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

I V/ C1/D / 356(97)

OFFICIAl DOCUMENTS COMMUNITY COMPETITION POLICY IN THE TELECOMMUNICATIONS SECTOR FOR THE PERIOD 1987 - 1995

Tel. 32.2.296.86.22 / Fax 32.2.296.98.19 /
E-mail Rose.Duhamel@dg4.cec.be

DOCUMENTS ON THE APPLICATION OF THE COMPETITION RULES TO THE TELECOMMUNICATIONS SECTOR

This publication is intended to facilitate easy reference to documents relating to the application of the competition rules in the telecommunications sector.

The documents are divided into the following chapters:

I Commission Directives

II Commission action, including Decisions under Regulation No. 17/62 (Articles 85 and 86) and under Regulation No. 4064/89 (Mergers) and Notices published in the Official Journal

III Judgments of the European Court of Justice

In addition, a number of press releases have been issued in relation to the above, and, where relevant, these have been included in Annex I with a reference to them in the Table of Contents. Annex I also includes some extracts from the Bulletin of the European Communities.

The documents are a partial selection and are thus not intended to be a complete set of documents relating to either competition law or the telecommunications sector.

A companion volume is published on a regular basis by DG XIII: this contains a number of other official documents relating to European telecommunications policy. For ease of reference, the Table of Contents of DG XIII's publication has been included at Annex II. The documents in this volume therefore do not include a number of other directives which are included in the companion document produced by DG XIII; for example on Open Network Provision, public procurement and mutual recognition of terminal type approval.

This edition covers the period up to July 1995.
The Commission will issue an annual update to this edition, as required.

I. Commission Directives

As stated above, this list does not include a number of other directives which are included in the companion document produced by DG XIII; for example on Open Network Provision, public procurement and mutual recognition of terminal type approval.

II. Commission Action in Individual Cases

Background Documents:

Council Regulation No. 17/62 - First Regulation implementing Articles 85 and 86 of the Treaty (not included in this volume): amended by

Regulation No. 59
OJ 68, 10 July 1962, p.1665 (Special Edition 1959-62, p.249)
Regulation No. 118/63/EEC
OJ 162, 7 November 1963, p. 2696 (Special Edition 1963-64, p.55)
Regulation (EEC) No. 2822/71
OJ 285, 29 December 1971, p.49 (Special Edition 1971 (III), p.1035)

Council Regulation No. 4056/89 on the control of concentrations between undertakings (not included in this volume)

OJ L 395, 30 December 1989, p.1; corrected in OJ L 257, 21 September 1990, p.13

The above two background documents are not included in this volume: in addition to their publication in the Official Journal, these documents have also been published in the European Commission publication, "Competition law in the European Communities: Rules applicable to undertakings - Situation at 30 June 1994".

***

***

B. Other Commission Action

C. **Merger Decisions**

III. Judgments of the Court of Justice relating to Telecommunications

A. Judgments relating to Articles 85 and 86 EC

B. Article 90

ANNEXES

ANNEX I
EC Commission Press Releases (in chronological order)

ANNEX II
Index to the document: Official Documents on Community Telecommunications Policy

DOCUMENTS ON THE APPLICATION OF THE COMPETITION RULES TO THE TELECOMMUNICATIONS SECTOR

I Commission Directives

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 04.04.1995
COM(95) 113 final

COMMUNICATION BY THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL ON THE STATUS AND IMPLEMENTATION OF DIRECTIVE 90/388/EEC ON COMPETITION IN THE MARKETS FOR TELECOMMUNICATIONS SERVICES

II/3

CONTENTS

Preface

The European Union is going through a process of rapid adaptation to the realities of the coming information society. Digital technology is transforming the telecommunications, computer, information and audio-visual industries. The information society is beginning to have a profound effect on the economy and the way we work, live, and play. It influences the way we do business, the way we organise ourselves and the way we interact.

The report "Europe and the Global Information Society", as established according to the request by the European Council has given full consideration to this basic change and proposed a comprehensive framework. In response, the European Heads of States at Corfu confirmed this analysis and called for the definition of a clear and stable regulatory environment for further development.

The changes are global. They effect not only Europe and its principal economic competitors, but the very nature of that economic competition itself. Competing effectively today demands the means to access, process, manipulate, stock and produce information, both quickly and efficiently.

In an increasingly global economy it is vital that European firms are able to maintain and reinforce their competitiveness, not only in existing markets, but to take advantage of new opportunities and win new markets. To do so they must be allowed to benefit from the widespread diffusion and integration into production processes of new information technology. Naturally, by stimulating economic growth, competitiveness contributes to job creation.

Technological progress and innovation brings with it the opportunity to offer users an increasing choice of services and applications, of superior performance and better suited to their particular demands. This is not only an advantage for business. For domestic users this means the possibility of direct access on demand of new services and entertainment, which are not only received by the customer, but also interacted with.

At the same time special regard must be given to employment aspects in the sector. As set out in the Green Paper on the liberalisation of telecommunications infrastructure and cable television networks (COM(94)440final and 682final) increased competitiveness will impact employment, both safeguarding jobs which would otherwise have been lost and allowing new jobs to be created as European companies benefit from the competitive advantage derived from new telecommunications technologies and services. Particularly important in employment terms will be the effects of the new technologies in small and medium sized enterprises - traditionally the principle source of employment generation in Europe.

Experience shows that potential job reductions are offset by new job creation, and that overall telecommunication employment has not been impaired by liberalisation. It will be important for the further development that the social dialogue in the sector is intensified. The Commission has launched a major study which should give a firmer quantitative basis for assessing the extent to which competition is creating new job opportunities.

These issues will also be studied and discussed in depth within the framework of the new advisory group on information society recently launched by the Commission, i.e. the Information Society Forum and the High Level Group of Experts on the Social and Societal aspects of the Information Society.

The Action Plan published by the Commission in response to the conclusions of the Corfu summit and the report on Europe and the Global Information Society ("Europe's Way to the Information Society", Communication of the Commission of 19 July 1994) emphasized the need for continued and accelerated liberalisation of telecommunications. Within this context, the Council Resolution 93/C 213/01 of 22 July 1993 on the further development of the telecommunications market sets the basic framework for the evolution of the regulatory environment in the European Union and has established 1 January 1998 as the date for full liberalisation (with additional transition periods for certain Member States). The Resolution has emphasized the importance of ensuring full implementation of existing legislation, as well as further evolution of this framework in preparation for 1 January 1998. On 22 December 1994, the Council adopted Resolution 94/C 379/03 extending the principle of liberalisation and the agreed timetable for services to the liberalisation of the underlying network infrastructures, over which such services are carried.

Commission Directive 90/388/EEC on competition in the markets for telecommunications services has been at the core of EU telecommunications liberalisation to date. It is, and will continue to be, at the centre of the reform process which is now centred on the deadline set by the Council of 1998 for liberalisation of all telecommunications services and the infrastructure over which it is carried and for which, according to the Council Resolutions mentioned, proposals and measures for the corresponding regulatory framework must be made before 1 January 1996. It also represents the framework within which the Commission is responding to requests for earlier action to lift the restrictions which are causing bottle-necks in the provision of infrastructure for the services currently already liberalised according to the Directive. In this framework, the Commission adopted on 13th October 1994 an amendment Directive drawing satellite networks and services into the framework of the Directive. Furthermore, on 21st December 1994 a draft amendment Directive was adopted by the Commission for consultation regarding the use of Cable-Television networks for the provision of such services.

The Council Resolution of 22nd July 1993 emphasized that "there is a need for rapid and effective implementation of the current regulatory environment, in particular Directive 90/388/EEC". At the same time, the Directive required that the effects of certain measures must be assessed by the Commission during 1994. The Commission therefore considers it appropriate to submit at this stage this Communication on the general progress made with regard to the implementation of the objectives of the Directive to the European Parliament and the Council.

Summary

Section I outlines the purpose of the Communication and sets it in the context of the past, current and future regulatory environment.

Section II represents a general comment on the progress achieved by the Member States in implementing Directive 90/388. It includes a list of the main elements which have been monitored and reviewed by the Commission and against which progress is measured.

Section III explains and clarifies some particular implementation issues which have arisen over the past four years. These fall into three main areas: voice services for closed user groups and corporate networks, data services for the public and the separation of operation and regulation.

Section IV describes the recent inclusion of satellite networks and services into the framework of the Directive, by way of the amending Directive 94/46/EC.

Section V explores the future outlook for the Directive and its implementation. It sets it in the broader context of full services and infrastructure liberalisation and, in particular, the preparation for the 1998 deadline.

Section VI draws together the Commission's conclusions on the implementation of the Directive and the implications for EU telecommunications policy in general.

I INTRODUCTION

The Purpose

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

It is within this context that the Commission submits this Communication on the status and implementation of the Directive[2].

The Communication has three related purposes[3]:

i Description and explanation of the current state of implementation

ii Identification and clarification of central issues

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

The Context

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

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

---

1 Council Resolution 93/C231/01.

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

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

- 1 July 1991, for putting in place an independent body responsible for the granting of licences and the surveillance of usage conditions;

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

- 31 December 1992, for the opening up to competition of the simple resale of capacity[4].

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

Council Resolution 93/C213/01 set out a timetable for the development of telecommunications and confirmed the date of

- 1 January 1998 for the liberalisation of voice telephony services for the general public[6].

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

- 1 January 1998 also for the liberalisation of telecommunications infrastructure.[7]

Following the Commission's action plan of 19th July 1994, published under the title "Europe's way to the information society, an action plan"[8], the Union is now profoundly engaged in the policy of implementing the information society. These Resolutions, the Conclusions of the European Council at Corfu[9] as well as the communication by the Commission on the consultation on the Green Paper on Mobile and Personal communications[10] and the results of the ongoing consultation on the Green Papers on Infrastructure (part I / II)[11] will set a framework for carrying forward the further amendments to the services Directive towards the

---

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

5 OJ No C 150/42 of 31 May 93.

6 Although some Member States with less developed networks (i.e. Spain, Ireland, Greece and Portugal) are granted an additional transition period of up to 5 years. Very small networks (Luxembourg) can also, where justified, be granted a period of up to two years.

7 With derogations as above, see Council Resolution of 22nd December 1994 on the principles and timetable for the liberalisation of telecommunications infrastructures, (94/C 379/03) ; OJ C379/4, 31.12.1994.

8 COM(94) 347.

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

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

11 Op cit.

full liberalisation of the telecommunications sector. In this context, ongoing review of the actual situation in the Member States will be increasingly important in the years leading up to the deadline.

II CURRENT STATUS OF IMPLEMENTATION

a) General Comment

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

- Definition of "voice telephony" for which currently exclusive and special rights can still be maintained according to the provisions of the Directive[15].

- Continuation of any other exclusive rights;
  Access by service providers to transmission/routing on PSTN and leased lines;
  Conditions imposed via any licensing or declaration scheme in existence;
  Transparency and openness of procedure for granting authorization.

- Conditions for simple resale of leased capacity for data communications;
  Notification (within deadline) of any special licensing regime regarding such resale;
  Justification of any special regime[16].

- Conditions of open access to public networks (formal and effective);
  Availability of leased lines within a reasonable time;
  Justification for usage restrictions (if any) on leased lines.

- Justification for any restrictions on the processing of data
  (before or after public network transmission)[17];
  Ensurance by the Member States of non-discrimination in usage conditions and charges between service providers (including the TO).

- Separateness and independence of effective and operational regulatory body
  Inclusion within its tasks of: granting licences, surveying usage conditions; control of type approval and mandatory specifications, and allocation of frequencies.

On the basis of these points the Commission has found that the extent to which the Directive

---

12 As mentioned, the exceptions to the 31/12/90 deadline relate to (a) specifications regarding simple resale of data services, 31/12/92; and (b) the setting up of an independent regulator, 1/7/91.

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

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

15 Subject to the time deadlines set by the Council Resolution of 22 July 1993

16 i.e. by the provisions set down in Article 2 and Article 3

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

has been effectively implemented[18] throughout the Union still varies significantly between the Member States. Various Member States will need to undertake further measures before the Commission may consider the directive correctly implemented[19].

b) Formal Procedures

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

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

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

c) Extension to the European Economic Area and Central and Eastern European States

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

---

18 Official notification does not necessarily mean effective implementation

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

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

21 Italy and Greece.

22 Germany and Spain.

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

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

III SPECIFIC IMPLEMENTATION ISSUES

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

a) General issues related to voice services
b) Enforcement of the voice telephony monopoly
c) Corporate networks and Closed User Groups (CUGs)
d) Data services for the public
e) The separation of operation and regulation

a) General issues related to voice services

Although the Directive defines in detail the concept of 'voice telephony'[24], various issues have arisen[25] over just what is considered to be 'voice telephony' in the individual Member States and, hence, the degree to which special or exclusive rights[26] on voice services had to be abolished[27].

According to the Services Directive, the Member States ensure the abolition of special and exclusive rights for the provision of telecommunication services other than the voice telephony service. In each case it has to be examined on the basis of the criteria set out below whether a given service is a voice telephony service. In order to allow the relevant national regulatory authorities to assess the envisaged service, the service providers may

---

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

25 See also European Court decision ECR-I 5833 which has guided the Commission in the elaboration of the definition of exclusive and special rights (see below).

26 According to Article 2 of amending Directive 94/46/EC (see section IV):

"exclusive rights" means the rights that are granted by a Member States to one undertaking through any legislative, regulatory or administrative instrument, reserving it the right to provide a telecommunications service or undertake an activity within a given geographical area
"special rights" means the rights that are granted by a Member State to a limited number of undertakings through any legislative, regulatory or administrative instrument which, within a given geographical area,

- limits to two or more the number of undertakings authorised to provide a service or undertake an activity, otherwise than according to objective, proportional and non-discriminatory criteria, or
- designates, otherwise than according to such criteria, several competing undertakings as being authorised to provide a service or undertake an activity, or
- confers on any undertaking(s), otherwise than according to such criteria, legal or regulatory advantages which substantially affect the ability of any other undertaking to provide the same telecommunications service or to undertake the same activity in the same geographical area under substantially equivalent conditions.

27 According to Article 2 of the Directive, "Member States shall withdraw all special or exclusive rights for the supply of telecommunications services other than voice telephony..."

be required to provide all the necessary information[28].

A regulatory approach that identifies only a limited set of permissible, non-reserved services does not conform to the requirements of the Directive.

A voice service may be reserved under national legislation *only* if it includes *all* of the elements of the Community voice telephony definition, i.e. it must be provided on a *commercial* basis to the *public* for the purpose of *direct transport and switching* of speech *in real time* between public switched network termination points.

It is useful to consider the significance of each of these elements:

"Commercial"

This requires that the simple technical non-commercial provision of a telephone connection between two users should be authorized. "Commercial" should be understood in the common sense of the word, i.e. provided against payment and with the intention of making a profit (or at least of covering all variable costs and making a contribution to existing fixed costs). A leased line, for example, made available on a cost-sharing basis between one or more users would only be considered a commercial activity if additional capacity were leased specifically to allow resale.

It also means that companies should be free to pool resources, i.e. to rent leased lines and benefit from the flat rate rental. This permits a more efficient use of the telephone network and, in particular, benefits small and medium-sized enterprises (SMEs)[29].

