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II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 29 May 1996

concerning aid proposed by Germany to Buna GmbH, Sächsische Olefinwerke GmbH, Leuna-Werke GmbH, Leuna-Polyolefine GmbH and BSL Polyolefinverbund GmbH

(Only the German text is authentic)

(Text with EEA relevance)

(96/545/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 93 (2) thereof,

Having regard to the Agreement establishing the European Economic Area, and in particular Article 62 (1) (a) thereof,

Having, in accordance with the abovementioned Articles, given notice to the parties concerned to submit their comments⁽¹⁾,

Whereas:

I

1. The chemical industry, grouped in large 'Kombinate' (conglomerates), was one of the main industries of the former German Democratic Republic, originally employing more than 90 000 people. It was centered in the Leipzig area, inland in

Saxony-Anhalt and Saxony, where the four largest complexes, namely Buna, Sächsische Olefinwerke (SOW), Leuna and Chemie AG Bitterfeld gave employment to 68 500.

In June 1990 the Government of the former German Democratic Republic founded the privatization trustee Treuhandanstalt (THA), which continued its activities after Germany had been unified. The THA transformed the planned-economy complexes into public limited companies, which remained interdependent, however, regarding the supply of raw materials, primary and intermediary products and energy. The resulting impediments to a fast restructuring and privatization of these companies were aggravated by the concomitant breakdown of traditional outlets.

The undertakings in question comprised a large number of quite diverse branches of activity. Many production plants were outdated, quite obsolete or had an uneconomic scale of production. The THA shut these plants down and tried to break down the remaining groups into smaller units, which would be easier to sell.

Of the three companies in the Leipzig area, Buna (at Schkopau), SOW (at Böhlen) and Leuna-Werke GmbH, the site of Leuna was the largest. After the hiving off of several branches, including its low-density polyethylene (LDPE) division as the independent Leuna-Polyolefine GmbH, the remainder was combined into one industrial park.

⁽¹⁾ 1. Opening of procedure:

— OJ No C 113, 5. 5. 1995, p. 5 (Buna),
— OJ No C 113, 5. 5. 1995, p. 13 (SOW),
— OJ No C 206, 26. 7. 1994, p. 10 (Leuna).

2. Enlargement of procedure:

— OJ No C 203, 8. 8. 1995, p. 6 (Buna, SOW, BSL),
— OJ No C 227, 1. 9. 1995, p. 8 (Leuna).

Buna was an integrated complex focused on chlorine and olefine chemistry. For environmental reasons, THA was forced to shut down acetylene production, thereby making Buna dependent on the ethylene cracker at Böhlen for this essential raw material. SOW at Böhlen and Buna were connected by pipelines, as was Leuna-Polyolefine as a consumer of ethylene.

Consequently, the dependence of these three facilities on the production of raw material by the cracker (olefines) at Böhlen, which supplies Buna's downstream activities at Schkopau and Leuna-Polyolefine at Leuna with ethylene, made it imperative for the THA to strive for privatization as a whole.

2. Based on this polyolefine concept, and after previous privatization attempts had failed, the bank Goldman Sachs & Co. was charged with the search for and negotiations with potential buyers. According to information supplied by Germany the Dow Chemical Company (Dow) presented a sound plan for a complete restructuring of the olefine complex with perspectives for long-term viability, and in the end Dow was the only bidder for the privatization of the bundled three chemical companies.

SOW's and Leuna-Polyolefine's shares were taken over by Buna for the subsequent merger into BSL Polyolefinverbund. On 3 and 4 April 1995 the privatization agreement between Dow and the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (BvS) — which had succeeded to the THA — was notarized. This contract provides for substantial payments by BvS to BSL, which by far exceed the price Dow pays for the takeover.

3. Between 1990 and 1995 the THA/BvS initiated and financed some urgent restructuring measures on the three sites and reduced the number of jobs in the three companies from 26 029 to 5 820 by January 1995. Despite these efforts, losses remained high in that period and these too were financed by THA/BvS.

II

1. The Commission made a general assessment of the interventions of the THA in 1991 (decision dated 26 September 1991) and again in 1992 (decision dated 8 December 1992). It assessed the interventions of the BvS and other successor institutions to the THA in 1995 (decision dated 1 February 1995). In those decisions the Commission laid down which of those interventions were likely to constitute aid and assessed the compatibility of such aid with the common market. Taking into

account the task of the THA in the unprecedented transformation of a planned economy into a market economy, the Commission found that the financing of companies held by the THA before their privatization could well constitute aid, but that such aid could, if certain conditions were fulfilled, be considered compatible with the common market. Likewise, a privatization sale to a party other than the highest bidder in a public call for bids or at a negative price could also entail aid. The decisions stipulate that aid granted by the THA and the BvS for the financing and privatization of large companies must be notified pursuant to Article 93 (3) of the Treaty for an individual assessment. The size of all three companies Buna, SOW and Leuna is well above the thresholds laid down in the decisions.

2. Germany complied with this obligation and informed the Commission of the following interventions of the THA before privatization:

2.1. Buna

The Commission approved the first two notifications. The first approval (aid N 199/93⁽²⁾) concerned guarantees amounting to DM 445,5 million to secure first investments and the infrastructure and loans amounting to DM 106,2 million to secure the company's liquidity.

A second approval (aid N 449/93⁽³⁾) concerned a loan of DM 220,2 million for environmental and restructuring measures and a discharge of personnel under socially acceptable circumstances.

A third notification concerned DM 1 232,1 million guarantees and DM 276,8 million loans, as well as a transformation of DM 288 million of guarantees into a shareholder's loan of the same amount, to finance investment and cover losses in 1994 (aid N 375/94; after the procedure was opened, C 61/94⁽⁴⁾). The Commission accepted the transformation of guarantees into a shareholder's loan, as well as a loan of DM 259,4 million and guarantees totalling DM 131,5 million for ensuring the company's liquidity and for financing environmental investment, but initiated proceedings pursuant to Article 93 (2) of the Treaty against the remaining DM 1 143 million investment aid.

2.2. SOW

The Commission approved guarantees on DM 142,7 million and a loan of DM 92,2 million in order to allow SOW to fulfil mandatory environmental requirements, for investment and

⁽²⁾ Not published.

⁽³⁾ Not published.

⁽⁴⁾ OJ No C 113, 5. 5. 1995, p. 5.

infrastructure and to cover losses in 1993 due to its being overstaffed (aid N 466/93⁽⁵⁾).

When the German Government notified additional guarantees amounting to DM 266,7 million and loans totalling DM 400,1 million to cover losses in 1994 and to finance environmental investment, the Commission decided not to object to the covering of DM 92,2 million losses and DM 45,2 million aid for complying with mandatory standards, but to initiate proceedings pursuant to Article 93 (2) of the Treaty against DM 529,1 million investment aid in the form of DM 261,7 million guarantees and DM 267,4 million loans (aid N 376/94; after the procedure was opened, C 62/94⁽⁶⁾).

2.3. Leuna

The Commission decided not to object to DM 30,1 million guarantees for financing environmental investment, but initiated proceedings pursuant to Article 93 (2) of the Treaty against a shareholder's loan of DM 146,3 million to cover losses in the first half of 1993 and guarantees totalling DM 405,8 million (DM 230,5 million to finance investment and DM 175,3 million to cover losses in the second half of 1993; aid NN 103/93; after the procedure was opened, C 4/94⁽⁷⁾).

The procedure was expanded to cover a guarantee on investment credit for 1994 awarded at a later date amounting to DM 266,2 million. At the same time the Commission approved of the transformation of the guarantees used at that stage into a shareholder's loan and closed the procedure regarding shareholder's loans totalling DM 321,6 million which had been used to cover losses in 1993 (aid N 56/94, included in C 4/94⁽⁸⁾).

second instalment of aid to SOW (aid N 376/94), such a privatization plan was submitted by Germany. Whilst recognizing that the plan as such was consistent and based on several studies made by outside experts, the Commission still feared that the aid would only serve to perpetuate, or even create, unviable structures for which the THA would never be able to find a buyer and which would continue to depend on aid. Procedures were therefore opened against the additional aid to Buna and SOW proposed by the THA and a study by independent consultants was commissioned to assist the Commission in its assessment. The Commission took the same view when it assessed the second aid to Leuna (NN 56/94).

Under these procedures Germany stated its view that viability could be achieved and illustrated this, as stated above, using a joint privatization plan. Germany also stressed that delays in carrying out the necessary restructuring investment would prolong the period of losses and so increase the total amount of aid. Germany furthermore stressed the extraordinary position of those companies due to the former division of Germany.

No observations were received from third parties under the original procedure against the aid in favour of Leuna. Under the procedures opened against the aid to Buna and SOW the Commission received observations from three other manufacturers of chemicals and from a national chemical industry federation. Those observations, which supported the view taken by the Commission when it opened the procedure and which also pointed out that additional aid would be awarded for the privatization of these companies (see below) were submitted to Germany for its comments.

3. The Commission initiated the first procedure referred to above against the investment aid to Leuna, because it noted that the privatization efforts of the THA for this company had still not been successful. The Commission recognized that Buna, SOW and Leuna were interdependent companies, which could never be privatized individually. The Commission demanded that a sound privatization plan involving all three companies be worked out. Under the procedure, and as part of the notification of the third instalment of aid to Buna (aid N 375/94) and the

4. In May 1995 the Commission was informed by Germany of the aid involved in the privatization of Buna, SOW and Leuna-Polyolefine (aid N 467/95). The Commission was also informed of certain urgent investments in Buna and SOW which needed to be carried out without delay and the financing of which was blocked under procedures C 61/94 and C 62/94. Finally the Commission was informed of the cleaning-up of Buna's and SOW's balance-sheets as at 31 December 1994 (aid N 2/95 and NN 3/95). In June 1995 the Commission decided to enlarge procedures C 4/94, C 61/94 and C 62/94 so that they would also cover the aid awarded within the framework of the privatization (aid specified in Chapter III). The Commission doubted, in particular, whether the principles of its approach to restructuring aid were being adhered to, namely that long-term viability of the companies in question had to be secured, that undue distortions

⁽⁵⁾ OJ No C 322, 30. 11. 1993, p. 14.

