on request also sub-license such rights to any parent or affiliate of such parent, to the extent that such a sub-licence is necessary to conduct the Phoenix business.

Royalties are payable as customary in the market and negotiated by the parties on an arm's-length basis. Licence rights granted to a party under the IPR agreements will continue in the event of either termination of the Phoenix venture or transfer of such party's interest in the Phoenix venture.

Similarly, pursuant to the trademark licence master agreement and implementing agreements each parent grants each of the Phoenix entities non-exclusive, non-transferable rights to use certain trademarks owned by or licensed to

such parent in connection with the marketing or sale of certain authorized products and services in the respective territories of such entity.

(2) *Concerning FT and DT's investment in Sprint*

(a) **Restrictions on transfer of shares by FT and DT and limits on increases of their shareholding in Sprint**

Pursuant to the investment agreement, neither FT or DT may dispose of its shares in Sprint for five years after the closing date. Thereafter restrictions apply to large transfers, which would in most circumstances give Sprint the right of first refusal.

Pursuant to the standstill agreement, FT and DT each have the right to acquire additional Sprint shares to reach and maintain a 10 % shareholding, but shall not for 15 years after the closing date acquire additional shares that would increase their aggregate voting rights to more than 20 %. Once this initial 'standstill' period has expired, FT and DT may acquire additional shares, but may not increase their aggregate voting rights above 30 % nor conduct certain activities intended at taking control of Sprint.

(b) **Consent rights and board representation of FT and DT**

FT and DT have the right to elect directors to the Sprint board in proportion to their shareholding, provided that each has the right to elect at least one director. Neither FT nor DT have access to confidential, competitive information on Sprint's activities in the EEA through their representation on Sprint's board. Nor may these representatives provide Sprint with confidential information that FT or DT may have obtained from United States competitors through correspondent relationships.

As the sole holders of Sprint's class A common stock, FT and DT have been granted substantial consensual rights with respect to certain corporate actions of Sprint, which nevertheless fall considerably short of control. These actions include major equity issuances, disapproval of investments in Sprint by major competitors, participation rights in transactions involving change of control, and other bilateral corporate transactions. FT and DT have a right of first offer with respect to long-distance assets of Sprint for a fixed period of time.

G. CHANGES MADE AND UNDERTAKINGS GIVEN FURTHER TO THE COMMISSION'S INTERVENTION

28. Some features of the agreements as notified appeared to be incompatible with the Community competition rules. In the course of the notification procedure the parties have amended certain clauses in their agreements and given undertakings to the Commission.

1. *Contractual changes*

29. Non-appointment of Phoenix as an agent for international half-circuits.

Following an announcement made in the Phoenix notification, which did not yet reflect the parties commitments regarding Atlas further to the Commission's intervention, DT, FT, Atlas and Sprint have deleted FT and DT's 'international private lines', meaning FT and DT's international half-circuits, from the list of products that Phoenix would distribute as agent.

30. Anti-competition provisions

Phoenix will provide international simple resale (ISR) services and call termination PSTN services under Sprint's existing licences in Sweden and the United Kingdom. However, the parties have not sought an exemption pursuant to Articles 85 (3) of the EC Treaty and 53 (3) of the EEA Agreement for any specific agreements regarding national long-distance services, which these services would require (see recital 7). The anti-competition clause in the original JV agreement has therefore been amended: the parties are now obliged to refrain only from either (i) competing with or (ii) investing in a competitor of entities providing long-distance services provided such entities are controlled by Phoenix.

2. *Non-discrimination*

31. Just as DT and FT are prohibited from discriminating in favour of their Atlas venture, so the Commission prohibits DT and FT from discriminating in favour of any entity created pursuant to the Phoenix agreements. This condition includes all specific elements described at recital 28 of the Atlas Decision, in relation to access and use of (i) the French and German PSTN, (ii) the French and German ISDN, (iii) reserved facilities and/or services until the French and German

telecommunications services and infrastructure markets are fully and effectively liberalized, as is scheduled to occur by 1 January 1998, and (iv) thereafter facilities and/or services for which FT and DT respectively are dominant and which are essential for the provision of a competitive service.

32. Specific services

The Commission attaches as a condition to this Decision that DT and FT shall not discriminate in favour of any entity created pursuant to the Phoenix agreements with regard to the facilities-related telecommunications services detailed at recital 28 of the Atlas Decision. The non-discrimination condition extends to all aspects of access to and use of such facilities and services, namely the terms and conditions, scope of services available, technical information and commercial information.

33. Correspondent services

The Commission imposes a specific condition not to discriminate with regard to correspondent services, for which (i) DT and FT shall not unduly prefer Sprint over other United States correspondents; (ii) DT and FT shall not unduly prefer each other over other German or French correspondents once telecommunications services markets are fully liberalized, as is foreseen by 1 January 1998; and (iii) Sprint shall not unduly prefer DT and FT over other European and eventually over other German and French correspondents. The condition on Sprint relates to traffic to final destinations outside Germany and France respectively until the German and French telecommunications services and infrastructure are fully and effectively liberalized, as is scheduled to occur by 1 January 1998, and to any traffic thereafter. A correspondent is a telecommunications services provider in one country party to a bilaterally negotiated agreement with a provider of telecommunications services in another country by which each party undertakes to terminate in its country traffic originated by the other party, for provision of an international telecommunications service.

3. *Other Conditions and obligations attached to this Decision*

34. Non-reserved corporate telecommunications services

The exemption of Phoenix's customized packages of corporate telecommunications services and packet-switched data communications services from the application of Articles 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement is conditional on DT and FT's compliance with the conditions attached to the separate Atlas Decision and described at recital 29 of that Decision.

35. Carrier services

Neither Atlas, Phoenix, DT, FT, Sprint or any affiliate of these entities shall make a particular telecommunications operator's ability to use Phoenix international carrier services conditional upon use or distribution by that telecommunication's operator of services provided by Atlas, Phoenix, FT, DT or Sprint. Neither shall Atlas, Phoenix, DT, FT, Sprint or any affiliate of these entities condition its commercial dealings (i.e. terms, conditions, price, discounts) with any telecommunications operator upon use or distribution by that telecommunication's operator of services provided by Atlas, Phoenix, FT, DT or Sprint.

36. DT and FT shall also comply with conditions that mirror those attached to the Atlas Decision concerning (i) use of DT and FT's public X.25 packet-switched data networks, (ii) cross-subsidization, (iii) bundling, and accounting in respect of the entities created pursuant to the Phoenix agreements operating in the EEA, and with recording and reporting obligations matching those imposed on DT and FT in the Atlas Decision. Likewise, all entities created pursuant to the Phoenix agreements which operate in the EEA shall keep separating accounting records using international accounting standards for each service they provide in any country.

37. To the extent related to existing obligations under national or Community law, these obligations and conditions are intended to ensure the parties' firm commitment to comply with the applicable legal framework.

H. THE REGULATORY SITUATION

38. The regulatory situation in France and Germany is described under recital 31 of the Atlas Decision. As for the United States, pursuant to the 1934 Communications Act, Sprint is required to publish tariff schedules and contracts describing its network arrangements and services. Furthermore, the 1934 Communications Act, enforced by the Federal Communications Commission (FCC), prohibits Sprint from providing services that unjustly or unreasonably discriminate against Sprint's competitors or foreign correspondents, which may lodge a formal complaint before the FCC if Sprint

does not comply with these obligations. The Telecommunications Act of 1996 gives the FCC the authority to refrain from regulating 'charges, practices or classifications' of telecommunications carriers, albeit only where the FCC finds that regulation is not necessary to ensure that these elements are just and reasonable or not unjustly and unreasonably discriminatory.

39. While the Commission was assessing the Phoenix notification under Community law, Phoenix was authorized under United States anti-trust law by a judicial consent decree filed by the United States Department of Justice and signed on 16 February 1996. This consent decree imposes conditions on the parties that largely resemble those attached to this Decision.

I. THIRD-PARTY OBSERVATIONS

40. Following the publication of a notice pursuant to Article 19 (3) of Regulation No 17 and to Article 3 of Protocol 21 of the EEA Agreement([27]), six interested third parties submitted observations to the Commission. Concerns expressed in these observations included the risk that Phoenix might (i) increase the dangers of DT and FT's cooperation in the framework of Atlas for Europe-wide markets given the elimination of another competitor there, Sprint, (ii) further facilitate abuses of dominant position by DT and FT in their respective home markets and (iii) distort competition in all relevant markets through an extension of the notified cooperation to reserved services, notably correspondent services. As for the latter allegation, third parties feared most that DT and FT might link favourable conditions for reserved services to the purchase of Phoenix services.

41. The Commission carefully reviewed all third-party observations and concludes that concerns expressed therein have been addressed during the notification procedure. Most conditions as to conduct and obligations attached to the Atlas Decision take sufficient account of anti-competitive concerns if extended to all entities created pursuant to the Phoenix agreements and to Sprint where appropriate. Third-party observations have not therefore affected the Commission's substantive position described in the Article 19 (3) notice in respect of the transaction named Phoenix at the time. However, in the interest of legal certainty the Commission has spelled out in greater detail in this Decision the scope and duration of certain conditions and obligations imposed on the parties.

42. Subsequent to third-party observations the Commission attaches an additional condition to this Decision requiring that DT and FT unbundle own services for which they are dominant and Phoenix services, which restricts the contractual rights of DT, FT and their affiliates under Section 2.1.1 of the operating entities services agreement dated 31 January 1996. As the Commission explained at recital 60 of the Atlas Decision, dominant providers are prohibited from bundling, widespread as it might be in the telecommunications market, under the regulatory framework of most countries where that market is fully competitive. The same condition already applies to DT and FT in respect of Atlas services, as described at recital 29 (5) of the Atlas Decision.

II. LEGAL ASSESSMENT

A. THE RÔLE OF ATLAS IN PHOENIX

43. The European parent company of Phoenix is Atlas. Within the framework of this transaction Atlas is merely a vehicle to coordinate DT and FT, including their respective European networks, as European providers which obtain global 'connectivity' — that is, worldwide reach of a service with constant technical performance and features. Phoenix's distribution agreements make a distinction between DT, FT and Sprint's home respective countries on the one hand and 'rest of Europe' and 'rest of world' areas on the other hand. Under these agreements, DT and FT jointly exercise decisive influence on Phoenix' European business.

44. Phoenix ROE entity results from adding Sprint's European business and network to that of Atlas outside France and Germany. Indicative of the integration of Atlas' Europe-wide services into Phoenix is that Info AG's current customers with headquarters outside Germany are transferred directly to Phoenix and not to Atlas. Moreover, the technical aspects of network cooperation between DT and FT which are exempted from the application of Articles 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement pursuant to Article 3 of the Atlas Decision are under the responsibility of the same entity that provides network management services to the ROE entity. Given that the relevance of Atlas as a separate entity from DT and FT for Phoenix is limited, the following legal assessment refers to DT, FT and Atlas without distinction.

([27]) See footnote 2 (hereinafter referred to as Article 19 (3) notice).

B. ARTICLES 85 (1) OF THE EC TREATY AND 53 (1) OF THE EEA AGREEMENT

1. *Structural cooperative joint venture*

The Phoenix joint venture is cooperative in nature, since Atlas, which takes over FT's Europe-wide Transpac network, and Sprint (jointly referred to as the 'parents') are potential competitors for the provision of Europe-wide services and certain global offerings within Phoenix's envisaged offerings portfolio (hereinafter referred to as the 'Phoenix products'), namely customized packages of corporate telecommunications services. Prior to this transaction, Sprint was an actual competitor of DT in Germany and of FT in France.

45. Potential competition in markets for Europe-wide services.

DT and FT remain potential competitors of Sprint as a provider of services over an own leased-line network in Europe and worldwide in spite of withdrawing from the markets addressed by Phoenix. While licensing some technology to Phoenix the parents retain their respective IPRs, know-how and R & D capabilities and receive grant-back licences for IPRs transferred to Phoenix. Phoenix will also award DT, FT and Sprint R & D contracts and license them to use any own developments or services other than Phoenix products. The parents will thus keep and increase proficiency and know-how in respect of such technologies as the market requires from time to time.

46. DT, FT and Sprint will maintain their commercial presence, reputation and, as exclusive distributors of Phoenix in their respective home countries, keep their knowledge of the market up to date. In this connection, Phoenix's global backbone network linking the ROW and ROE entities will initially be a mere cross-Atlantic line concentrating traffic between Germany or France and the United States which implies that DT, FT or Sprint's own offering could be competing directly with Phoenix's where a customer prefers favourable terms of an agreement on domestic telecommunications services to the international scope of Phoenix. The above implies that market (re-)entry by DT, FT and Sprint is possible. Moreover, all three undertakings directly develop own activities outside their home markets through subsidiaries or as members of international organizations, while Sprint is providing private line services to and from the United States under a United Kingdom licence.

47. Structural joint venture.

Phoenix combines Sprint's as well as DT and FT's joint activities in a range of Europe-wide and global markets for non-reserved telecommunications services and is set to develop and take over new services in these markets. This venture entails major changes in the structures of DT and FT, undertakings with very limited presence outside their respective home countries, and of Sprint whose international presence was limited for lack of strong regional partners. Through Phoenix these three undertakings pool a significant number of assets in connection with the provision and marketing of non-reserved corporate telecommunications services.

2. *Application of Articles 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement to the creation of Phoenix*

The Phoenix agreements creating a joint venture as a means of cooperation between DT and FT, and Sprint eliminate competition in the relevant markets and affect trade between Member States. The Commission cannot therefore give negative clearance to the creation of the joint venture as requested in the parties' application.

48. On the grounds set out under recital 38 of the Atlas Decision, Atlas and Sprint were competitors for the provision of outsourcing services. DT, FT and Sprint were also competitors for the obtention of large customers' telecommunications 'hubs'. Sprint's Sprintnet division also competed with FT's Transpac for the provision of non-correspondent services, notably Europe-wide and national packet-switched data communications services with limited global connectivity, under licences in several European countries. This competition is eliminated by the creation of Phoenix.

49. Creating Phoenix each of DT, FT and Sprint refrain from developing similar offerings to compete individually, reducing R & D competition and choice for customers in the relevant markets. In a way similar to Atlas' effects[28] eliminating

[28] Recital 41 of the Atlas Decision.

competition between DT and FT, the anti-competition provisions, intellectual property agreements, geographical scope of the licences and grant-back licences agreed, and the terms of the exclusive distribution agreements turn Phoenix into an instrument for pooling and cross-licensing DT, FT and Sprint's respective IPRs.

50. DT, FT and Sprint each have the financial and technological capabilities required to enter the relevant markets on their own. DT, FT and Sprint are among the world's largest telecommunications companies in terms of traffic. While DT and FT are dominant for most non-reserved corporate telecommunications services in their respective home countries, Sprint is the third-largest long-distance carrier in the United States. Creating Phoenix is therefore not DT, FT and Sprint's only objective means to enter the market for international non-reserved corporate telecommunications services. The same applies to carrier services, which at least initially will mainly serve the purpose of increasing efficiencies by selling unused network capacity. Atlas and Sprint, which is already one of the largest Internet carriers in the United States, could provide such services in competition with each other by investing in an own global or intercontinental extension to its network. Individual market entry would notably raise the same issues, for example in terms of regulatory hurdles, that Phoenix must address.

3. *Applicability of Articles 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement to DT and FT's investment in Sprint*

51. The Commission and the Court of Justice do not consider Article 85 (1) of the EC Treaty applicable to agreements for the sale or purchase of shares unless these agreements affect the competitive behaviour of the parties to the transaction [29]. The Commission analysed whether the appointment of DT and FT representatives to Sprint's board and subsequent access to confidential business data could give rise to coordination of the competitive behaviour of all three undertakings. The Commission found that (i) the investment agreement signed on 31 July 1995 does not afford DT and FT the possibility of exercising a controlling influence over Sprint and (ii) United States corporate and antitrust laws are designed to prevent access to and misuse of Sprint's confidential information by DT and FT. Sprint and DT, and Sprint and FT, respectively, set out an additional prohibition to misuse such information in two investor confidentiality agreements signed on 31 January 1996.

The Commission therefore concludes that DT and FT's investment in Sprint falls outside the scope of Articles 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement.

4. *Application of Articles 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement to contractual provisions*

52. The following provisions restrict competition:

(a) the anti-competition obligation on the parents as regards the activities of Phoenix (sections 10.2 and 10.3 of the JV agreement as amended by Amendment 1 to the JV agreement);

(b) the obligation on the parents to obtain from Phoenix all requirements for global services (section 2.1.1 of the operating entities services agreement) in Germany and France respectively; and

(c) the appointment of DT and FT respectively as exclusive distributors of Phoenix (section 2.2 (b) of the JV agreement as amended) in Germany and France respectively.

Of the above restrictions, the anti-competition provision and the obligation to purchase all requirements for global services from Phoenix are ancillary to the creation and successful initial operation of Phoenix, and are therefore assessed under Articles 85 of the EC Treaty and 53 of the EEA Agreement together with the joint venture.

53. Both restrictions reflect the parties' commitment, towards one another and towards Phoenix. Both are also required if Phoenix is to enter the market successfully, given considerable uncertainty and commercial risks, substantial investment requirements and strong competition in the relevant markets. Thus:

(1) the anti-competition clause expresses DT and FT and Sprint's commitment to withdraw from the relevant markets targeted by Phoenix and to concentrate their efforts in the relevant services markets on Phoenix lest other initiatives, alone or in cooperation with third parties, impair Phoenix's establishment in the market; and

[29] See BT-MCI Decision (footnote 4) at recital 44 and footnote 1 of that Decision for references.

(2) the obligation on DT, FT and Sprint as exclusive distributors of Phoenix products in their respective home countries to buy all requirements for global services from Phoenix, aims at ensuring Phoenix steady funding, credibility and market reputation, which would be seriously jeopardized if the very founding partners of Phoenix used other global services providers.

Ancillary provisions are usually acceptable only for a limited period of time. In the light of the BT-MCI Decision, where similar volumes of investment and risks were at issue ([30]), the Commission will however accept the above ancillary restrictions for the entire duration of the exemption granted by this Decision.

54. Exclusive distribution.

DT and FT's exclusive distributorship in their respective home countries is caught by Articles 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement because it has the object or effect of isolating Germany and France against imports of Phoenix services from other EEA Member States and from outside the EEA, which may adversely affect the conditions of competition within the EEA. Unlike the other restrictive provisions, the Commission cannot consider DT and FT's exclusive distributorship to be ancillary to the creation of the joint venture, as non-exclusive forms of distribution are possible which would not impair the performance or marketing of Phoenix services. Given that Germany and France taken together account for more than 40 % of all telecommunications revenues in the European Union, the restriction is appreciable.

5. Effect on trade between Member States and between Member States and EFTA countries

55. As discussed under recital 44 of the Atlas Decision, a joint venture designed to provide cross-border non-reserved corporate telecommunications services in the EEA has an effect on trade between Member States which is set to increase over the coming years. The same applies to the appointment of DT and FT as exclusive distributors in the two largest single national telecommunications markets in the Union, namely in Germany and France. This effect is especially substantial given that the purpose of Phoenix in Europe is the provision of services between Member States.

56. The Commission concludes that the creation of Phoenix falls under Articles 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement. The same conclusion is drawn as regards the non-ancillary appointment of DT and FT as exclusive distributors in Germany and France respectively. The Commission considers the restrictive effect on competition and on trade between Member States to be substantial in both cases.

C. ARTICLES 85 (3) OF THE EC TREATY AND 53 (3) OF THE EEA AGREEMENT

1. Technical and economic progress

57. The creation of Phoenix

The combination of Atlas and Sprint's technology will allow Phoenix to offer new services with global 'connectivity' at lower cost and better than either Atlas or Sprint are capable of providing alone given their current business. Combining different platforms and product features will still require a considerable investment of time and money. Like BT and MCI's Concert and like Atlas at the European and national level ([31]), Phoenix will add value to leased line capacity by implementing own homogeneous network elements such as switches, software platforms and signalling systems to provide seamless international telecommunications services. Phoenix will also allow cost savings, given that the operation of a single network architecture generates economies of scale and scope at a technological and commercial level, and may contribute to downward pressure on infrastructure prices across the Community, for example through lowest cost routing.

58. Seamlessness substantially improves international services as currently provided over different interconnected national networks. If successful, Phoenix will increase choice in the relevant markets and offer businesses across the Community state-of-the-art telecommunications services which their competitors overseas can already use. Although Sprint already operated a network in some European countries which allowed seamless connectivity with certain foreign locations, Sprint's market shares reveal that it would have taken much longer for Sprint to become a globally competing supplier for the ever increasing number of multinational companies that need a comprehensive range of customized global non-reserved corporate telecommunications services.

([30]) Footnote at recital 46 *in fine*.

([31]) Recital 48 of the Atlas Decision.

59. Exclusive distributorship in Germany and France

The exclusive distribution arrangements in respect of DT, FT and their respective subsidiaries aim at ensuring that DT and FT concentrate their respective marketing efforts through Atlas, such as customer prospecting or investments in regional and/or national networks and other facilities in their home countries on making Phoenix successful, rather than considering alternative options. Only if DT and FT are seen as fully committed to Phoenix will the joint venture benefit from the reputation and presence of its parents in the marketplace.

2. *Benefits to consumers*

60. The benefits of seamless network implementation across national borders is discussed under recital 54 of the Atlas Decision. Phoenix makes it possible that consumers benefit from a considerably wider range of new services that DT, FT and Sprint would not be capable of providing separately within the same period of time. The Commission stated before the notification of Phoenix that only a truly global dimension would make the cooperation between DT and FT in the framework of Atlas sufficiently important to consider an exemption from the prohibition of Articles 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement. The volume of investment required to ensure a worldwide presence, which is a requirement for global services provision, is beyond the capabilities of most potential users of such services, including MNCs active in sectors other than telecommunications. The creation of a global venture committed to undertaking the investment needed to be present worldwide is therefore crucial for the choice and quality of communications available to MNCs and eventually SMEs.

Adding global 'connectivity' to Europe-wide services, Phoenix is a substantial step forward in relation to Atlas. Accordingly, the Commission concludes that both the creation of Phoenix and the exclusive distributorship of DT, FT and their respective subsidiaries are beneficial to consumers.

3. *Indispensability*

61. The creation of Phoenix

Phoenix is indispensable for the parents to successfully enter the relevant global and regional markets. Phoenix will allow the time required for the relevant services to be marketed in competition with longer existing competitors to be substantially shortened. As further companies enter the relevant markets, Phoenix enables DT, FT and Sprint substantially to reduce costs and risks inherent to an organization set to offer telecommunications services worldwide to multinationals and other large users. While cost savings are important, an alliance such as Phoenix is also a decisive means to overcome the technical and logistic difficulties of providing the services and features (*inter alia* one-stop shopping, end-to-end delivery, seamlessness) required by such users, which cannot be addressed satisfactorily under the existing framework of TO correspondent relationships.

62. Exclusive distribution

DT and FT are exclusive distributors of Phoenix products in their respective home countries. Article 4 (2) of the 'technical information licence and access master agreement' of 31 January 1996 provides that the territory to which DT, FT and Sprint are granted licence rights shall generally be worldwide and not restricted to the respective party's own exclusive distribution territory. Under the terms of this Decision, DT and FT are prohibited from selling Phoenix products as distributors under the same contracts covering own reserved services.

63. Exclusivity is a guarantee for DT and FT to protect IPRs contributed to the joint venture against third parties and thus an incentive to contribute more valuable IPRs than would otherwise seem reasonable. On the other hand, the combination of (i) competitive alternatives in the market, (ii) bargaining power of customers in the market for customized packages of corporate telecommunications services to corporate users and (iii) the opening for DT and FT's passive sales into each other's home market ensure that the aim of protecting DT and FT's IPRs does not lead to an elimination of competition.

64. DT and FT are constrained under both national legislation and the terms of this Decision not to disclose information derived from operating the PSTN or providing reserved services to the entities whose services DT and FT are distributing. This ensures that exclusive distribution by DT in Germany and FT in France will not give Phoenix an unfair advantage over competitors in these countries. The Commission concludes from the above that the exclusive distributorship of DT and FT is indispensable within the meaning of Articles 85 (3) of the EC Treaty and 53 (3) of the EEA Agreement.

4. *Elimination of competition*

65. The creation of Phoenix will not in itself afford the parties the possibility of eliminating competition in the relevant services markets. The Commission has addressed related concerns raised by the integration of DT and FT's public X.25 packet-switched data networks into Atlas. The combination of (i) competitive alternatives in the market, (ii) bargaining power of customers in the market for customized packages of corporate telecommunications services to corporate users and (iii) the opening for DT and FT's passive sales into each other's home market ensure that the creation of Phoenix does not eliminate competition in the relevant markets.

66. As to the impact of DT and FT's dominant positions in Germany and France respectively, the Commission concludes that the terms of this Decision are sufficient to prevent an elimination of competition in the relevant markets. DT, FT and their respective subsidiaries are prohibited from selling Phoenix products as distributors under the same contracts covering own reserved services. DT and FT are also constrained under both national legislation and the terms of this Decision not to disclose information derived from operating the PSTN or providing reserved services to the Phoenix entities whose services DT and FT are distributing. This ensures that distribution of Phoenix services by DT in Germany and FT in France will not lead to market foreclosure or constitute a barrier to entry.

In the context of Phoenix, the following considerations are relevant:

Markets for non-reserved corporate telecommunications services

67. Global markets

Two years after the Commission's BT-MCI Decision global markets are still only emerging. Corporate users with global telecommunications needs still have an open demand for seamless services with customized features such as 24-hour technical assistance and maintenance service, one-stop billing across language barriers and currency zones and seamless links between premises spread over wide geographic areas. BT and MCI's Concert was the first player to enter that emerging market, with a head-start over its competitors. Phoenix is set to become a competitive player once the substantial required investment is made and a reliable seamless backbone network created. At this point in time the Commission regards entry of a competitor to Concert into this immature market as being dependant on the participation of an established United States provider with wide geographic coverage ([32]). Recent legislative changes in the United States have allowed regional Bell operating companies (RBOCs) to enter the long-distance market there. However, before such changes are felt in the market and while AT&T and MCI are engaged in alliances of their own, large existing players such as Sprint or LDDS are DT and FT's natural choice among United States long-distance carriers. The Commission therefore sees no elimination of competition in the emerging global market.

68. Cross-border regional market

This relevant market is discussed in detail under recitals 62 *et seq.* of the Atlas Decision. As was noted above, Phoenix essentially adds a global dimension to DT and FT's cooperation in the framework of Atlas and adds Sprint's existing European business in these markets. The elimination of Sprint as an independent supplier does not lead to an elimination of competition in the light of significant third-party competition stemming from existing alliances, such as AT&T WorldPartners, Concert and IPSP, and from future alliances between TOs that are not yet positioned, such as the RBOCs, NTT and European TOs such as Mercury. Moreover, at least partial competition for certain components of global customized packages of corporate telecommunications services and notably for packet-switched data communications services stems from niche players ([33]).

69. National markets

Phoenix adds to the restriction of competition brought about by Atlas in France and Germany in that one competitor to FT or DT there disappears. Adding DT's and FT's market shares to those of Sprint in France and Germany makes Phoenix the market leader for certain non-reserved corporate telecommunications services offered in customized packages, notably for outsourcing services. Outsourcing is relevant only until the market for cross-border and global services has evolved sufficiently to give current self-providers a choice of services that suits their needs. The Commission has ensured in the context of the related Atlas

([32]) See BT-MCI Decision (footnote 4) at recital 51.
([33]) Cf. BT-MCI Decision (footnote 4) at recital 56, first indent.

notification and in its 'Full Competition' Directive([34]) the essential prerequisite of increased choice, namely infrastructure liberalization. The Commission is persuaded that competition will not be eliminated given the conditions imposed on DT and FT to (i) provide all reserved services required for the provision of non-reserved corporate telecommunications services, such as PSTN interconnection with all relevant information on *inter alia* implementation of protocols such as the Signalling System 7 (SS7)([35]) on non-discriminatory terms to Phoenix and third parties, (ii) sell Phoenix products in contracts separate from those for own reserved services and (iii) gather, submit and have available the information required to verify compliance with those commitments.

70. The sale of Sprint's data and card business to T-Data in Germany and to Transpac France in France respectively is a concentration that does not attain a Community dimension. This does not affect the Commission's assessment of the Phoenix transaction under Articles 85 (3) of the EC Treaty and 53 (3) of the EEA Agreement. As was shown under recital, Sprint has small market shares in absolute figures for packet-switched data communications services in the French and German markets, but is an important player given that all competitors of FT and DT respectively, taken together add up to less than a 20 % market share. The Commission considers that this will not be tantamount to an elimination of competition. A large number of data services providers is active in Germany and in France, where six service providers have been licensed to provide public data services under conditions similar to Sprint, in addition to a number of players that provide services under class licences or in areas where no licence is required.

71. DT and FT's public X.25 packet-switched data networks shall not be contributed to Atlas until there is full and effective liberalization of the French and German telecommunications markets. Moreover, the Commission considers that the conditions attached to this Decision for its entire duration, such as non-discriminatory interconnection of Phoenix and third parties to DT and FT's public X.25 packet-switched data networks over X.75 interfaces or equal technical and commercial treatment of Phoenix and competitors in respect of interconnection to the PSTN and other services relevant to call termination and services distribution, will ensure a level playing field more efficiently than in the past. Nevertheless, the existing regulatory framework in the respective home countries of DT, FT and Sprint already prohibits cross-subsidization and/or discrimination. These regulatory constraints, together with the additional conditions attached to this Decision, lead the Commission to conclude that Phoenix does not afford the parties the possibility of eliminating competition by either discrimination or cross-subsidization.

Markets for traveller services and carrier services

72. The Commission sees no elimination of competition attributable to the creation of Phoenix, in the relevant markets. Phoenix's aggregate market share in the Community is far from giving it a dominant position; it includes both postpaid and prepaid cards, although in the latter category most of the cards issued by DT and FT are usable in national public telephones only and are thus possibly not directly comparable to Sprint's cards. As for carrier services, Phoenix will be active in selling excess capacity on its backbone network in a market which is only emerging. Phoenix's position as third-largest global switched transit provider is due to the fact that only two other companies meet the most valuable requirement in this market, namely worldwide reach and ultimately coverage.

5. Conclusion

73. The Commission concludes that the Phoenix transactions meet all four conditions for an individual exemption pursuant to Articles 85 (3) of the EC Treaty and 53 (3) of the EEA Agreement, as regards both the creation of Phoenix and the indispensable restriction of DT and FT's exclusive distributorship in Germany and France respectively.

D. DURATION OF THE EXEMPTION, CONDITIONS AND OBLIGATIONS

74. Pursuant to Article 8 of Regulation No 17 and to Protocol 21 of the EEA Agreement respectively, the

([34]) Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in the telecommunications markets, OJ No L 74, 22. 3. 1996, p. 13.

([35]) Major digital protocol/signalling system for managing and transmitting control and routing information in networks.

Commission shall issue a Decision pursuant to Articles 85 (3) of the EC Treaty and 53 (3) of the EEA Agreement for a specified period, and may attach conditions and obligations. Pursuant to Article 6 of Regulation No 17, such a Decision cannot take effect from an earlier date than the date of notification. Accordingly, this Decision shall, in so far as it grants an exemption from Articles 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement, take effect for seven years from the date on which the second new infrastructure licence comes into force in both Germany and France authorizing the licensee to operate infrastructure for the provision of liberalized services in competition with DT and FT, and the respective first licensee as regards the Phoenix agreements as described above. Unlike Atlas, Phoenix is not focused on the German and French national markets, where the restrictive effects of a cooperation between DT and FT are felt strongest. These restrictive effects in a fast-changing market that is not yet fully liberalized meant that Atlas had to be granted an exemption only for a relatively short period of time. By contrast, Phoenix targets mainly cross-border and ultimately global markets, and only to a certain extent third-country national markets. Given that in this regard Phoenix resembles BT and MCI's Concert venture, the Commission considers that the same duration of the exemption is justified.

75. Until the date defined in Article 2 of the Atlas Decision, no entity created pursuant to the Phoenix agreements should receive more favourable treatment than any third-party in respect of access to DT and FT's public X.25 packet-switched data networks, provided that Phoenix may access such networks over proprietary interfaces on condition that such interconnection is economically equivalent to third-party access over interfaces using the X.75 protocol or any other generally used CCITT-standardized interconnection protocol that may modify, replace or co-exist as a standard related to the X.75 standard and is used by DT and FT, T-Data and Transpac France and eventually Atlas Germany and Atlas France.

76. Given the link between Atlas and Phoenix, the Commission may withdraw this Decision if the exemption granted to the Atlas agreements is not renewed by the end of the period defined in Article 1 of the Atlas Decision. Likewise, in the light of the assessment of the Atlas agreements due at the end of the initial exemption period the Commission will lift or modify those conditions attached to this Decision which parallel the conditions and obligations described in recitals 23 to 29 of the Atlas Decision. Moreover, the Commission will, upon the parties' request, review the need for any particular condition or obligation attached to this Decision if circumstances change substantially before the period of exemption expires.

77. The Commission has decided to attach certain conditions and obligations to this Decision to exclude the risk of collusion between DT, FT and Sprint and to prevent an elimination of competition in the relevant markets. To this end, the Commission must ensure that DT and FT, where they are dominant in the provision of infrastructure and services used by Phoenix or Sprint, treat both Sprint and all entities created pursuant to the Phoenix agreements on similar terms as third-party competitors in respect of such provision. The condition imposed on DT, FT and Sprint not to discriminate in each other's favour is necessary because Phoenix will offer non-reserved services and will operate under Sprint's existing international simple resale (ISR) licence in the United Kingdom and under FT's existing ISR licence in Sweden. A distinction between reserved and non-reserved voice services does not exist in a number of geographic markets targeted by Phoenix and this distinction is due to disappear in most Member States with full liberalization of public voice telephony by 1 January 1998. Therefore, in the absence of such condition the parents' cooperation in the framework of Phoenix could easily spill over to the voice telephony markets, thus impairing effective liberalization of such markets and the development of competition in the Community.

The non-discriminatory treatment of Sprint, of Phoenix entities and of third-party competitors (recital 31) will allow the last-named category to compete against DT and FT, which in turn have room to compete over distribution: passive sales are possible because the same Phoenix service may be sold from either end of the requested circuits, for example from Germany or from France. To limit the potentially negative effects of the joint venture on overall competition between the parents, the Commission considers it appropriate to impose restrictions on the exchange of sensitive information between the parents and Phoenix (recital 64).

The most crucial requirements as to conduct, designed to safeguard competition in the EEA, are attached as conditions rather than as obligations to this Decision, given the need to prevent an

elimination of effective competition. Given the legal consequences of a breach of a condition, national courts can adequately and swiftly contribute to a decentralized policing of compliance and thus ensure that the competition rules will be adhered to the benefit of private individuals[36]. However, the principle of proportionality requires that far-reaching legal, financial and commercial consequences do not ensue from occasional or individual mistakes whose effects on the market are negligible. Therefore, infringements of the prohibitions on cross-subsidization, discrimination and bundling cannot be considered to breach a condition attached to this Decision unless such infringements have a substantial impact on market conditions, for instance if practices are pursued systematically or repeatedly.

78. This Decision is without prejudice to the application of Article 86 of the EC Treaty and Article 54 of the EEA Agreement,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Articles 85 (3) of the EC Treaty and 53 (3) of the EEA Agreement and subject to Articles 2 and 3 of this Decision, the provisions of Articles 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement are hereby declared inapplicable, for a period of seven years from the date on which two or more licences for the construction or ownership and control of alternative infrastructure for the provision of liberalized telecommunications services come into force in both Germany and France, to:

(a) the creation of the Phoenix joint venture by Deutsche Telekom AG ('DT'), France Télécom ('FT') and Sprint Communications Corporation ('Sprint'), as notified to the Commission, including the ancillary obligation imposed on Sprint, on DT and on FT to obtain from Phoenix all requirements for global products under section 2.1.1 of the operating entities services agreement and not to compete with the joint venture for the provision of Phoenix services under sections 10.2 and 10.3 of the joint venture agreement, as amended; and to

(b) the appointment of DT as the exclusive distributor of Phoenix in Germany and of FT as the exclusive distributor of Phoenix in France under section 2.2 (b) of the joint venture agreement as amended.

Article 2

The exemption set out in Article 1 is subject to the following conditions:

(a) Non-discrimination

1. DT and FT shall not grant either Sprint or any entity created pursuant to the Phoenix agreements, terms and conditions dissimilar to the terms and conditions applied to other providers of similar services, nor shall they exempt Sprint or such entity from any usage restrictions which would enable such entity to offer services which competing providers are prevented from offering with regard to the following facilities-related telecommunications services provided by FT and DT in France and Germany respectively:

   (i) leased lines services, in particular international leased lines (half-circuits) and domestic leased lines, including any discounts, as the case may be; and

   (ii) PSTN/ISDN services, including both access to PSTN/ISDN networks (namely analogue access; basic ISDN access; ISDN access to the public packet-switched data networks; special access from the public packet-switched data networks to ISDN; and national and international voice VPN and VPN interconnection services) and traffic over such networks.

   Similarly, Phoenix shall not be granted more favourable treatment than third parties in connection with reserved facilities and services and with such facilities and services as remain an essential facility after full and effective liberalization of telecommunications infrastructure and services in France and Germany.

2. DT and FT shall grant to Sprint, to any entity created pursuant to the Phoenix agreement, and to any third party operating a telecommunications facility that apply for the interconnection of such facility with DT or FT's networks, such interconnection on non-discriminatory terms as will enable it/them to provide telecommunications services or provide its telecommunications facilities without limitation in any respect within the reasonable capabilities of the operator concerned.

[36] Cf. Commission notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, OJ No C 39, 13. 2. 1993, p. 6.

3. DT and FT shall not in any way discriminate between Sprint, any entity created pursuant to the Phoenix agreements, and any other service provider competing with Sprint or such entity in connection with:

   (i) either a decision substantially to modify technical interfaces for the access to reserved services, and/or essential facilities or services, or the disclosure of any other technical information relating to the operation of the PSTN/ISDN; competitors shall in particular have access to such software and interface information as is indispensable for maintaining the technical features of voice services where such competitors interconnect to the German or French PSTN/ISDN; and

   (ii) the disclosure of any commercial information which would confer a substantial competitive advantage and which is not readily and equally available elsewhere to service providers competing with such entity.

4. Breaches of the requirements set out in points 1, 2 and 3 shall not be considered to infringe this condition unless such breaches have a substantial impact on the market.

(b) Interconnection to DT and FT's public packet-switched data networks

1. FT and DT shall immediately grant to Sprint, to any entity created pursuant to the Phoenix agreements, and to any third party, access to their respective public X.25 packet-switched data networks on non-discriminatory terms, including availability of volume or other discounts and the quality of interconnection provided.

2. Transpac France and T-Data shall, until such time as Transpac France and T-Data are yielded to Atlas, not disclose either to Sprint or to any entity created pursuant to the Phoenix agreements any specifically agreed terms that are identified and maintained as confidential by the party obtaining interconnection through standardized X.75 interfaces to access the French or German national public X.25 packet-switched data networks.

3. Sprint and any entity created pursuant to the Phoenix agreements may access the French and German public X.25 packet-switched data networks through proprietary interfaces, even for the provision of X.25 data communications services, provided that the access granted to Sprint or such entity through such interfaces is economically equivalent to third-party access to these networks.

4. Breaches of the requirements set out in points 1, 2 and 3 shall not be considered to infringe this condition unless such breaches have a substantial impact on the market.

(c) Correspondent services

1. DT and FT shall not give more favourable treatment to:

   (i) Sprint over other United States correspondents; or

   (ii) each other over other German or French correspondents once telecommunications services markets are fully liberalized.

2. Sprint shall not give more favourable treatment to DT and FT over other German or French correspondents once telecommunications services markets are fully liberalized.

(d) Cross-subsidization

1. All entities created pursuant to the Phoenix agreements shall be established as distinct entities separate from DT and FT.

2. All entities created pursuant to the Phoenix agreements shall obtain their own debt financing on their own credit, provided that FT and DT:

   (i) may make any capital contributions or commercially normal loans to such entities that are required to enable such entities to conduct their respective businesses;

   (ii) may pledge their venture interests in such entities, in connection with non-recourse financing for such entities; and

   (iii) may guarantee any indebtedness of such entities; however, FT and DT may only make payments pursuant to any such guarantee following a default by such entities in respect of such indebtedness.

3. No entity created pursuant to the Phoenix agreements shall allocate directly or indirectly any part of its operating expenses, costs, depreciation, or other expenses of their business to any parts of FT or DT's business units (including, without limitation, the proportionate costs based on work actually performed that are attributable to shared employees or sales or marketing of Phoenix products and services by DT or FT employees), provided that any such entity may bill DT or FT for products and services supplied to DT or FT by such entity at:

(i) the same price charged third parties in the case of products or services sold to third parties in commercial quantities, or

(ii) on the basis of the full cost reimbursement or other arm's length pricing method in the case of products and services not sold to third parties in commercial quantities.

4. Breaches of the requirements set out in points 1, 2 and 3 shall not be considered to infringe this condition unless such breaches have a substantial impact on the market.

(e) Bundling

1. DT and FT shall sell their services under contracts separate from the contracts for the sale of Phoenix services concluded as distributors of Phoenix in Germany and France respectively. Each separate contract shall set out the terms and conditions of each individual service sold thereunder and shall, in particular, attain any quantity discounts or other discounts to a particular service, as the case may be.

2. Breaches of the requirements set out in point 1 shall not be considered to infringe this condition unless such breaches have a substantial impact on the market.

(f) Accounting

1. Any entity created under the Phoenix agreements in France and Germany, any ROE parent entity and any entity controlled by a ROE parent entity shall keep separate accounting records using international accounting standards for each service they provide in any country. DT and FT (including all subsidiaries) shall keep separate accounting records using international accounting standards for each service they provide to any entity created pursuant to the Phoenix agreements, operating in the EEA.

2. DT and FT shall within one year of the date defined in Article 1 above implement an accounting system which generates sufficiently detailed records of the services covered by point 1 above. These records shall detail the following:

(i) the cost standard used;

(ii) the accounting conventions used for the treatment of costs;

(iii) the allocation and attribution of expenses or costs, revenues, assets and liabilities shared between any entity created pursuant to the Phoenix agreements and DT and/or FT; and

(iv) the attribution method chosen.

3. The accounting records referred to in points 1 and 2 shall identify all services provided to:

(i) any entity created pursuant to the Phoenix agreements in France and Germany;

(ii) any ROE parent entity; and

(iii) any entity controlled by a ROE parent entity by DT and FT or transfers to or from DT and FT.

4. No entity created pursuant to the Phoenix agreement, ROE parent entity or entity controlled by a ROE parent entity shall receive any material subsidy directly or indirectly from DT or FT, or any investment or payment from DT or FT that is not recorded in the books of such entities as an investment in debt or equity.

Article 3

The exemption granted under this Decision is subject to the following obligations:

(a) Auditing

1. All entities created pursuant to the Phoenix agreements in France and Germany, all ROE parent entities and any entity controlled by a ROE parent entity shall be audited by an independent external auditor every 12 months, provided that such audit shall certify from an accounting viewpoint that:

(i) all transactions between these undertakings, on the one hand, and FT and DT, on the other hand, have been conducted at arm's length;

(ii) these undertakings have adhered to the accounting procedures; and

(iii) the calculation numbers are accurate.

2. The first auditing report and certificate complying with point 1, covering the 12-month period starting on the date when this Decision takes effect, shall be submitted to the Commission within 15 months of that date.

(b) Other obligations

DT, FT, all entities created pursuant to the Phoenix agreements in France and Germany, all ROE parent entities and all entities controlled by a ROE parent

entity shall each, for the purpose of ascertaining and ensuring compliance by these undertakings with the conditions set out in Article 2,

1. keep all detailed records and documents necessary to prove complete compliance with the terms of the conditions set out in Article 2 ready for inspection by the Commission and to enable the Commission to verify the correctness of the audit certificate referred to in point (a) (2);

2. give the Commission access to their business premises to inspect records and documents covered by the obligations set out under heading (a) and to receive oral explanations relating to such documents on reasonable notice, during office hours, and without the need for the Commission to invoke the powers of inspection pursuant to Regulation No 17; and

3. provide the Commission with:

   (i) any records and documents in the possession or control of these undertakings necessary for that determination;

   (ii) unaudited accounting data as specified in points 1 and 2 every six months, starting one year after the commencement date of the exemption pursuant to Article 1; and

   (iii) further oral or written explanations.

Article 4

This Decision is addressed to:

Deutsche Telekom AG
Friedrich-Ebert-Allee 140
D-53105 Bonn

France Télécom
Place d'Alleray
F-75505 Paris Cedex

Sprint Communications Corporation
2330 Shawnee Mission Parkway
Westwood, Kansas
Missouri 66205
USA.

Done at Brussels, 17 July 1996.

For the Commission
Karel VAN MIERT
Member of the Commission

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 18 December 1996

relating to a proceeding under Article 85 of the EC Treaty and Article 53 of the EEA Agreement

(Case IV/35.518 — Iridium)

(Only the English text is authentic)

(Text with EEA relevance)

(97/39/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (1), as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular Article thereof,

Having regard to the application for negative clearance and the notification for exemption submitted pursuant to Articles 2 and 4 of Regulation No 17, on 11 August 1995,

Having regard to the summary of the application and notification published pursuant to Article 19 (3) of Regulation No 17 and to Article 3 of Protocol 21 of the EEA Agreement (2),

After consultation with the Advisory Committee for Restrictive Practices and Dominant Positions,

Whereas:

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No C 255, 3. 9. 1996, p. 2.

I. THE FACTS

A. Introduction

(1) The Iridium system was conceived by the United States company Motorola Inc. in 1987 to provide global digital wireless communications services using a constellation of low earth orbit (LEO) satellites. Services will include voice telephony, paging and basic data services (such as facsimile) and will be provided via portable hand-held (dual mode or single mode) telephones, vehicle mounted telephones, pagers and other subscriber equipment.

Iridium expects to be the first operational provider of global satellite personal-communications services (S-PCS). The system is expected to become commercially operational by 1 October 1998. For that purpose, 66 satellites will have to be launched and placed in orbit during the next 24 months.

B. Parties

(2) Motorola Inc., is a US provider of wireless communications and electronic equipment, systems, components and services for worldwide markets. Motorola is the originator of the Iridium concept and is the primary contractor to Iridium for the procurement of the space segment and a major supplier for other components of the Iridium system.

Motorola's investment percentage in Iridium is 20,1 %. It has reserved for itself the Mexican/ Central American gateway (1), has an interest in the South American gateway and shares the North American gateway with Iridium Canada and Sprint.

Under the Space System Contract Motorola has agreed not to produce for itself or others any similar satellite-based system without Iridium's prior written approval until 31 July 2003 or the termination of the Space System Contract, whichever is earlier.

(3) Apart from Motorola, Iridium is owned by 16 strategic investors, including a number of telecommunication services providers and equipment manufacturers from around the world. Each of them (with the exceptions of Lockheed Martin and Raytheon) is expected to own and operate a gateway (individually or jointly) and may also act as service provider (or nominate others to do so) within its allocated exclusive gateway services territory.

Investors are the following: Iridium China (Hong Kong) Ltd (belonging to the corporate group China Great Wall Industry Corporation: investment percentage 4,4 %), Iridium Africa Co., (formed by the Saudi group Mawarid Overseas Company: 2,5 %), Iridium Canada, Inc., (owned by a Motorola subsidiary: 33 %; and by two subsidiaries of the Canadian company BCE, Inc.: 4,4 %), Iridium India Telecom Private Ltd. (India: 3,9 %), Iridium Middle East Co. (owned by two Saudi groups: 5 %), Khrunichev State Research and Production Space Center (Russia: 4,4 %), Iridium Sudamérica (owned by a Motorola subsidiary, a Venezuelan consortium and a Brazilian group: 8,8 %), Korea Mobile Telecommunications (controlled by the South Korean conglomerate Sunkyong Business Group: 4,4 %), Lockheed Martin (USA: 1,3 %), Nippon Iridium Co., (a consortium formed by two Japanese groups, DDI Co., and Kyocena Co., and a number of other Japanese investors: 13,2 %), Pacific Electric Wire & Cable Co., (Taiwan: 4,4 %), Raytheon Co., (USA: 0,7 %), Sprint (USA: 4,4 %) and Thai Satellite Telecommunications Co., Ltd (Thailand: 4,4 %).

Two European companies are also strategic investors; Stet (Italy: 3,8 %) and Vebacom (Germany: 10 %). Each of the two has its own gateway service territory covering different parts of Europe and the associated exclusive right to construct and operate a gateway within its respective territory. However, they have concluded an agreement to jointly install and operate their gateways. In order to do so, they will create a joint venture. The first gateway will be that in Italy.

Most of the above investors do not operate yet; they have been created for the purpose of investing in Iridium. In the building-up phase of the system, many of the investors will provide some services to Iridium, basically as subcontractors to Motorola. Thus, China Great Wall and Khrunichev will provide launching services, Lockheed Martin is a principal subcontractor in the construction of the Iridium satellites, Raytheon is primarily responsible for providing the satellite antennas and Stet, through its subsidiary Telespazio, will build and operate the backup system control facility.

(4) Iridium LLC, a US-incorporated company with limited liability, has been formed to establish and commercialize the Iridium communications system. It will own the space-related portion of the system including the satellites and the related ground infrastructure for the delivery of Iridium services.

(5) As regards distribution of Iridium services, it will have a central role, issuing guidelines for the appointment of service providers by gateway operators and establishing commercial and pricing policies. In addition it will provide some business support functions required by gateway operators and service providers, including a clearinghouse to calculate the amounts due to and from Iridium and each gateway operator.

(6) Iridium will be managed by a Board of Directors made up of 24 members. Of these, 23 will be elected by the investors and the Chairman will be elected by the other 23. The Board of Directors will delegate certain executive authority to the management team of the company, which will include a Chief Executive Officer and a President. The Chairman of the Board of Directors will also be the Chief Executive Officer. The Chief Executive Officer will be in the general and active charge of the entire business and affairs of the corporation. The President shall have general charge of the business, affairs and property of the corporation under the supervision of the Board of Directors and the Chief Executive Officer. The management will be responsible for carrying out the directions of the Board of Directors and for informing it of progress in the company's development and business.

(1) For a description of a gateway, see recital 12.

(7) Decisions by the Board of Directors will be adopted by simple majority.

C. The Iridium system

1. *The network*

(8) The system (1) will consist of the space segment, the gateways and the user handheld terminals. Iridium will own the space segment, while gateway operator investors will own and operate the gateways and subscribers will purchase or lease the subscriber terminal equipment from service providers and other retailers.

(9) The space segment includes the satellites (2) and the system control segment (SCS) necessary to monitor, manage and control the satellites and the provision of services.

(10) Iridium intends to operate a constellation of 66 (3) satellites to be deployed in low earth orbit (780 km. above the earth's surface). The satellites will be arranged in six planes of 11 satellites each, in near polar orbit. Each satellite will circle the earth every 100 minutes and will cover a circular area with a diameter of approximately 4 700 km.

Satellites are equipped to communicate with subscriber terminals and to send traffic direct from one satellite to another. As regards the latter, each Iridium satellite will have four cross-link antennas to allow it to communicate and route traffic to the two satellites that are fore and aft of it in the same orbital plane as well as neighbouring satellites in the adjacent co-rotating orbital planes. Inter-satellite networking provides access to the Iridium system irrespective of gateway location by routing a call from satellite to satellite until it is connected to the gateway which is most appropriate to the destination of the particular call. In that respect, the system allows any user in any country that has authorized the Iridium service to receive a call originating from any gateway.

(11) The SCS includes a master control facility (4) (located in the USA), a back-up control facility (to be located in Italy) and two tracking, telemetry and control stations (TT&C) (5) located in Canada and Hawaii.

(12) Gateways are switches which communicate with subscribers' units and other satellites via the SCS and the constellation. They will serve as the interface between the satellite constellation and the public switched telephone networks (PSTN). As was stated above, they will be owned by investors. There will be 13 gateways in operation.

The concrete functions of a gateway will be to support the subscriber billing function, to process calls, to keep track of each user location and to communicate with PSTN to which it will be interconnected (in case of calls to fixed users).

(13) Finally, handsets will be produced by major manufacturers of equipment. Motorola has agreed to license to other suppliers the right to use its proprietary information to manufacture and sell Iridium-compatible subscriber equipment subject to reasonable terms and conditions acceptable to both parties. Most handsets will be capable of dual-mode operation with both satellite and terrestrial cellular (including GSM) systems, so that they will be able to select, either automatically or under user control, satellite or terrestrial modes of operation.

2. *Distribution of the services*

(14) Distribution of Iridium services will involve different participants in the notified agreements:

— Iridium will have responsibility for central functions, such as the space segment and certain business support systems including the clearing-house,

— gateway operators will be responsible for the gateway,

and

— service providers will provide services to customers and will sell and/or lease subscriber equipment.

(1) The total system's implementation costs are estimated at nearly USD 4.7 billion (not including handsets).

(2) The system will use a frequency in the range of 1616-1626,5 Mhz for user links (as reserved for S-PCS systems during WRC-92), 19,4-19.6 Ghz and 29,1-29,3 Ghz for feeder and gateway links (space to earth and earth to space) and 23,18-23,38 Ghz for the inter-satellite links.

(3) The system also includes a number of spare satellites in orbit, intended to replace failed ones.

(4) The master control facility will control the performance and status of satellites and manage the network. The back-up control facility will replace the master control facility in case of failure and will control spare satellites in orbit.

(5) TT&C stations will track the movements of the satellites and adjust their orbits to maintain the constellation.

(a) Gateway operators

(15) Under the stock purchase agreements, each investor in Iridium designated as a gateway operator will have exclusive rights to provide Iridium services within the geographic territory provided in the contract. Iridium will not authorize any other person to provide gateway services or construct gateways in the investor territory.

(16) In addition, gateway operators will have exclusive rights to act and/or designate others to act as service providers within their designated gateway territory. It is the intention of Iridium that every gateway operator shall create a network of service providers within its allocated territory.

(17) Finally, under each gateway authorization agreement, Iridium will provide the gateway operator, and its designated service providers, with continuous access to the Iridium space system. Such right is subject to continued compliance with the applicable mandatory provisions of the Iridium System Practices (1).

(18) In exchange, gateway operators have to:

— apply for, obtain and maintain all governmental authorizations and frequency allocations necessary to construct and operate the gateway and to provide services in each of the countries included in the gateway services territory,

— construct, operate and maintain the gateway,

— establish and maintain appropriate interconnection, access and settlement arrangements through and with every PSTN operating within the gateway services territory,

and

— provide gateway services to its designated services providers in each of the countries included within its allocated service territory.

(b) Service providers

(19) Service providers will be responsible for marketing and retail sale of the services and terminals and will have primary contact with end users within their territories. They will also be responsible for all aspects of account management and customer care including customer credit, billing, accounting and customer credit risk. In addition, they have to support gateway operators' efforts to obtain regulatory authorizations and frequency allocation within their territories

(20) Appointment of the service provider will in principle be non-exclusive in order to allow access to the largest customer base and to ensure adequate availability of subscriber equipment and customer service within the gateway service territory. Such would be the case in wireless markets open to competition. However, exclusive service provider agreements could also be possible in other markets. It is expected that most will also be local cellular service providers. In this respect, S-PCS services will, in general, be offered by wireless terrestrial networks as a premium service in order to extend coverage to areas outside terrestrial coverage or where terrestrial roaming is not possible.

It is contemplated that a single company could act as a service provider for more than one gateway operator investor. In addition, service providers can operate in more than one country within a gateway service territory.

(21) Service providers will be appointed by gateway operators in accordance with guidelines provided by Iridium. According to the notification, an initial screening of the service provider will assess financial standing, reputation, concern for customers and resources. The major determinants for selection will be the existence of a substantial subscriber base of wireless mobile users and the degree of performance of the potential service provider for customer care and billing services which are essential for an adequate provision of the service.

(c) Pricing

(22) Price to subscribers will be made up of four charges:

1. a payment by the gateway operator to Iridium for use of the space segment to be established by the Iridium Board of Directors;

2. a payment to the gateway operator for use of the gateway link at a price to be set by the gateway

(1) Iridium Systems Practices (ISP) is the set of guidelines, recommendations, rules, plans and other instructions related to technical and operational matters associated with the operation of the Iridium system. Some technical and operational portions of these practices are intended to be mandatory in order to secure a high degree of network integrity. The ISP has not yet been completed even in draft form.

operator, albeit following Iridium's guidelines and recommendations to the extent permitted by applicable law and regulation;

3. a payment to the service provider,

and

4. tail charges, if any, for the origination or completion of calls over the PSTN.

(23) Service providers will be the collection point for charges paid by subscribers. Revenues will be distributed by the clearinghouse operated by Iridium.

The clearinghouse will hence act as a central point for collection of call detail record and will calculate and execute the net settlement position among Iridium and all gateways.