"for the public"

The term "for the public" is not defined in the Directive and must be understood in its common sense: a service for the public is a service available to all members of the public on the same basis.

Particular examples of services which should not be considered "for the public", and thus should not be made subject to special or exclusive rights, are those provided over corporate networks and/or to closed user groups. Corporate networks and closed user groups (CUGs) cover a number of telecommunications services, both voice and data. They are fundamental to the Services Directive particularly because they fall outside the scope of the voice service which Member States may reserve to their telecommunications organizations.

---

28 This will in particular be the case concerning the provision of voice services to closed user groups on leased lines networks connected at different ends to the public switched network. In this case some national regulatory authorities request detailed information, such as clients targeted, draft advertisements, envisaged tariffs ..., to assess the nature of the envisaged service.

29 A disadvantage for SMEs existed previously because they do not generally use the switched telephone service sufficiently intensively to make it worthwhile for them to pay the (high) flat rate rentals for leased lines. As a consequence, leased lines were, in practice, reserved to larger companies.

The particular issues associated with liberalisation of these services are discussed in more detail below (IIIc).

"from and to public switched network termination points"

"From and to public switched network termination points" means that, to be reserved, the voice service has not only to be offered commercially and to the public, but also to connect *two* network termination points of the *switched* network[30] at the same time. As long as each customer of the service provider is connected via a dedicated leased line, it is possible to offer a commercial service which terminates on the public network.[31] The aim is, again, to ease technical restrictions on the use of leased lines. In this way lines may be used for voice telephony offered to non-CUGs, as long as there is no commercial offer of "simple resale" of the switched telephone service.[32] On the other hand, "simple resale" may be legitimate when the service is not offered to the public, but, for instance, is provided to a closed user group[33].

"direct transport and switching of speech in real time"

This part of the definition excludes any store and forward or voice mail applications from being reserved. Least cost routing of telephone calls by a service provider on the public switched network or credit card telephony, whereby access is given to the voice telephony service of a TO in the framework of a financial transaction service, are further examples of liberalised voice services as these do not constitute "direct transport".

---

30 The public switched network is not formally defined in the Directive. It must be given its common meaning, i.e., the public switched telephone network (PSTN) which is the collection of switching and transmission facilities used by the telecommunications organisation to provide the normal telephony service.

31 i.e. as long as they are connected via a dedicated leased line, customers of a liberalised voice service do not necessarily need to demonstrate a pre-existing legal or economic relationship with the recipients of their calls. This is often referred to as "dial-out" service or "one-ended" service. .

32 "Simple resale" refers to the situation where the call is both originated and terminated on the public switched network. It is, in this sense, offered to the general public since the local call may originate from any user of the public switched network and the customer itself is not connected by the service provider via a dedicated leased line

33 Such a service may, indeed, include features requiring bypass such as teleworking, out of office hours calls diversion, paging, Centrex services or when small business units, whose call volume does not justify use of leased lines, need to communicate with each other.

Since the reservation of voice services is an exception to the general rule of competition, it must be interpreted narrowly. When new voice services and features are introduced and meet demand which is not satisfied by the current telephone service, they should normally be considered non-reserved. If they are defined as reserved, the burden of proof, as always should fall to the Member State to justify such a restriction[34].

Calling card services offer a specific example of services, which can, from the point of view of the users, be considered to be different from the reserved voice telephony service. They fall outside the definition in as much as the calling card service matches important needs which the (normal) voice telephony does not meet, for example as a result of additional features such as payment via credit or debit card, least cost routing, destination speed dialling etc. Where additional features such as these, rather than possible lower tariffs, are decisive in prompting users to use the calling card service instead of voice telephony, the service should be considered liberalised. The fact that a calling card market is emerging, although tariffs are in most of cases higher than those of voice telephony[35], is evidence that there is a calling card market which is distinct from the voice telephony one. Calling card providers have developed this new market tailoring the services to the customers and billing them accordingly. This evolution creates new opportunities for the users in the Union and should not be delayed by restrictions aimed at preserving the traditional voice telephony market.

The prohibition of leased line routing for the provision of calling card services would put providers of calling card services at a competitive disadvantage in this market relative to calling card providers with own facilities. In the absence of the routing facility they are merely resellers of voice telephony and would have no control over their main costs. They could therefore hardly compete with the Telecommunications Operators (TOs). TOs have a further advantage in that they can offer their customers both voice telephony and calling card services and develop their card service by building on their database of high volume users.

Such a state of affairs would promote possible scenarios whereby national TO's offering calling card services would limit their offer to residents of their national territory without entering neighbouring geographic markets.

An individual assessment of the envisaged calling card service may, however, be necessary, in particular of the additional features offered, in order to determine the nature of the service and upon which market it will be offered. The criteria used should be the

---

[34] To allow the relevant national regulatory authorities to assess the envisaged service, the applicants may be required to provide them with all the necessary information, including draft advertisements and envisaged tariffs lists, if any.

[35] *"contrary to widespread belief, cost saving is not the main driver* (for the development of calling card services). *Indeed, calling card and international direct dial (IDD) tariff comparisons for calls originating from the EC reveal that convenience is the main driving factor for a service essentially targeted at business users"* . See : New forms of competition in voice telephony services in the European Community, BIS Strategic Decisions, October 1993, study carried out for the European Commission.
Additional features, such as billing and usage convenience (no local currency required, operator speaking the same language) seem to be the main driving factor for this service.

degree of functional interchangeability between the services and the possible barriers to substitution. Such assessment must take into account the specific circumstances of the markets concerned.

b) Enforcement of the Voice Telephony Monopoly in a liberalised environment

Since certain categories of voice services have been opened up to competition, and since such categories may not be defined in a rigidly technical sense, certain Member States feared that service providers would offer what is in effect "voice telephony" and thereby by-pass the monopoly. In fact, experience has shown that such fears were not founded. The main reason is that such "un-official" by-pass will not occur to any significant extent without being noticed by the relevant Member State. A service which is offered to the public must be, "ipso facto", public knowledge.

In particular, given that any commercial offer would normally involve advertising (of the services available) or, at the very least, issuing price lists, contracts and invoices, such by-pass should be evident from an early stage. Furthermore, any breach leading to a substantial diversion of traffic on to a competitor's network is rapidly detected by the public operator providing the competitor's leased line capacity. The TO would clearly have an interest in bringing the situation to the attention of the appropriate national regulatory authority.

In the framework of the licensing or declaration procedures, various Member States, however, still request the applicant to provide a description of the intended service. Where networks are connected to the public switched telephony network (PSTN), for example in the case of voice services provided on leased lines, Member States often require evidence of how the applicant will prevent dial-in and dial-out facilities being available at the same time. It should be noted that, under Article 4 of the Directive, *technical* restrictions may not be imposed on the service provider. It suffices that the service provider clearly sets out in the contracts, signed with its clients, the extent of services authorised.

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

c) Corporate networks and Closed User Groups

As mentioned, the special issue of corporate networks and / or closed user groups (CUGs) has been of particular importance amongst the issues encountered in the course of implementation of the Directive.

Effective liberalisation of corporate networks and CUG services is, without doubt, critical for the development of advanced business communications and therefore the competitiveness of EU industry vis a vis its counterparts in Japan and the US. It is, thus, a central goal of the Directive. The economics of competition, and markets themselves are becoming increasing global. Where business is denied the clear benefits of lower cost, and increased quality and choice which competition ensures, it will ultimately either suffer from the competitive disadvantage this implies, or, where possible, will seek to relocate to a less restrictive environment.

In this context, the goals of the Directive have still not been achieved in a number of Member States. Two reasons for this are :

i disputes as to the extent of allowed 'membership' of CUGs, which are broader than strict corporate networks. This has led to lack of full or effective implementation of the Directive

ii bottlenecks in the *supply* of capacity to the new service providers caused by restrictions on use of alternative infrastructure (this will be addressed more fully in Section V)

The Commission has considered the cases where Member States have issued provisions under the Directive for authorizing the provision of voice to CUGs. Various definitions have emerged[36]. On the basis of experience gained, the Commission will use the following definitions[37] :

"corporate networks"

those networks generally established by a single organisation encompassing distinct legal entities, such as a company and its subsidiaries or its branches in other Member States incorporated under the relevant domestic company law.

"closed user groups":

those entities, not necessarily bound by economic links, but which can be identified as being part of a group on the basis of a lasting professional relationship among themselves, or with another entity of the group, and whose internal communications needs result from the common interest underlying this relationship. In general, the link between the members of the group is a common business activity.

---

36 For country by country information, see Annex

37 The Commission has acknowledged these definitions in its "Green Paper on the liberalisation of telecommunications infrastructure and cable television networks, Part I, Principles and Timetable", COM(94)440 final, Brussels 25.10.1994, p.27.

Examples of activities likely to fall into this category are fund transfers for the banking industry, reservation systems for airlines, information transfers between universities involved in a common research project, re-insurance for the insurance industry, inter-library activities, common design projects, and different institutions or services of intergovernmental or international organisations.

Services provided concerning such categories of networks or entities are fully liberalised according to the definition of "voice telephony" in Article 1 of the Directive. Some Member States did, however, only authorise such services after further discussions with the Commission.

d) Data services for the public[38]

Article 10 of the Services Directive provides that the Commission shall assess the effects of the measures adopted by the Member States regarding simple packet- or circuit-switched data services under Article 3 of the Directive in 1994, to see whether any amendments need to be made to the provisions of that Article, particularly in the light of technological evolution and the development of trade within the Community.

During the consultation on the 1987 Green Paper, various Member States stressed the need for a special regime for basic switched data network services such as X.25[39]. No justification could be found for the maintenance of exclusive rights as regards the provision of such services per se. The Commission, however, acknowledged that developed data switching networks might have a structural effect on investments and regional planning, and could therefore qualify for a specific regime, set out in Article 3 of the Directive, in particular the application of public service specifications in the form of trade regulations relating to conditions of permanence, availability, and permanence of service.

---

[38] Article 1 defines 'packet and circuit-switched data services' as "the commercial provision for the public of direct transport of data between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point"

[39] X.25 is a standard protocol for packet switched networks. Another advanced protocol for high speed data transfer is frame-relay.

Moreover, given the substantial difference between charges for use of the data transmission service on the switched network and charges for use of leased lines at the time of adoption of the Directive, Article 3 allowed that exclusive rights for data services which represented "simple resale of capacity"[40] could be maintained until 31 December 1992, with possible additional deferments until 1 January 1996 for those countries where the relevant network for the provision of the packet or circuit switched services were not yet sufficiently developed[41]. The aim was to allow that equilibrium in such charges would be achieved gradually. Two Member States[42] initially requested such an extension of deadline, although in neither case the request was maintained.

As regards the special regime, only three Member States[43] notified draft specifications to the Commission before the deadline provided in the Directive, i.e. 30 June 1992. The Commission has assessed with the Member States concerned, whether the planned specifications were objective, non-discriminatory, transparent and proportionate to the aim pursued. These bilateral discussions were very useful and provided a basic experience of how a liberalised service can be regulated to guarantee certain public service objectives, without restricting competition. It appeared in particular that, given the different starting positions of incumbent operators and potential new entrants, special attention should be given to avoid burdening the latter in a way which could constitute a barrier to entry and which would comfirm the market power of the dominant operator. In such cases Member States should not necessarily impose the same conditions on new entrants as imposed on the dominant public operator.

---

40 The Directive defines the latter as "the commercial provision on leased lines for the public of data transmission as a separate service, including only such switching, processing, data storage or protocol conversion as is necessary for the transmission in real time to and from the public switched network".

41 Recital 11 of the Directive.

42 Greece and Spain

43 Three Member States (Belgium, France, and Spain) have adopted additional licensing conditions for the provision of simple resale for packet or circuit-switched services. In Spain, for example, there is a scheme regulating the granting of concessions for the provision of packet or circuit switched data services which does not tie in completely with the Commission's comments concerning this area. The scope of the Spanish scheme is too broad, since it applies to data services between "network termination points" instead of "termination points of the public switched network".

Italy was also considering the adoption of additional conditions, but failed to implement the Directive within an appropriate timescale. Given that under the direct effect of Articles 2 and 3 of the Directive simple resale of capacity was liberalised in Italy without any further restrictions, the Italian government shall have to provide appropriate justifications for the reintroduction of any additional restrictions in that respect.

Over the last years, rapid technological evolution and, in particular, the development alongside the traditional X.25 of ATM[44], has undermined the traditional justifications for the current specific regime for basic data services. One can assume that in the near future X.25 public backbone networks will continue to co-exist with frame-relay-networks and the new emerging ATM-backbones. Applying the same service-specific regulation to such different technologies will prove difficult. It could delay new offers of virtual private networks and value added services and thus limit technical progress in the area. Moreover the rationale behind quality or coverage obligations decreases with the increasing differentiation of the offer. The emergence of new services requires a degree of flexibility which cannot be steered by regulation.

The current specific schemes in force in three Member States also have an impact on trade between Member States. The limited number of applicants for authorisations under the current schemes in the three Member State can, in part, be explained by the fact that many providers of the relevant service prefer to limit their offer to CUG's instead of having to apply for a license under these circumstances.

On the basis of its assessment, given that most of the Member States have not deemed it necessary to adopt specific schemes for data services, without noticeable negative effect as regards the public interest objectives pursued by these schemes, the Commission considers, that the requirement for applying specific public service specifications with regard to data services should be reviewed in the framework of the general adjustment of the telecommunications regulatory framework to be presented before 1 January 1996 according to Council Resolution 93/C 213/01, and that the termination of the current specific schemes for data services should be considered[45].

e) The Separation of Operation and Regulation

The separation of the regulation of the telecommunications sector from the operation of the national Telecommunications Organisation was, without doubt, the most fundamental condition for achieving reform and liberalisation of the EU telecommunications markets. Whatever institutional, legal or structural means may be used to achieve it, Article 7[46] of the Directive requires that the Member States must separate telecommunications regulatory and operational functions.

---

44 ATM : "Asynchronous Tranfer Mode", advanced high speed communications. See also Green Paper on the Liberalisation of Telecommunications Infrastructure and Cable Television Networks, op. cit.

45 However, such schemes may be required as regards the provision of voice telephony for the public, once liberalised. See licensing criteria proposed for licensing mobile and personal communications networks, as well as for fixed networks (Green Paper for mobile and personal communications, Green Paper on the liberalisation of telecommunications infrastructure and cable television networks, op. cit. .

46 Article 7 requires Member States to ensure that "from 1 July 1991 the grant of operating licences, the control of type approval and mandatory specifications, the allocation of frequencies and surveillance of usage conditions are carried out y a body independent of the telecommunications organisations"

Whilst National Regulatory Authorities (NRAs) now formally exist in most Member States, the Commission considers that the degree of separation between these and those of the operator functions is still not sufficiently clear in at least five Member States.[47].

This issue of the independence of the National Regulatory Authorities was raised in a number of preliminary referrals to the Court of Justice relating to Article 6 of Directive 88/301/EEC (the 'Terminals Directive') , which required Member States, as of 1 July 1989, to ensure that the fixing of technical standards as well as supervision of type approval, were carried out by bodies independent from public or private undertakings involved in the marketing of telecommunications equipment. In its judgements of 27 October 1993[48], the Court found that this requirement had been infringed in France where, at that time, departments in the same Ministry were responsible for the commercial exploitation of the public network, and the fixing of technical standards, the supervision of conformity and the approval of terminal equipment.