⁽⁶⁾ OJ No C 113, 5. 5. 1995, p. 13.

⁽⁷⁾ OJ No C 206, 26. 7. 1994, p. 10.

⁽⁸⁾ OJ No C 227, 1. 9. 1995, p. 8.

of competition were to be avoided and that the aid was to be limited to the minimum necessary.

The Commission was able to close procedure C 61/94 concerning DM 67,7 million of urgent environmental investment in Buna, and procedure C 62/94 concerning DM 173,1 million of urgent environmental investment in SOW. The Commission was also able to accept the waiving of Buna's debt to the THA as at 31 December 1994 amounting to DM 1 441,4 million and of SOW's debt amounting to DM 312 million. Additional waivers of DM 191,1 million for Buna and DM 74 million for SOW, as well as injections of capital to those companies amounting to DM 151 million and DM 61 million respectively, were added to the sums covered by procedures C 61/94 and C 62/94⁽⁹⁾. That decision was communicated to Germany by letter dated 14 July 1995.

Under the enlarged procedures, Germany provided information by letters dated 30 June, 14 July, 8 August, 29 August, 5 September, 7 September and 10 October 1995 and in meetings which took place on 23 June, 10 July, 16 and 30 August 1995.

One other Member State and three companies in other Member States submitted written information under the enlarged procedures in support of the Commission's position expressed in the letter under which the procedure was expanded. Those observations were submitted to Germany for its comments. Dow also presented written information and participated in the second and third of the meetings referred to above.

III

1. The notarized privatization contract between BvS and Dow dated 3 and 4 April 1995 contains the complete financial means that BvS makes available for the privatization of BSL. These were summarized in the published enlargement of the procedure⁽¹⁰⁾ as follows:

(million DM)

— restructuring programme (maximum)	3 436
— BSL current projects (outside DOW)	1 078
— waiver of outstanding loans (minimum)	1 479
— cash flow compensation (maximum)	3 150
— up-front payment (structural deficiencies)	440,5

— demolition costs (maximum)	750
— social plans (maximum)	110
— courts and possible liabilities (maximum)	110
— consultancy fees	44
— environmental indemnification (estimate)	1 000
— energy cost (open-ended)	—
— pipeline Rostock (open-ended risk)	—

Total financing without considering the open-ended compensation payments therefore potentially amounted to DM 11 597,5 million when the procedure was enlarged. The privatization contract contains suspensory clauses for Commission approval pursuant to Council Regulation (EEC) No 4064/89 of 21 December 1989 on merger control⁽¹¹⁾ and Article 93 of the EC Treaty.

2. Also covered by the procedure is the following aid:

- 2.1. A guarantee to Leuna for DM 266,2 million of investment in the first half of 1994, and a shareholder's loan of DM 230,5 million for investment in 1993.

- 2.2. The DM 529,1 million of aid to SOW in the form of DM 261,7 million of guarantees for investment credit and DM 267,4 million of interest-bearing loans, against which the Commission had opened the Article 93 (2) procedure at the end of 1994 (see Chapter II, point 2.2) is included by the amount covered by the waiver of outstanding debt in the context of privatization (see the third item in the summary in point 1).

- 2.3. The same applies to the DM 1 143 million investment aid to Buna (see Chapter II, point 2.1) which was also waived as part of the privatization.

- 2.4. DM 477,1 million is the sum of those parts of the balance sheet clean-up for Buna and SOW as at 31 December 1994 which the Commission did not accept before the privatization (see Chapter II, point 4); it is also caught by the waiver under the privatization.

3. Under the procedure Germany communicated clarifications and certain modifications of the restructuring plan, which affect the sums of aid within the framework of the privatization, when compared with the situation when the procedure was opened, as follows:

⁽⁹⁾ OJ No C 203, 8. 8. 1995, p. 6.

⁽¹⁰⁾ OJ No C 203, 8. 8. 1995, p. 6.

⁽¹¹⁾ OJ No L 395, 30. 12. 1989, p. 1. Corrigendum: OJ No L 257, 21. 9. 1990, p. 13.

— The DM 44 million consultancy fees do not constitute aid to one of the companies. They constitute internal expenditure in the BvS linked to the efforts to privatize and to manage the contract.

— The cost of making good all environmental damage has been limited to DM 1 billion. If this ceiling should be exceeded for environmental damage caused after 1 July 1990, the Commission will be notified by Germany in sufficient time, pursuant to Article 93 (3) of the Treaty.

In its general decisions on the interventions of the THA and the BvS referred to in point 1 of Chapter II, the Commission laid down that an environmental indemnification for pollution caused before 1 July 1990 does not constitute aid. The Commission took the opinion that the companies in the new *Bundesländer* cannot be held liable for the pollution they had caused under the former German Democratic Republic, when they had no say at all in the matter. The Commission agrees with Germany that by far the greater part of the pollution caused by the plants belonging to BSL took place before 1 July 1990 and that hence the bulk of the DM 1 billion does not constitute aid. The Commission also accepts the view of Germany that it is not feasible to quantify the remainder, which does constitute aid.

— Regarding the possible open-ended additional cost of an alternative pipeline provided for in the original notification, Germany stated that no such additional cost would arise. If any

additional aid should nevertheless be required, the Commission would be notified in sufficient time pursuant to Article 93 (3) of the Treaty.

— The Dow investment programme laid down in the privatization contract provides for up to DM 3 436 million financing of investments by BvS. This sum comprises an amount of DM 201,5 million, however, for investments authorized by the Commission under previous decisions. Additional investment amounting to DM 459 million was added to the restructuring programme under the procedure, together with corresponding additional investment aid amounting to DM 384 million. On the other hand, DM 150 million for the construction of an aniline plant was taken out of the part of the Dow business plan financed by BvS. From the remaining ceiling for investment that can be awarded by the BvS, an amount must be deducted which will be awarded under various aid schemes in Germany which have been approved by the Commission; although decisions have not yet been taken, two *Länder* hold out a prospect of DM 483 million aid under schemes approved by the Commission⁽¹²⁾. The procedure therefore covers investment aid within the Dow investment programme up to DM 2 985,5 million, the compatibility of which with the common market must be examined by the Commission.

The restructuring programme as modified by Germany consists of the following investments:

⁽¹²⁾ Land Sachsen-Anhalt, DM 345 million and Freistaat Sachsen, DM 138 million.

SOW restructuring	Capital expenditure (million DM)
Upgrading/debottlenecking of the cracker 450 000 t/a (new cracker ovens and electronic controlled processes)	195
New feedstock pipeline from Rostock	540
Infrastructure (i.a. storage tank, ethylene- and propylene pipelines to Leuna and Buna, brine pipeline, streets and rail network)	360
Modernization of butadiene extraction unit (45 kt/a); no enlargement of capacity	9
New aromatics unit (toluene/xylene dealkylation) from 220 to 375 kt/a to increase benzene production from 75 to 122 kt/a	106
Nitrobenzene and nitric acid plants, effluents	77
Additional measures lowering structural cost (propane tanks, styrol production lowering transportation cost, etc.)	287
Sub-total SOW	1 577

BUNA restructuring	Capital expenditure (million DM)
Chlorine plant upgrade (changing to the membrane process and upgrading of sodium chloride to 84 kt/a in 2002)	316
New polyethylene plant (HPDE, linear LPDE) 210 kt/a to replace existing slurry (30 kt/a) and gas-phase HPDE (30 kt/a)	218
New polypropylene unit (220 kt/a) to ensure, together with an acrylic acid unit, an outlet for the propylene	218
New acrylic acid unit (90 kt/a) to complete the utilization of propylene	272
New acrylic ester unit (93 kt/a) to use about half of the acrylic acid	93
Oxychlorination unit	143
Upgrade of the PVC unit (125 kt/a)	46
SBR rubber (increase from 60 to 70 kt/a) and PB rubber (24 kt/a)	32
Upgrading of site infrastructures (Buna water supply, internal streets, rails and sewage-purification unit)	576
Auxiliary steam boiler	172
Kiln + 1 throx	98
Phital acid, solvents, dispersions	327
Sub-total	2 511
Leuna	
Upgrade of two LDPE units	40
Sub-total Leuna	40
Total	4 125

Investment amounting to DM 2,65 billion is secured by a contractual penalty of 20 % of the difference between this amount and the lower amount of investment actually realized.

- The cost of current projects started by BVS and which are not part of the plan submitted by Dow will — contrary to previous estimations — only amount to DM 245 million. With the exception of DM 33,8 million in Buna and DM 16,4 million at Leuna this sum was authorized under previous decisions.
- At the Commission's request, Germany stated that possible compensation payments to Dow of up to DM 70 million in case of rescission of the contract would be notified separately if this should occur.
- Concerning the open-ended power and steam aid Germany informed the Commission that the amount of aid would consist of DM 162 million as part of the cash-flow compensation, in addition to DM 804 million, this being the present value of the power and steam

compensation payments provided for in Article 15 of the privatization contract. After several discussions Germany informed the Commission that it would renegotiate the contract with Dow in order to reduce the cash-flow compensation by DM 162 million and to delete the clause concerning power and steam compensation payments.