(24) End customers for voice services are expected to pay, on global average terms, a monthly fee of around USD 50 and a tariff per voice minute traffic of around USD 3 (1), plus any applicable PSTN tail charges.

D. Relevant Market

1. *Product market*

(25) The term S-PCS system denotes a network used to provide satellite personal communications services, usually on a worldwide basis. A S-PCS system encompasses a constellation of LEO (low earth orbit), MEO (medium earth orbit) or GEO (geostationary earth orbit) satellites (2), their control earth stations and a number of gateway earth stations through which access will be provided to terrestrial fixed or mobile networks. Such a configuration will support full user mobility and identification by a single number anywhere in the world, using 'intelligent' features, similar to those of digital terrestrial cellular systems (such as GSM), that will be located either in earth stations or, as in the current case, in the satellites themselves.

(26) It is expected that voice service will be the primary application for these systems, but other significant segments will involve so-called mobile personal digital assistants, data transmission and paging.

(27) LEO and MEO systems (to be used by most of the currently announced S-PCS systems) do not present a high degree of substitutability with existing or planned GEO systems. Geostationary satellites are more complex and expensive than other satellites. They require more cooperation from the end-user to establish an unobstructed, clear line of sight to one of the satellites. In addition, power losses over such great distances from earth make hand-held portability currently impossible (3). Sheer distances from earth also cause echo and time delays (of a magnitude of around half a second that compares very badly with the 20-151 milliseconds of a LEO system like Iridium) that seriously degrade and confuse normal voice communications. In addition, GEO subscribers located at high latitudes (that is, near the Poles) experience a shadowing effect that makes the successful establishment of calls difficult.

(28) S-PCS systems are expected to act as a complement to both GSM and digital cordless telephony within fixed radius (DECT) wireless terrestrial mobile technologies. This will be particularly the case in areas where the cellular network has failed to penetrate (namely rural parts of the developed world and both urban and rural parts of lower income countries) or where terrestrial roaming is not available because of incompatible technologies. In this respect, they will be offered by GSM network operators as an additional feature priced at a premium rate.

However, S-PCS are not intended to compete with terrestrial cellular and paging systems in urban or other densely populated areas because of the advantages such cellular and paging systems have in terms of cost, voice quality and signal strength. In that respect, the performance of S-PCS systems will deteriorate in urban areas, given the existence of a large number of very densely spaced obstacles (such as buildings). That deterioration will be exacerbated in moving automobiles without external antennas and, in particular, inside buildings.

(1) Iridium will keep a part of the access fee and of the usage fee. In addition, Iridium expects to keep an additional amount as compensation for the clearinghouse function. The remaining will be used to compensate gateway operators, service providers and other parties.

(2) LEO satellites are located around 900 km over the earth. Full coverage of the earth's surface would require a minimum of 66 LEO satellites. This is the kind of orbit chosen by Iridium.
MEO satellites are located around 10 000 km over the earth. Full coverage of the earth's surface would require a minimum of 10 MEO satellites.
GEO satellites are located at 36 000 km over the earth. Full coverage of the earth's surface would require only 3 GEO satellites.

(3) The smallest GEO receiver is as big as a small briefcase.

(29) In addition, S-PCS systems are expected to act as a complement and even a substitute for the public switched fixed telephone network, enhancing service coverage in remote areas of low population density and/or where the terrestrial infrastructure is very poor.

(30) Major users of S-PCS will be international business travellers using their dual terminals (1) in the terrestrial mode within a given network and switching to satellite in areas outside terrestrial coverage or with incompatible networks. Other important categories of user will be rural communities, Government communications and aeronautical users.

2. *Geographical market*

(31) When fully operational, the Iridium system will be able, from a technical point of view, to provide a global coverage. However, the exact scope of the geographical market is difficult to ascertain. In addition, the conclusions of the Commission in this case will not be affected by whether the market is finally worldwide or smaller than that. For that reason, the precise dimension of the geographical market can be left open.

3. *Competition in the future S-PCS market*

(32) S-PCS systems represent a market which is expected to result in revenues of ECU 10 000 million to 20 000 million during the next decade. Competition is expected to be very intense and to come not only from other S-PCS systems, but also from terrestrial networks.

(33) A number of alternative projects are known to be trying to offer hand-held telecommunication services through satellite, some of them (the so-called 'little LEOs') having a more limited product and/or geographical coverage, whilst others (the so-called 'big LEOs') are aiming at the same relevant market as Iridium. Most planned S-PCS systems are US-led initiatives. However, European industry is already substantially involved in the announced S-PCSs. The most important competitors of Iridium will be:

(1) It is expected that the price differential between dual-mode (satellite and GSM) and single-mode terminals (GSM only) will be as low as 10 %.

— Inmarsat-P/ICO (2)

(34) ICO is a S-PCS system sponsored by Inmarsat and a substantial number of its signatories. Unlike Iridium it will use 10 satellites in ICO (intermediate circular orbit, an orbit which is included among MEO orbits) to provide global mobile and other ancillary telecommunications services. The system is expected to be operational by the end of the year 2000. The cost of the system approaches USD 3 billion.

— Globalstar

(35) Globalstar intends to set up a S-PCS system using 48 LEO satellites. The Globalstar consortium is led and sponsored by the Loral Corporation, a leading US defence electronics and space company. Partners/contractors include the European aerospace companies Alcatel (France), Aerospatiale (France), Alenia (Italy), Deutsche Aerospace (Germany) and Tesam, a joint venture created by Alcatel and France Télécom. The total cost of the system is estimated at USD 2 000 million.

Globalstar expects to begin launching satellites in the second half of 1997 and to commence initial commercial operations via a 24-satellite constellation in 1998. Full global coverage, via the 48-satellite constellation, is expected to be established in the first half of 1999.

— Odyssey

(36) The Odyssey S-PCS system is supported by the US aerospace company TRW and the Canadian telecommunications operator Teleglobe Inc. Odyssey will consist of 12 MEO satellites and is expected to be operational by 1999.

E. The notified agreements

(37) The notified agreements are the following:

— the 'terrestrial network development contract' between Iridium and Motorola,

— the 'stock purchase agreements', including those signed with Stet and Vebacom,

— the 'space system contract' between Iridium and Motorola,

(2) For details of the Inmarsat-P system see Article 19 (3) Notice: OJ No C 304, 15. 11. 1995, p. 6.

— the 'Iridium communications system operations and maintenance contract' between Iridium and Motorola, and

— the 'gateway authorization agreements' concluded between Iridium and Stet and Vebacom.

(38) In a subsequent submission, the parties provided a standard (non-binding) MoU to be used by gateway operators for the appointment of service providers and the 'service provider appointment guide for Iridium gateway operators'.

F. Third party observations

(39) Following the publication pursuant to Article 19 (3) of Regulation 17 and Article 3 of Protocol 21 of the EEA Agreement, comments were received from three interested parties. These comments were fully assessed by the Commission but proved not to be such as to cause the Commission to modify its original favourable position.

II. LEGAL ASSESSMENT

A. Application of Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement to the creation of Iridium

(40) On the basis of arguments developed below, the partners of Iridium are not to be considered to be actual or potential competitors in the S-PCS market:

— the S-PCS concept is yet untried. By its nature, S-PCS network implementation is a complex programme involving considerable risk, and will not prove itself until deployed in the operational configuration and loaded with a significant volume of traffic, something which will not happen until the early years of the next century,

— no investor in Iridium could reasonably be expected to make the necessary financial investment to set up and operate a worldwide S-PCS system. As indicated above, the investment required for the setting-up of the Iridium system approaches USD 5 000 million. Such an amount is furthermore comparable to that of competing S-PCS world-wide systems,

— in addition, no investor in Iridium is in a position to assume the substantial risk of technical failure inherent in space operations. Launching failures (1), satellites which are unable to reach their final position from their transit orbit, and satellites which do not work properly or which go out of control once in their final position are still quite common hazards in space operations, and if one of these happens, it usually entails the total loss of the satellite (it is already possible to recover or repair a satellite in orbit, but doing so is prohibitively expensive).

To that risk has to be added the possibility of commercial failure inherent in the fact that S-PCS systems are a completely novel and even revolutionary concept which, in the developed part of the world, are expected to encounter tough competition from cellular terrestrial mobile services and from competing S-PCS systems,

— furthermore, given the global reach of the system, no investor in Iridium holds the necessary authorizations and licences to provide international telecommunication services on a worldwide basis through satellite. In order to set up and operate a S-PCS system, such as Iridium, the following regulatory approvals are required:

(a) the international allocation by a World Radiocommunication Conference (WRC) of the International Telecommunications Union (ITU) of the spectrum required for the system user, gateway and inter-satellite links. WRC-92 and 95 dealt with the spectrum allocation issues,

(b) a licence by the relevant regulatory authority for the construction, launch and operation of the satellite constellation (as regards Iridium, the Federal Communications Commission of the US granted the required licenses in January 1995. Four other US-based S-PCS systems, including Globalstar and Odyssey, were also granted licences),

(c) in each country in which a gateway or a system control terminal will be located, an authorization to construct and operate those facilities,

(d) in each country in which subscriber equipment will operate, authority to operate that

(1) The level of launch concentration in Iridium (66 satellites to be launched — launching several satellites at a time — in just 24 months) has not previously been undertaken on a commercial basis.

equipment with the system, including the necessary user link spectrum (1),

(e) international coordination of the system with other entities using or proposing to use the spectrum required for the system in order to ensure the avoidance of harmful interference,

and

(f) consultation with Intelsat and Inmarsat to ensure technical compatibility and to avoid significant economic harm to them,

— finally, the array of technologies required for a S-PCS system is outside the individual capabilities of investors in Iridium. Even if Motorola has title to many of the technologies required for the Iridium system, a number of the investors have a crucial role in developing important elements of the system that are outside the capabilities of Motorola. That is the case of Lockheed Martin for the satellites themselves, of Raytheon for the antennas, of China Great Wall and Khrunichev for the launchers, and so on.

(41) In conclusion, in view of the above, the creation of Iridium means the introduction of a viable competitor in a completely new mobile telecommunications field and, as such, falls outside the scope of both Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement.

B. Application of Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement to the pricing policies of Iridium and to the distribution of Iridium services: ancillary restraints

(42) According to paragraph 3 (1) of each gateway authorization agreement, the Iridium BOD will establish the charge for accessing the space segment (owned by Iridium). In addition, it may suggest pricing policies as guidelines. Under the guidelines, which take into account Iridium's charge for access to the space segment, gateway operators are free to set their own prices within a certain range. The guidelines refer also to rules for the repartition of charges between gateways in calls that use multiple gateways, currency requirements and exchange rates. Each gateway operator is expected to comply with these guidelines to the extent permitted by applicable law and regulation.

The guidelines are aimed at maintaining the coherence and the integrality of the world-wide service that Iridium will provide. Such coherence is particularly important for potential users of the system. They will most of the time be moving in different areas of the world but they will nevertheless want to receive a single bill in a single currency. On that basis, as was recognized in the IPSP Decision (2), the principle of uniform prices and other conditions in different territories, together with the implementation of marketing practices in a decentralized manner, seems appropriate to fulfil customers' needs.

(43) The distribution of Iridium services will be organised around on the one hand the gateway operators — the strategic investors in Iridium — which have exclusive rights over their respective territories and on the other hand the service providers which are nominated by gateway operators, in general on a non-exclusive basis. Iridium, as 'producer' of the services will keep some central functions to ensure the coherence of the system.

(44) According to paragraph 3 of every Stock Purchase Agreement, investors in the Iridium system (that is, the gateway operators) will get exclusive rights for the territory provided for in that agreement. The exclusive rights basically mean that no other company will acquire rights from Iridium (i) to build and operate a gateway within that territory and (ii) to provide the Iridium services inside the territory. In exchange, gateway operators must build, maintain and operate the gateway and perform several other tasks, such as obtaining the necessary regulatory approvals for the Iridium system in the countries included in their respective territories, which can be costly and cumbersome. In this respect, and taking into account the very high risks entailed by the Iridium system and the need to attract gateway operators covering all parts of the world, such exclusivity can be seen as an incentive to investors to assume these risks.

(45) In addition, any possible restrictive effect resulting from the exclusivity is reduced by the following facts:

1. neither gateway operators nor service providers are prevented from dealing with competing systems. As regards services providers, it is indeed expected that some of them (usually terrestrial cellular operators) will be service

(1) In the Community, although exclusive and special rights in respect of the use of terminal equipment and of the provision of telecommunication services (excluding voice telephony until 1998) have been recently abolished (Commission Directive 94/46/EC of 13 October 1994; OJ No L 268, 19. 10. 1995, p. 15), a common approach to frequency-licensing has not been developed yet.

(2) OJ No L 354, 31. 12. 1994, p. 75 (paragraph 55).

providers for as many S-PCS systems as possible in order to increase the attractiveness of their own cellular offerings to customers (S-PCS systems will be a premium, complementary service to cellular terrestrial offerings).

In this respect, as regards STET, which is the only partner still having exclusive rights for the provision of telecommunications services and infrastructures, the parties have confirmed that the Iridium agreements will not affect the ability of any other company or person to gain access to the telecommunications infrastructure of STET other than those STET facilities specifically developed for the Iridium system;

2. the agreements do not prohibit service providers from selling the Iridium service to customers which are not located in the same area or country as the gateway operator investor;

3. the intelligence on board the satellites allows any user to be reached from any gateway. In this respect, it is planned that subscribers (customers) of a given gateway that move to another area will keep their former contract and will not be obliged to sign a new contract with a service provider of the gateway operator with exclusive rights over the new country to which they have moved;

4. given the global nature of the services, a single call will usually involve several gateways;

5. the intense competition for Iridium services expected from other S-PCS systems and other terrestrial cellular systems;

and

6. all capacity provided for by the Iridium system satellites will be used by Iridium, its gateway operators investors and designated service providers for their telecommunication services. There will be no spare capacity available for third parties.

(46) Finally, exclusivity is also a result of the configuration of the satellites: each satellite has antennas to link at any one time with only three gateways within its footprint (a fourth antenna is kept as reserve in case of failure). This feature requires a limited number of gateways.

(47) As for the guidelines for the appointment of service providers, it appears to the Commission that selection criteria described above are objective and qualitative.

(48) On the basis of the particular circumstances of the present case, it can be concluded that the pricing policies as guidelines, the exclusivity granted to gateway operators and the guidelines for service provider selection are directly related and necessary to the successful implementation and operation of the Iridium system. Hence they have to be regarded as ancillary restraints to the Iridium system under the competition rules of the EC Treaty and the EEA Agreement.

However, the above conclusion regarding the ancillary nature of the exclusive rights granted to gateway operator investors could be revisited should the particular circumstances of the case change in a substantial manner. Such would be in particular the case should Iridium acquire a dominant position in respect of the actual provision of S-PCS services.

(49) Ancillary restraints are to be assessed together with the creation of the company. In this respect, as Iridium has been found not to fall within the scope of both Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement, then neither do provisions detailed above,

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in its possession, the Commission has no grounds for action under Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement in respect of the notified agreements relating to the creation of Iridium.

Article 2

On the basis of the facts in its possession, the Commission has no grounds for action under Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement in respect of the pricing policies to be established by Iridium as guidelines under Paragraph 3.1 of each Gateway Authorization Agreement, in respect of the exclusive distribution rights granted to gateway investor operators under Paragraph 3 of every Stock Purchase Agreement and in respect of the guidelines for service provider selection as notified.

Article 3

This Decision is addressed to:

Iridium LLC,
1401 H. Street, NW,
Washington, DC 20005,
USA.

Done at Brussels, 18 December 1996.

For the Commission
Karel VAN MIERT
Member of the Commission

Notice pursuant to Article 19 (3) of Council Regulation No 17 (1) and Article 3 of Protocol 21 of the EEA Agreement concerning a request for negative clearance or an exemption pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement

(Case No IV/35.738 — Uniworld)

(97/C 44/04)

(Text with EEA relevance)

A. INTRODUCTION

On 29 September 1995 the Commission received a notification of a joint venture pursuant to Article 4 of Council Regulation No 17 formed by Unisource Pan-European Services BV, a subsidiary of Unisource NV, and AT&T Pan-European Services, Inc. (2), a subsidiary of AT&T Corp. under the name 'Uniworld'.

As further described below, Uniworld (now AT&T — Unisource Communication Services) has been created to provide pan-European telecommunications services with global connectivity to the European business market.

The present case is inextricably linked to the Unisource — Telefónica case (Case No IV/35.830). An Article 19 (3) notice in that case has been published in this same issue of the *Official Journal of the European Communities.*

B. THE PARENT COMPANIES

1. Unisource NV is a joint venture company the shareholders of which are Telia AB, PTT Telecom BV, Swiss Telecom and Telefónica de España SA. Unisource NV (hereinafter, Unisource) is a holding company active in the telecommunications sector that incorporates seven operating subsidiaries. Total turnover of the group in 1994 was Fl 933 million (ECU 443 million). Net result was losses of Fl 41;072 million (ECU 20 million). The activities of the Unisource Group can be split in three main areas: business services, personal services and network services. A detailed description of the services currently provided by Unisource through its subsidiaries can be found in the Article 19 (3) notice in the Unisource — Telefónica case (IV/35.830).

2. AT&T is a telecommunications operator in the United States providing a broad range of US and international telecommunications services and infrastructures to and from the US. AT&T announced in September 1995 a restructure pursuant to which its services, equipment and computer business will, by the end of 1996, become wholly separated businesses with no common management. AT&T Corp. retains the communications and information services business. Its turnover in 1995 was US $ 47 billion.

On 9 May 1996, the Federal Communications Commission (FCC) of the US adopted an order declaring AT&T a non-dominant carrier for international voice services (3).

Direct revenues in 1995 of AT&T in the EEA and Switzerland were as follows: AT&T Easylink (messaging) [...]; AT&T Istel (corporate services) [...] and Business Communications Europe (hereinafter, BCS-E) [...].

C. CONTRIBUTIONS BY PARENT COMPANIES TO UNIWORLD

Unisource will contribute to Uniworld the following companies or the relevant international assets thereof: certain of the Unisource Business Networks (UBN) companies, Unisource Voice Services (UVS), Unisource France SA, Unisource USA Inc, Unisource Business Services Inc. and Unisource WPC Inc.

AT&T will contribute the relevant assets of the following entities: AT&T Europe SA, most of AT&T Istel Ltd, BCS-E and the AT&T companies in the Member States.

After the Uniworld transaction, AT&T will still provide in the EEA and Switzerland, under its own name, the following services: new high value-added

(1) OJ No 13, 21. 2. 1962, p. 204/62.

(2) Unisource Pan-European Services and AT&T Pan-European Services have been created as special subsidiaries to hold the respective interests of the parent companies in Uniworld VOF.

(3) By order released on 23 October 1995, the FCC reclassified AT&T as a non-dominant carrier in the market for interstate (US domestic) telecommunications services.

applications (such as AT&T network notes), consumer cards and calling cards services, outsourcing (AT&T solutions) and the full range of voice telephony services to business and consumer customers in the UK — by means of AT&T Communications UK's operating licence, which permits also international simple resale to the US.

D. THE JOINT VENTURE: UNIWORLD

1. Structure of Uniworld

Uniworld consists of two companies: Uniworld VOF and Uniworld NV.

(a) Uniworld VOF is a general partnership under Dutch law. Unisource, through Unisource Pan-European Services, has a 59,94 % shareholding interest in it, AT&T, through AT&T Pan-European Services, a 39,96 %, and Uniworld NV the remaining 0,1 %. Uniworld VOF is not a separate legal person distinct from its owners. In addition it is tax transparent so the income flows through directly to the parents. Uniworld VOF will actually provide the telecommunications services within the business scope of Uniworld.

The Uniworld NV's supervisory board and CEO will be directly responsible for the partnership.

(b) Uniworld NV has been created to supervise and act as general partner of Uniworld VOF. Thus it is the only partner that governs and can bind the partnership and has legal title to all tangible and intangible assets which it will hold for the benefit of Uniworld VOF. It also has the authority to manage the day-to-day operation and affairs of the partnership and has all of the resources necessary to manage and operate the business activities of Uniworld VOF. Unisource, through Unisource Pan-European Services, has a 60 % shareholding interest in Uniworld NV, whereas AT&T, through AT&T Pan-European Services, owns the other 40 %. According to the Parties, Uniworld NV, although jointly owned is not a joint venture in itself as it will not conduct any business for its own account. Uniworld NV will earn an annual management fee for its activities as general partner of the partnership.

Uniworld NV is governed by a management board of one chief executive officer nominated by Unisource (AT&T nominates the chief operating officer), responsible for managing the company, and a supervisory board of five directors, three nominated by Unisource and two by AT&T. The supervisory board approves the budget and business plan by supermajority (i.e. unanimity of directors present or represented). AT&T has been granted veto rights in respect of all significant matters.

2. Strategic advisory boards

Upon its incorporation, Uniworld will create three strategic advisory boards to deal with the following matters:

(a) service portfolio development and offerings;

(b) marketing and sales (the international sales board responsible for the global account management plan); and

(c) architecture and technology.

All participants to the Uniworld transaction, including representatives of the Unisource shareholders will be represented in the boards.

The boards are resources for achieving consistency in approach to an issue, as well as working committees to help make decision-making processes efficient. They are also a forum to solve disputes between the parents that might have an impact on Uniworld. Uniworld can use them to forge a consensus for Uniworld's initiatives in advance of supervisory board consideration. Originally, recommendations were binding on all participants. However, after the Commission objected to that, the Parties modified that provision so that recommendations shall not be binding on the participants and their pertinent affiliated companies (see later).

Information to be exchanged by participants to the boards will neither include actual retail prices of Uniworld end-user services, nor information relating to commercial conditions of products and services outside the business scope of Uniworld as notified. In addition, market trends in pricing will only be discussed in general terms without disclosing sensitive customer pricing information.

3. Business scope

The scope of Uniworld's business will be the provision of seamless (4) multilateral (5) pan-European telecommunications services with global connectivity to the European

(4) Seamlessness is defined as a cohesive and homogenous approach to the service from a user's perspective. So, the customer does not see the underlying complexities of providing the service.

(5) The term 'multilateral' encompasses foreign-to-foreign as well as home-to/from-foreign traffic. Bilateral services are not able to encompass foreign-to-foreign traffic.

business market. The Parties have identified [...] global and European multinationals with international telecommunications expenditure greater than [...] a year as the target market for Uniworld. Of these, it will focus on the [...] biggest corporations having at least an office in the EEA plus Switzerland (such focus does not preclude the offering of Uniworld services to any other customer with similar needs).

Global connectivity outside the EEA and Switzerland (*) will be mainly achieved through Uniworld's participation in the WorldPartners Company and Association (*). In this respect, Unisource will transfer to Uniworld its rights in the WorldPartners Company and Association and AT&T UK will do the same with its rights in the WorldPartners Association. As a result Uniworld will become the exclusive distributor in the EEA plus Switzerland of the telecommunication services bearing the WorldSource trade mark (*).

In accordance with the initial business plan for Uniworld, revenues would amount to [...] in 1996. They are expected to grow to [...] by 2005. Break-even is expected to be achieved by 1999 (1998 for data).

The Parties aim at Uniworld achieving market shares of [...] in voice IVPN and [...] in data services by 2005, in the EEA plus Switzerland.

Uniworld is expected to have around [...] employees.

Although Uniworld is responsible for its own product development, it will not conduct its own basic research activities. It will have access to research capabilities of AT&T, Unisource and the Unisource shareholders via intellectual property arrangements to be agreed, the principles of which have been notified.

Uniworld will own and/or manage all frame relay, messaging, X.25 international backbone, X.25 domestic switches with exclusive or predominantly international usage, non-home country X.25 networks and managed bandwidth assets. Asset selection will be made according to a set of rules agreed upon by the parties in accordance with the given principles for asset selection.

In addition, the existing backbone data network — Unidata — that links together the domestic data networks of the shareholders of Unisource will also be assigned to Uniworld.

4. Telecommunications services to be provided by Uniworld

Uniworld's services are based on end-to-end control by Uniworld of the services to customers including the national extensions of such services. However, Uniworld will not offer purely domestic services (*).

The services will initially include international virtual private network (IVPN) voice services, packet-switched, frame relay and other data networks and services, messaging and network related outsourcing. The home countries, France, Germany, the United Kingdom, Belgium and Italy represent primary target countries.

— As regards voice IVPN services, an IVPN service (Uniworld VNS), made of different packages with different features, will be offered to customers to cover their intra-European needs (*). The backbone network (basic transmission capacity) to be used will

(*) In areas outside Europe or the WorldPartners Association, the bilateral agreements of the Unisource shareholders, of Unisource and/or AT&T will be used to extend global connectivity. In the future, Uniworld could have its own bilateral arrangements. In addition, Unisource has recently announced a non-exclusive agreement with Infonet (which is 56 % controlled by the Unisource shareholders) regarding the provision by Infonet of X.25 connectivity outside Europe. X.25 is not offered within the WorldPartners framework.

(*) WorldPartners is a limited partnership promoted by AT&T basically to set performance standards, agreed and respected by the members of the partnership, in respect of given telecommunications services. Such standards are a way to extend connectivity for those services outside the borders of each of its members. Members of the WorldPartners Company have invested in it and participate, among other things, in the definition of the standards. Members of the WorldPartners Association are distributors of the services in given territories. The agreements regarding Unisource and AT&T UK's entry into WorldPartners have been separately notified to the Commission (Case No IV/35.490 — WorldPartners).

(*) The WorldPartners portfolio of WorldSource services is limited to the offering of virtual network services (VNS), frame relay and private lines. For each of these, a common denominator of features is defined. Such common denominator would be provided by each WorldPartner's member or associate. Services complying with the common denominator can bear the WorldSource trademark.

(*) In this respect, according to the parties, a customer receiving international and national services from a distributor of Uniworld, will clearly perceive that he is receiving two different kinds of services.

(*) Such service is basically the same Phase II service jointly developed by Unisource and AT&T in the framework of the EVUA bid.

be that of UCS and, in some cases, that of third-party suppliers. The Uniworld VNS [11] service is defined as 'multilateral', as opposed to the existing IVPN services of the Unisource shareholders that are available abroad depending on bilateral agreements concluded by each telecommunications operator (TO),

— as regards data networks, during 1996 to 1997, Uniworld will integrate the existing international data networks assigned by the parents. These networks are not currently interworkable as they are based on different equipment (mainly Nortel for X.25 and frame relay in the case of Unisource and Stratacom for frame relay in the case of BCS-E). As a first stage, a network to network interconnection — to be developed by manufacturers of the equipment installed — will improve seamlessness. ATM will then gradually be introduced — together with UCS — so that an integrated voice-data platform will be available by the year 2000. Part of the integration will involve the standardization of delivery platforms for each service. The combined network will be expanded by the setting up of additional points of presence (POPs); in particular, in key markets like Germany and Italy, where current coverage is very poor. Integrated traffic will make feasible the installation of POPs in countires where it would not be economical to do so for a single type of traffic,

— as regards data services the Uniworld services will initially be based on the current pan-European offerings of Unisource and AT&T's BCS-E, but they will offer a better geographical coverage than these existing offerings, given the different POPs of the existing data networks of the parents.

In addition, Uniworld will roll out new data services like high speed LAN [12] interconnect, high speed bandwidth services, interworking and Internet access to big business users (offering improved quality and security). Most of these will be introduced by the end of 1996 and will generally be available in 1997.

Alongside these, other services to be launched (in early 1997) are integrated (voice and data) services [13] like video-conferencing, fixed-mobile integration, teleworking, bandwidth on demand and call centres including automatic re-routing on real time [14], and remote network management for customer's data networks,

— the domestic data services and networks in the home countries and the UK will not be contributed to Uniworld but will remain in Unisource and AT&T UK respectively. The respective Unisource shareholder will act as distributor of Unisource for these domestic products in each home country,

— messaging covers electronic mail and EDI (electronic data interchange). Current plans foresee the use by Uniworld of AT&T's messaging platform (Easylink), instead of Unisource's existing one (400Net).

All of the above services are divided between exclusive [15] (virtual network services — VNS/IVPN/closed user group voice services, X.25 bearer service, frame relay service, SNA service [16], managed bandwidth service and X.400 bearer service) and non-exclusive services (call centre services, LAN interconnect services, messaging services, VSAT satellite services, network-related outsourcing, network facilities management, private network provisioning, Internet access services and data VPN services).

5. Uniworld's operating functions: sales, marketing and services

(a) *Sales*

Uniworld will be responsible for negotiating distribution agreements and third-party commercial sales agreements. In addition, it will work closely with distributors to

(11) It also offers more features (than the minimum common denominator) but less geographical coverage (limited to Europe), than the WorldSource VNS service that Unisource and AT&T UK are beginning to distribute in continental Europe and the UK respectively.

(12) Local area network.

(13) The EVUA has issued in 1996 a new tender for integrated voice/data services.

(14) Service applications will include reservation centres, customers service support centres and maintenance and warranty support centres. These services require European-wide free phone numbers (0 800).

(15) See below under point E (2) (c).

(16) SNA is an extension of the frame relay service that offers network access interfaces suitable to meet the requests of customers working within an IBM environment.

ensure that offers to customers respond to their expressed needs and will provide sales training for Uniworld employees and distributors. Uniworld will also support the development of a single integrated sales process incorporating technical support, bid management, contract support and service ordering.

In respect of complex bids, Uniworld will assist in or assume direct leadership responsibility.

(b) *Marketing*

Uniworld will be responsible for developing the service portfolio marketing strategy including the overall pricing strategy (retail pricing will however be the responsibility of distributors). It will also conduct competitive assessment and customer analysis and assist product managers in developing individual service strategies. Uniworld will develop marketing communications products including advertising. It will also support bid management to non-standard requests for proposals requiring the integration of multiple services.

(c) *Services*

Uniworld will define, control and own service definition and define and control service platforms (i.e. the software installed in the equipment that controls the voice and data traffic over the backbone network), and customer care elements. It will also be responsible for the life cycle management of all services in its portfolio. In addition, it will determine the overall architecture/technology/platform evolution that enables the services to be competitive and efficient in terms of features, functionality, customer service attributes and cost. In so doing, it will seek to accommodate the reasonable needs of its affiliated and other key non-affiliated suppliers. The resulting plans will be approved by the supervisory board by supermajority.

E. THE NOTIFIED AGREEMENTS

1. Agreements

The original notification comprised the Joint Venture and Shareholders Agreement and the following agreements and other documents annexed to it:

— the articles of association of Uniworld NV,

— the limited partnership agreement of Uniworld CV (now Uniworld VOF),

— the by-laws of Uniworld NV and Uniworld CV (idem),

— the parental support agreement,

— principles for asset selection,

— the supply agreement between Uniworld and UCS,

— the master distribution agreement,

— principles for IPR negotiations, and

— the network evolution plan.

2. Contractual provisions

(a) *Supply agreement with Unisource Carrier Services (UCS)*

Uniworld will be a service provider and thus will not develop or operate its own basic switching and transmission systems, but will purchase these capabilities from suppliers. The preferred supplier will be UCS, a subsidiary of Unisource NV responsible for managing the international networks of the Unisource NV shareholders ('preferred' means that Uniworld will be free to contract with other suppliers if the demanded services are outside the scope of UCS or in case UCS does not or cannot compete with the terms and conditions of other suppliers).

Under the supply agreement, UCS will deliver basic switching and transmission elements, including the main switching elements and the international switching centres of the Unisource shareholders, and will route the traffic to the agreed destination or point of interconnection as determined by the service database administered by Uniworld. In this respect, UCS will provide to Uniworld interconnection and transmission capacity that will include international, national and local leased lines and international and national PSTN terminations.

UCS will have a contractual requirement to provide the capacity necessary to meet Uniworld's traffic forecasts at agreed performance levels. The price for UCS' services is guaranteed for 5 years. The average minute/price charged by UCS will be reduced provided that Uniworld delivers the agreed total volume of international traffic

and uses the agreed capacity of international bandwidth. Should that not be the case, prices charged by UCS will be adjusted accordingly.

The Parties have indicated that similar price guarantees will be provided to third-party customers that commit to deliver similar volumes of international traffic.

In addition, the intention of the parties is to use the UCS' pan-European network for all internodal bandwidth needs of the Uniworld services.

Uniworld will collect customer care information for billing, account inquiry, etc. In addition, Uniworld will also own the service control points that maintain the real time definition and realization of the Uniworld services. Such points will be connected to the UCS network.

Uniworld's CEO will attend UCS' board meetings — without the right to cast any vote — concerning network planning and other matters concerning the supply agreement.

(b) *Relationship between Uniworld and its parents*

Under Article 10 of the Joint Venture Agreement, Uniworld:

— shall purchase supplies on a best available basis in accordance with rules, regulations and guidelines of the European Commission and the relevant national regulatory agencies. 'Best available' refers to price, quality, features and functions, capacity and geographical coverage purchased from affiliated parties offered (or not) by them to third parties,

— shall be provided access to networks and underlying facilities of any company involved directly or indirectly in Uniworld at non-discriminatory competitive prices. Such prices charged to Uniworld shall be competitive in view of prices charged for similar services by competitors of the affiliated companies and shall be consistent with applicable national and European law, including obligations of non-discrimination and prohibitions of cross-subsidizations. Neither must they be more advantageous than the prices charged for similar services in similar circumstances to other customers of such affiliated companies,

— shall have a 'privileged subsidiary' status, with regard to terms and conditions for transactions between Parties for resources and services from these companies. In this respect, it will be treated as though it were a subsidiary of Unisource, its shareholders or AT&T in respect of services, to the extent that there are no contractual restrictions with third parties prohibiting it,

— will have a 'most favoured customer status' from Unisource, its shareholders and its affiliated companies and AT&T for the provision of other related commercial services, such as the purchase of capacity. Uniworld will be offered 'best customer' prices for services which are in principle available both to Uniworld and to non-related customers in the marketplace.

(c) *Non-competition*

Under Article 12 of the Joint Venture Agreement, the parents agree with Uniworld VOF that they shall not incorporate a business or engage in exclusive Uniworld services (as described above) or participate in any joint venture or other cooperative arrangement engaged in the provision of exclusive Uniworld services.

The following activities are excluded from the non-compete provisions:

— the development and offering to customers of a parent's national services and international services based on bilateral arrangements,

— services that compete with non-exclusive Uniworld services, and

— competing offers of third parties (basically Infonet's services, but also Concert's or Atlas's) who have decided to market their services through the Unisource shareholders.

The non-compete obligation shall not affect the access by third parties to any reserved and basic network of the Parties and their affiliated companies, nor shall it affect any parent obligation to make available reserved and basic services.

All non-competition obligations of the parents and their affiliated companies would be valid until the termination of the Joint Venture Agreement. After termination no participant shall during the original duration of a customer contract solicit those existing customers with respect to which the other Party has been assigned under the termination rules the right to provide Uniworld

services (Article 16 (3) (1) (F) of the Joint Venture Agreement). Finally, Article 16 (3) (2) (B) (ii) of the Joint Venture Agreement provides that a company exiting (from Uniworld) shall, under the non-permitted exit (17) provision as from the date of the non-permitted exit and for a period of 12 months continue to be subject to Article 12 of the Joint Venture Agreement.

(d) *Distribution*

(1) *Distribution of services*

Uniworld will distribute its services through local distributors. Uniworld intends, wherever appropriate, to own or control them. Distributors are responsible for managing (and can own) local/national networks. However, Uniworld will approve the delivery platforms to be used by distributors in delivering Uniworld services, the overall architecture of the combined distributor/Uniworld network and the location and capacity of the gateways to be used to interface the distributor's and Uniworld's networks.

In the home countries, the respective Unisource shareholder will be the exclusive distributor. AT&T UK will be the exclusive distributor in the UK and AT&T will act as the exclusive distributor in the US of Uniworld's services to be delivered in Europe. In addition, AT&T could sell Uniworld services to a European-headquartered firm which vested its European and/or worldwide telecommunications decisions with its US subsidiaries or locations.

In other countries where Unisource, AT&T, the Unisource shareholders or any of their affiliated companies have selected a national partner, the latter will be the preferred distributor.

Distributors will pay to Uniworld the established transfer price for any given service. Uniworld will provide distributors with lists of recommended retail prices. Distributors, however, are free to set their own retail prices. Originally such prices have to be communicated to Uniworld. That was required in order for Uniworld to provide billing services to distributors and final customers (using AT&T's proprietary billing platform). However, the Commission objected to that on grounds that Uniworld could use such information to influence resale price by distributors. On that basis, the Parties modified such provision so that the obligation to communicate retail prices to Uniworld has been eliminated. In addition, the Parties have ensured that Uniworld will not use information regarding retail prices received from a distributor for fixing or attempting to fix resale prices.

An initial distribution of potential customers has been made based on the location of the decision making units (DMU) of the top target customers. However, the final assignment of a customer to a distributor depends on the choice of the customer. In any event, it is expected that most sales will involve a lead distributor, one or several support distributors and Uniworld. Support distributors will receive from Uniworld a distributor fee of 4 % of the transfer price.

In addition, Uniworld plans to create a 'Uniworld Association' after the model of the WorldPartners Association. It will have a light structure made of a permanent secretariat and an executive forum chaired by the CEO of Uniworld. The Uniworld Association will serve as a platform for discussion between Uniworld and its distributors, so that the latter will be provided an opportunity to influence Uniworld's services development, processes and technology (i.e. the growth of the network). The Association will act as a central coordinator between distributors for ensuring that the European requirements of customers are met in the most efficient manner.

The Parties have indicated that no actual retail prices (or related conditions) of Uniworld end-user services will be discussed in the Association and that market trends in pricing will only be discussed in general terms without disclosing sensitive customer pricing information.

The distribution licences extend to the Uniworld and WorldSource services in the territory granted.

The exclusivity provisions oblige Uniworld and the distributor not to actively seek customers for Uniworld's exclusive services in the distributor's territory, as regards Uniworld, and outside it, as regards the distributor, respectively.

(17) Under Article 16 (3) (1) neither parent company of Uniworld may terminate the agreement before 1 January 2000. Most terminations before that date, in particular in case of material breach of the agreement, non-permitted transfers of shares or withdrawal, bankruptcy or suspension of payments by a party, are deemed to be non-permitted exit.

(2) *Existing customer contracts*

Existing customer contracts that fall within the scope and the territory entrusted to Uniworld, concluded by Unisource or AT&T prior to the setting up of Uniworld, will be assigned to:

(a) Uniworld, as regards the right to provide services which it shall deliver at transfer prices to the specific distributor; and

(b) the Uniworld distributor, as regards the customer relations and distributions rights.

These customers will serve as a customer base for Uniworld. Such customer base is not negligible in view of the number of contracts already signed by its parents.

The following rules will apply in the assignment of these existing contracts:

(i) the respective parent distributor will assume customer contracts (and the associated financial obligations) for customers whose decision-making unit (DMU) is in any of the home countries, the UK or the US;

(ii) for existing customer contracts where the DMU is outside the abovementioned countries, the contract will be assigned to the new distributor in that country. The actual conditions of the assignment will be a matter of negotiation between the owner of the contract and the new distributor;

(iii) in countries where no Uniworld distributor has been nominated yet, Uniworld will manage the distribution activities.

The priority considerations are the maintenance of customer satisfaction and customer preference.

(3) *Global account management programme*

Uniworld will organize an international support organization which will support a global account management programme created to enhance business relationships with multinational customers. It will focus on prospective customers which because of size and/or strategic importance will be selected by Uniworld's international sales board. Instead of being attributed to a given distributor in accordance with the normal procedures, a global account team will be formed for each of these customers comprising a global account team leader and at least one regional or national account manager. The global account team will report to Uniworld's multinational accounts group.

The global account team will coordinate and involve the worldwide resources of Uniworld, AT&T Business solutions, WorldPartners, Unisource and its shareholders as required in order to better serve the global needs of that category of top customers on am one-stop-shopping basis. In this respect, the global account group will request support from any affiliated or related company through a defined worldwide sales support process that will allow for a simple, low-cost sales support coordination process.

According to the Parties, the global account management programme will be a very large determinant of the relative success in the marketplace.

F. RELEVANT MARKET

1. **Product market**

Services within the business scope of Uniworld fall within the customized package of corporate telecommunications services and packet switched data communications product markets as described in the Atlas and Global One Decisions (10).

Services within those two categories are mainly demanded by large multinational corporations, extended enterprises, as well as major national and other intensive users of telecommunications, often as an alternative to self-provision. The requirements of such users, that extend to all products or corporate services provided by Uniworld, were discussed in detail in the BT-MCI (11) Decision. Providers of such services are expected to take full responsibility for all services provided from 'end to end'.

Very large companies demand that locations geographically dispersed across different territories be

(10) Commission Decisions of 17 July 1996 relating to proceedings under Article 85 of the EC Treaty and Article 53 of the EEA Agreement (Case Nos IV/35.337 — Atlas, and IV/35.617 — Global One). OJ No L 239, 19. 9. 1996.

(11) Commission Decision of 27 July 1994, OJ No L 223, 27. 8. 1994.

linked. The services required in this connection (i.e. provision of sufficient delivery capacity and in-country support) must be supranational in nature and respond to a very particular set of features including the provision of services across multiple borders at consistent service levels, the availability of delivery schedules; the irrelevance of time zones, languages and currencies; and making customers assume service is local regardless of where such service is provided from. Truly global services (i.e. connecting locations of companies in countries or territories located outside the main industrialized areas of the world) are an extreme case.

The provision of such services would appear to customers to be seamless. However, the provision of real seamless services is now only at a very rudimentary stage in particular as regards customer care and global billing features, and the establishment of infrastructure abroad, the latter in view of differences in regulatory regimes between countries.

2. Geographic market

Due to the cost structure of advanced corporate services, notably the cost of leasing the required infrastructure, prices of such services are related to geographic coverage, as is the cost of additional features (e.g. one-stop-billing, help-desk and technical assistance around the clock, customized billing). In that respect, and following the reasoning applied in the Atlas and Global One cases, demand for these services exists in at least three distinct geographic markets, namely at global, cross-border regional and national levels.

Uniworld will be active in the cross-border regional layer of the geographical market, that in this case will be the provision of such services on a pan-European basis (including national extensions of the latter).

Given the links between Uniworld, Unisource and its shareholders, and given the inextricable links between all notified cases involving Unisource, Uniworld is thought to have also an impact at least on the domestic markets of the European home countries, where each Unisource shareholder enjoys a dominant position.

3. Competition in the markets

(a) *Cross-border regional market: the market for non-reserved corporate telecommunications services in Europe*

According to AT&T, the European market place currently will resemble the US market that existed between 1983 and 1993, during which period essential restructuring of the telecommunications industry occurred as a result of market competition, new services, pricing structures, marketing sales and services strategies. The result was a very big shift in market dynamics, significant entry and unparalleled growth.

According to the Parties, the addressable size of the European market will grow from US $ 1,9 billion in 1995 to US $ 4,2 billion in 2005 for IVPN and from US $ 2,9 billion in 1995 to US $ 4 billion in 2005 for data services.

BT-MCI's Concert and Atlas/Global One are expected to become major players on that market. To those it is necessary to add some other significant players like Infonet, Sita or IPSP.

(b) *National markets in Europe*

Each of the shareholders of Unisource face a number of competitors in their respective domestic market for packet switched data communication services. So, such services are completely liberalized in Sweden, there are at least five licences granted in the Netherlands, eight in Spain and several in Switzerland. Some of those companies (such as Spain's BT Tel or Sweden's Telenordia) are also the domestic extensions of the global alliances (BT in those two cases).

4. Market shares of the parties

(a) *Cross-border regional market*

Market shares figures for the cross-border regional market are highly unreliable. Their emerging and evolving nature and the large traffic volume of big corporate customers are explanatory arguments for such unreliability.

Current combined market share in the EEA and Switzerland of the parties is less than 10 % for data services and 10 % for messaging. No data are available for IVPN voice services and network related outsourcing.

(b) *National markets*

As regards domestic packet switched data communication services, in 1995, Telia had 78 % in Sweden ([20]), PTT Telecom and Telefónica over 95 % in the Netherlands and Spain and Swiss Telecom nearly 100 % in Switzerland. Market figures in respect of the overall domestic telecommunications services were 91 % for Telia, near 100 % for PTT Telecom, 95,7 % for Telefónica and near 100 % for Swiss Telecom.

G. CHANGES MADE AND UNDERTAKINGS GIVEN FURTHER TO THE COMMISSION'S INTERVENTION

Certain features of the notified transaction appeared to be incompatible with Community competition rules. Consequently, the Commission by letter of 7 May 1996 informed the Parties of its concerns. In the course of the notification procedure the Parties have amended the original agreements and given undertakings to the Commission.

1. Contractual changes

As described before, the Parties committed to amend the following provisions in the notified agreements:

(a) *the communication of retail prices to Uniworld*

The Parties agreed to remove the stipulation that distributors are obligated to communicate price information to Uniworld regarding specific customers ([21]).

(b) *strategic advisory boards*

The parties agree to amend the notified agreement in respect of the strategic advisory boards to stipulate that:

— recommendations by the strategic advisory boards shall not be binding on the participants and their pertinent affiliated companies, and

— no information relating to prices and commercial conditions of products and services outside the business scope of Uniworld will be exchanged in the strategic advisory boards.

2. Undertakings given by the parties

In addition, the Parties have provided the following behavioural undertakings:

(a) *Undertakings by Unisource NV and all of its shareholders*

(1) Unisource and every one of its shareholders undertakes that it or its subsidiaries will not offer terms and conditions to Uniworld in respect of access to basic switched transmission capacity and leased lines as well as interconnection to PSTN and PSDN networks in the home countries of the Unisource shareholders which are discriminatory in favour of Uniworld.

(2) Unisource and every one of its shareholders undertakes not to misuse confidential information obtained from third parties to the benefit of Uniworld and will in relation to Uniworld ensure and facilitate the respect of the undertakings related to misuse of confidential information given in the context of the Unisource — Telefónica case (Case No IV/35.830).

(b) *Undertakings by all Unisource shareholders*

(3) Every shareholder undertakes not to grant any cross-subsidies to any entity created pursuant to the Uniworld agreements funded out of income generated by any business which they operate pursuant to any exclusive right.

(4) Every shareholder undertakes that it will not tie in the sale of any service provided by Uniworld with any service provided by each of them. Each will moreover, for as long as it has exclusive or special rights to provide telecommunications services and/or infrastructures, only make combined offerings of Uniworld and its own services in a way that the customer can identify in the contract forms the price charged as well as the other terms and conditions for these services and it will ensure that each of these components is separately available at equivalent conditions.

(5) Every shareholder undertakes not to bundle the provision of Uniworld (international) services with the provision of domestic services outside the scope of Uniworld.

([20]) In all cases through the respective UBN domestic subsidiary.

([21]) Where a distributor chooses not to communicate its retail prices to Uniworld, then clearly that distributor's customers would not be able to benefit fully from Uniworld's centralized billing capacity, as described above.

3. Position of AT&T

During the assessment of the case, AT&T made a detailed description of its obligations under US regulations in respect of its international facilities and services, in particular regarding interconnection to its networks. AT&T further confirmed its intention to abide by all relevant US legislation and FCC rules to which it is subject from time to time in respect of its international facilities and services.

In addition, AT&T offered to the Commission the following:

(a) AT&T undertakes to advise DG IV promptly of any complaint filed with the FCC regarding access to or interconnection with AT&T's international facilities, including any complaint filed with the FCC regarding bilateral correspondent arrangements, by telecommunications operators or service providers from the EEA or Switzerland. AT&T further undertakes to inform DG IV of any final decision taken by the FCC in regard to any such complaint;

(b) with respect to operators with international facilities licences in the EEA and Switzerland with whom AT&T today has an accounting rate agreement, and for traffic sent in the context of the bilateral correspondent regime, AT&T undertakes to offer cost-based accounting rates that, in all cases, would be no higher than the lowest accounting rate established between AT&T and any Unisource shareholder;

(c) with respect to operators with international facilities licences in the EEA and Switzerland with whom AT&T may in the future establish an accounting rate agreement, AT&T undertakes to offer cost-based accounting rates that, in all cases, would be no higher than the lowest accounting rate then in effect between AT&T and any Unisource shareholder.

H. THE COMMISSION'S INTENTIONS

On the basis of the foregoing, the Commission intends to take a favourable view pursuant to Article 85 of the EC Treaty and Article 53 of the EEA Agreement and to grant to Uniworld an individual exemption pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement. Before doing so, it invites interested third parties to send their observations within one month of the publication of this notice to the following address, quoting the reference 'IV/35.738 — Uniworld'.

European Commission,
Directorate-General for Competition (DG IV),
Directorate C,
Rue de la Loi/Wetstraat 200,
B-1049 Brussels;
Fax: (32 2) 296 98 19.

Notice pursuant to Article 19 (3) of Council Regulation No 17 (1) and Article 3 of Protocol 21 of the EEA Agreement concerning a request for negative clearance or an exemption pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement

(Case No IV/35.830 — Unisource — Telefónica)

(97/C 44/05)

(Text with EEA relevance)

A. INTRODUCTION

On 4 March 1996, Unisource NV (hereinafter 'Unisource') and Telefónica filed a modified agreement providing for the incorporation of Telefónica to Unisource as a fourth equal shareholder.

Unisource NV was established on 24 April 1992, was a 50-50 joint venture between PTT Telecom BV, the Dutch telecom operator, and Swedish Telecom International, a subsidiary of Televerket, the predecessor of Telia AB, a Swedish telecom operator, for the purpose of concentrating the international value added networks of the two Parties. The Parties effectively transferred the corresponding networks as from 1 January 1993.

The joint venture was first expanded by an entry into Unisource Satellite Services BV of Swiss PTT on 4 November 1992 and later by its entry into Unisource NV on 1 July 1993. During 1994, Unisource and Telefónica started negotiations aimed at the entry of Telefónica into Unisource as a fourth shareholder. A result of these negotiations were the original agreements notified to the Commission under the merger control regulation on 29 September 1995.

On 6 November 1995, the Commission decided that the notified transaction was not a concentration. Following the Commission's decision, and at the request of the parties the notification was converted into a notification under Regulation 17.

Almost at the same time, following further negotiations, an agreement was reached by the parties on 22 November 1995 as to the value of Telefónica's packet switched data networks (PSDN). As a consequence, the Parties modified the structure of the transaction, so that, Telefónica will contribute to Unisource its subsidiaries Telefónica Transmisión de Datos SA (owner of the Iberpac and Red Uno networks) and Telefónica VSAT SA in exchange for a 25 % participation in the capital of Unisource.

(1) OJ No 13, 21. 2. 1962, p. 204/62.

B. TELEFÓNICA AND THE EXISTING SHAREHOLDERS OF UNISOURCE

— Telefónica SA is the incumbent telecom operator in Spain, where it provides national and international telecommunications services and infrastructures.

Telefónica is a private company listed in the stock exchange. However, the Spanish State has in all a 21,16 % shareholding and has substantial powers to control the company. In particular, it nominates the chairman of the board and 5 of the board's members (out of 23). In addition, the State is further and directly represented by a delegate (2) which is also a member without voting power of the board. The delegate is at the same time the director general of the Dirección General de Telecommunicaciones (DGTEL, the existing regulator).

The remaining shares of Telefónica are in the hands of two big Spanish banks and the biggest savings bank (around 11 %), American pension funds and other non-Spanish shareholders (25 %). Around 300 000 small private investors account for the rest.

The consolidated turnover of the Telefónica group in 1995 was Pta 1 740 557 million (around ECU 10 927 million) of which the Telefónica mother company accounted for Pta 1 372 674 million (ECU 8 617 million).

Telefónica undertook a change of its corporate structure in 1994. As a result, some of its activities (data transmission, mobile telephony, international businesses, multimedia, payphones and publicity) have been transferred to separated subsidiaries. The basic telephony business (including infrastructure, leased lines and international communications) remains with the corporate core.

Telefónica is the only European telecom operator operating voice telephony in the US through Telefónica Larga Distancia de Puerto Rico (TLD). In 1995, the Federal Communications Commission (FCC) of the US classified TLD as a non-dominant

(2) Under the terms of a Royal Decree Law recently adopted by the Spanish Parliament, the post of delegate will disappear as of 1 January 1998.

carrier for international traffic (except for routes to Spain, Argentina, Chile and Peru) and also authorized TLD to originate and terminate long-distance domestic US traffic from all of the US territory.

Telefónica's was Europe's first PSDN. Based on a proprietary standard, the networks began operations in 1973 with migration to an X.25 service by the end of the 1970s. A domestic frame relay service was introduced in 1995,

— PTT Telecom BV is the telecom operator in the Netherlands, where it provides national and international telecommunications services and infrastructure.

Royal PTT Netherlands NV (KPN), a public limited liability company, owns 100 % of the shares in PTT Telecom. Currently the Dutch State holds approximately 44 % of the outstanding ordinary shares of KPN (which is also the owner of PTT Post).

KPN's turnover in 1994 was Fl 18 592 million (ECU 8 769 million), of which Fl 12 686 (some ECU 6 000 million) corresponded to PTT Telecom.

By the end of June 1996, a consortium formed by PTT Telecom and Telia was selected as the strategic partner for a stake of up to 35 % in Telecom Eireann, Ireland's State-owned telecommunications company,

— Schweizerische PTT-Betriebe (Swiss PTT) is an incorporated public-law institution which is part of the Swiss federal administration. It encompasses post and telecommunications. Total turnover of Swiss PTT in 1994 was Sfr 13 838 million (ECU 8 989 million) of which telecommunications (services and infrastructures) accounted for Sfr 9 256 million (ECU 6 010 million).

Swiss PTT's future is under discussion, and it is planned to divide it up into Post and Telecom AG, the latter being a joint stock company with limited liability in which the State will keep a majority participation (51 %),

— Telia AB is a telecom operator providing domestic and international telecommunications services and infrastructure in Sweden. It is a limited liability company incorporated under Swedish law. All shares are owned by the Swedish State.

Telia's turnover in 1995 was Skr 41 066 million (ECU 4 729 million).

Telia is currently in the middle of a substantial reorganization that will completely change its structure. As a result, the provision of services will be separated from the provision of networks. Thus Telia Network Services will support all the other Telia's business areas.

C. THE JOINT VENTURE: UNISOURCE NV

Unisource NV is a holding company active in the telecommunications sector that incorporates seven operating subsidiaries. Total turnover of the group in 1994 was Fl 933 million (ECU 443 million). Net result were losses of Fl 41,072 million (ECU 20 million).

1. Current structure of Unisource NV

Unisource is governed by a management board and a supervisory board.

The management board, which is entrusted with the day-to-day business of Unisource (3), is composed of three members appointed by the general meeting of shareholders by unanimity. The three members are the president and chief executive officer, the executive vice-president and chief financial officer and the executive vice-president and director of Business Services. All decisions by the management board are adopted by a majority of the votes.

The supervisory board will exercise supervision over the management board conduct of affairs and over the general course of business in Unisource and the operating companies. The supervisory board shall be composed of four members appointed by the general meeting of shareholders. Each shareholder nominates one of them. There would be a chairman. The position of chairman will rotate every two years.

Most resolutions of the supervisory board (including the annual budget and business plan) shall be adopted by unanimity of the votes cast (4).

Finally, every operational subsidiary has its own board of directors or management team entitled with the day-to-day business of the subsidiary.

(3) Some decisions will nevertheless require the approval of the supervisory board, including among others, acquisitions, entering into agreements and investments.

(4) Absolute majority will be required for resolution of disputes arising out of transactions between Unisource and any of the shareholders.

The supervisory board has to report to the general assembly of shareholders which, for instance, has to approve the annual accounts.

2. The Unisource alliance: the one telecom country

According to the Unisource's 'Organization and Governance' document, one of the aims of the alliance is 'to improve time to market and cost effectiveness by merging or coordinating activities of the parents and creating service transparency between mother countries'. This is the definition of what the Parties call 'the one telecom country'. In practical terms the concept translates into a structure, which is still independent from the structure of Unisource NV as described below, made of the following alliance boards:

— network board (NB). Its mission will be the adoption of strategic decisions concerning network questions to establish one transparent network and to use all opportunities to reduce costs and the harmonization and integration of national networks and architectures of the shareholders between them and with Unisource Carrier Services (see below). Membership will include the presidents of the companies involved;

— service and distribution board (S&DB). Its missions will be the adoption of strategic decisions concerning the joint service portfolio and its coordination, the harmonization and integration of national services of the parents between themselves and with the relevant Unisource services;

— R&D board. It will be responsible for the adoption of strategic decisions regarding annual joint research and development of portfolios and regarding R&D optimization. It will also support the NB and S&DB;

— purchasing board (PB). It will be mainly responsible for creating common opinions and making decisions about areas worth common purchasing and for harmonizing the process of purchasing and logistics both in support systems and in approach to the supplier market;

— IT board. It will be responsible for the adoption of strategic decisions concerning planning, provisioning and implementation of IT across the Alliance members, the harmonization and integration of national IT systems between the parent companies and with the IT systems of Unisource.