Article 7 of the Services Directive to a large extent mirrors the wording of Article 6 of the Terminals Directive. The implementation by the Member States of the former must be considered in view of this past judgement. A mere legal or administrative separation between the functions - such as that between two services of a Ministry - would only be sufficient to comply with Article 7 under the following conditions:

- it must be shown that there is a *'real' separation*
- in particular, there must be *financial independence* of one from the other
- any *movement of personnel* from the regulatory body to the operational body should be subject to special supervision.

Forms of structural separation offering a reasonable guarantee that such conditions would be upheld, include :

i the granting of the regulatory functions to a department of the relevant Ministry

---

47 For example, in the Netherlands, the regulation is carried out by the Ministry for Transport and Public Works through the Directorate General for Post and Telecommunications. The Ministry is, however, also the majority shareholder of KPN which has still the exclusive right to install, maintain and operate the telecommunications infrastructure, and provides the mandatory services to each applicant.

Some questions have also been raised about how distinct a separation of powers exists between regulator and operator in Belgium, Spain, and Greece. The Belgian Government has, however, stated its intention to respect the complete autonomy of the public operator BELGACOM in the area of non-reserved services in response to Commission concerns. In Spain, the Director General for Telecommunications (responsible for regulation) is also the Government Delegate on the Board of directors of Telefónica, although such a delegate could legally come from another Ministry. In Greece, while functions have been formally separated, the continuous movement of personnel from the operational body to the regulatory body makes the practical separation of these bodies unclear.

48 The cases Decoster et al (C-69/91) and Taillandier (C-46/90)

when the telecommunications undertaking is itself controlled by private shareholders, or

ii the granting of the relevant regulatory functions to a body, which is independent from the relevant Ministry (except for the control of its accounts and the legality of its decisions) when the latter is also acting as sole or dominant shareholder of the operator or where a considerable state shareholding in the operator remains.

Alongside the legal guarantees and general rules implied by the Directive, actual practice and spirit are an important test of compatibility with Article 7. How "independence" is actually achieved institutionally will therefore vary, to a certain degree, according to the legal tradition and experience in each Member State.

IV Inclusion of Satellite Networks and Services Directive 94/46/EC

On 13 October 1994, the Commission adopted Directive 94/46/EC. This Directive extends the Terminal Directive[49] to include satellite earth station equipment and extends the Services Directive to include satellite communications services[50].

a) The significance of the amending Directive

The aim of the Union's policy in the area of satellite communications, shared by the Council and the Commission, is to stimulate without delay greater use of satellite communications in the EU. This is particularly important given the widening gap between the delay in development of EU business satellite communications compared to that which its major competitors enjoy.

The Directive requires the abolition of all exclusive rights granted for the provision of satellite services, and the abolition of all special rights[51] to provide any telecommunications service covered by the Directive.

b) Voice telephony

The amended Directive does not affect restrictions on offering voice telephony for the public via satellite network. However, this must not lead to technical restrictions. While recital 16 states that "in the case of direct transport and switching of speech via satellite earth station networks, commercial provision for the public in general can take place only when the satellite earth station network is connected to the public switched network", this is merely a guide as to what is normally the case. It should not be understood as allowing technical restrictions to protect the voice telephony monopoly. The burden of proof that the new service actually constitutes "voice telephony" rests with the regulator.

---

49 Commission Directive of 16 May 1988 on competition on the markets in telecommunications terminal equipment (88 / 301 / EEC, OJ L131 / 73, 27.5.88)

50 Directive 94/46/EC constitutes the central measure for implementing the liberalisation objectives for the satellite sector, set forth by Council Resolution 92/C 8/01 (based on the Green Paper on satellite communications, COM(90)490).
Other measures in this field are Council Directive 93/97/EEC of 29th October 1993, relating to mutual recognition of type approval for satellite terminals and the proposal for a European Parliament and Council Directive on a policy for the mutual recognition of licences and other national authorisations for the provsiion of satellite network services and/or satellite communications services, COM(93)652, 4.1.94.

51 Special rights is defined in the Directive as "limiting the number of undertakings authorised to provide telecommunications services otherwise than according to objective, proportional and non-discriminatory criteria or designating otherwise than to such criteria several competing undertakings to provide such services".

In fact, the provision of voice for closed user groups will often involve such connections with the public switched network, since some members of such groups will not be connected to the network via satellite stations[52].

c) Broadcasting services

The status of broadcasting services are also unaffected by Directive 94/46/EC. One has, however, to distinguish between the content and the technical provision of broadcasting services. As mentioned in recital 17, the provision of satellite network services for the conveyance of radio and television programmes is, by its very nature, also a telecommunications service and there is therefore no justification for treating it differently from any other telecommunications service. The Directive, thus, makes a distinction between:

* the services provided by the carrier (transmission, switching and other activities) necessary for the *conveyance* of the signals, which are telecommunications services liberalised under the Directive, and

* the activities of those bodies which control the *contents* of the messages to be broadcasted, which are broadcasting activities falling outside the scope of this Directive.

Satellite broadcasting services which should now be liberalised under this Directive therefore include services provided over telecommunications operator's feeder links from studios/events to uplink sites, as well as uplink services for point to point, point to multipoint, direct-to-home (DTH) satellite broadcast services and services to cable-head ends.

d) Access to space segment

Member States are required by the Directive to abolish all restrictions on the offer of space-segment capacity on their territory.

This means that the Member States now must ensure that:

* any regulatory prohibition or restrictions on the offer of space segment capacity to any authorised satellite earth station network operator are abolished,

* any space segment supplier is authorized to verify within its territory that the satellite earth station network for use in connection with the space segment of the supplier in question, is in conformity with the published conditions for access to his space segment capacity.

---

52 According to the definition given, closed user groups are indeed not to be defined technically, by the network to which their members are connected and which should not be accessible by third parties but sociologically by the economic or professional relationship among their members.

In its Communication of 10 June 1994 on satellite communications relating to the provision of - and access to - space segment capacity[53], the Commission announced its intention to use the competition rules to remove all national restrictions within the European Union on access to space segment. The discovery procedures set out in Article 3 of the Directive will, in particular, be implemented to gather the necessary information to achieve this purpose.

e) International Satellite Organisations

The new obligations related to space segment do not directly affect the position of the telecommunications organizations as signatory of international organisations. However, Member States are obliged to ensure that there are no restrictive provisions in their national regulations which would have the effect of preventing the offer of space segment capacity in their territory by either another signatory of the relevant organisations or by independent systems. Similarly Member States are obliged to ensure that there are no regulatory or non-regulatory restrictions preventing space segment capacity already leased by a licensed operator in one Member State from being freely accessed from any other Member State. Such restrictions include those preventing parties other than the signatory in the Member State(s) concerned from verifying the technical and operations specifications of satellite earth stations.

Article 3 of Directive 94/46/EC requires Member States to communicate to the Commission, at its request, the information relating to international satellite organisations they possess on any measure that could prejudice in particular compliance with the competition rules of the EC Treaty. Recital 21 explains that this provision aims amongst others to monitor the review which is underway within these international organisations to improve access.

Article 3 of Directive 94/46/EC does therefore also not directly affect the position of the signatories. However, if it appeared that signatories continue to maintain mechanisms dissuading multiple access and thus favouring market sharing for the provision of space segment, the Commission would have to assess whether action should be taken under the competition rules of the Treaty against the relevant signatories.

The coupling of investment obligations and utilisation could constitute such a dissuasive mechanism, where it dissuades signatories to market space segment by the threat of having to bear an increased investment share. With international organisations, and in particular EUTELSAT, operating in increasingly competitive markets, the current investment requirements will therefore, if they are not amended, have to be thoroughly assessed under the Competition rules.

---

53 COM(94)210 final.

f) Time table for implementation

The Directive gives Member States nine months to inform the Commission of the measures taken to transpose the Directive into national law. The Member States should thus communicate to the Commission before 8 August 1995, a copy of the measures taken to abolish the current restrictions on the provision of satellite services, and of any licensing or declaration procedure which is currently in force or is being drafted for the operation of satellite networks. The aim is to allow the Commission to assess whether these conditions are necessary with a view to satisfying essential requirements. The information provided to the Commission should include possible fees imposed as part of these authorization procedures as well as the criteria upon which these fees are based.

Recital 22 which mentions that the Commission will also take into account the situation of those Member States in which the terrestrial network is not yet sufficiently developed must be seen in the framework of this notification requirement. Member States which would deem necessary a deferment of the date of full application of the above mentioned provisions[54] should request it formally and with the necessary justification within the time period provided for the communication of the implementation measures of the Directive, i.e. before 8 August 1995. The Commission will then assess whether it should refrain from insisting on the immediate liberalisation of the relevant satellite services. This would, however, not prevent possible actions in national courts brought by third parties in these Member States.

Given the wide variety of satellite services, the motivation given should, in the first place, include the list of satellite network services for which the deferment is requested, accompanied by estimates of the markets concerned.

It should further explain which services of the national Telecommunications Organisations would be affected, and on the basis of the turnover of these services and their contribution to the financing of the public network, a potential negative impact on the future development of the public network should be demonstrated.

The Commission will apply to the proportionality principle. The Commission will in any case insist on, for example, the liberalisation of services which are economically insignificant.

---

[54] This derogation can apply up to 1st January 1996 at the latest.

V FUTURE EVOLUTION IN THE CONTEXT OF SERVICES AND INFRASTRUCTURE LIBERALISATION

While major attention will have to continue to be paid to the full effective implementation of the Services Directive, the future development of the Directive must be considered within the overall context, which was determined by the review carried out according to the provisions of the Directive during 1992, leading to Council Resolution 93/ 213/01 of 22 July 1993 on full service liberalisation by 1 January 1998, now supplemented by Council Resolution 94/C379/03 of 22 December 1994, integrating infrastructure liberalisation into this time schedule.

According to Council Resolution 93/ 213 / 01 the Commission should

"... prepare, before 1st January 1996, the necessary amendments to the Community regulatory framework in order to achieve liberalisation of all public voice telephony services by 1 January 1998.."

Given its central role in lifting the restrictions to competition and ensuring fair market conditions, amendments to the Services Directive will represent a focal point of these measures.

As set forth in the Green Paper (Part I) on telecommunications infrastructure liberalisation[55]:

Under the Directive 90/388 on competition in the markets for telecommunications services, the provision of all telecommunications services was opened to competition, subject to four significant exceptions

- satellite services
- mobile telephony and paging services
- radio and TV broadcasting services to the public, and
- voice telephony services to the general public.

Directive 90/388 in its original form did not address the use of alternative infrastructures and cable TV networks for the provision of liberalised services. Directive 90/388 only required the removal of restrictions on the use of a single source of infrastructure, namely leased lines provided by the TOs, for the provision of liberalised services.

As regards the exceptions set out above, the following applies :

---

55 Op cit

- Commission Directive 94/46/EC[56], amending Directives 88/301/EEC (telecommunications terminal equipment) and 90/388/EEC (telecommunications services) in particular with regard to *satellite communications*, adopted on 13 October 1994 has lifted the exception with regard to satellite services. As set out under IV., Member States are given 9 months to communicate implementation measures taken.

- On 21 December 1994, the Commission adopted, for consultation, a draft amending Directive concerning the liberalisation of the use of cable TV networks for the services already liberalised according to the Services Directive, providing for substantial opening of the further development of these networks, particularly with regard to multi-media.

- The Commission Communication on the consultations following the Green Paper on *Mobile and Personal Communications* was published on 23 November 1994[57]. It proposed the lifting of all special and exclusive rights with regard to mobile services by 1 January 1996. The corresponding amendments to the Services Directive will have to be considered.

Finally, a major issue will be the adjustment of the telecommunications regulatory framework to the objectives of the Council resolutions of 22 July 1993 and 22 December 1994, integrating the date of 1 January 1998 for full liberalisation (with additional transition periods for certain Member States), to be proposed before 1 January 1996. As set forth in the Infrastructure Green Paper (Part II)[58], such an approach must aim at creating the optimal environment for the future development of the European Union's telecommunications sector by combination of both competition policy and sector specific regulation.

Besides the adjustment of the existing harmonization Directives in the telecommunications sector (such as ONP Directives) and the working out of proposals for maintaining universal service and ensuring interconnection, as well as the review of the institutional arrangements for regulating the sector, this will in particular require further adjustment of the Services Directive.

At the Council of 17 November, the Commission has welcomed the agreement on the date of 1998 as the deadline for the liberalisation of infrastructure for all telecommunication services. It has also taken note of the concerns of a number of Member States expressed at this Council, to undertake early measures for the liberalisation of alternative infrastructures for services already liberalised according to the Services Directive. This aspect will need further consideration.

---

[56] see section IV

[57] COM(94) 492 final: Communication to the European Parliament and the Council on the Consultation on the Green Paper on Mobile and Personal Communications

[58] Op. cit.

V. CONCLUSION

Commission Directive 90/388/EEC represents the most significant legislative measure for liberalising EU telecommunications to date. The Commission will ensure that maximum effort and resources are directed towards solving identified problems and filling gaps in implementation.

The 1992 Review revealed that the effectiveness of the measures liberalising the telecommunications sector (concerning at that stage, in particular the liberalisation of data communications, value added services and the provision of data and voice services to corporate users and closed user groups) was questioned by many service providers and users of such services. It has also been understood that implementation of the Services Directive is hampered by the non-availability of infrastructure under reasonable conditions.

In particular, high tariffs for and lack of availability of the basic infrastructure over which liberalised services are operated or provided to third parties have delayed the widespread development of high speed corporate networks in Europe, remote accessing of databases by both business and residential users and the deployment of innovative services such as telebanking and distance learning. Additionally, the regulatory restrictions in many Member States still prevent the use of alternative infrastructure operated by third parties, such as cable TV-networks and networks owned by energy companies, railways, or motorways to meet their internal communications needs. Many user associations and companies have stressed that European business is less competitive, that innovative services are more slowly deployed and that the creation and development of pan-European networks and services is being delayed as a result.

The importance of effective and affordable infrastructure is increasingly recognised in political debate within the Member States themselves. The European Parliament has called on the Commission to adopt, as soon as possible, the necessary measures.

The continued bottleneck situation has been emphasized as a key obstacle to the development of the European Information Infrastructure in the report on *Europe and the global information society.* The Action Plan towards the European Information Society adopted by the Commission in response has set a general framework.

Further emphasis on effective implementation of the telecommunications Services Directive and its future evolution will take account of these general objectives. It is with this intention in mind, that the Commission transmits this Communication to the European Parliament and to the Council.

ANNEX I

MEMBER STATE IMPLEMENTATION OF DIRECTIVE 90/388/EEC

The following represents a short overview of the state of implementation of the Directive in individual Member States. Given the rapid development in this field, reference should be made to National Regulatory Authorities for more detailed information.

The overview does not include information with regard to implementation in the European Economic Area.