- Germany also informed the Commission that the waiver of outstanding debt on 1 June 1995, taking into account that the Commission had only allowed part of the requested waiver as at 31 December 1994, would amount to DM 1 466,52 million.
- Germany informed the Commission that the compensation of structural deficiencies after the restructuring amounting to DM 440,5 million would be reduced to DM 96 million for the operation of an environmental monitoring system.

4. Consequently, the total sum of remaining aid to BSL covered by the procedure amounts to a

maximum of DM 9 556,22 million. This sum contains DM 1 billion for environmental damage, most of which does not constitute aid. Open-ended payments were capped off.

5. There is competition between manufacturers of chemicals and these products are traded between Member States, as is well documented in trade statistics. BSL will not only continue to produce some of the intermediary products made by Buna, SOW and Leuna, but will also manufacture new derivatives as part of the integrated set-up resulting from the restructuring. The effects of the plan on Dow's capacity for the various products and its market share is set out in Chapter IV, point 6.5.

Financial aid to companies strengthens their position compared with others that are competing with them in the Community and the European Economic Area. Where this occurs, such aid must be deemed to distort competition with such other undertakings.

Article 92 (1) of the EC Treaty and Article 61 (1) of the EEA Agreement lay down the principle that aid having certain characteristics which they specify is incompatible with the common market.

IV

1. Of the derogations set out in Article 92 (2) to the principle that aid having the characteristics specified in Article 92 (1) is incompatible with the common market, those listed under points (a) and (b) are inapplicable in this instance, given the nature and the objectives of the aid, and were not in any case invoked by Germany.
2. However, Article 92 (2) (c), concerning aid granted to the economy of certain areas of the Federal Republic of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division, was invoked by Germany. Although Germany has been unified since 3 October 1990, it can be said that the economy of the new *Bundesländer* is still suffering from the consequences of the former division, such as the loss of traditional suppliers and outlets, remaining imperfect transportation infrastructure, etc. It is the Commission's view that the derogation provided for in Article 92 (2) (c) must be interpreted strictly, notably as regards the need for such aid, which must therefore be limited to the minimum necessary to compensate those specific

remaining disadvantages that are caused by the former division. Difficulties companies in the former German Democratic Republic are facing, which result from the fact that these companies need to stand up to competitors in the Community and the EEA after the unification, cannot be interpreted as disadvantages caused by the former division of Germany. Such aid should rather be judged on the basis of the derogations set out in Article 92 (3) (a) and (c), which are dealt with below. The Commission also notes that Germany, whilst invoking Article 92 (2) (c) for the aid identified in Chapter III, has not convincingly demonstrated that the totality of this aid, or part of it, is limited to what is necessary to compensate for economic disadvantages caused by the former division of Germany (see also point 8.2).

3. Article 92 (3) of the Treaty specifies the aid which may be considered to be compatible with the common market. Compatibility with the Treaty must be viewed in the context of the Community and the EEA and not of a single Member State. So as to maintain the proper functioning of the common market and take account of the principles laid down in Article 3 (g), the exceptions to the principle of Article 92 (1) which are set out in Article 92 (3) must be interpreted strictly in examining any aid scheme or any individual aid measure.

In particular, the derogation may be applied only if the Commission finds that, if the aid were not granted, market forces alone or measures by the public authorities other than aid would not be sufficient to induce the recipients to act in such a way as to achieve one of the objectives pursued.

Applying the derogations to cases which do not contribute to such an objective, or where the aid is not necessary for this purpose, would mean conferring undue advantages on the industries or undertakings of certain Member States and affecting trading conditions between Member States and distorting competition, without any justification based on the common interest referred to in Article 92 (3).

4. The derogations in Article 92 (3) (b) are not satisfied in this case. It is true that German unification has had negative effects on the German economy, but these alone are not sufficient to apply Article 92 (3) (b) to an aid scheme, let alone to an *ad hoc* case of aid, because there must be a serious disturbance in the economy of a Member State, which must be judged in a Community context. The last time the Commission considered that an aid scheme remedied a serious disturbance in the economy of a Member State was in 1991, when aid

was approved for a privatization programme in Greece⁽¹³⁾. In that decision the Commission noted that the privatization programme was an integral part of the undertakings given under Council Decision 91/136/EEC⁽¹⁴⁾ concerning the recovery of the entire national economy. The German situation is clearly different.

Neither can the aid in question be considered to constitute aid for an important project of common European interest, nor has Germany put forward any argument that this might be the case.

5. The derogations provided for in Article 92 (3) (a), concerning aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment and in Article 92 (3) (c), concerning aid to facilitate the development of certain economic activities or of certain economic areas, may well constitute the legal basis for the verification of the compatibility of the aid measures in question with the common market.

The Commission decided in January 1994 that the new *Bundesländer* belong to the areas in need for assistance pursuant to Article 92 (3) (a) (aid N 464/93) and the Commission takes due account of this fact in this Decision.

As regards the question whether the derogations provided for in Article 92 (3) (c) can apply, it should be recalled that the Commission in its decisions concerning the THA and its successor institutions referred to in Chapter II took into consideration that the THA's task — to support the transformation of a planned economy into a market economy — is without precedent in the history of the Community. The Commission also took into due consideration the grave social and economic problems in the five new *Bundesländer* and East Berlin.

The Commission notes that in 1990 the companies and parts of companies in question were quite unprofitable, due to the large number of obsolete plant and high operation cost. The integration in products and production processes and the interdependence of the sites made it possible to maintain a chemical industry there only if the core activities of Buna, SOW and Leuna LDPE could be privatized as one polyolefine activity, and if other activities were split off and privatized separately. It was obvious from the start that high investment was required and that the first years of operation

would bring losses which no private investor would be willing to bear alone. Dow was the only investor who after several calls for tender submitted a coherent plan for the complete privatization of the polyolefine activity, with a long-term perspective of profitability, and who was thus willing to continue the restructuring that THA and BvS had initiated.

It is the Commission's opinion that the investment aid and loss compensation which were started by the THA and continued by the BvS, before the privatization took place, and which are the subject of the present procedure, should be judged together with the restructuring aid awarded under the privatization contract prepared by Dow. For both groups of aid the Commission requires that a satisfactory restructuring plan be available. The privatization plan submitted by Dow, which is based on the existing cracker and chlorine capacities and aims at expanding the value added chain based on olefines, was described in point II of the enlargement of the procedure⁽¹⁵⁾.

The Commission decided to have Dow's business plan and the basic conditions on which it is based analysed by independent consultants, who found them solid. In the present decision the Commission has given due consideration to the thorough report of its consultants.

The consultants confirmed that Dow is a suitable partner for BSL, given its experience and know-how in chlorine production as well as the production of olefines and their derivatives. In addition, Dow has major synergism in marketing and Dow's internal demand for aniline and acrylic esters is a major benefit for BSL.

6. Investments

- 6.1. The concentration of cracker capacity at Böhlen and the upgrading of chlorine capacity at a competitive level, which form the basis of Dow's plans, were commissioned by THA and BvS before the privatization. The remaining problem of assuring the supply of feedstock to the cracker at competitive prices was solved by the plan to build a pipeline from Rostock to Böhlen. This also necessitated new storage capacity for ethylene, as well as new brine and propylene pipelines to Buna.
- 6.2. As for the derivatives, there was insufficient demand to absorb the existing ethylene, propylene, chlorine and benzene capacity of the installations

⁽¹³⁾ Aid NN 11/91; Commission Decision of 31 July 1991.

⁽¹⁴⁾ OJ No L 66, 13. 3. 1991, p. 22.

⁽¹⁵⁾ OJ No C 203, 8. 8. 1995, p. 6.

which could be upgraded; only butadiene capacities could be used in full. Given that transportation to other sites would have entailed high cost, Dow analysed possibilities, amongst others in the form of new installations, to balance production and processing of key raw materials with minimal logistics cost, whilst having due consideration for the main existing areas of activity of BSL and Dow. This complete integration of continued processing of the complete first stage processing output is a key condition for an inland production site to become competitive, a view shared by the consultants. Only for final, solid products such as rubber, PVC and polyethylene is overland shipping usual for a distance of 200 to 500 kilometres, which according to the new plan will also take place at BSL. Taking into account the criteria of profit optimization over a chosen period of 13 years and cost minimization (capital, operation and sales cost), Dow has according to the consultants proposed an optimal configuration for the three sites. Almost none of the planned projects can be broken out of the company plan without jeopardizing the objective of profitability after restructuring. Only the necessity of aniline production and the related dealkylation plant could, in the opinion of the consultants, be questioned. The aniline plant was also questioned by a third party within the framework of the procedure.

Dow itself commented under the procedure that the production at Böhlen of aniline is an essential and necessary part of its business plan. It also stated that BSL's total aniline production will be required by Dow for captive consumption at Stade. Dow expected that there would be no sales of aniline to third parties and that Dow would continue to purchase aniline for its MDI production at Estareja in Portugal from Anilina de Portugal, who would therefore not be affected.

Germany, when requested by the Commission to comment on the production of aniline, noted that the totality of the aniline produced at Böhlen will be transported to Dow's MDI plant at Stade in Lower Saxony. Aniline being a derivative of benzene, one could in principle think of transporting benzene to Stade and to construct an aniline plant there. However, Germany pointed out that that benzene is more explosive than aniline and that it belongs to category 3 of perilous substances to groundwater, whereas aniline belongs to the less dangerous, though still perilous category 2. Through the higher value added of aniline it is more economical to transport this substance over long distances than benzene. Furthermore, the necessary supply of ammonia for aniline production is nearer in Böhlen than in Stade. Alternatives to aniline production, such as the production of phenol, would not be possible because of a lack of propylene and because a phenol production unit would not absorb the output of hydrogen. Neither

would it make sense to sell benzene to others, given that there is no local demand for this product and that it would hence have to be transported to Rotterdam or even farther.