3. Scope of activities of Unisource NV

The Unisource product portfolio is developed along the lines of liberalization of the EU telecommunications market and follows customer demand. According to Unisource, the activities of the group can be split into three main areas: business services, personal services and network services. The following subsidiaries operate in each of these areas:

(a) *Business services*

Unisource Business Networks (UBN) is responsible for the provision of pan-European, seamless, end-to-end data network services, managed bandwidth services, messaging and outsourcing. UBN has subsidiaries in Sweden, the Netherlands, Switzerland, Spain, Germany, the United Kingdom, Belgium, Luxembourg, Norway, Denmark, Finland and Italy.

In addition, the respective domestic packet switched data networks (PSDN) of the Unisource initial parents were contributed in 1993 to the respective domestic UBN subsidiaries.

At the moment the situation regarding the integration of the above networks is as described below; each network is based on the same technology (Nortel (5)) and they are interfaced through a common backbone network owned by Unisource (Unidata (6)) using proprietary interfaces (with the exception of the Netherlands, see below):

— the Netherlands: the domestic X.25 data network (Datanet 1) is owned by UBN Netherlands. It is interfaced to Unidata by a X.75 interface. Domestic only data services in the Netherlands are offered by PTT Telecom as exclusive distributor of UBN Netherlands,

— Sweden: the domestic X.25 data network (Unidata Data Pack) is owned by UBN Sweden. It is fully integrated with Unidata using Nortel's proprietary internal network protocol (INP). Domestic only data services in Sweden are offered by Telia as exclusive distributor of UBN Sweden,

— Switzerland: the domestic X.25 data network (Telepac) is owned by UBN Switzerland. It is fully integrated with Unidata using Nortel's proprietary INP. Domestic only data services in Switzerland

(5) Nortel — Northern Telecom — is a Canadian manufacturer of communications equipment.

(6) As for Telefónica's PSDN, Iberpac is interfaced with Unidata through a X.75 interface and Red Uno was integrated with Unidata in 1995.

are offered by Swiss PTT as exclusive distributor of UBN Switzerland.

The respective UBN subsidiaries own and operate the data nodes, the associated databases and the network control centres. Basic services (leased circuits) are provided to the UBN domestic subsidiary by the relevant Unisource shareholder. The latter resells the Unisource services to its local customer base. The networks are used to support the offering of pan-European services and purely domestic services. The country specific domestic services are branded Unisource.

The three networks are being upgraded to offer also frame relay, again using Nortel switches. That Nortel network is being interconnected to another frame relay network of Unisource that uses Stratacom (') technology by using network-to-network interconnections specifically developed by Nortel and Stratacom.

The three PSDN and Unidata share their international X.75 gateways. Finally, the respective PSDN services available in each country are being aligned with the Unisource's Unidata PSDN service to create a basic PSDN service with a wider reach.

Unisource Voice Service (UVS) is in fact a business unit of Unisource offering pan-European voice IVPN services and other closed user group services.

Unisource Satellite Services (USS) offers international value-added, voice, video, text and data communications using fixed and VSAT satellite terminals. It allows UBN services to be extended to remote areas outside terrestrial coverage.

(b) *Personal services*

Unisource Card Services (UC) offers personal and corporate post-paid calling cards.

Unisource Mobile (UM) is a provider of pan-European GSM mobile services. It also applies for licences for mobile networks operators in Europe, outside the home countries.

UM has three subsidiaries, GEAB AB in Sweden, GEAB Norge AS in Norway and TMG GmbH in Germany which act as distributors and retail outlets for the national mobile services in these countries. So GEAB acts in Norway as distributor of Telenor Mobile and Netcom and in Germany, where TMG is a service provider for the German D1, D2 and E Plus networks.

UM is currently developing a virtual mobile network to provide seamless pan-European mobile telephony services based on GSM technology at a significant discount to standard roaming tariffs.

(c) *Network services*

Unisource Carrier Services (UCS) is currently responsible for managing the international networks (*) of the shareholders of Unisource. It is organized as a management company given that the Unisource shareholders are not permitted to assign their international networks and licences to UCS. As UCS is not an ITU-recognized telecom operator, nor is it allowed to negotiate with other telecom operators in its own name for transit traffic.

UCS is a crucial element for Unisource. In the future it will provide carrier services to other services providers. In this connection it is building a pan-European network (PEN) with global connectivity based on SDH (*) technology in those countries where legally permissible.

The PEN will be an integrated, centrally managed network that will provide seamless telecom services in Europe. It will take advantage of its presence in many European countries to provide an advantage to the current system of bilateral settlements.

The PEN will be deployed in two phases. The first phase, aimed to be completed in the third quarter of 1996, will be a managed high capacity network between the four home countries with centralized management

(') Stratacom is an US manufacturer of communications equipment. It has a substantial presence in frame relay switches.

(*) The international networks include the international switching centres in the three countries, the international transmission maintenance centres, the international network management centres, satellite earth stations, sea cables and other international transit capacity, the ATM- and SDH-cross connects and the international signalling transfer points of the said companies in the said countries and any other cross-border facilities of the Unisource shareholders in the countries involved.

(*) Acronym for synchronous digital hierarchy; an international standardized transmission technique which enables greater capacity in existing fibre-optics networks, better remote control and automatic rerouting in the case of faults.

and customer support. The second phase is aimed to be completed on 1 January 1998. By then it will be extended to non-shareholder countries and enhanced in order to provide signalling and intelligent network services to customers.

The services provided on the PEN will include switched transit services, switched hubbing services, managed bandwidth services, delivery of PSTN and ISDN traffic and signalling services.

At present UCS only offers services to the shareholders of Unisource and Uniworld. However, in 1997 it will start providing network services to third parties in its own name on the basis of network services purchased from the Unisource shareholders (and other operators) and resold in an integrated manner to service providers. The terms and conditions for the provision of network services will be laid down in supply agreements between each Unisource shareholder and UCS (10).

Outside that structure there is another subsidiary, Itema (to be renamed Unisource Information Services) active in the information technology field. It provides information services (IS) and information technology (IT) services to the Unisource group and to identified common projects in the Unisource Alliance. It also plays a leading role in the harmonization process between the IS/IT services of the Unisource shareholders.

A management agreement has been signed to subcontract the management, coordination and supervision of certain projects and programmes to Itema. It receives a general management fee for its activities.

D. THE NOTIFIED AGREEMENTS

1. Agreements

The parties have notified the following agreements regarding Unisource:

— the Joint Venture and Shareholders Agreement and its Appendices,

— the Contribution Agreement,

— the articles of association,

— the by-laws,

— the share issuance deed, and

— the Non-Compete Agreements for UBN, USS, Unisource Cards and Unisource Mobile.

2. Contractual provisions

(a) *The non-compete provisions*

In accordance with Article 19 of the Joint Venture and Shareholders Agreements, the Parties are free to conduct, outside Unisource and independently of each other all activities whether or not within the areas of cooperation. Nevertheless, at such time as they agree to develop or acquire or participate in an operating company, they shall negotiate and agree to a non-competition agreement specifically geared to the business activities to be conducted by that operating company.

As of now, for such non-competition agreements have been concluded in respect of the activities of UBN, USS, UC and Unisource Mobile:

— under the Non-Competition Agreement for UBN's activities, the four parties decide to concentrate their international value added data network services in UBN. Thus, and except with regard to Infonet services, none of the four will offer comparative services in parallel to the UBN portfolio. Each of them will offer to their respective national markets the UBN product portfolio as an agent or distributor of UBN,

— under the Non-Competition Agreement for Unisource Satellite Services, none of the four will offer comparative VSAT-services in parallel to the USS portfolio. Each of them will distribute the USS product portfolio to their respective national markets as an agent or distributor of USS,

— under the non-competition provision for Unisource Cards, the parties have decided to concentrate on UC the ownership and operation of the technical platform for non-payphone calling card services and product development. Consequently, none of them will offer comparative services in parallel to the UC pan-European product portfolio. Nonetheless, each of them will continue to market their own non-payphone calling cards within their respective national markets, and UC will market and distribute its cards on a real pan-European scale,

— finally, the non-competition provision for Unisource Mobile (GSM and DCS 1800) services requires the Unisource shareholders not to act as pan-European mobile service providers outside their territories in parallel to the UM product portfolio. However, each

(10) One of these agreements has been concluded between UCS and Uniworld (see Case No IV/35.738 Uniworld).

of them will continue offering their GSM services at home and abroad through the relevant roaming agreements concluded under the framework of the GSM MoU.

(b) *Distribution of services*

The services of UBN ([11]), UVS and USS will be distributed through exclusive distributors. Each of the Unisource shareholders is the exclusive distributor for its own country (Telia is also the exclusive distributor for Norway and Denmark). Exclusive distributors shall not actively seek customers outside its territory and are bound by non-competition provisions (see above). The non-competition provision regarding UBN permits nevertheless the distribution to the territory of Infonet's (global) data services. Thus, as in all other European countries, the reseller in the Unisource countries is a business unit to the country's telecom operator. Such business unit is not transferred to Unisource ([12]).

E. RELEVANT MARKETS

The relevant markets involved are basically the same as described in the Atlas and Global One Decisions ([13]).

1. Product markets

(a) *The markets for non-reserved corporate telecommunications services*

Unisource, through UBN, UVS and USS targets the markets for both customized packages of corporate telecommunications services and packet-switched data communications services, jointly referred to as 'non-reserved corporate telecommunications services'. The services to be provided fall within the following categories:

— corporate voice services: global virtual private network (VPN), international toll free, selected card and simple resale services and switched digital,

— data communications services using, *inter alia*, the X.25, Frame Relay and Internet protocols (IP),

— dedicated transmission for voice and data services: managed bandwidth and VSAT,

— custom network solutions: systems/equipment procurement, tailored and managed services and outsourcing,

— platform-based enhanced services: messaging including access to telex, local area network (LAN) interconnection, electronic document interchange (EDI), videoconferencing and audioconferencing.

(b) *The market for traveller services*

The market for traveller telecommunications services comprises offerings that meet the demand of individuals who are away from their normal location, either at home or at work. Among the most relevant of these offerings are calling card services (i.e. pre-paid cards with or without a code and post-paid cards), including those in combination with credit cards and other branded service cards ('affinity cards'),

Customers for traveller services include both business travellers and other travellers. In the card business targeted by Unisource through UC, the former are by far the largest group of buyers. Business travellers are generally intensive card users, the main incentive for card usage being the possibility to avoid paying hotel telephone surcharges.

The pan-European GSM mobile services being developed by UM are also mainly intended to serve the needs of traveller services and for that reason are included here as well. However, they are also seen as a GSM mobile extension to corporate customers' fixed private or virtual private (VPN) networks, it can not be excluded now that they will have to be included in the previous market in the future.

(c) *The market for carrier services*

The market for carrier services comprises the lease of transmission capacity and the provision of related services to third-party telecommunications traffic carriers and service providers. Along with liberalization and globalization of telecommunications markets, demand for efficient, high-quality traffic transportation capacity has risen among old and new carriers. In this connection, the traditional model of separate arrangements with other individual carriers is increasingly challenged by players with global network infrastructure that offer an array of services. The most relevant of such services are:

([11]) After the Uniworld transaction, the UBN distribution agreement will relate to national data services and to international data services (bilateral) outside the scope of Uniworld.

([12]) In these countries, Infonet claims a market share of less than 1 %.

([13]) Commission Decisions of 17 July 1996 relating to proceedings under Article 85 of the EC Treaty and Article 53 of the EEA Agreement (Cases IV/35.337 — Atlas and IV/35.617 — Global One). OJ No L 239 of 19 September 1996, points 4 to 15 and 5 to 16, respectively.

(1) switched transit, i.e. transport of traffic over bilateral facilities between the originating carrier, the transit carrier and the terminating carrier; neither the originating carrier nor the terminating carrier need bilateral facilities between themselves, but only with the transit carrier;

(2) dedicated transit, i.e. leased line offerings for the transport of traffic through the domestic network of the transit carrier; leased line facilities used for this purpose may include discrete voice circuits or a high-bandwidth digital circuit that can be used for both voice and data services;

(3) traffic hubbing offerings, where the provider takes care of all or part of international connections; these offerings are typically designed for emerging carriers, who are interconnected with the provider over bilateral facilities and whose international traffic is merged with other traffic on the provider's global network; and

(4) reseller services for service providers without international telecommunications facilities of their own.

Demand for carrier services is increasingly driven by alternative carriers concerned with entrusting the incumbent TO with their international traffic, for reasons such as technical dependency and commercial sensitivity of customer information.

Purchasers of carrier services include established and emerging carriers. Both groups of clients are sophisticated purchasers. Among the emerging carriers, one may distinguish facilities-based carriers that provide telecommunications services over alternative infrastructure or cable television networks seeking greater efficiency in the transport of international client traffic, while non-facilities-based carriers and services providers seek to preserve a competitive advantage by avoiding dependence on a local TO for international client traffic.

2. Geographic markets

Along the lines of the Commission's findings in its BT-MCI [14], Atlas and Phoenix decisions, the geographic scope of certain markets targeted by Unisource is cross-border regional and pan-European if not global. Although national borders subsist for many services, strategic alliances like Unisource are built not only in anticipation of a market unaffected by national boundaries but even with the express purpose of offering large global telecommunications users seamless end-to-end services anywhere by overcoming the difficulties inherent in the current market structure split along national borders. However, the service offerings of Unisource through its subsidiaries reach different existing geographic markets.

(a) *The markets for non-reserved corporate telecommunications services*

As described in the Atlas decision, demand by large users for customized packages of corporate telecommunications services exists in at least three distinct geographic markets, namely at a global, cross-border regional and national level. Unisource services have pan-European reach.

Packet-switched data communications services are offered by Unisource, through UBN (and the domestic subsidiaries thereof) at a cross-border regional and national level in the different Member States involved.

(b) *The market for traveller services*

Along with the globalization of the economy the market for traveller services appears to be increasingly global; travellers demand offerings which include a single bill and integrated functions such as voice messaging, voice response and information systems everywhere. Geographic limitations of current traveller service offerings are generally due to technical shortcomings set to be overcome in the near future, such as the incompatibility of mobile communications systems or differences in pre-paid cards without an individual user code.

(c) *The market for carrier services*

Both supply of and demand for carrier services are by nature cross-border regional. Geographic proximity between purchaser and supplier of switched transit capacity is hardly relevant for switched transit which carriers use either as a substitute for operating own international lines or to deal with peak traffic on such lines. Likewise, dedicated transit services offer cable- or satellite-based routing capacity across third countries. Finally, using hubbing services is an alternative to entering into an undetermined number of bilateral agreements with individual carriers.

[14] Commission Decision of 27 July 1994 in Case No IV/34.857 — BT-MCI, OJ No L 223/36, 27. 8. 1994.

3. Competition in the markets

(a) *Cross-border regional or global markets*

Many players, acting alone or jointly with partners, have entered or are entering the above defined cross-border regional or global markets:

(1) the market for non-reserved corporate telecommunications services: BT-MCI's Concert and Atlas/ Global One are expected to become major players on a global basis. To those it is necessary to add some other significative players like Infonet, Sita or IPSP;

(2) the market for traveller services: many companies are actively marketing calling cards, US firms like AT&T, MCI and Sprint and alliances like Global One. In addition, most European telecommunication operators and some new entrants are lauching direct-to-home or collect-call services in order to follow their customers abroad;

(3) the market for carrier services: all telecommunications operators compete with each other in the provision of transit and hubbing services. A few companies are entering the market on a cross-border regional or global basis, Global One and Hermes are, in principle, the most important ones.

(b) *National markets*

Each of the shareholders of Unisource face a number of competitors in their respective domestic market for packet switched data communication services. So such services are completely liberalized in Sweden, there are at least five licences granted in the Netherlands, eight in Spain and several in Switzerland. Some of those companies (such as Spain's BT Tel or Swedish's Telenordia) are also the domestic extensions of the global alliances (BT in those two cases).

4. Market shares of the parties

(a) *Cross-border regional markets*

Market shares figures for those cross-border regional or global markets are highly unreliable. Their emerging and evolving nature and the high volume of traffic generated by large corporate customers are explanatory arguments for such unreliability.

Unisource's estimates of its own market shares for 1994 were slightly above 5 % in the EEA plus Switzerland in respect of value added services to corporations (encompassing most of the services within the three markets above) and slightly over 15 % for VSAT services.

(b) *National markets*

As regards domestic packet switched data communication services, in 1995, Telia had 78 % in Sweden (11), PTT Telecom and Telefónica over 95 % in the Netherlands and Spain and Swiss Telecom nearly 100 % in Switzerland. Market figures in respect of the overall domestic telcommunications services were 91 % for Telia, near 100 % for PTT Telecom, 95,7 % for Telefónica and near 100 % for Swiss Telecom.

F. CHANGES MADE AND UNDERTAKINGS GIVEN FURTHER TO THE COMMISSION'S INTERVENTION

Certain features of the notified transaction appeared to be incompatible with Community competition rules. Consequently, the Commission by letter of 7 May 1996 informed the Parties of its concerns. In the course of the notification procedure the Parties have amended the original agreements and given undertakings to the Commission.

In addition, the Commission wrote to the four Governments involved enquiring about the existing framework and the intended evolution thereof. Letters, where required, also requested changes to that framework necessary in the Commission's view in order to create a level playing field. The results of such action are summarized under 3 below.

1. Contractual changes

The following undertakings reflect changes in the notified agreements:

(a) *Spanish data networks*

From the date of completion of the transactions envisaged in the notified agreement until full and effective liberalization of telecommunication infrastructures and services in Spain, scheduled for 30 November 1998, Unisource NV undertakes to maintain the Spanish public data network and business as a separate legal entity under Unisource NV. The network will during that period not be integrated in the

(11) In all cases through the respective UBN domestic subsidiary.

domestic UBN subsidiary in Spain or its successor, Uniworld Spain. It will keep separate accounts and will be audited as such. The Commission will receive annually a copy of the auditors report. A register shall be kept of all contracts between this entity and any other Unisource subsidiary. Such transactions will comply with normal market Conditions. The Commission will be entitled to consult this register pursuant to this undertaking, without the need to invoke its powers under Council Regulation 17/62.

(b) *Agency arrangements*

Unisource NV undertakes that neither it nor any of its subsidiaries will act as an exclusive agent for PTT Telecom or Telia in respect of basic services and will not be involved with the provision of leased lines on behalf of its shareholders (other than Telia) until 1 January 1998 except as purchaser of leased lines from shareholders for its own use or for resale. It will terminate as from the date of the granting of an exemption under Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement the exclusive agency agreement with PTT Telecom as far as it is concerned with leased lines.

Unisource NV undertakes that neither it nor any of its susidiaries will act as an exclusive agent for the provision of leased lines on behalf of Swiss PTT or Telefónica until 1 January 1998 except as purchaser of leased line from each of therm for its own use or for resale.

(c) *Transit negotiations*

Unisource NV undertakes that neither it nor any of its subsidiaries, in particular UCS, will act as the sole representative in any capacity for any of the Unisource shareholders in respect of the negotiations of transit tariffs in/through the Unisource shareholders countries on behalf of the shareholders with licensed operators and that it will not be involved in these negotiations on behalf of the shareholders until 1 January 1998.

2. Undertakings given by the parties

(a) *Prevention of discrimination*

Article 86 of the EC Treaty prohibits the abuse of dominant positions. Each of the parents of Unisource is in a dominant position in its respective domestic market at least for the provision of infrastructures required by competitors of Unisource in those domestic markets. Accordingly, to ensure the absence of discrimination, the Commission intends to ask Unisource and/or its parent companies to comply with the following:

— all shareholders undertake that all dealings with any entity organized under the Unisource agreements will be on non-discriminatory terms with regard to those terms offered to third parties and at arm's length basis, in connection with reserved facilities and services and with such facilities and services which remain an essential facility after full and effective liberalization of telecommunications infrastructure and services in each of their respective countries.

(1) *Leased lines*

— all shareholders undertake that, to the extent that such would not yet be the case, the provision of leased lines will be a separated service for which separate accounts will be kept pursuant to the principles, rules and practices currently in use under national or community law,

— all shareholders undertake to publish the standard terms and conditions for the leasing of lines (national and international). The terms will refer to the technical specifications of the lines, the provisioning time, repair time, tariffs and discounts,

— all shareholders undertake that all types of lines made available to any of its subsidiaries or to Unisource will also be available under the same terms and conditions for third parties,

— PTT Telecom has no clause in its general conditions containing any obligation on customers to reveal the use they intend to make of leased lines and does not request such information from (potential) customers before or after entering into contracts for leased lines. PTT Telecom will delete any clause form its general conditions containing references to the use of leased lines (i.e. clause 11.10) and international half circuits in any way which would not be justified by technical considerations or mandatory provisions and undertakes not to introduce such clause or interference.

(2) *Interconnection*

— Unisource and its affiliates, in particular UBN, undertakes to establish and maintain, third party access to public data networks (X.75 or any standard

that might replace it) of domestic UBN's on non-discriminatory cost-oriented terms including price, availability of volume and other discounts and the quality of interconnection provided as from the granting of an exemption pursuant to Article 85 (3) of the EC Treaty and Article (3) of the EEA Agreement. These terms will be publicly available. The price shall be based on costs defined and attributed using an analytical accounting system. This undertaking shall remain valid for the period of the validity of the exemption subject to review upon request of the parties of the need to maintain this undertaking by the Commission,

— Telefónica will provide no later than on the date of the granting of an exemption under Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement a draft standard interconnection agreement to the Commission in respect of the PSTN and ISDN networks which will be in accordance with relevant EU and national regulations. This agreement will provide for timely interconnection and will include terms and conditions (including technical standards and specifications) which are non-discriminatory and cost-oriented on a service-by-service basis.

Interconnection will be available at a reasonable range of termination points, in accordance with international technical standards, to ensure adequate and efficient interconnections to the extent necessary to ensure interoperability of services. There would be a number of regional points of interconnection where international standardized interfaces and signalling systems are available and where it is economically feasible,

— Telefónica undertakes that it will continue to grant access on a non-discriminatory basis to customer databases necessary for the provision of directory services at a cost-oriented pricing and in compliance with the provisions of the Public Act on Personal Data Handling (LORTAD),

— PTT Telecom will provide no later than on the date of the granting of an exemption under Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement a standard interconnection agreement to the Commission in respect of the PSTN and ISDN networks which will provide for timely interconnection and will include terms and conditions (including technical standards and specifications) which are non-discriminatory and cost-oriented on a service-by-service basis.

Interconnection will be available at a reasonable range of termination points in accordance with international technical standards to ensure adequate and efficient interconnections to the extent necessary to ensure interoperability of services. There would be a number of regional points of interconnection where international standardized interfaces and signalling systems are available and where it is economically feasible,

— PTT Telecom undertakes that it will continue to grant access on a non-discriminatory basis to customer databases necessary for the provision of directory services at a cost-oriented pricing,

— Swiss PTT will provide no later than on the date of the granting of an exemption under Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement a standard interconnection agreement to the Commission in respect of the PSTN and ISDN networks which will be in accordance with relevant Swiss regulations. This agreement will provide for timely interconnection and will include terms and conditions (including technical standards and specifications) which are non-discriminatory and cost-oriented on a service-by-service basis.

Interconnection will be available at a reasonable range of termination points in accordance with international technical standards to ensure adequate and efficient interconnections to the extent necessary to ensure interoperability of services. There would be a number of regional points of interconnection where international standardized interfaces and signalling systems are available and where it is economically feasible,

— Swiss PTT undertakes that it will continue to grant, in accordance to the relevant Swiss regulations, access on a non-discriminatory basis to customer databases necessary for the provision of directory services at a cost-oriented pricing,

— Telia undertakes that interconnection charges will be non-discrimintory, cost-oriented and transparent in compliance with relevant Swedish regulations.

(b) *No misuse of confidential information*

— Unisource NV undertakes that UCS will not make available to any other of its subsidiaries or shareholders confidential information in respect of reserved services e.g. in respect of customer contract-

related data such as prices received in its capacity as agent of the Unisource shareholders,

— Unisource NV will require that the Unisource shareholders will not use confidential customer information acquired by Unisource in the provision of Unisource data services within business units of the Unisource shareholders selling competing services or products.

The above undertakings are also given by Unisource NV in respect of the subsidiary which will own and operate the Spanish public data network and business,

— all shareholders undertake that they will not misuse confidential information in respect of customer contract related data such as prices received in its capacity as shareholders in Unisource NV., because of its representation on any board or committee in any entity established pursuant to the Unisource agreements, or as distributor for any Unisource services,

— all shareholders will furthermore ensure that Unisource NV or its subsidiaries will not have access to confidential information in respect of customer contract-related data such as prices acquired by providing reserved services (for instance interconnection agreements or the provision of basic capacity to competitors of Unisource).

(c) *Prevention of cross-subsidies*

The parties shall not engage in cross-subsidization within the meaning of the Commission's competition guidelines for the telecommunications sector ([14]):

— all shareholders undertake not to grant any cross-subsidies to any entity created pursuant to the Unisource agreements funded out of income generated by any business which they operate pursuant to any exclusive right or in respect of which they hold a dominant position in the meaning of Article 86 of the EC Treaty,

— all shareholders further undertake; (i) to provide any entity created pursuant to the Unisource agreements with their own debt financing; (ii) not to allocate operating expenses of these entities to the shareholders; and (iii) to charge the shareholders the same price as they charge third parties for the provision of services,

— all shareholders will ensure transparency by ensuring compliance with the accounting rules, principles and practices currently in use under national or community law. Such rules, principles and practices include the cost standard used, the accounting conventions used for the treatement of costs and the attribution method chosen. Payments and transfers to Unisource and Unisource companies can be identified on the basis of accounting reports that are periodically available,

— Telefónica undertakes and confirms that it will continue to keep the analytical accounts according to the rules, principles and practices already in use and to the extent that it is not the case yet, Telefónica will fully implement such analytical accounting system. Telefónica refers specifically to the Spanish Royal Decree 1558/1995 (whiches gives implementation to Council Directive 92/44/EEC for the establishment of the open network provision for leased circuits) and to the resolution of the Directorate-General for Telecommunications (DGTEL) of 21 February 1996 approving the contract-type for the provision of the national and international circuit leasing carrier service that was already sent to the Commission on April 26.

(d) *Prevention of bundling*

— Telefónica undertakes that it will not tie in the sale of any service provided by Unisource with any service provided by Telefónica. It will moreover for as long as it has exclusive or special rights to provide telecommunications services and/or infrastructures only make combined offerings of Unisource and its own services in a way that the customer can identify in the contract forms the price charged as well as the order terms and conditions for these services and it will ensure that each of these components is separately available at equivalent conditions,

— PTT Telecom undertakes that it will not tie in the sale of any service provided by Unisource with any service provided by PTT Telecom. It will moreover, for as long as it has the exclusive or special rights to provide telecommunication services and/or infrastructures, only make combined offerings of Unisource and its own services in a way that the customer can identifiy in the contract forms the price charged as well as the other terms and conditions for these services and it will ensure that each of these components is separately available at equivalent conditions,

([14]) Guidelines on the application of EEC competition rules in the telecommunications sector. OJ No C 233, 6. 9. 1991. Point 102 *et seq.*

— Swiss PTT undertakes that it will not tie in the sale of any service provided by Unisource with any service provided by Swiss PTT. It will moreover, for as long as it has exclusive or special rights to provide telecommunications services and/or infrastructures, only make combined offerings of Unisource and its own services in a way that the customer can identify in the contract forms the price charged as well as the other terms and conditions for these services and it will ensure that each of these components is separately available at equivalent conditions.

All the above undertakings will be valid as from date of the exemption for the period of validity of such exemption.

3. **Changes to the regulatory framework in the countries involved in Unisource**

The Commission discussed with the governments involved the degree of liberalization of each national market directly involved and the existence of regulatory mechanisms to ensure a level playing field in these telecommunications markets. Such discussions took the form of an exchange of letters between the Commission and each government which began on 10 April 1996.

Sweden

There is already full liberalization in Sweden.

By letter of 25 April 1995, the Swedish Minister for Telecommunications added that the current Telecommunications Act of 1 July 1993 will be reformed in 1997. The most important changes will regard the powers of the regulator (the National Post and Telecom Agency), which will be extended as a consequence of the EU Interconnection Directive to be adopted.

The Netherlands

The Commission sought confirmation that the Netherlands will respect the dates for the liberalization of alternative infrastructure and for the introduction of full competition respectively, and that an independent regulatory agency was in place.

In her reply of 25 June 1996, the Minister for Transport and Waterways of the Netherlands indicated that as of 1 of January 1996, it is possible to use cable television networks for liberalized telecommunications services and as leased lines. Furthermore, under new legislation being adopted by the Parliament, full liberalization will take place on 1 July 1997. Two more national licences (apart from KPN's concession) without territorial limitation and a large number of regional licences with territorial limitations will be granted to install, maintain and operate fixed infrastructure. All these new infrastructure licences will have the right and (after an interim period) the obligation to supply leased lines. All of them will have rights of way.

Further fixed networks can be installed by any person without a licence. Such networks will be used to provide leased lines or telecommunication services (except voice telephony). However, they will not have rights of way.

Finally, an independent regulator will be established by 1 January 1997.

Spain

The liberalization of alternative infrastructure by 1 July 1996, the setting up of an independent regulatory agency and the formal relinquishment by Spain of the right to request a temporary derogation in respect of the date of liberalization of voice telephony and infrastructure granted to Spain by Directive 96/19/EC of 13 March 1996, amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets, constituted the subject matter of an exchange of letters between the Commission and the Spanish Government.

In his initial reply of 25 June 1996, the Spanish Minister for Public Works and Telecommunications indicated that the Royal Decree-Law 6/96 of 7 June on the liberalization of telecommunications proposed by the new Spanish Government and adopted by the Spanish Parliament (17) provides, among other things, for the immediate liberalization of alternative infrastructure (as of now, Retevisión and Correos — the post office — are already authorized to provide capacity to third parties) and for the creation of a new independent regulator (Comisión del Mercado de las Telecommunicationes), the members of which have already been nominated and which will be operational be the end of 1996.

The Spanish telecommunications market will be fully liberalized before 30 November 1998. By that date, further licences for voice telephony services and public infrastructure will be granted, in addition to those granted that date (as further described below).

(17) The Spanish Parliament decided at the same time to pass the Royal Decree-Law as a law, which would delay by a few months the entry into force of the new legislation.

The abovementioned Royal Decree-Law established a second operator — Retevisión — for the entire range of telecommunications services and infrastructures. The second operator will be privatized by tender to be awarded during the first quarter of 1997. A third licence for the provision of voice telephony and public infrastructures with nationwide coverage will be granted by the beginning of January 1998. By the same date, cable television operators which so request will start offering voice telephony and public infrastructures within their respective areas. On that basis, the Commission has considered that the degree of actual competition in the Spanish telecommunications market by the beginning of 1998 will be comparable to that of most Member States which will abide by the liberalization date of 1 January 1998.

Switzerland

The Commission requested the acceptance by Switzerland of the 1 July 1996 and 1 January 1998 dates for the liberalization of alternative infrastructure and for the introduction of full competition respectively and the confirmation that an independent regulatory agency was in place.

By letters of 2 July and 13 September 1996, the Swiss Minister for Transport, Communications and Energy stated that telecommunications in Switzerland will be fully liberalized by 1 January 1998 in parallel with the EU. A new law will be enacted in the new future eliminating remaining restrictions.

As regards alternative infrastructure liberalization, the Minister indicated that since 1 May 1995 15 pilot licences have been granted (the majority to cable tv operators). Such pilot licences allow the provision of some telecommunications services to subscribers (Internet access, data transmission, multimedia and telephony within closed users groups). The contents of such licences will be extended before the end of 1996 to offer the possibility to owners of alternative infrastructures in Switzerland to carry out commercial activities, in particular for the provision over them of corporate telecommunications services. Competitors to Swiss PTT for the provision of such corporate telecommunications services will be allowed to use such alternative infrastructures.

As regards the regulator, the existing regulator (Ofcom) will be supplemented by a communications commission independent from the Swiss federal administration. The new commission will be particularly responsible for decisions in respect of which a conflict of interests could exist between Ofcom as regulator and the Confederation as owner of Swiss PTT.

G. THE COMMISSION'S INTENTIONS

On the basis of the foregoing, the Commission intends to take a favourable view pursuant to Article 85 of the EC Treaty and Article 53 of the EEA Agreement and to grant to Unisource and to the incorporation of Telefónica to Unisource an individual exemption pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement. Before doing so, it invites interested third parties to send their observations within one month of the publication of this notice to the following address, quoting the reference IV/35.830 — Unisource — Telefónica.

European Commission,
Directorate-General for Competition (GD IV),
Directorate C,
Rue de la Loi/Wetstraat 200,
B-1049 Brussels,
Fax: (32-2) 296 98 19.

Notice relating to Case Nos IV/35.337 — Atlas and IV/35.617 — Phoenix/Global One

(97/C 47/08)

(Text with EEA relevance)

On 17 July 1996 the Commission adopted individual exemption decisions pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement in Case Nos IV/35.337 — Atlas [1] and IV/35.617 — Phoenix/Global One [2]. Pursuant to Article 6 (1) of Council Regulation No 17 [3], the Commission specified that the exemptions would become effective from the date on which two or more licences for the construction or ownership and control of alternative infrastructure for the provision of liberalized telecommunications services take effect in both Germany and France.

On 15 October 1996, the Federal Republic of Germany granted three alternative infrastructure licences pursuant to the German telecommunications law, one with nationwide coverage and two with broad coverage of major urban areas. By 22 November, seven further licences, one allowing for nationwide coverage, had been granted and awards of several more were announced before the end of 1996. In France, the first alternative infrastructure licence was granted under the French telecommunications law on 21 November 1996 and the second, allowing for nationwide coverage, on 29 November 1996. Two further licences were awarded in December 1996, whereby all outstanding requests for licences had been dealt with by the competent French authorities. In both countries, these licences entitle the respective licensees to provide all telecommunications services to the public except public voice telephone services between fixed points. This means that there are no longer any regulatory constraints on the licensees in question to provide such telecommunications services, including infrastructure, to telecommunications services providers competing with the Atlas and Global One companies. Furthermore, the granting of the licences referred to above indicates that the licensing procedures established under the respective national telecommunications legislation in France and Germany are working satisfactorily and that competition in the provision of infrastructure can be expected to increase; it is expected that there will be requests for and awards of further licences in both countries.

Pursuant to Article 1 of the Atlas and Phoenix/Global One decisions, the exemptions granted by the Commission were stated to take effect once two alternative infrastructure licences have become effective in both France and Germany. The alternative infrastructure licences granted by the Federal Republic of Germany in October and November 1996 became effective immediately upon being issued to the licensees. The alternative infrastructure licences granted by the French Republic on 21 November and 29 November 1996 became effective upon publication in the Journal Officiel de la République Française, on 23 November and 1 December 1996 respectively. Therefore, the conditions referred to which were required by Article 1 of the Atlas decision and Article 1 of the Phoenix/Global One decision have been fulfilled and the exemptions granted on 17 July 1996 have taken effect on 1 December 1996.

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[1] OJ No L 239, 19. 9. 1996, p. 23.
[2] OJ No L 239, 19. 9. 1996, p. 57.
[3] OJ No 13, 21. 2. 1962, p. 204/62.

Notification of a joint venture

(Case No IV/36.308 — BT/News International — Springboard)

(97/C 65/06)

(Text with EEA relevance)

1. On 6 December 1996, the Commission received notification of an agreement pursuant to Article 4 of Council Regulation No 17 (1) signed between British Telecommunications plc and News International plc. The Parties have formed a joint venture to be known as Springboard Internet Services Limited, with the principal services provided by the joint venture to be known as LineOne. The mass market service will be aimed at UK and non-UK consumers. The parties state that BT's technical expertise and News International's extensive content and editorial skills are necessary for the joint venture. Springboard will provide:

— an integrated consumer oriented Internet access and content service to UK customers,

— a consumer-oriented Internet content-only service to EU and worldwide customers,

— a third party Web site creation service for business customers.

Content will be sourced from the joint venture parents and third parties, and will also be developed by Springboard itself. Content rights will be acquired on an exclusive and a non-exclusive basis.

2. On preliminary examination, the Commission finds that the notified agreement falls within the scope of Regulation No 17.

3. The Commission invites interested third parties to submit any observations on the proposed agreements to the Commission. Third parties submitting observations should indicate clearly any business secrets which should be kept confidential.

Observations must reach the Commission to later than 10 days following the date of this publication. Observations may be sent to the Commission by fax (No (32-2) 296 70 81) or by mail, stating the reference IV/36.308, to the following address:

European Commission,
Directorate-General for Competition (DG IV),
Directorate C,
Avenue de Cortenberg/Kortenberglaan 150,
B-1040 Brussels.

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(1) OJ No 13, 21. 2. 1962, p. 204/62.

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 17 February 1995

declaring a concentration to be compatible with the common market

(Case IV/M.468 — Siemens/Italtel)

(Only the English text is authentic)

(95/255/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), and in particular Article 8 (2) thereof,

Having regard to the EEA Agreement and in particular Article 57 (1) thereof,

Having regard to the Commission Decision of 14 October 1994 to initiate proceedings in this case,

Having regard to the opinion of the Advisory Committee on Concentrations (2),

Whereas:

(1) The abovementioned operation concerns the establishment of a joint venture between STET — Società Finanziaria Telefonica — per Azioni ('STET') and Siemens Aktiengesellschaft ('Siemens').

(1) OJ No L 395, 30. 12. 1989, p. 1. Corrigendum: OJ No L 257, 21. 9. 1990, p. 13.
(2) OJ No C 176, 11. 7. 1995, p. 4.

I. THE OPERATION AND THE PARTIES

(2) On 26 March 1994, STET and Siemens signed a memorandum of understanding aimed at the creation of a European Telecom group capable of playing a major role as an international supplier. In the notified operation the parties will transfer to the joint venture their Italian subsidiaries, Italtel and Siemens Telecomunicazioni (ST), for developing, manufacturing, sales and service activities in the field of telecommunications.

STET and Siemens will create a holding to which STET will transfer initially 60 % of the capital stock of Italtel (the remaining 40 % equity being contributed later) and Siemens will contribute by transferring the whole capital stock of ST as well as an amount in cash.

(3) STET is an Italian company of which 46,61 % of the capital shares (64,20 % of the ordinary voting shares) is owned by the Istituto per la Ricostruzione Industriale SpA (IRI). STET coordinates the activities of a group of companies operating in the field of telecommunications.

(4) STET operates a fully independent company and its stock is quoted on the Milan Stock Exchange. IRI's function is limited to that of a holding company on behalf of the Italian State, and for the purposes of this notification, STET is considered to be 'an economic unit with an independent power of decision' as described in recital 12 of the Merger Regulation.

Italtel is the manufacturing and marketing company of STET in the telecommunications sector. STET holds 100 % of Italtel's registered shares.

Italtel is mainly active in developing, producing and marketing systems and equipment for public and private telecommunications in the fields of switching, transmission systems, mobile radio networks, PBX's and terminals.

(5) Siemens is a publicly held German industrial and electronics company and the ultimate parent of the Siemens group of companies. The principal activities of Siemens are: industrial and building systems, drives and standard products, automation, automotive systems, power generation (KWU), power transmission and distribution, semiconductors, medical engineering, public communication networks, network systems, passive components and electron tubes, private communication systems, defense electronics and transportation systems.

ST is a wholly-owned Italian subsidiary of Siemens, with manufacturing, sales and services activities in the fields of public and private telecommunications equipment, systems and services, including public and private switching, transmission, fixed and mobile radio networks, as well as terminal equipment for the private market.

(6) After several years' work on the rationalization of the Italian telecommunications sector in the current year a single telecommunication operator has been established. Further to the resolution of the shareholders of SIP, Italcable, Iritel, Telespazio and Sirm on 19 May 1994, the deed merging the other concessionaire companies into SIP was signed on 27 July 1994 and took retrospective effect in accounting and fiscal terms as of 1 January 1994.

The merger was implemented on 18 August 1994. While retaining its present name, SIP has also been entitled to adopt the name of Telecom Italia SpA for all legal purposes. As a result of the operation STET has 56,10 % of the ordinary shares of Telecom Italia and IRI 2,81 % of the ordinary shares. Telecom Italia is listed on the stock market and the remaining part of the share capital is held by private minority shareholders.

With the abovementioned operation and the other subsequent resolutions the major parts of the steps for the completion of the plan for the reorganization of the Italian telecommunication sector according to the lines approved by the Italian Government have been taken.

In particular the company which is active in the provision of the telecommunication services (Telecom Italia) has been separated within the STET group from the companies which are in charge of the equipment manufacturing activities (Italtel, Sirti and Aet).

The remaining steps of the reorganization plan concern the transfer from Telecom Italia of its mobile phone operations and space divisions to independent companies.

(7) Italtel had been looking for a technological partner in the past. It first established a number of agreements with AT&T which included the acquisition by AT&T of a minority stake in the capital share of Italtel. The agreements with AT&T have now been terminated and AT&T has sold its stake back to STET.

II. THE CONCENTRATION

Joint control

(8) STET and Siemens shall each own 50 % of the share capital in the joint venture. The joint venture will have a nine-member Board of Directors. STET and Siemens will appoint four members each, while the ninth member, the Chairman of the Board, will be designated by STET and approved by Siemens.

(9) The Board shall be governing body of the joint venture and shall have the authority to adopt resolutions on any matter not reserved by virtue of law to the shareholders' meeting. The resolution of key decisions will be adopted by the Board of Directors with the approval of the STET and Siemens' representatives. These decisions inlcude among others:

— the approval of the strategic business plan and the yearly budget,

— the proposals of the CEO as to the appointment and removal of senior officers of the joint entity and of the Board members of the holding's subsidiaries.

(10) With regard to matters reserved to the shareholders meeting's decision, under the shareholders agreement each party commits itself to vote its shares in conformity with the proposals previously approved by the Board according to the above.

(11) Each of the parties will have the right of veto at least over the principal decisions concerning the joint venture, which are mentioned under point 9. Therefore, they will have joint control over the joint venture.

Full function entity

(12) The parties will transfer to the joint venture their Italian subsidiaries which are active in the manufacturing of telecommunication equipment. The operation will bring about the industrial merger of the activities of the parties in the product areas of switching, transmission, radio systems, mobile radio and private communication systems and terminals. The joint venture will have all the assets and resources necessary to perform all the functions of an autonomous entity, including R&D, manufacturing and distribution.

For the main products of the public telecommunication sector (public switching systems and transmission) the bulk of the sales of the joint venture will continue to be absorbed by the Italian telecom operator, which is controlled by one of the parents (STET). A high level of sales to a parent in a downstream market could lead to questioning the autonomy of the joint venture. It is true that for the foreseable future Telecom Italia will be the only buyer on the public telecom markets. This is due to the infrastructure monopoly and not to the fact that the manufacture of telecommunication equipment is an auxiliary activity to the provision of the service.

Absence of coordination

(13) While Siemens will remain active in the same product markets as the joint venture outside Italy, STET is to withdraw from the markets concerned by transferring its relevant business to the joint venture. The only exception to this is that AET, a subsidiary of STET, is active in one of the markets (transmission) affected by the operation. However, Siemens does not retain any business activity for transmission in Italy. At European level AET turnover in transmission is of minor importance; it represents less than 1,5 % of the total market. Furthermore, the potential for coordination arising from this situation is minimal given the fact that the activities of AET in the transmission market in Italy are of minor importance in relation to the overall activities of the merged entity (around 2%).

With regard to the role of Marconi as a competitor of Italtel on the relevant markets, it has to be considered that recently Marconi, which is an Italian company which forms part of the GEC group and Finmeccanica, a company which, like STET, also belongs to the Italian State holding company, IRI, established a concentrative joint venture (1) which will operate in a number of communications market segments including some (PTT network management and supervisory systems, infrastructure for cellular radio networks and terminals for public cellular radio network) in which the parties are present. Although IRI is the ultimate holding company of both Finmeccanica, which owns 50 % of the share capital of the Marconi/Finmeccanica joint venture, and STET, which will have a 50 % stake in the Siemens/Italtel joint venture, there is no link between STET and Finmeccanica, both of which operate as separate economic units, conducting their business independently from each other.

Thus effectively only Siemens will remain active on the joint venture's markets. Having transferred its assets and expertise in the high-tech products concerned, it would be costly and commercially unreasonable for STET to attempt to re-enter the market. There is therefore no relevant risk of coordination arising from the notified operation.

III. THE COMMUNITY DIMENSION

(14) The undertakings concerned have a combined aggregate worldwide turnover in excess of ECU 5 000 million. STET achieved a turnover of ECU 16 174 million in 1993 and Siemens one of ECU 42 087 million in the financial year ending on 30 September 1993. They both have a Community-wide turnover of more than ECU 250 million. They do not achieve more than two-thirds of their aggregate Community-wide turnover in one and the same Member State. The operation therefore has a Community dimension. The operation is not an EEA 'cooperation' case within the meaning of Article 58 and Protocol 24 of the EEA Agreement.

(1) OJ No C 253, 10. 9. 1994, p. 10.

IV. THE RELEVANT PRODUCT MARKET

(15) The proposed transaction concerns broadly the public and private telecommunications systems and equipment sectors. For the purposes of identifying the relevant affected product markets, the parties have subdivided the first of these sectors into four product markets:

1. public switching systems
2. transmission
3. radio systems
4. mobile radio network

and the second they have likewise subdivided into two:

5. private switching and key telephone systems (KTS)
6. communication terminals

(16) **Public telecommunications**

1. Public switching systems allow the interconnection of service users. The switched services can cover voice, data, image and text. The three main network switching nodes are characterized by:

(a) local switching functions which interconnect end-users;

(b) transit exchanges which interconnect transmission links;

(c) international transit exchanges which provide international services.

In the past, these switching nodes were built in analogue mode but, since the 1980s, public switching equipment with analogue technology is being gradually replaced in Europe by equipment in digital synchronous mode and new extensions in the networks are likewise being carried out in digital technology. In Italy, this process of digitalization of the network is now at around 60 % of its completion and is expected to reach 90 % by the end of 1998, according to the parties.

The current life cycle for public switching systems is around 15 years. This lengthy life cycle, despite rapid progress, is due to the possibility of adaptation and updating of the software programmes that run the switching equipment and to the reengineering of parts of the systems.

At present, the major technological trend that is influencing developments in public switching is the increasing use of software to provide intelligence in the network. Examples of this trend are TNM (telecommunication network management), IN (intelligent network), OS (operator systems) and AN (access network). The use of stand-alone modules with open interfaces allows for the continuous upgrading and enhancing of the network by such new features and services. Software is frequently updated (e.g. every six months or year) on a regular basis and has a life span of from two to five years.

In the future, the next major development in public switching systems will be the introduction of asynchronous transfer mode (ATM) technology which will allow the broadband transmission of voice, data, image and text. This technology is presently undergoing technical and commercial evaluation by telecom operators in field trials being carried out in several European countries, including Italy. However, its actual introduction in the public network is not expected before the end of the 1990s. The future of ATM switching will depend also on the attitude of the telecom operators who may be reluctant to replace expensive equipment, that has not been fully depreciated, but could be forced to do so by competition in an emerging liberalized market. Consequently, there seems to be no great certainty with regard to when ATM will find a large-scale application in voice telephony and it is possible that it may be restricted initially to an overlay network for business/service applications. According to market sources, ATM switches are expected to represent around 10 % of the sales of switches in Europe in five years' time.

With regard to the evolution of the life cycle of public switching equipment, it is thought that the major new technology developments in switching, both in software and hardware products, are more likely to expand the range of available functions, and therefore to serve new needs, than to shorten the life cycle of existing equipment. This trend is expected to continue over the next five to 10 years.

2. Transmission provides the transport function for:

(a) traffic between local central switching offices and transit central switching offices;

(b) leased line traffic between business customers, by cable and optics.

The main building blocks of transmission are digital multiplexers and optical line terminals (the parties are not active in the cable field). The latest major development in transmission is the transition to synchronous digital hierarchy (SDH) technology from plesiochronous digital hierarchy (PDH) in network management systems equipment, which is already underway. This new technology enables ATM broadband switching and it is expected that, within five years, SDH will represent 95 % of the transmission equipment market. It is operational via TNM and will, in the future, operate via the open interfaces of AN. It is thought that the introduction of AN will open up this market and enforce competition as there will be an increasing migration of services and functionality away from central office switching into the local access networks.

The life cycle for transmission has been around 10 years when only major technological changes are regarded. This life cycle includes, however, major redesigns every three to five years of the PDH equipment which is hardware intensive. The life cycle of SDH equipment, being more software intensive, is expected to behave more like the life cycle of switching equipment.

3. In radio systems, line-of-sight radio technology provides an alternative to cables in information transport among switching offices or between subscribers and central offices. A recent important role of radio is the interconnection of large business customers to the switched network, or to corporate and private virtual networks. Line-of-sight radio is today being applied in the interconnection of mobile radio base stations, in particular in the market segment of new operators who have no cable infrastructure. Radio systems are, like transmission, migrating towards SDH. R&D expenditure is estimated at 15 %, the same level as for transmission, by the parties.

The parties include in this market microwave and UHF/VHF radio, line-of-sight antennas, feeder cables and operation support systems. The parties have confirmed, however, that neither Italtel nor any other company controlled by STET is active in the radio systems market. For this reason, the market is not an affected product market and will not be analysed further.

4. Mobile radio networks allow for communication :

(a) within the own network ;

(b) to or from another fixed or mobile network as longer as the user is within radio coverage of the mobile network.

The last major technological innovation in mobile communication networks has been the introduction of GSM, the pan European digital mobile communications systems, in 1989. GSM architecture has been clearly defined in the GSM recommendations promulgated by ETSI in the EEA countries.

The evolution in this area is expected to be towards the provision of an increasing proportion of narrowband services by mobile (e.g. cellular) systems. It is thought that the significant growth already being experienced in the customer demand for such mobile services will lead to the introduction of new technologies.

The next generation of infrastructure is expected to be direct satellite communications which it is thought will be available in 1998. With GSM technology, innovation cycles of two to three years are foreseen.

(17) **Private telecommunications**

5. In private telecommunications systems, private branch exchanges (PBX's) and key telephone systems (KTS) allow for communication within/between users, whether public or private. They are connected to the public networks via trunk lines, operating as stand alone systems or in a networking environment. Modern (ISDN) PBX's and KTS provide services such as fax-PC interworking, video-conferencing, and network management.

In the present case, data communication equipment is excluded from the market definition as neither Siemens nor Italtel ever specifically addressed this market segment. Their sales of data communication equipment are marginal (1 % of their turnover). These sales are occasional, mainly connected to the integration of OEM data products into complex projects. For these reasons, the analysis of the notified concentration will be restricted to private voice transmission equipment. The question of whether data transmission should be included in the market may be left open.

The parties point out the constantly increasing cost of R&D in private telecommunications at 10 to 15 % of turnover, due to heavy R&D competition in a market which is characterized by the rapid introduction of additional/new technologies in increasingly shorter time periods/life cycles.

6. Within the range of communication terminals, the parties indicate that for the relevant years Siemens and Italtel have only sold telephones, fax machines and cellular telephones. They have included all three products under one affected relevant product market, although they have provided separate figures relating to market estimates and market shares separately for each type of terminal. Since the notified transaction does not raise competition issues of dominance either considering an overall product market for private terminals or separate narrow markets for each type of terminal, the question of the exact product market definition can be left open.

(18) The above relevant product markets, as defined by the parties, were confirmed by the competitors and the telecom operators in the course of the investigation.

V. THE RELEVANT GEOGRAPHIC MARKET

(19) The overlap of the parties' activities and the main impact of the operation will be in Italy. Italtel only has limited sales of public telecom equipment elsewhere : ECU 1 million in Germany for public switching, limited sales of transmission equipment in Germany, the Netherlands, Portugal and Spain with a market share below 5 % in all cases, and sales of mobile radio network equipment worth ECU 24 million in Greece.

Public telecommunications equipment

(20) The parties argue in their notification that the strict application by SIP (now Telecom Italia) of Council Directive 90/531/EEC (1) (the Utilities public procurement directive) and the current level of standardization ensure that barriers to access to the Italian markets in public telecommunication equipment are of little importance. Although the public procurement directives have not yet been transposed into Italian law, according to the parties since 1993 SIP has operated its own internal rules in compliance with the directives, including the creation of a qualification system and a register of qualified suppliers.

(21) Until now, the Commission has only defined geographic markets in public telecommunication equipment in its Decision 91/251/EEC (2), Alcatel/Telettra, where the market for public telecommunication equipment was found to be national for a merger affecting Spain. Some of the factors which motivated this national market definition were specific to the situation in the Spanish telecommunications market at that time, such as : that Telefonica, the Spanish telecommunications operator, had traditionally purchased from local suppliers ; that the application of the Utilities public procurement directive would not take place in Spain for the following five years ; and that there were vertical links between Telefonica and its major equipment suppliers through minority shareholdings.

(22) Of the characteristics outlined in the decision which were specific to the Spanish market, none applies fully to the Italian market in the context of the current case. Through it is true that in the past Telecom Italia and its predecessors have purchased both switching and transmission equipment from Italtel, they have more recently also sourced significant quantities from other suppliers outside Italy. The Utilities Directive has applied to Italy since the beginning of 1993 and internal rules have been drawn up within Telecom Italia in order to comply with it. Finally, there is a type of link between Italtel and Telecom Italia in that they are both separate parts of the STET group.

(23) Traditionally, public telecommunication equipment markets have shown clear national characteristics, arising from the different attitudes and strategies of the national monopolies at the service level. Usually, domestic suppliers have enjoyed high market shares in their home countries, and other non-domestic suppliers have often served other markets from national subsidiaries there, sometimes with local manufacturing facilities.

(24) The prevailing view among manufacturers of telecommunications equipment and telecom operators is that the markets for telecommunications equipment are in the process of opening up to international competition. The following factors are relevant to that judgment :

— technological developments,

— international standards and national specifications/type-approval of equipment,

— the application of public procurement directives,

— liberalization of public voice telephony and telecoms infrastructure.

(a) *Public switching*

(25) The technology of public switching equipment is complex and has an important impact on the geographic market definition. An operator will generally only use a maximum of three different

(1) OJ No L 297, 29. 10. 1990, p. 1, replaced by Directive 93/38/EEC (OJ No L 199, 9. 8. 1993, p. 84).
(2) OJ No L 122, 17. 5. 1991, p. 48.

types of switches in significant quantities in a network. Once the suppliers have been chosen for a particular network, then those suppliers will install the switches and provide software upgrades to the operator. Should an increase in capacity be needed with requires additional switches at that location, then for technical reasons the same supplier is likely to be used.

(26) This technology 'lock-in' effect leads to differing conditions of competition at different stages in the life cycle of a switch. The opportunity to supply new switches to a network is the subject of a high degree of competition between switch manufacturers. At that stage, competition takes place amongst the major public switch manufacturers at least on a Europe-wide basis and possibly on a worldwide basis. However, once the two or three suppliers have secured the contracts, it becomes more difficult for new entrants to enter the market whilst that technology remains extant. Only in exceptional circumstances, for example if an existing supplier fails to perform to the satisfaction of the customer, will a new supplier get the opportunity to enter the market. Market structures to supply operators then remain relatively stable until the next new technology is introduced (which in the case of public switching will be ATM switching).

(27) The international standards making bodies, and in particular ETSI, are in the process of drawing up standards for public switching equipment. Other standards are developed independently and are subsequently validated by ETSI. Given manufacturers' wishes to protect their intellectual property and the continuing development of the standards, it cannot be said that international standards yet exist for digital switches. Therefore, though standardization is breaking down the barriers between markets, it has not yet completely taken place and so significant differences amongst Member States remain for existing digital switch technology.

(28) For new technology, such as ATM switches, the picture may be different. ATM switches are currently being pilot tested in a number of European countries and the testing programme is the subject of some cooperation between telecom operators. It may be expected therefore that once ATM is introduced, a higher level of standardization across Europe may have been achieved than was the case when digital switches were introduced. The experience of the manufacturers and operators in ETSI and elsewhere in cooperating to produce standards may also make a wider standards more likely with ATM and other new technology.

(29) The application of public procurement directives in the switching sector is closely related to the technology and standardization factors outlined above. Pursuant to Article 20 (2) (e) of Council Directive 93/38/EEC, Telecom operators may use a procedure without a prior call for competition, for example, where a change in suppliers would oblige the contracting entity to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance. Other small purchases of equipment may fall below the threshold or be part of framework contracts covering more than one individual purchase. All these factos tend to support a national market definition. Conversely, when new technology is introduced, then the procurement directives should be applied fully, with invitations for tender from all possible suppliers. This would tend to imply a European or wider market definition.

(30) Liberalization at the level of the operator will also have an effect on the geographic market definition. Liberalization of public voice telephony, which is scheduled for 1998, the open network provision directive and, most importantly, liberalization of the infrastructure will almost certainly lead to a broader market definition than national markets as the new operators will not be constrained by the existing network standards and will have a free hand when choosing their equipment suppliers.