BELGIUM

The Directive is implemented in Belgium by the law of 21 March 1991[59]. With regard to telecommunications it transforms the Régie des Télégraphes et des Téléphones/Regie van Telegraaf en Telefoon (RTT) into the public autonomous company BELGACOM.

As regards the definition of the reserved service in the Belgian law, Article 68 defines the 'Telephone Service' as the telecommunications service intended for the direct carrying and real time switching of vocal signals at the start and at the destination of the connection points, including the services necessary for its operation. In letters of July 1991 and June 1993 the Belgian Government confirmed that it interprets the law in the way intended by the Directive.

Where a provider wishes to supply liberalised services, a list of non-reserved services can be established by Royal Decree which, by derogation, would automatically be authorised providing that the applicant informs the IBPT of the service. Thus far, however, the Commission is not aware of such a list. In its absence, the applicant must give the IBPT two months prior notice of its intention during which time the IBPT can oppose the provision of the service if it deems it contrary to the 1991 law. Article 89(5) states that the IBPT must provide a reasoned decision if it refuses to authorise the provision of a service.

Belgium is one of three Member States to have adopted additional licensing conditions for the provision of packet- or circuit-switched data services for the public. This is allowed under Article 3 of the Directive as long as the Commission approves the conditions, which it did in July 1993.

---

[59] Moniteur Belge, 27 March 1991, p.6155 and corrigendum in Moniteur Belge 20 July 1991. The same law also implements the Directive on competition in the markets for telecommunications terminal equipment, Commission Directive 88/301/EEC.

Under Article 85 of the 1991 Belgian Law, BELGACOM can only refuse a user access to a leased line on the basis of the essential requirements recognised by Community Law. Further, as defined in the management contract (Art 21(3)), BELGACOM must satisfy at least 90% of the registered applications for ONP-leased lines within three months unless otherwise agreed with the customer.

With respect to the issue of the independence of BELGACOM from the regulatory authority as required by Article 7 of the Directive, under the 1991 law regulatory powers are assigned to the Minister responsible (assisted by the national regulatory authority, Institut Belge des Services Postaux et des Télécommunications, IBPT). The Belgian Government has stated that it will respect the complete autonomy of BELGACOM in the area of non-reserved services.

DENMARK

The Directive has been implemented in Denmark by Law No. 743 of 14 November 1990 and the Consolidating Order No.398 of 13 May 1992.

Under the Act, the Minister of Communications can grant a concession to TeleDanmark on the establishment and operation in relation to public radio and fixed services as well as of voice telephony, text and data communication, provision of leased lines, mobile communications and satellite services, and transmission of radio and TV programmes.

An area of concern, and indeed the issue which led to the commencement of infringement proceedings against Denmark, was the definition of "voice telephony" which is reserved to TeleDanmark. The initial law reserved all of the non-public transmission of traffic to TeleDanmark with the sole exception of voice telephony over leased lines between different legal entities (i.e. shared use). This clearly left too many restrictions on the usage conditions of leased lines in place, in contravention of the Directive.

The Commission closed its proceedings after the adoption by the Danish Government of Order No. 905 of 2 November 1994 which allows anyone to provide domestic public voice telephony without requiring any form of authorization or declaration. As regards international calls, a license is required where calls originating from the PSTN are carried via leased lines and then returned back to the PSTN. Such licence is only granted for traffic to countries which have liberalised voice telephony.

The Order was adopted under Article 3 of the 1990 Danish Act, which entitles the Minister to issue regulations for the establishment and operation of services which are not covered by TeleDanmark's concession or special rights.

The rules to be applied to packet- and circuit-switched data services after 31 December 1992 were stated in the Danish Order of December 1992. There is a slight discrepancy between the scope of these rules, and that intended by Article 3 of the Directive since the Order covers *all data communications services*.

FRANCE

The French government has implemented the Directive mainly through the adoption of Law No. 90-1170 of 29 December 1990 on the regulation of telecommunications. This Law is a modification of the "Code des Postes et Télécommunications" (the Code) which gives France Telecom an exclusive right to establish telecommunications network infrastructures open to the general public.

Article L 34 specifies that only services provided to the public are covered by the Law. Article L.32-7 of the Code defines reserved voice telephony as the commercial provision of a system of direct, real-time voice transmissions between users connected to termination points of a telecommunications network. All other services provided to the public are liberalised subject to a declaration procedure or, for services of 5 Mbits/sec or more, to a licensing procedure[60].

According to Article L.34-2, France Telecom is authorised to supply any bearer service (this is how the French regulation qualifies the provision of simple resale of packet or circuit-switched services). Other providers need a licence. France has adopted additional licensing conditions for the provision of such bearer-service. A final draft Decree for the application of Article L.34.2 relating to bearer services was transmitted to the Commission which decided, on 26 November 1992, not to object to its entry into force. The Decree was formally adopted on 30 December 1993 and published in the French Official Journal of 31 December 1993 (p.18276). This decree sets out a number of conditions relating to:

- the essential requirements,
- the measurement and the publication of the characteristics and the area of coverage of the service (Article 2)
- the respect of technical constraints concerning access to the service (Article 3)
- the interconnection with other bearer services (Article 4)
- national defence and public security as regards the encryption of data (Article 5),
- fair competition.

The authorization of France Telecom to provide this service, cannot be transferred to its subsidiaries. TRANSPAC, which is a subsidiary of the Compagnie Générale des Communications (COGECOM), itself a 100 % daughter of France Telecom, had therefore to request a licence which was granted by order of 15 July 1993 (French Official Journal of 8 August 1993, p. 11224).

As regards the separation of regulation and operation (Article 7), the Minister for Industry, Posts and Telecommunications and Foreign Trade ensures that the regulations are respected by the public operators and, furthermore, that the regulation of the telecommunications sector on the one hand, and the operation of networks and the provision of telecommunications services on the other hand, are performed independently. He exercises his rights through the "Direction Générale des Postes et Télécommunications" (DGPT).

---

[60] The following companies were granted a licence: SITA, BT, SPRINT, SLIGOS, GSI, EDT and ESPRIT TELECOM.

GERMANY

Two German laws adopted on 8 June 1989 define the legal framework for the provision of telecommunications services: the Postverfassungsgesetz (PVG), which delimits the organisation and tasks of the Ministry for Post and Telecommunications and of Deutsche Bundespost Telekom; and an amendment of the Fernmeldeanlagegesetz (FAG), defining among other things, the monopoly retained by the State. The legal framework was substantially amended by Law of 14 September 1994 (Postneuordnungsgesetz -PTNeuOG), which came into force on 1 January 1995.

The new Act did not however alter the definition of the "voice telephony" reserved to the DBP Telekom, although the Commission had in April 1994 drawn the attention of the German Government to the fact that it is broader than that in the Directive. Essentially three issues arise. Firstly, the definition uses the wording "for third parties" as opposed to "for the public". As a consequence, the switching of voice for closed user groups is part of the monopoly. Secondly, the terms "switching of voice" in the Law are interpreted in practice as including also mixed telecommunications (voice combined with data or images) in the monopoly, when the exchange of speech can technically be dissociated from data communication as is the case as regards videophony on ISDN. Finally, the definition covers all switching of voice, without distinguishing whether the voice both originates in and is switched to the public switched network. According to the Directive the switching of voice originating in a leased line network or switched to such a leased line network should not be reserved.

Following bilateral contacts, the first issue was provisionally settled to a large extent. The German Law (FAG) reserves voice telephony for third parties, which is more than voice telephony "for the public" as allowed according to the Directive. To restore conformity between German and Community Law, the German Ministry for Post and Telecommunications, instead of changing the Law, used its licensing powers to allow by order (Verfügung) No. 1/1993, of 6 January 1993 and 8/1993 of 13 January 1993, private companies to provide telephony to closed user groups. The order established a class license (Allgemeingenehmigung) for the provision of the service to entities which are economically integrated.

As regards Article 6 of the Directive, Section 29 TKV provides that a connection licence (Anschalteerlaubnis) is required for terminal equipment for connection to the network termination of transmission lines. The Commission views such a restriction as contrary to Article 6 of the Directive since it delays the use of equipment, already type approved, used in the switching and processing of signals (such as concentrators) to connect leased lines networks with the public switched telecommunications network. The issue has been raised with the German authorities which will abolish the relevant provision. In the meantime, the ministry has granted a class connection licence (Vfg 269/1994).

The powers referred to in Article 7 of the Directive were until 31 December 1994 exercised by The Minister for Posts and Telecommunications. Under the new regime, the Ministry will be assisted by a Regulation Council (Regulierungsrat), including representatives of the Länder and the Federal Parliament (Bundestag). On the other hand, the government share in DBP Telekom, which was transformed into a joint stock company, will now be managed by a distinct office: the Bundesanstalt für Post und Telekommunikation (BAnst PT).

GREECE

Greece implemented the Directive by means of Law No. 2075/92 of 21 July 1992, which has never been brought fully into effect as the Greek government failed to adopt the order setting out the internal working rules of the independent regulatory body set up by the Act. On 20 October 1994, this law was replaced by Law No. 2246/94. The legislation does also not provide a complete regulatory framework and will necessitate further secondary legislation which has not yet been adopted.

Given the failure of the Greek government to adopt timely implementation measures of the Services Directive the Commission has started proceedings before the Court of Justice under Article 169 of the Treaty.

Article 2 (15) of Law No. 2246/94 defines "voice telephony" using the same wording as the Directive. However, Article 3 (2) of the Law states as principle that voice telephony is reserved and acknowledges only in a second stage that all other services are liberalised. Consequently, there is a threat of a broader definition of the reserved voice telephony in Greece. Moreover, this Article makes the liberalisation of these services subject to the condition that their provision is compatible with the proper fulfilment of the mission assigned to the public operator OTE.

Liberalised services are, according to this Article 3 (2), subject to either an individual licence or to a declaration, depending on the limit of the capacity of leased lines used. The threshold has not yet been established.

As regards simple resale of packet - and circuit - switched data transmission, Greece applied by letter of 7 February 1992 for the derogation until 1 January 1996 under Recital 11 of the Directive. After the adoption of Law No. 2075/92, which did not distinguish packet- and circuit-switched data transmission from other liberalised telecommunications services, Greece confirmed by letter of 27 May 1993, that it did no longer seek such a derogation and that packet- and circuit-switched data transmission was liberalised.

According to Law No. 2246/94, the independent regulatory authority referred to in Article 7 of the Directive, is the National Telecommunications Commission (EET), under the supervision of the Minister of Transport and Communications. The EET is the relevant authority for frequency allocation, numbering, licensing and type approval, as well as for ensuring compliance with national and EEC Treaty competition rules. It is not yet operational. In the mean-time, the Ministry exercises its competence.

IRELAND

Ireland has adopted specific regulations to give effect to the Directive. These are contained in "Statutory Instrument S.I. No.45 of 1992, European Communities (Telecommunications Services) Regulations 1992." which have amended the Postal and Telecommunications Services Act, 1983.

In the area of voice telephony, the definition of "public voice telephony" expressed in S.I. No.45 mirrors that in the Directive. The exclusive right granted to Telecom Eireann under Section 87 of the 1983 Act is restricted to offering, providing and maintaining the public telecommunications network and offering, providing and maintaining voice telephony services under Regulation 3(1) of S.I. No.45. Value added licences can be obtained under Article 111 of the Act of 1983 for provision of any other service, including voice for closed user groups or voice services making use of only one connection point between leased lines and the public switched network. By end 1994, 20 such licences were granted.

Statutory Instrument No.45 of 1992 sets out the rights of these licensees as regards access to and use of the public telecommunications network. The conditions applied must be objective, non-discriminatory and published. Similarly, under Regulation 4(3) of the S.I., requests for leased lines have to be met within a reasonable period , and there should be no restrictions on their use other than to ensure non-provision of telephone services, the security of network operations, the maintenance of network integrity and, in justified cases, the interoperability of services and data protection.

With respect to Article 7 of the Services Directive, The Minister for Transport, Energy and Communications is responsible for surveillance of Telecom Eireann according to Regulation 5 of S.I. No.45.

ITALY

The Directive has been included in the Law No. 142 of 19 February 1992, "Legge Comunitaria for 1991" (LC 1991), which delegated to the Government the power to issue, within one year after its coming into force (i.e. by March 6, 1993), a number of legislative decrees for the implementation of the EEC Directives listed in Annexes A and B, including the Services Directive. The legislative decree implementing the Services Directive was, however, not adopted within this deadline. Subsequently, the Italian Government included the Services Directive in Article 54 of Law No. 146 of 22 February 1994 (legge comunitaria 1993).

This Article repeats the specific principles and criteria to be followed in the preparation of the legislative decree implementing the Directive, which were mentioned in LC 1991. Consequently it still provides for a specific licensing procedure for the supply of packet- or circuit-switched data services although the deadline set out in Article 3 of the Service Directive for the introduction of such scheme had already elapsed. Given that under the direct effect of Articles 2 and 3 of the Directive simple resale of capacity was liberalised in Italy without any further restrictions, the Italian government shall have to provide appropriate justifications for the reintroduction of any additional restrictions in that respect.

The legislative decrees have not been adopted yet, and the Commission is considering taking Italy to the Court of Justice for failure to notify the implementation measures of the Services Directive.

In the meantime, Article 1 of the Italian Postal Code of 1973, stating that "telecommunication services ... exclusively pertain to the State" remains applicable although Article 2 of the Directive implies that this Article, as well as all other provisions setting out the state monopoly for telecommunications services, should be changed to allow private operators the right to provide all telecommunications services excluding well defined areas reserved to the State. According to the Italian legal framework, only value added services listed in Article 3(para.2) of the National Regulatory Plan for Telecommunications, enacted by a Ministerial Decree of 6 April 1990, may be provided.

However, in a decision of 10 January 1995, the Italian Antitrust Authority (Autorità Garante) stated, disregarding the mentioned Italian regulation, that a refusal of Telecom Italia to provide leased lines to a private company wanting to offer voice services liberalised under the Directive is an abuse of dominant position and requested Telecom Italia[61] to present, within 90 days, the actions taken in order to remove the restrictions to competition in the market for voice services for corporate networks/closed user groups, including virtual private networks. The Antitrust Authority bases this decision on the direct effect of Articles 1 and 2 of the Services Directive in Italy. Telecom Italia has appealed against the decision.

With the implementation of Act 58/92 on the reorganisation of the telecommunications sector, regulatory and operational functions were, in principle, separated by transferring the operating bodies of the Ministry, namely ASST, to Iritel, a company of the IRI Group. A bill on "Public Utility Services Regulatory Authorities" (No. 359) is currently pending at the Italian Parliament., which will, if adopted, create, inter alia, a regulatory body for post and telecommunications. However, no date is yet anticipated for its adoption.

LUXEMBOURG

- Two legislative acts were adopted in 1990 in order to implement the Directive, the Regulation (Règlement grand-ducal) of 3 August 1990 establishing the general rules applicable to public telecommunications services and the Regulations of 8 October 1990 concerning public telephone service, telecommunications leased lines, public luxpac service, public alarm transmission service and public automatic telephone service - Serviphone.

The Luxembourg authorities have, by letter of 22 October 1991, declared their intention to amend the definition of "basic telephonic service" in the Regulation and add the term "to the public".