The consultants found the arguments of Germany and of Dow valid, in the sense that any alternative to the aniline plant would be less commercially attractive and have the effect of reducing cash flow and hence impact on the profitability of the project.

The Commission subscribed to its consultants' view that the dealkylation plant and the aniline plant form an essential and necessary part of the Dow business plan, but also agreed with its consultants that it is not essential that the aniline plant should be built at Böhlen, even though alternative sites would be less attractive financially. The Commission concluded that the need for aid going beyond the regional incentives available in Germany had not been convincingly demonstrated for the aniline plant in Dow's business plan.

By letter dated 10 October 1995 Germany informed the Commission that it would exclude the cost of the aniline plant, which amounts to DM 150 million, from the Dow business plan aided by BvS. Within the framework of the privatization, no investment aid or cash-flow compensation would therefore be awarded to the construction of an aniline plant.

The Commission notes that the cost of the aniline plant was estimated at DM 227 million in Annex 7 to the privatization contract. The difference between this sum and the DM 150 million which Germany has excluded from the plan, consists of the following items:

- DM 27 million for a nitric acid plant,
- DM 35 million for a nitrobenzene plant, and
- DM 15 million for a waste water installation.

Both the nitric acid plant and the nitrobenzene plant are necessary for processing benzene to nitrobenzene, which can be processed to aniline. The two plants in question serve no other purpose. The Commission is of the opinion that Germany has failed to demonstrate that the two plants in question are necessary and essential for the complex, given that the aniline plant has been excluded from the Dow business plan. Consequently, no sufficient justification has been presented for the DM 62 million investment aid which Germany intends to award for these plants.

Regarding the waste water installation, the Commission notes that this benefits several other installations than those linked to aniline production. The Commission therefore accepts the necessity of this part of the aid, amounting to DM 15 million.

Within the framework of the procedure, a third party also questioned the investment in the VCM and PVC plants.

The Commission notes that the upgrading of the PVC plant, which is estimated to cost DM 46 million, will not increase nominal production capacity. The Commission also notes that, according to its consultants' expectations, this capacity of 125 000 t/a will only account for 1,9 % of installed PVC capacity in western Europe by the year 2000 and that the utilization of capacity in the coming 10 years is expected to be above 89 %.

Neither does the investment in the VCM plant constitute additional capacity. Buna possessed a relatively large and competitive VCM plant with a capacity of 330 000 t/a before its acetylene cracker was shutdown. This shutdown created imbalances between chlorine production capacity and VCM capacity; the very low operating level of the VCM plant will come to an end by the investment in an additional EDC train. The Commission's consultants consider this balancing to be very important to ensure the economic viability of the chlorine chain. The Commission notes that Dow/BSL are expected to account for 4,8 % of VCM capacity in western Europe by the year 2000 and that the utilization of capacity in the coming 10 years is expected to be above 89 %.

- 6.3. The Commission concludes that the investment programme consists of interlinked elements, each of which is necessary in order to create the integrated and viable complex proposed by Dow. None of these elements can be left out or modified without endangering the complex as a whole.
- 6.4. The Commission has also looked at the evolution of capacities resulting from the investment programme.

In 1990, when the THA started the restructuring of the companies in question, olefine capacities in the new *Bundesländer* was as follows:

— Ethylene Böhlen (SOW)	330 kt/a
— Ethylene Leuna	90 kt/a
— Ethylene equivalent Buna (acetylene)	300 kt/a
— Total capacity	720 kt/a

Since 1990, these olefine capacities were reduced to 450 kt/a further to the shutdown of the crackers in Leuna and Buna (a reduction of 37,5 %), despite the upgrading of the cracker at Böhlen by 120 kt/a. Furthermore, total cracker capacity (C2—C4 and secondary cracker products) will be reduced by 12 % from 918 to 808 kt/a. Because of the feedstock supply (LPG, propane, butane) the downstream plants dispose of less aromatics and pyrolysis gasoline. This capacity reduction represents a certain counterpart in the interest of competitors to the distortive effect of the aid.

At Buna, the older, less efficient and more polluting plants were shut down. Other production units will be shut down at a later date, such as the existing 100 kt/a ethylene oxide plant, the 40 kt/a propylene oxide and the expanded polystyrene plant (12 kt/a).

The planned capacity increase for derivatives is, as set out above, necessary in order to process feedstock and thereby to establish and secure the competitiveness of the company. It is the unavoidable consequence of the integrated concept which Dow is proposing. Basically it concerns the expansion of benzene capacity from 75 to 122 kt/a and production of caustics, as well as the introduction of new capacity through new installations for the production of LLDPE (210 kt/a), PP (200 kt/a), VCM/EDC (300 kt/a), acrylic acid (90 kt/a), acrylic ester (93 kt/a), oxychlorine and aniline (130 kt/a). As was explained above, the aniline plant has been excluded from the investment plan aided by BvS.

The construction of an additional oxychlorination train allows for a complete use of capacity of the existing chlorine plant, as well as the existing VCM plant.

The construction of the new LLDPE plant with Dow's own technology replaces the HDPE plant, which the THA had planned to balance ethylene capacity in Böhlen with processing capacity in Leuna and Buna. Dow's choice fits better in the product range.

Propylene needed to be balanced as well as supply and demand for ethylene. This should be achieved by constructing the polypropylene plant and the acrylic acid plant. In order to integrate production of acrylic acid as well in the production of derivatives, Dow intends adding an additional acrylic esters plant.

The Dow programme also provides for a replacement of the existing aromatics plant by new

C5—C9 plants and a pyrolyse gasoline/distilling plant, in order to maximize production of benzene. Half of benzene production will be consumed by the new aniline plant that was excluded from the Dow business plan aided by BvS.

With these new capacities Dow will be able to further process on the spot all products of the first processing range, namely ethylene, propylene, butadiene and chlorine which, although manufactured at competitive prices, could only be transported to other plants with heavy cost, thereby losing their competitiveness. The configuration chosen by Dow frees the products it brings on the market from their important logistic handicap, by adding value. The configuration makes the products competitive by achieving the best possible integration. If a link were to be removed from this chain, capacity in the first processing range would remain idle, or the product would have to be

transported to other sites, which would undermine the soundness of the concept.

The Commission has also investigated whether the expansion of capacity and the introduction of new capacity will lead to overcapacity on the Community market or will take place in areas where structural overcapacity already exists. The Commission is of the opinion that none of the plants will create overcapacity, nor do its consultants expect that there will be structural overcapacity in any of the product areas in question, perhaps with the exception of aniline. As set out above, the aniline plant will not receive aid under the privatization contract.

The independent consultants expect the following growth in demand in western Europe between 1994 and 2000 and utilization of capacity in the latter year:

Ethylene (%)	LDPE (%)	LLDPE (%)	HDPE (%)	PP (%)	Acrylic acid (%)	Butadiene (%)	VCM (%)	PVC (%)	Benzene (%)	Aniline (%)
2,3 96	0,6 90	8,1 90	3,5 99	4,4 90	11,5 90	2,7 92	1,4 90	2,3 94	1,2 86	5,4 78

Neither have any third parties demonstrated within the framework of the procedure that the aid in question would serve to create or expand capacity in areas with structural overcapacity.

6.5. The Commission has also looked at the effects of the planned rationalization and restructuring on the European market for petrochemicals.

Product	Dow capacity in Europe		Dow market share (%)	
	1995	2000	1995	2000
Polyethylene	1 025	1 380	8,8	11,2
Polypropylene	—	200	—	2,6
Caustic	990	1 215	7,0	8,7
Chlorine	880	1 080	7,1	8,7
VCM	—	330	—	4,8
PVC	—	125	—	1,9
Acrylic acid	—	90	—	9,9
Aniline	—	130	—	13,0
Benzene	870	1 070	11,3	13,3
PBR	—	50	—	9,7
SBR	—	70	—	6,9
Ethylene	1 575	2 065	8,0	9,9
Propylene	720	965	5,3	6,7
EDC	310	765	2,5	6,1

The Commission verified the compatibility of the merger pursuant to Council Regulation (EEC) No 4064/89 and decided not to object to it⁽¹⁶⁾.

- 6.6. The sum of investment in current projects outside the original DM 3 816 million laid down in the Dow's business plan, which THA and BvS had begun earlier and which could be inserted into Dow's plan, amounts to DM 245 million in so far as Buna and SOW are concerned. This amount consists of DM 70 million purchase and construction cost of investment incompatible with the Dow plan, DM 159,6 million cost for the EPS (expanded polystyrene) and oxychlorination plant and the plant for producing unsaturated polyesters and the dispersion plant amounting to DM 14,1 million. Apart from an amount of DM 33,8 million for which the Commission had not yet given its approval, these amounts were approved by the Commission in previous decisions (see Chapter II, points 2.2 and 2.3). In Leuna-Polyolefine DM 16,4 million was not yet approved by the Commission. In order to prepare the privatization, to secure the safety of employees and the environment and to reduce the cost of operating obsolete and uneconomical installations, the THA and the BvS had to begin the restructuring even before an investor had been found. The measures were limited to the minimum necessary for this purpose.

- 6.7. The Commission has also considered whether the totality of the investment aid in question really is necessary for the project to be achieved, taking into account that investment aid will also be awarded under schemes for regional development.

Given that various other types of aid will also be granted to this project, the question of the necessity of all of the investment aid should not be judged in isolation. It would be more appropriate to look at the justification for each type of aid first and then to assess whether the aid package as a whole is necessary.