(31) Competition in the public switching market only properly takes place at a European level when a new technology is introduced. Once the suppliers of that technology have been chosen by the network operator, competition only takes place between these suppliers. This is as a result of the lock-in of technology and the current infrequent use of tender procedures under the procurement directives for upgrades to and extensions to existing technology. The liberalization of services and infrastructure appears to be the main factor which will ensure a European or wider market with the continuing process of European standardization also helping to confirm this market definition.

(b) *Transmission*

(32) For transmission equipment, not all of the factors listed for public switching apply. Standardization of transmission equipment is more widespread, partly because the interface aspects of the equipment are more important than for switches. A higher priority is, therefore, necessary for compatibility with other types of equipment from other manufacturers. Operators do not limit their sourcing of transmission equipment to three suppliers in the same way that takes place for switching. Market shares are therefore lower as more companies can supply one operator.

(33) Transmission equipment is a market which is more open than public switching and the market shares of the parties in the Italian market are lower. Even on the basis of the worst case scenario, which would be a national market definition, the operations does not cause competitions problems, so the precise market definition can be left open.

(c) *Mobile radio networks*

(34) Operators of mobile radio networks throughout western Europe have confirmed that they purchase telecommunication equipment throught tender procedures. The geographic location of the equipment manufacturers has little relevance in the decision to choose a supplier and in all cases the main suppliers worldwide were in a position to submit a bid. In any case, and in view of the position of the merged entity in Italy and in Europe, the exact definition of the geographic makret may be left open in this case since the notified operation does not raise serious competition concerns.

Private telecommunications equipment and communication terminals

(35) The markets of private switching and related terminals and communication teminals seem to be relatively more open to competition, with a higher penetration of non-Italian companies. None of the competitors or clients consulted during the investigation have indicated the existence of legal or technical barriers to access to Italy. In any case, and given the position of the notifying parties on these markets, the precise geographic market does not have to be defined in this decision. The notified transaction does not raise any major concerns in the markets of private telcommunication equipment and communication terminals, either at national or European level.

VI. ASSESSMENT

(36) In order to assess the competitive impact of this operation, the following factors have to be taken into account, besides the market positions of the parties:

— public procurement rules,

— changes in technology,

— trends in liberalization, and

— vertical aspects.

(A) Public telecommunication equipment

(37) A general overview of the worldwide industry of public telecommunication equipment is provided in the following ranking of companies, with their respective worldwide turnover in communications equipment in million dollrs in 1993, together with their respective share of the total sales of these companies.

Company	Sales	% share
1. Alcatel Alsthom	14 544	15,70
2. Siemens	11 986	12,94
3. AT&T	11 783	12,72
4. NEC	8 714	9,41
5. N. Telecom	7 861	8,49
6. Ericsson	7 703	8,32
7. IBM	5 300	5,72
8. Fujitsu	4 388	4,74
9. Bosch	2 655	2,87
10. Nokia	2 161	2,33
11. GEC	1 917	2,07
12. Philips	1 813	1,96
13. Samsung	1 788	1,93

Company	Sales	% share
14. Italtel	1 558	1,68
15. Ascom	1 538	1,66
16. Matra	1 508	1,63
17. Oki	1 462	1,58
18. Hitachi	1 429	1,54
19. Sagem	1 049	1,13
20. DSC	731	0,79
21. DeTeWe	721	0,78
Total	92 609	100,00

Source: Communications Week International. Companies specialized in private network systems, mobile networks or data networks have not been included.

1. *Market shares of the parties*

Public switching

(38) The initial market shares calculated by the parties in their notification for public switching referred to a market inclusive of public switching and operating support systems (OSS), power equipment and other relating exclusively to the purchases of switching and OSS by the telecom operator (TO) in Italy. The inclusion originally of the other products in the market brought in suppliers which are not able to sell switches as such and therefore are not competitors of the parties in the strict sense, with the result that the parties' initial market shares were underestimated. On this basis, the market value, sales and respective market shares of the parties and their main competitors in Italy are established as follows:

Purchases of Telecom Italia

(Ecu million)

Italtel Siemens *Combined* Alcatel Ericsson Others	(. .) (1)
Total	

(1) Deleted as business secret.

Market shares (1)

(in %)

	1991	1992	1993
Italtel	40-50	50-60	40-50
Siemens	5-10	5-10	5-10
Combined	50-60	60-70	50-60
Alcatel	10-15	10-15	10-15
Ericsson	15-20	10-15	15-20
Others	10-15	10-15	15-20
Total	100	100	100

(1) Precise figures deleted as business secret.

Competitors have broadly confirmed this magnitude of market shares, although they estimate that Siemens and Italtel combined share remained at roughly 60 % in 1993.

(39) Market shares in the Community amount to 20 % in 1991, 23 % in 1992 and 24 % in 1993 for Siemens and 12 % in 1991, 12 % in 1992 and 8 % in 1993 for Italtel. The combined market share represents therefore 32 %, 35 % and 32 % respectively.

(40) The main impact of the notified operation from a competition point of view is in principle restricted to Italy, since the sales of Italtel and the overlap of the parties' activities are basically concentrated in this country. In a broader geographic market, Italtel

is a smaller player, and the joint venture is not likely to have a significant impact on the competitive relations between the 10 leading worldwide suppliers of telecommunication equipment. The combined market share of the parties in the sales of public switching equipment in Italy will be substantial by the usual standards applied under Regulation (EEC) No 4064/89 (about 55 to 60 % depending on the year taken as reference). However, it has to be noted than this market share is not higher than the market shares of the leading suppliers in other Member States. Information submitted by the parties themselves, competitors and the public telecom operators (TOs) in Germany, France, the United Kingdom, Spain, Denmark, Netherlands, Belgium and Ireland show in fact that the Italian market structure is relatively less concentrated than in any other Member State of a comparable size, regardless of the extent of liberalization.

(41) The high concentration of the supply of switches in all Member States is largely explained by the fact that TOs normally limit the number of different technologies or systems coexisting in a network to a maximum of two or three. Factors such as network management, training, service logistics, security and the introduction of new services in the network lock operators into a limited number of suppliers. Furthermore, once a technology has been introduced into the network, given the long life cycle of switches (around 15 years, never less than 10, see point 16), demand for public switching is basically driven by upgrades and extensions of the network. This market must be awarded to the original supplier of the already installed switch for reasons of costs and efficiency. With the exception of the time when a new major technology (i. e. digitalization) is going to be introduced in the basic network, demand for switching equipment is largely determined by this lock-in effect arising from the original choice of suppliers for the installed base. This fact has been confirmed by both competitors and TOs and it is further confirmed by the existing situation in various Member States.

(42) In Germany, the public network includes only two technologies: Siemens' and Alcatel's. There are other suppliers of public switches (Bosch and DeTeWe for instance), but the supply Siemens' technology under licence. In France, Alcatel and Ericsson supply all the purchases of France Telecom, since the French network is composed of only these two systems. In the United Kingdom, the installed base comprises switching systems from GPT and Ericsson. It is true that there are other companies suppling switches to British Telecom (BT), such as Alcatel, Northern Telecom and AT&T. However, these purchases referred to one-off operations for field trials or for the establishment of overlay networks to provide special services, such as a virtual private networks or free call services. Their share of BT's purchases is limited, and their presence does not alter the fact that BT's basic network comprises only two switching systems, and that therefore GPT and Ericsson account together for most of BT's purchases of public switches. In Belgium, only two systems are used: Alcatel and Siemens. In Spain, the basic network is composed of Alcatel switches and to a lesser extent, Ericsson and AT&T. In Portugal all purchases of equipment in 1992 to 1994 were supplied by either Siemens or Alcatel, since these are the only systems installed. In Ireland, the network is based on Ericsson and Alcatel systems. Finally, three different system are installed in Italy: those from Italtel, Alcatel, and Ericsson. Siemens' subsidiary in Italy sells Italtel's systems under licence. Consequently, Italtel, Alcatel and Ericsson account for most of the purchases of switching equipment of Telecom Italia.

(43) In view of the above considerations, it cannot be concluded that aggregation of the market share within the merged entity in Italy constitutes in itself a proof of possible dominance. A high concentration of the supply of public switching systems is the normal consequence of the basic rationale underlying demand for these products.

Transmission

(44) The sales and respective market share of the main competitors for transmission equipment in Italy are as follows according to the notification:

Sales of main competitors

(Ecu million)

STET Siemens *Combined* Alcatel Marconi Others	(. . .)
Total	

Market shares (1)

(in %)

	1991	1992	1993
STET	30-40	40-50	30-40
Siemens	10-15	5-10	5-10
Combined	50-60	50-60	40-50
Alcatel	25-30	20-25	25-30
Marconi	15-20	15-20	15-20
Others	5-10	5-10	5-10
Total	100	100	100

(1) Precise figures deleted as business secret.

(45) Market shares in the Community amount to 18 % in 1991, 20 % in 1992 and 18 % in 1993 for Siemens and 8 % in 1991, 9 % in 1992 and 5 % in 1993 for Italtel. The combined market share represents therefore 26 %, 29 % and 23 % respectively.

(46) The lock-in effect arising from the installed base described above for public switching plays a much lesser role with respect to transmission. Standardization for transmission is relatively more advanced and generally TOs in the EC tend to diversify more their sources of supply. Detailed information submitted by TOs in the United Kingdom, France, Germany, Denmark, Belgium and Spain as well as Telecom Italia show that there are usually at least three main suppliers of transmission equipment, and in most cases several other less important ones.

2. *Public procurement*

(47) Purchases of public switching and transmission equipment in the EC have been subject to the public procurement directive, Directive 93/38/EEC for almost two years now.

Switching

(48) Purchases of public switching under the public procurement directive, however, have in most cases been carried out without using a call for tenders procedure. Most of these purchases have been done either applying the derogation pursuant to Article 20 (2) of the Directive which includes an exception for technical reasons or reasons connected with protection of exclusive rights, or under multiannual contracts entered into be the TOs with their traditional suppliers prior to the entry into force of the Directive. Suppliers of public switching equipment have also stated that the situation is not likely to change in the future, with regard to the extension or upgrading of the installed base. As stated above, there are technical reasons for awarding this type of contract to a given supplier. However, public procurement is likely to play a more important role at those times when TOs are considering the introduction of new major technological developments (such as digitalization or ATM broadband switching) in their networks. This situation opens up the possibility for TOs to consider new suppliers and for suppliers to enter *de novo* a public network. In this situation, tendering procedures would indeed be justified. An example of this is provided by the pan European ilot trials of ATM switching. Telecom Italia, as most of the other 15 TOs involved in this trial, issued a call for tenders following the procedures foreseen in the Directive. The call for tenders was published in the *Official Jornal of the European Communities* and the technical specifications were based on ETSI standards. Eight manufacturers were in a position to bid, including Italtel and Siemens. The competition was won by Erricsson and Alcatel.

Transmission

(49) Because of the lesser constraints to diversify the sources of supply and the relatively higher degree of standardization of transmission equipment, the impact of public procurement has been relatively higher in this market. In 1993, three TOs had purchased significant amounts of their requirements after calls for competition. In 1994, there has been a significant increase in the proportion of purchases acquired after calls for tender, and TOs in other Member States have started to use them. However, in most cases, the larger part of the purchases were still attributable to multiannual contracts established before the entry into force of Directive 93/38/EEC, notably in Italy.

3. *Technology*

(50) The public telecommunication equipment industry, and in particular the development and manufacture of public switching, is research intensive. Companies typically spend around 15 to 20 % of their turnover in R&D. The cost of developing a new generation of telecommunication switches has been estimated as high as ECU 4 billion by the parties. The figure varies depending on whether it refers to a small local switch or a major international exchange. Lifetime expenditures for a major family of digital exchange systems (such as EWSD from

Siemens or Linea UT from Italtel) approach ECU 1,6 billion. According to information submitted by the parties, the main suppliers of public switches (Alcatel, AT&T, Ericsson, Northern Telecom, Siemens) each invested close to 500 million dollars or more in R&D for public switches in 1992. These costs must be regarded as necessary to be able to maintain a competitive position from a technological point of view. Long-term viability in the market requires therefore a certain minimum amount of sales in order to be able to develop a new generation of switches and maintain the usual ratio in the industry of R&D expense to sales. Technology constitutes therefore another factor leading to a relatively high concentration of supply.

(51) The major technological developments regarding public switches have been described above, under product market definition. An important effect in this context is that major technological innovations typically give rise to operators considering new suppliers and suppliers considering opportunities to enter into new markets. In this context, and to analyse the possible impact of the notifed operation, it has to be noted that Telecom Italia has already made its choice of suppliers of digital switches (Ericsson, Alcatel and Italtel). Although ST has sold switches in the past in Italy, it has to be noted that these were not Siemens switches, but UT switches manufactured under licence from Italtel.

(52) The digitalization of the Italian network was decided according to an architecture defined during the 1980s, when the decision to move from analogue systems to digital systems was taken. This architecture is based on about 600 areas, within each of which the switching system is homogeneous. At that time, SIP assigned each single switching area through negotiations with all manufacturers of switching equipment that were able to guarantee maintenance service and assistance throughout the whole national territory. The last assignment of an area was done in 1991. It is improtant to note that with the transition from analogue to digital, SIP considered reducing the number of systems in its network from three to two, in line with the situation in other Member States. The choice has been described by representatives of Telecom Italia as a trade off between increased operating costs (in terms of maintenance and introduction of new services) and maintaining leverage against suppliers. The decision was taken to accept higher operating costs and maintain three different systems in the network, unlike most other TOs in the Community.

(53) The next technological discontinuity that may be compared to digitalization is the introduction of ATM switching. At present, no competitor expects large commercial orders for ATM switches in the public sector before the end of the century. Furthermore, there is at present uncertainty about the extent to which ATM switches will really replace digital public voice networks. The possibility remains that ATM will only be introduced in overlay networks for specific services of a limited scope, or that it be restricted to LAN or LAN interconnections. In any case, it has to be noted that the next round of competition for public switching will take place, if at all, under a market structure that will have been substantially modified by liberalization of basic services (anticipated in Italy by 1998) and infrastructures.

(54) With respect to ATM switches, it has to be noted that the experience in those countries that have started to introduce overlay networks with ATM switches or in the commercial applications for ATM in data transfer has shown the emergence of non-traditional public telecommunication equipment suppliers. According to specialized press reports, there are number of non-conventional suppliers of public switches that have already won commercial contracts from public network operators in the United States of America, Finland, Switzerland, the United Kingdom and Denmark.

4. Liberalization of services and infrastructures

(55) Competitors contacted by the Commission in its enquiries, have stressed that liberalization of services and infrastructures is more relevant to the actual functioning of the public telecommunication equipment markets than the traditional approach based on standardization and public procurement. Liberalization of public voice service is planned from 1 January 1998 (1). Furthermore, the Council of Ministers agreed on 17 November 1994 on the principle that public telecommunications infrastructures should be liberalized at the same time as the remaining services. It has to be noted that Italy is not among the countries that have requested specific derogations to these objectives.

(1) Council resolution of 22 July 1993 on the review of the situation in the telecommunications sector and the need for further development in that market (OJ No C 213, 6. 8. 1993, p. 1).

(56) According to some competitors, the progressive liberalization of services (private telecommunications, GSM) has reduced the potential for revenues of the TOs. TOs have lost significant markets and when they have still maintained a presence in those markets, prices and margins are in any case constrained by competition. The result of the liberalization of services could therefore, indirectly induce pressure on TO's to purchase equipment competitively even in the non-liberalized areas if they want to maintain their overall profits. Most other competitors have nevertheless focused on the liberalization of infrastructures as the determinant factor to introduce actual competition in this market.

(57) On the other hand, it has to be considered that even if infrastuctures are fully liberalized, the current monopolists will still enjoy a very strong position in their home markets until new entrants progressively set up their own infrastructures. In any case, the decisions as to the principle of liberalization and its time frame have been already adopted. This is of particular importance in view of the long life cycle of switches, because the decisions as to the infrastructure that TO's will build in the following years will have an irreversible impact for a long time frame, and consequently, the decisions regarding the choice of systems and technologies that will determine the basic telecommunications infrastructure of a country cannot ignore the future impact of these measures.

5. Vertical aspects in public telecommunication equipment

(58) One of the reasons for which the Commission decided to open a second phase investigation in this case relates to the fact that one of the parents of the joint venture, STET, controls Telecom Italia. Telecom Italia enjoys exclusive rights to provide public telecommunication services and to install and operate the relevant infrastructure in Italy and consequently, it is not subject to the usual competitive constraints in its own markets. On the other hand, the other parent of the joint venture, Siemens, is a European and world leader in telecommunication equipment. Therefore the notified operation raised serious doubts as to its compatibility with the common market since there was, in principle, scope for STET and the joint venture to significantly distort competition among suppliers of public telecommunication equipment in Italy.

(59) After the second phase investigation, and having consulted a large number of telecommunication equipment manufacturers and telecommunication operators, the Commission concludes that the notified concentration does not create or reinforce a dominant position in the markets of public telecommunication equipment (switching and transmission) for the reasons given gelow.

(60) First of all, it is necessary to examine the extent to which the notified concentration creates a market structure such that the objective interest of STET to force Telecom Italia to pursue an anticompetitive purchasing policy, or give privileged treatment to a supplier, is created or reinforced. In this respect, it has to be noted that if the notified concentration is not implemented, STET will continue to have full control of Italtel through the ownership of its share capital. In the situation where the concentration has been implemented, the benefits of any privileged treatment to the joint venture imposed on Telecom Italia by STET would be shared with Siemens. Prima facie, the notified operation reduce therefore the objective interest of STET or Telecom Italia to favour the joint venture at the expense of Telecom Italia, for instance by accepting higher prices for equipment. This is more so since Siemens gains a direct influence only over the equipment supplier (Italtel), and no influence at all over the telecom operator (Telecom Italia) or over its parent (STET). Such an operation would be of a very different nature.

(61) STET's or in the last instance, IRI's, economic interests are much wider with respect to the provision of telecommunication service than with respect to the manufacture of telecommunication equipment. The turnover generated by Telecom Italia represents roughly 80 % of the total turnover generated by the companies belonging to the STET group.

(62) Although STET has control of Telecom Italia, a large part of the share capital of both companies (over 40 %) is in private hands. Both companies cannot be identified as one single entity and certainly the interests of a large part of the shareholders of Telecom Italia are clearly distinguishable from those of the future joint venture. The distinction between the interests of the service activities and the manufacturing activities within the STET group has been further reinforced in the framework of the reorganization of STET, through the creation of Tecnitel, a 100 % owned company of STET. Tecnitel constitutes a separate organizational level in the structure of the STET group whose main function is the supervision of the manufacturing activities of STET, including the planning, technical and economic control of the manufacturing

businesses and the exercise, on behalf of STET, of the voting rights in the shareholders meetings in the manufacturing companies. Furthermore, in the course of the proceedings, STET stated in writing that it would not interfere in the purchasing policy of Telecom Italia, more in particular with regard to the choice of suppliers, and that it will maintain a clear separation of the Boards of Directors, the CEO, and in general the management of Telecom Italia, Tecnitel and the companies of the Italtel group.

(63) The structural characteristics of the public telecommunication markets described above, and the evidence gathered during the investigation, indicate that the entry of Siemens in the capital of Italtel will not result in a significant deterioration of the conditions of competition. The shareholder link between Siemens and STET and STET and Italtel is unlikely to have any major effect during the process of upgrading and extending of the existing network, since the decisions about the systems on which the network will be based have already been taken. This is further confirmed by the forecasts of revenues established by the parties for the joint venture, where most of the growth of the joint venture's turnover will be achieved through exports. The joint venture agreements set a target for the joint venture attain 40 % of its sales on export markets by 1997. Furthermore, none of the current competitors of the parties in Italy have approached the Commission during the second phase investigation to express serious concern as to maintaining their present position in Italy.

(64) With regard to the longer term, and in particular to the introduction of new technologies, the markets for telecommunications equipment are in the process of transformation due to (i) the possible development of large markets because of technological developments, (ii) the fact that the effects of standardization and public procurement legislation will progressively have a larger impact in opening up national markets, (iii) the further progress towards liberalization of services and, foremost, the liberalization of infrastructures which will lead more and more to the creation of a worldwide market for public telecommunications equipment. The effects of the combination of these developments have already been seen in the area of mobile communications, where the definition of a European standard (GSM), the liberalization of services and the liberalization of infrastructures have resulted today in the creation of a European, if not worldwide, market for the supply of telecommunication equipment.

Mobile radio networks

(65) In mobile radio the market share of Italtel in the last three years has been declining (from 64 % in 1990/91 to 39 % in 1992/93), while Siemens has reached a 6 % market share in 1992/93. The main competitors of the parties are Ericsson with a market share of 41 % in 1992/93 and Alcatel with a market share of around 10 %.

Furthermore the market for mobile radio networks in Italy has been opened to competition with the introduction of a second GSM mobile phone operator Omnitel-Pronto Italia Consortium which has been awarded the contract by the Italian Government after bidding.

From the investigation carried out in the European countries already opened to competition it can be stated that the access of a second mobile phone operator for GSM in Italy will have a significant impact on the competitive situation of the market of the equipment for mobile radio. In fact it is the usual practice of the new operators to build their own infrastructure for the provision of mobile telecommunication services utilizing the equipment of a variety of manufacturers. Some of the GSM operators have more than one supplier for each of the various parts of the mobile radio infrastructure (switching, base station, microwave equipment and terminals).

GSM is an autonomous network, interfacing with the rest of the telecommunication infrastructure at clearly defined points. GSM architecture has been defined in the GSM recommendations promulgated by ETSI and adopted as national standards in the EEA countries. The clear architecture and interface structure of GSM have had the effect of creating a truly European-wide (and subsequently worldwide) market for the equipment.

Generally the suppliers of infrastructure are chosen on a worldwide basis via tenders. A lot of suppliers were invited to tender for contracts. These include Siemens, Ericsson, Sel-Alcatel, Nokia, Motorola, Matra, AT&T, Northern Telecom and Orbitel.

The more common criteria followed by GSM operators to award contracts to suppliers are:

— technology,

— reputation of the supplier,

— price,

— engineering and technical knowledge,

— ability to meet delivery requirements.

The choice of equipment is crucial for the competitiveness of the service of GSM operators. Even if the market of the service has a strong local component, the market for GSM's equipment is worldwide.

(B) Private telecommunication equipment

(66) With regard to private telecommunication equipment, for the segment of PBX, KTS and related terminals, the market share of Italtel has been declining (from 22,9 % in 1990/91 to 17 % in 1992/93), while Siemens had a market share of 9 % in 1992/93. In compliance with the Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment (1), the individual markets are now fully liberalized. There is a large number of manufacturers which are active on the market. In line with the fragmented production sector, distribution is carried out by a large number of sellers.

(67) With regard to private telecommunication equipment, the customers contacted in the investigation have stated that, even after the completion of the transaction, they will continue to have a sufficient number of alternative suppliers to purchase from. Generally they have indicated that they purchase through SIP, which has given them the possibility of choosing the products of different manufacturers (Siemens, Alcatel, Italtel, Ericsson). They have also indicated that there are other potential suppliers like Philips, Olivetti, IBM and Northern Telecom. The competitors contacted by the Commission have in general stated that they do not face any major obstacle to selling in Italy.

(68) The position of the merged entity in any of the private telecommunication equipment markets is comparatively weaker than in the public telecommunication sector in terms of market shares. Also, Italtel has lost significantly in its market share in the last three years. Even though SIP continues to enjoy a very strong position as a distributor direct sales from suppliers to customers are possible in the absence of legal barriers. The competitors have stated that they can address the Italian market selling directly or through channels of distribution other than SIP, like independent distributors.

VII. CONCLUSION

(69) For the reasons outlined above, the Commission considers that the proposed concentration does not lead to the creation or reinforcement of a dominant position in any of the markets identified above in the sectors of public and private telecommunication equipment, as a result of which effective competition would be significantly impeded in the common market within the meaning of Article 2 (3) of Regulation (EEC) No 4064/89. The concentration can therefore be declared compatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The proposed concentration between STET and Siemens is declared compatible with the common market and the functioning of the EEA Agreement.

Article 2

This Decision is addressed to:

STET Società Finanziaria Telefonica SpA
Corso d'Italia 41
I-00198 Roma

and

Siemens Aktiengesellschaft
Wittelsbacherplatz 2
D-80333 München

Done at Brussels, 17 February 1995.

For the Commission
Karel VAN MIERT
Member of the Commission

(1) OJ No L 131, 27. 5. 1988, p. 73.

Commission Decision

of 19 July 1995

declaring a concentration to be incompatible with the common market

(Case No IV/M.490 - NORDIC SATELLITE DISTRIBUTION)
Council Regulation (EEC) No 4064/89

(Only the English text is authentic)

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[1] on the control of concentrations between undertakings, and in particular Article 8(3) thereof,

Having regard to Article 57 of the EEA Agreement,

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,

WHEREAS :

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[1] OJ L 257, 21.09.1990, p. 13.

I. THE PARTIES

1. Norsk Telekom AS (NT), Tele Danmark AS (TD) and Industriförvaltnings AB Kinnevik (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).

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

3. 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 telephone 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.

4. 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 TV channel TV 4 (a Swedish channel) and is represented on the Board of Management of TV4.

Finally, Kinnevik has a 37.4% shareholding in Kabelvision AB, a cable television operator in Sweden.

II. THE OPERATION

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

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

7. NSD will provide satellite TV channels to cable TV operators and to direct-to-home households.

8. 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

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

10. 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

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

12. 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.

13. 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 technology (analogue) each transponder will have a capacity to transmit one TV channel. The introduction of digital technology is expected to increase the capacity of each transponder five to ten times.

14. 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[2].

15. 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, ie. subscribers to the particular encrypted channel(s), can receive the channel(s). Pay-TV are invariable encrypted. In the Nordic area all channels broadcasted by satellite are encrypted in contrast to other parts of Europe. When encryption takes place a datastream is inserted along with the TV signal for use by the conditional access system. A conditional access system consists essentially of (1) an adaptor for decryption (decoder), (2) a subscriber management system (SMS), (3) a Subscriber Authorization System (SAS) and, finally, (4) an encryption system.

16. 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.

17. 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

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[2] 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.

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.

18. 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 certain 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.

19. 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.

20. 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.

21. 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.

22. 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 with the purpose 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.

23. 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, thereby, the cable TV operator could save an encoding and decoding system in each head-end.

V. CONCENTRATION

Joint control

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

25. 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:

- approval of and amendments to NSD's operational and investment budgets and strategic plans;
- borrowing exceeding 2 million NOK (approximately 250.000 Ecu);
- matters entailing substantial or extraordinary financial commitments for the company, including the lease of satellite capacity if the company thereby assumes substantial liabilities when such liabilities are not included in the last budget approved by the board;
- use of other satellite positions than 1 degree West and 5 degrees East, and decisions on major changes in technical standards an other operational issues;
- employment of a chief executive officer who will be responsible for the day-to-day management of the company and the approval of operation guidelines for this chief executive officer.

26. The chairman of the board of directors shall act as chairman of the general shareholders' meeting, unless the parties agree otherwise. The chairman of the shareholders' meeting does not have a casting vote.

Resolutions at the shareholders' meeting will be adopted by

the majority required by the Norwegian Companies Act, except for issues listed in Clause 5.2 for which, if brought to the shareholders' meeting , unanimity will be required.

27. 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

28. 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 degree West and 5 degrees East;
- 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. This will not include telephone services and data or other services to the business market.

29. 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.

30. 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.

31. 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 degree West, 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 degree West.

32. 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 (internal business television and data transmission services are excluded). 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.

33. 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 after offering NSD an economic compensation.

34. In addition, Kinnevik and TD have entered into lease agreements with the Swedish satellite operator Nordiska Satelitaktiebolaget (NSAB) for the lease of six transponders situated at 5 degrees East. On this position, NSAB owns the Sirius satellite and the Tele-X satellite, each with 5 transponders. Kinnevik and TD have leased four transponders on Sirius which now transmit four of Kinnevik's channels, TV3 Sweden, TV6, ZTV and Filmmax. This agreement went into effect on August 1994 and runs for six years. In addition Kinnevik and TD have leased two transponders on Tele-X, of which one is currently not used. TD and Kinnevik entered into these two agreements on November 1994 and January 1995 and both will expire on July 1997 or with end of life of the satellites. Under the agreements Kinnevik and TD will have a right of first refusal until August 2000 with respect to the remaining 4 transponders on 5° East (one on Sirius and three on Tele-X) and, furthermore, for the same period the two companies will have a right of first refusal with respect to future capacity at 5° East becoming available to NSAB. All the lease agreements containing the rights of first refusal are intended to be transferred to NSD prior to the date of commencement of operations.

35. 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 (7-10 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.

36. 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.

37. 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 6% of the share capital in Viasat Denmark in 1998.

38. In Norway NSD will have, for the time being, two representatives: Viasat Norway (100% owned by Kinnevik) and Telenor CTV. It is foreseen that both entities should merge and remain under control of Telenor.

39. 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 here is that in order to favour NSD's Hot Bird position, if the channel in question is located at 1 degree West, Sirius or Tele-X, the distributor will not be able to distribute the same channel from another satellite position.

40. The price to subscribers of the individual channels included in NSD's package will be decided by the broadcaster itself, when NSD acts as an agent. Where NSD enters into a distributorship agreement with the broadcaster the price to the subscribers will be decided by NSD or by NSD's distributors if they act as sub-distributors in cooperation with NSD. 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.

41. 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 the prices and budget approved by NSD.

42. 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 as soon as it is technically possible.

43. 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 the exclusive right to conduct negotiations and enter into agreements with broadcasters concerning marketing and sale of channels via cable in those geographic areas.

44. In a similar way as that agreed with Viasat, NT and TD's cable operator's agreements with broadcsters 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'.

45. Despite of the fact, that NSD will be relatively small in economic terms, since it will only employ around 20 people the first year and around 50 within two or three years and it will have assets for a value of around 25 million Ecu, 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

46. 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.

47. In the direct-to-home distribution market the parties intend to merge Telenor CTV's activities in Sweden, Denmark and Norway with those of Viasat, which will become the exclusive distributor of NSD's package of TV channels 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.

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

49. 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 point 53). 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.

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

51. 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*

52. 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.

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

53. 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 625 Million Ecu). 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.

54. 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 the decision IV/M.469 - MSG Media Service). The NSD operation will result in a reorganisation 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[3]

55. 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.

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[3] In the statement of objections, this market was named "Administrative and technical services in distribution of satellite pay-TV and other encrypted channels". The change has been made in order to emphasize the commercial relationship between the distributer as a provider of TV channels and the direct-to-home households.

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.

56. 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 parents distribuion companies on an exclusive basis. (see points 37-39).

57. 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 point 59). According to the parties, 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 1,15 million households.

(iii) Operating cable-TV networks

58. The cable operators provide the following services to households connected to their networks : maintainance of the network, sale and marketing of TV channels. In addition, the cable operators target the SMATV households in order to sell the TV channels also to this segment. Households wanting access to pay-TV normally rent a decoder from the cable TV operator. However, cable TV operators normally operate 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.

59. From the point of view of the viewer there are considerable differences between the possible transmission routes - terrestrial, direct-to-home satellite and cable - which affect both technical requirements and finance. While terrestrial transmission and satellite television only require the viewer to install an aerial or a satellite dish at his own expense, cable TV is dependent on the maintenance of a cable network, which is financed by the viewer by means of cable fees (see IV/M.469 - MSG/Media Service). As shown, currently approximately 4.3 million of the 10 million Nordic households are connected to cable TV networks and around 0.7 million are connected to SMATV of which some receives the signal from cable TV operators.

	DENMARK	SWEDEN	NORWAY	FINLAND
Households	2.3 mio	3.9 mio	1.9 mio	1.9 mio
of which connected to :				
cable TV	1.05 mio	1.9 mio	0.565 mio	0.78 mio
SMATV	0.25 mio	0.3 mio	0.120 mio	0.10 mio

60. 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 characterised 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 forseeable future.

A further element which can limit the option for a household is 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.

61. 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

62. 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.

63. 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 economic and aesthetic restrictions as the direct-to-home households, they will be able to receive signals from nearly all European satellite positions.

64. 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 provided by the parties, 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.

65. 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.

66. 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 from the parties in which is it 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.

67. 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 from

the parties indicates that the fee for leasing a transponder on Astra or Eutelsat will be considerably 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.

68. However, in this case, technical questions relating to footprints and sizes 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

69. 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 points 135-138). 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

70. Provision of cable TV services to viewers is a regional service. Competition between operators to obtain connections may to a certain extent take place on a national scale in terms of marketing efforts. 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, at least a national market.

VIII. ASSESSMENT

71 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). Sections D [...] discuss issues relating to economic and technical progress.[...] The Commission's conclusions are set out in section E.

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"

72. Currently, there are five satellites in the position 1° West and 5 degrees East. These are :

- Thor with 5 transponders (of which all are used for NSD's channels)
- Intelsat with 10 transponders (of which four are used for NSD's channels; three are used for public channels; the rest is used by other independent broadcasters)
- TV-Sat with 5 transponders (of which three are used for NSD's channels; one is used by an independent broadcaster; one is currently not used but controlled by NSD)
- Sirius, owned by the Swedish state owned company NSAB, with 5 transponders (of which four are used for NSD's channels; one is used by an independent broadcaster)
- Tele-X, owned by NSAB, with 5 transponders (of which one is used for NSD's channel; one is currently not used but controlled by NSD; one is used for a public channel; the rest is used by other independent broadcasters).

Telenor owns and operates the Thor satellite, positioned at

1 degree 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 Sirius satellite and two on the Tele-X satellite, both situated at 5° East. This agreement is intended to be transferred to NSD prior to the date of the commencement of operations.[...]

73. 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° West and 5° East, NSD will immediately lease 19. [...]

b) Competition from Astra and Eutelsat

74 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 interests to Nordic households.

75 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 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.

76 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**
Because broadcasters will be able to lease transponders on NSD at lower prices than on Astra and Eutelsat, a broadcaster targetting the Nordic market will obtain an advantage by being on NSD's satellites compared to competitors who are on Astra or Eutelsat.

(v) **No capacity on Astra an Eutelsat**
All transponder capacity on Astra and Eutelsat is currently occupied.

(i) <u>The importance of Kinnevik's TV channels</u>

77 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 25 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 4 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 TV 3 is the most important.

78 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.

79 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 channels TV3 Denmark, TV3 Sweden, TV3 Norway and TV1000. Because of the operation, Astra shall no longer transmit the Kinnevik owned channels which will then be exclusively transmitted from the Nordic satellites. In addition, it is likely that Astra will also stop transmitting the remaining national channel, FilmNet's pay-TV channel, since FilmNet by the agreement with Telenor (see point 134) will get access to an additional transponder on 1 degree West.

80 Kinnevik's four transponders on Astra will not become available for broadcasters of Nordic TV channels. It is the stated aim of Kinnevik to lease the four transponders to broadcasters with no Nordic interests. In a market characterized by a rise in demand and a shortage of supply, such a move serves to limit competition.

81 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. The first four mentioned channels will be transmitted in a more attractive Nordic version in NSD's package. According to the parties, 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 Eurosport Nordic, CNN Nordic and MTV Europe 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.

82 Based upon the above mentioned, 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.

83 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.

84 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 degree West or 5 degrees East.

85 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.

86 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 motorised dishes and fixed dishes with side-feeds. If they wish to, households can also buy another fixed dish.

87 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 motorised 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 the parties. Motorised 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 25 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.

88 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

89 A broadcaster transmitting from Astra or Eutelsat will be excluded from NSD's package of satellite TV channels. In the Nordic countries satellite TV channels are sold in packages and by the operation NSD will offer very attractive packages. To be excluded from NSD's packages of channels will put a broadcaster in a very disadvantaged position compared to NSD's broadcasters. It is very unlikely that such broadcasters could develop new packages which could compete with NSD's package of channels. Another option would be to get onto FilmNet's packages of channels. However, compared to what NSD's packages can offer (i.e. the Kinnevik channels including TV3, the Nordic versions of other channels see points 77-81 above) FilmNet's package (see point 132) 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 point 140).

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

90 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 25% of the approximately 5 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 128).

(iv) The price difference

91 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

92 All transponder capcity on Astra and Eutelsat is occupied and in addition, the market for TV transponder capacity is for the moment characterised by a rise in demand and a shortage on the supply side. Furthermore, Kinnevik which currently leases 4 transponders on Astra directed at Nordic region, has decided not to sub-lease these to broadcasters targetting the Nordic region when it moves its channels to NSD satellites.

c) Potential competition from future capacity

93 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

94 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.

95 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 that many that it would be possible to create a package that could compete commercially with NSD's.

(ii) NSAB

96 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. This means inter alia that NSAB shall not acquire additional capacity at 5° East without first consulting NSD. Furthermore, NSD will have a right of first refusal with regard to satellite capacity at 5° East which is or will become available to NSAB or which NSAB plans to have

available. Consequently, NSD will also control those 32 transponders, if NSAB carries its plan through. **These are non-ancillary agreements subject to Art. 85 of the treaty.**

(iii) New players using new satellites

97 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 40 and 100 million Ecu. To this must be added launching costs of between 20 and 75 million Ecu 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 is taken to built a new satellite until the satellite can begin transmitting.

(iv) New players using second hand satellites

98 The parties argue that there is a second hand market for operative satellites which means that potential operators can buy or lease 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° West and 5° East are "second-hand-satellites". Furthermore, according to the parties, it is possible to tilt the satellite so that the entire foot-print is moved.

99 However, according to information available to the Commission, although it is possible to re-point the satellite to a different region of the earth, the footprint coverage is unlikely to be ideal since the satellite was not originally designed to cover the new region. In addition, even if an independent satellite operator chose to carry through such an operation, such satellites would be competing with NSD's "Hot Bird" with all its competitive programming advantages transmitting 20 -25 TV channels of which several are Nordic channels not accessible for other satellite operators than NSD.

100 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

101 The introduction of digital technology will increase the capacity of a satellite by 5-10 times. According to the parties, 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 300 and 500 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. According to the parties, 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.

102 Furthermore, NSD will still 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.

103 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

104 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 4.4.95). 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.

105 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 degree West and **the present leasing** agreements with NSAB (the Swedish satellite operator) ensures NSD control of **[...[the majority of the** transponder capacity situated on 5 degrees East. As a result, NSD and its parents will control all Nordic transponders. [...]

106 Through its control over the transponder capacity, the links to 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.

107 Even if Astra and Eutelsat could be considered actual competitors, they will not have transponders to offer eventual 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 Kinnevik has stated that the four transponders will not be offered to broadcasters with Nordic interests. 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.

108 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 no 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.

109 **The above conclusions are reinforced by the existence of the rights of first refusal on 5° East even if these are not to be considered ancillary and therefore to be assessed under Art. 85 of the Treaty.**

B Operation of cable TV networks

B.1. Market structure

110 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

111 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 625 000 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 110 000 households. Stofa is controlled by Telia, the Swedish telecom operator. Besides these two operators the market consists of a large number of aerial associations.

112 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

113 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.

114 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 section B.2-3 below).

115 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[4] 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

116 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 190 000 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.

117 Retransmission of satellite television programmes by way of cable networks does not require a special license 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.

118 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

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[4] Commission letter of 23.12.1994 to the Danish Government.

to a large extent possible since about 2/3 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 2-3% per year and the penetration is expected to reach a level of 40-50% of the total amount of households.

c) Sweden

119 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 (the former public telecom operator which has been privatised) is the dominant operator with approximately 1,2 million connections (about 50% of all connections). The parties had invited Svenska Kabel to participate in NSD but negotiations are no longer taking place. Kinnevik has a 37.4% interest in the second largest cable operator Kabelvision AB (TCI 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.

120 Kinnevik has a 37.4% interest in Kabelvision and appoints one member of the board of directors of Kabelvision. 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

121 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.

122 The parties to the operation are not active on the Finnish cable TV market. However, the parties invited the two largest cable TV operators - Helsinki Media, which are also active in Norway (Janko Kabel TV with about 22% of all

connections), and the public Finnish telecom operator, to participate in the joint venture. No agreements have been reached but it is still the aim of the parties to included the two Finnish cable TV operators in the joint venture.

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

123 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 channels 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.

124 The parties have argued that the creation of NSD would not prevent the independant 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 (Eurosport Nordic, CNN Nordic and MTV Europe and probably more since it is the intention of NSD to obtain such exclusivity arrangements) independant 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 programs from Astra, or other satellites not controlled by NSD and in such a case they would negotiate directly with broadcasters. However, only non-Nordic languaged channels will be available on Astra or other satellites.

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

126 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 favor 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.

127 According to the parties, in the digital environment it is the intention of the parties to develop and 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 transparent transmission of its package of TV channels and provision of SMS and SAS to cable TV operators, including the parents' own cable operators. According to the parties, such a solution 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 needs 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.

128 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. The parties have not yet decided what technology to be used and whether the encryption system will be open or closed. 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

129 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 liberalisation, as TD will still retain many advantages over its competitors due to its past legal monopoly.

The Wider Nordic Area

130 The parties control or influence about 25 % of the cable and SMATV connections in Norway, Sweden and Denmark. Because of NSD's dominance of the transponder market, point i. to iii. above will apply to the competitive situation between the parties' cable opertors in Norway and Sweden as much as they do in Denmark.

131 However, there will be no reinforcement of a pre-existing dominant position on these markets other than in Denmark, and 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

132 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 the parties, by March 1995 Viasat, FilmNet and Telenor CTV provided the following numbers of smart cards in the Nordic countries:

Denmark	Number of Cards sold
Viasat	148 000
FilmNet	30 000
Telenor CTV	4 000
Norway	
Viasat	122 000
FilmNet	30 000
Telenor CTV	31 000
Sweden	
Viasat	272 000
FilmNet	50 000
Telenor CTV	29 000
Finland	
Viasat	0
FilmNet	5 000
Telenor CTV	11 000
Nordic Total	Number of Cards sold
Viasat	542 000
FilmNet	115 000
Telenor CTV	75 000

133 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 below) Telenor's CTV package will be available also on FilmNet's smart card. 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. In this connection it has to be borne in mind that it is the intention of the parties to merge the activities of Telenor CTV into Viasat.

134 The FilmNet/Telenor agreement : FilmNet is currently being broadcasted 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 distibutor 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 Telenor grants Nethold an option to lease one more transponder on 1 degree West. Telenor's CTV package will also be available on Multichoice's smartcard. The agreement only deals with the broadcasting of channels in the analogue format. However, according to the agreement, the parties will establish a joint working party to investigate co-operation on the introduction of digital services.

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

135 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 points 123-128), 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.

153 The dominant position of NSD in transponders would provide NSD with a "gate keeper" function in the supply of TV channels to the Nordic area. Kinnevik will thereby be able to influence which channels will be allowed to broadcast advertising financed TV channels to the Nordic area, and in what form.

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

155 Apart from the three markets analysed in the decision the Commission has investigated the four other businesses - 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 a dominant position due to the operation.

156 On the basis of the above considerations, it is considered that the proposed merger would lead to the creation or strengthening of dominant positions through which effective competition in a substantial part of the Community would be significantly hindered. The concentration is, therefore, pursuant to Article 2(3) of the Merger Regulation and Article 57 of the EEA Agreement, declared incompatible with the common market and with the functioning of the EEA agreement.

For the Commission

Nordic region.

147 The Commission recognizes the long term economic benefits of having an integrated system for transmission of satellite TV. However, as stated by the parties, the system has not been developed yet and it is not possible to say when it will be developed and implemented. Furthermore, the decision as to the technology to be used and the decision as to whether such an encryption system shall be closed or open has not been taken. According to the parties, such a decision will, among others, be based on the competitive situation. 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. According to the parties whether NSD will be willing to licence the rights to a new standard to third parties has not been decided.

148 The Commission takes the view 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.

149 Consequently, the reference to the technical and economic progress in Article 2(1)(b) of the Merger Regulation cannot be taken into account.

[...]

E. Conclusion

150 As a result of the operation, NSD will acquire a dominant position on the market for satellite TV transponder services suitable for Nordic viewers both in the short term and in the medium to long term.

151 NSD's dominant position on transponders would strengthen TD's dominant position on the cable TV market in Denmark.

152 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.

D. Economic and technical progress

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

143 However, 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 how available transponder capacity is allocated to broadcasters.

144 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.

145 According to the parties, in the digital environment it is the intention to develop and 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.

146 Because of NSD's dominant position as provider of TV channels from Nordic transponders 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 NSD's system. Thus, if the plans are carried through, NSD's joint Nordic encryption system would become the dominant system in the

136 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 above mentioned new agreement with FilmNet.

137 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.

138 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

139 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.

140 The agreement between FilmNet and Telenor allows FilmNet to sell the CTV package provided by NSD 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.

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

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 16.08.1995

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b)DECISION

To the notifying parties

Dear Sirs,

Subject : Case N° IV/M.618 - CABLE AND WIRELESS/VEBA
Notification of a concentration pursuant to Article 4 of Council Regulation No 4064/89

1. The above operation concerns the formation of two jointly controlled companies : VEBACOM and Cable & Wireless (Europe) to offer telecommunications services in Germany and the EU (plus Switzerland but excluding the UK) respectively. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of the Merger Regulation and that it does not raise serious doubts as to its compatibility with the common market.

I THE PARTIES

2. Cable and Wireless plc (C&W) is an international provider of telecommunications services with activities in Asia, the Caribbean, Europe, the United States, Japan, the Middle East and Africa. Its European activities are centred in the UK with its majority interest in Mercury Communications, the second telecommunications operator following liberalisation of services in the UK. C&W also has a worldwide strategic alliance called the C&W Federation. The C&W Federation is an umbrella organisation which provides the participants with the opportunity to co-operate by making facilities available and offering joint services to multinational corporate clients.

3. VEBA AG is a German holding company for subsidiaries with activities in electricity, chemicals, oil, trade, transport and services and telecommunications. Its existing telecommunications interests are consolidated in VEBA Telecom. VEBA holds a shareholding of 10.5% in C&W and is a member of the C&W Federation.

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II THE OPERATION

4. The operation consists of the formation of two joint ventures in Europe in the telecommunications sector. The first, VEBACOM, will comprise all the parties' telecommunications interests in Germany (except for certain dedicated telecommunications activities carried out by and for other VEBA AG companies). The second, Cable & Wireless Europe (CWE), will be established in Belgium and will contain substantially all the parties' activities in Europe other than in Germany or the UK. C&W will keep Mercury Communications and the PCN operator Mercury One2One outside the joint ventures.

5. Both parties have activities in PCN networks in Europe. C&W has a 50% stake in Mercury One2One in the UK, a 20% stake in Bouygues Telecom in France and a 5% stake in Mannesmann Mobilfunk GmbH in Germany. VEBA has a 28.375 % stake in E-Plus in Germany and a 15% stake in Bouygues Telecom. The E-Plus stake will be transferred from VEBA to VEBACOM at closing. The two parents' stakes in Bouygues Telecom will be managed by CWE for 12 months after which time they will be transferred to CWE or the new joint venture outlined below. C&W has undertaken, at the request of VEBA to either dispose of or waive its rights in Mannesmann Mobilfunk (except those relating to dividends). The C&W stake in Mercury One2One will remain outside the joint venture.

6. The interests in the Swiss cable TV activity, Cablecom and the French paging business Infomobile will be transferred to CWE following the consent of the other shareholders. In the meanwhile, the stakes will be managed by VEBACOM and CWE respectively. The transfer of shares in the relevant C&W subsidiaries will be completed within three months of closing. C&W also has a holding in Tele 2 (the Swedish PSTN operator) which may also be held for a short period before being transferred to the JV. CWE will also manage the two parents' stakes in Bouygues Telecom (C&W - 20%, VEBA - 15%).

III CONCENTRATION

Joint control

7. The shares in VEBACOM will be held 55% by VEBA (through VEBA Telecom) and 45% by C&W. VEBA will have the management lead in VEBACOM. VEBACOM will have four levels of corporate governance: Shareholders' Meeting, Shareholders' Committee, Supervisory Board and Management Board. Day to day matters will be dealt with at the latter level. Strategic decisions will be taken in the Shareholders' Committee and will require unanimity for *inter alia* future budgets and business plans following the expiry of the start up business plan for 1995/97 and the budget for 1995, capital expenditure of over DM 50 million and the entering into of any interconnection agreement over DM 10 million.

   Accordingly, VEBACOM will be jointly controlled by C&W and Veba.

8. The shares in CWE will be held 50% each by C&W and Veba. Day to day management of CWE will be delegated to a management committee which will consist of at least three people and will be lead by C&W. This committee will manage CWE's affairs in accordance with its business plan and budget.

   CWE's board of directors will manage the companies' ordinary activities and will consist

of no fewer than eight directors, four from each parent. Other directors can be appointed with the agreement of both shareholders. The initial business plan (1995/97) and budget have been agreed by C&W and Veba. A revised business plan (1995/99) may be agreed pre-completion. All future business plans and budgets will require the unanimous approval of CWE's board of directors as well as decisions on capital expenditure in excess of DM 50 million and applications for licences from regulatory authorities.

Accordingly, CWE will be jointly controlled by C&W and VEBA.

Autonomous full function entity

9. The activities of the parent companies in the allocated territory will be taken over by the joint venture. VEBA's telecommunications interests in Germany will be taken over by VEBACOM. C&W will transfer activities in the relevant territories to CWE. Both companies' telecommunications businesses in the territories of the joint ventures will be contributed to the joint ventures together with their respective staff. Therefore, the two joint ventures are autonomous entities on a lasting basis.

Absence of co-ordination of competitive behaviour

(a) Withdrawal of VEBA from the market

10. By the operation, VEBA will transfer all of its principal activities in telecommunications into the joint ventures. It will, however, retain certain marginal activities which are integrated into their subsidiaries which operate in other (non-telecommunications) sectors. These include the internal telecommunications activities of the VEBA subsidiary companies (for example the remote measurement of heat consumption by energy companies via telecommunications networks) which are incidental to those companies' activities. They do not undermine VEBA's withdrawal from the telecommunications market.

VEBA's has a non-controlling stake (10.5%) in C&W and a standstill agreement has been signed by which VEBA undertakes not to increase it any further. VEBA has one member of the board of C&W by invitation of C&W.

Accordingly, VEBA does not exercise any control over C&W and therefore it cannot be considered to retain any presence in telecommunications activities other than through the joint venture.

(b) No likelihood of the re-entry of parent companies into the markets of the joint venture

11. As both C&W and VEBA will put all their telecommunications activities (with certain minor exceptions as set out above) in the allocated territories into the joint ventures, it is not economically feasible for the parents to re-enter the market in competition with either of the joint ventures. This is particularly true for C&W which would, outside VEBACOM, lack the local knowledge for a successful entry into the German market alone. This withdrawal from the market is confirmed by the non-compete clause in the VEBACOM agreement which excludes the possibility of a separate entry into the German market by C&W with any other German partner.

In respect of PSTN networks, certain activities in which VEBACOM is expected to be active, may involve the use of telecommunications infrastructure which belongs to the

VEBA subsidiary PreussenElektra. According to the agreement, VEBA has specified that it will offer to VEBACOM use of that network on at least open market arm's length terms which it offers to third parties. The right of VEBACOM to use the network cannot be of an exclusive nature since VEBA is obliged to offer use of the PreussenElektra network to third parties by draft German legislation which will implement the Open Network Provision directive (90/387/CE). However, this provision only applies to third party access and not to the possibility of VEBA offering telecommunications services in competition to VEBACOM. Through the alliance with C&W, VEBACOM shall financially and technologically be put into the position to compete in services with Deutsche Telekom and other suppliers from 1998 onwards. Also, VEBA will transfer to VEBACOM both the shareholding and any rights in respect of the proposed joint venture with Deutsche Bahn to establish a fibre optic network. A re-entry of VEBA into the market is therefore equally very unlikely.

The VEBACOM agreement contains a very limited exception to the non-compete clause which allows for the possibility of financial investments by one of the parents alone if and only if they cannot agree within VEBACOM.

For these reasons there is no likelihood of the parent companies re-entering the market of either of the joint venture companies.

(c) Conclusion on absence of co-ordination

12. In the light of the above information, there are no grounds to consider that the establishment and operation of CWE or VEBACOM will lead to the co-ordination of the competitive behaviour of independent undertakings, falling within the meaning of Article 3(2) second sub-paragraph of the Merger Regulation.

Conclusion

13. Thus, the notified operation constitutes a concentration within the terms of Article 3 of the Merger Regulation

IV COMMUNITY DIMENSION

14. C&W has a worldwide turnover of 6,615 million ECU in the last financial year whilst VEBA has a worldwide turnover of 36,915 million ECU. C&W has a turnover of 2,219 million ECU in the EU whilst Veba's EU turnover is 30,927 million ECU. C&W makes over two-thirds of its EU turnover in the United Kingdom whilst VEBA makes more than two-thirds of its EU turnover in Germany.

15. Accordingly, the concentration has a Community dimension within the meaning of Article 1 of the Merger Regulation.

V COMPATIBILITY WITH THE COMMON MARKET

Market definitions

16. VEBACOM and CWE will be active in the following fields: national and international fixed terrestrial telephone networks, satellite telecoms services, mobile PCN networks, paging, cable TV, corporate networks, managed bandwidth and value-added services.

However, there is no overlap between the two companies' activities in any of these fields and also significant actual (eg Deutsche Telekom) and potential (eg the emerging alliances mentioned below) competitors are present.

17. There is no overlap between Veba's and C&W's activities for national and international terrestrial networks since for the time being, VEBA does not operate those networks for third parties. The optic cable system of PreussenElektra, a subsidiary of VEBA, currently only serves its internal telecoms use, and the proposed joint venture between VEBA and Deutsche Bahn AG concerning the installation of fibre-optic links alongside railway lines in Germany with regard to deregulation in 1998 would be established through VEBACOM. Furthermore, VEBA has no activities in managed bandwidth and international voice access nor is C&W active in satellite telecoms services.

18. Mobile telephone networks form a distinct market from fixed telephony markets. PCN networks, in particular, have some characteristics which even distinguish them from GSM mobile networks. PCN ("Personal Communication network") and GSM ("Global System for Mobile communication") operate on different frequencies (900 MHz for GSM and 1710-1880 MHz for PCN). A PCN network requires a denser system of transmitters and rather aims at local or regional users. In the UK, PCN phones are primarily used by domestic and small-trade users. A PCN phone can, furthermore, not log into a GSM network at present. PCN networks which are also licensed on a national basis are altogether younger than GSM networks and the system infrastructure is still in the developing stage (see for example E-Plus as compared to the D1 and D2 GSM networks in Germany). International roaming agreements do not yet exist, and even national coverage is not yet reached for PCN in any Member State. Due to these characteristics of PCN, there are strong indications that PCN forms a separate product market which is different from GSM and has to be considered as a national market.

19. However, the precise market definition can be left open as, even on the basis of the narrowest market definition, the concentration raises no competition problem.

20. Mobile radio paging systems represent a separate product market which has to be considered on a national basis due to national regulatory systems and marketing on a national level.

21. The markets for cable TV networks are equally national in scope (see Commission's decision of 19.7.1995, IV/M.490 - Nordic Satellite Distribution, no. 73).

22. Corporate networks exist for data transmission and for voice transmission between large closed user groups. The concentration involves data network services which are provided on a national or international level according to the needs required by corporate customers.

23. Value-added services comprise a wide range of electronic communication applications which are tailored to the needs of customers. They may include messaging services (EDI, E-mail, E-fax, multi-messaging), in-flight telephony or access to databases. In the absence of regulatory or technical barriers, this market is EEA-wide, if not a world market.

24. In conclusion, given the absence of any competition problems in any of the possible market segments affected by the operation (as set out above), there is no need to define either product or geographic markets precisely.

Assessment

25. Apart from the above-mentioned markets where either of the parent companies has not been active up to now, the areas of paging and cable TV involve only activities on the side of VEBA, which will be transferred to the JVs: a 40 % interest of VEBA in Miniruf GmbH in Germany and a 10% stake in Infomobile SA in France (both in paging). C&W's paging activities in the UK will, in any case, remain outside the operation. VEBA will transfer two cable TV businesses, Tele Columbus and Concepta Kommunikations und Gebäudetechnik GmbH, as well as a Swiss subsidiary (Cablecom) into VEBACOM while C&W's cable TV interest in the UK will remain separate. In the absence of any overlap, competition concerns do not arise. In particular, VEBA could not be seen as a potential entrant in the UK in both markets which are determined by licence requirements and strong actual competitors (BT Mobile, Vodapage, Hutchinson in paging; and regional cable TV operators).

26. As to corporate networks and value-added services, VEBA has a controlling interest in Meganet, which operates a data network primarily for customers of the financial and services sector in Germany, and in LION which provides different communication solutions. Apart from its business in the UK, C&W is active in Germany only as far as Germany-based multinational companies or the "German end" of international networks are concerned. Since a number of significant suppliers such as national telecom operators (e.g. Deutsche Telekom), telecoms and computing service providers (IBM, EDI etc.) and a growing number of recently created or proposed alliances (e.g. BT/Viag, RWE/Générale des Eaux) are already active or will offer those services in these fields, the proposed concentration does not raise a competition problem.