The Law of 20 February 1992 transformed the former Administration des P&T into a public undertaking with a separate legal identity, to comply with the requirement of Article 7 of the Directive to separate regulatory and operational functions. The Minister for Posts and Telecommunications exercises all regulatory responsibility in respect of the establishment and operation of the telecommunications networks.

---

[61] Telecom Italia was created on 18 August 1994 out of a merger between SIP, Italcable, IRITel, Telespazio and SIRM.

NETHERLANDS

The basic telecommunications legislation in the Netherlands (Act No. 520 on the telecommunications facilities (Wet op de Telecommunicatievoorzieningen) ("WTV") of 26 October 1988, which came into force on 1 January 1989, was drafted before the publication of the Commission Green Paper of 1987. It therefore uses a terminology which is substantially different from the terminology used in the Directive.

Reserved voice telephony is defined in Article 2 of Decree No 551 of 1 December 1988 which lists the mandatory services of KPN (Koninklijke PTT Netherlands). According to the definition, the reserved service is not limited to a service which is provided on a commercial basis. Secondly, it does not limit the monopoly to voice telephony "for the public". Thirdly, it does not take into account whether the provision of the service implies the use of two connection points of the relevant leased lines. These issues have been discussed in bilateral contacts between the Dutch authorities and the Commission services. The Dutch authorities have subsequently published a notice on 30 May 1994 allowing voice services to closed user groups. However, the issue of voice services provided on leased lines and using only one connection with the public switched network is still under discussion.

The Ministry for Transport and Public Works (Verkeer en Waterstaat) is the body entrusted with regulatory responsibilities for telecommunications and it may give detailed instructions to KPN concerning the execution of the general Directives (BART) and the obligations relating to mandatory services. This ministerial responsibility includes general tariff policy for public telecommunications services (which, in application, is similar to 'price capping' in the UK).

PORTUGAL

As in the case of the Netherlands, the regulatory framework for telecommunications in Portugal predates the adoption of the Directive. The "Basic Law on the Establishment, the Management and the Exploitation of Telecommunications Infrastructures and Services", Law 88/89, ("Basic Law") was adopted on 11 September 1989 before the adoption of the Directive. This explains in part why the terminology used often differs markedly from that of the Directive. The Basic Law, and in particular the distinction between complementary and value added services, is technology-based rather than services-based.

On the issue of reserved services, the Portuguese legislation does not define services whose provision is reserved to public carriers as narrowly as the Commission Directive. Firstly, Article 2(2) of the Basic Law defines "telecommunications for public use" as all services which are designed to meet the generic collective requirements for transmitting and receiving messages and information. This is a broader definition than the concept of public in the Directive. It is true that the Basic Law lists telecommunications for private use in Article 2(3) and that this list encompasses at point h) "other communications reserved for the use of specific public or private entities by means of an authorization granted by the government under the terms of treaties or international agreements or special legislation". However, since the entry into force of the law, the Portuguese government has not adopted the necessary legislation to liberalise voice telephony or telex services provided for closed user groups. In September 1991, the Portuguese government announced the adoption of a ministerial order (diploma) on private networks to resolve this issue. By letter of 18 November 1993, the Portuguese authorities confirmed that they were still studying the issue and, in a subsequent bilateral meeting on 31 January 1994, no more precise undertaking on timing could be given.

Secondly, under Portuguese legislation voice telephony is defined more broadly than in the Directive. The Basic Law does not define voice telephony. The definition is included in Article 1 of the former Regulation of the Public Telephone Service annexed to the Decree (Decreto-Lei) 199/87 of 30 April 1987. The Basic Law refers to the technical operation of a fixed subscriber access system (which it defines as the set of transmission means located between a termination point and the first concentration, switching or processing node) without distinguishing between the situation, where this "access system" is a leased line or the PSTN ; nor does it take into consideration the number of connections to the leased line which may be used.

A third issue is the licensing conditions. According to the Directive, Member States may make the supply of telecommunications services subject to a licensing scheme, but only to warrant compliance with the essential requirements listed in the Directive. However, the Portuguese licensing scheme encompasses other obligations.

The liberalised services are divided in two categories: "complementary telecommunications services" and "value added services" according to a technical criterion : the use of own infrastructure, and in particular, concentration, processing and switching nodes. Therefore, most liberalised services come within the fixed complementary services category. The two types of services each have their own licensing conditions.

Article 4 paragraph 2 of the Directive requires Member States to ensure that there are no restrictions on the use of leased lines except those justified by essential requirements or the existence of the voice telephony monopoly. Article 14 of the Basic Law appears more restrictive as it allows only the use of leased lines voice traffic to the suscriber's own use or to the provision of complementary and value added services, and even requires a licence for the shared use of leased circuits.
Portugal claims that its complementary services scheme (Portaria 930/92) is in accordance with Article 3 of the Directive. This issue is however not settled.

Portugal separated regulatory and operational functions in 1989. According to the Basic Law, the Ministry is responsible for supervising and monitoring telecommunications. This includes the planning and co-ordination of the national public infrastructure and services which are

considered essential.

In practice the regulatory functions are delegated to the Institute for Communications of Portugal (ICP), leaving the Ministry to supervise the ICP and approve directives proposed by the ICP.

SPAIN

The *Ley de Ordenación de las Telecomunicaciones*, Law No. 31/1987 of 18 December 1987, ("LOT") is the legislation in force relating to telecommunications activities in Spain. In light of the Directive, the LOT has been amended by Law No. 32/1992 of 3 December 1992, which limited the reserved services to the basic telephone service, telex and telegrams, and a Royal Decree 804/1993 of 28 May 1993 implementing Article 3 of the Directive as regards basic data switching services.

As has been the case in some other Member States, the major issue in the Directive's implementation has concerned the definition of voice telephony and, hence, the reserved area. The LOT defines "basic voice telephony", in paragraph 15 of its annex, in terms identical to the definition of "voice telephony" in the Directive. However, following a complaint to the Commission, it seems that the Spanish authorities' understanding of this definition was not so clear and that, although defined in the Law, an administrative order would be required to define further Telefónica's basic voice telephony monopoly. This definition is not yet adopted.

Spain originally requested an extension period for exclusive rights for simple resale, as allowed under Recital 11 of the Directive, although such a request was not maintained. As regards the grant of concessions for the provision of packet or circuit switched data services, a scheme for its regulation was created by the Royal Decree of 28 May 1993. The draft had been notified to the Commission, but the text adopted did not take account of all the Commission's remarks. Issues relevant to this, particularly regarding the scope of the scheme, are being further discussed with the Spanish authorities

The regulatory powers referred to in Article 7 of the Directive are the responsibility of the Directorate General for Telecommunications (DGT). The DGT was created by Royal Decree of 19 June 1985. It grants concessions, authorizations and administrative licenses for equipment and services. The Director General for telecommunications is, however, also the Government Delegate on the Board of Directors of Telefónica. He has the right to veto decisions of the Board on grounds of public policy. Moreover, Article 15 of the LOT allows for the appointment by the Government of five other members of the Board.

UNITED KINGDOM

The legislation in force applying to telecommunications services is the 1984 Telecommunications Act which predates the Commission's Green Paper and Directive. The Act has been extended by a new policy building on the 1991 White Paper comprising amendments to existing licences, extensions of cable licences to include the provision of voice telephony services and the issuing of new licences.

UK legislation has generally preceded the Commission's Directive. For example, the exclusive rights of BT to provide the telecommunications services covered by Article 2 of the Directive were abolished in the UK by section 2 of the Telecommunications Act of 1984. Section 5 requires all persons who run telecommunications systems to have a licence (which may be an individual or class licence) .

As regards the provisions of Article 4 of the Directive, no precise definition of infrastructure, such as exists in Germany or the Netherlands has been set down. Section 4 of the TA instead defines a "telecommunications system" as : A system for the conveyance, through the agency of electric, magnetic, electro-magnetic, electro-chemical or electromechanical energy, of

- speech, music and other sounds
- visual images
- signals serving for the impartation (whether as between persons and persons, things and things or persons and things) of any matter otherwise than in the form of sounds or visual images; or
- signals serving for the actuation or control of machinery or apparatus

The Secretary of State designates certain of these systems as "public telecommunications systems". Operators of public telecommunications systems are authorised by individual licences and are generally granted PTO status. Around twenty public fixed link operators have been granted such licences, as well as 126 cable TV franchisees.

The 1984 Telecommunications Act, in conjunction with the Wireless Telegraphy Act 1949 also ensures that the regulatory functions specified in Article 7 are carried out independently of the Telecommunications Operators. This is largely through the work of OFTEL, a non-ministerial government department under the Director General of Telecommunications who, for the duration of his appointment, is independent of ministerial control.

SWEDEN

There has never been a legal telecommunications monopoly in Sweden. The de facto monopoly of Telia ("Televerket" at the time) was the result of a commercial process.

The current Regulatory framework of telecommunications is set out in the Telecommunications Act (Telelagen) of 1993. Under this Act there are no exclusive rights to provide telecommunication services (Art. 2.1. and 4). Any operator has the right to obtain a licence and to supply telecommunications services. Reasons are given in case of refusals and Article 37 of the Act states that appeals against such refusals may be lodged with the administrative court of Appeal.

Licences are required only for the operation of public networks and the provision of leased lines. Other services are subject only to a registration procedure.

There are no restrictions on the processing of signals before or after transmission via the public network (Art. 6.1), nor is there any discrimination in the conditions of use or in the charges payable (Art. 6.2).

As regards the separation of regulation and operation (Article 7 of the Directive), the

Telestyrelsen (Telecom Agency) is responsible for ensuring that regulations are respected by all operators. The Agency was set up on 1 July 1992. Its functionning is laid down in Förording 1992:895. The Agency may adopt sanctions, including the revocation of licences, against operators which do not comply with their obligation.

The Agency is headed by a Director General, under the supervision of a board, which is appointed by the Government. Telestyrelsen has also responsibilities in the defence area. The Agency is financed through fees levied on the basis of gross turnover of licencees and parties which registered.

The main telecommunication operator in Sweden is Telia, which was incorporated as a private limited liability company on 1 January 1993 according to Law 1992:100. It is a 100 % publicly owned company, supervised by the Ministry of Transport and Communications.

AUSTRIA

Austria implemented the Directive mainly through its Telecommunications Act (Fernmeldegesetz) Nr. 908/1993, which entered into force on 1 April 1994. Austria has however not yet notified the implementing decrees of this law, nor the general usage conditions of the public network.

The reserved telephone service is defined in Articles 44(2) and 2(6) of the Act. This definition does not fully correspond to the definition in the Directive. However, no licenses are required for the provision of liberalised services. Conditions for access to the public network and use of leased lines will, under Article 44(6) of the Act be laid down in the general usage conditions (Geschäftsbedingungen).

The public telecommunications operator is the Post und Telegraphenverwaltung (PTV). The law entrusts the regulatory tasks to the Ministry of Public Economy and Communications.

FINLAND

The basic regulatory framework of telecommunications is the telecommunications act 87/183 (Teletoimintalaki), which was amended in 1988, 1990 and 1992.

Under this framework, there are no more special or exclusive rights for the provision of telecommunications services, including voice telephony, in Finland. The whole tlecommunications sector has been opened to competition. Public telecommunications networks are operated by organizations with an operating licence granted by the Government.

Article 10 of the Act sets out the rights and duties of subscribers and in particular the right to lease lines as well as to use them to provide telecommunications services or to sub-lease them to others.

Public switched data communications are subject to notification only (Article 5(2) of the Act). In 1994, there were 63 organizations with operating licences and 13 notified organizations operating public switched data communications.

Articles 18 - 23 of the Act entrust the Ministry of Transport and Communications with the

general supervision and promotion of telecommunications. The day to day enforcement of the Telecommunications Act is, however, entrusted to the Telecommunications Administration Centre, which is an agency under the Ministry of Transport and Communications. In principle the costs of the centre are covered by licence and inspection fees.

Telecom Finland is 100 % state-owned but operates at arms length from the Ministry of Transport and Communications, although the members of its board as well as the top executives are appointed by the Government.

ANNEX II

LIST OF NATIONAL REGULATORY AUTHORITIES IN THE FIELD OF TELECOMMUNICATIONS

The survey of the national regulatory framework of the Member States in annex I has been drafted on the basis of the information officially notified to the Commission.

For more detailed information, interested persons should contact directly the National Regulatory Authorities of the Member States. The full address of these authorities were published in the Official Journal C 277/9 of 15 October 1993.

Belgium	Institut belge des services postaux et des télécommunications (IBPT) Avenue de l'Astronomie, 14 1000 Brussels
Denmark	Telestyrelsen Holsteingade 63 DK - 2100 København Ø
Germany	Bundesministerium für Post und Telekommunikation Postfach 80 01 D-53005 Bonn
Greece	Ministry of Transport Sygrou 49 Athens
Spain	Dirección General de Telecomunicaciones 5a. planta Plaza de Cibeles S/N E-28701 Madrid
France	Direction générale des Postes et Télécommunications 20, avenue de Ségur 75700 Paris
Ireland	Department of Transport, Energy and Communications Scotch Hause, Hawkins Street Dublin 2

Italy	Ispettorato generale delle telecomunicazioni Viale Europa 190 00 144 Roma
Luxembourg	Ministère des Communications 18, montée de la Pétrusse L - 2945 Luxembourg
The Netherlands	Ministerie van Verkeer en Waterstaat Hoofddirectie telecommunicatie en Post Postbus 20901 NL - 2500 EX 's Gravenhage
Portugal	ICP Av. José Malhoa Lote 1683 1000 Lisboa
United Kingdom	DTI 151 Buckhingham Palace Road London SW1W 9SS
Sweden	Telestyrelsen (Telecom Agency) Box 5398 S-10249 Stockholm
Austria	Bundesministerium für öffentliche Wirtschaft und Verkehr Kelsenstraße 7 A-1030 Wien
Finland	Teleförvaltningscentralen Hallonnäsgatan 8 BP 53 00211 Helsingfors

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DIRECTIVE

of 16 May 1988

on competition in the markets in telecommunications terminal equipment

(88/301/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Whereas:

1. In all the Member States, telecommunications are, either wholly or partly, a State monopoly generally granted in the form of special or exclusive rights to one or more bodies responsible for providing and operating the network infrastructure and related services. Those rights, however, often go beyond the provision of network utilization services and extend to the supply of user terminal equipment for connection to the network. The last decades have seen considerable technical developments in networks, and the pace of development has been especially striking in the area of terminal equipment.

2. Several Member States have, in response to technical and economic developments, reviewed their grant of special or exclusive rights in the telecommunications sector. The proliferation of types of terminal equipment and the possibility of the multiple use of terminals means that users must be allowed a free choice between the various types of equipment available if they are to benefit fully from the technological advances made in the sector.

3. Article 30 of the Treaty prohibits quantitative restrictions on imports from other Member States and all measures having equivalent effect. The grant of special or exclusive rights to import and market goods to one organization can, and often does, lead to restrictions on imports from other Member States.

4. Article 37 of the Treaty states that 'Member States shall progressively adjust any State monopolies of a commercial character so as to ensure that when the transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.

The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.' Paragraph 2 of Article 37 prohibits Member States from introducing any new measure contrary to the principles laid down in Article 37 (1).