- 6.8. The compatibility with the common market of DM 684,5 million of the investment aid provided for in the privatization contract need not be assessed in the present decision. This sum consists of DM 201,5 million for investments, the financing of which by means of guarantees and loans had already been authorized by the Commission under previous decisions. The Commission also notes that DM 483 million of the proposed investment aid can be replaced by aid under regional investment aid schemes approved by the Commission. The Commission is well aware that the *Länder* Saxony-Anhalt and Saxony have not yet finally

decided to award the aid. It is, however, the opinion of the Commission that investment aid in assisted regions should in the first place be awarded under aid schemes approved by the Commission for that purpose. Supplementary aid, such as that awarded by the BvS, should not take the place of such aid schemes.

- 6.9. The Commission has also looked into the possibility that Dow may have over-estimated the amount of investment necessary for the restructuring. The Commission notes that investment aid will only be awarded for investment that has actually been realized. However, given that BvS will pay an incentive of 20% to BSL for that part of its potential contribution that will not be spent, Dow could have had an interest in presenting inflated plans. The Commission notes in this context that its consultants believe that Dow's estimations are indeed on the high side. They assume that the estimations for installations are inflated in the order of 10 to 20%, whilst conceding that there is a general tendency in the chemical industry to inflate investment estimations.

Germany noted on this point that the investment in question does not take place on a green-field site, but has to be integrated in an existing and highly interdependent group of sites, in an ongoing production process, which could increase investment cost.

The difficult integration of inter-linked individual building blocks involves risks which can hardly be estimated in a blueprint.

Calculation margins are unavoidable when planning such installations with highly complicated process technology and unknown factors. In order to be able to control precisely the cost that actually takes place, BvS included the following control mechanisms in the privatization contract:

- Under Article 8 (3) (1) of the privatization contract, BvS provides its capital contributions as follows: for the period between the economic transfer date and 31 December 1995 BvS shall pay to BSL an instalment in the amount of DM 250 million for quite specific projects. For each year of the restructuring period beginning in 1996 BSL shall provide BvS no later than on 7 November of the previous calendar year with an investment budget in which the investments budgeted in that calculation period and the type, cost and financing of such investments are described and all significant deviations from the reconstruction programme, if any, are explained and justified qualitatively and quantitatively.

⁽¹⁶⁾ OJ No C 148, 15. 6. 1995, p. 4.

The investment budget shall include a funding schedule stating the amounts to be financed by BvS and the respective due dates of all amounts in detail, an updated overall calculation and an updated project schedule for the reconstruction programme.

- Under Article 8 (3) (2) of the privatization contract, BSL shall provide to BvS together with the capital budget by no later than 7 November of each calculation period a preliminary investment report stating the amounts actually spent for the first three quarters of such calculation period and scheduled to be spent during the remainder. Any difference between the capital contributions by BvS and the amounts spent on projects listed in the preliminary investment report shall be offset against the capital contributions to be paid by BvS for the following calculation period.
- In addition, BSL shall for each calculation period submit, together with the annual financial statements, an investment report containing a detailed report on the implementation of the investments contemplated in the capital budget and the amounts actually spent on such investments. The investment report will be audited by the auditors of BSL. Any difference between the amounts stated in the preliminary investment report for such calculation period and in the investment report will be offset against the capital contributions to be paid by BvS for the following calculation period.
- Under Article 8 (3) (3) of the privatization contract, BSL shall prepare a final report within three months after the end of the restructuring period on the basis of the investment reports.
- Under Article 13 (2) of the privatization contract, the annual budget of BSL, together with the investment budget and the updated reconstruction programme, is submitted to the shareholders' meeting of BSL (with BvS as a shareholder) in November for final approval as a binding basis for its implementation and for the investment budget for the next accounting period.
- Under Article 14 (2) (1) of the privatization contract, BSL shall submit to its shareholders (including BvS) after the end of each calendar quarter a reviewable quarterly report, which *inter alia* includes the status of the capital budget showing the investment of the funds provided by BvS.
- The audit of the year end financial statements of BSL will be conducted jointly by an auditor nominated by Dow and an auditor nominated by BvS (Article 14 (2) (2)).

— Article 14 (4) of the privatization contract provides that the Bundesrechnungshof shall have the right to conduct a special audit for each calculation period pursuant to Section 104, paragraph 1, No 3 in connection with Section 88 *et seq.* Bundeshaushaltsordnung.

It is the Commission's view that BvS has instituted the mechanisms needed for a comprehensive, detailed and ongoing control of the investments, as a shareholder and as financier of that necessary investment.

Finally, BvS included an additional control mechanism through its incentive scheme. In general terms the Commission is of the opinion that an incentive to limit investment — and hence the aid linked to that investment — to the minimum necessary is to be applauded. Under these circumstances the Commission does not object to the incentive as a matter of principle, the more so as BSL is obliged pursuant to the privatization contract to reinvest incentive payments in the petrochemical complex. However, the Commission cannot accept that incentive payments take place on the margin of 10%, which according to the Commission's consultants is the minimum over-estimation of investment cost. An incentive of 20% can therefore only apply to a reduction of investment in excess of 10%.

The Commission has in this context also taken note of the explanation provided by Germany on the interpretation of Annex 8.3.4 to the privatization contract, which excludes the possibility of incentives being paid to BSL for the DM 483 million aid that BvS does not need to pay because of payments under aid schemes already approved by the Commission (see point 6.8).

7. Cash-flow compensation

- 7.1. Under Article 9 of the privatization contract, BvS will compensate to BSL any negative cumulative cash flow during the restructuring period in full up to a maximum of DM 2 650 million. BvS will furthermore compensate one half of any negative cumulative cash flow in excess of DM 2 650 million up to DM 3 650 million. The maximum BvS could be called upon to pay under this heading would therefore amount to DM 3 150 million, in which case Dow would contribute DM 500 million as well.

According to Article 15.3.1 of the privatization contract part of the cash-flow compensation

payment will be used to subsidize the price BSL will pay for power. Under the procedure this element was quantified by Germany as amounting to DM 162 million. As set out in detail in point 8 of this chapter, the Commission is of the opinion that the subsidization of energy prices, even for a limited period, is not related to the restructuring that is being carried out and that such aid is in principle a form of operating aid that is incompatible with the common market. As set out in Chapter III point 3, Germany, in the course of the procedure, decided to withdraw this part of the proposed aid and announced that the privatization contract would be modified accordingly. The proposed aid ceilings referred to above are hence reduced by DM 162 million from DM 2 650 to DM 2 488 million and from DM 3 150 to DM 2 988 million.

- 7.2. The Commission has investigated this compensation in relation to the restructuring programme. Based on its experience with other cases of restructuring aid, it is of the opinion that a five-year restructuring plan, which can be prolonged to seven years if unforeseen circumstances should occur, is relatively long. However, the present case involves important investment in several links of the production chain, and this at three different sites, which creates problems of timing in order to avoid bottlenecks in the production process. Under those circumstances a duration of the restructuring period of five years is justifiable. If unforeseen circumstances should occur that would make it necessary to prolong the restructuring period beyond five years, this should be notified to the Commission in sufficient time pursuant to Article 93 (3) of the Treaty.

The complexity of the restructuring referred to above also entails considerable risk of extraordinary losses during the restructuring period. Notably delays in the construction of the pipeline to Rostock would entail huge additional transportation cost for the duration of the delay. Other important factors likely to lead to losses in the restructuring period are the cost of overstaffing, given that excessive personnel will be discharged gradually from 5 600 on 1 June 1995 to 2 200 by 1 June 1999, and the unprofitable exploitation of the existing installations until these have been upgraded or replaced. Risk in excess of the cash-flow compensation will be borne by Dow.

- 7.3. The Commission has also verified whether there is a risk that BSL will artificially raise its losses in order to consume the maximum of the potential compensation, whether BSL might pass on parts of the compensation to its mother, Dow, and whether BSL might use the compensation in order to sell its products at inappropriately low prices.

The Commission notes that the privatization contract contains a system of quarterly reports, as well as audits of the annual financial statements of BSL. Furthermore, BSL will submit to BvS annual reports on its financial relationships with Dow and companies belonging to Dow. The Bundesrechnungshof will have the right to conduct a special audit. The Commission also notes that the privatization contract contains an incentive for BSL not to consume the totality of the cash-flow compensation up to the maximum of DM 2 650 million, in the form of a 33 % premium on the amount not consumed by the end of the restructuring period.

Article 10 of the privatization contract and the corresponding Annexes, which were all submitted to the Commission, contain the conditions on which products, services, licenses, technical assistance and loans are made available between the companies. These commercial conditions are unusual in their set-up, but they are not completely uncommon between related companies — a point of view with which the Commission's consultants concur. The marketing and sales agreement annexed to the contract contains clauses which exclude the possibility that Dow as BSL's marketing and sales agent might sell BSL's products at inappropriately low prices.

8. Energy

- 8.1. In Article 15 (1), the privatization contract states that the existing power and steam contracts between Buna and Veba Kraftwerke Ruhr AG and Kraftwerk Schkopau GmbH (collectively VKR) need to be substantially renegotiated and changed. Until these changes have been achieved and in so far as changes would not be sufficient for a profitable exploitation of BSL, the contract contains four clauses under which the price BSL pays for its purchase of steam and power is to be subsidized by BvS: Article 15 (3) provides for an unquantified subsidy of power and steam prices during the restructuring period in addition to the cash-flow compensation discussed in point 7 of this chapter, Article 15 (4) provides for the possibility — for which renegotiations would be a prerequisite — of an additional subsidy of power and steam prices in the period after the restructuring and up to 31 December 2014, Article 15 (3) in combination with its Article 9 provides that an unquantified part of the cash-flow compensation discussed in point 7 of this chapter would also be destined to subsidize power prices, Article 15 (5) provides for additional steam operating cost.