27. Finally, both parent companies have interests in PCN networks which will, apart from C&W's UK activities ("One2One"), be part of the JVs' businesses. VEBACOM has a 28.375% stake in E-Plus in Germany, and both have interests in Bouygues Telecom, currently the only operator of PCN in France (C&W 20 %, VEBA 15 %). The parties might at a later stage put all these interests together in another joint venture as it is foreseen in a non-binding Memorandum of Understanding. At present, E-Plus will be part of VEBACOM, and the two stakes in Bouygues will, as set out above, be managed by CWE until the final transfer of the shares within 12 months time provided the agreement of the other Bouygues shareholders has been secured. The three PCN networks in which the parties or the JVs are involved operate in different member states. This would, on the assumption of national markets, exclude any overlap in market shares. On a European wide market for PCN and GSM combined, the market shares of the two parties taken together would be well below 10%.

28. As a result, the creation of VEBACOM and CWE will not lead to the creation or the strengthening of a dominant position in any market.

VI ANCILLARY RESTRAINTS

29. In each of the Shareholders' Agreements, C&W and VEBA each undertake to procure that none of their respective group companies will compete with the two JVs. These non-compete covenants are necessary to reflect the lasting withdrawal of C&W and VEBA from the JVs' markets and are integral to the concentration.

VII CONCLUSION

The proposed concentration therefore does not raise serious doubts as to its compatibility with the common market.

For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the functioning of the EEA Agreement. This decision is adopted in application of Article 6 (1) b of Council Regulation No 4064/89.

For the Commission,

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 15.09.1995

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(a) DECISION

To the notifying parties

Dear Sirs,

Subject: **Case No IV/M.604 - ALBACOM**
Your notification of 11 August 1995 pursuant to Article 4 of Council Regulation No. 4064/89

1. This operation concerns the creation of a company which will combine the telecommunications activities of British Telecommunications plc (BT) and Banca Nazionale del Lavoro SpA (BNL) in Italy. The new company - to be called ALBACOM SpA - will initially offer business communication services based on the two companies' existing networks and will expand their activities to offer other types of telecommunications services as the Italian market is liberalized.

2. After examination of the notification, the Commission has concluded that the notified operation involves the acquisition of sole control by BT of a new joint venture company which incorporates certain assets of BNL. The operation does not fall within the scope of application of Council Regulation 4064/89.

I. THE PARTIES

3. BT's principal activity is the supply of telecommunications services and equipment. Its main services are local and long-distance telephone calls in the UK, the provision of telephone exchange lines to homes and businesses, international telephone calls made from and to the UK and the supply of telecommunications equipment for customers' premises. BT and MCI Communications Corporation (MCI) are partners in the "Concert"

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joint venture, for the provision of advanced business telecom services to multinational companies[1].

4. BNL is one of Italy's largest banks with a total turnover of about 2,5 billion Ecu. BNL's subsidiary - Multiservizi - has an exclusive private (X25, 100 nodes) telecommunications network. Multiservizi also operates BNL's primary data network. Multiservizi's telecommunications activities are offered to third parties as well as BNL. The Italian Treasury holds a stake of about 73% in BNL.

II. THE OPERATION

5. The operation is the creation of ALBACOM as a new business telecommunications operator in Italy. BNL will contribute Multiservizi and the other telecommunications activities in which BNL is engaged. BT will contribute the activities of BT Italy relating to its network business within Italy but not its international correspondent business. ALBACOM will immediately acquire the BT Italy GNS and the Multiservizi TDM networks. The Multiservizi X25 network will be leased initially to ALBACOM, in order to comply with [...][2], and it is planned that that network will be automatically transferred to ALBACOM after five years. In any event, Multiservizi will not be able to sell capacity on the network.

III. CONTROL

6. The parties' shareholdings in ALBACOM will be split 50.5% BT and 49.5% BNL. At board level, BT is expected to have four members to BNL's three. Therefore at both shareholder and board level, BT will have an inbuilt majority of issues where no minority right provisions apply.

7. BNL retains certain joint rights, some of which are on a permanent basis (or until BNL's shareholding falls below 25%) and others of which are only applicable to the first three years (the Development Phase) of ALBACOM's operations. The permanent rights include the following:

- approval of triennial reviews to the Business Plan;
- approval of annual updates to the initial Business Plan and Business Plan where these entail funding above the thresholds in the Initial Business Plan;
- changes to the power or authority of the Chief Executive Officer (CEO);
- shareholder related contracts;
- [...][2];
- changes in the scope of the company and the Articles of Association;
- [...][2].

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(1) Case No. IV/M.353 - British Telecom / MCI, of 13 September 1993 and Case No. IV/34.857 BT-MCI, of 27 July 1994.

(2) Deleted; business secret.

8. For the first three years only, BNL enjoys rights also in the following areas:

- appointment and dismissal of the CEO;
- [...][3];
- [...][3];
- [...][3].

9. The areas in which a simple majority is sufficient include the approval of the budget and long-term strategic decisions within ALBACOM's original scope.

10. A Put Option exists for BNL [...][3].

11. On a permanent basis, a Call Option gives BT the right to acquire BNL's shareholding [...][3].

12. An Initial Business Plan has been agreed between BT and BNL. This Business Plan covers the first ten years of operation of ALBACOM. The Business Plan is updated annually (with the joint rights listed above) and is subject to a triennial review which is proposed [...][3] to the shareholders meeting where BNL [...][3].

13. In the Commission Notice on the notion of a concentration, the relative importance of veto rights is assessed in section 2.2. In general, the principal rights which a minority shareholder should hold in order to be able to exercise a decisive influence are the appointment of the management and the determination of the budget (see paragraph 25). Next in order of importance is the rights over the business plan (paragraph 26). In the ALBACOM shareholder's agreement, the appointment of the Chief Executive Officer is subject to joint decision making during the first three years and is by simple majority thereafter. For the approval of the budget, a simple majority is sufficient as BNL has no joint rights at any stage. By contrast, BNL retains joint rights for both the triennial review of the Business Plan and for the annual updates where these involve major funding increases.

14. On the basis of the above information, it could be argued that for the time of the Development Phase (3 years), BNL has joint rights in relation to the Business Plan and to the appointment/dismissal of the CEO and will therefore exercise joint control over ALBACOM. After the completion of the Development Phase, BNL's veto rights will be limited to the updates and reviews of the Business Plan except of minor funding increases where BT has a Call Option (see para. 15). Thus, BT will subsequently not only control the budget and long-term strategic decisions of the JV, but also the appointment and dismissal of the CEO, i.e. the management of ALBACOM.

15. In the light of the BS/BT case[4], the fact that after three years BT will have the decisive influence over budget, management and long term strategic decisions in the context of a ten years business plan means that the operation should be assessed as sole control by BT. In BS/BT, both BT and Banco Santander were deemed to have joint control during the first three years of the operation of the joint venture. Due to a significant change in

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(3) Deleted; business secret.

(4) Case No. IV/M.425 - BS/BT of 28.03.1994.

the consent rights of the parties and a special Put Option of BS, BT was deemed to exercise a decisive influence over the JV after three years.

16. In the present case, BNL will retain joint rights after three years as to the updates of the Business Plan including major funding increases. It is true that a veto right over the business plan may be sufficient to confer joint control even in the absence of any other veto right as it is stated in paragraph 26 of the Commission Notice on the notion of a concentration. However, the Business Plan of ALBACOM is in particularly close relation with the budget of the joint venture. According to section 1.11 of the Business Plan, the annual budget will be established on a monthly basis, allowing for variance analysis and updates on actual figures to be submitted to the Board on a monthly basis. Through the continuous control over the budget, BT will thus have a considerable influence on the regular updates of the Business Plan itself.

17. In addition, BNL will from year 4 onwards lose the right to veto changes to the [...][5]. A part of the Business Plan which is of importance for the activities of ALBACOM will thus be solely controled by BT after completion of the Development Phase.

18. Finally and as opposed to the BS/BT case, the options, which are granted to the parent companies under the Shareholders Agreement, are not appropriate to give decisive influence in one way or the other. The BNL Put Option [...][5] which can only be exercised in narrowly defined circumstances. Consequently, the Put Option cannot act as any sort of deterrent to BT to act in a way that takes account of BNL's views more than if it did not exist. This is equally true for the BT Call Option which can only be exercised [...][5].

19. It would appear, therefore, that on the basis of the traditional determinants of control, BNL may have joint control for the first three years. It will however no longer have control from year 4 onwards since it has no longer decisive influence on the appointement of the managment and the budget, which are (according to the Commission Notice on the notion of a concentration) the most important veto rights. As in the BS/BT case, the business plan covers a ten year period and, according to the financial projections of the parties, [...][5]. Given the long term nature of this investment in the telecoms sector in Italy, the three year period is insufficient to bring about a lasting change with regard to the participation of BNL (see also paragraph 38 of the Commission Notice on the notion of a concentration). BT will therefore have sole control over ALBACOM. Consequently, the operation is the acquisition of control by BT of a new joint venture company which incorporates certain assets of BNL. Therefore, for the purposes of calculating turnover, Article 5(2) is applicable.

IV. ABSENCE OF COMMUNITY DIMENSION

20. BT and the parts of BNL which are the subject of the transaction have a combined worldwide turnover of more than 5000 million ECU as BT alone had a worldwide turnover of 17,905 million Ecu in the financial year 1994/95. BT has a Community wide turnover of over 250 million ECU. The assets of BNL acquired by BT are about 20 million Ecu and do thus not have the Community wide turnover required by Article 1

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[5] Deleted; business secret.

(2) b of Council Regulation 4064/89. Therefore, the operation does not have a Community dimension.

V. CONCLUSION

21. Based on the above, the Commission has concluded that the notified operation does not have a Community dimension within the meaning of Article 1 of the Merger Regulation and therefore does not fall within the scope of the Merger Regulation. This decision is adopted in application of Article 6(1)(a) of Council Regulation No 4064/89.

For the Commission,

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 15.09.1995

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(a) DECISION

To the notifying parties

Dear Sirs,

Subject: **Case No IV/M.604 - ALBACOM**
Your notification of 11 August 1995 pursuant to Article 4 of Council Regulation No. 4064/89

1. This operation concerns the creation of a company which will combine the telecommunications activities of British Telecommunications plc (BT) and Banca Nazionale del Lavoro SpA (BNL) in Italy. The new company - to be called ALBACOM SpA - will initially offer business communication services based on the two companies' existing networks and will expand their activities to offer other types of telecommunications services as the Italian market is liberalized.

2. After examination of the notification, the Commission has concluded that the notified operation involves the acquisition of sole control by BT of a new joint venture company which incorporates certain assets of BNL. The operation does not fall within the scope of application of Council Regulation 4064/89.

I. THE PARTIES

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14. On the basis of the above information, it could be argued that for the time of the Development Phase (3 years), BNL has joint rights in relation to the Business Plan and to the appointment/dismissal of the CEO and will therefore exercise joint control over ALBACOM. After the completion of the Development Phase, BNL's veto rights will be limited to the updates and reviews of the Business Plan except of minor funding increases where BT has a Call Option (see para. 15). Thus, BT will subsequently not only control the budget and long-term strategic decisions of the JV, but also the appointment and dismissal of the CEO, i.e. the management of ALBACOM.

15. In the light of the BS/BT case[4], the fact that after three years BT will have the decisive influence over budget, management and long term strategic decisions in the context of a ten years business plan means that the operation should be assessed as sole control by BT. In BS/BT, both BT and Banco Santander were deemed to have joint control during the first three years of the operation of the joint venture. Due to a significant change in

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17. In addition, BNL will from year 4 onwards lose the right to veto changes to the [...][5]. A part of the Business Plan which is of importance for the activities of ALBACOM will thus be solely controled by BT after completion of the Development Phase.

18. Finally and as opposed to the BS/BT case, the options, which are granted to the parent companies under the Shareholders Agreement, are not appropriate to give decisive influence in one way or the other. The BNL Put Option [...][5] which can only be exercised in narrowly defined circumstances. Consequently, the Put Option cannot act as any sort of deterrent to BT to act in a way that takes account of BNL's views more than if it did not exist. This is equally true for the BT Call Option which can only be exercised [...][5].

19. It would appear, therefore, that on the basis of the traditional determinants of control, BNL may have joint control for the first three years. It will however no longer have control from year 4 onwards since it has no longer decisive influence on the appointement of the managment and the budget, which are (according to the Commission Notice on the notion of a concentration) the most important veto rights. As in the BS/BT case, the business plan covers a ten year period and, according to the financial projections of the parties, [...][5]. Given the long term nature of this investment in the telecoms sector in Italy, the three year period is insufficient to bring about a lasting change with regard to the participation of BNL (see also paragraph 38 of the Commission Notice on the notion of a concentration). BT will therefore have sole control over ALBACOM. Consequently, the operation is the acquisition of control by BT of a new joint venture company which incorporates certain assets of BNL. Therefore, for the purposes of calculating turnover, Article 5(2) is applicable.

IV. ABSENCE OF COMMUNITY DIMENSION

20. BT and the parts of BNL which are the subject of the transaction have a combined worldwide turnover of more than 5000 million ECU as BT alone had a worldwide turnover of 17,905 million Ecu in the financial year 1994/95. BT has a Community wide turnover of over 250 million ECU. The assets of BNL acquired by BT are about 20 million Ecu and do thus not have the Community wide turnover required by Article 1

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[5] Deleted; business secret.

(2) b of Council Regulation 4064/89. Therefore, the operation does not have a Community dimension.

V. CONCLUSION

21. Based on the above, the Commission has concluded that the notified operation does not have a Community dimension within the meaning of Article 1 of the Merger Regulation and therefore does not fall within the scope of the Merger Regulation. This decision is adopted in application of Article 6(1)(a) of Council Regulation No 4064/89.

For the Commission,

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 6.11.1995

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(a) DECISION

To the notifying parties

Dear Sirs,

Subject : Case No IV/M.544 - Unisource/Telefónica
Notification of 29.09.1995 pursuant to Article 4 of Council Regulation No 4064/89

1. Unisource International NV (Unisource International) is a proposed joint venture between Unisource NV (Unisource) on the one hand, a company whose shareholders are PTT Telecom BV (the monopoly telecom operator in the Netherlands), Telia AB (the main Swedish telecom operator) and Swiss PTT (the monopoly telecom operator in Switzerland), and Telefónica, the Spanish telecom operator, on the other hand. The intention of the parties is to pool their experience, business and efforts in certain business areas, mainly value-added telecom services. After examination of the notification, the Commission has concluded that the notified operation falls outwith the scope of application of Council Regulation n° 4064/89.

I. THE PARTIES

2. Telefónica is the public telecommunications operator in Spain and is engaged directly and/or indirectly in national and international telecommunications networks and services.

3. The current structure of Unisource was created in 1993 when Swiss PTT joined with PTT Telecom and Telia. There had been an earlier agreement between Telia and PTT Telecom to pool their satellite services and later to create a international data communications company. The company is arranged into a number of different subsidiaries for specific service activities. These are:

- **Unisource Business Networks (UBN)** which has 1,208 employees and a turnover in 1994 of 388 MEcu;

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- **Unisource Voice Services (UVS)** a business unit of UBN which offers voice services to multinational business customers. It represents 60/80 employees and a turnover of 0.2 MEcu (est. 1994);

- **Unisource Satellite Services (USS)** a subsidiary offering international satellite services. It has 25 employees and a turnover of 5.6 MEcu (est. 1991);

- **Unisource Card Services (UC)** a subsidiary offering personal and corporate post-paid calling card services. It represents 13 employees and a turnover of 3.9 MEcu (est. 1994);

- **Unisource Mobile (UM)** a subsidiary offering mobile services (provision + acquisition of licences). It represents 236 employees and a turnover of 0.8 MEcu (est. 1994);

- **Unisource Carrier Services (UCS)** a subsidiary dealing with synergies in international networks. It represents 70 employees and a turnover of 5.76 MEcu (est. 1994);

- **ITEMA** is a subsidiary the prime mission of which is to strengthen the ability of the EDP organisations of the Unisource shareholders to provide improved functionality and quality of IT-services at lower cost for internal use.

II. THE OPERATION

4. The Unisource International shareholders will pool some of their businesses in value added telecom services. Telefónica will contribute its satellite services (VSAT - very small aperture terminal) business. Unisource will contribute UCS, ITEMA, UM, UC, the UVS business unit of UBN and USS. Unisource will also contribute UBN BV the holding company of the data communications businesses but not the domestic subsidiaries where the business is carried out.

III. ABSENCE OF CONCENTRATION

A. JOINT CONTROL/ABSENCE OF JOINT CONTROL

5. Unisource International will be jointly owned by Unisource (75%) and Telefónica (25%). The Unisource shareholding will be known as the A shares and Telefónica will hold the D shares.

6. The Unisource International structure of control is the following :

1) <u>The Supervisory Board</u>

7. The General Meeting of shareholders will appoint a Supervisory Board which shall exercise supervision over the Management Board, in charge of the day-to-day business of Unisource International and over the general course of business in the joint venture.

8. The Supervisory Board will be composed of 12 members appointed by the shareholders : 9 for Unisource (divided into 3 for each of PTT Telecom (the A directors), Telia (the B directors) and Swiss PTT (the C directors)) and 3 for

Telefónica (the D directors). The board will have a chairman and three vice-chairmen, each of them representing one of the four telecommunications companies.

9. All resolutions of the Supervisory Board will be adopted by unanimity of the votes cast. However, as far as budget and business plan related to the data communications business are concerned, it is expressly stated in article 12 of the shareholders' agreement that :

- the UBN budget and business plan will be adopted by the vote of the Supervisory Board members A, B and C (who represent Unisource);

- the Telematica budget and business plan will be adopted by the vote of the Supervisory Board members D (who represent Telefónica).

10. This means that the two parent companies will decide separately on two key issues (budget + business plan) related to the data communication business of Unisource International. Moreover, there is no provision in the agreements that allow Unisource to impose its conditions on Telefónica on these issues. There is, therefore, no joint control at the Supervisory Board level of Unisource International for its data communications activities. There is joint control only for the remaining activities of Unisource International.

2) <u>The Management Board</u>

11. The Management Board will be appointed by the General Meeting of shareholders and will be the same as the management board of Unisource. Telefónica will not be represented at this level as a result of the operation. The Management Board will be entrusted with the day-to-day business of Unisource International.

12. Although there is no transfer of assets and no joint control as far as data communications business is concerned, the parties have entered into a management agreement in which it is agreed that Unisource International will coordinate the responsibility for the management and operations of the domestic UBN subsidiaries and Telematica in order to avoid duplications of resources and to coordinate services development in the data communications business area. This coordination achieved through the Management Board of Unisource International does not amount to joint control as explained above, in paragraph 10.

Conclusion

13. In the light of the above information, Unisource International will only be jointly controlled for the non data communications areas of the business. As the parent companies retain separate arrangements for the data communications businesses, they are not jointly controlled notwithstanding the co-ordination of day-to-day management which is mentioned in the previous paragraph.

B. FULL FUNCTION JOINT VENTURE/NOT A FULL FUNCTION JOINT VENTURE

14. As it is stated above Unisource International will receive from both shareholders their satellite service businesses and from Unisource, UCS, ITEMA, UM, UC, the UVS

business unit of UBN, USS and UBN BV. The domestic subsidiaries of UBN BV will not be contributed to Unisource International.

15. Unisource Carrier Service (UCS) is a subsidiary of Unisource which has been set up to exploit synergies in the international networks of the Unisource shareholders in order to reduce costs. Under the national laws of The Netherlands, Switzerland and Spain, PTT Telecom, Swiss PTT and Telefónica respectively are not presently permitted to assign their international networks and corresponding licences to UCS. Consequently, in the current situation, UCS will only perform the role of a management company for the international networks of the Unisource International shareholders themselves and not as Unisource International. Accordingly, the activities of UCS are not full function and therefore fall outside the scope of the Merger Regulation.

16. The primary activity of ITEMA (which is to be renamed Unisource Information Services) is to strengthen the IT operations of the Unisource shareholders in order to improve quality and reduce costs for the shareholders. Its secondary objective is to offer integrated IT solutions on the market. Most of the resources of ITEMA are hired on a secondment basis from the Unisource shareholders. On the basis that the primary purpose of the company is to provide services to the Unisource parents, and that most of the resources are provided by the parents, ITEMA is not in a position to act as an autonomous economic entity and cannot therefore be considered as a full function entity. Its operations therefore fall outside the scope of the Merger Regulation.

C. RISK OF CO-ORDINATION OF COMPETITIVE BEHAVIOUR

17. For those activities which are jointly controlled and are full function it is necessary to assess the likelihood of co-ordination of competitive behaviour between Unisource and Telefónica.

Mobile telephony

18. Unisource Mobile (UM), a subsidiary of Unisource, specialises in mobile service provision, is transferred to the joint venture. The Unisource shareholders and Telefónica, through its 100% subsidiary Telefónica Mobile, retain their domestic services. [...][1] According to the parties, UM is active as a mobile service provider outside the countries of the Unisource shareholders where each of them remains active on its own account. However, Unisource has no licence on its own account in any country. The parent companies are investigating the possibility of transferring their licences to Unisource in their territories. A non-competition agreement between the four shareholders states that they will limit their offerings of their national mobile services to their respective national markets only. In 1994, UM acquired a retail organisation in Sweden for mobile equipment (GEAB).

19. UM will be a GSM network operator as are each of the parent companies in their own territory. One of the most important characteristics of a GSM network is that it enables the consumer to use the mobile phone widely across Europe as a consequence of roaming agreements between the different network operators. It is only the availability of roaming agreements that affects the consumer's use of mobile phones regardless of the country in which the subscription is taken out. This integration of previously national mobile phone markets is occurring quickly and an indication of this is the existence of

(1) Deleted business secret.

mobile operators independent of the national telecommunications network provider offering services to consumers irrespective of location.

20. In addition, as UM has no licence yet, UM may acquire a licence from Telefónica or from one of the shareholders of Unisource since nothing prevents it from doing so and indeed the parent companies are exploring this possibility. In that event, the parent companies may have a strong interest in not competing with each other.

21. In the light of the above, and on the basis of the Omnitel decision[2], it is clear that this operation will increase the likelihood for Unisource, Telefónica and the three parent companies of Unisource: PTT Telecom, Telia and Swiss PTT to co-ordinate their activities in the provision of GSM mobile telephone services through Unisource International. Because the shareholders of Unisource International retain their domestic services, they remain potential competitors, mainly within the framework of the roaming agreements as explained above. The creation of Unisource International does not remove this likelihood of competition between the parent companies. The non competition agreement for the non parent company territories shows the non-withdrawal of the parent companies from their domestic markets rather than a long-lasting withdrawal from the joint venture market.

Card services

22. Unisource Card Services (UC) is a subsidiary of Unisource, which specialises in personal and corporate post-paid calling card services. This subsidiary will be transferred to Unisource International. The Unisource shareholders and Telefónica currently offer post-paid calling cards in their respective territories. UC calling cards are only offered to customers who live outside shareholder home countries and Spain.

23. However, a subscriber of any of the four shareholders' card may use his card (or several cards of the different shareholders or of UC) all over Europe to the extent that the service provider has got freephone numbers in the different states. The availability of these freephone numbers is therefore the only constraint to the European wide use of calling cards in a similar manner to the roaming agreements in the mobile phone sector as mentioned above. Because they remain active in their respective domestic territories, parent companies may have therefore an interest in not competing with the joint venture or with each another. In that respect, there is a non-competition agreement between the four shareholders limited to marketing and distribution in respective national markets and in the UC territory. As for mobile services, this non-competition agreement shows that the parent companies remain potential competitors from their respective domestic territories.

Voice services

24. Unisource Voice Services (UVS) is a business unit of UBN. However, as the areas which are covered by the special separate voting arrangements referred to above are confined to the UBN Budget and Business Plan (which is clearly defined as the activities of the domestic UBN subsidiaries) these arrangements do not cover UVS. Therefore, UVS is subject to the joint control arrangements which apply to the non-UBN and Telematica areas of the joint venture.

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(2) Case No IV/M.538 - Omnitel of 27 March 1995.

25. UVS offers International Virtual Private Network services and other closed user group services on an European basis. According to the parties, 40% of its purchases were from the parent companies in 1994. Unisource is a partner in WorldPartners and is the continental European member of that grouping. This arrangement has been notified under Article 85. In the home territories of the shareholders, UVS services are distributed by the relevant Unisource shareholder whilst distribution outside the parent companies' home territories in carried out by the local UBN subsidiary.

26. The market for IVPN services is at least European and possibly global. The demands of a customer for IVPN services will determine which provider they will look to to provide the service. Depending on the company's location in different countries, the solution may be achievable through means than other than a European or global service provider. National telecommunications operators may be able to offer comparable services on a bilateral basis by entering into bilateral agreements with the national public network provider. Therefore, a company may look to the parent companies as well as to other providers such as Unisource International for these services. Because they remain active in their respective domestic territory, the parents will therefore have an incentive to co-ordinate competitive behaviour between themselves through Unisource International. In addition, the parent companies will be a supplier of capacity to Unisource International for leased lines in their home territories and even abroad. This will further increase the scope for co-ordination.

Satellite services

27. Unisource Satellite Services (USS) offers value added communications services using satellite terminals based on VSAT technology. According to the parties, prior to the establishment of USS the Unisource parents had no satellite services of their own. After the transaction, the shareholders of Unisource International will have no comparable VSAT services outside their respective national markets as a result of a non-competition agreement between the parents of Unisource International. In the parent companies' home territories, USS services will be distributed by the parents themselves, elsewhere in Europe by the appropriate UBN national subsidiary and through distribution agreements in countries where UBN has no presence.

28. VSAT technology is used where fixed links are impractical or uneconomic or where there is a poor quality existing infrastructure. It can also be used instead of fixed lines in certain circumstances and is used in that way by companies with widespread distribution networks. USS targets at business customers in the automotive, banking and finance sectors as well as government, transport and retail operations and customers in Eastern Europe.

29. The non-competition agreement between Unisource and Telefónica covering VSAT services provides that the parents will distribute the VSAT services in their territories and will not offer a parallel product portfolio to Unisource International. This represents an effective withdrawal by the parents from VSAT activities. Though there is some overlap with services provided through fixed lines, VSAT services can be considered as a distinct product segment in their own right. Accordingly, there is no likelihood of the co-ordination of competitive behaviour in the provision of VSAT services between Unisource and Telefónica.

Conclusion on likelihood of co-ordination

30. In conclusion, therefore, there is a likelihood of co-ordination of competitive behaviour between the parent companies in the fields of mobile telephony, card services and voice telephony but not in the area of satellite services. In the light of this information and taking into account the notice on the distinction between concentrative and co-operative joint ventures[3] (and in particular paragraph 20 second sub-paragraph), there is a likelihood of co-ordination of competitive behaviour between the parent companies as a result of the operation. The notified operation cannot be therefore regarded as a concentration as such.

CONCLUSION ON ABSENCE OF CONCENTRATION

31. For the above reasons the Commission has concluded that the notified operation does not constitute a concentration within the meaning of Article 3(2) of the Merger Regulation and consequently does not fall within the scope of this Regulation. This decision is adopted in application of Article 6(1)(a) of Council Regulation No. 4064/89.

32. The Commission will treat the notification pursuant to Article 5 of Commission Regulation No 2367/90 as an application within the meaning of Article 2 or a notification within the meaning of Article 4 of Council Regulation 17/62 as requested by the parties in their notification.

For the Commission,

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(3) OJ C 385 of 31.12.1994.

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 22.12.1995

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b)DECISION

To the notifying parties

Dear Sirs,

Subject : Case No IV/M.595 - British Telecommunications/VIAG
Notification of a concentration pursuant to Article 4 of Council Regulation No 4064/89

1. On 24 November 1995, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 4064/89[1] by which the undertakings British Telecommunications (BT) and VIAG acquire within the meaning of Article 3 (1) b of the Council Regulation joint control of their 50:50 joint venture VIAG Interkom (Interkom).

2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation No 4064/89 and does not raise serious doubts as to its compatibility with the common market and with the functioning of the EEA Agreement.

I. THE PARTIES

3. BT is the main telecommunications operator in the United Kingdom. It has also activities outside the United Kingdom, in particular the 'Concert' agreement with the US operator MCI, for the provision of advanced business telecom services to multinational companies, as well as other joint ventures in Italy, Sweden and Spain. Its German

(1) OJ No L 395 of 30.12.1989; Corrigendum: OJ No L 257 of 21.09.1990, p. 13.

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subsidiary BT Telecom (Deutschland) GmbH had a turnover of less than [...][2] million in 1994.

4. VIAG is the holding company of operating companies located primarily in Germany with acitivities mainly in the areas of energy, chemicals, packaging and logistics. VIAG's subsidiary TB & D Telekommunikation Gesellschaft für Betrieb und Dienstleistungen GmbH (TB&D) provides telecommunications services to VIAG subsidiaries, but not to third parties which is also not possible from a regulatory point of view. The telecommunications services are based on the optical fibre network owned by Bayernwerk, in which VIAG has a [...][3] share.

II. THE OPERATION

5. The objective of the parties' joint venture Interkom is to become an alternative telecommunications operator in Germany, including on the public voice telephony market as soon as this is possible from a regulatory point of view, and to start with the services already liberalized (mainly data transmission and services to closed user groups, i.e. private network services). All German activities of the parties in the field of Interkom are transferred to the joint venture. These consist of BT's existing German telecommunications business and certain activities which VIAG currently carries out through its subsidiary TB&D as well as VIAG's domestic managed network services.

III. CONCENTRATION

6. The joint venture will be jointly controlled by BT and VIAG. Each partner has 50% of the shares and votes in the joint venture. Each party is initially entitled to appoint 3 members to the Partner's Committee which is responsible for taking strategic decisions including the approval of the budget.

7. Furthermore, the joint venture will perform on a lasting basis all functions of an autonomous economic entity. Interkom carries BT's and VIAG's telecommunications activities in Germany. In particular, the exisiting German telecommunications business of BT will be transferred to the joint venture. The activities of VIAG's subsidiary TB&D in the business field of Interkom will also be transferred to Interkom.

8. The creation of the joint venture will not give rise to coordination of the competitive behaviour of the parties amongst themselves or between them and the joint venture. Interkom will basically be a domestic German telecommunications provider. VIAG will withdraw from the markets on which Interkom operates. In addition, it is economically implausible that VIAG will re-enter the markets of Interkom because of the size of investment required to achieve a critical mass on the German market.

IV. COMMUNITY DIMENSION

9. The concentration has a Community dimension within the meaning of Article 1 of the Merger Regulation. The combined aggregate worldwide turnover of BT and VIAG amounts to more than 5.000 million ECU. The aggregate Community-wide turnover of each is more than 250 million ECU. The parties do not achieve more than two-thirds of their Community-wide turnover in one and the same Memeber State.

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(2) Deleted business secret. Less than DM 30 million.

(3) Deleted.

V. COMPATIBILITY WITH THE COMMON MARKET

10. Interkom will be a competitor of Deutsche Telekom. Its activities involve two distinct dimensions:
    - a domestic German dimension where Interkom will offer all currently liberalized telecommunications services and voice services to closed user goups; when full liberalisation is achieved, it will also offer public voice telephony services;
    - an international dimension, as a result of the fact that Interkom will be a subdistributor of BT/MCI's 'Concert' services, which are by definition of a transnational nature.

11. The servises provided by Interkom will include domestic and transborder managed network services including data, voice, visual and integrated access services to customers in Germany. The transborder services will be offered by 'Concert', the joint venture between BT and MCI. Interkom will establish and operate a domestic network to deliver these services which will be interconnected with the 'Concert' network. The parties identified these as product markets:
    - domestic value added network services,
    - private switched voice services to large business customers,
    - domestic corporate network services and
    - public voice services.

    As there is no risk of the creation of a dominant position in any relevant market, the precise market definition can however be left open.

12. The primary area of activity of the joint venture is Germany. Therefore, the relevant geographical market is Germany. For some services including 'Concert' services and certain value added and corporate network services, the relevant geographical market could be European- or worldwide.

13. As Deutsche Telekom clearly dominates the German market and there are also other alliances which are trying to enter the German market, the creation of a market domination position in Germany can not be foreseen. The operation seems to be positive from the competition point of view. As far as the international dimension is concerned, there is also no threat of a market domination position.

VI. CONCLUSION

14. The proposed concentration therefore does not raise serious doubts as to its compatibility with the common market.

15. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the functioning of the EEA Agreement. This decision is adopted in application of Article 6 (1) b of Council Regulation No 4064/89.

For the Commission

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 05.03.1996

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sirs,

Subject: Case N° IV/M.683 - GTS-Hermes Inc/HIT Rail BV
Notification of a concentration pursuant to Article 4 of Council Regulation N° 4064/89

1. On 2 February 1996, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 4064/89[1] by which the undertakings GTS-Hermes Inc. (GTS) and the parties from 2 to 12, the latter acting through HIT Rail B.V. (HIT Rail), acquire within the meaning of Article 3 (1) b of the Council Regulation joint control of their 50/50 joint venture Hermes Europe Railtel B.V. (Hermes).

2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation No 4064/89 and does not raise serious doubts as to its compatibility with the common market and within the functioning of the EEA Agreement.

I. THE PARTIES

3. GTS develops and operates a broad range of value-added telecommunications services, primarily in the Commonwealth of Independent States, Central Europe and Asia. In Western Europe, its only activity is a joint venture with the PTO in Monaco.

4. The ten European national railway undertakings, the parties from 2 to 6 and 8 to 12, are principally active in the transportation of freight and passengers, mainly within their national territories. In addition, most Railways have other business activities, e.g. travel agencies, banking, mechanical fabrication, electronic and data-processing services, energy and real estate management.

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(1) OJ No L 395 of 30.12.1989; Corrigendum OJ No L 257 of 21.09.1990, p.13.

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5. Racal-BR Telecommunications Ltd. (Racal) is part of the Racal Electronics group. Its main activity is the provision of the business and operational telecommunications services to British Railways Board in the United Kingdom excluding Northern Ireland together with the maintenance of railway-specific terminal systems. Racal's network facilities are those originally operated by British Railways Board and therefore national. The Racal Electronics group does not provide international transmission capacity to third parties.

II. THE OPERATION

6. GTS, the ten above mentioned national railway undertakings and Racal intend to create a joint venture Hermes, which will introduce a pan-European telecommunications network dedicated to the cross-border transport of telecommunication traffic primarily along the rights of way of the railway undertakings by public network operators, carrier consortia, cellular telephone companies and other authorised telecommunication operators.

III. CONCENTRATION

7. Hermes will be controlled equally by GTS and the parties from 2 to 12, who will act together through HIT Rail. HIT Rail is used in order to facilitate decision-making amongst the parties from 2 to 12 and to ensure that they speak and act as one.

8. HIT Rail is a Dutch company in which the parties from 2 to 12 have equal voting rights in the general meeting, where decisions are taken by a simple majority. The supervisory board consists of 7 members, one from each of the parties from 2 to 12, rotating periodically. The general meeting reserves certain issues for its own decision, including the appointment of the representatives of HIT Rail on Hermes. At least six of the parties from 2 to 12 must agree on a proposal in the general meeting. This configuration ensures that the parties from 2 to 12 can exercise a decisive influence with the other acquiring company, GTS, over Hermes and avoids the situation where that other acquirer could exercise sole control because of their inability to reach a unified position on any decision.[2]

9. The railway undertakings and Racal act through HIT Rail which was originally formed in 1990 for the purpose of managing international IT projects for its members. In this role, HIT Rail has been involved in two or three joint projects of the Railways, the most important of which is Hermes-plus, a project providing for network signalling and ticketing systems. Its primary function now is to serve as a vehicle through which the railway undertakings and Racal jointly participate in Hermes. Furthermore, Racal has a common interest with the railway undertakings. Racal represents the privatized telecommunications activities of British Railways. It is partner of Hermes because with respect to Hermes it has the same kind of business and interest as the railway undertakings.

10. GTS and HIT Rail basically have equal rights as shareholders. Decisions of the General Assembly are adopted on the basis of a two-thirds majority unless and until either GTS or HIT Rail holds two thirds of the votes, in which case simple majority suffices, except

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[2] See Commission decision IV/M.102 - TNT/Canada Post and others

for some decisions which require unanimity. At the moment, both companies have a 50% share. GTS and HIT Rail are also equally represented on the Supervisory Board, where decisions are taken by simple majority. In case of deadlock, there is no casting vote but provision exists for further discussions and final reference to an independent committee of experts. The Supervisory Board has complete and exclusive power to supervise the policy of the Management Board and the general course of affairs of Hermes and its business.

11. Hermes will operate as an independent economic entity which possesses all the assets and resources to act autonomously on the market. It will obtain the necessary rights of way and/or dark fibre from the Railways, through negotiations at arm's length, or from third parties. It will have complete end-to-end operational control of its network. Hermes acts as a single entity in selecting its prime contractor for the construction of the network. It will act autonomously in relation to its customers, which may include the Railways and GTS. The provisions of infrastructure facilities by Hermes to the Railways and GTS will be on an arm's length basis.

12. The creation of Hermes does not give rise to coordination of the competitive behaviour of the parties. None of the parent companies is active in the market of the joint venture, which is the market for carrier's carriers. According to the Phoenix notice under Regulation 17/62 art 19 (IV/35.617, 15 December 1995), the market for carrier's carrier services comprises the lease of transmission capacity and the provision of related services to third-party telecommunications traffic carriers. Some of the parent companies are active on a market which is downstream from the joint venture's market, which is the market for carriers[3]. GTS and Racal are presently active in the field of telecommunications services but not in the same geographical markets. Even if the national railway companies enter into national joint ventures with other telecommunications services operators, it is unlikely that they will become competitors as they will probably operate only on a national basis. The Railways are active in a market which is upstream from the Hermes's market as they will provide networks to Hermes. However, they will each provide a network for a different geographical market.

IV. COMMUNITY DIMENSION

13. The present operation has a Community dimension within the meaning of Article 1(2) of the Merger Regulation. The worldwide turnover of all the undertakings concerned amounted, in 1994, to more than ECU 5 billion ([...][4]) and more than two of the undertakings achieved a Community-wide turnover of more than ECU 250 million. The undertakings concerned did not achieve more than two-thirds of their respective Community-wide turnover within one and the same Member State.

V. ASSESSMENT UNDER ARTICLE 2 OF THE MERGER REGULATION

A. Relevant product market

14. In the terminology used in the Commission's Phoenix notice Hermes will be a carrier's carrier. More specifically Hermes will provide infrastructure services similar to dedicated transit services - ie the transport of traffic over permanent dedicated facilities through the

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(3) See par. 14 f.

(4) Deleted for publication

network of the transit carrier, using a high-bandwidth digital circuit used for both voice and data services.

15. This kind of business of a carrier of telecommunications carriers differs generally from the business provided by a telecommunications carrier, i.e of a typical services provider. The latter typically provides services to end-users, i.e. the typical customer of a services provider. The business of a carrier's carrier is broadly described as providing capacity and related services for these telecommunications operators, i.e. a kind of wholesale.

16 Two different types of business can be regarded as forming a pan-European carrier's carrier market: the provision of bandwidth (in Mbit/s) interlinking the switch locations of carriers, and the provision of switched-minute services (in millions of paid minutes), taking telephone calls from one carrier and either terminating these calls upon a company's own switched network infrastructure, or passing them to another carrier for the final stage. The traditional way of providing cross-border services to end users is to make separate arrangements with a range of other carriers. In future, especially because of the formation of alternative national telecommunications services providers, these carriers might seek to entrust the transport of international traffic to a single provider or a small number thereof.

17. Hermes will provide two categories of transmission capacity:

- During its start-up period Hermes will supply cross-border basic transport capacity (point-to-point) targeted at carriers requiring large bandwidth capacity between two gateway points,

- With the commencement of the liberalisation of telecommunication infrastructure markets in the EU from 1996 Hermes will provide instead a pan-European virtual private transport network supplying bulk capacity to carriers who will sub-supply to end-users.

18. According to the parties these services should be located in two separate product markets: the first is merely an alternative to the traditional point-to-point connections offered by PTOs by combining two or more half-circuits; the second is a part of a new and distinct product market - the provision of pan-European transport networks - which in consequence of liberalisation will develop as the role of traditional PTOs on the market for international infrastructure services gradually decreases.

19. For the purposes of the present decision the Commission can leave open the definition of both the product markets involved, since on the narrowest definitions - those given by the parties - no competition problems arise.

B. Relevant geographic market

20. Hermes will initially supply its telecommunications network between some of the countries whose railway undertakings participate in the operation; it will then extend its activities to other countries in the present network. It is possible that railway undertakings in other countries in the EEA will join the operation at a later date. The Commission accordingly concludes that the relevant product market is at least EEA-wide.

C. Competitive Assessment

21. In the first market described by the parties - cross-border basic transport capacity (point-to-point) - Hermes will compete with PTOs and will have an insignificant share.

22. The parties claim that, since the second market described by the parties - the provision of pan-European transport networks - is new, no valid market share data are available. However, market players with global network infrastructures or regional ones will be in a position to provide a variety of services to telecommunications carriers. If the creation of a pan-European network like that one of Hermes is part of an already existing carrier's carrier market, the creation of a market dominating position cannot be expected because of the market power of the national PTOs. Only if the provision of a pan-European network by the parties creates a new product market, will it be possible to conclude that, as the first entrant into it, Hermes will in the immediate future enjoy a very high share, possibly even 100 pc, of this new market.

23. Even if a seamless pan-European telecommunications network is a product of its own, the Commission is confident that the potential competitors of Hermes are equally or more powerful and that Hermes will have no opportunity to foreclose the market. The principal source of such competition is the national PTO operators; as the national regulation of telecommunications, the main barrier to entry, diminishes in the next few years, they will have the capacity to combine into a pan-European network resources (particularly infrastructure) which are much greater than those available to the parties. Furthermore, the national PTO operators are dominant in the field of cross-border traffic with respect to the existing connections between the several PTOs which enable cross-border telecommunications to take place at the moment. Another type of infrastructure suitable for telecommunications is that of the national energy and water undertakings; already the electricity grid in Germany is used as the infrastructure for telecommunications,[5] and there is no reason why following the liberalisation of telecommunications energy and water undertakings should not in cooperation with telecommunications operators create cross-border networks of comparable strength to those of Hermes. Competition could also be provided by such telecommunications consortia as Unisource Carrier Services, Orion and Atlas/Phoenix; these consortia have the advantage of vertical integration both upstream and downstream, whereas Hermes will have to negotiate with each of the railway companies on an arm's length basis and will not have the resources to supply telecommunications services to end-users. Furthermore, one has to take into account that the proposed Hermes infrastructure still has to be set up. Further market entries can already be expected from 1 January 1998.

24. Therefore, even if the business of Hermes is regarded as a new product, it cannot be foreseen that the formation of Hermes will lead to the creation of a market-dominating position. Furthermore, this conclusion is underlined by the fact that the potential customers of Hermes are strong and well informed companies which have considerable buying power and will be able to limit the market power of any supplier of carrier's carrier services, especially with respect to existing alternatives.

25. The proposed concentration therefore does not raise serious doubts as to its compatibility with the common market.

VI. ANCILLARY RESTRAINTS

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(5) Commission decision IV/M.618 Cable & Wireless/Vebacom

26. The parties have requested that certain restrictions be considered as ancillary to the concentration. To answer their request, the assessment made below is also related to the question whether a provision is an integral part of the operation.

27. HIT Rail and GTS agree not to assist or cooperate in the development of any other pan-European Telecommunications operator while HIT Rail and GTS remain shareholders in Hermes; for HIT Rail the obligation continues for a further year. The evaluation of this clause must take account of the characteristics peculiar to concentrative joint ventures. This prohibition on the parent undertakings competing with the joint venture aims at expressing the reality of the lasting withdrawal of the parents from the market assigned to the joint venture. However, insofar as this clause is a restriction of competition, it can be regarded as an ancillary restriction.

28. The parties agree not to disclose confidential information relating to Hermes. This restriction is directly related and necessary to the implementation of the concentration. Therefore it can be regarded as ancillary to the concentration.

29. Hermes agrees not to provide telecommunication network facilities services at a national level, unless on the application of a customer the relevant national railway consents. Insofar as this is only a definition of the scope of business of Hermes, it can be regarded as an integral part of the concentration, since it reflects the decision of the parent companies to limit the business of the joint venture to international services. Nevertheless, the second part of the clause leads to the conclusion that the limitation is not an integral part of the concentration as this part of the clause in question provides an exemption from the limitation. This part of the clause therefore cannot be regarded as an integral part of the operation. Furthermore, as this clause imposes an obligation only on Hermes, it cannot be regarded as ancillary to the concentration.

30. Hermes will not be obliged to obtain dark fibre and rights of way from the railway companies; nor will the railway companies be obliged to supply those assets to Hermes. Rights of way and related agreements will be concluded on an arm's length, commercial basis. This clause is not restrictive of competition.

31. However, Hermes will be obliged to negotiate with the railways concerning contracts for the installation and maintenance of the network; only if fair and commercial terms cannot be agreed will Hermes be entitled to contract with other suppliers. This provision cannot be regarded as directly related and necessary to the implementation of the concentration. Therefore it cannot be regarded as ancillary to the concentration.

VII. CONCLUSION

32. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the functioning of the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation N° 4064/89.

For the Commission,

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 29-02-1996

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sirs,

Subject : Case No IV/M.689 - ADSB/Belgacom
Notification of a concentration pursuant to Article 4 of Council Regulation No 4064/89

1. On 26 January 1996 the Commission received a notification on an acquisition of a shareholding in Belgacom by a Consortium consisting of Ameritech International, Inc. Tele Danmark A/S and Singapore Telecommunications Limited (the Consortium) from the Belgian State.

2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation 4064/89 and does not raise serious doubts as to its compatibility with the common market.

I THE PARTIES

3. **Belgacom** is the principal provider of domestic and international telephone services in Belgium. The Belgian State currently holds all of the capital stock of Belgacom.

4. **Ameritech International Inc. (Ameritech)** is a wholly owned subsidiary of Ameritech Corporation, a US corporation and one of the largest full-service communications companies in the world. Ameritech International is the entity through which Ameritech Corporation conducts its international activities and investments.

5. **Tele Danmark A/S** is the principal provider of domestic and international telephone services in Denmark.

6. **Singapore Telecommunications Limited (Singapore Telecom)** is the principal provider of domestic and international telephone services in Singapore. It also provides postal services.

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II THE OPERATION

7. On 21 December 1995, a Stock Purchase Agreement was signed between on the one hand, the Belgian State and, on the other hand, the consortium consisting of Ameritech, Tele Danmark and Singapore Telecom (the Consortium), pursuant to which the Consortium will acquire 50% minus one share of the capital stock of Belgacom from the Belgian State. The members of the Consortium will acquire the Belgacom shares through a special purpose vehicle company: ADSB Telecommunications B.V. (ADSB). ADSB is a private limited liability company incorporated in the Netherlands which is jointly owned by the members of the Consortium.

III CONCENTRATION

JOINT CONTROL

(a) ADSB

8. The members of the Consortium currently own shares in ADSB as follows:

Ameritech	40%
Tele Danmark	33%
Singapore Telecom	27%

9. A Belgian financial partner may be invited to invest up to 5% of the share capital of ADSB which would be subtracted from the Ameritech shareholding. [...][(1)].

10. At the shareholder level of ADSB, 95% of the votes are needed for certain matters [...][(2)]. At board level, [...][(3)]. Each shareholder must have one representative present for the meeting to constitute a quorum and the board member(s) representing each parent exercise the voting rights in proportion to the shareholdings of that parent. A [...][(4)] majority of the shares is required for matters relating to the adoption or amendment of the Business Plan and Budget and to decisions relating to voting behaviour at Belgacom's shareholders meetings.

11. Accordingly, Ameritech, Tele Danmark and Singapore Telecom will have joint control over ADSB.

(b) Belgacom

12. The Belgacom shareholders' agreement (Article 3) provides that shares of Belgacom will be divided into three classes. Class A will include all shares owned by the State or public institutions, Class B shares will be owned by ADSB, and Class C will include shares which could come to be held by persons or entities other than those already mentioned [...][(5)]. These C shares would not have voting rights.

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(1) Deleted business secrets
(2) Deleted business secrets
(3) Deleted business secrets
(4) Business secret - more than 75%
(5) Deleted business secrets

13. Belgian company law requires a majority of 75% within each class for a number of matters including the increase or reduction of the share capital or the approval of a merger or split-up and 80% for other issues including the redemption of own shares or the change of the corporate object. The shareholders' agreement requires that the disposition of earnings and profits must be approved by a majority of votes in both Class A and Class B as long as [...][6].

14. The management of Belgacom will be conducted by the Board of Directors. The Belgacom Board of Directors will consist of eighteen members, nine of which will be appointed by Belgian State (through Royal Decree) and the other nine by the Consortium Members. The chairman of the Board will be appointed from among the directors appointed by the Belgian State. He will have a casting vote. However, all decisions relating to the strategic commercial behaviour of Belgacom including the adoption or amendment of the Business Plan and of the Budget, any delegation of management powers, strategic acquisitions or alliances, the appointment or removal of Belgacom's Chief Executive Officer, will require a majority of two-thirds or more of the votes cast at Board meetings. In addition, these strategic decisions will demand a quorum of at least two directors representing Class A and two directors representing Class B.

15. Class C shareholders would be entitled to board representation when their shareholding reached 5%. Even if these shareholders had board representation there are several factors which indicate that the structure of the various shareholdings will continue to ensure that ADSB and the Belgian State will hold joint control for the foreseeable future. Belgian law requires the Belgian State to hold at least 50% plus one share of the capital stock of Belgacom. [...][7].

16. The executive management of Belgacom lies with the Chief Executive Officer (CEO) assisted by one or two deputies who will together form the Executive Office. The CEO is formally appointed and removed by a Royal Decree which is taken in accordance with the proposal of the Board of Directors, which requires a majority of at least two-thirds of the votes cast.

17. In the light of the above information and the Commission notice on undertakings concerned[8], Ameritech, Tele Danmark and Singapore Telecom, through ADSB, have joint control over Belgacom with the Belgian State.

FULL FUNCTION AUTONOMOUS ECONOMIC ENTITY

18. Belgacom has been operational as the Belgian national telecommunications provider for a considerable period. Its net cash flow of Belgacom in 1994 amounted to 1,351 million BF and at the end of 1994 it employed about 27,000 staff.

19. According to Article 11 of Exhibit M to the Stock Purchase Agreement dated 21 December 1995 the parties to the Joint Venture have entered into the Agreement for a term of thirty years which will be automatically renewable for two successive terms of ten years. In addition, as stated above, the Belgian Government is required by law to hold at least 50% plus one share of the stock of Belgacom and [...][9].

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(6) Deleted business secrets
(7) Deleted business secrets
(8) OJ C 385 of 31.12.94 paragraph 29
(9) Deleted business secrets

20. Accordingly, Belgacom will perform as a Joint Venture on a lasting basis, all the functions of an autonomous economic entity, on grounds of disposal of assets, staff and financial independence, in the field of the provision of telecommunication services.

ABSENCE OF SCOPE FOR CO-ORDINATION OF COMPETITIVE BEHAVIOUR

21. The Belgian State is not active in telecommunications other than through Belgacom. Accordingly, the likelihood of coordination must be measured between the members of the Consortium.

22. The parent companies are potential competitors to Belgacom following the liberalisation of telecommunications and services in Belgium. It is unlikely that the parent companies would enter the market following the substantial investment which they have made in acquiring the stake in Belgacom. Even if they were to offer services in Belgium following liberalisation, the number and strength of the other potential competitors in Belgium would make any co-operative behaviour insignificant. This is confirmed by the non-compete clause in which the Consortium members have undertaken not to compete with Belgacom directly or indirectly in the provision of telecommunications and related services offered in Belgium. Limited exceptions apply for activities which account for less than 0.5% of Belgacom's revenues in any one year, for the publication of industrial directories by Ameritech (through Wer Liefert Was?) and for electronic commerce services through GEIS.

23. With the exception of those services which are offered by Belgacom on a national basis (and where the Consortium members have agreed not to compete with Belgacom), most remaining services have geographical market definitions which have been considered to be at least European wide. These services include certain data communications services, cellular telephone services, certain non cellular mobile activities and certain value added services (as set out in the market definition section V below).

24. Tele Danmark's international activities (which account for under 2% of its turnover) include paging services and Telenordia, a joint venture in Sweden with BT and Telenor, which offers communications services to companies in Sweden. Ameritech currently has activities in the EU for industrial directories (primarily in Germany but also with turnover in neighbouring countries) and certain activities through GEIS for electronic commerce services on an European basis. Singapore Telecom has EU activities in the UK and Sweden through cable TV operations. There is no overlap between Tele Danmark and Singapore Telecom's activities in Sweden and the Ameritech activities in Belgium are of such a limited extent that there is no likelihood of significant co-ordination.

25. As liberalisation takes place across the EU, the opportunities for new entrants to enter telecommunications markets on an EU wide basis will increase. Even though all of the Consortium members will be potential competitors on these markets; and that they have activities already in the EU/EEA; the potential restriction of competition will not have a significant effect on competition given the number and strength of existing and potential competitors on this market. For those services which have world-wide market definitions, the absence of any anti-competitive effect is even stronger, given the relative absence of economic power of the parties against the competition which they do or will face.

26. In the light of the above information, there is no likelihood of co-ordination amongst Ameritech, Tele Danmark and Singapore Telecom or between them and the Belgian State through Belgacom.

27. Accordingly, the notified operation is a concentration.

IV COMMUNITY DIMENSION

28. The undertakings concerned have a combined aggregate worldwide turnover in excess of 5,000 million ECU (Belgacom: 2,951 million ECU, Ameritech Corporation: 10,747 million ECU, Tele Danmark: 2,366 million ECU, Singapore Telecom: 1,927 million ECU), following their latest reports and accounts. At least two undertakings concerned have a community-wide turnover of more than ECU 250 million (Belgacom: [...][10], Tele Danmark: [...][11]). The undertakings concerned do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same member State. Therefore, the operation has a Community dimension.

V COMPATIBILITY WITH THE COMMON MARKET

A RELEVANT PRODUCT MARKETS

29. The relevant product market in this operation are a wide range of telecommunications and related services.

According to the notifying parties, Belgacom operates in the following product areas.

- Local telephone services (PSTN and ISDN)
- Domestic long distance telephone services
- International telephone services (inc.VPN)
- Leased lines
- Data communication services (inc. MAN&LAN, Telex, Telegraph, EDI)
- Cellular telephone activities
- Non-cellular mobile activities (paging, calling card, pay phones, maritime radio services)
- Value added services (inc.centrex,operator services)
- Supply and service of CPE
- Telephone directories publishing
- Telephone directories data
- Telecommunication and engineering consulting

30. However, a precise product market definition is not necessary as, given the respective market positions of the parties in the sectors referred to above or even in separate narrower markets, such a definition would not alter the Commission's conclusion with regard to dominance in this case described under Assessment below.

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(10) Business secret - more than 250 million ECU

B RELEVANT GEOGRAPHIC MARKETS

31. Basic services related mainly to reserved services in Belgium (e.g. fixed national and international voice, leased lines, telex) have traditionally been considered as a national geographic market due to the still prevailing regulations and the role of the national telecommunications operators.

32. The geographic market for certain value added services is generally considered as at least European and possibly worldwide. In any case the markets for telecommunications services are evolving very rapidly as a result of technical change and liberalisation of the regulatory environment.

33. However, given that the operation does not result in any problem of dominance in the EU/EEA area, for the reasons exposed in the assessment below, it is not necessary to define the relevant geographic market in the present case.

C ASSESSMENT

Belgium

34. The market behaviour of telecommunications operators in Belgium is controlled by regulatory mechanisms which are being put into place. A telecommunications regulatory authority is already in existence and legislation which will provide some of the conditions necessary for competition is in place. Further measures are envisaged, and will be necessary, in order for the proper competitive conditions to exist for new entrants to compete effectively with Belgacom on the markets in which it currently has a monopoly.

35. Belgacom holds very high market shares (including 100% for some services). Following the operation, it appears that this position will not change until liberalisation of services and infrastructure becomes effective in Belgium. In European and worldwide markets, Belgacom should become a stronger competitor following the operation and will be able to take advantage of the liberalised telecommunications markets in most of the EU which should take place by the beginning of 1998. Belgacom will compete on those European markets with strong competitors such as BT, Unisource, Deutsche Telekom and France Telecom. However, in the short term, the possibility exists that Belgacom may undergo a financial and technical strengthening without having to face actual competition on the markets for its currently non liberalised activities.

36. In the light of information provided by the notifying parties, the products in which Belgacom has [...][11] of sales in Belgium comprise: local and domestic long distance telephone services, international telephone services, leased lines, value added services and telephone directories data. It has in excess of [...][12] of sales in Belgium for data communication services, cellular telephone services, non cellular mobile services, payphone services and paging services and [...][13] for the publishing of telephone directories and [...][14] in the telecommunications and engineering consulting sector. Also,

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(11) Business secret - close to 100%
(12) Business secret - at least 90%
(13) Business secret - between 30% and 40%
(14) Business secret - between 35% and 45%

Belgacom was responsible for [...][15] of the supply and service of Customer Premises Equipment in Belgium in 1995.