5. The special or exclusive rights relating to terminal equipment enjoyed by national telecommunications monopolies are exercised in such a way as, in practice, to disadvantage equipment from other Member States, notably by preventing users from freely choosing the equipment that best suits their needs in terms of price and quality, regardless of its origin. The exercise of these rights is therefore not compatible with Article 37 in all the Member States except Spain and Portugal, where the national monopolies are to be adjusted progressively before the end of the transitional period provided for by the Act of Accession.

6. The provision of installation and maintenance services is a key factor in the purchasing or rental of terminal equipment. The retention of exclusive rights in this field would be tantamount to retention of exclusive marketing rights. Such rights must therefore also be abolished if the abolition of exclusive importing and marketing rights is to have any practical effect.

I/49

7. Article 59 of the Treaty provides that 'restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.' Maintenance of terminals is a service within the meaning of Article 60 of the Treaty. As the transitional period has ended, the service in question, which cannot from a commercial point of view be dissociated from the marketing of the terminals, must be provided freely and in particular when provided by qualified operators.

8. Article 90 (1) of the Treaty provides that 'in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94.'

9. The market in terminal equipment is still as a rule governed by a system which allows competition in the common market to be distorted; this situation continues to produce infringements of the competition rules laid down by the Treaty and to affect adversely the development of trade to such an extent as would be contrary to the interests of the Community. Stronger competition in the terminal equipment market requires the introduction of transparent technical specifications and type-approval procedures which meet the essential requirements mentioned in Council Directive 86/361/EEC (1) and allow the free movement of terminal equipment. In turn, such transparency necessarily entails the publication of technical specifications and type-approval procedures. To ensure that the latter are applied transparently, objectively and without discrimination, the drawing-up and application of such rules should be entrusted to bodies independent of competitors in the market in question. It is essential that the specifications and type-approval procedures are published simultaneously and in an orderly fashion. Simultaneous publication will also ensure that behaviour contrary to the Treaty is avoided. Such simultaneous, orderly publication can be achieved only by means of a legal instrument that is binding on all the Member States. The most appropriate instrument to this end is a directive.

10. The Treaty entrusts the Commission with very clear tasks and gives it specific powers with regard to the monitoring of relations between the Member States and their public undertakings and enterprises to which they have delegated special or exclusive rights, in particular as regards the elimination of quantitative restrictions and measures having equivalent effect, discrimination between nationals of Member States, and competition. The only instrument, therefore, by which the Commission can efficiently carry out the tasks and powers assigned to it, is a Directive based on Article 90 (3).

11. Telecommunications bodies or enterprises are undertakings within the meaning of Article 90 (1) because they carry on an organized business activity involving the production of goods or services. They are either public undertakings or private enterprises to which the Member States have granted special or exclusive rights for the importation, marketing, connection, bringing into service of telecommunications terminal equipment and/or maintenance of such equipment. The grant and maintenance of special and exclusive rights for terminal equipment constitute measures within the meaning of that Article. The conditions for applying the exception of Article 90 (2) are not fulfilled. Even if the provision of a telecommunications network for the use of the general public is a service of general economic interest entrusted by the State to the telecommunications bodies, the abolition of their special or exclusive rights to import and market terminal equipment would not obstruct, in law or in fact, the performance of that service. This is all the more true given that Member States are entitled to subject terminal equipment to type-approval procedures to ensure that they conform to the essential requirements.

12. Article 86 of the Treaty prohibits as incompatible with the common market any conduct by one or more undertakings that involves an abuse of a dominant position within the common market or a substantial part of it.

13. The telecommunications bodies hold individually or jointly a monopoly on their national telecommunications network. The national networks are markets. Therefore, the bodies each individually or jointly hold a dominant position in a substantial part of the market in question within the meaning of Article 86.

The effect of the special or exclusive rights granted to such bodies by the State to import and market terminal equipment is to:

— restrict users to renting such equipment, when it would often be cheaper for them, at least in the long term, to purchase this equipment. This effectively makes contracts for the use of networks subject to acceptance by the user of additional services which have no connection with the subject of the contracts,

(1) OJ No L 217, 5. 8. 1986, p. 21.

I/50

— limit outlets and impede technical progress since the range of equipment offered by the telecommunications bodies is necessarily limited and will not be the best available to meet the requirements of a significant proportion of users.

Such conduct is expressly prohibited by Article 86 (d) and (b), and is likely significantly to affect trade between Member States.

At all events, such special or exclusive rights in regard to the terminal equipment market give rise to a situation which is contrary to the objective of Article 3 (f) of the Treaty, which provides for the institution of a system ensuring that competition in the common market is not distorted, and requires *a fortiori* that competition must not be eliminated. Member States have an obligation under Article 5 of the Treaty to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty, including Article 3 (f).

The exclusive rights to import and market terminal equipment must therefore be regarded as incompatible with Article 86 in conjunction with Article 3, and the grant or maintenance of such rights by a Member State is prohibited under Article 90 (1).

14. To enable users to have access to the terminal equipment of their choice, it is necessary to know and make transparent the characteristics of the termination points of the network to which the terminal equipment is to be connected. Member States must therefore ensure that the characteristics are published and that users have access to termination points.

15. To be able to market their products, manufacturers of terminal equipment must know what technical specifications they must satisfy. Member States should therefore formalize and publish the specifications and type-approval rules, which they must notify to the Commission in draft form, in accordance with Council Directive 83/189/EEC (1). The specifications may be extended to products imported from other Member States only insofar as they are necessary to ensure conformity with the essential requirements specified in Article 2 (17) of Directive 86/361/EEC that can legitimately be required under Community law. Member States must, in any event, comply with Articles 30 and 36 of the Treaty, under which an importing Member State must allow terminal equipment legally manufactured and marketed in another Member State to be imported on to its territory, and may only subject it to such type-approval and possibly refuse approval for reasons concerning conformity with the abovementioned essential requirements.

16. The immediate publication of these specifications and procedures cannot be considered in view of their complexity. On the other hand, effective competition is not possible without such publication, since potential competitors of the bodies or enterprises with special or exclusive rights are unaware of the precise specifications with which their terminal equipment must comply and of the terms of the type-approval procedures and hence their cost and duration. A deadline should therefore be set for the publication of specifications and the type-approval procedures. A period of two-and-a-half years will also enable the telecommunications bodies with special or exclusive rights to adjust to the new market conditions and will enable economic operators, especially small and medium-sized enterprises, to adapt to the new competitive environment.

17. Monitoring of type-approval specifications and rules cannot be entrusted to a competitor in the terminal equipment market in view of the obvious conflict of interest. Member States should therefore ensure that the responsibility for drawing up type-approval specifications and rules is assigned to a body independent of the operator of the network and of any other competitor in the market for terminals.

18. The holders of special or exclusive rights in the terminal equipment in question have been able to impose on their customers long-term contracts preventing the introduction of free competition from having a practical effect within a reasonable period. Users must therefore be given the right to obtain a revision of the duration of their contracts,

HAS ADOPTED THIS DIRECTIVE:

Article 1

For the purposes of this Directive:

— 'terminal equipment' means equipment directly or indirectly connected to the termination of a public telecommunications network to send, process or receive information. A connection is indirect if equipment is placed between the terminal and the termination of the network. In either case (direct or indirect), the connection may be made by wire, optical fibre or electromagnetically.

Terminal equipment also means receive-only satellite stations not reconnected to the public network of a Member State,

— 'undertaking' means a public or private body, to which a Member State grants special or exclusive rights for the importation, marketing, connection, bringing into service of telecommunications terminal equipment and/or maintenance of such equipment.

(1) OJ No L 109, 28. 3. 1983, p. 8.

Article 2

Member States which have granted special or exclusive rights within the meaning of Article 1 to undertakings shall ensure that those rights are withdrawn.

They shall, not later than three months following the notification of this Directive, inform the Commission of the measures taken or draft legislation introduced to that end.

Article 3

Member States shall ensure that economic operators have the right to import, market, connect, bring into service and maintain terminal equipment. However, Member States may:

— in the absence of technical specifications, refuse to allow terminal equipment to be connected and brought into service where such equipment does not, according to a reasoned opinion of the body referred to in Article 6, satisfy the essential requirements laid down in Article 2 (17) of Directive 86/361/EEC,

— require economic operators to possess the technical qualifications needed to connect, bring into service and maintain terminal equipment on the basis of objective, non-discriminatory and publicly available criteria.

Article 4

Member States shall ensure that users have access to new public network termination points and that the physical characteristics of these points are published not later than 31 December 1988.

Access to public network termination points existing at 31 December 1988 shall be given within a reasonable period to any user who so requests.

Article 5

1. Member States shall, not later than the date mentioned in Article 2, communicate to the Commission a list of all technical specifications and type-approval procedures which are used for terminal equipment, and shall provide the publication references.

Where they have not as yet been published in a Member State, the latter shall ensure that they are published not later than the dates referred to in Article 8.

2. Member States shall ensure that all other specifications and type-approval procedures for terminal equipment are formalized and published. Member States shall communicate the technical specifications and type-approval procedures in draft form to the Commission in accordance with Directive 83/189/EEC and according to the timetable set out in Article 8.

Article 6

Member States shall ensure that, from 1 July 1989, responsibility for drawing up the specifications referred to in Article 5, monitoring their application and granting type-approval is entrusted to a body independent of public or private undertakings offering goods and/or services in the telecommunications sector.

Article 7

Member States shall take the necessary steps to ensure that undertakings within the meaning of Article 1 make it possible for their customers to terminate, with maximum notice of one year, leasing or maintenance contracts which concern terminal equipment subject to exclusive or special rights at the time of the conclusion of the contracts.

For terminal equipment requiring type-approval, Member States shall ensure that this possibility of termination is afforded by the undertakings in question no later than the dates provided for in Article 8. For terminal equipment not requiring type-approval, Member States shall introduce this possibility no later than the date provided for in Article 2.

Article 8

Member States shall inform the Commission of the draft technical specifications and type-approval procedures referred to in Article 5 (2);

— not later than 31 December 1988 in respect of equipment in category A of the list in Annex I,

— not later than 30 September 1989 in respect of equipment in category B of the list in Annex I,

— not later than 30 June 1990 in respect of other terminal equipment in category C of the list in Annex I.

Member States shall bring these specifications and type-approval procedures into force after expiry of the procedure provided for by Directive 83/189/EEC.

Article 9

Member States shall provide the Commission at the end of each year with a report allowing it to monitor compliance with the provisions of Articles 2, 3, 4, 6 and 7.

An outline of the report is attached as Annex II.

Article 10

The provisions of this Directive shall be without prejudice to the provisions of the instruments of accession of Spain and Portugal, and in particular Articles 48 and 208 of the Act of Accession.

Article 11

This Directive is addressed to the Member States.

Done at Brussels, 16 May 1988.

For the Commission

Peter SUTHERLAND

Member of the Commission

ANNEX I

List of terminal equipment referred to in Article 8

	Category
Additional telephone set; private automatic branch exchanges (PABXs):	A
Modems:	A
Telex terminals:	B
Data-transmission terminals:	B
Mobile telephones:	B
Receive-only satellite stations not reconnected to the public network of a Member State:	B
First telephone set:	C
Other terminal equipment:	C

ANNEX II

Outline of the report provided for in Article 9

Implementation of Article 2

1. Terminal equipement for which legislation is being or has been modified.

   By category of terminal equipment:
   - — date of adoption of the measure or,
   - — date of introduction of the bill or,
   - — date of entry into force of the measure.

2. Terminal equipment still subject to special or exclusive rights:
   - — type of terminal equipment and rights concerned.

Implementation of Article 3

- — terminal equipment, the connection and/or commissioning of which has been restricted,
- — technical qualifications required, giving reference of their publication.

Implementation of Article 4

- — references of publications in which the physical characteristics are specified,
- — number of existing network termination points,
- — number of network termination points now accessible.

Implementation of Article 6

- — independent body or bodies appointed.

Implementation of Article 7

- — measures put into force, and
- — number of terminated contracts.

COMMISSION

COMMISSION DIRECTIVE

of 28 June 1990

on competition in the markets for telecommunications services

(90/388/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Whereas:

(1) The improvement of telecommunications in the Community is an essential condition for the harmonious development of economic activities and a competitive market in the Community, from the point of view of both service providers and users. The Commission has therefore adopted a programme, set out in its Green Paper on the development of the common market for telecommunications services and equipment and in its communication on the implementation of the Green Paper by 1992, for progressively introducing competition into the telecommunications market. The programme does not concern mobile telephony and paging services, and mass communication services such as radio for television. The Council, in its resolution of 30 June 1988 (1), expressed broad support for the objectives of this programme, and in particular the progressive creation of an open Community market for telecommunications services. The last decades have seen considerable technological advances in the telecommunications sector. These allow an increasingly varied range of services to be provided, notably data transmission services, and also make it technically and economically possible for competition to take place between different service providers.

(2) In all the Member States the provision and operation of telecommunications networks and the provision of related services are generally vested in one or more telecommunications organizations holding exclusive or special rights. Such rights are characterized by the discretionary powers which the State exercises in various degrees with regard to access to the market for telecommunications services.

(3) The organizations entrusted with the provision and operation of the telecommunications network are undertakings within the meaning of Article 90 (1) of the Treaty because they carry on an organized business activity, namely the provision of telecommunications services. They are either public undertakings or private enterprises to which the State has granted exclusive or special rights.

(4) Several Member States, while ensuring the performance of public service tasks, have already revised the system of exclusive or special rights that used to exist in the telecommunications sector in their country. In all cases, the system of exclusive or special rights has been maintained in respect of the provision and operation of the network. In some Member States, it has been maintained for all telecommunications services, while in others such rights cover only certain services. All Member States have either themselves imposed or allowed their telecommunications administrations to impose restrictions on the free provision of telecommunications services.

(5) The granting of special or exclusive rights to one or more undertakings to operate the network derives from the discretionary power of the State. The granting by a Member State of such rights inevitably restricts the provision of such services by other undertakings to or from other Member States.

(6) In practice, restrictions on the provision of telecommunications services within the meaning of Article 59 to or from other Member States consist mainly in the prohibition on connecting leased lines by means of concentrators, multiplexers and other equipment to the switched telephone network, in imposing access charges for the connection that are out of proportion to the service provided, in prohibiting the routing of signals to or from third parties by means of leased lines or applying volume sensitive tariffs without economic justification or refusing to give service providers access to the

(1) OJ No C 257, 4. 10. 1988, p. 1.

I/55

network. The effect of the usage restrictions and the excessive charges in relation to net cost is to hinder the provision to or from other Member States of such telecommunications services as:

— services designed to improve telecommunications functions, e.g. conversion of the protocol, code, format or speed,

— information services providing access to data bases,

— remote data-processing services,

— message storing and forwarding services, e.g. electronic mail,

— transaction services, e.g. financial transactions, electronic commercial data transfer, teleshopping and telereservations,

— telecation services, e.g. telemetry and remote monitoring.