8.2. In its letter dated 14 July 1995 enlarging the procedure and within the framework of that procedure the Commission took the position that it saw no justification for such operating aid. Energy contracts are negotiated between individual companies, without State aid being available to cover the gap between the amount the purchaser of energy is prepared to pay and the amount the supplier wishes to receive. Germany has furthermore not demonstrated convincingly that such aid to energy prices is the consequence of, or even linked to, the restructuring process. Neither could such aid be considered compatible pursuant to the derogation provided for in Article 92 (2) (c) of the Treaty, because aid to subsidize energy prices is not required to compensate any disadvantages caused by the former division of Germany. This view is confirmed by the facts of the present case, as the existing energy contracts were concluded after the unification of Germany, VKR's power plant at Schkopau was also built after the unification, and Buna and Leuna already existed before the division of Germany took place.

8.3. During the procedure Germany stated that no aid would be awarded pursuant to Article 15 (4) of the privatization contract. Germany quantified the other three open-ended energy aid amounts described in point 8.1 as follows: The part of the cash-flow compensation that subsidizes power cost referred to in Articles 15 (3) and 9 of the privatization contract would amount to DM 162 million. The additional compensation of power and steam cost referred to in Article 15 (3) and (5) of the privatization contract, would have a present value of DM 804 million. Total energy aid would hence amount to DM 966 million.

8.4. After lengthy discussions, in which also DOW and VKR participated, Germany agreed to withdraw its proposal and to renegotiate the privatization contract in the sense that Article 15 (3) and (5) would be completely deleted and the cash-flow compensation ceilings would be lowered by DM 162 million, in order to exclude the compensation.

The Commission concludes that these modifications, which it will be able to verify in the renegotiated privatization contract, completely meet its initial objections.

9. Structural deficiencies

9.1. Article 9 (2) of the privatization contract provides for an up-front payment by BvS to BSL of

DM 440,5 million, which will be booked as capital contribution, and which will serve to compensate remaining structural deficiencies after the restructuring period.

9.2. The Commission had two objections to this aid. First, aid should be necessary to compensate certain disadvantages after the restructuring had been completed. This would lead to the conclusion that the restructured BSL would still not be viable and under those circumstances the compatibility of the aid package as a whole would become doubtful. Secondly, aid destined for the period after the five-year restructuring period should be paid at the beginning of that restructuring, thus providing BSL with interest on this sum during five years.

9.3. Within the framework of the procedure Germany justified DM 96 million of the DM 440,5 million. It concerns the cost of operating an environmental monitoring system after the restructuring period. This sum and its justification are described in detail in point 12 of this chapter.

A justification was also provided for the cost of constructing an additional boiler system, initially amounting to DM 129 million. Under the procedure it was clarified by Germany that the cost in question constitutes investment cost rather than operating cost and that it was not included in the investment sum mentioned in the original notification, although the investment would take place inside the restructuring period. After discussions with the Commission, Germany decided to increase the sum of restructuring investment by DM 172 million. Similarly, the remaining DM 215,5 million up-front payment was also replaced by additional investment in the cracker and the benzene plant, the construction of propane tanks and a styrene plant amounting to DM 286 million. The additional investment, will replace operating costs that would otherwise be necessary after the restructuring period. The investment aid ceiling will correspondingly be raised by DM 384 million.

9.4. It is the Commission's view that there is an important difference between aid to finance restructuring investment leading to a profitable exploitation, and operating aid serving to compensate operating cost for a longer period. Under the Community guidelines on State aid for rescuing and restructuring firms in difficulty⁽¹⁷⁾ the first type of aid can be considered compatible, if certain conditions are fulfilled, but not the second type.

⁽¹⁷⁾ OJ No C 368, 23. 12. 1994, p. 12.

9.5. The Commission concludes that of the DM 440,5 million only DM 96 million aid to compensate structural disadvantages remains. The compatibility of this aid is examined in point 12. The remaining sum of DM 344,5 million will not be awarded in its original form, but a corresponding amount will be awarded as investment aid, the compatibility of which was examined above in point 6. None of these amounts will be awarded as up-front payments, unless they are discounted to their present value (see also point 13).

10. Social cost and liabilities

10.1. As set out in point 7.2 of this chapter, BSL will reduce its employment from 5 600 to a level of at least 2 200 by 1 January 1999; under the privatization contract Dow is obliged to maintain 1 800 jobs until the year 2003. For the discharged personnel a social plan has been worked out with a budget of DM 110 million. The Commission, in accordance with point 3.2.5 of the aforementioned Community guidelines on State aid for rescuing and restructuring firms in difficulty, looks favourably on such aid.

10.2. DM 110 million is the maximum liability for BvS for legal reasons not expressly provided for in the privatization contract (see privatization contract Article 29). DM 10 million of this sum is the maximum risk for legal costs entailed by the discharge of personnel referred to above.

The Commission notes that the sum of DM 110 million is not a grant to BSL or Dow, but rather constitutes a guarantee against unknown claims, which is not unusual in the case of transfers of companies. The Commission accepts that it is a *conditio sine qua non* for the privatization and hence for the restructuring to take place.

11. Waiving of debt

11.1. In previous communications (see Chapter II, point 4) Germany informed the Commission of previous waivers of debt. For a successful restructuring according to Dow's business plan a complete waiver of long-term debt by the date of transfer (31 May 1995) is held necessary. In its decision of 25 November 1992 on the activities of the THA the Commission noted that the longer a company is held by the THA, and the higher its debt to or guaranteed by the THA is, the less likely will it be

that a buyer can be found who will take over these debts or guarantees; as time goes by, loans and guarantees end up being grants. In the present case the waiving of loans, which were at the time granted legally according to Community law, reflect the fact recognized by the Commission in 1992. In order to give the companies a chance to re-establish their long-term profitability, Germany needed to forgo its claims on repayment of loans. This was the only way to prevent that the burden, resulting from the revolutionary changes that took place in the chemical industry in the former German Democratic Republic between 1990 and 1995, would become excessive.

The Commission also notes in this context that there is no difference, in terms of aid control, between a situation where BSL is taken over free of debt for an appropriate price, and on where it is sold with its debt for a negative price. The higher indebtedness in the latter case would, however, cause a more negative cash-flow and correspondingly higher compensation payments during the restructuring period.

The waiver on 31 May 1995 amounted to DM 765,98 million for Buna and to DM 700,54 million for SOW, making a total of DM 1 466,52 million.

11.2. The Commission also investigated whether the waiver provided for in Article 3 of the privatization contract leaves BSL in a better position than other chemical companies in Europe in general and in Germany in particular and whether all debt is waived. Germany stated in this context that there is no complete remittal, given that only specific loans are waived and that other liabilities resulting from current operations are not remitted. The waiver goes together with the skimming of BSL's positive working capital at that date.

After the waiver BSL's equity/total assets ratio of 33 % will be lower than the latest available figures for this sector (1991) of the Bundesbank showing a German average of 39 %. The German chemical industry association calculated an average of 36,5 % for 1994. According to balance sheet comparisons made by Goldman Sachs, the equity/total assets ratio of European and American competitors varies between 32 and 42 %. Consequently BSL's equity/total assets ration is not more advantageous than those of its competitors.

A second way of measuring the proportionality of the waiver of BSL's debt is to calculate the

financial cost of companies in relation to their turnover. The Commission notes that BSL's interest burden will account for 2% of projected turnover, whereas the industrial average in this sector in Germany according to the Bundesbank was 1,3% in 1991 and 1,6% in 1992. Competitors in the Community had an average interest burden of 1,6% in 1994.

BSL's interest burden of 2% takes into account the financing of the first part of the purchase price (DM 300 million), but not the future sale of the remaining 20% of the shares, nor Dow's contribution to investment, nor its compensation payments to a cash-flow deficit.

The Commission concludes that the waiver does not leave BSL in a more advantageous position than its competitors. The Commission also notes that Dow could have opted instead for buying the assets only of the three companies, in which case all liabilities would have remained with the BvS.

- 11.3. As was set out in Chapter II, point 3, the Commission expanded the procedure of Article 93 (2) against aid to Leuna, in order to ensure equal treatment with the aid to Buna and to SOW, given that all three companies were caught by the same restructuring plan. Leuna-Polyolefine GmbH was split off without debt from Leuna, leaving its liabilities with the latter company. The aid falling under the procedure includes a guarantee of DM 266,2 million for investment in the first half of 1994, as well as a shareholder's loan of DM 230,5 million for investment in 1993. Of this aid, DM 33,8 million relates to investment in Leuna's LDPE business, of which DM 17,4 million was withdrawn, leaving DM 16,4 million still to be assessed, of which sum Leuna-Polyolefine GmbH is the real beneficiary.

The remaining guarantee and the shareholder's loan totalling DM 462,9 million to Leuna-Werke GmbH were necessary for carrying out plans to privatize parts split off, such as Leuna-Tenside GmbH (70 employees), Leuna-Katalysatoren GmbH (157 employees) and Leuna Chemtec GmbH (92 employees). The measures necessary for maintaining the site and for fulfilling legal environmental and safety requirements were limited to what was absolutely necessary, thus stabilizing production without creating any new capacity.

In its decision of 18 September 1991 on the activities of the THA referred to in Chapter II,

point 1, the Commission laid down that the THA can award guarantees and loans to its companies before their privatization, allowing them to continue operations. The Commission decided in 1991 that these can be considered compatible with the common market, if they are limited to the minimum necessary to secure the continued existence of the companies. As stated above, the measures taken to prepare for privatization and to prevent environmental and other damage were absolutely necessary. As they furthermore did not increase capacity, the Commission considers them compatible with the common market, based on its decisions of 1991 and 1992 on the activities of the THA and of 1995 on the THA's successor institutions.

- 11.4. In accordance with point 3.2.2 (iii) of the aforementioned Community guidelines on State aid for rescuing and restructuring firms in difficulty, if such aid is used to write off debt resulting from past losses, any tax credits attaching to the losses must be notified.