There are only two very limited areas of overlap between any of the Consortium members and Belgacom in Belgium. These are a limited number of sales of industrial directories by a German subsidiary (Wer Liefert Was?) of Ameritech into Belgium and the activities of GE Information Services (GEIS) in which Ameritech has an interest, which offers electronic commerce services throughout Europe, including, to a limited extent, Belgium. Neither of these activities, combined with those of Belgacom, give rise to the creation or strengthening of a dominant position. This is because, as far as directories are concerned, the addition of market shares is insignificant and with regard to electronic commerce services there is no direct overlap between Ameritech and Belgacom. The issue of potential competition is covered in paragraph 22 above.

37. There are no overlapping activities of any significance in Belgium between different Consortium members. Ameritech, Tele Danmark and Singapore Telecom conduct the bulk of their operations in their respective home territories.

38. Accordingly, in the light of the above information, there is no creation or strengthening of a dominant position in Belgium within the meaning of Article 2 of the Merger Regulation.

Outside Belgium

39. Belgacom is active only in Europe. Apart from its activities in Belgium, it has the limited interests in Russia as described above. Ameritech, Tele Danmark and Singapore Telecom also have activities in the EU/EEA as set out above. This operation involves no addition of market shares in those countries.

For the services which have a market definition which is Europe or even world wide, the combined market shares of Belgacom and Tele Danmark in Europe and Belgacom and all the consortium members on world wide markets, the transaction does not raise any competition problems.

Conclusion

In the light of the above information, the notified operation does not raise serious doubts as to its compatibility with the common market.

VI ANCILLARY RESTRAINTS

40. [...][16] the Consortium members undertake not to compete with Belgacom in the provision of telecommunications services and related services in Belgium. An exception is provided for operations which represent less than 0.5% of Belgacom's revenues for the publication of directories by Ameritech and for electronic commerce services provided through GEIS. Ameritech has given a similar non compete undertaking for it and its controlled affiliates. This clause is a normal consequence of the parent companies' investment in the joint venture and reflects the parent companies' withdrawal as potential

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(15) Business secret - between 50% and 70%

(16) Deleted business secrets

competitors in the Belgian market. Insofar as this is a restriction of competition, this provision is directly related and necessary to the implementation of the concentration.

For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the functioning of the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation No 4064/89.

For the Commission,

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 18.12.1996

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

Registered with advice of delivery:

To the notifying parties

Subject: **Case No IV/M. 802 - Telecom Eireann**
Notification of 14.11.1996 pursuant to Article 4 of Council Regulation (EEC) No 4064/89

1. On 14.11.1996 the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89 by which PTT Telecom BV ("PTT Telecom") and Telia AB publ ("Telia"), acting together through a joint venture company called Comsource, and the Irish State, will acquire joint control of Telecom Eireann.

I. THE PARTIES AND THE OPERATION

2. Telecom Eireann is a limited liability company incorporated under Irish law. It is the national telecommunications operator in Ireland of which all shares are currently owned by the Irish State. Through a 75% shareholding in Cablelink Limited Telecom Eireann is also active in the provision of cable television services in Ireland.

3. The Irish State is in this operation represented by the Minister for transport, Energy and Communications and by the Minister for Finance ("the Ministers"), who are the present shareholders of Telecom Eireann.

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4. PTT Telecom is a full subsidiary of Royal PTT Nederland NV. Its main activities are telephony services, mobile communication services and sales of telecommunications equipment. Telia is a limited liability company of which all shares are owned by the Swedish State. Its main activities are the provision of telecommunications services.

5. The concentration involves the establishment of a consortium between PTT Telecom and Telia, named Comsource, and the acquisition by Comsource of 20% of the issued share capital of Telecom Eireann. Comsource shall act solely as a holding company to perform the role of shareholder of Telecom Eireann. As a consequence of this acquisition of 20% of the shares of Telecom Eireann Comsource will acquire control, jointly with the Irish State, of Telecom Eireann. The Ministers will grant Comsource an option to acquire a further 15% of shares in Telecom Eireann.

II. CONCENTRATIVE JOINT VENTURE

Joint control

(a) Comsource

6. According to the information provided by the parties PTT Telecom and Telia will each be entitled to appoint four Directors. The Board of Directors has to decide on the major issues of the business policy of Comsource. In such decisions neither of the parties has a casting vote and consequently both parties have a de facto veto right.

7. Accordingly, PTT Telecom and Telia will have joint control over Comsource.

(b) Telecom Eireann

8. With respect to decisions on major issues of the business policy of Telecom Eireann the following provisions apply. [...][1]

9. It can be concluded that the Irish State and Comsource will be able to veto the major strategic decisions on the business policy of Telecom Eireann and that they thus will be controlling this company jointly.

10. It follows from the above that PTT Telecom and Telia, through Comsource, and the Irish State, will have joint control over Telecom Eireann.

Autonomous full function entity operating on a lasting basis

11. Telecom Eireann is the national telecommunications operator in Ireland. The parties have entered into a strategic agreement for an indefinite period of time. The parties in Comsource will supply major contributions to a further development of the Irish market and to enhance the competitiveness of Telecom Eireann in the international markets. These contributions will be related to human resources, technologies, operational support systems, and will include mobile and multimedia markets.

12. It can therefore be concluded that the Joint Venture will operate on a lasting basis and will perform all the functions of an autonomous economic entity.

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[1] Deleted; business secrets. Description of veto rights of the parties.

Absence of coordination

13. The Irish State is not active in telecommunications or cable television other than through Telecom Eireann. Accordingly, the likelihood of coordination must be assessed with respect to PTT Telecom and Telia.

14. PTT Telecom and Telia can be considered as potential competitors to Telecom Eireann on the telecommunication markets and the market for services supplied by cable operators in Ireland which are liberalized or are to be liberalized. However, it is unlikely that they will enter these markets other than through Telecom Eireann, following the substantial investments to which they are committed within the framework of the present operation.

15. With respect to telecommunications services for which the relevant geographic market is wider than national, PTT Telecom, Telia and Telecom Eireann are actual or potential competitors. It must also be noted that PTT Telecom and Telia are, together with Swiss PTT and Telefónica, partners in Unisource/Uniworld (Case No IV/M.544 - Unisource/Telefonica). It is foreseen that Telecom Eireann will become the distributor of the services of Unisource/Uniworld in Ireland.

16. The possible cooperative aspects of this operation are only of minor importance relative to the operation as a whole. The revenues derived from the value added operations for which the market has to be considered international amount for PTT Telecom and Telia to a very small proportion of less than 1% of their total turnover. Also, the present operation can not be considered as a cause for strengthening of the already existing coordination between the partners in Unisource in any significant way. (Case No. IV/M.570 -TBT/BT/TELE DANMARK/TELENOR pt. 29).

17. It can be concluded that the present operation does not give rise to coordination between PTT Telecom and Telia.

18. Accordingly, the notified operation is a concentration.

III. COMMUNITY DIMENSION

19. The undertakings concerned have a combined aggregate worldwide turnover of more than 5,000 million ECU (Telecom Eireann 1,367m ECU, PTT Telecom 6,255m ECU and Telia 4,743.26m ECU). Each of these undertakings has a Community-wide turnover in excess of 250 million ECU, and they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension according to Article 1(2) of the Merger Regulation.

IV COMPATIBILITY WITH THE COMMON MARKET

A. RELEVANT PRODUCT MARKETS

20. Telecommunications operators can be regarded as engaging in several different activities. These include the provision of infrastructure to terminate calls, provide the local loop and the provision of services. Telecom Eireann provides both infrastructure (where it currently has a statutory monopoly) and services.

21. Telecommunications services could be grouped into Basic Services and Value-Added Services. Basic services include voice telephony, leased lines, mobile telephony and telex. The main product, voice telephony, accounts for 70-80% of telecommunications services.

22. Value-added services comprise non-public services, as well as, enhanced services to multinational corporations and other intensive users of telecommunications services over intelligent networks. Within this group distinction should be made between a segment concerned with advanced telecommunication services to corporate users and a segment concerned with standardised low-level packet-switched data communication services (see Decisions of 17 July 1996 in Cases No. IV/35.337 - Atlas (at para. 5 et seq) and No.35.617 - Phoenix/GlobalOne (at para 6) and Commission decision of 27 July 1994 Case IV/34.857 - BT-MCI).

23. In previous cases involving concentration of telecommunications' operators (Case No. IV/570 - TBT/BT/TELE DANMARK/TELENOR and Case No.IV/M.689-ADSB/Belgacom), the question of the precise delimitation of the telecommunication services market has been left open by the Commission. In the present case a precise segmentation of services is not required for the assessment of the operation since, even on the basis of the narrowest definition, the operation does not raise serious doubts as to strength the market position of Telecom Eireann.

24. Cablelink Limited (which is 75% owned by Telecom Eireann) is a provider of cable television services in Greater Dublin, Galway City and Waterford. In each of these areas, Cablelink has a monopoly of cable TV services. Other cable TV companies have similar geographic monopolies in their own area. Cablelink's infrastructure could be used to provide telecommunications services.

25. The Commission has recognised the existence of a separate market for services supplied by cable operators to their subscribers. See Commission Decision of 9 November 1994. Case IV/M.469 - MSG Media Service and Commission Decision of 31 October 1995. Case No.IV/M.490 - Nordic Satellite Distribution.

B. RELEVANT GEOGRAPHIC MARKETS

26. Basic services e.g. fixed national and international voice, leased lines, telex, have traditionally been considered as a national geographic market due to the still prevailing regulations and the role of the national telecommunications operators. See Case No. IV/570 - TBT/BT/TELE DANMARK/TELENOR and Case No. IV/M.689 - ADSB/Belgacom. For public voice telephony in Ireland, there will continue to be a statutory monopoly until 1 January 2000 which is another factor indicating the national nature of the market.

27. Geographic market for certain value added services is generally considered as at least European and possibly worldwide. Markets for telecommunications services are evolving very rapidly as a result of technical change and liberalisation of the regulatory environment. See Case No. IV/570 - TBT/BT/TELE DANMARK/TELENOR and Case No. IV/M.689 -ADSB/Belgacom. However, given that the operation does not result in any problem of dominance in the EU/EEA area, for the reasons exposed in the assessment below, it is not necessary to define the relevant geographic market for telecommunications services in the present case.

28. The Commission has considered the market for services supplied by cable operators to their subscribers as national in scope (See Commission Decision of 9 November 1994. Case IV/M.469 - MSG Media Service and Commission Decision of 31 October 1995. Case No.IV/M.490 - Nordic Satellite Distribution).

C. ASSESSMENT

29. Telecom Eireann has the exclusive privilege of providing within Ireland the public telecommunications network, voice telephony services and telex services. The market behaviour of telecommunications operators in Ireland is controlled by regulatory mechanisms which are not yet in place. The legislation which will set up the independent regulatory authority is currently being considered by the Irish Parliament. According to the notifying parties, the regulatory authority should be set up in the early part of 1997. On 27 November 1996, the Commission took a Decision[2] to set out in the timetable for the liberalisation of services in Ireland in response to the request from the Irish Government for a derogation from the deadlines for liberalisation proposed in the various telecommunications liberalisation directives.

30. For the provision of telecommunications infrastructure, Telecom Eireann will have a monopoly until 1 July 1997. Potential alternative infrastructure providers would include cable TV networks, the electricity network and possibly some others. Accordingly, the Cablelink network will be an important network immediately available when liberalisation takes place. This is because of its network in Greater Dublin, which contains much of the population and business activity in Ireland.

31. The original acquisition of a majority of shares in Cablelink by Telecom Eireann in 1990 was examined by the Fair Trade Commission[3] in Ireland. At that time, the Irish Government secured commitments when authorising the operation[4] which included a commitment from Telecom Eireann that Cablelink would be operated on an arms' length basis from Telecom Eireann with management separate from that of Telecom Eireann. According to the Irish Government, these commitments still apply. In addition, the Commission notes that the Irish Government has stated that access to the Cablelink network for telecommunications services will be open to third parties on a cost oriented

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(2) Commission decision C (96) 3342 of 27 November 1996 Voice telephony will not be liberalised until 1 January 2000. Providers of alternative infrastructure will be allowed from 1 July 1997. Finally, direct international interconnection of mobile networks will be effective from 1 January 1999.

(3) Under the Mergers, Take-overs and Monopolies (Control) Acts 1978 and 1987.

(4) Contained in a press notice from the Department of Industry and Commerce dated 8 June 1990.

and non-discriminatory basis. This open access will be supervised by the new regulatory authority when it is formed.

32. Value added and mobile services and the infrastructure for the provision of mobile services is liberalised and subject to licensing by the Minister for Transport, Energy and Communications. In the light of information provided by the notifying parties, for the period to March 1996, the products in which Telecom Eireann has [...][5] market shares in Ireland comprise: voice telephony services, leased private circuits, data services, telemessage and telegram, mobile telephony, value added services and telephone directories. However, liberalised telecommunications services (mainly value-added) are presently provided in Ireland by 38 licensed service providers including the main European telecommunications' operators. Value-added income represents approximately [...][6] of Telecom Eireann revenue. Esat Telecom ([...][7] market share on liberalised services), TCL ([...][6]) and other important players such us Cable & Wireless and BT are currently gaining market shares in various market segments. In addition, BT, Mercury and Cabletel, which have a presence in Northern Ireland, are expected to expand their operations in Ireland. In October 1995 the second licence for GSM was awarded to the ESAT DIGIFONE consortium with Esat and Digifone as the major shareholders. ESAT DIGIFONE will start operating at the end of 1996.

33. Geographically, the areas of market overlap between PTT Telecom, Telia and Telecom Eireann are very limited since all three conduct the bulk of their operations in their respective home territories in the markets for basic services. In the market for value added telecommunications services, which activity has been generally defined as broader than national, the activities of PTT Telecom, Telia and Telecom Eireann are relatively small. Also even taken into account the fact that PTT Telecom and Telia participate in Unisource/Uniworld the present operation does not give rise to dominance in this market as Unisource/Uniworld is one among other strong players.

34. For non-liberalised services in Ireland, the operation does not change the present position of Telecom Eireann until liberalisation takes place. Telecom Eireann is, at present and by itself, strong enough and well rated by the financial markets and it is in the short term technologically sufficient. The support of the new partners will improve the efficiency of the company but it is unlikely that, in the light of ongoing liberalization proces, it will strengthen its present market position.

35. The support of the new partners consequent on their shareholding is likely to improve the efficiency of the company and strengthen its financial and technical position. However, this developement will not affect the change in the competitive position brought about by the liberalisation due on 1 July 1997. Telecoms liberalisation is to take place in Ireland according to a clear timetable set out in the Commission's decision. Under that decision, alternative infrastructure providers will be entitled to obtain licences to enter the market from 1 July 1997. The present decision permits PTT Telecom and Telia to become shareholders in Telecom Eireann but this joint venture agreement does not bring about the development of a supplier or distributor relationship between Telecom Eireann and either Unisource or Uniworld.

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(5) Deleted: business secrets - more than 95%.

(6) Deleted: business secrets - less than 5%.

(7) Deleted: business secrets - between 12% and 16%.

Even if the proposed operation will, in the long term, strengthen technically and financially Telecom Eireann's capacity to provide services on liberalised markets, Telecom Eireann will face competition from other strong players such as BT, Concert, GlobalOne and Atlas and other telecommunications operators.

36. Cablelink has 313,000 subscribers in Ireland and 63% of the Irish market for services supplied by cable operators to their subscribers. However, neither PTT Telecom nor Telia have any special knowledge or expertise which would strengthen Cablelink's market position in the provision of cable TV services over and above that which would be provided by another cable operator or consultant.

37. Accordingly, in the light of the above information, there is no creation or strengthening of a dominant position within the meaning of Article 2 of the Merger Regulation.

V ANCILLARY RESTRAINTS

38. The notifying parties have requested that the clauses and agreements described below be considered as ancillary to the concentration.

39. Article 11 of the Agreement on Strategic Co-operation provides that Comsource, PTT Telecom and Telia shall neither individually or collectively nor through subsidiaries, engage in certain activities during the Agreement on Strategic Co-operation and two years after. These activities include competition with Telecom Eireann, soliciting orders from Telecom Eireann's customers or soliciting Telecom Eireann's employees. This provision is directly related and necessary to the implementation of the concentration and should be considered as ancillary to the operation.

40. The agreements provide for the conclusion of an agreement between Telecom Eireann and Unisource and Uniworld whereby Telecom Eireann will become the distributor of and the preferred supplier to Unisource/Uniworld in Ireland. This provision should not be considered as ancillary to the concentration. Prior to this operation, Telecom Eireann exists already as a full function telecommunications operator. It can not be considered that the acquisition of control by PTT Telecom and Telia can only be implemented under the condition of the conclusion of these distribution/supply agreements. They should therefore be assessed under the scope of Article 85 and 86 of the Treaty.

For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the functioning of the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation No 4064/89.

For the Commission,

Prior notification of a concentration

(Case No IV/M.876 — Telia/Ericsson)

(97/C 24/15)

(Text with EEA relevance)

1. On 17 January 1997, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89 [1] by which Telia A.B. and Telefonaktiebolaget L.M. Ericsson acquire within the meaning of Article 3 (1) (b) of that Regulation joint control of the AU-System Group by way of purchase of shares.

2. The business activities of the undertakings concerned are:

— for Telia A.B.: the national Swedish telecommunications operator,

— for Ericsson: a Swedish manufacturer of telecommunications equipment,

— for AU-System Group: a Swedish group active in telecommunications consultancy services, software development, and distribution of information technology and telecommunications equipment.

3. Upon preliminary examination, the Commission finds that the notified concentration could fall within the scope of Regulation (EEC) No 4064/89. However, the final decision on this point is reserved.

4. The Commission invites interested third parties to submit their possible observations on the proposed operation.

Observations must reach the Commission not later than 10 days following the date of this publication. Observations can be sent to the Commission by fax (No (32 2) 296 43 01/ 296 72 44) or by post, under reference number IV/M.876 — Telia/Ericsson, to the following address:

European Commission,
Directorate-General for Competition (DG IV),
Directorate B — Merger Task Force,
Avenue de Cortenberg/Kortenberglaan 150,
B-1040 Brussels.

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[1] OJ No L 395, 30. 12. 1989; Corrigendum: OJ No L 257, 21. 9. 1990, p. 13.

COMMISSION LAUNCHES INVESTIGATIONS INTO GLOBAL MOBILE SATELLITE SYSTEMS

DN: IP/95/549 Date: 1995-06-07

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By the year 2000 millions of subscribers worldwide are expected to be offered satellite personal communications services.
In this sector global consortia start are being set up involving major american and european companies. This new phenomenon which is set to become a dominant feature of the international satellite market in the second half of this decade has attracted the attention of the European Commission, among others as far as competition policy is concerned.

Hence, Mr. Karel Van Miert, the European Commissioner in charge of competition matters has recently asked his services to send out requests for information regarding two mobile satellite systems (MSS), Globalstar (led by the US companies Loral and Qualcomm) and Iridium (led by the US company Motorola). Inmarsat-P, another major MSS, has already notified its system and partnership agreements to the Commission's competition services. Since Iridium and Globalstar have not yet followed suit, the Commission has commenced investigations at its own initiative.

Although MSS systems are inherently global and the establishment of such systems, in principle procompetitive, it is important that they are screened from the outset under the EC competition rules. The aim of the investigation is to ensure level playing fields in the EU and, in particular, to assess the impact of the consortia and their partnership and related agreements on future competition in the relevant more localised markets within the European Union.

As part of its examination of these ventures, the two consortia have been asked to provide a comprehensive description of their systems from the technical, financial and commercial point of view. Moreover, the investigation also addresses the major areas of potential concern which these projects present from the point of view of the competition rules of the EC Treaty; in particular the nature, terms and conditions of the distribution policies chosen by the consortia, the nature of links with cellular terrestrial networks and the access by competing MSS to infrastructure owned by partners in one of them. Most of these areas of concern have also been identified with regard to Inmarsat-P.

Satellite-based, global mobile communications using hand-held terminals represent a market which is expected to result in revenues of 10 to 20 Billion ECU during the next decade. The indirect effects which will ripple through related markets will be much greater. Due to the scarcity of frequencies, the very heavy financial implications involved in launching and operating the large number of satellites needed for such systems, and a high level of market uncertainty, however, it is unlikely that there will be more than a few major players. Given this small number of alternatives and the potential market power of these global satellite system operators, it is particularly important that competition is maximised in the European Union for the other, "downstream", elements of the market involving local service provision, distribution and equipment supply. Open, non-discriminatory and fair conditions regarding partnerships and agreements will need to be maximised.

The Mobile Satellite Systems Services Market

The general service to be offered involves the full coverage of a roaming satellite system, using LEO (low earth orbit) or MEO (medium earth orbit) satellites, which will also support full user mobility, as well as offering the user a light hand-held portable terminal and identification by a single number anywhere in the world. Entering the global age, it is clear that global service is becoming the most appropriate solution to solving an increasing number of communication needs. It is expected that mobile voice service will be the primary application for these networks, but two other significant segments will involve so-called mobile personal digital assistants, data transmission and paging.

In essence, MSS represent the ability to maximise mobility of users, by providing global roaming and coverage in remote areas where terrestrial services may be uneconomic. "Global coverage" means not only that the user can move anywhere, but also that the communications system can "move" to serve new fixed or "stationary" users. Thus, these systems are not aimed only at the international business traveller. In fact Commission studies predict that by far the greatest potential (in terms of numbers of subscribers) in the MSS market will be for communities in less developed regions of the world as a substitute for "fixed service" where fixed networks have yet to be rolled out or are very poor. Central and Eastern Europe represent an important customer base in this context, which could be accessed from gateways within the EU. A third important use of MSS will be as a substitute for cellular mobile telephony in areas where the cellular network has failed to penetrate (i.e. rural parts of the developed world and both urban and rural parts of lower income countries).

MSS is expected to act as complement to both GSM and DECT wireless technologies as well as the public telephone network, enhancing universal service coverage since it is uniquely well suited to areas of low population density.

Iridium

Motorola, a major US telecommunications equipment manufacturer, plays the leading role in the Iridium consortium. A number of European companies are participating by way of partnership agreements and/or investment. This includes companies such as STET (the Italian state holding company, majority owner of Telecom Italia) and Vebacom (subsidiary of the major German telecom corporation VEBA AG).

Motorola Satellite Communications is in charge of spacecraft construction but Iridium itself will own and operate the system once in place. Lockheed Corp. (USA) is contracted to actually build 125 satellites for Iridium by the year 2003. Other partners/investors include Krunichev Enterprise (CIS) who will launch the satellites with Proton rockets, Scientific Atlanta Inc (USA) who will develop and manufacture the hand-held units as well as the satellite earth terminals, and Sprint, the third US long-distance telecommunication carrier. The total cost of the system is estimated at US$ 3.8 billion.

In 1990 Motorola filed its application to operate a global satellite personal communications system with the US Federal Communications Commission (FCC). Approval was given and frequencies allocated by the FCC in January 1995. Iridium plans to be operational with a limited number of satellites by 1997-98, and expects 1.5 million subscribers by the year 2000. It will offer voice, paging and data services.

GlobalStar

The Globalstar consortium is led and sponsored by the Loral Corporation, a leading US defence electronics company which acquired Ford Aerospace in 1990. Loral Qualcomm Satellite Service has bypassed many funding problems experienced by other players in the satellite industry by use of existing, in orbit, satellites. Partners/contractors include the European companies Alcatel (France), Aerospatiale (F), Alenia (I) and Deutsche Aerospace (D).

The total cost of the system is estimated at US$800 million.

Like Iridium, Globalstar has been approved in the US by the FCC in January 1995. It expects to be operational in the US around 1999-2000 and globally, around five years later. Globalstar will also be offering voice and data, as well as tracking services

Inmarsat-P

Inmarsat-P is a MSS system sponsored by the International Maritime Satellite Organization (Inmarsat) and a large number of its signatories, including the European companies Telefónica de España (E), Telecom Finland (SF), OTE (Gr), Swiss Telecom (Swt), CPRM (P), PTT Telecom (Nl) and Detemobil (D). The Inmarsat-P system which will consist of 12 satellites in intermediate circular orbit, will be operational around the turn of the century.

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MOBILE AND PERSONAL COMMUNICATIONS : COMMISSION WANTS OPEN MARKET

DN: IP/95/647 Date: 1995-06-21

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In the wake of the Telecoms Council of June 13, Commissioner Van Miert, in cooperation with Commissioner Bangemann has put forward an Article 90 directive to introduce full competition in the EU mobile and personal communications market by 1 January 1996. Substantial progress has already been made in the Member States as EU competition rules have been applied to abolish monopolies in the provision of mobile services. However the new measures include liberalisation of the most important cost factors for the new market entrants, particularly use of own facilities and alternative infrastructure.

With the directive, the European Union takes the lead in setting the right regulatory conditions for encouraging the development of mobile and personal communications into a vast mass market. The EU market will be the first to enjoy the combination of liberalisation of services and networks, together with the deployment of harmonised, leading edge, digital standards over such a large area. These are GSM, DCS 1800 (the two frequencies available for digital mobile services) and DECT (digital cordless telephony within a fixed radius). The directive is based on the discussion process launched last year by the Green Paper on Mobile and Personal Communications. It requires Member States to abolish all exclusive and special rights in the area of mobile communications and, wherever this has not yet been achieved, to establish licensing procedures to authorise the launch of digital services GSM, DCS 1800 and DECT.

Consensus building

Building on the consensus reached by EU Telecoms Ministers at last week's Telecoms Council the directive also goes further on specific issues, most importantly concerning use of own and alternative infrastructure. It thus removes all existing restrictions on use of facilities for mobile networks, allowing new mobile operators to make full use of their own infrastructure as well as that provided by third parties such as utilities' networks. The countries with less developed networks are to be given derogations of up to five years to take account of their specific situations. This concerns Portugal, Greece, Spain and Ireland. Very small networks (Luxembourg) will have a two year derogation Alongside this, the directive also abolishes restrictions on direct interconnection for mobile networks.

Use of infrastructure other than those controlled by the incumbent telecoms operator is essential to the success of new entrants to the mobile market as it gives them much greater control over their cost base. Leasing capacity currently represents a cost factor for second operators of between 30 and 50%. Furthermore, the right to set up their own networks and choose alternative infrastructure and connections gives mobile operators significantly more flexibility which represents an important push towards further development and innovation in the market.

Competing operators in Member States have complained, for example, that for the price of renting capacity from the incumbent they could already have built up their own networks but regulatory restrictions have prevented them taking up this obviously preferable opportunity. Current restrictions on

direct interconnection means that, in most Member States the second mobile operator is obliged to pass a call through the fixed network of the incumbent national operator for interconnection into another Member State, whereas direct interconnection with a chosen operator in the country of destination is often both technically logical and cheaper.

A booming market

The mobile sector is by far the most dynamic in the telecoms market experiencing levels of growth averaging 60%. In just one year the number of cellular subscribers in Europe has grown from around 9 million (3/94) to around 15 million (3/95), now outstripping growth in numbers of fixed subscribers.

Commission studies predict 38 million cellular mobile users in Europe by the year 2000 and around 80 million by 2010.

On top of very substantial analogue networks in countries such as the UK, Italy and Scandanavia, the growth potential of GSM is now also evident in most Member States. In France, for example, GSM subscribers grew from around 112 000 to around 500 000 over the past year. In Belgium there were around 11 000 GSM subscribers at the beginning of 1994 and there are now nearly 90 000. Italy saw growth over the same period from 9000 in 1994 to 94 000 in 1995. Germany still remains by far the most important market with over two and a half million users, of which close to two million are now on the GSM network. However progress in countries with less developed networks is also notable. Last year GSM subscribers in Greece increased from 45 000 to 180 000, and in Portugal, from 109 000 to 175 000. The Scandanavian are now also experiencing massive growth in take up of GSM. Most impressive is Sweden where the GSM market has grown from around 38 000 to 465 000 over the past year. This growth is evenly divided between the two competing operators.

Job creation and universal service

Mobile operations are increasingly significant job creators in the members states. Extrapolating from current figures it is estimated that the market is directly creating several tens of thousands of jobs across the European Union.

One of the most important aspects of development of the mobile and personal communications market will be its transformation into a truely mass market, making mobile communications affordable to the average citizen of the European Union. Wireless communications are also becoming, in many cases the cheapest alternative to reaching remote users and regions, and thus improving universal service.

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COMMISSION CONFIRMS MEASURES ENSURING FULL COMPETITION IN TELECOMS BY 1998

DN: IP/95/765 Date: 1995-07-19

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The Commission has today (19th July 1995) agreed, at the initiative of Commissioner Van Miert in charge of Competition and Commissioner Bangemann in charge of Telecommunications, two fundamental measures that together will shape the telecommunications market in Europe over the coming years.

i The first, a draft Directive (under Article 90 of the Treaty) implements the political agreement among Member States to liberalise all telecommunications services (i.e. including public voice telephony) and telecoms infrastructure by 1st January 1998, with transition periods for certain Member States. It also calls on Member States to take the necessary steps before 1998 in order to ensure that markets are fully open by the agreed deadline. In particular it specifies that restrictions on use of alternative infrastructure should be lifted by 1996 (except for public voice telephony until 1998) and that licensing conditions and interconnection rules should be set down by 1997. Following the procedure chosen for the Article 90 cable and mobile drafts, this draft Directive will now be published for public consultation before full adoption by the Commission by the end of this year.

ii The second, a proposal for a Directive (based on Article 100A), sets out a harmonised framework for interconnection in telecommunications in the context of ONP, with the aim of ensuring universal service and interoperablity of telecommunications services throughout the Union. It will enable new entrants to liberalised telecommunications markets to interconnect their facilities with those of the existing network operators. This proposal will be subject to approval by the European Parliament and the Council, and should be implemented before 1998.

The two measures continue the balanced EU approach whereby liberalisation and harmonisation in the telecommunications sector are progressing hand-in-hand. They represent the core of a package of regulatory changes that the Commission is preparing for the post- 1998 environment, and are the results of extensive consultation with the sector over the past months. Other measures already announced in the Commission's Communication on the Infrastructure Green Paper Consultations are expected to be published by the end of 1995[1]

I Liberalising all telecoms services and infrastructure by 1998
The draft text adopted today fixes the basic principles for licensing new entrants to both voice telephony and telecoms infrastructure markets by 1998. The principles not only safeguard the introduction of competition into these areas, but also allow for the required measures for safeguarding universal service in the Member States.

The directive sets down firm dates for the Member States to issue legislation so that the aims of of full liberalisation by 1998 will be effectively realised. By January 1997 Member States must notify to the Commission licensing procedures for voice telephony and public telecoms networks, and by July 1997 Member States must publish the licensing conditions and declaration procedures as well as the terms and conditions for interconnection. As regards the dates set down Member States with less

developed telecoms networks, and very small networks, shall be granted, upon request, extension periods of up to five years and two years respectively.

Universal service means permitting access to a defined minimum telecoms service of a specified quality to all users everywhere at an affordable price. Currently the main elements of this concern subcriber connection to the network, basic voice telephony service, emergency services and public call boxes. However it is also recogniced that the concept of universal service must evolve to keep pace with technical and economic progress. The directive emphasises that universal service must be safeguarded but that this should not unnecessarily distort competition. Thus it admits the establishment of fair schemes for sharing the net cost of universal service obligations between the incumbent operator and competing public operators, but it also obliges the Member States to communicate such schemes to the Commission to be screened by EU competition rules.

This directive will also liberalise use of alternative infrastructure for already liberalised telecoms services by 1 January 1996. This means that, from this date, use of the telecoms networks of utilties such as rail, electricity and water may be not be restricted from carrying any telecoms service except for public voice telephony. Such alternative networks will provide high capacity high speed networks at lower prices. Such capacity is now either unavailable or prohibitively expensive on the national telecoms operator's network in most Member States. The type of services which will benefit will include: interactive audiovisual and multimedia services for businesses, educational and public institutions; information services providing access to data bases, remote data processing, electronic mail, transaction services (such as financial transactions, commercial data transfer, teleshopping and telereservations), corporate voice services and other value added services. As with 1998 liberalisation, Member States with less developed and very small networks may apply for an extension for alternative infrastructure liberalisation of up to five years (and two years for very small networks) from the 1996 date.

Interconnection between the new entrants (often with limited coverage of their own) and the national network operators is essential to full and effective competition in a market where "any-to-any" communications is often a pre-requiste. The general features and principles for interconnection in a pro-competition environment are laid out here, representing a necessary complement to the provisions in the ONP Interconnection Directive.

In sum, the Article 90 full competition directive will create early certainty with regard to national legislation and the rights and obligations of market players in the liberalised telecoms environment. Its provisions aim to give full effect to the commitment to the 1998 date for full liberalisation.

II Ensuring universal service and interoperability: Proposal for a Directive on Interconnection in Telecommunications

New entrants to the future liberalised telecommunications market must be able to interconnect their facilities with those of the existing telecommunications operators in order to access business and residential customers. Clear rules on interconnection are essential in order to encourage new investment, to stimulate the rapid development of effective competition, to secure universal service, and to ensure that liberalisation brings immediate benefits to all European users.

Access to advanced telecommunications and information technology networks and services is at the heart of the future information society. The evolving European telecommunications infrastructure will comprise a multitude of independently owned and operated networks, supporting a wide range of telecommunications and information based services. Ensuring adequate interconnection and interoperability of these networks and services is crucial. The proposed Directive sets out the basic rights and obligations of the market players in this area, under the supervision of the national regulatory authorities for telecommunications. Current prohibitions on cross-border interconnection within the EU are set to disappear.

The important features which will be ensured by the proposed regulatory framework for interconnection are :

application of the principles of transparency, objectivity, and non-discrimination to guarantee a fair deal in interconnection agreements in particular between new entrants and the powerful incumbent telecommunications operators

priority given to commercial negotiations between interconnection parties while reserving some conditions to be set a priori by national telecommunications regulatory authorities ;

clear responsibilities for national regulatory authorities, in accordance with the principle of subsidiarity, including effective mechanisms for dispute resolution at the national and European level.

Issues addressed in the Directive include :
Interconnection and Universal Service contribution
Requirements for non-discrimination and transparency
Principles for interconnection charges and cost accounting systems
Accounting separation and financial accounts
General responsibilities of the national regulatory authorities
Essential requirements (security of network operations, maintenance of network integrity, interoperability of services, protection of data)
Numbering (provision of numbers and numbering ranges for all public telecommunications services)
Technical standards
Publication of and access to information

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COMMISSIONER VAN MIERT DETAILS CONDITIONS UNDER WHICH ATLAS TELECOMMUNICATIONS VENTURE COULD BE ACCEPTABLE UNDER THE COMPETITION RULES

DN: IP/95/791 Date: 1995-07-18

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The agreements between Deutsche Telekom AG (DT), France Télécom (FT) and the US Sprint Corporation (Sprint) were notified to the Commission on 29 June 1995 and have been subject to a first examination by the Commission services. The agreements include the creation of a global telecommunications joint venture, PHOENIX, between ATLAS, itself a joint venture between DT and FT, and Sprint.

This notification is an important factor in the ongoing notification procedure regarding DT and FT's proposed ATLAS venture: PHOENIX addresses one of the aspects raised in the Commission's administrative letter sent to DT and FT (see Press Release IP/95/524), namely that ATLAS did not appear to be in a position to address the global needs of multinational companies in competition with other strategic alliances (e.g. BT-MCI's Concert venture).

The Commission is now further assessing the remaining aspects of the proposed ATLAS venture which raise concern under the EC competition rules. Mr Karel Van Miert, the European Commissioner in charge of competition matters, has spelled out in detail the conditions which DT and FT must fulfil if the Commission is to consider authorising ATLAS. The parties have been given a deadline until 15 September 1995 at the latest to reach an agreement on these detailed requirements.

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COMMISSION DECIDES NOT TO AUTHORISE NSD IN ITS CURRENT FORM, BUT REMAINS OPEN TO EXAMINE NEW PROPOSALS

DN: IP/95/801 Date: 1995-07-19

TXT: FR EN DE DA ES PT NL IT EL
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Following the proposal by Mr. Karel Van Miert, the Commission has decided to declare the proposed joint venture NORDIC SATELLITE DISTRIBUTION (NSD) in its current form incompatible with the Common Market and the EEA Agreement. However, Commissioner Karel Van Miert remains open to examine new proposals from the parties.

NSD is conceived as a joint venture between Norsk Telekom A/S (NT), TeleDanmark A/S (TD) and Industriförvaltnings AB Kinnevik (Kinnevik) with each parent holding one third of the company. The proposed joint venture was notified to the Commission on February 23, 1995. The Commission opened a phase II in-depth investigation on March 24, 1995 (IP/95/311).

Dominant position

In its investigation the Commission found that the NSD joint venture in its current form would create or strengthen a dominant position on three markets:

(i) On the market for provision of satellite TV transponder capacity to the Nordic region (Denmark, Norway, Sweden, and Finland), NSD would achieve a dominant position.

(ii) On the Danish market for operation of cable TV networks, TD's dominant position would be strengthened.

(iii) On the market for distribution of satellite pay-TV and other encrypted TV channels to direct-to-home households, NSD would obtain a dominant position.

The vertically integrated nature of the operation means that the market positions down-stream (cable TV operations and pay-TV) reinforce the market positions up-stream (satellite transponders, provision of programmes) and vice versa. All in all, the parties would achieve such strong positions that they would be able to foreclose the Nordic market for satellite TV.

In this respect the operation to some extent resembles the joint venture MSG Media Service, proposed by Bertelsman, Kirch Group, and Deutsche Telecom, which was blocked by the Commission in the autumn of 1994. Through the vertical nature of the MSG operation the parents would have obtained control over competitors in the German pay-TV market and thereby competitors would have had to accept the conditions offered by MSG for its services.

However, there is a considerable difference between the size and the market power of the NSD parents and those of the MSG parents. Bertelsmann and Kirch together as suppliers of pay-TV and Kirch as supplier of films and TV programmes represent market power significantly stronger than that of Kinnevik. Furthermore, the position of Deutsche Telecom in the German cable TV market is much stronger than that of the NSD parents in the Nordic countries.

The affected markets are currently in a transitional phase, since the

telecommunications markets are about to be liberalized and new technologies and services are being developed and are about to be introduced. In this situation the decision of the Commission takes on a particular importance, since this is a period during which future market structures are being defined. It is important that the Commission does not allow future markets to be foreclosed.

However, the Commission recognizes that joint ventures and particularly transnational joint ventures can be instrumental in developing the media and telecommunications sectors to their full potential. It should therefore be noted that it is the policy of the Commission to take new developments into account. Thus the parties remain invited to present a modified project which is compatible with the Common Market and the functioning of the EEA agreement.

The parties to NSD are three very strong players in the Nordic TV and media industry:

- NT is the largest cable TV operator in Norway with about 30% of the connections. NT controls the satellite capacity on the 1o West satellite position (one of the two Nordic positions), and it is an important pay-TV distributor in Norway through its company Telenor CTV.

- TD is the largest cable TV operator in Denmark with about 50% of the connections, and it will still enjoy a privileged situation for its cable TV operations possibly until January 1, 1998, the latest date for the telecommunications markets to be liberalized. TD also, together with Kinnevik, controls most of the satellite capacity on the 5o East satellite position (the other Nordic position).

- Kinnevik is a Swedish conglomerate with interests in TV programming, magazines and newspapers as well as in steel, paper, packaging and telecommunications. Kinnevik is the most important provider of Nordic satellite TV programmes with, among others, the very popoular TV3 channels, TV6, Z-TV, and the TV1000 pay-TV channels. The company is the largest pay-TV distributor in the Nordic countries through its Viasat companies. Kinnevik also has an important stake in Kabelvision, the second largest cable TV company in Sweden, as well as in TV4, the largest advertising-financed Swedish channel.

NSD intends to transmit satellite TV programmes to cable TV operators and households receiving satellite TV on their own dish ("direct-to-home" market). The establishment of NSD in its current form would in effect lead to a concentration of the activities of NT, TD and Kinnevik, resulting in the creation of a highly vertically integrated operation extending from production of TV programmes through operation of satellites and cable TV networks to retail distribution services for pay-TV and other encrypted channels.

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COMMISSION APPROVES ESTABLISHMENT OF CABLE AND WIRELESS AND VEBA TELECOMMUNICATIONS JOINT VENTURES

DN: IP/95/922 Date: 1995-08-18

TXT: FR EN DE DA ES PT NL IT EL
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Word Processed:

The European Commission has approved the formation of two joint ventures in telecommunications between Cable and Wireless and VEBA.

The first - VEBACOM - will bring together the parties' telecommunications activities in Germany including Personal Communications Network (PCN) services, paging and various value added services. In the future, VEBACOM will expand its activities into public service network provisions once the German telecommunications market has been liberalized and other companies are allowed to compete with Deutsche Telekom.

The other joint venture - Cable and Wireless Europe - will combine the two parents' telecommunications operations in the rest of the EU plus Switzerland but excluding the United Kingdom. Cable and Wireless will retain its UK telecommunications activities (Mercury Communications and Mercury One2One) outside the joint venture.

The operation presents no competition problems. Cable and Wireless and VEBA do not have any activities which overlap in any significant manner. In any case, on all the markets on which the two joint ventures will operate, there are strong competitors for the joint ventures such as the incumbent national telecommunications operators and the emerging multinational telecommunications alliances. In markets where liberalization is envisaged in 1998, such as Germany, the joint venture will provide a new a potentially strong competitor to the existing national monopoly telecommunications provider.

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AS GSM MOBILE COMMUNICATIONS MARKET IS OPENED TO COMPETITION THE COMMISSION SCREENS THE LICENSING PROCEDURES

DN: IP/95/959 Date: 1995-09-13

TXT: FR EN DE DA ES PT NL IT EL
PDF:
Word Processed:

GSM (Global System for Mobile communications) is the digital mobile telephony system developed in the European Union, which is currently achieving large-scale success. Following intervention of the Commission, nearly all Member States have now introduced competition as regards the provision of this new service.

The Commission welcomes this introduction of competition which will ensure better value and greater service choice for consumers in the rapidly growing mobile market. However the Commission has also intensified its screening of the GSM licensing processes in the Member States to ensure a level playing field between the new entrant and the incumbent. In nearly all cases the latter is the former monopoly telecoms operator or one of its subsidiaries..

In July 1995, Commissioner Karel Van Miert successfully concluded negotiations with the Irish and Belgian Telecommunications Ministers and is currently engaged in further discussions with Italy and Spain. Moreover he intends to keep a close watch on others, notably Austria.

One point of concern is the auction procedure which these Member States have included in the selection criteria of the second operator, whereby the second licence is awarded not only on the basis of a comparison of intrinsic qualitative elements such as intended coverage roll out, expertise in the area and envisaged tariffs, but also on the basis of a financial bid above a certain set threshold.

The Commission has always criticized this type of auction approach which implies a selective burden on new, innovative technologies which will ultimately disadvantage future users. In its Green paper on Mobile Communications (27 April 1994) the Commission emphasized the drawbacks of auction procedures for granting mobile licences.

In the selection procedures screened to date, it appeared moreover that the use of auctions for the selection of the second operator only, lead to unfair conditions and thus threatened to thwart competition in the developing GSM market. The Commission therefore decided in December 1994 to take legal action (under Treaty Article 90) against Italy and considered similar steps against the other governments who impose such conditions. Under this procedure, when the Member State has not amended the offending regulations, or justified or compensated for them after receiving a letter of formal notice of the Commission, the latter may adopt a formal Article 90 (3) decision requiring the government to end the infringement within a set time period. If it still does not comply proceedings under Treaty Article 169 may be launched which result in a judgement from the European Court of Justice.

The Commission takes the view that imposing a significant charge only on the new entrant, threatens to unfairly burden this undertaking in competing with the incumbent national mobile operator. In general, the latter, not only enjoys all the competitive advantages of its universal network, entrenched market dominance and established mobile subscriber base, but also was

granted its GSM licence automatically and for free.

In the GSM cases the Commission stated that it would renounce legal action if the relevant Member States, either abolished the discriminatory fee, or required the incumbent to pay the same fee, or, by implementing regulatory measures, adequately compensated the second operator. In principle, the compensatory measures should be at least as "valuable", vis a vis the business plans of the latter, as the imposed cost of licence. Compensation might concern, for example, better conditions of interconnection with the national operator's network and/or a commitment to earlier liberalisation of infrastructure for mobile communications than previously foreseen. Since interconnections with, and use of, leased line capacity of the incumbent operators currently represents around 30 to 40 % of the second operator's turnover, the significance of such compensatory measures is clear.

Following discussions with the Commission, the Irish government agreed to impose a similar fee on the public operator Telecom Eireann and communicated further measures to ensure a level playing field in the area. For example, the regulator is to ensure that efficient and fair procedures are in place to deal with interconnection disputes between the new operator and the incumbent. This includes a clear accounting methodology (vis a vis interconnect charges) which is in line with EU competition principles. Furthermore, the Irish Government has granted the second operator the immediate right to use its own or alternative infrastructure to carry and terminate its calls, in line with the wording of the Commission's draft directive on mobile communications (see below).

In view of these circumstances and, assuming that the measures are effectively implemented the Commission has now deemed that the granting procedure followed by the Irish Government does not favour the extension of the dominant position of the incumbent operator, and so, there is no longer grounds for legal action against Ireland. Accordingly the Commission wrote to the Irish authorities on July 14 1995 to officially close the case.

Belgium who had also chosen to include an auction element in the selection procedure announced the second GSM licensee on September 7, 1995. Subsequent to contacts between Commissioner Van Miert and the competent Belgian Minister concerning the conditions under which such an auction element could be accepted, the Belgian government announced that the first licensee will have to pay an amount equivalent to the license fee the second licensee agreed to pay.

In the Italian case, however, the Commission is still pursuing the procedure. While substantial progress was achieved, in particular with the recent announced measures, concerned with liberalisation of infrastructure for mobile communications, the Commission has not yet received the ultimate reassurances regarding the actual implementation of this liberalisation. Thus the Commission will soon have to consider the adoption of a formal Article 90 (3) decision against the Italian Government. A final warning letter was notified to the Italian authorities on July 27 1995.

The screening of the Spanish situation is also still in progress. The Spanish Ministry reacted to the Commission's concern about the auction procedure in Spain with a list of clarifications regarding the measures taken in favour of the new entrant. However further details are needed to allow for a final assessment of these measures. For example, the government does propose to take into account decreasing underlying costs to Telefonica in ensuring reasonable interconnect fees, but provides no appropriate cost accounting system (e.g. average long term incremental costs). Implementation of the Spanish agreement to establish cost accounting between Telefonica's GSM operation and its activities as a monopoly provider of fixed and analogue mobile telephony is also not yet clear. Therefore, in this case the Commission has sent out a request for more information from the Spanish Government (July 18).

Austria has recently launched a call for tender which will expire at the end of October. Upon a request from Commissioner Van Miert the Austrian government provided the Commission with detailed information on the

tendering procedure in August which is currently analysed by the Commission's services.

The Commission has in the meantime approved the wording of a draft mobile communications directive on June 14 1995 and published it in the Official Journal on 1 August 1995 for a two months public consultation period. The draft text will also be presented to the Council and the Parliament this Autumn and the Commission intends to adopt this Directive before the end of this year. It will apply Article 90(3) more generally across the EU GSM market, specifying competitive conditions required by the Treaty and pre-empting a growing number of complaints in the area. In particular it requires that competing mobile operators be allowed unrestricted use of own and alternative infrastructure, direct interconnections with each other and fair conditions of access to the incumbent's network.

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COMMISSION FINDS BANCA NAZIONALE DEL LAVORO/BT TELECOMS JOINT VENTURE ALBACOM TO BE OUTSIDE THE JURISDICTION OF THE MERGER REGULATION

DN: IP/95/984 Date: 1995-09-21

TXT: FR EN DE DA ES NL IT EL
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Word Processed:

The European Commission has found the agreement between Banca Nazionale de Lavoro (BNL) and British Telecommunications (BT) to set up a telecoms company named ALBACOM in Italy to be outside the jurisdiction of the Merger Control Regulation. Consequently, it has not assessed the competitive impact of the operation.

BNL and BT notified to the Commission an operation to set up a company to offer business communication services and subsequently other telecommunications services based on the two companies' existing networks in Italy. This company would compete against the current monopoly supplier of telecommunications, Telecom Italia.

After assessing the operation, the Commission found that BNL and BT may have joint control of the company for the first three years. After that period, however, BT would definitively have sole control as BT will then have the decisive influence on the appointment of the management and on the budget of ALBACOM. As in the case Banco Santander/BT, the three year period was judged to be insufficient to decide that the company would be jointly controlled. The operation was, therefore, an acquisition by BT of certain assets of BNL. As a result, the operation did not exceed the threshold set out in the merger control regulation which requires that at least two of the parties to an operation each have an EU-wide turnover of 250 million ECU.

The Commission has declared that the operation does not fall under the merger control regulation.

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THE COMMISSION SURVEYS THE EUROPEAN ONLINE MARKET

DN: IP/95/1001 Date: 1995-09-19

TXT: FR EN DE DA ES PT NL IT EL
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Word Processed:

At the initiative of Commissioner Karel Van Miert, the Commission's Directorate General for competition (DG IV) has opened a procedure to investigate the creation and operation of the online services joint venture Europe Online.

The Commission's main objective in dealing with online cases will be to prevent at an early stage the establishment of anti-competitive situations which could stifle the development of online services and the 'Information Society' by ruling out viable competition before an effective market has had a chance to grow. In the Europe Online case, the Commission would like to know if (i) access to the publications controlled by the partners would be available at fair conditions to other online services, both concerning advertising for the new services and online provision of their content, (ii) publications not belonging to the founding groups would have access to Europe Online's subscribers at conditions similar to those enjoyed by the partners' publications, and (iii) anti-competitive agreements with other companies would be avoided.

DG IV has asked the partners of Europe Online to provide the information necessary for this enquiry. The opening of this procedure does not prejudice the Commission's ultimate position on Europe Online. In line with European competition rules and with its opinion on the 'information society', the Commission is committed to providing the conditions for as much innovation as possible; it will take into particular consideration the benefits which the emergence of new online service providers represent for consumers.

According to the information presently available with DG IV, the joint venture Europe Online brings together important players from the publishing and communication fields as well as financial participants with broader interests. The three main shareholders are the major publishing groups Burda (Germany), Matra-Hachette (France) and Pearson (UK). It seems that another German publishing group, Springer Verlag, recently joined as well. In addition, two US companies would contribute experience from the US online services sector. These are: Meigher Communications (created by certain founders of America Online) and Interchange Online Network (developer of some software used by Europe Online, and recently acquired by the leading US telecom operator AT&T). The financial partners include the Luxembourg-based Société Nationale de Crédit à l'Investissement and the Banque et Caisse d'Epargne de l'Etat, Luxembourg, both of which are also involved in Société Européenne de Satellites (SES), promoter of the Astra satellites.

In competition with existing online companies in Europe, such as CompuServe, Europe Online aims to provide domestic and business users with the "gateway" linking their personal computer with a range of online services. Currently such services mainly concern electronic mail, specialized databases providing publications and other data, access to bulletin boards, discussion groups and interactive games. Online services are, however, developing rapidly and will increasingly include more sophisticated audiovisual communications such as video-on-demand, videoconferencing and "virtual shopping malls" together with tele-transaction services (shopping, banking, reservations etc. from the home). They will become increasingly accessible via personal computers, cable TV and videotex services such as the French Minitel.

These services which mark the start of the Information Society have been identified in the Commission's 'White Paper on growth, competitiveness and employment' as major areas for growth of the European economy. To ensure stronger innovation, investments and benefits to the consumers in Europe, a careful monitoring is required, especially to ensure respect for the competition rules. Today, Europe's online services market is less than half that of the US market. It is also two to three years behind the US in terms of available products and consumer interest. But this gap is narrowing, particularly as new services become available in all European languages. The European market for online services is expected to double by the year 2000, reaching around ECU 5 to 6 bn.

In addition to a number of existing companies, at least two other international online services are to establish themselves in Europe by the end of 1995: the joint venture between America Online (AOL) and Bertelsmann, and the Microsoft Network (MSN). AOL/Bertelsmann has already had contacts with the Commission and MSN is being monitored carefully both by the Commission and by the US authorities. On a more national or local basis many other players are hoping to reach that critical mass of subscribers which makes an on-line enterprise commercially viable.

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GSM ITALY : COMMISSION ASKS FAIR TREATMENT FOR OMNITEL

DN: IP/95/1093 Date: 1995-10-04

TXT: FR EN DA ES PT NL IT EL
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Word Processed:

On the initiative of M. Karel Van Miert the Commission has today decided to ask the Italian Government to take necessary measures to establish a level playing field between the two competing operators on the Italian GSM market.

The Commission has indeed requested that the Italian authorities take the necessary steps to abolish the distortion of competition resulting from the initial payment imposed on Omnitel Pronto Italia and to secure equal conditions for all operators of GSM radiotelephony by the following means:

- a requirement that Telecom Italia make an identical payment; or
- the adoption, after receiving the agreement of the Commission, of corrective measures equivalent in economic terms to the payment made by the second operator

The Commission recognises and supports the significant progress already made in Italy in this latter context, with the recent submission of draft legislation to the Italian Parliament for fundamental regulatory reform of the Italian telecoms market. Within three months the Italian authorities are to indicate what measures have been implemented.

The Commission is particularly concerned with the auction procedure which certain Member States, including Italy, have included in the selection criteria of the second operator. In these cases the second licence is awarded not only on the basis of a comparison of intrinsic qualitative elements such as intended coverage roll out, expertise in the area and envisaged tariffs, but also on the basis of a financial bid above a certain set threshold. The Commission criticized this type of auction approach in its mobile Green paper of 1994 since it implies a selective burden on new, innovative technologies which will ultimately disadvantage future users. In the selection procedures screened to date, it appears that the use of auctions for the selection of the second operator only, lead to unfair conditions and thus threatened to thwart competition in the developing GSM market.

The Commission decided in December 1994 to take legal action (under Treaty Article 90) against Italy. The Commission stated that it would renounce legal action if Italy either abolished the discriminatory fee, or required the incumbent to pay the same fee, or, by implementing regulatory measures which adequately compensated the second operator. Compensation might concern, for example, better conditions of interconnection with the national operator's network and/or a commitment to earlier liberalisation of infrastructure for mobile communications than previously foreseen. Since interconnections with, and use of, leased line capacity of the incumbent operators currently represents around 30 to 40 % of the second operator's turnover, the significance of such compensatory measures is clear.

COMPARATIVE TABLE REGUARDING THE GRANTING OF COMPETING MOBILE LICENCES IN THE COMMUNITY

GSM OPERA-TORS	DCS 1800 OPERA-TORS	SELECTION SECOND (AND FURTHER) OPERATOR(S)	RELEVANT CIRCUMSTANCES

B	2	-	auction element amongst the selection criteria of the second operator	equivalent amount to be paid by public operator
DK	2	-	qualitative criteria only	same annual fee
DE	2	1	qualitative criteria only	same annual fee
GR	2	-	auction only	public operator excluded from auction
E	2	-	auction element	compensations currently discussed
FIN	2	-	qualitative criteria only	same annual fee
F	2	1	qualitative criteria only	same annual fee
IR	1	-	auction element	limited weighing (19%) - similar amount requested from public operator
I	2	-	auction element	no similar amount requested from public operator
L	1	-		no intervention of the Commission taking account size of the country
NL	2	-	qualitative criteria only	same annual fee
A	1 (but tender issued)	-	auction element	Austria announced same payment by public operator
PT	2	-	qualitative criteria only	same annual fee
SV	3	-	qualitative criteria only	same annual fee
UK	2	2	qualitative criteria only	same annual fee

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UK	2	2	qualitative criteria only	same annual fee

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THE COMMISSION OPENS CABLE TV NETWORKS TO LIBERALISED TELECOMS SERVICES

DN: IP/95/1102 Date: 1995-10-11

TXT: FR EN DE PT NL IT EL
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Word Processed:

At the initiative of Commissioners Van Miert and Bangemann, the Commission has today adopted a directive lifting restrictions on the use of cable TV networks throughout the Union for the carriage of all liberalised telecommunications services. It aims, in particular, to allow new multi-media telecoms services to be carried on cable networks, throughout the European Union, by 1 January 1996.

In many of the Member States existing national regulation still restricts use of cable TV networks to simple, one-way televisionbroadcasting services (see table). The regulatory restrictions thus effectively prevent cable TV operators from offering carriage or provision of any of the new switched (i.e. interactive) multimedia services. The main goal of the Commission is to lift those restrictions in order to encourage investment and foster pilot projects and new initiatives in this field. Examples of such new services include: tele-shopping and tele-transaction packages, interactive games and education services, on-line databases including detailed/moving images

Lifting restrictions on cable network usage should also introduce alternative means for all telecoms service providers to gain switched access to end customers (instead of relying exclusively on the monopoly telecoms operator) permitting a lowering of costs.