(5) Articles 55, 56 and 66 of the Treaty allow exceptions on non-economic grounds to the freedom to provide services. The restrictions permitted are those connected, even occasionally, with the exercise of official authority, and those connected with public policy, public security or public health. Since these are exceptions, they must be interpreted restrictively. None of the telecommunications services is connected with the exercise of official authority involving the right to use undue powers compared with the ordinary law, privileges of public power or a power of coercion over the public. The supply of telecommunication services cannot in itself threaten public policy and cannot affect public health.

(6) The Court of Justice case-law also recognizes restrictions on the freedom to provide services if they fulfil essential requirements in the general interest and are applied without discrimination and in proportion to the objective. Consumer protection does not make it necessary to restrict freedom to provide telecommunications services since this objective can also be attained through free competition. Nor can the protection of intellectual property be invoked in this connection. The only essential requirements derogating from Article 59 which could justify restrictions on the use of the public network are the maintenance of the integrity of the network, security of network operations and in justified cases, interoperability and data protection. The restrictions imposed, however, must be adapted to the objectives pursued by these legitimate requirements. Member States will have to make such restrictions known to the public and notify them to the Commission to enable it to assess their proportionality.

(9) In this context, the security of network operations means ensuring the availability of the public network in case of emergency. The technical integrity of the public network means ensuring its normal operation and the interconnection of public networks in the Community on the basis of common technical specifications. The concept of interoperability of services means complying with such technical specifications introduced to increase the provision of services and the choice available to users. Data protection means measures taken to warrant the confidentiality of communications and the protection of personal data.

(10) Apart from the essential requirements which can be included as conditions in the licensing or declaration procedures, Member States can include conditions regarding public-service requirements which constitute objective, non-discriminatory and transparent trade regulations regarding the conditions of permanence, availability and quality of the service.

(11) When a Member State has entrusted a telecommunications organization with the task of providing packet or circuit switched data services for the public in general and when this service may be obstructed because of competition by private providers, the Commission can allow the Member State to impose additional conditions for the provision of such a service, with respect also to geographical coverage. In assessing these measures, the Commission in the context of the achievement of the fundamental objectives of the Treaty referred to in Article 2 thereof, including that of strengthening the Community's economic and social cohesion as referred to in Article 130a, will also take into account the situation of those Member States in which the network for the provision of the packet or circuit switched services is not yet sufficiently developed and which could justify the deferment for these Member States until 1 January 1996 of the date for prohibition on the simple resale of leased line capacity.

(12) Article 59 of the Treaty requires the abolition of any other restriction on the freedom of nationals of Member States who are established in a Community country to provide services to persons in other Member States. The maintenance or introduction of any exclusive or special right which does not correspond to the above-mentioned criteria is therefore a breach of Article 90 in conjunction with Article 59.

(13) Article 86 of the Treaty prohibits as incompatible with the common market any conduct by one or more undertakings that involves an abuse of a dominant position within the common market or a substantial

1/56

part of it. Telecommunications organizations are also undertakings for the purposes of this Article because they carry out economic activities, in particular the service they provide by making telecommunications networks and services available to users. This provision of the network constitutes a separate services market as it is not interchangeable with other services. On each national market the competitive environment in which the network and the telecommunications services are provided is homogeneous enough for the Commission to be able to evaluate the power held by the organizations providing the services on these territories. The territories of the Member States constitute distinct geographical markets. This is essentially due to the existing difference between the rules governing conditions of access and technical operation, relating to the provision of the network and of such services. Furthermore, each Member State market forms a substantial part of the common market.

(14) In each national market the telecommunications organizations hold individually or collectively a dominant position for the creation and the exploitation of the network because they are the only ones with networks in each Member State covering the whole territory of those States and because their governments granted them the exclusive right to provide this network either alone or in conjunction with other organizations.

(15) Where a State grants special or exclusive rights to provide telecommunications services to organizations which already have a dominant position in creating and operating the network, the effect of such rights is to strengthen the dominant position by extending it to services.

(16) Moreover, the special or exclusive rights granted to telecommunications organizations by the State to provide certain telecommunications services mean such organizations:

(a) prevent or restrict access to the market for these telecommunications services by their competitors, thus limiting consumer choice, which is liable to restrict technological progress to the detriment of consumers;

(b) compel network users to use the services subject to exclusive rights, and thus make the conclusion of network utilization contracts dependent on acceptance of supplementary services having no connection with the subject of such contracts.

Each of these types of conduct represents a specific abuse of a dominant position which is likely to have an appreciable effect on trade between Member States, as all the services in question could in principle be supplied by providers from other Member States. The structure of competition within the common market is substantially changed by them. At all events, the special or exclusive rights for these services give rise to a situation which is contrary to the objective in Article 3 (f) of the Treaty, which provides for the institution of a system ensuring that competition in the common market is not distorted, and requires *a fortiori* that competition must not be eliminated. Member States have an obligation under Article 5 of the Treaty to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty, including that of Article 3 (f).

(17) The exclusive rights to telecommunications services granted to public undertakings or undertakings to which Member States have granted special or exclusive rights for the provision of the network are incompatible with Article 90 (1) in conjunction with Article 86.

(18) Article 90 (2) of the Treaty allows derogation from the application of Articles 59 and 86 of the Treaty where such application would obstruct the performance, in law or in fact, of the particular task assigned to the telecommunications organizations. This task consists in the provision and exploitation of a universal network, i.e. one having general geographical coverage, and being provided to any service provider or user upon request within a reasonable period of time. The financial resources for the development of the network still derive mainly from the operation of the telephone service. Consequently, the opening-up of voice telephony to competition could threaten the financial stability of the telecommunications organizations. The voice telephony service, whether provided from the present telephone network or forming part of the ISDN service, is currently also the most important means of notifying and calling up emergency services in charge of public safety.

(19) The provision of leased lines forms an essential part of the telecommunications organizations' tasks. There is at present, in almost all Member States, a substantial difference between charges for use of the data transmission service on the switched network and for use of leased lines. Balancing those tariffs without delay could jeopardize this task. Equilibrium in such charges must be achieved gradually between now and 31 December 1992. In the meantime it must be possible to require private operators not to offer to the public a service consisting merely of the resale of leased line capacity, i.e. including only such processing, switching of data, storing, or protocol conversion as is necessary for transmission in real time. The Member States may therefore establish a declaration system through which private operators would undertake not to engage in simple resale.

I/57

However, no other requirement may be imposed on such operators to ensure compliance with this measure.

(20) These restrictions do not affect the development of trade to such an extent as would be contrary to the interests of the Community. Under these circumstances, these restrictions are compatible with Article 90 (2) of the Treaty. This may also be the case as regards the measures adopted by Member States to ensure that the activities of private service providers do not obstruct the public switched-data service.

(21) The rules of the Treaty, including those on competition, apply to telex services; however, the use of this service is gradually declining throughout the Community owing to the emergence of competing means of telecommunication such as telefax. The abolition of current restrictions on the use of the switched telephone network and leased lines will allow telex messages to be retransmitted. In view of this particular trend, an individual approach is necessary. Consequently, this Directive should not apply to telex services.

(22) The Commission will in any event reconsider in the course of 1992 the remaining special or exclusive rights on the provision of services taking account of technological development and the evolution towards a digital infrastructure.

(23) Member States may draw up fair procedures for ensuring compliance with the essential requirements without prejudice to the harmonization of the latter at Community level within the framework of the Council Directives on open network provision (ONP). As regards data-switching, Member States must be able, as part of such procedures, to require compliance with trade regulations from the standpoint of conditions of permanence, availability and quality of the service, and to include measures to safeguard the task of general economic interest which they have entrusted to a telecommunications organization. The procedures must be based on specific objective criteria and be applied without discrimination. The criteria should in particular be justified and proportional to the general interest objective, and be duly motivated and published. The Commission must be able to examine them in depth in the light of the rules on free competition and freedom to provide services. In any event, Member States that have not notified the Commission of their planned licensing criteria and procedures within a given time may no longer impose any restrictions on the freedom to provide data transmission services to the public.

(24) Member States should be given more time to draw up general rules on the conditions governing the provision of packet- or circuit-switched data services for the public.

(25) Telecommunications services should not be subject to any restriction, either as regards free access by users to the services, or as regards the processing of data which may be carried out before messages are transmitted through the network or after messages have been received, except where this is warranted by an essential requirement in proportion to the objective pursued.

(26) The digitization of the network and the technological improvement of the terminal equipment connected to it have brought about an increase in the number of functions previously carried out within the network and which can now be carried out by users themselves with increasingly sophisticated terminal equipment. It is necessary to ensure that suppliers of telecommunication services, and notably suppliers of telephone and packet or circuit-switched data transmission services enable operators to use these functions.

(27) Pending the establishing of Community standards with a view to an open network provision (ONP), the technical interfaces currently in use in the Member States should be made publicly available so that firms wishing to enter the markets for the services in question can take the necessary steps to adapt their services to the technical characteristics of the networks. If the Member States have not yet established such technical interfaces, they should do so as quickly as possible. All such draft measures should be communicated to the Commission in accordance with Council Directive 83/189/EEC [1], as last amended by Directive 88/182/EEC [2].

(28) Under national legislation, telecommunications organizations are generally given the function of regulating telecommunications services, particularly as regards licensing, control of type-approval and mandatory interface specifications, frequency allocation and monitoring of conditions of use. In some cases, the legislation lays down only general principles governing the operation of the licensed services and leaves it to the telecommunications organizations to determine the specific operating conditions.

(29) This dual regulatory and commercial function of the telecommunications organizations has a direct impact

[1] OJ No L 109, 26. 4. 1983, p. 8.
[2] OJ No L 81, 26. 3. 1988, p. 75.

on firms offering telecommunications services in competition with the organizations in question. By this bundling of activities, the organizations determine or, at the very least, substantially influence the supply of services offered by their competitors. The delegation to an undertaking which has a dominant position for the provision and exploitation of the network, of the power to regulate access to the market for telecommunication services constitutes a strengthening of that dominant position. Because of the conflict of interests, this is likely to restrict competitors' access to the markets in telecommunications services and to limit users' freedom of choice. Such arrangements may also limit the outlets for equipment for handling telecommunications messages and, consequently, technological progress in that field. This combination of activities therefore constitutes an abuse of the dominant position of telecommunications organizations within the meaning of Article 86. If it is the result of a State measure, the measure is also incompatible with Article 90 (1) in conjunction with Article 86,

(30) To enable the Commission to carry out effectively the monitoring task assigned to it by Article 90 (3), it must have available certain essential information. That information must in particular give the Commission a clear view of the measures of Member States, so that it can ensure that access to the network and the various related services are provided by each telecommunications organization to all its customers on non-discriminatory tariff and other terms. Such information should cover:

— measures taken to withdraw exclusive rights pursuant to this Directive,

— the conditions on which licences to provide telecommunications services are granted.

The Commission must have such information to enable it to check, in particular, that all the users of the network and services, including telecommunications organizations where they are providers of services, are treated equally and fairly.

(31) The holders of special or exclusive rights to provide telecommunications services that will in future be open to competition have been able in the past to impose long-term contracts on their customers. Such contracts would in practice limit the ability of any new competitors to offer their services to such customers and of such customers to benefit from such services. Users must therefore be given the right to terminate their contracts within a reasonable length of time.

(32) Each Member State at present regulates the supply of telecommunications services according to its own concepts. Even the definition of certain services differs from one Member State to another. Such differences cause distortions of competition likely to make the provision of cross-frontier telecommunications services more difficult for economic operators. This is why the Council, in its resolution of 30 June 1988, considered that one of the objectives of a telecommunications policy was the creation of an open Community market for telecommunications services, in particular through the rapid definition, in the form of Council Directives, of technical conditions, conditions of use and principles governing charges for an open network provision (ONP). The Commission has presented a proposal to this end to the Council. Harmonization of the conditions of access is not however the most appropriate means of removing the barriers to trade resulting from infringements of the Treaty. The Commission has a duty to ensure that the provisions of the Treaty are applied effectively and comprehensively.

(33) Article 90 (3) assigns clearly-defined duties and powers to the Commission to monitor relations between Member States and their public undertakings and undertakings to which they have granted special or exclusive rights, particularly as regards the removal of obstacles to freedom to provide services, discrimination between nationals of the Member States and competition. A comprehensive approach is necessary in order to end the infringements that persist in certain Member States and to give clear guidelines to those Member States that are reviewing their legislation so as to avoid further infringements. A Directive within the meaning of Article 90 (3) of the Treaty is therefore the most appropriate means of achieving that end,

HAS ADOPTED THIS DIRECTIVE:

Article 1

1. For the purposes of this Directive:

— 'telecommunication organizations' means public or private bodies, and the subsidiaries they control, to which a Member State grants special or exclusive rights for the provision of a public telecommunications network and, when applicable, telecommunications services,

— 'special or exclusive rights' means the rights granted by a Member State or a public authority to one or more public

I/59

or private bodies through any legal, regulatory or administrative instrument reserving them the right to provide a service or undertake an activity,

— 'public telecommunications network' means the public telecommunications infrastructure which permits the conveyance of signals between defined network termination points by wire, by microwave, by optical means or by other electromagnetic means,

— 'telecommunications services' means services whose provision consists wholly or partly in the transmission and routing of signals on the public telecommunications network by means of telecommunications processes, with the exception of radio-broadcasting and television,

— 'network termination point' means all physical connections and their technical access specifications which form part of the public telecommunications network and are necessary for access to and efficient communication through that public network,

— 'essential requirements' means the non-economic reasons in the general interest which may cause a Member State to restrict access to the public telecommunications network or public telecommunications services. These reasons are security of network operations, maintenance of network integrity, and, in justified cases, interoperability of services and data protection.

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

— 'voice telephony' means the commercial provision for the public of the direct transport and switching of speech in real time between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point,

— 'telex service' means the commercial provision for the public of direct transmission of telex messages in accordance with the relevant Comité consultatif international télégraphique et téléphonique (CCITT) recommendation between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point,

— 'packet- and circuit-switched data services' means the commercial provision for the public of direct transport of data between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point,

— 'simple resale of capacity' means the commercial provision on leased lines for the public of data transmission as a separate service, including only such switching, processing, data storage or protocol conversion as is necessary for transmission in real time to and from the public switched network.

2. This Directive shall not apply to telex, mobile radiotelephony, paging and satellite services.

Article 2

Without prejudice to Article 1 (2), Member States shall withdraw all special or exclusive rights for the supply of telecommunications services other than voice telephony and shall take the measures necessary to ensure that any operator is entitled to supply such telecommunications services.

Member States which make the supply of such services subject to a licensing or declaration procedure aimed at compliance with the essential requirements shall ensure that the conditions for the grant of licences are objective, non-discriminatory and transparent, that reasons are given for any refusal, and that there is a procedure for appealing against any such refusal.

Without prejudice to Article 3, Member States shall inform the Commission no later than 31 December 1990 of the measures taken to comply with this Article and shall inform it of any existing regulations or of plans to introduce new licensing procedures or to change existing procedures.

Article 3

As regards packet- or circuit-switched data services, Member States may, until 31 December 1992, under the authorization procedures referred to in Article 2, prohibit economic operators from offering leased line capacity for simple resale to the public.