12. Demolition cost and environmental measures

- 12.1. In its Article 21 the privatization contract provides for a full environmental indemnification by BvS for pollution which was in existence prior to the economic transfer date, or which arises during the restructuring period from operations existing as of the economic transfer date, without any quantification of the cost this entails to BvS. Under the procedure Germany communicated to the Commission that according to their best estimates the sum would not exceed DM 1 billion and that they would notify the Commission pursuant to Article 93 (3) of the Treaty if this ceiling should be insufficient. Article 21.11 of the privatization contract provides that the environmental pollution referred to above will be recorded by an expert, who will be appointed jointly by the contracting parties.

As was set out in Chapter III, point 3, the bulk of the DM 1 billion does not constitute aid and the remainder, which does constitute aid, cannot be quantified. The Commission also recognizes that it was materially impossible for companies in the new *Bundesländer* to adapt their installations on 1 July 1990 to the standards applicable in the old *Bundesländer*. The THA and subsequently the BvS shut down the most polluting installations and carried out necessary investment to adapt the

remaining installations to mandatory standards, as referred to in Chapter II, points 2, 3 and 4, but this took time and meanwhile pollution continued. In such a situation the Commission believes it justifiable to divert from the 'polluter-pays principle' laid down in Article 130R (2) of the Treaty, in accordance with the Community guidelines on State aid for environmental protection⁽¹⁸⁾ which in its point 3.4 allows for environmental operating aid under certain well-defined circumstances.

- 12.2. Chlorine and mercury pollution at great depth on the Buna site causes a continuing threat to groundwater. It is therefore necessary to develop and to apply for a very long period a monitoring system to deal with this hazard. The cost of developing such a system is estimated to amount to DM 75 million; this development, as well as its operation during the restructuring period, will be aided under the cash-flow compensation dealt with above under point 7. The cost of operating the system after the restructuring period is estimated to have a discounted value of DM 96 million and was mentioned above in point 9.3 The Commission notes that the monitoring system is exclusively designed to deal with the mercury pollution caused in the past and which has been brought to an end. Under these circumstances the Commission accepts that the amount of DM 96 million will have no effect on BSL's operations and that it can hence be considered compatible with the common market.

- 12.3. During the restructuring period BSL will completely dismantle, demolish, vacate and dispose of all obsolete or redundant plants, equipment and property located on all land of BSL. Pursuant to Article 22 (5) of the privatization contract BvS will reimburse BSL up to a maximum amount of DM 750 million.

The Commission notes that most of the buildings are heavily polluted and that their demolition includes the excavation of polluted land. The Commission is of the opinion that these demolition measures, which have already been started by the THA and the BvS, are a necessary prerequisite for the restructuring to take place. As set out in point 12.1 above, there are good reasons in this case to deviate from the 'polluter-pays principle' and to allow the State to finance the demolition, which furthermore does not affect BSL's own operations.

- 12.4. The Commission also verified whether BSL might make a profit by selling land after it had been cleaned up. The Commission notes that any such sale above DM 1 million during the period in which BvS is a shareholder would need the latter's approval. Furthermore, any income from such sales during the restructuring period would decrease the cash-flow compensation awarded by BvS. The Commission also took note of Germany's assurances that Dow has no intentions to sell land belonging to BSL, but wishes to maintain a green belt around the production sites.

13. General observations

- 13.1. The Commission's consultants concur in their report with Germany's opinion that the restructuring plan drawn up by Dow will make BSL a profitable company. The Commission's original fears that continued operating aid might be necessary after the restructuring have therefore been shown to be unfounded.

On the other hand, the Commission also requested its consultants to indicate whether the aid package to BSL, the details of which are described in points 6 to 12, would exceed the minimum necessary for establishing BSL as a profitable company. On the basis of cash-flow expectations calculated in several ways, the consultants concluded that the profitability of the venture to Dow appeared to be above average and that Dow's own contribution could hence be raised by DM 380 to 760 million, before reaching what could be considered an average profitability.

The Commission notes that these calculations were based on the original aid package, which included the DM 966 million energy aid described in point 8 and the DM 150 million aid to the aniline plant described in point 6. The Commission also notes that this aid totalling DM 1 116 million will now not be granted. Taking into account that the withheld energy aid will be shared between BSL and its energy supplier VKR in proportions to be negotiated between these two companies, the Commission concludes that BSL's own contribution will increase to an amount above the range indicated above and that its — and hence also Dow's — profitability will not be excessive when compared with competitors. The Commission also notes in this context that there are many hidden risks due to the very

⁽¹⁸⁾ OJ No C 72, 10. 3. 1994, p. 3.

unusual nature of the project and that despite all privatization efforts of the THA and the BvS, Dow was the only company willing to take over Buna, SOW and Leuna. The Commission therefore also concurs with the view of its consultants that the point where Dow would lose interest in the project would be reached very quickly.

When it opened the procedure, the Commission also believed that the total amount of aid would be very high, both in absolute terms and in relation to the number of jobs that would be maintained. In this connection, it notes that BvS would have to finance social cost and liabilities (see point 10), the waiving of debt (see point 11), and environmental and demolition cost (see point 12), even if the companies were to shut down immediately. The environmental and demolition costs, and especially social costs, would even be considerably higher in the case of an immediate shutdown.

13.2. The Commission also investigated the price of DM 250 million which Dow will pay for the remaining 20 % of BSL's shares, if it exercises its option to buy these from BvS. On this point Germany stated that BvS and Dow had negotiated this fixed price on the basis of the profit/stock quotation rate in comparable companies, which was extrapolated to the restructured BSL. The Commission notes that the price of DM 250 million is within the higher part of the range thus calculated and that after the completion of the restructuring programme, an annual interest rate of 8 % will be added. The Commission concludes that the price does not involve additional aid.

13.3. Finally, the Commission also investigated whether Dow's contribution to the restructuring is sufficient. The Commission notes that if the totality of the aid described in the preceding points 6 to 12 will be paid out, Dow will contribute the following identifiable sums:

- DM 300 million purchase price for 80 % of the shares in BSL,
- DM 250 million purchase price for the remaining 20 %,
- DM 380 million minimum investment,
- DM 75 million supplementary investment,
- DM 500 million contribution to the cash-flow deficit,

which makes a total of DM 1 505 million. If Dow should decide to carry out its intention to build an aniline plant and necessary ancillary plant, it will itself have to finance this DM 212 million investment.

In view of this sizeable sum and the finding set out in point 13.1, that the aid is limited to the minimum necessary for the restructuring to succeed, it is the Commission's opinion that Dow's contribution is sufficient. In arriving at this conclusion, the Commission has also taken account of the various operating risks during the restructuring period, which may well exceed the modified cash-flow compensation ceilings referred to in point 7 and which would then lead to additional payments by Dow. Dow's commitments to operate the Buna and Böhlen site as well as each of the plants listed in the privatization contract for well-defined periods after the restructuring programme has come to an end also entail a risk, the more so as these commitments are linked to contractual penalties. As set out in point 6.4, no increase in capacity will take place other than what is absolutely necessary for the viability of the project.

13.4. The Commission has also taken into consideration the point that the aid secures an industrial base, with all of its positive ramifications on the employment levels and the region. Article 8 (4) of the privatization contract lays down that Dow and BSL contemplate making investments of DM 1 250 million in addition to the investments under the reconstruction programme until the year 2010, in order to secure the long-term competitiveness, growth and economic viability of the petrochemical complex. According to information provided by Germany, Dow has done its best to attract related manufacturers, notably of synthetic materials, to these sites. Several manufacturers have already signed letters of intent to develop the sites together with Dow.

If the privatization were to fail, however, the basis for the chemical industry in the new *Bundesländer* would be taken away. As set out above, Dow was the only interested party willing to carry out the privatization plan of THA/BvS in its restructuring plan for all three companies. As the companies are not yet competitive, and as one cannot expect that other investors will be found, the companies would have to be shut down, because they cannot be subsidized for an unlimited period. Such closure would, in turn, at the very least endanger other companies and productions in the new *Bundesländer* which depend on the products of the petrochemical complex. This applies, amongst

others, to Domofin NV's caprolactam production, which depends on the supply of, notably, hydrogen by Leuna, the Stickstoffwerke Piesteritz AG, which itself belongs to the hydrogen league of Leuna, Buna, Bitterfeld and supplies part of its production such as ammonia to the petrochemical complex, and the refinery Leuna 2000.

In its considerations the Commission has also taken into account that the new *Bundesländer* belong to the regions in need of regional aid pursuant to Article 92 (3) (a) of the EC Treaty and that the aid in question will promote the economic development in Saxony and Saxony-Anhalt.

- 13.5. The Commission's assessment of the compatibility with the common market of the aid to BSL takes full account of the unprecedented problems which exist in the new *Bundesländer*. The Commission has repeatedly recognized the importance of these problems in its general decisions concerning aid awarded by the THA and BvS, as referred to in Chapter II, point 1 of this Decision.

In this context the Commission notes the following: On the basis of the polyolefin concept forwarded to the Commission by letter dated 21 June 1994 and after previous privatization efforts had failed, Goldman Sachs & Co. was charged with the search for and negotiations with potential purchasers by means of an open and unconditional call for tender. In 1994 the THA offered a letter of intent (LOI) to three potential investors after presentations and concrete negotiations. Two of the three interested parties rejected the LOI, because they only had an interest in certain areas of production. Dow signed a LOI in September 1994. According to the information provided by Germany only this investor presented a conclusive concept for the complete privatization of the olefin complex of all three companies (only part of Leuna) with a perspective of long-term viability. A report forwarded by Germany to the Commission concerning the privatization efforts of Goldman Sachs demonstrates that Dow was in the end the only bidder for the privatization of the three joint chemical enterprises (BSL).