Scope of the Directive

Like the satellite directive adopted in October 1994, the cable directive involves an amendment to the 1990 telecoms services directive (90/388) . The amendment allows service providers the choice of offering their services over cable TV networks. This does not affect the Member States' rights to maintain monopolies in provision of public voice telephony until 1998.

During the consultation on the draft text, the European Parliament, as well as other interested parties proposed extending the scope of the directive to cover the provision of cable TV services by telecom operators. The idea is based on "symmetry" of liberalisation: i.e. once cable operators may enter the telecoms services market, then telecom operators should be allowed to enter the TV broadcasting market.

For legal reasons however it was not possible to address the "symmetry" issue in this directive. The question will certainly need to be addressed in the context of the measures surrounding the 1998 date for full telecoms liberalisation.

Content of the Directive

* Lifting Restrictions

Article 1 of the cable TV directive abolishes restrictions on the use of transmission capacity on CATV networks for all telecoms services, apart from public voice telephony, from 1 January 1996. This covers, in particular data communications, corporate networks and multi-media services. The article also ensures that cable TV networks are allowed to (a) interconnect

with the national public telecoms network, and (b) directly interconnect with each other (i.e in as far as already possible in the framework of their broadcasting business).

* Competitive safeguards and joint provision

Article 2 of the directive further addresses the situation occurring in some Member States where the telecoms operator also owns cable TV companies.

The Directive thus asks the Member States to impose accounting transparency and separation of financial accounts between the two business activities as soon as a turnover of 50 million Ecus is reached in the market for telecom.

The Commission will assess, before January 1, 1998, whether accounting separation is sufficient to avoid abusive practices.

BACKGROUND
The current situation in the Member States

The most extensive cable TV networks are in the Benelux countries with over 90% of households passed. They are generally provided by local municipal monopolies. Although very developed in terms of penetration technological upgrading will be needed in most cases in order to cope with demands for transmission of new interactive audiovisual services and other two-way telecoms services. Cable networks in Denmark and Germany cover around 70% of households. Denmark has over 6500 cable operators, but Germany only one, that is the public telecoms operator DBPT.

Ireland has a relatively developed cable network with around 50% of households passed and around 13 cable operators. Services are provided by licence holders in conjunction with Telecom Eireann. The latter has recently announced an increase in its stake to 75% in the leading Irish cable operator and programmer, Cablelink.

In Spain, cable penetration is also low with around 8% of households passed and a subscription rate of 1% of all households . Service is currently provided in a limited number of areas by regional authorities or town councils. There are 28 of these local cable operations which generally started as local distributers of satellite pay TV. However, Telefonica, in the meantime has been rapidly upgrading its own network with optic fibre capacity and claims it is now adapted for carriage of TV signals and multimedia services to the homes of the major part of the population. The Spanish telecom operator has recently established a joint venture called Cablevision with the leading media group in Spain, PRISA. The PRISA group controls the largest newspaper publisher, and broadcasting operation as well as the only pay TV channel in the country. A complaint to the Commission against the formation of this joint venture was lodged this month by one of Spain's three private TV channels, Antena 3.

In Italy there is no significant cable network development as yet. However Telecom Italia has recently announced its own $7.8 billion "Socrates" project to roll out its own nationwide cable network, like Telefonica, by installing fibre optic lines to the home. The target is to pass at least 50% of households by 1998. In a first phase Socrates will offer cable TV channels and pay-per-view services. In a second phase interactive services including video games, home-banking and home shopping, will be introduced. In the third and final phase Telecom Italia proposes full "services integration" of telecoms and broadcasting services over a common network platform

The European Commission has in the meantime sent requests for information have been sent to Telecom Italia, Telefonica and Telecom Eireann. The aim is to clarify the plans of these operators and to assess the facts and possible legal implications concerning their potential use of monopoly telecoms infrastructure to provide cable TV services.

In the UK cable network roll out is still relatively limited with only around 10% of homes passed and a subscription rate in 1994 of only 2.8%.

However, early infrastructure liberalisation in the UK ensured that investment was made in making these networks technologically advanced, so that they are generally already capable of providing switched multi-media services.

In Portugal cable television only started at the end of 1994 through TV Cabo Portugal which is a part of the Portugal Telecom group. It is divided into 9 regional operational companies. By the end of this year TV Cavo Portugal hopes to have passed almost 400 000 homes.

Greece has no cable TV network as yet.

Table

	Use of cable TV networks for liberalised services
Belgium	No
Denmark	No
France	Non-voice services only
Germany	No
Greece	---------*
Ireland	No legal provision
Italy	---------* (legislation pending)
Luxembourg	No legal provision
Netherlands	Limited use
Portugal	No
Spain	No (but pending legislation)
UK	Yes

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FUTURE DEVELOPMENT OF THE MARKET IN DIRECTORIES AND OTHER TELECOMMUNICATIONS INFORMATION SERVICES

DN: IP/95/1104 Date: 1995-10-13

TXT: FR EN DE DA ES NL EL
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On the initiative of Mr Bangemann, the Commission has decided to forward to the European Parliament and the Council a communication setting out guidelines on the directories market. The introduction of a competitive environment in the telecommunications sector requires, on the one hand, an extension of Community telecommunications rules to include directories and information services and, on the other hand, the maintenance of a universal directory and an information service that is easily accessible to all users at an affordable price.

To the extent that a directory is both a product and a service, the provisions of the Treaty relating to competition (Art. 85, 86, 90) and to the free movement of goods, the freedom to provide services and consumer protection (Art. 30 to 34, 36, 59, 60, 100a, 129a and several directives based on these articles) must be applied. The Commission will pursue an application of these provisions taking into account the guidelines outlined in the communication. Where appropriate they will be incorporated in proposals to be presented to the European Parliament and to the Council in order to complete the legal framework for a liberalised telecommunications market.

The directories and associated information services sectors are at the sharp end of telecommunications and publishing and, in consequence, their development is completely at the mercy of any changes that may occur in these two sectors. Directories account for a major proportion of the media and represent 7.5% of the advertising market in the European Union.

Directory services, making up as they do the most important means of access to telecommunications services, will play a central role with regard to the use of telecommunications services in a competitive environment.

Drawing on the benefits of the new technologies and, in particular, of the interactivity made possible by videotex services, this sector is currently making its debut in the world of multimedia. As one of the major elements in this new market, it should contribute significantly to the development of the latter.

Telecommunications directories are supplied in a variety of forms: printed, electronic (on line or CD-ROM) or via a telephone hotline.

The Commission is proposing the following guidelines with a view to developing this sector:

1. Retention of a universal directory and a telephone information service in a competitive environment. In each Member State, users of voice telephony services must have at their disposal at least one complete "White Pages" directory containing the telephone particulars of the subscribers to fixed and mobile services, while at the same time having access to at least one information service at affordable

2. Abolition of the exclusive and special rights in the telecommunications directories market which exist under certain national regulations. These

liberalization measures seek to promote the dynamic development of supply, while at the same time respecting the rules of competition and taking account, on the one hand, of recent trends in the regulations applicable to telecommunications services, notably the complete liberalization of fixed voice telephony services with effect from 1 January 1998 and, on the other hand, of the anticipated development of the trans-European networks and mobile telephony services in the years to come.

3. Conditions governing access and marketing. To the extent that directory services and other information services for subscribers can no longer be regarded as reserved activities, access to raw subscriber data, pure and simple, should be provided on the basis of objective, transparent and non-discriminatory criteria and in accordance with the Community provisions in force, notably with regard to the rules of competition, the principles of Open Network Provision (ONP) and the protection of personal data and individual privacy.

4. Promotion of new technologies (electronic directory, CD-ROM and X500 service) and opening-up to multimedia. By virtue of the facilities already offered by electronic directories (speed of interrogation on line, continuous updating of data, diversification of applications), steps should be taken to encourage the development of interconnections between the various existing services in the Union. Furthermore, the emergence of electronic media and the interactivity developed through videotex should facilitate the evolution of directories along multimedia lines.

5. Precautionary measures

Protection of individual privacy. In the context of the provision of directory services, the protection of personal data must be guaranteed. Subscribers must be informed of their rights to protection against all forms of intrusion into their private lives, i.e. the right not to be included in the directory, the right of access and the right to correction in respect of data which concern them, the right to oppose the marketing of data relating to them and the right to limit the use of such data.

Protection of intellectual property rights. The benefits of the national and Community provisions governing copyright should be extended to include directories, pursuant to the criteria allowing for protection under the regulations currently in force.

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ATLAS-PHOENIX: CLEARANCE POSSIBLE BY MID-1996

DN: IP/95/1138 Date: 1995-10-18

TXT: FR EN DE DA ES PT NL IT EL
PDF:
Word Processed:

Mr.Karel Van Miert, Commissioner in charge of EU competition policy, has informed the European Commission about commitments made by the French and German ministers in charge of telecommunications and the CEOs of France Telecom and Deutsche Telekom AG regarding the notified ATLAS and PHOENIX telecommunications alliance.

On the basis of these main and other commitments, the Commission now intends to initiate the formal procedure, the first step of which will be the publication of a Notice in the Official Journal setting out the main factual elements of the notified transactions, including the amendments and commitments agreed upon by the parties, and inviting interested third parties to submit any comments they may have within a specified period, normally speaking one month.

The procedure also involves a consultation of the Advisory Comittee of Member State competition authorities on the text of a draft decision by the Commission, which could be formally adopted during the first half of 1996.

The amendments and undertakings offered by the national telecommunications ministers of France and Germany and the parties to the ATLAS and PHOENIX alliances are designed to meet the concerns expressed by the Commission, i.e.:

- the French and German governments have undertaken a firm political commitment to liberalize alternative telecommunications infrastructure for the provision of liberalized telecommunications services, i.e. not basic public voice telephony, by 1 July 1996 and to liberalize fully all telecommunications services, including public voice, and infrastructure by 1 January 1998;

- the public switched data networks in France and Germany, Transpac and Datex-P respectively, will until 1 January 1998 remain separated from the ATLAS joint venture set up by France Telecom and Deutsche Telekom;

- France Telecom and Deutsche Telekom agree to establish and maintain access to their domestic public switched data networks in France and Germany on a non-discriminatory, open and transparent basis to all service providers offering low-level (so-called X.25) data services; to ensure continued non-discriminatory access in the future, the parties' commitment also relates to any generally applied standardised interconnection protocol that may modify, replace or co-exist with, the current standard;

- France Telecom and Deutsche Telekom agree not to engage in cross-subsidisation; to prevent cross-subsidies, all entities formed pursuant to the ATLAS and PHOENIX ventures will be established as distinct entities, separate from the parent companies and subject to regular and customary auditing, to ensure that dealings between these entities and France Telecom and Deutsche Telekom take place on an arm's length basis;

- France Telecom agrees to sell the INFO AG company, an important competitor of Datex-P on the German data network services market.

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COMMISSION PROPOSES ACTION IN THE FIELD OF SATELLITE PERSONAL COMMUNICATIONS SERVICES (S-PCS).

DN: IP/95/1202 Date: 1995-11-08

TXT: FR EN DE DA ES PT NL IT
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On a proposal of Commissioner Martin Bangemann, the European Commission today adopted a "Proposal to European Parliament and Council for an action at a Union level in the field of satellite personal communications services". The proposal could be adopted by the European Parliament and the Council by the middle of 1996.

Satellite personal communications services will provide data and/or voice(and in the future also video) services into a fixed or protable personal terminal, approximately the size of today's terrestrial cellular phones, by means of new types of the satellite systems such as Low Earth Orbit(LEO) constellation of some 40-70 satellites overflying the surface of the earth at around 1000 km. These systems will enable global interconnectivity and mobility via the use of personal communications equipment as a complement to world-wide mobile terrestrial networks (in particular GSM).

The current situation: European action is urgently needed.

There is a significant opportunity for European mobile and space industry in both equipment and services in satellite PCS. Actual European industry contracts are valued at about 500 million ECU, while potential further contracts are estimated to reach tens of billions of ECU, especially in handsets.

In view of limited availability of frequency spectrum resources and the number of announced satellite PCS systems, there is a need to come worldwide to a co-ordinated selection of satellite PCS systems taking due account of the economic, industrial and social implications of the proposed services.

The operation of the satellite systems is subject to two inter-related sets of issues:

- formal notification to the ITU (International Telecommunications Union) for the purpose of technical frequency coordination, and

- selection and authorisation of the systems in nations where the space segment capacity is to be used.

Successful completion of the ITU frequency coordination process does not provide any guarantee that the satellite system will indeed be authorised to proviede space segment capacity for use in a particular country.

In the United States, the Federal Communications Commission (FCC) has considered six applications. In early 1995 the FCC issued orders selecting and licensing three of the proposed concepts for global service provision, namely Globalstar, Iridium, and Odyssey.

Regulatory measures, including licensing, in other parts of the world are yet to be taken although many countries are evaluating the issues arising from the introduction of these services. In the European Union, the Commission has undertaken a number of initiatives. She organised a hearing

in September 1992 where the industry presented their plans to interested regulators, industry and users. In its Communication on Satellite Personal Communications of April 1993, the Commission underlined the strategic importance of satellite personal communications systems and services.

There needs to be compatibility between any European spectrum usage and usage in other regions of the world. The spectrum is to some extend controlled by those who lay first claim on the spectrum in the context of the ITU procedures and there is a danger that, unless precautions are taken, systems capable of providing service in Europe may be selected by a process outside European jurisdiction. Therefore a European approach for licensing is urgently needed in order to use the limited frequency resource most efficiently and to strengthen the combined European position on this matter.

The proposed action

The objectives of action shall be to ensur, within a period of three years

- selection of satellite PCS space segment operators;
- the adoption of common conditions to be attached to authorisations for satellite PCS spac segment operators;
- harmonisation of conditions for authorisations;
- the establishment of a dialogue and, where appropriate, negotiations between the European Union and third countries with the aim of establishing international cooperation in order to promote development of satellite personal communications services and remove the obstacles to their development.

As a first step, the Commission has decided to publish a Call-for-Information in the Officiel Journal, addressed to prospective consortia and other relevant industry planning to provide satellite personal communications services and/or equipment in the European Union. Through this Call-for-Information, the Commission seeks detailed information of all relevant matters which may assist the definition of the scope and modalities of a selection and authorisation process, including suitable criteria for selection and conditions for authorisation.

The Commission may ask the European standardisation bodies such as the European Telecommunications Standards Institute (ETSI) and Cen/Cenelec, as well as the European Radio Committee (ERC), and the European Committee for Telecommunications Regulatory Affairs (ECTRA), via work requirements under the relevant existing framework agreements with those organisations, to study the necessary technical criteria and conditions.

Finally the Commission, who shall be assisted by an advisory and a regulatory Committee shall adopt Decisions on:

- common conditions to be attached to the authorisations of the selected satellite personal communications space segment operators;

- harmonised conditions for the authorisation of providers of satellite personal communications services, gateway operators, and, if required, for the circulation and use of equipment;

- any other measures aimed at facilitating the development of satellite personal communications services.

As to International aspects, the Commission monitors developments outside the Community and consults with third countries on the coordinated introduction of satellite personal communications at a global level.

Whenever the Commission establishes that the situation may require negotiations with third countries, the Commission will start, where appropriate, negotiations in view of these aims. The principle of Community action will be aimed at ensuring effective and comparable access for Community organisations in all markets.

Annex

to a European Parliament and Council Decision of
on an action at a Union level in the field of
satellite personal communications services in the European Union.

Time schedule for measures

Sept. 96 Establishment of categories of satellite personal communications services for which a selection of satellite systems is required;

Publication of a Call-for-Declaration of Interest in the Official Journal;

Oct. 96 Adoption of criteria for the selection of satellite systems and the principles for the authorisations for these systems;

Dec. 96 Based on a comparative bidding process and subsequent evaluation, selection of satellite systems used for the provision of categories of satellite PCS services;

Adoption of common conditions for the authorisation of the selected systems;

Mar. 97 Adoption of harmonised conditions for the authorisation of all aspects of satellite - personal communications as they concern, inter alia, service provision, equipment, interconnection, numbering, and gateway access.

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COMMISSION ADOPTS TWO PROPOSALS COMPLETING THE REGULATORY FRAMEWORK FOR A LIBERALISED TELE-COMMUNICATIONS MARKET.

DN: IP/95/1243 Date: 1995-11-14

TXT: FR EN DE DA ES PT NL IT EL
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At the initiative of Commissioner Bangemann, the Commission today adopted two proposals for legislation (both based on Article 100A) that constitute key elements of the future regulatory framework for the telecommunications sector, following liberalisation by 1 January 1998.

1. The first one, a proposal for a European Parliament and Council Directive, will, together with directive 90/388/EEC[1] (based on Article 90 of the Treaty), establish a common framework for general authorisations and individual licences granted by Member States in the field of telecommunications services.

While full competition will be introduced in the telecommunications sector in most Member States in 1998, authorisation regimes remain necessary in order to ensure that certain public interest objectives such as universal service are attained. At the same time no undue burdens must be imposed on market players.

In that context, the proposed directive sets up rules to be implemented at national level, together with the full application of competition principles, both for the procedures for the granting of authorisations or licences and the conditions that can be attached to these authorisations. Such a common framework should facilitate, for undertakings acting in the field of telecommunications, the exercise of freedom of establishment and freedom to provide services in the European Union.

The most important features of the proposed directive are:

- in line with the principle of subsidiarity, the granting of authorisations will be the responsibility of Member States;

- there should be no obligation for Member States to require an authorisation, but if they do so they must be in compliance with the following principles;

- the prohibition of any a priori limitation in the number of new entrants, except to the extent required to ensure an efficient use of radio frequencies;

- the priority given to general authorisations (every undertaking complying with conditions set out in general rules may offer its services or infrastructure), as opposed to individual licences;

- national authorisation or licencing procedures have to be open, transparent and non-discriminatory;

- the definition of harmonised principles and the provision of harmonisation mechanisms both for the procedures for the granting of authorisations and the conditions attached to authorisations (for example conditions related to the protection of users, in particular in relation to prior approval by the regulatory authority of the standard

consumer contract, provision of detailed and accurate billing, provision of emergency services and special arrangements for disabled people).

- the introduction of provisions designed to facilitate cross-border services. In particular an undertaking intending to provide a telecommunications service in more than one Member State may request the national regulatory authorities concerned to co-ordinate their authorisation procedures in order to deliver the necessary authorisations on substantially the same conditions.

2. The second text adopted today by the Commission is a proposal to update two existing Directives in the area of open network provision (ONP).

Open Network Provision (ONP) concerns the harmonisation of conditions for access to, and use of, public telecommunications networks and services.

The framework Directive 90/387 EEC describes objectives and procedures. It covers the use of standards, requirements for the independence of the national regulatory authorities, and the ONP Committee procedures. The Directive does not place any specific obligations on market players. These obligations are covered by two individual ONP Directives:

- Council Directive 92/44/EEC on the application of ONP to leased lines
- European Parliament and Council Directive on the application of ONP to voice telephony (adoption expected by the end of 1995)

The ONP framework Directive, first adopted in 1990, and the ONP Leased Lines Directive, adopted in 1992, are being now updated to take account of the introduction of competition after 1998, and to provide a common approach for the provision of important public telecommunications services in the European Union.

Given the crucial role played by national regulatory authorities for the telecommunications in a liberalised market, a new requirement is being introduced in the ONP framework Directive to reinforce the independence of the national regulatory authorities for telecommunications in each Member State. In particular, where a Member State maintains a significant degree of ownership or control of a telecommunications organisation, it must ensure the effective seperation of the regulatory activities from activities related to ownership or control.

The objective of the revised ONP framework Directive remains the harmonisation of conditions for access to and use of public telecommunications networks and services, but the emphasis is on achieving this through voluntary observance of standards. The existing procedure, whereby standards can be made compulsory under certain circumstances, would be modified to include a persod of public consultation before any decision was taken.

The leased lines Directive requires that leased lines shall be offered and provided on request without discrimination to all users.

Non-discrimination applies to, inter alia, availability of technical access, tariffs, quality of service, provision time (delivery period), fair distribution of capacity in case of scarcity, repair time and availability of network information.

The revised ONP leased lines Directive will continue to require that the present minimum set of leased lines is available to all users in the EU from at least one organisation in each Member State. This obligation will be placed only on organisations with significant market power, as determined by the national regulatory authorities in accordance with guidelines given in the Directive. Requirements for advance publication of tariff changes will be removed and the requirement for cost orientation of tariffs will be relaxed where there is strong competition in the provision of leased lines. A new annex identifies other types of high speed leased line whose provision is to be encouraged, and recommends suitable voluntary standards for connection to these types of leased line.

[1] Commission Directive 90/388/EEC on competition in the markets for telecommunications services, O.J. L 192/10, 24.7.90, and in particular its amendment, Draft Commission Directive amending Commission Directive 388/90/EEC regarding the implementation of full competition in the telecommunications markets, O.J. C 263/6, 10.10.95 (adopted by the on 19 July 1995).

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ALTERNATIVE TELECOMS NETWORK AUTHORISED IN GERMANY AFTER COMMISSION INTERVENTION

DN: IP/95/1275 Date: 1995-11-22

TXT: FR EN DE DA ES PT NL IT EL
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Following the introduction of a legal procedure (under Article 90 of the EC Treaty) by the Commission, the German Ministry of Posts and Telecommunications has granted a new licence for the establishment and operation of a major alternative telecommunications network.

Vebacom is the telecommunications subsidiary of the VEBA AG, a German utilities holding company. The former filed a complaint with the Commission's Directorate General for competition in April 1995 after several unsucessful attempts to obtain a licence for a broadband telecommunications network based on SDH (Synchronous digital hierarchy) technology, which would allow the transfer of data between 36 different sites of the German public television broadcaster ARD.

The Commission took the preliminary view that the complaint was justified, in particular since Vebacom intends to offer a service based on a new technology (SDH) which is not offered by Deutsche Telekom AG, the holder of the infrastructure monopoly in Germany. The refusal to authorize the new offering is thus holding back technical progress.

After informal discussions with the Commission the German Ministry of Posts and Telecommunications has now agreed to grant the licence as requested.

Alternative telecommunications infrastructure refers in general to the telecommunications networks owned and run by companies other than traditional telecommunications operators, like utilities and railways. Currently regulatory restrictions in most Member states limit the use of these networks to the internal needs of the company who owns it. That is, they are not allowed to lease spare capacity to the third parties. These restrictions constitute a major obstacle for the introduction of a fully liberalised regulatory environment for the telecommunications sector up to 1998 since such leased capacity is in great demand but mostly only available from a monopoly.

In order to avoid legal action in similar cases the Commission proposed on the initiative of Commissioner Van Miert in a Draft Directive of 19 July 1995 to generally liberalise alternative infrastructures. The draft Directive has been published on 10 October in the Official Journal for a two-months public consultation period.

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COMMISSION OPENS AN ENQUIRY ON THE ALLIANCE AMERICA ONLINE / BERTELSMANN / DEUTSCHE TELEKOM

DN: IP/95/1354 Date: 1995-12-06

TXT: FR EN DE ES PT NL IT EL
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Commissioner Karel van Miert asked the Directorate-General for Competition of the Commission (DG IV) to analyse the creation of this alliance in the field of online services. This alliance brings together the companies America Online (leader on this market in the United States), Bertelsmann (first publishing group in Germany and in Europe) and Deutsche Telekom (dominant telecommunications operator in Germany and first in Europe); it could also be opened to another German publisher: Axel Springer.

A letter of intent has already been signed by the partners, and specific contracts are being prepared. The agreement envisages in particular cross-shareholdings between AOL / Bertelsmann on the one hand, and Telekom Online on the other hand, as well as the acquisition of shares in America Online in the United States by Deutsche Telekom. The partners intend to segment their offerings, Telekom Online specializing in services to businesses, and AOL in services to private consumers. An extension of the alliance to include Springer is also under discussion, and other partners from other countries could join it as well.

This alliance is important due to the size of its partners. Deutsche Telekom, in particular, holds a dominant position on the German market of online services (through its subsidiary Telekom Online, comprising the BTX and DATEX-J services), and also controls networks that are essential for the development of competing online services .

DG IV's objectives in relation to online services are to prevent the establishment of anti-competitive situations which could slow down the development on-line services and of the 'Information Society'.

In the case of AOL / Bertelsmann / Deutsche Telekom, the Commission wishes to know in particular under which conditions (i) competing online services would be able to obtain access to the content of publications controlled by the partners, or to purchase advertising space to promote new services (ii) publications not belonging to the partners would be able to propose their content online (iii) other online service companies would be able to use the networks and services of Deutsche Telekom (iv) agreements with other online services companies might exist.

DG IV has asked the alliance partners to provide the information necessary for this enquiry. This enquiry in no prejudges the final position of the Commission. In accordance with its opinion on the 'Information Society', the Commission is ready to provide the conditions for the greatest possible innovation, including alliances and joint-ventures, while respecting competition rules. It will take into particular consideration the advantages that the emergence of new online services brings for consumers.

BACKGROUND

In addition to numerous existing companies, at least two other international online services are currently being established in several European countries in parallel: Europe Online (grouping the German publisher Burda and several Luxembourg financial institutions) and Microsoft Network

(MSN). DG IV opened an enquiry into Europe Online in September 1995, the answers to which are being examined, and MSN is being monitored closely both by the Commission and by the American authorities. On a more national or local basis many other new entrants hope to reach the critical mass of subscribers which makes an online service commercially viable.

The commercial online services provide a "bridge" connecting Personal Computers (PC) with a broad range of online services, including a screen interface, telecommunication access through local telephone numbers , and access to the services themselves.

These services are provided either by the partners themselves, or by other companies taken under contract, such as other publishers, or via the worldwide network Internet.

Currently, such services concern mainly electronic mail, specialized databases providing publications and other data, access to bulletin boards, to discussion groups and to interactive games. However, online services develop quickly and, in the future, will comprise more sophisticated audio-visual communications such as video-on demand, videoconference as well as "virtual shopping malls" including teletransactions from home (purchases, banks, travel and entertainment reservations). Access to such services will improve gradually, from PCs, from cable TV and from videotex systems like France's Minitel.

These services, which mark the beginning of the 'Information Society' were identified by the Commission's White Paper on 'Growth, competitiveness and employment' as important sectors for European economic growth. To ensure stronger innovation, investments and the interests of the consumers, careful monitoring is necessary, including in particular compliance with competition rules. Today, the European market for online services is less than half that of the United States. Europe is also a few years behind in terms of new services availability and consumer interest. But this gap is narrowing, particularly as new services become available in all European languages. The European market for online services is expected to double between now and the year 2000, reaching approximately 5 to 6 billion ECU.

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THE COMMISSION CLEARS A JOINT VENTURE BETWEEN ERICSSON AND ASCOM

DN: IP/96/14 Date: 1996-01-09

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On 27 November 1995 the Commisssion was notified by Ericsson and Ascom of their agreement to establish a joint venture company, for which Ascom's Swedish subsidiary, Ascom Tateco, will serve as vehicle. The joint venture which will carry out activities in the wireless businesss communications sector, in particular the development, manufacture, sales and installation of on-site paging systems and equipment, in which up to the present both of the parents have been active in the market.

The investigation carried out by the Commission among customers and competitors of the parties in the on-site paging market has shown that the joint venture will be faced with sufficient competition throughout the EEA from the present players, which are either strong multinational companies such as Philips, Bosch and Motorola, or are companies specialized in on-site paging, such as Multitone. Furthermore, the market concerned is characterized by the existence of large sophisticated customers, in particular in the public sector, who are in a position to exercise significant bargaining power and who frequently use calls for tenders to award contracts. In addition, the Commission has taken into account the competitive pressure of other wireless technologies, such as cordless telephony.

Given the above-mentioned factors, the Commission has concluded that there is neither creation nor strengthening of a dominant position as a result of the operation and has, therefore, decided not to oppose it.

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COMMISSION FORMALLY ADOPTS DIRECTIVE ACCELERATING COMPETITION IN EU MOBILE AND PERSONAL COMMUNICATIONS MARKET

DN: IP/96/51 Date: 1996-01-16

TXT: FR EN DE DA ES PT NL IT EL
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The Commission has today formally adopted the Article 90 directive, put forward by Commissioner Van Miert in cooperation with Commissioner Bangemann, opening the EU mobile and personal communications market to full competition.

The directive is based on the discussion process launched last year by the Green Paper on Mobile and Personal Communications. It requires Member States to abolish all exclusive and special rights in the area of mobile communications and, wherever this has not yet been achieved, to establish open and fair licensing procedures to authorise the launch of the digital services GSM, DCS 1800 and DECT. This includes lifting the restrictions on current licensees for one of these frequencies from applying to extend their services into the others. The directive stipulates that Member States must cease to restrict the combination of the mobile technologies or systems, in particular where multistandard equipment is available, while also taking into account the benefit of ensuring effective competition between operators in the relevant markets by allowing new entrants gain a foothold.

The directive also removes all existing restrictions on use of facilities for mobile networks, allowing new mobile operators to make full use of their own infrastructure as well as that provided by third parties such as utilities' networks. Use of infrastructure other than those controlled by the incumbent telecoms operator is essential to the success of new entrants to the mobile market as it gives them much greater control over their cost base. Leasing capacity currently represents a cost factor for second operators of between 30 and 50%. The right to set up their own networks and choose alternative infrastructure and connections also gives mobile operators significantly more flexibility representing an strong push towards further development and innovation in the mobile market.

Greater efficency and choice bought about by competition in the mobile market is particularly important in the run up to 1998 full telecoms liberalisation as it will dampen the potential for increases in (fixed) local charges to the consumer. The increasingly commercial incumbent (fixed link) operations are now set to position themselves to make the most of their local loop monopoly before the effects of full network competition are felt. However, the rapidly decreasing price of competitive mobile services will set an effective ceiling for the wire based local tariffs.

The Commission will be paying close attention to price adjustments in the telecoms sector between now and 1998 in order to secure the maximum benefits of liberalisation for consumers across the EU.

Time Table

The mobile directive will enter into force twenty days after publication in the Official Journal of the EC which is expected within the next ten days. The Member States then have nine months to notify the Commission of the appropriate national measures taken to implement its provisions.

From the moment the directive enters into force, in addition to what has already been achieved in opening up the GSM licensing process across the Union, Member States must open licence allocation procedures for all public access/Telepoint applications, including systems operating on the basis of the DECT standard.

By January 1, 1998, at the latest the Member States must also have opened up the licencing of mobile systems according to the DCS 1800 standard.

Restrictions on infrastructure and direct interconnection for mobile communications must be abolished immediately. However, Member States with less developed networks may apply for derogations of up to five years to take account of their specific situations. This concerns Portugal, Greece, Spain and Ireland.

Some figures about the Mobile Market

With adoption of these measures the European Union has now taken the lead in setting the right regulatory conditions for encouraging the development of mobile and personal communications into a vast mass market. The directive means that the EU market will be the first region in the world to enjoy the combination of liberalisation of services and networks, together with the deployment of harmonised, leading edge, digital standards over such a large area. The standards confirmed for the EU are GSM, DCS 1800 (the two frequencies available for digital mobile services) and DECT (for digital cordless telephony within a fixed radius). This both reflects and further establishes the global momentum behind the take up of this technology for the second generation digital mobile systems. The wireless market is now set to become a core component of the information society and the development of true person to person communications.

The mobile sector is by far the most dynamic in the telecoms market in the EU experiencing levels of growth of over 60%. In the last year the number of cellular subscribers in Europe has grown from around 12 million to over 20 million, clearly outstripping growth in numbers of fixed subscribers. The vast majority of the new mobile customers are enjoying digital services, particularly GSM, which allows them to roam throughout Europe with the same handset and is also much more efficient concerning use of the frequency spectrum.

On top of very substantial analogue networks in countries such as the UK, Italy and Scandinavia, the growth potential of GSM is now also evident in nearly all the Member States. In France, for example, GSM subscribers grew from around 337 000 to around 797 000 over the past year. In Belgium there were around 53 000 GSM subscribers at the end of 1994 and there are now nearly 146 000. Italy saw growth over the same period from 45 000 in 1994 to 170 000 in October 1995. Germany still remains by far the most important market with almost three and a half million users, of which over two and a half million are now on the GSM network. However progress in countries with less developed networks is also notable. Over the last 12 months GSM subscribers in Greece increased from 125 000 to 255 000, and in Portugal, from 122 000 to 241 000. The Scandinavian countries are now also experiencing massive growth in take up of GSM. Most impressive is Sweden where the GSM market has grown from around 200 000 to 905 000 over the past year.

In total, Commission studies predict 38 million cellular mobile users in Europe by the year 2000 and around 80 million by 2010.

The Market growth and lower prices brought about by introducing competition into these markets will effect all sorts of users: residential, both young singles as well as families, and elderly or disabled people who benefit from a cordless phone; small and medium sized businesses benefitting from the organisational flexibility implied by the cordless office, and international business travellers benefitting from cross border GSM roaming.

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COMMISSION CLEARS THE ACQUISITION BY AT&T OF CERTAIN BUSINESS UNITS OF PHILIPS IN THE TELECOMMUNICATIONS EQUIPMENT SECTOR

DN: IP/96/129 Date: 1996-02-07

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The Commission has given the green light for the acquisition by AT&T Corp., the American telecommunications company, of certain business units of the Dutch company Philips Electronics N.V. in the market for the provision of public telecommunications equipment.

AT&T, the American telecommunications company, provides a broad range of voice and data communications services, in particular US and international long-distance carrier services. AT&T is the ultimate parent company of a group engaged in the full range of telecoms operator activities.

AT&T's activities are organised into a number of different businesses. The telecoms equipment manufacturing activities are in the Network Systems Group. The acquisition takes place in the framework of the process of restructuring of AT&T which will lead to the separation of the telecommunications equipment business from other groups (including telecoms services) by 01.01.97.

Philips, the Dutch company, is one of the world's largest electronics companies. Its products include lighting, industrial and consumer electronics, recorded music, components, semiconductors, medical systems, and communications systems.

The two divisions from which the Acquired Businesses are to be divested are Télécommunications Radioélectriques et Téléphoniques (TRT) and Philips Kommunikations Industrie AG (PKI). Both of these divisions are within the Philips Communication Systems division and are engaged in the development, production and distribution of telecommunication equipment.

A number of National Sales Organisations will also be acquired by AT&T in the operation. The NSOs concerned are those located in Austria, Belgium, Denmark, Greece, Ireland, Italy, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and the United Kingdom.

The operation will mainly be of a complementary character with regard to market shares of AT&T and Philips in the relevant product and geographic markets.

The Commission investigation has concluded that the operation will not create or strengthen a dominant position in the affected market.

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COMMISSION ACCELERATES LIBERALISATION IN TELECOMS SECTOR WHILE EMPHASISING THE IMPORTANCE OF UNIVERSAL SERVICE

DN: IP/96/183 Date: 1996-02-29

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At the initiative of Commissioners Van Miert and Bangemann, the Commission today agreed to adopt the directive implementing in EU law the commitment to full competition in the EU telecommunications market by 1st January 1998. Issued under Treaty Article 90, the directive fixes the date for full liberalisation into EU legislation and sets out deadlines for progress in national implementation in preparation for this goal. Underpinning the directive is the recognition that competition, in the presence of necessary regulatory safeguards, enhances the provision of universal service. Member States must notify the Commission of measures to ensure universal service by 1 July 1997 at the latest.

In line with the broader interests of global information society coordination, adoption of this new EU legislative framework comes just four weeks after final agreement in the US of the 1996 Telecoms Act which fully modernises US telecoms regulations and market structure.

In addition to the 1998 date for opening up the markets in voice telephony and public network infrastructure, the directive accelerates the liberalisation in all other areas: the lifting of all remaining Member State restrictions which do not require major changes in legislative and regulatory frameworks must be achieved this year (1996). Restrictions have already been abolished in satellite, cable and mobile communications. The current directive thus removes the last hurdle before the final gate is opened: As of July 1 of this year use of all alternative infrastructure (such as the telecoms networks of railways, energy and water companies which are currently only authorised for restricted "in-house" purposes) must be liberalised for carriage of commercial telecoms services. This provision excludes public voice telephony service which may be reserved to the national telecoms organisation until 1998.

The original date put forward by the Commission of January 1, 1996, for lifting restrictions on alternative infrastructure has been moved back six months as a compromise to the Member States. Two factors were taken into consideration here:

- the time needed to achieve the implementation requirements
- bringing the date in line with the agreement conditions set down by the Commission in important competition cases

As regards the deadlines of July 1996 and January 1998 for alternative infrastructure and full competition respectively, Member States with less developed networks shall be granted, upon request, additional implementation periods of up to five years provided that this is needed to achieve the necessary structural adjustments. Member States with very small networks may be granted up to two years under the same conditions.

Alongside the lifting of government restrictions, the Full Competition directive also sets down broad competition principles as regards the appropriate national regulatory frameworks for the post 1998 environment. This concerns, in particular, interconnection, licensing and financing of universal service. Such regulatory instruments should be transparent, non-

discriminatory and as least restrictive of competition as possible whilst still achieving important policy goals of public service, interoperability and use of limited resources such as spectrum and rights of way.

Universal service in fact the subject of the recently adopted (13/12/96), Parliament and Council directive applying open access rules to voice telephony. In the coming weeks, the Commission will isssue a detailed Commission Communication which will set out the scope of universal service and the future approach of the Commission in this regard.

The harmonisation requirements of Member State rules in these areas fall under the EU's ONP (Open Network Provision) framework which is concerned with open and efficient access to, and use of, the public telecoms networks and services. ONP Council and Parliament legislation in these areas, issued under Article 100A, is currently under discussion. The Commission has ensured that the Article 90 framework is fully coordinated and coherent with the draft ONP framework.

In the meantime, before implementation of ONP rules is achieved and/or in areas where their application is limited, the rights of new entrants to liberalised markets under the Treaty competition rules should not be compromised.

Size and growth of telecoms markets and impact of competition*

Telecommunications is one of the largest and most profitable economic sectors in the world. In 1992 public telecoms services revenue reached $505 billion. The global telecoms equipment market came to $120 billion in the same year. At a time when nearly all large industrial and service corporations faced general economic slow down the telecoms sector has thrived. In 1993, for example, the largest 25 public telecoms operators in the developed world were more profitable than the largest 100 commercial banks. Where telecoms services (data, long distance and mobile) have been subjected to the greatest level of competition is where the greatest revenue growth and new employment have been created. In those countries in the EU and around the world with the longest experience of liberalisation, it is demonstratable* that telecoms employment by new service suppliers offsets jobs shed by incumbent PTOs as they take on the productivity gains of new technology.

At the same time, the increasingly strong link between efficient telecoms service and the whole national economy is shown in the growing reliance which business in general places on telecoms. Over the last ten years the ratio of business telecoms links to employees was around one to nine, now it is more than one to three.

The benefits to business of telecoms competition are of course well known. It is important to underline that residential users also see significant benefits when competition is introduced as is shown in the following graphs (based on OECD research on countries in the OECD region).
Source: OECD 1995
Communication Outlook.
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TELECOMMUNICATIONS COUNCIL

DN: BIO/96/313 Date: 1996-06-26

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The Telecommunications Council is going to have its next session on 27 June 1996, beginning at 10.00 a.m. in Luxembourg. The topics of the day are the following ones:

1. Framework for authorisations and licences for telecommunications services.

   The proposed directive based on Art. 57(2), 66 and 100 A sets up rules to be implemented at national level, together with full application of competition principles, both for the procedures for the granting of authorisations or licences and the conditions that can be attached to these authorisations. Such a common framework should facilitate for undertakings acting in the field of telecommunications the exercise of freedom of establishment and freedom to provide services in the European Union.

   The Council could reach a Common Position in principle with a view to formal adoption in September on this proposal.

2. Adaptation of two Open Network Provision (ONP) Directives.

   Open Network Provision (ONP) concerns the harmonisation of conditions for access to, and use of, public telecommunications networks and services.

   The ONP Framework Directive (90/387 EEC) and the ONP Leased Lines Directive (92/44 EEC), both based on Art. 100 A, are being now updated to take account of the introduction of competition after 1998, and to provide a common approach for the provision of important public telecommunications services in the European Union.

   The objective of the revised ONP framework Directive remains the harmonisation of conditions for access to and use of public telecommunications networks and services. The leased lines Directive requires that leased lines shall be offered and provided on request without discrimination to all users.

   Given the crucial role played by national regulatory authorities for the telecommunications in a liberalised market, a new requirement is being introduced to reinforce the independence of the national regulatory authorities for telecommunications in each Member State.

   The Council could reach a Common Position on this proposal.

3. Postal Services

   The proposed Directive based on Art. 100 A of the EC Treaty provides for a mandatory level of universal service to be provided throughout the Community to all citizens, wherever they are located, at affordable prices and for a high degree of quality of service.

   In order to ensure the financial viability of the universal service, the proposed Directive defines harmonised criteria for the services that may be reserved for universal service providers and a timetable for a partial

opening of the market (direct mail and incoming cross-border mail).

The Council will have an orientation debate on the definition of the universal service and the reserved area.

4. Directive concerning the Protection of Personal Data.

The proposal (based on Art. 100 A) defines general principles for the protection of personal data and privacy in the context of telecommunication networks, in particular the integrated services digital network (ISDN).

The Council could - 6 years after the first proposal of the Commission - reach a common position. This would be an important step towards an efficient protection of the ISDN users.

5. Programme to promote the linguistic diversity of the Community in the Information Society.

The programme covering language aspects of the Information Society will run for a period of three years 1996-1998 and have a budget of 15 MECU. The three action lines proposed seek to support efforts to construct a European infrastructure for multilingual language resources, to spur the language industries into action by stimulating technology transfer and demand through a limited number of shared-cost demonstration projects.

Transferring the experience acquired by the European institutions in the processing of multilingualism to the administrations in the Member States and sharing the language resources which each produces can help achieve economies of scale and reduce the cost to multilingual communication to encourage cooperation between administrations in the Member States and the European institutions in order to reduce the cost of multilingual communication in the European public sector.

The Council could adopt this proposal, which is based on Art. 130 (3) of the Treaty.

6. Universal service in the telecommunications sector.

The Commission presented on 13 March 1996 a communication on the future development of the universal service in the European Union. In a fully liberalised environment, every citizen of the Union, whatever his living standard or the region he lives in, will benefit a guaranteed access at affordable conditions to a range of telecommunication services including voice telephony, fax, electronic data, allowing him thereby to participate in the Information Society.

The Presidencey has prepared a Council resolution which follows the Commissions communication and opens the way for the proposed revision of the ONP voice telephony directive in order to integrate the notion of affordability, equivalent level of service to disabled users and the introduction of advanced features.

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TELECOMMUNICATIONS COUNCIL ON 27 JUNE 1996

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The Telecommunications Council on 27 June 1996 in Luxembourg reached political agreements for common positions on two important directives:

1. Directive concerning the Protection of Personal Data.

   The Council reached a political agreement on this proposal. A common position will be adopted at one of the next Council meetings.

   The proposal for a Directive (based on Art. 100 A) on the protection of data and privacy in the telecommunications sector, dates back to 1990, when it was submitted together with a draft for a general Directive on Data Protection. In 1994 both drafts were formally revised by the Commission to take account of the first reading in the European Parliament and of the new tide of subsidiarity.

   However, the Council suspended work on the telecommunications data protection Directive until work on the general Directive was completed. In October 1995 the general Directive was formally adopted and the telecommunications data protection directive was put back on the agenda again by the Spanish Presidency. The text represents a considerable added value in relation to the General Directive on Data Protection.

   The added value consists in particular of the coverage of legal persons (General Directive only covers natural persons), the protection of privacy (e.G. by the articles on unsolicited calls and on automatic call forwarding) and of the translation of the principles of the General Directive into more concrete and operational requirements which limit the scope for divergent interpretations by Member States and/or operators.

2. Adaptation of two Open Network Provision (ONP) Directives.

   The Council reached a political agreement on this proposal. A common position will be adopted at one of the next Council meetings.

   The ONP Framework Directive (90/387 EEC) and the ONP Leased Lines Directive (92/44 EEC), both based on Art. 100 A, are being now updated to take account of the introduction of competition after 1998, and to provide a common approach for the provision of important public telecommunications services in the European Union.

   The most important modification of the ONP framework Directive is that given the crucial role played by national regulatory authorities for the telecommunications in a liberalised market, a new requirement is introduced to reinforce the independence of the national regulatory authorities for telecommunications in each Member State.

   The objective of the revised ONP framework Directive remains the harmonisation of conditions for access to and use of public telecommunications networks and services. The leased lines Directive requires that leased lines shall be offered and provided on request without discrimination to all users.

3. Edicom (Electronia Data Intercharge on Commerce)

On the 26 March 1996, the Court of Justice has annuled the Council Decision 94/445/EC on inter-administration telematic networks for statistics relating to the trading of goods between Member States (Edicom) because it was adopted persuant Article 235 of the Treaty and not Article 129 D.

As the European Parliament has not yet given its position, the Council could not take a formal decision, but it came to a political agreement to renew its decision, this time based on Article 129 D. The decision will cover the period 1997-1999 with a budget of ECU 30 million.

4. Postal Services

The proposed Directive based on Art. 100 A of the EC Treaty provides for a mandatory level of universal service to be provided throughout the Community to all citizens, wherever they are located, at affordable prices and for a high degree of quality of service.

In order to ensure the financial viability of the universal service, the proposed Directive defines harmonised criteria for the services that may be reserved for universal service providers and a timetable for a partial opening of the market (direct mail and incoming cross-border mail).

After a debate on the definition of the universal service and the reserved area, the Council charged the COREPER to continue its work on the proposal.

5. Framework for authorisations and licences for telecommunications services.

The proposed directive based on Art. 57(2), 66 and 100 A sets up rules to be implemented at national level, together with full application of competition principles, both for the procedures for the granting of authorisations or licences and the conditions that can be attached to these authorisations. Such a common framework should facilitate for undertakings acting in the field of telecommunications the exercise of freedom of establishment and freedom to provide services in the European Union.

After a long discussion, the Council was of the opinion that the further preparation by COREPER was necessary.
The most difficult question is whether scarce ressources should be the only possible justification for a limitation of the number of licences or whether other criteria should be introduced (for example size of the market).

6. Programme to promote the linguistic diversity of the Community in the Information Society.

The Commission has proposed a programme covering language aspects of the Information Society which will run for a period of three years 1996-1998 and have a budget of ECU 15 million. The three action lines proposed seek to support efforts to construct a European infrastructure for multilingual language resources, to spur the language industries into action by stimulating technology transfer and demand through a limited number of shared-cost demonstration projects.

Transferring the experience acquired by the European institutions in the processing of multilingualism to the administrations in the Member States and sharing the language resources which each produces can help achieve economies of scale and reduce the cost to multilingual communication to encourage cooperation between administrations in the Member States and the European institutions in order to reduce the cost of multilingual communication in the European public sector.

As the proposal is based on Art. 130 (3) of the Treaty, an unanimous Council decision is required. Two delegations being opposed to the proposal, the programme was not adopted.

7. Universal service in the telecommunications sector.

The Commission presented on 13 March 1996 a communication on the future development of the universal service in the European Union. In a fully liberalised environment, every citizen of the Union, whatever his living standard or the region he lives in, will benefit a guaranteed access at affordable conditions to a range of telecommunication services including voice telephony, fax, electronic data, allowing him thereby to participate in the Information Society.

The Council has a comprehensive discussion on the Commissions communication but took no decision.

8. Consequences of the turn of the century for information technology systems.

At lunch the Council discussed the problems posed by the turn of the century for information technology systems. Wherever a unique indication of the year is required, the use of an abbreviated 2 digit indication is no longer acceptable, and instead the full 4 digit representation will have to be used, e.g. 1996 instead of '96. Changing the software, and where necessary also the data, represents a major effort. In particular administrative, financial and accounting applications will be affected, in public administrations as well as in the private sector. Furthermore, it will have to be feared that not all problems will, or even can be pinpointed before they appear, and therefore some disruption and artefacts have to be foreseen for the beginning of the next century.

The Council asked the Commission to convoke a group of experts in order to analyse further this question.

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COMMISSIONER KAREL VAN MIERT - KEYNOTE ADDRESS - IIC TELECOMMUNICATIONS FORUM - 15 JULY 1996 - "PREPARING FOR 1998 AND BEYOND"

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Ladies and Gentlemen, Good morning. The opening theme of this conference is Preparing for 1998 and Beyond. There are four key elements of this which I want to bring out this morning:

The first is the significance of the dramatic breakthrough we have made in liberalisation of EU telecommunications - not just the 1998 deadline but the critical steps leading us up to it

The second comes out of the first: the changing landscape calls for new, streamlined procedures. On the one hand we are upgrading resources devoted to implementation of the liberalisation directives and speeding up the impact of infringement procedures. On the other hand we are now revising the merger regulation, ensuring more agreements can be dealt with, more quickly and coherently than under current procedures. Another important procedural point concerns the question of a European Regulatory Agency for telecoms. If this is finally considered desirable, it should be focused on certain specific technical tasks for the telecoms market, where progress in coordination and a clear EU perspective is urgently called for.

The third element is the development of competition policy regarding bottlenecks and dominance in telecoms markets. Here we are concerned with: access to networks, access to customers and the formation of multi-media operations. A Notice will be out soon on the application of the competition rules to access and interconnect agreements. We have just published a major study looking into joint provision of cable and telecom networks. And, we are also keeping a close watch on the ever changing myriad of partnerships coming together to offer digital satellite TV services.

The fourth and last element I want to bring to your attention concerns the external face of the EU and the global side of the telecoms market. As concerns telecoms issues such as frequency and spectrum management and technical specifications we need to intensify coordination in order to speak with one voice in fora such as the ITU. On competition policy aspects an external dimension is also called for, both regarding the impact of global alliances as well in the WTO context as a necessary where competition principles are an essential underpinning for the market access offers on basic telecoms.

I The breakthrough in Liberalisation

We have come a long way towards setting up the platform for realising the huge potential of Europe's communication and information markets, but we also have an intense and challenging task ahead. In order to meet the demands of the next five to ten years it is crucial that we hold on to, make full use of and build on the best and most effective tools we have to hand: this means competition policy.

On the other hand, we also need to work harder on those areas where

effective tools or organisational frameworks have not yet been fully developed: in particular this means clearer coordination of critical aspects of telecoms specific regulation

Let us begin, in any case, with the "good news": the progress we have made to date and my vision of the full and enhanced use of effective competition policy in this area:

As most of you will no doubt be aware, the EU liberalisation timetable is now fully confirmed and set into legislation, with the Full Competition Directive adopted last March. It culminates with the lifting of all government restrictions on provision of all and any telecoms services or networks by January 1998. But the real work, both for the Commission and the Member States, of course starts now in the run up to the deadline. July 1 was the deadline for liberalisation of alternative infrastructure and I will come back to this in a moment. By October 1st member states must notify the measures they have taken to open up use of cable networks for telecoms purposes and by November 15 they must notify liberalisation measures for mobile networks and services. During 1997 arrangements for licensing, dealing with interconnect agreements and mechanisms for sharing out and funding universal service must be notified to the Commission so that they can be scrutinised under the competition rules and so that we can ensure the framework is in place for effective market entry in 1998.

The Member States are committed, politically and legally to this timetable which is a great achievement in itself, but the true impact is of course only felt when we have full and effective implementation of these commitments. I am determined to use the full potential of the Competition Rules of the Treaty to maintain a tough stance in this area. We cannot tolerate tardy or incomplete implementation at this stage, and luckily we have the legal tools to impose this:

On the one hand we can and will start infringement procedures immediately a deadline has passed or a notification has been found to be lacking

On the other hand we are taking full advantage of the strong and effective link between implementation of government commitments to liberalisation and our conditions for allowing alliances involving dominant telecom operators. Let me illustrate what I mean by this with some recent cases in this area.

The arrangement between the French and German national operators in the Atlas / GlobalOne alliance agreements raised some very serious concerns regarding their home markets in the relevant services where both operators were holding legal and de facto dominant positions. One of the main conditions for us to give this joint venture the go-ahead under competition rules is that full implementation of the commitment to liberalise alternative infrastructure in both Germany and France is not only notified but actually effective - this means new licences granted and new players entering the market. The same strategy for putting pressure on governments' commitments is being used in relation to the Unisource agreements. We cannot look favourably upon such a deal unless the relevant markets are really open to competition.

Another point I might mention here is that both these cases have also involved a major American partner. We are being no less tough on ensuring appropriate market entry conditions in AT&T's home market before allowing involvement in a European Operation such as Unisource / Uniworld.

Another illustration of this link between competition cases and implementation of the liberalisation timetable was the recent GSM case in Italy. As part of a compensation package for what we regarded as an unfair fee being charged to the second operator, we demanded that the Italian government make firm and specific commitments to an early opening of the alternative infrastructure market to competition. I am

determined to insist on this commitment in our current contacts with the new Italian Government.

These cases have of course been very much in the public eye and I believe the general momentum caused by them has played no small part in the success we have had with the July 1 deadline for notification of alternative infrastructure under the provisions of the full competition directive. Apart from four of the five eligible countries applying for derogations due to small or less developed networks, all the member states are generally on track and many are already in advance of our timetable to lift restrictions on all services and infrastructure.

The other side of this strong parallel link between applying competition rules to key cases and achieving effective liberalisation concerns direct control of the commercial behaviour of the dominant operators in the market once it is opened to competition. In particular this concerns terms and conditions of access and interconnection as well as the control, more generally, of anti-competitive pricing behaviour.

The same cases I just mentioned are also relevant here. In the Atlas and Unisource cases we are imposing conditions not just on governments but also on the parties in terms of non-discriminatory treatment of their competitors and downstream service providers vis a vis access to their networks. Just so in the Italian GSM case, the compensation package also involved commitments on the part of Telecom Italia regarding favourable interconnection conditions for the second mobile operator.

The other important case I am thinking of is the recent concern over new tariff schemes proposed by DT. It looked like the German operator could be using its market power and monopoly profits in order to target just those business customers where it faced new competition, with discounts and bundled packages which the new entrants, however innovative and efficient they might be, could not reasonably match. In fact we also received a formal complaint from the latter on exactly these grounds. The concern, to be more precise, was threefold: cross subsidy, predatory pricing and bundling. Having investigated the problem, we came to an agreement with the German authorities on the minimum conditions, or competitive safeguards, under which the proposed discounts could be allowed.

The most important of these were that:

* at least two new alternative infrastructure licences must be granted
* new agreements allowing competitors fair access DT's public network must be concluded
* clear and transparent accounting separation must be put in place between DT's monopoly voice telephony business and the liberalised corporate business
* rebates must be more generalised, ie they must also be granted to domestic customers

This case again shows how application of EU competition rules can be used as a stimulus and engine for governments to push through reforms which are really effective "on the ground", to the benefit of both a sustainable competitive market and the end consumers.

It also highlights a general issue of concern which should be stressed: as the 1998 deadline draws in incumbent operators may well attempt to gain advantage from their remaining time as monopolists to improve their strategic and pricing position in ways which could include cross subsidy and predatory behaviour. Commercial behaviour which may appear to result in attractive discounts or tailor made products may in reality be defensive strategies which are ultimately unsustainable in a competitive environment. Close scrutiny by competition rules is essential to ensure that in this period of flux between monopoly and competition, pricing and marketing strategies are sustainable and are designed to win

customers not lock them in.

II The changing landscape calls for new streamlined procedures

Having brought you up to date on our record to date concerning use of competition policy let me go on to outline how I see the future role of competition rules developing in the telecoms market:

Most importantly the full and effective use of these Treaty articles must be maximised in the coming months. As I have just outlined, they are the most important and successful tool the Commission has at its disposal for turning liberalising goals into reality. For this reason we must maintain and enhance competition controls in the areas for which they were designed. There are four important strands here:

First, we will be targeting increased resources and energy at ensuring effective implementation. This will include streamlining the infringement process where problems occur. The competition policy focus vis a vis telecoms legislation has now shifted from policy development to ensuring its application on the ground. This needs to be a two way process between the competition services of the Commission and the market "out there". Alongside our own investigative powers, we hope to be increasingly receiving and reacting to feedback from competitors, new entrants and users as to what is working in terms of competition, and what is not and why. Once it is clear there is a problem with implementation the new streamlined and simplified infringement procedures will be put into gear to ensure the earliest possible satisfaction for aggrieved parties. I also want to stress the importance of the "direct application" of the Article 90 / liberalisation directives. I expect to see much greater use in the coming years of the national courts for complaints regarding discrepancies between our directives and the de facto or de jure situation in the national market.

Second, is our planned revision of the merger regulation. With the wave of alliances and joint ventures in the communications and information sector this will mean that more agreements can be scrutinised, more quickly, coherently and effectively.