The Commission notes that the restructuring plan which Dow has worked out for BSL meets the requirements listed in the Community guidelines on State aid for rescuing and restructuring firms in difficulty: viability will be restored, undue distortions of competition through the aid are avoided, the aid is limited to the strict minimum needed to enable restructuring to be undertaken,

the aid is related to benefits from a Community point of view, the buyer makes a significant contribution to the restructuring plan from his own resources, no investment is financed unless required for the restructuring, aid for financial restructuring will not unduly reduce the firm's financial charges, the restructuring plan will be fully implemented and will be monitored by the Commission.

In this context, the Commission notes that the restructuring plan will transform the three former companies Buna, SOW and Leuna into a viable, integrated complex. The aid package, as modified within the framework of the procedure and verified by the Commission's consultants, consists of the minimum necessary to achieve this goal; aid amounts for which no justification could be found or which exceeded the minimum necessary were deleted. Whereas olefine capacity will be reduced, capacities for certain downstream products will replace others, increase or be created. The Commission has verified that every one of these increases is an essential and necessary element of the integrated concept and that none of them will create overcapacity. The only doubtful element, the aniline plant and its ancillary plants, was excluded from aided investment. Apart from securing jobs in BSL itself, the restructuring will also have the effect of maintaining and creating employment in this Article 92 (3) (a) region both upstream and downstream from BSL. The Commission finds that, for the reasons stated above, the aid is offset by the Community interest, and concludes that the positive effect of the aid outweighs its negative effects for competitors.

V

Conclusions

1. Of the various interventions covered by the procedure the Commission finds that DM 44 million internal BvS consultancy cost does not constitute aid to the companies in question. A large, but not fully quantifiable part of the DM 1 billion environmental indemnification does not constitute aid either.
2. The Commission has identified a maximum of DM 9 556,22 million to BSL which does constitute new aid and which fulfils the requirement of Articles 92 (1) of the EC Treaty and 61 (1) of the EEA Agreement. The Commission has also identified DM 462,9 million new aid to Leuna-Werke AG.

3. Of the aid to BSL the following elements are compatible with the common market pursuant to Article 92 (3) (a) and (c) of the Treaty, if the conditions set out in point 4 below are met:

- a maximum of DM 2 985,5 million investment aid of the DM 3 436 million provided for in the privatization contract, plus DM 50,2 million for investment outside the Dow programme, minus DM 62 million for nitric acid and nitrobenzene plant (see Chapter IV, point 6),
- a maximum of DM 2 988 million of the DM 3 150 million cash-flow compensation during the restructuring period (Chapter IV, point 7),
- a maximum of DM 220 million social aid (Chapter IV, point 10),
- a waiver of debt amounting to DM 1 466,52 (Chapter IV, point 11),
- the remainder of the DM 1 billion environmental cost and DM 750 million demolition cost (Chapter IV, point 12), plus DM 96 million to operate an environmental monitoring system.

The DM 462,9 million aid to Leuna-Werke is also found compatible with the common market if the conditions in point 4 below are met.

4. The following conditions must be met if the aid set out in point 3 is to be compatible with the common market:

- The privatization contract must be amended in order to insert the modifications of the investment aid described in Chapter IV, point 6, among which the exclusion of the aniline, nitric acid and nitrobenzene plant from aided investment. Article 8.3.4 of the privatization contract must be amended in order to exclude incentive payments on the first 10 % of investment cost saved, as set out in point 6.9.
- The privatization contract must also be amended in order to exclude payments to compensate structural deficiencies after the restructuring period (see Chapter IV, point 9), other than DM 96 million for the operation of an environmental monitoring system mentioned in Chapter IV, point 12.2.
- Article 15.3 and 15.5 of the privatization contract must be deleted, as set out in Chapter IV, point 8.
- The privatization contract must also be amended in order to insert the obligation of prior notification pursuant to Article 93 (3) of the Treaty in the following cases provided for in that

contract: additional cost of an alternative routing of the pipeline, environmental cost in excess of DM 1 billion, payments to Dow in case of the rescission of the contract.

- If the restructuring is delayed for any reason which is beyond the control and the responsibility of Dow, BSL, or their affiliates, and if Dow and BvS should in such case decide to prolong the restructuring period for up to another two years as provided for in Article 7 of the contract, such prolongation must be notified to the Commission pursuant to Article 93 (3) of the Treaty. The privatization contract must be amended in that respect as well.
- In order to avoid that incompatible aid is granted, any award of fiscal advantages attaching to past losses which have been remitted in accordance with point 3.2.2 (iii) of the Community guidelines on State aid for rescuing and restructuring firms in difficulty must be notified to the Commission.
- A copy of the modified contract must be submitted to the Commission within one month of its conclusion.
- Half-yearly reports must be submitted to the Commission on the progress of restructuring and the amount of aid actually awarded under the various items, allowing it to verify that this Decision is complied with. These reports must be submitted in the first semester of the year following the reporting period. For the same purpose, the Commission also wishes to receive the investment reports referred to in Article 8 of the privatization contract, the annual audits referred to in Article 14.2.4 of the privatization contract and the final report referred to in Article 8.3.3 of the privatization contract. If the Commission should find that aid is awarded for other purposes than provided for in the modified privatization contract, or if other misuse of aid takes place, or if more aid is awarded than allowed under this Decision, the Commission can decide on the basis of Article 93 of the Treaty that such aid amounts must be recovered with interest running from the date of payment,

HAS ADOPTED THIS DECISION:

Article 1

Of the new aid which Germany intends to grant to BSL Olefinverbund GmbH, the Commission finds the following amounts compatible with the common market:

	(million DM)
Investment aid up to	2 973,7
Cash-flow compensation up to	2 988
A waiver of debt	1 466,52
Operating a monitoring system	96
Demolition costs up to	750
A social plan up to	110
Court action and liabilities up to	110
Environmental indemnification up to	1 000

Furthermore, the aid of over DM 462,9 million to Leuna Werke AG is also compatible with the common market.

Article 2

Germany shall ensure that the privatization agreement between The Dow Chemical Company, Buna GmbH, Sächsische Olefinwerke GmbH, Leuna-Polyolefine GmbH and Bundesanstalt für vereinigungsbedingte Sonderaufgaben is altered. The following points shall be amended, inserted or deleted:

1. The privatization agreement shall be amended in order to exclude the cost of the aniline, nitric acid and nitrobenzene plant amounting to DM 212 million from the capital contribution of BvS provided for in Article 8.3 of the privatization contract and to include DM 384 million additional contribution for DM 459 million additional investment. Article 8.3.4 of the privatization contract shall be amended in order to exclude incentive payments on the first 10 % saved of the investment cost laid down in the privatization contract.
2. The privatization contract, and in particular Article 9.2 thereof, shall be amended in order to exclude payments to compensate structural deficiencies after the restructuring period, other than DM 96 million for the operation of an environmental monitoring system.
3. Articles 15.3 and 15.5 of the privatization contract shall be deleted.
4. The privatization contract shall be amended so as to include the obligation of prior notification pursuant to Article 93 (3) of the Treaty in the following cases provided for in that contract: additional cost of an alternative routing of the pipeline, environmental cost in excess of DM 1 billion, prolongation of the restructuring period beyond five years, payments to Dow in the event of rescission of the contract.
5. Germany shall ensure that no fiscal advantages can be derived from past losses that are written off.

Article 3

1. A copy of the modified contract shall be submitted to the Commission within one month of its conclusion.
2. Any deviations from the modified contract together with any award of fiscal advantages attaching to past losses shall be notified to the Commission pursuant to Article 93 (3) of the EC Treaty.

Article 4

1. Germany shall submit to the Commission half-yearly reports on the progress of restructuring and the amount of aid actually awarded under the various items in the privatization contract, allowing it to verify that this Decision is complied with. These reports shall also specify all incentive payments made for investment costs saved pursuant to Article 8.3.4 of the privatization contract. These reports shall be submitted in the first semester of the year following the reporting period.
2. Germany shall also submit to the Commission the annual investment reports referred to in Article 8 of the privatization contract, the audits referred to in Article 14.2.4 of the privatization contract and the final report referred to in Article 8.3.3 of the privatization contract within one month of their respective conclusions.

Article 5

Germany shall refrain from granting any further aid to Buna GmbH, Sächsische Olefinwerke GmbH, Leuna-Werke GmbH, Leuna-Polyolefine GmbH or BSL Polyolefinverbund GmbH in support of the restructuring plan which is subject of this Decision.

Article 6

Germany shall inform the Commission within two months of the date of notification of this Decision of the measures it has taken to comply therewith.

Article 7

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 29 May 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/35.337 — 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:

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.

I. THE FACTS

B. THE PARTIES

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

- (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.

⁽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.

(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

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).⁷

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 Telekommunikations-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 choose 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);

date of the exemption pursuant to Article 1; and

(iii) further oral or written explanations.

- (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

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.

- (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

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.

— 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.

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.

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.

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,

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 Synchronia.

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 33 1/3% and 66 2/3%, 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.

offer with respect to long-distance assets of Sprint for a fixed period of time.

(2) *Concerning FT and DT's investment in Sprint*

G. CHANGES MADE AND UNDERTAKINGS GIVEN
FURTHER TO THE COMMISSION'S
INTERVENTION

(a) **Restrictions on transfer of shares by FT and DT and limits on increases of their shareholding in Sprint**

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.

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.

1. *Contractual changes*

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.

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.

(b) **Consent rights and board representation of FT and DT**

30. Anti-competition provisions

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.

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*

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

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

services to and from the United States under a United Kingdom licence.

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

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.

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

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.

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

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

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 MCP'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.
- (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:

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Done at Brussels, 17 July 1996.

For the Commission

Karel VAN MIERT

Member of the Commission