III Development of competition policy regarding bottlenecks and dominance in liberalised markets

The third strand of enhancement of competition rules in the telecoms environment concerns the development of clear guidelines regarding the commercial relations between the dominant incumbents and their new competitors and wholesale customers. Basically I am talking about access and interconnect agreements:

We will soon be publishing an important Notice giving general and advance guidance as to the application of the Treaty competition articles in this area. This should represent a clear indication to market players as to the way complaints, regarding abuse of dominant position, discrimination and/or collusive behaviour, between operators, will be decided. In this way, and with a few precedent setting decisions, we hope to discourage anti-competitive practices from the outset. Thus neither market players nor the Commission services need face the untenable situation of having each and every interconnection or access agreement scrutinised on a case by case basis.

The other strand concerning bottlenecks and dominance is the increasingly important role of EU competition rules in applying to the converging sectors of the information economy: that is between telecommunications, broadcasting and computing. I am talking about, of course, the development of multi-media networks, multi-media ventures and of course multi-media products.

In the same way as I have already outlined above, our application of competition rules here also involves tapping the potential of the

parallel application of pro-competitive policy and some key case decisions and investigations. In particular this concerns entry of dominant network operators into the converged markets.

The original versions of the Media Services Group (MSG) in Germany, and Nordic Satellite Distribution (NSD) agreement in the Nordic market had to be blocked because they involved, amongst other things, network operators, enjoying essentially gatekeeper functions extending dominance into related broadcasting and content markets. With the same basic concerns in mind we have launched initial investigations into the plans of national telecom operators in counties like Spain and Italy to venture into the cable TV market.

In parallel, the whole question of joint provision of telecoms and cable TV networks by dominant operators is being addressed from the policy perspective by the twin reviews announced in our Cable Directive (1995) and the Full Competition Directive (1996).

We have recently announced a major study in this area which will assess different policy options based on results of the an intensive analysis of the market itself and of actual and potential policy impact on the developing multi-media market structure. In particular we will concentrating on the following policy options:

* maintenance of the status quo
* lifting of existing constraints on telecom operators to provide cable TV capacity to their customers
* divestiture of cable operations of dominant telecom operators.

The main underlying issue in all this is the need to leave open the potential for development of a viable infrastructure platform for real competition at the customer access level. On the other hand we must not stand in the way of the realisation of real synergies from the perspective of either of the three converging sectors.

The results of the policy review based on the study results will be issued for consultation by the start of next year.

Lastly in the multi-media field I have to mention the spate of new partnerships and agreements coming together across Europe for the offer of digital satellite TV services and conditional access systems. Until the commercial negotiations between the likes of Bertelsmann, Vebacom, Canal +, CLT and Kirch, finally settle down to result in notified agreements it rather difficult for me to give a clear indication of my attitude to such potentially powerful systems. Let me just say at this point that where ventures draw together content provision and transmission systems we will be keeping a very close eye on the competition implications. On the other, to the extent that there are now major projects developing in parallel their market power may be seen to counterbalance each other.

In this brief run down of our track record to date and the major strands of the development and future of the Commission's competition powers in telecoms, I hope some clear messages have come to the fore:

The use of EU competition policy has played a key role, it is proving to be a particularly effective tool, and it is going to be enhanced further in the coming years, both in the run period to 1998 and its aftermath.

IV The role for a European Telecoms Agency?

I would like now to leave competition policy for a moment and focus on some institutional questions thrown up by key areas of telecoms regulation which represent a critical underpinning to effective liberalisation and the development of the EU-wide market in communications services. Competition rules can only really work and make sense in this environment within an appropriate and coordinated EU regulatory framework. It is all very well to open markets and lift

restrictions, and even to manage and control dominant players where necessary, but new market entrants need more than this.

It is not yet clear whether a European Telecoms Regulatory Agency will finally be considered a desirable development, as concerns certain specific technical tasks for the telecoms market, areas where progress in coordination and a clear EU perspective is being urgently called for.

The EU's ONP framework is now of course spelling out clear areas of responsibility and guiding principles for the telecoms regulators in each Member State. However, the pressure on these national authorities will be dramatically increasing over the next year, especially in terms of their resources, their independence and their effectiveness in correctly implementing EU harmonisation legislation. The accelerated pace called for, coming up at the same as many countries are going through privatisation reforms is likely to cause considerable tension.

On top of this the challenge of true cooperation and coordination between the national regimes is clearly intensifying. This is becoming most urgent in fields such as numbering, frequencies and spectrum management and technical specifications. Not only do we need EU coherence in these matters for our own internal market, but we also need to be in a position to truly speak with one voice in international fora. I am particularly thinking here of the International Telecommunications Union.

As regards numbering the most important weaknesses currently concern the lack of a unified numbering space and Europe-wide numbering plan. Competitors throughout the EU will need much greater access to numbers, they need more numbers and ultimately number portability which must be planned out at EU level.

My concern about technical standards and specifications is that essentially global markets such as mobile communications are still in danger of being tied up regionally with a limited range of technologies. Technical restrictions and consequent divisions of markets help no one, least of all our telecoms equipment industries. Even though we did achieve successful internal coordination through framework bodies such as the CEPT, and now ETSI and ERO, to agree upon the EU wide GSM standard, our market now faces the challenge of competing mobile standards on the other side of the Atlantic.

The need for effective forward planning and negotiation at a more global level will test our current coordination mechanisms, and certainly the national regulatory bodies will need to cooperate closely if they wish to deal with the problems satisfactorily.

The allocation of frequencies, management of spectrum and granting of orbital slots for satellite systems are likewise problematic areas vis a vis the current coordination mechanisms between the member states. I believe the EU market and pan-European services may increasingly suffer from the lack of direct EU mechanisms, in particular the absence of a joint EU representation in decisive international talks, particularly the ITU. This has negative repercussions, both for our own internal policies and the efficacy of global coordination as a whole.

As general restrictions are lifted, both by the EU timetable and, assuming success next February, in the WTO context, divergencies in national policies in these technical areas pose increasingly significant obstacles to market entry.

We will have to see if the need for consistency and coordination and the need for a clear EU perspective leads us to think that institutional reform is necessary. There are of course already many existing coordination bodies drawing together national regulations and fostering cooperation. There is no shortage of acronyms to draw upon such as CEPT, ECTRA, ERO, ETO, EUTC, but however many there are it is becoming increasingly apparent that these are not sufficient.

The main point I want to make is that we should focus upon exactly and only those areas where it is truly called for. In order to be a viable idea and a workable reality a European Telecommunications Agency should have a mandate of clearly defined and mainly technical tasks such as numbering and spectrum management.

Naturally I am contrasting this with the tasks which competition policy is concerned with in the telecoms market: here the EU perspective is strong and the tools are working well.

V WTO and the External Dimension to EU Competition Policy in telecoms

So, I have now underlined the increasing importance of the external dimension of certain regulatory aspects in telecoms due, inter alia, to the global implications of technical impediments and restrictions. It is clearly in everyone's interest that we maximise our potential here to coordinate internally and speak with one voice.

But this now leads me on to another very important aspect highlighted by telecoms liberalisation - this concerns an external dimension to EU competition policy:

- the telecoms market is more and more no longer essentially an EU one, it becomes a global one
- the most important alliances notified to me are fundamentally international not just European
- the customers and companies served by this market want direct access to increasingly global services - whether this may be a web site in Australia, or a corporate communications network for a multinational

I have already mentioned the extent to which joint ventures involving international partners allow me to set down certain conditions concerning market access and competitive conditions in these partners' home countries. So this is one way in which we are already developing a certain external dimension to the competition rules regarding mergers and alliances.

As such ventures increasingly and more intensively link in to existing and expanding international networks of partnerships around the world (eg AT&T World Partners) the scope of this instrument is growing.

Other important aspects of competition policy, however, are also calling for an external dimension in the telecoms sector: that is, the aspects dealing with unnecessarily restrictive regulations and abuse of dominant position.

As we have learned generally from development of Community single market policy over the years, elimination of trade barriers and application of competition law need to go hand in hand, especially where the newly opened markets are still dominated by incumbent monopolies. We can say broadly that significant international market access barriers are created by both restrictive regulations (and these do not need to be discriminatory against foreign entrants to represent barriers); as well as anti-competitive practices of dominant players. The latter includes behaviour such as hindering access to essential facilities, tying and bundling, excessive or predatory pricing and vertical arrangements often involving cross subsidies.

At this general level I have, together with my colleague Sir Leon Brittan, put forward recently a Communication aiming to move us toward an international framework for competition rules - in particular proposing that the WTO ministerial meeting in Singapore this December establish a working party on the issue.

But what direct relevance does this have to the European telecoms market? Telecommunications represents the first and most important test bed for this new international convergence of trade issues, domestic

regulatory issues and competition issues. The WTO group now negotiating for an agreement on access to basic telecoms markets will also adopt a framework of common regulatory principles to support effective competition. These will and must go hand in hand with the market access offers on the table, otherwise the offers may be relatively meaningless. The common principles include some very important competition safeguards which essentially reflect our own internal application of articles 90 and 86 to the telecoms sector. Amongst other things these concern: cross subsidies, interconnection and network access, licensing procedures, independence of the regulatory authority and transparent international accounting rates.

It is important to emphasise that the EU's external voice vis a vis our competition policy and the application of the competition rules of the Treaty is, I believe, proving to be increasingly successful.

VI EU telecoms liberalisation in the framework of the information society

Of course all these words on the future shape of the European Telecommunications market and its regulation make little sense without orienting them within the umbrella of goals and expectation which we call the information society.

The information society is for me first and foremost about creating wealth for citizens, employees and business alike. By wealth, I do not mean simply more ECU in our pockets. Creating wealth means creating more jobs, it means creating more knowledge and more education, and it also means more pleasures and entertainment. On the one hand European employees are relying upon healthy growing competitive economies, and on the other European citizens must be guaranteed access to increasingly rich and universal networks of communication and information. The basic infrastructure of all this is telecommunications networks. To make get maximum potential from this infrastructure we must consistently take decisions which encourage greater and greater opportunities for increasing access and bandwidth.

Too often in member countries which have not yet reaped the benefits of open and competitive markets, it was assumed that competition policy was somehow antithetical to public service and the interests of unions and employees. Or at least that there was some sort of trade off to be had between them. Of course this is muddled thinking. Competition is not in fact an end or goal in itself. It is simply the most effective and least risky strategy we have for achieving our real policy goals concerning economic growth and satisfactory and efficient public service. The real question we need to tackle is not, of course competition or public service. They are two sides of the same coin. It is, rather, how and where can we best use the tool of competition policy to further public service and economic objectives.

Let us re-focus for a moment on the issue of universal service: It is useful to spilt our approach into two parts: one protective and one progressive

A guaranteed level of universal service must be completely "protected" against risk in a competitive environment with solid regulatory safeguards

However the improvement and expansion of universal service is itself enhanced, even ensured, by the competitive environment. As I mentioned before, the broader concept of developing universal service is about greater and greater access to more and more bandwidth. It relies upon competition and could actually be stifled by excessive regulatory restrictions

The European Commission has already set certain basic principles at EU level for the scope of the guaranteed level of universal service and its funding. This is in order to ensure that different national regimes do

not create barriers to trade. This is also to ensure that the rules do not create unnecessary distortions of competition in the newly liberalised markets.

At the end of the day my fundamental concern is to encourage competition and choice at the customer access level: Access to the end user for service providers on the one hand; and access for the end user to a growing range of services, on the other.

What sort of access? What sort of terminal? It doesn't matter. Internet access provided by Internet Access Providers over local telecom networks; broadband cable access provided by cable operators or PTOs; satellite and wireless access provided by broadcasters and mobile operators? We can certainly see the growth potential and the possibilities of Europe's telecommunications market but we can not, we must not, predict or pre-empt its exact shape. I see my job as simply ensuring that as many possibilities are left open as possible so as to allow consumer demand, innovation and creativity in the market to decide the future.

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ATLAS-GLOBALONE: COMMISSION GIVES GO-AHEAD TO GLOBAL TELECOMMUNICATIONS ALLIANCE CONDITIONAL ON LIBERALISED REGULATORY FRAMEWORK

DN: IP/96/651 Date: 1996-07-17

TXT: FR EN DE
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At the proposal of Mr Karel van Miert, Commissioner in charge of EU competition policy, the European Commission gave its authorisation today to the European telecommunications alliance between France Telecom (FT) and Deutsche Telekom AG (DT), known as Atlas, and to the global alliance between Atlas and Sprint Corporation, recently renamed GlobalOne.

However, the Commission's decision ties the potential inclusion of various services and networks in the joint venture to regulatory reform at the national level. Once the new French and German telecom liberalisation laws are fully implemented and operative, DT and FT may request that the Commission review specific restrictions attached to the decision. The Commission will then decide depending on the competitive nature of the markets. Moreover, the Commission approves Atlas for a relatively short period of 5 years. The alliance will come up for review in 2001, at the same time as the review of BT and MCI's Concert joint venture which was approved in 1994.

The European Commission only agreed to initiate the formal authorisation procedure (on 17 October 1995) once the French and German ministers in charge of telecommunications had committed to early alternative infrastructure liberalisation in 1996, and, furthermore, once FT and DT's CEOs had substantially changed the commercial structure of the proposed alliance.

The final Atlas and GlobalOne agreements signed on 22 January 1996 are a further step towards a positive restructuring of the European telecommunications industry, which must reposition in the wake of increasing globalisation of demand and given the prospect of full competition in the EU markets by 1998. To ensure dominance is not abused, nor markets foreclosed in the sensitive run up period to effective competition, strict conditions on agreements and alliances of the dominant operators are vital. The Commission foresees a gradual phase-out of restrictions alongside the establishment of a fully competitive regulatory framework at national and EU level. Further liberalisation as regards regulation of international services in France, Germany and the US in the context of the WTO negotiations in this area, may also have an impact on the future conditions surrounding the global venture.

This flexible and dynamic approach, tying authorisation of the agreements to implementation of general policy opening the relevant markets, received the support of the Advisory Committee of Member State competition authorities in June 1996.

The Commission decisions set out a two-tier approval:

i Atlas/GlobalOne's European and global services as well as most value-added services in France and Germany are authorised from the date on which France and Germany grant the first two alternative telecommunications infrastructure licences. This should be imminent since French and German Telecom laws have now been adopted which

implement the EU timetable for lifting restrictions (i.e. July 1 1996 for alternative infrastructure). These infrastructure licences must allow the provision of liberalised telecommunications services (i.e. they may exclude basic public voice telephony until 1998).

ii At a second stage, FT and DT may include within the Atlas venture their national public switched data networks, Transpac and T-Data. This may be authorised only when France and Germany liberalise fully all telecommunications services, including public voice, and all network infrastructure. The granting of the first of such licences is envisaged, by both French and German legislation, by 1 January 1998.

The Commission attaches the following conditions to Atlas/GlobalOne:

- FT and DT must establish and maintain access to their domestic public switched data networks in France and Germany, even after their integration into Atlas, on a non-discriminatory, open and transparent basis to all service providers offering low-level data services (i.e. using protocols such as X.25, Frame Relay, Internet or SNA); to ensure continued non-discriminatory access in the future, they must also implement any generally applied standardised interconnection standard that may modify, replace or co-exist with, the current standard;

- FT and DT must treat Atlas/GlobalOne and all third party competitors in a non-discriminatory way in relation to their facilities; this condition extends to the availability of facilities-related services, to the terms and conditions of service provision and to relevant information on such services;

- FT and DT are prohibited from any cross-subsidisation; to prevent cross-subsidies, all entities formed pursuant to the Atlas and GlobalOne ventures are established as distinct entities, separate from the parent companies; FT, DT and their joint entities must implement an analytical accounting system, subject to regular external auditing, to ensure that these entities deal with FT or DT on an arm's length basis at all times;

- FT and DT acting as Atlas/GlobalOne's distributors in France and Germany must conclude separate one separate contract for their own services and one for the distributed Atlas/GlobalOne services respectively; each of the two contracts must identify the price and the rebate, if any, of each individual service provided;

- FT must sell INFO AG, an important competitor of T-Data on the German data network services market, before a specified deadline.

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THE COMMISSION TAKES ACTION TO PREVENT ANTI-COMPETITIVE PRACTICES IN THE MOBILE PHONES SECTOR

DN: IP/96/791 Date: 1996-08-08

TXT: FR EN
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The Directorate-General for Competition (DG IV) has written to GSM/DCS1800 handset manufacturers and network operators in the EEA limiting the use of the "SIM Lock" feature in mobile phone handsets: the feature effectively ties the customer to one GSM operator or service provider. The handset must be able to be unlocked upon demand by the consumer. This will prevent the anti-competitive effects of the feature vis-à-vis existing or new operators, and avoid a reinforcement of the division of the mobile phone market along national lines.

The benefit of the SIM Lock, for both consumers and operators, is that it helps to deter theft of handsets, but at the same time it "locks" the particular handset (phone) to a particular operator or service provider. This raised serious concerns as it would prevent consumers who had purchased a mobile phone handset from later choosing which mobile phone service best suited their needs. The SIM Lock can in fact be deactivated in order to allow a customer to switch to another network or service provider once they have bought a handset, but this sometimes requires the return of the handset to the operator or service provider. A more common form of the "lock" does allow deactvation by the customer him/herself but operators often charge the latter a significant sum before they will provide the information necessary to unlock the phone.

On 30 May 1996, the Commission wrote a "warning letter" to all GSM/DCS1800 network operators and all manufacturers of handsets in the EEA alerting them to the anti-competitive effects of the SIMLock feature. The Commission also wrote to ETSI, the European Telecommunications Standards Institute, which was proposing to standardise this feature as part of the GSM standard. A large number of responses were received, and it became clear that most operators do not feel it necessary to use the SIM Lock feature, and in certain countries - notably France and Denmark - the risk of anti-competitive uses of the feature had been forseen and would be avoided by the establishment of special rules overseeing its use. This was, however, not the case in all countries.

The Commission has now written to the manufacturers to ensure that they only supply SIM Locked handsets which can be unlocked by consumers themselves. DG IV has also indicated to ETSI that this should be taken into account in determining how the SIM Lock feature should be standardised.

Furthermore, the Commission has also written to operators indicating that SIM Lock should only be used if the handset can be unlocked by the consumer on demand. In particular:

The end-user should be made aware at the time of purchase of the handset whether that handset is locked to a particular network operator / service provider.

A form of SIM Locking which allows the end-user to unlock the handset, on the basis of information provided by the network operator / service provider, gives the Commission s services no difficulties.

Network operators or service providers should inform end-users of the possibility of unlocking the handset, or provide the information necessary to unlock the handset to all end-users on request.

In circumstances where the sale of the handset is combined with the provision of a telephony service, and the sale of the handset has been subsidised by the network operator / service provider:

The existence and amount of any subsidy, and the conditions for repayment of all monies due under the contract should be made clear to the end-user at the time of purchase.

Network operators or service providers may need to withhold the relevant unlocking information from end-users until one billing cycle has been completed, thus ensuring that a subscription has been properly set up in respect of the handset.

The handset need not be unlocked (and the information required to unlock it need not be provided) until the outstanding amount of the subsidy has been repaid by the end-user.

The practical effect of this will be that consumers will no longer be charged what were often significant amounts of money for the privilege of linking their own handset to the services of another operator / service provider.

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LIBERALIZATION OF TELECOMMUNICATIONS: COMMISSION REMAINS FIRM

DN: IP/96/958 Date: 1996-10-24

TXT: FR EN ES
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At its meeting this week in Strasbourg, the Commission examined the derogations available to some Member States in the field of telecommunications liberalization.

Mr Van Miert gave several reasons why the number of such derogations should be reduced to a minimum:

- under the directives concerned, such transitional periods could be granted only in the light of network developments;

- the Council of Ministers, the European Council and the Commission had, on several occasions, asserted the importance of rapid liberalization as a means of promoting economic growth and developing the information society. The date of 1998 played a key role in this respect;

- lastly, it was important for the countries concerned to integrate themselves as quickly as possible into the European telecommunications market in order to benefit from the corresponding investments and services.

The liberalization of telecommunications within the European Union can also have a major impact on the international telecommunications negotiations taking place within the World Trade Organization. The European Union's deadline must be as close a possible to 1998 in most Member States since that year is also the target date for global liberalization. This would allow an improved European offer to be made, if possible before the WTO summit in Singapore, i.e. within a matter of weeks.

Special attention was paid to recent developments in Spain. In line with the approach taken in the Atlas/Global One case (France Télécom/Deutsche Telekom), Mr Van Miert made the point that an alliance between dominant operators was not acceptable in the context of a market still closed to competition. Spain is also particularly important in the context of the WTO negotiations given the size of its domestic market and the presence of its dominant operator in several countries of Latin America.

For this reason, Mr Van Miert would like to see Spain rapidly confirm that it was prepared to dispense with a derogation and thus to give its formal commitment to the date of 1 January 1998 for full liberalization (services and infrastructures). He stressed the importance of such a commitment if licences were to be awarded to new operators in Spain in the first half of 1998.

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COMMISSIONER VAN MIERT LINKS DT'S NEW BUSINESS USERS TARIFFS TO COMPREHENSIVE NETWORK ACCESS

Mr Karel van Miert, Commissioner in charge of EU competition policy, has agreed that the German Federal Ministry of Posts and Telecommunications (BMPT) grant Deutsche Telekom's application for certain new business customer tariffs by 1 November 1996. His agreement is conditional on the conclusion of retroactive network access agreements between DT and its competitors by 31 December 1996 and on the BMPT taking additional regulatory steps required for competitive network access in the German market before that date.

The terms and conditions of these agreements shall be retroactive to 1 November 1996. The settlement follows an application by six of DT's largest competitors that the Commission adopt interim measures (i.e. take immediate action) against the new tariffs. Under its powers the Commission can substantially accelerate the adoption and enforcement of preliminary decisions to avert serious and irreparable harm to competitors. Mr Van Miert agreed to stay proceedings for two months, but warned that the Commission would act swiftly if DT's competitors were denied network access on fair terms by the 31 December deadline.

The Commission challenged DT's new tariff scheme, which requires prior BMPT approval, earlier this year. The BMPT and the Commission agreed in June that DT may implement some of its proposed tariffs once the BMPT had granted at least two alternative infrastructure licences and provided DT satisfied certain conditions (see IP/96/543). Most importantly, DT had to start trials of residential customer rebate schemes and conclude network access agreements with its competitors for traffic either 'breaking in' to the competitors' network from DT's public switched telephone network (PSTN) or 'breaking out' of the competitors' network into the PSTN.

The BMPT and DT have satisfied five out of six conditions set out in June. Moreover, DT introduced special volume rebates on end user tariffs for 'break in' and 'break out' traffic of closed user group (CUG) networks. Mr Van Miert informed the German Minister, Dr Wolfgang Bötsch, that mere volume rebates for DT's competitors do not fully satisfy the remaining condition under which the Commission halted its investigation in June, i.e. fair access to DT's network without infringing the fundamental principle of non-discrimination. He recalled that comprehensive network access was the cornerstone of telecommunications market liberalisation in Germany and, accordingly, a condition attached to the Commission's authorisation of DT's Atlas and GlobalOne joint ventures on 17 July.

Messrs Van Miert and Bötsch agree that CUG operators need comprehensive network access on fair terms to compete with DT. However, negotiation of appropriate arrangements requires prior regulatory action. Therefore, the terms of the agreement between Messrs Van Miert and Bötsch provide the following:

1) Before 31 December 1996 the BMPT shall allot special network access numbers to applicants and change current regulations allowing DT to charge third-party network operators by the second.

2) DT shall conclude comprehensive network access agreements by 31 December 1996, which must integrate the BMPT's above regulatory action and include certain commercial arrangements (e.g. certain tariff condition) and technical features (e.g. provision of the signalling system #7).

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MOBILE PHONES: NO EVIDENCE FOR HEALTH RISKS, BUT FURTHER RESEARCH ACTIONS UNDER CONSIDERATION

DN: IP/96/1053 Date: 1996-11-20

TXT: FR EN DE
PDF:
Word Processed:

"There is no evidence of any health risk emerging from mobile phones, but the results of present research are inadequate to draw firm conclusions on this issue. Further research is therefore required." This is the main conclusion of a report drafted by an expert group which was asked by the Commission to prepare an action plan for comprehensive research into the effects of radio frequency radiation on health. The Commission intends to decide before the end of this year how the proposed action plan can be integrated in the European research and development programmes.
On 3 October 1995 the Commission asked a group of ten experts (see Annex) in biology, neurophysiology, epidemiology, physics, radiation protection and telecommunications engineering to prepare an action plan for research into the possible health effects related to the use of mobile telephony. The group's mandate was not to conduct any research, but to review the available results of the research conducted world-wide.

Today the Commissioners Martin Bangemann, in charge of Information Technology and Telecommunications, and Padraig Flynn, in charge of Public Health, presented the findings of the expert group to the Commission.

Having examined the technology of mobile phones, the exposure levels to which people may be currently exposed and relevant published biophysical, biological and epidemiological research, the expert group concluded that on the basis of studies conducted to date, there is no evidence of any increased health risk. However the results of existing research are inadequate to draw firm conclusions in either a positive or negative sense.

The expert group makes concrete recommendations for further research, focused on the specifics of mobile communications and co-ordinated at the European level. The recommendations include a call for research studies on possible mechanisms of interaction of radiotelephone emissions with living tissues, genetics, cancer induction, immune and nervous system related effects and epidemiology.

The Commission will examine how the research plan proposed by the expert group could be implemented and intends to take a decision on this later this year.

European Commission Expert Group

Chairman and editor

Dr A F McKinlay
National Radiological Protection Board, United Kingdom

Members

Professor J B Andersen
Center for Personkommunikation, Aalborg University, Denmark

Professor J H Bernhardt
Bundesamt für Strahlenschutz, Institut für Strahlenhygiene, Germany

Professor M Grandolfo
Instituto Superiore di Sanità, Italy

Professor K-A Hossmann
Max-Planck-Institut für Neurologische Forschung, Germany

Dr F E van Leeuwen
The Netherlands Cancer Institute, The Netherlands

Dr. K H Mild
National Institute for Working Life, Sweden

Dr A J Swerdlow
London School of Hygiene & Tropical Medicine, United Kingdom

Dr L Verschaeve
Vlaamse Instelling voor Technologisch Onderzoek, Belgium

Dr B Veyret
Université de Bordeaux, France

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THE COMMISSION APPROVES TIMETABLE FOR FULL TELECOMMUNICATIONS LIBERALISATION IN IRELAND

DN: IP/96/1089 Date: 1996-11-27

TXT: FR EN
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The European Commission has today approved a timetable for the full liberalisation of telecommunications in Ireland. This will give the opportunity for infrastructure competitors to enter the Irish market from the middle of next year. Indeed, alternative infrastructure providers will be permitted from 1 July 1997. Full liberalisation will take place from the beginning of 2000. In the meantime, direct international connections for GSM mobile phone providers will be liberalised from 1 January 1999 and voice telephony will be completely liberalised from 1 January 2000. Under the liberalisation directives, Ireland was entitled to request a derogation period up to 2003.

In reaching its decision, the Commission investigated the Irish government's argument that Ireland has been carrying out major development of the telecommunications networks. This required significant capital investment, involving high levels of debt and Telecom Eireann has been constrained in its ability to achieve the necessary structural adjustments, particularly tariff rebalancing, because of the high costs in several areas, including debt levels, the delivery of telecommunications services in Ireland and Telecom Eireann's high cost structure.

The Commission considered each of the three requests carefully and took account of comments from 14 companies as well as the Irish Congress of Trade Unions. All except the latter were opposed to the granting of the derogations.

This decision has also to be seen in the context of the negotiations concerning the opening up of telecommunications in the World Trade Organisation. This decision forms part of the EU's improved offer to its trading partners.

Voice telephony

The voice telephony date was granted because Telecom Eireann had a need to rebalance tariffs and increase telephone penetration before the introduction of full competition.

Alternative infrastructure

The Irish request for the liberalisation of alternative infrastructures was not granted beyond the middle of 1997. The reason put forward by the Irish Government was that the alternative infrastructures could be used to bypass the voice telephony monopoly. The Commission believed that there were other methods of enforcing the voice monopoly and that the extension to July 1999 which the Irish government had requested was unjustified.

International GSM connection

The Commission has partially accepted the request concerning the direct international interconnection of GSM operators. The Irish Government argued that the prohibition on direct interconnection should continue until voice telephony was liberalised as the second GSM operator could compete using its

international tariffs with those of the fixed voice service of Telecom Eireann. The Commission could only accept this prohibition until 1 January 1999 as Telecom Eireann will have rebalanced its tariffs in advance of the voice telephony liberalisation.

The obligation and dates requested and granted are summarised in the table below.

obligation concerned	date foreseen in the Directives	additional period requested by Ireland	period granted
liberalisation of voice telephony and underlying networks	1 January 1998	1 Jan. 2000	1 January 2000
liberalisation of the use of own/alternative networks for other already liberalised services	1 July 1996	1 July 1999	1 July 1997
Direct international interconnection of mobile networks with other mobile or fixed networks	February 1996	1 Jan. 2000	1 January 1999

Background

World trade negotiations

The reduction of the Irish derogation is also relevant to ongoing negotiations on telecommunications at the World Trade Organisation (WTO), in Geneva. Thanks to this internal liberalisation schedule, and to other changes concerning Spain and Belgium, it was possible for the EU to improve its offer to other trading partners. This show of EU leadership, coordinated with an improvement in the US offer, was very positively received. It will help develop a positive momentum at the WTO Ministerial Summit in Singapore, in December. This should contribute to a better telecommunications agreement by the end of negotiations, in February 1997, and more generally to constructive talks on the other agenda items of interest to the EU, such as future discussions on competition and trade.

Telecom Eireann - strategic alliance

The Commission is currently investigating the strategic alliance which Telecom Eireann is entering into with PTT Telecom of the Netherlands and Telia of Sweden. PTT Telecom and Telia are expected to strengthen Telecom Eireann both financially and technically to operate on liberalised markets. This investigation is taking place under the Merger Regulation. The Commission must make a decision about whether the operation raises serious doubts about its compatibility with the common market by 18 December. Comments from third parties are being sought by the Commission.

Cablelink

Telecom Eireann holds a majority stake in Cablelink, the cable TV operator for Dublin, Waterford and Galway City. This stake will be examined in the context of the investigation under the Merger Regulation procedure. The Commission is also conducting a more general review into the issue of cable TV companies. The issue of Telecom Eireann's shareholding in Cablelink will also have to be seen in the context of that review.

Other derogations

Portugal, Greece and Luxembourg have also submitted requests for derogations. The public consultation period on these derogations has almost finished and the Commission is in the process of preparing further decisions

regarding these countries.

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THE COMMISSION ADOPTS DRAFT NOTICE ON ACCESS TO TELECOMS NETWORKS AND INVITES FOR COMMENTS

DN: IP/96/1152 Date: 1996-12-10

TXT: FR EN DE DA ES PT NL IT
PDF: DE DA PT NL IT
Word Processed: DE DA ES PT NL IT

The European Commission today decided to adopt a draft notice on access agreements in the telecoms sector. This Notice, which forms part of the Commission's Action Plan for the Information Society, clarifies the role that the competition rules will play in resolving such access problems. It does not establish new principles of competition law, but demonstrates how the principles existing in current case law of the Commission and the Court of Justice will be applied to a new type of problems occurring in the context of the liberalisation of the telecoms sector.

The Notice aims to do three things. First, to set out access principles stemming from EU competition law in order to create greater market certainty and more stable conditions for investment and commercial initiative in the telecoms and multimedia sectors. Second, to define and clarify the relationship between competition law and sector specific legislation. And, thirdly, to explain how competition rules will be applied in a consistent way across the converging sectors involved in the provision of new multimedia services especially to access issues and gateways.The notice is being published in draft form for comment.

The draft Notice deals, in its first part, with the relationship between the applications of the competition rules and sector-specific regulation. In particular, this refers to the ONP directives issued under the EC's Open Network Provision framework and national regulations. This section also covers procedural issues in the area of access agreements. This part sets out the principle that priority should be given to sector-specific regulation, where practicable and subject to the rights of companies to complain under the competition rules. The second part defines in general terms relevant markets in the context of access agreements. In the third part, some principles regarding the application of Articles 85 and 86 to access agreements are developed.

In the telecoms sector, access agreements are central in allowing market participants to reap the benefits of liberalization. Interconnection to the public switched telecoms network is one typical example of such access. Once telecoms markets are fully opened, Community competition rules also apply to the sector and will grow in importance. This notice is vital to ensure the success of the liberalisation of telecoms markets in the Union from the beginning of 1998. It will provide a rulebook to help telecoms services companies to gain access to existing telecoms networks, in competition with the existing providers.

Comments should be made within two months of the publication of the draft notice in the Official Journal. In practice, they will be accepted at any time up to the end of February. Comments can be sent by mail, fax or E mail to the following addresses.

Mail
European Commission
Directorate-General for Competition (DG IV)
Directorate C
C 158 3/48

III 70

Rue de la Loi 200/Wetstraat 200
B-1049 Brussels

E mail
access.notice@dg4.cec.be

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SECOND GSM OPERATOR IN SPAIN : THE COMMISSION REQUESTS CLARIFICATION FROM THE SPANISH AUTHORITIES

DN: IP/96/1175 Date: 1996-12-18

TXT: FR EN
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The European Commission has decided to request the Spanish authorities to provide clarifications on the initial licence fee imposed on Airtel Móvil for the grant of a second concession of GSM services in Spain. The second operator which started operating in October 1995 was selected on the basis of a tender process which resulted in Airtel having to pay Ptas 85 billion whereas the public telecommunications operator, Telefónica, was granted its GSM licence without an initial licence fee. The Commission considers that the initial fee distorts competition in favour of Telefónica and gives the Spanish Government three months to inform the Commission on the steps it will take to secure equal conditions for GSM operators on the market.

On 23 April 1996, the Commission requested the Spanish Government to refund the Ptas 85 billion paid by the second operator or to adopt equivalent corrective measures. The Spanish authorities proposed then to transfer, from the principal public operator to a 100% subsidiary which operates mobile telephone services for the public operator, the cost of providing fixed cellular connections to the public network in scarcely populated remote areas (TRAC-project), this cost being previously borne by Telefónica. However, the Spanish Government did not provide sufficient data to allow the Commission to consider the project equivalent to the initial payment. Therefore, the Commission decided to ask clarifications on the corrective measures the Spanish authorities intend to take in order to remove the distortion of competition.

Under the terms of the concession granted to Telefónica in 1991, the public operator would obtain a GSM concession without any further payment. The Commission considers therefore that the public operator has a competitive advantage allowing it to strengthen its dominant position to the detriment of the second GSM operator. The Commission adds that any strengthening of Telefónica 's dominant position as well as any limitation of production, markets or technical development in relation to GSM are likely to delay the process of steadily reducing tariffs for GSM telephony. In the absence of the licence fee imposed on Airtel, price competition would have been stronger and GSM tariffs would have fallen more quickly.

Four other Member States granted their second mobile licence under a procedure which had anti-competitive effects : Italy, Belgium, Ireland and Austria. Subsequent to the intervention of the Commission, Belgium, Ireland and Austria decided to impose a similar payment on the public operator. The Italian Government proposed a package of corrective measures which was agreed by the Commission. Second operators started operating commercially at the following times : Omnitel Pronto Italia (Italy) December 1995, Maxmobil (Austria) : July 1996, Libertel (Netherlands) : September 1996, Mobistar (Belgium) : October 1996 and Esat Digifone (Ireland): December 1996.

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COMMISSION CLEARS UK CABLE TELEVISON AND TELECOMS MERGER

DN: IP/96/1169 Date: 1996-12-12

TXT: FR EN
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The Commission has cleared a merger which will bring together the current UK cable-tv interests of Videotron, Cable & Wireless, Nynex and BCE, with those of Mercury Communications to form a new cable television/telecommunications group. The new venture will be known as Cable and Wireless Communications.

The operation will be done in two main stages. In the first, Bell Cable Media will acquire Videotron, and Cable & Wireless and BCE will assume joint control of Bell Cable Media. In a second, the interests of BCM, Nynex CableComms Inc and Nynex CableComms plc will be brought together under the umbrella of a new company, Cable & Wireless Communications.

The new company will be active in pay television, cable networks, and telecommunications services and networks. In the UK currently BSkyB is dominant in pay television. British Telecom is dominant in telecommunications services and networks. The new group will have access to Mercury's existing trunk lines, as well as to the cable companies local loop connections. It will provide the stimulus for the development of further competition in these areas.

Because of the structure of the transaction, two separate notifications were received by the Commission under Council Regulation No 4064/89 (the Merger Regulation). After examination, the Commission issued one decision recording its conclusion that the transactions described in each of the notifications are compatible with the common market.

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THE COMMISSION CLEARS THE CREATION OF IRIDIUM, A FUTURE PROVIDER OF WORLDWIDE SATELLITE PERSONAL COMMUNICATIONS SERVICES (S-PCS)

DN: IP/96/1215 Date: 1996-12-19

TXT: FR EN
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The European Commission has given its formal green light to the creation of Iridium, a company led by the US corporation Motorola, which intends to provide as from the last quarter of 1998, global digital wireless communications services using a constellation of 66 low earth orbit (LEO[1]) satellites. Services will include mobile voice telephony, paging and basic data services (such as facsimile) and will be provided via portable hand-held (dual mode or single mode) telephones, vehicle mounted telephones, pagers and other subscriber equipment. Because Iridium will not restrict competition, its creation has been concluded to fall outside the scope of both Article 85(1) of the EC Treaty and Article 53(1) of the EEA Agreement. Indeed, none of the strategic investors could be reasonably expected to separately assume the very high level of investments required (nearly USD 5 billion) and the very high risk of technical and commercial failure associated with such a new system. In addition, no investor has all the necessary licences to operate such a system.

Apart from Motorola, Iridium is owned by 16 strategic investors including a number of telecommunication services providers and equipment manufacturers from around the world. Two European companies figure among those strategic investors: Stet (Italy; 3.8%) and Vebacom (Germany; 10%). Each of the two has its own gateway service territory covering different parts of Europe and the associated exclusive right to construct and operate a gateway within its respective territory.

Satellite systems, like Iridium (commonly referred to as S-PCS systems[2]) are expected to complement wireless terrestrial mobile technologies (such as GSM) in areas where those terrestrial technologies have failed to penetrate (i.e. rural parts of the developed world and both urban and rural parts of lower income countries) or where terrestrial roaming is not available because of incompatible technologies. In addition, S-PCS systems are expected to act as a complement and even a substitute for the public switched fixed telephone network, enhancing service coverage in remote areas of low population density and/or where the terrestrial infrastructure is very poor.

The same conclusion as to the inapplicability of the competition rules of both the EC Treaty and the EEA Agreement has been reached in respect of several ancillary restraints; namely as regards the distribution of the Iridium services and the pricing policies which Iridium may suggest as guidelines to gateways investor operators. The distribution of Iridium services will be organised around, first gateway operators, which are the strategic investors in Iridium and which have exclusive rights over their respective territories to install and operate the gateways and to act or designate others to act as services providers within the territory; second, service providers nominated by gateway operators, in general on a non-exclusive basis, which are responsible for customer relationships; and, finally, Iridium, which as "producer" of the services will keep some strategic central functions to ensure coherence of the system. Taking into account the very high risks entailed by the Iridium system and the need to attract gateway operators covering all parts of the world, the exclusivity

granted to gateway operators, as further described in the Decision, has been concluded to be a necessary incentive for investors to assume these risks.

Nevertheless, in view of the very strong position of STET in Italy as regards the provision of satellites services, the Commission requested an additional safeguard in respect of Italy. Thus, the parties have confirmed that the Iridium agreements will not affect the ability of any other company or person to gain access to the telecommunications infrastructure of STET other than those STET facilities specifically developed for the Iridium system. In addition, the Commission has explicitly indicated in the decision that the ancillary nature of the exclusive rights granted to gateway operator investors, could be revisited should the particular circumstances of the case change in a substantial manner. In particular should Iridium acquire a dominant position in respect of the actual provision of S-PCS services.

Iridium may suggest pricing policies as guidelines to its gateway operators. The contents of such guidelines has been described to the Commission. They would refer basically to rules for the repartition of charges between gateways in calls that use multiple gateways, currency requirements and exchange rates. Each gateway operator would be expected to comply with these guidelines to the extent permitted by applicable law and regulation, but will otherwise be free to set their own tariffs.

The guidelines are basically aimed at maintaining the coherence and the integrality of the worldwide service that Iridium will provide. Such coherence is particularly important for potential users of the system. They will most of the time be moving in different areas of the world but they will nevertheless want to receive a single bill in a single currency. In the Decision, the Commission has accepted, as recognized in the "International Private Satellite Partners" Decision[3] , that the principle of uniform prices in different territories, together with the implementation of marketing practices in a decentralized manner, seems appropriate to fulfil customers' needs.

[1] 780 km. above the earth's surface.
[2] The Commission cleared also the Inmarsat-P/ICO S-PCS. For details of the Inmarsat-P system, see Article 19(3) Notice published in OJ noC304 of 15.11.96, p.6.
[3] OJ noL354/75 of 31.12.94, at paragraph 55.

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THE COMMISSION CLEARS JOINT VENTURE IN THE TELECOMMUNICATIONS SECTOR IN IRELAND

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The European Commission has decided to clear the proposed concentration by which PTT Telecom BV, a full subsidiary of Royal PTT Nederland NV, and Telia AB publ, a company owned by the Swedish State, acting together through a joint venture company called Comsource, and the Irish State, will acquire joint control of Telecom Eireann.

The concentration involves the establishment of a consortium between PTT Telecom and Telia, named Comsource, and the acquisition by Comsource of 20% of the issued share capital of Telecom Eireann. Comsource shall act solely as a holding company to perform the role of shareholder of Telecom Eireann. As a consequence of this acquisition of 20% of the shares of Telecom Eireann, Comsource will acquire control, jointly with the Irish State, of Telecom Eireann.

The operation relates to telecommunications' infrastructure, telecommunications' services and cable television. Value-added telecommunication services are liberalised and subject to licence. Presently 38 licensed service providers including main European operators are present in Ireland. A second GSM operator will start soon to operate. PTT Telecom and Telia are not presently active in the Irish market and the concentration does not result in a direct change in market shares. For non-liberalised services, in the light of the ongoing liberalisation process in Ireland, Telecom Eireann will not strengthen its present market position.

In this respect the Commission has taken into account the approved timetable for full liberalisation in Ireland: alternative infrastructures will be liberalised by July 1997, international GSM connection by January 1999 and voice telephony by January 2000. Ireland was entitled to request a derogation period up to 2003. In addition, the access to the cablelink network for telecommunication will be open to third parties on a non-discriminatory basis.

Telecom Eireann, owned by the Irish State, is the national telecommunications operator in Ireland. Through a 75% shareholding in Cablelink Limited Telecom Eireann is also active in the provision of cable television services in Ireland. PTT Telecom is a full subsidiary of Royal PTT Nederland NV. Telia is company owned by the Swedish State. They are, respectively, the main telecommunications operators in The Netherlands and in Sweden.

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COMMISSION INDICATES A FAVOURABLE POSITION IN RESPECT OF UNISOURCE - TELEFONICA AND UNIWORLD AND INVITES COMMENTS

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M. Karel Van Miert, European Commissioner in charge of competition policy, has decided to publish two notices which indicate the intention of the Commission to take a favourable view of the Unisource/Telefónica and Uniworld cases, subject to the comments of interested third parties. Unisource is an alliance of PTT Telecom of the Netherlands, Telia of Sweden and Swiss PTT, which is being joined by Telefónica of Spain. The Uniworld transaction is an alliance between Unisource and AT&T. The Commission's favourable view follows discussions with all the companies concerned as well as the governments of Spain, Sweden, the Netherlands and Switzerland. In each case, interested third parties have one month to send their observations.

Both notices explain in detail changes to the original agreements and undertakings given by the parties to make the transactions acceptable under EU competition law. In addition, the Unisource-Telefónica Notice explains discussions with the Governments of the four countries directly involved in Unisource (Sweden, the Netherlands, Spain and Switzerland).

The main features of the outcome of the discussions are as follows:

- the full liberalisation of the telecoms market in Spain by 30 November 1998, with three licences being granted by 1 January 1998 plus limited licences for the cable TV companies to offer telecoms within their areas;

- the full liberalisation of telecoms in Switzerland from 1 January 1998; and

- in respect of the Uniworld transaction a series of undertakings have been offered by AT&T in respect of its conduct on interconnection, access and accounting rates.

1.Full liberalisation of telecommunications services and networks in Spain:

The Spanish telecommunications market will be fully liberalised by 30 November 1998. By that date, further licenses for voice telephony services and public infrastructure will be granted, in addition to those granted before that date. Such further licenses will be requested from 1 August 1998. For so doing, a new General Law on Telecommunications will be adopted and enacted before the end of 1997. Furthermore, all necessary implementation measures will be adopted before 31 July 1998.

In addition, the Royal-Decree Law 6/96 of 7 June 1996 established a second operator -Retevisión- for the entire range of telecommunications services and infrastructures. 80% of its share capital will be sold by tender to be awarded during the first quarter of 1997. A third licence for the provision of voice telephony and public infrastructures with nation-wide coverage will be granted by the beginning of January 1998. By the same date, cable television operators will start offering voice telephony and public infrastructures within their respective areas. On that basis, the Commission has considered that the degree of actual competition in the Spanish telecommunications market by the beginning of 1998 will be comparable to

that of most Member States which will abide by the liberalisation date of 1 January 1998.

2. Full liberalisation of telecommunications services and networks in Switzerland:

Telecommunications in Switzerland will be fully liberalised by 1 January 1998 in parallel to the EU. A new Law will be enacted shortly eliminating remaining restrictions.

Regarding alternative infrastructure liberalisation, the Swiss Government indicated that from 1 May 1995, 15 pilot licences have been granted (the majority to cable tv operators). Such pilot licences allow the provision of some telecommunications services to subscribers (Internet access, data transmission, multimedia and telephony within closed users groups). The contents of such licences will be extended before the end of 1996 to offer the possibility to owners of alternative infrastructures in Switzerland to carry out commercial activities, in particular for the provision over them of corporate telecommunications services. Competitors to Swiss PTT for the provision of such corporate telecommunications services will be allowed to use such alternative infrastructures.

3. AT&T offerings:

In the framework of the Uniworld case, AT&T offered to the Commission the following:

(a) AT&T undertakes to advise the Competition Directorate General of the European Competition (DG IV) promptly of any complaint filed with the US Federal Communications Commission (FCC) regarding access to or interconnection with AT&T's international facilities, including any complaint filed with the FCC regarding bilateral correspondent arrangements, by telecommunications operators or service providers from the EEA or Switzerland. AT&T further undertakes to inform DG IV of any final decision taken by the FCC in regard to any such complaint.

(b) With respect to operators with international facilities licences in EEA and Switzerland with whom AT&T today has an accounting rate agreement, and for traffic sent in the context of the bilateral correspondent regime, AT&T undertakes to offer cost-based accounting rates that, in all cases, would be no higher than the lowest accounting rate established between AT&T and any Unisource shareholder.

(c) With respect to operators with international facilities licenses in EEA and Switzerland with whom AT&T may in the future establish an accounting rate agreement, AT&T undertakes to offer cost-based accounting rates that, in all cases, would be no higher than the lowest accounting rate then in effect between AT&T and any Unisource shareholder.

The Commission initiates second phase proceedings on BT-MCI merger

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ip/97/76

Brussels, 30th January 1997

The Commission initiates second phase proceedings on BT-MCI merger

The European Commission has decided to open second-phase proceedings in the BT (British Telecommunications plc) and MCI (MCI Communications Corporation) merger notification. The merger would take place against a background of rapid change in the telecommunications sector, and in particular the granting of 44 new international facilities licences in the UK. And although many of the parties' activities are complementary, the Commission's enquiries suggest a certain number of areas in which further investigations are required.

These include whether the merger might have the capability of impairing the competitive position of its major competitors on the UK-US route by reducing their net settlement revenues; whether the new entity could divert US-European traffic through the UK in a way not currently open to its European competitors, and whether the merger would have any impact on the availability of transatlantic cable capacity to new entrants. The impact of the merger on the teleconferencing market will also need to be carefully examined, given the parties' current position. The Commission will also examine any other relevant issues which come to light as a result of the investigation into these fast-changing markets.

BT is a UK-based supplier of telecommunications services and equipment. Its main services and products are local and long distance telephone exchange lines to homes and businesses, international telephone calls to and from the United Kingdom, and the supply of telecommunications equipment for customers' premises.

MCI is a US-based diversified communications company, offering consumers and businesses a portfolio of integrated services, including long distance, wireless, local, paging, messaging, Internet, information services, outsourcing and advanced global communications. BT and MCI also operate jointly a venture known as Concert, which supplies value-added and enhanced services to multi-national business customers.

The Commission now has a maximum of a further 4 months (until 11 June 1997) in which to complete its enquiries and take a final decision on the case.

The Commission approves timetable for full telecommunications liberalisation in Portugal

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ip/97/118

Brussels, 12 February 1997

The Commission approves timetable for full telecommunications liberalisation in Portugal

Upon request from the Portuguese Government, the European Commission has today approved a timetable for the full liberalisation of telecommunications in Portugal from 1 January 2000. Voice telephony will be completely liberalised from that date. In the meantime, direct international connections for GSM mobile phone providers will be liberalised from 1 January 1999.

As far as infrastructures are concerned, the opportunity will be given for competitors to enter the Portuguese market from the middle of this year. Alternative infrastructure providers for already liberalised services will be permitted from 1 July 1997 and Portugal must liberalise without delay the market for GSM mobile phone alternative infrastructure. Under the liberalisation directives, Portugal was entitled to request a derogation period up to 2003.

Voice telephony

On request of the Portuguese Government, the voice telephony deadline of 1 January 2000 was granted because Portugal Telecom needed to rebalance tariffs and increase telephone penetration further before the introduction of full competition.

Alternative infrastructure for already liberalised services

The Portuguese request for the liberalisation of alternative infrastructures for already liberalised services (such as telephone services for Closed User Groups) was not granted beyond the middle of 1997. The Commission believed that any potential reduction in revenues on the provision of leased circuits would be compensated by growth in the market and that the development of the network could be continued with the additional implementation period granted for voice telephony. The Commission stated that an extension to July 1999 which the Portuguese Government had requested could not be justified.

International GSM connection

The Commission has accepted the request in full concerning the direct international interconnection of GSM operators. This was because there was a realistic risk of substitution between international GSM and international fixed telephony which would threaten the development of the telecommunications network in Portugal.

Alternative infrastructure for GSM services

The Commission rejected Portugal's request to postpone the lifting of restrictions on the provision of alternative infrastructure for mobile and personal communications services. The Commission believed that the liberalisation of this section of the market without delay did not pose a threat to Portugal Telecom's revenues and hence to the necessary structural adjustments and development of the network.

The obligation and dates requested and granted are summarised in the table below.

Obligation concerned	Date foreseen in the Directives	Additional period requested by Portugal	*Period granted*
Liberalisation of voice telephony and underlying networks	1 January 1998	1 January 2000	***1 January 2000***
Liberalisation of the use of own/alternative networks for other already liberalised services	1 July 1996	1 July 1999	***1 July 1997***
Direct international interconnection of mobile networks with other mobile or fixed networks	February 1996	1 January 1999	***1 January 1999***
Alternative infrastructure for mobile networks	February 1996	1 January 1998	***none***

Background

The Full Competition directive (Directive 96/19/EC) which provided for the introduction of full competition the telecommunications sector on 1 January 1998 entitled five member states (Ireland, Greece, Luxembourg, Portugal and Spain) to submit requests for derogations from that deadline to the Commission. The Decision concerning Ireland was taken on 27 November 1996 and provided for a date of full liberalisation by 1 January 2000. Greece and Luxembourg have also submitted requests for derogations. Spain will not apply for a full derogation and its request has been recently published (IP/96/1231).

This decision creates certainty for the rapidly developing Portuguese market. It also provides a positive environment for national and global alliances which may be shaped in that market.

World trade negotiations

The agreement of the Portuguese derogation is also relevant to the negotiations on telecommunications at the World Trade Organisation (WTO), in Geneva. Thanks to this internal liberalisation schedule, and to other changes concerning Spain and Belgium, it was possible in December for the EU to improve its offer to other trading partners. This show of EU leadership, coordinated with an improvement in the US offer, was very positively received. This should contribute to a better basic telecommunications agreement by the end of negotiations at the end of this week, and more generally to constructive talks on outstanding agenda items of interest to the EU.

WTO Telecoms Agreement Press conference by Sir Leon Brittan, Geneva, Feb 15

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Bruxelles, le 17 février 1997.

NOTE BIO AUX BUREAUX NATIONAUX

cc. aux Membres du Service du Porte-Parole

WTO Telecoms Agreement

Press conference by Sir Leon Brittan, Geneva, Feb 15

(P. Guilford)

This agreement is of historic importance to the future of the world trading system as well as to the world economy, not just in telecommunications. Estimated to cover over $600 billion years of telecoms business, it will boost sales and investment in the telecoms sector, cut costs for business and ultimately improve the cost and quality of communications for ordinary people. It will also remove further obstacles to the development of the information society. Taken together with the ITA (due to be finalised in April), which removes tariffs on telecoms equipment among other things, the WTO deal on telecoms services will give a powerful lift to the globalisation of telecoms markets across the board.

It will also inject momentum into talks in other services sectors, notably financial services, due to begin in April and finish at the end of this year. "The omens are good" for the conclusion of financial services, Sir Leon said, for the telecoms accord had created the right climate for negotiations.

The telecoms deal has shown that the WTO was capable of concluding negotiations successfully in individual sectors. Furthermore, it reinforces the case for a Millenium Round of global trade talks at the end of the century, revealing a thirst for further liberalisation of the world economy. "Telecoms has shown that the world is not suffering from negotiating fatigue or an excess of liberalisation", he said. We are already committed to further negotiations on agriculture, services and other areas, and Sir Leon predicted these and other issues would come together into a new trade round.

The EU led the negotiations from the front for the last 1 1/2 years, convinced from its own internal liberalisation process that open telecoms markets are good for business. America's last-minute request for an MFN exemption for direct-to-home services and digital broadcasting by satellite (DBS) was described by Sir Leon as an "unfortunate blemish" on the overall package. He dismissed it as illegal, and in breach of US commitments on broadcasting made at the time of the Uruguay Round, and said the EU reserved all its rights to challenge the exemption, although the US had made it abundantly and publicly clear that such an exemption would not be applied to the EU.

Helms-Burton

The EU Council of Ministers, gathered in Geneva for the telecoms talks, also discussed Helms-Burton. Sir Leon said the EU was actively negotiating a resolution of the dispute with the United States, and had deferred the date for the composition of a disputes Panel until this coming Thursday, February 20. The Council unanimously supported this stance at Saturday's meeting. Sir Leon said the EU was only asking the United States for something that was lawful under US law - which would not need an act of Congress to achieve - and which was moderate and reasonable. He cautioned that in the absence of a better offer than had so far made by the US, a Panel would be named by Director-General Ruggiero on February 20. The Council was unanimous in the view that if no such offer is received, a Panel will be named.

Best regards,

N. G. van der Pas

Commission services clear the Global European Network agreement to create high quality trans-European telecommunications networks.

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IP/97/242

Brussels, 20th March 1997

Commission services clear the Global European Network agreement to create high quality trans-European telecommunications networks.

The European Commission's competition services have given clearence to the Global European Network (GEN) agreement to provide high quality digital links between Member States. This agreement amongst the major European telecommunications operators will considerably improve the quality of trans-European network telecommunications services. The European Commission's competition services have secured amendments to the agreement in order to preserve competition between the companies involved and ensure free and fair access for third parties.

The main amendments are :

(a) Each signatory will refrain from entering into a collective concerted pricing arrangement and will negotiate on a bilateral basis the conditions under which it will give access to its GEN capacity.

(b) Each signatory will offer in its public tariff access to GEN capacity on a non-discriminatory basis to third parties. These will thus be able to access GEN capacity on the same basis as to the signatories.

The GEN agreement was signed by British Telecom, Deutsche Telekom, France Télécom, Telecom Italia, Telefonica de Espana. It will create a 2 Mbit/s fibre optics telecommunications network between the signatories' nodes using so-called PDH (Plesiosynchronous Digital Hierarchy) technology. The network will improve the speed of circuit provision, the network availability and quality and reliability of service.

Although they take a favourable approach towards the improvements trans-European telecommunications networks can bring, the European Commission's competition services have stated that at the same time they will closely scrutinise such agreements which involve dominant operators in order to ensure the development of pro-competitive structures.

In particular, the conditions under which third parties can access European leased lines remain a strong concern for the European Commission. For that reason, the European Commission services have warned the parties that the negative clearance of the agreement does not mean that signatories may abuse their strong if not dominant positions in this market. At the same time, the European Commission is, in the context of the ONP leased line Directive, examining the application of the ONP principle in Member States.

Should a complaint be made regarding access to European leased line capacities, or should the

European Commission become aware that the conditions under which access is provided are discriminatory or excessive, individual cases pursuant Article 86 EC will be opened against the telecommunications operators in question.