Member States shall, no later than 30 June 1992, notify to the Commission at the planning stage any licensing or declaration procedure for the provision of packet- or circuit-switched data services for the public which are aimed at compliance with:

— essential requirements, or

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

— measures to safeguard the task of general economic interest which they have entrusted to a telecommunications organization for the provision of switched data services, if the performance of that task is likely to be obstructed by the activities of private service providers.

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

1/69

Member States shall ensure, no later than 31 December 1992, that such licensing or declaration procedures for the provision of such services are published.

Before they are implemented, the Commission shall verify the compatibility of these projects with the Treaty.

Article 4

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

In particular, they shall ensure that operators who so request can obtain leased lines within a reasonable period, that there are no restrictions on their use other than those justified in accordance with Article 2.

Member States shall inform the Commission no later than 31 December 1990 of the steps they have taken to comply with this Article.

Each time the charges for leased lines are increased, Member States shall provide information to the Commission on the factors justifying such increases.

Article 5

Without prejudice to the relevant international agreements, Member States shall ensure that the characteristics of the technical interfaces necessary for the use of public networks are published by 31 December 1990 at the latest.

Member States shall communicate to the Commission, in accordance with Directive 83/189/EEC, any draft measure drawn up for this purpose.

Article 6

Member States shall, as regards the provision of telecommunications services, end existing restrictions on the processing of signals before their transmission via the public network or after their reception, unless the necessity of these restrictions for compliance with public policy or essential requirements is demonstrated.

Without prejudice to harmonized Community rules adopted by the Council on the provision of an open network, Member States shall ensure as regards services providers including the telecommunications organizations that there is no discrimination either in the conditions of use or in the charges payable.

Member States shall inform the Commission of the measures taken or draft measures introduced in order to comply with this Article by 31 December 1990 at the latest.

Article 7

Member States shall ensure that from 1 July 1991 the grant of operating licences, the control of type approval and mandatory specifications, the allocation of frequencies and surveillance of usage conditions are carried out by a body independent of the telecommunications organizations.

They shall inform the Commission of the measures taken or draft measures introduced to that end no later than 31 December 1990.

Article 8

Member States shall ensure that as soon as the relevant special or exclusive rights have been withdrawn, telecommunications organizations make it possible for customers bound to them by a contract with more than one year to run for the supply of telecommunications services which was subject to such a right at the time it was concluded to terminate the contract at six months' notice.

Article 9

Member States shall communicate to the Commission the necessary information to allow it to draw up, for a period of three years, at the end of each year, an overall report on the application of this Directive. The Commission shall transmit this report to the Member States, the Council, the European Parliament and the Economic and Social Committee.

Article 10

In 1992, the Commission will carry out an overall assessment of the situation in the telecommunications sector in relation to the aims of this Directive.

In 1994, the Commission shall assess the effects of the measures referred to in Article 3 in order to see whether any amendments need to be made to the provisions of that Article, particularly in the light of technological evolution and the development of trade within the Community.

Article 11

This Directive is addressed to the Member States.

Done at Brussels, 28 June 1990.

For the Commission
Leon BRITTAN
Vice-President

COMMISSION DIRECTIVE 94/46/EC

of 13 October 1994

amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Whereas:

1. The Green Paper on a common approach in the field of satellite communications in the European Community, adopted by the Commission in November 1990, set out the major changes in the regulatory environment necessary to exploit the potential of this means of communications. This Satellite Green Paper called for, *inter alia*, full liberalization of the satellite services and equipment sectors, including the abolition of all exclusive or special rights in this area, subject to licensing procedures, as well as for the free (unrestricted access to space segment capacity.

2. The Council Resolution of 19 December 1991 on the development of the common market for satellite communications services and equipment (1), gave general support to the positions set out in the Commission's Satellite Green Paper, and considered as major goals: the harmonization and liberalization of the market for appropriate satellite earth stations, including where applicable the abolition of exclusive or special rights in this field, subject in particular to the conditions necessary for compliance with essential requirements.

3. The European Parliament, in its Resolution on the development of the common market for satellite communications services and equipment (2) calls upon the Commission to enact the necessary legislation in order to create the environment to enable existing constraints to be removed and new activities developed in the field of satellite communications, while stressing the need to harmonize and liberalize the markets in satellite equipment and services.

4. Several Member States have already opened up certain satellite communications services to competition and have introduced licensing schemes. Nevertheless, the granting of licences in some Member States still does not follow objective, proportional and non-discriminatory criteria or, in the case of operators competing with the telecommunications organizations, is subject to technical restrictions such as a ban on connecting their equipment to be switched network operated by the telecommunications organization. Other Member States have maintained the exclusive rights granted to the national public undertakings.

5. Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment (3), as amended by the Agreement on the European Economic Area, provides for the abolition of special or exclusive rights to import, market, connect, bring into service and maintain telecommunications terminal equipment. It does not cover all types of satellite earth station equipment.

6. In its judgment in Case C-202/88, *France* v. *Commission* (4), the Court of Justice of the European Communities upheld Commission Directive 88/301/EEC. However, in so far as it relates to special rights, the Directive was declared void on the grounds that neither the provisions of the Directive nor the preamble thereto specify the type of rights which are actually involved and in what respect the existence of such rights is contrary to the various provisions of the Treaty. As far as importation, marketing, connection, bringing into service and maintenance of telecommunications equipment are concerned, special rights are in practice rights that are granted by a Member State to a limited number of undertakings, through any legislative, regulatory or administrative instrument which, within a given geographical area,

— limits to two or more the number of such undertaking, otherwise than according to objective, proportional and non-discriminatory criteria, or

— designates, otherwise than according to such criteria, several competing undertakings, or

— confers on any undertaking or undertakings, otherwise than according to such criteria, legal or regulatory advantages which substantially affect

(1) OJ No C 8, 14. 1. 1992, p. 1.
(2) OJ No C 42, 15. 2. 1993, p. 30.

(3) OJ No L 131, 27. 5. 1988, p. 73.
(4) [1991] ECR I-1223.

the ability of any other undertaking to engage in any of the abovementioned activities in the same geographical area under substantially equivalent conditions.

This definition is without prejudice to the application of Article 92 of the EC Treaty.

7. The existence of exclusive rights has the effect of restricting the free movement of such equipment either as regards the importation and marketing of telecommunications equipment (including satellite equipment), because certain products are not marketed, or as regards the connection, bringing into service or maintenance because, taking into account the characteristics of the market and in particular the diversity and technical nature of the products, a monopoly has no incentive to provide these services in relation to products which it has not marketed or imported, nor to align its prices on costs, since there is no threat of competition from new entrants. Taking into account the fact that in most equipment markets there is typically a large range of telecommunication equipment markets there is typically a large range of telecommunication equipment, and the likely development of the markets in which there are as yet a limited number of manufacturers, any specially right which directly or indirectly — for example by not providing for an open and non-discriminatory authorization procedure — limits the number of the undertakings authorized to import, market, connect, bring into service and maintain such equipment, is liable to have the same kind of effect as the grant of exclusive rights.

Such exclusive or special rights constitute measures having equivalent effect to quantitative restrictions incompatible with Article 30 of the EC Treaty. None of the specific features of satellite earth stations or of the market for their sale or maintenance is such as to justify their being treated differently in law from other telecommunications terminal equipment. Thus it is necessary to abolish all existing exclusive rights in the importation, marketing, connection, bringing into service and maintenance of satellite earth station equipment, as well as those rights having comparable effects — that is to say, all special rights except those consisting in legal or regulatory advantages conferred on one or more undertakings and affecting only the ability of other undertakings to engage in any of the abovementioned activities in the same geographical area under substantially equivalent conditions.

8. Satellite earth station equipment must satisfy the essential requirements harmonized by Council Directive 93/97/EEC (1) with special reference to the efficient use of frequencies. It will be possible to monitor the application of these essential requirements partly through the licences granted for the provision of the services concerned. Alignment on the essential requirements will be achieved mainly through the adoption of common technical rules and harmonization of the conditions attached to licences. Even where these conditions are not harmonized, Member States will nevertheless have to adapt their rules. In either case, Member States must in the meantime ensure that the application of such rules does not create barriers to trade.

9. The abolition of special or exclusive rights relating to the connection of satellite earth station equipment makes it necessary to recognize the right to connect this equipment to the switched networks operated by the telecommunications organizations so that licensed operators can offer their services to the public.

10. Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (2), as amended by the Agreement on the EEA, provides for the abolition of special or exclusive rights granted by Member States in respect of the provision of telecommunications services. However, the Directive excludes satellite services from its field of application.

11. In Joined Cases C-271/90, C-281/90 and C-289/90, *Spain* v. *Commission* (3), the Court of Justice of the European Communities upheld this Commission Directive on 17 November 1992. However, in so far as it relates to special rights, the Directive was declared void by the Court of Justice on the grounds that neither the provisions of the Directive nor the preamble thereto specify the type of rights which are actually involved and in what respect the existence of such rights is contrary to the various provisions of the Treaty. Consequently, these rights must be defined in this Directive. As far as telecommunications services are concerned, special rights are in practice rights that are granted by a Member State to a limited number of undertakings, through any legislative, regulatory or administrative instrument which, within a given geographical area,

(1) OJ No L 290, 24. 11. 1993, p. 1.
(2) OJ No L 192, 24. 7. 1990, p. 10.
(3) [1992] ECR I-5833.

I/64

— limits to two or more, otherwise than according to objective, proportional and non-discriminatory criteria, the number of undertakings which are authorized to provide any such service, of

— designates, otherwise than according to such criteria, several competing undertakings as those which are authorized to provide any such service, or

— confers on any undertaking or undertakings, otherwise than according to such criteria, legal or regulatory advantages which substantially affect the ability of any other undertaking to provide the same telecommunications service in the same geographical area under substantially equivalent conditions.

This definition is without prejudice to the application of Article 92 of the EC Treaty.

In the field of telecommunications services, such special legal or regulatory advantages may consist, among other things, in a right to make compulsory purchases in the general interest, in derogations from law on town-and-country planning, or in the possibility of obtaining an authorization without having to go through the usual procedure.

12. Where the number of undertakings authorized to provide satellite telecommunications services is limited by a Member State through special rights, and *a fortiori* exclusive rights, these constitute restrictions that could be incompatible with Article 59 of the Treaty, whenever such limitation is not justified by essential requirements, since these rights prevent other undertakings from supplying (or obtaining) the services concerned to (or from) other Member States. In the case of satellite network services, such essential requirements could be the effective use of the frequency spectrum and the avoidance of harmful interference between satellite telecommunications systems a other space-based or terrestrial technical systems. Consequently, provided that equipment used to offer the services satisfies the essential requirement applicable to satellite communications, separate legal treatment of the latter is not justified. On the other hand, special rights consisting only in special legal or regulatory advantages, do not, in principle, preclude other undertakings from entering the market. The compatibility of these rights with the EC Treaty must therefore be assessed on a case-by-case basis, regard being had to their impact on the effective freedom of other entities to provide the same telecommunications service and their possible justifications regarding the activity concerned.

13. The exclusive rights that currently exist in the satellite communications field were generally granted to organizations that already enjoyed a dominant position in creating the terrestrial networks, or to one of their subsidiaries. Such rights have the effect of extending the dominant position enjoyed by those organizations and therefore strengthening that position. The exclusive rights granted in the satellite communications field are consequently incompatible with Article 90 of the EC Treaty, read in conjunction with Article 86.

14. These exclusive rights limiting access to the market also have the effect of restricting or preventing, to the detriment of users, the use of satellite communications that could be offered, thereby holding back technical progress in this area. Because their investment decisions are likely to be based on exclusive rights, the undertakings concerned are often in a position to decide to give priority to terrestrial technologies, whereas new entrants might exploit satellite technology. The telecommunications organizations have generally given preference to the development of optical-fibre terrestrial links, and satellite communications have been used chiefly as a technical solution of last resort in cases where the cost of the terrestrial alternatives has been prohibitive, or for the purpose of data broadcasting and/or television broadcasting, rather than being used as a fully complementary transmission technology in its own right. Thus the exclusive rights imply a restriction on the development of satellite communication, and this is incompatible with Article 90 of the Treaty, read in conjunction with Article 86.

15. However, where the provision of satellite services is concerned, licensing or declaration procedures are justified in order to ensure compliance with essential requirements, subject to the proportionality principle. Licensing is not justified when a mere declaration procedure would suffice to attain thte relevant objective. For example, in the case of provision of a satellite service which involves only the use of a dependent VSAT earth station in a Member State, the latter should impose no more than a declaration procedure.

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

'Voice telephony' is defined in Article 1 of Directive 90/388/EEC as the commercial provision for the public of the direct transport and switching of speech in real-time between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point. In the case of direct transport and switching of speech via satellite earth station networks, such commercial provision for the public in general can take place only when the satellite earth station network is connected to the public switched network.

As regards all services other than voice telephony, no special treatment under Article 90 (2) is justified especially in view of the insignificant contribution of such services to the turnover of the telecommunications organizations.

17. The provision of satellite network services for the conveyance of radio and television programmes is a telecommunications service for the purpose of this Directive and thus subject to its provisions. Notwithstanding the abolition of certain special and exclusive rights in respect of receive-only satellite earth stations not connected to the public network of a Member State and the abolition of special and exclusive rights in respect of satellite services provided for public or private broadcasters, the content of satellite broadcasting services to the general public or private broadcasters, the content of satellite broadcasting services to the general public provided via frequency bands defined in the Radio Regulations for both Broadcasting Satellite Services (BSS) and Fixed-Satellite Services (FSS) will continue to be subject to specific rules adopted by Member States in accordance with Community law and is not, therefore, subject to the provisions of this Directive.

18. This Directive does not prevent measure being adopted in accordance with Community law and existing international obligations so as to ensure that nationals of Member States are afforded equivalent treatment in third countries.

19. The offering by satellite operators of space segment capacity of national, private or international satellite systems to licensed satellite earth station network operators, is still, in some Member States, subject to regulatory restrictions other than those compatible with frequency and site coordination arrangements required under the international commitments of Member States. These additional restrictions are contrary to Article 59, which implies that such satellite operators should have full freedom to provide their services in the whole Community, once they are licensed in one Member State.

20. Tests to establish whether satellite earth stations of licensed operators other than national operators conform to specifications governing technical and operational access to intergovernmental satellite systems, are, in most of the Member States, carried out by the national Signatory of the nation upon whose territory the station is operating. These conformity assessments are therefore performed by service providers which are competitors.

This is not compatible with the Treaty provisions, notably Articles 3 (g) and 90, read in conjunction with Article 86. Member States therefore need to ensure that these conformity assessments can be carried out direct between the satellite earth station network operator concerned and the intergovernmental organization itself, under supervision of the regulatory authorities alone.

21. Most of the available space segment capacity is offered by the international satellite organizations. The charges for using such capacity are still high in many Member States because the capacity can be acquired only from the signatory for the Member State in question. Such exclusivity, permitted by some Member States, leads to a partitioning of the Common Market to the detriment of customers requiring capacity. In its resolution of 19 December 1991, the Council consequently called on the Member States to improve access to the space segment of the intergovernmental organizations. As regards the establishment and use of separate systems, restrictive measure taken under international conventions signed by Member States could also have effects incompatible with Community law, by limiting supply at the expense of the consumer within meaning of Article 86 (b). Within the international satellite organizations, reviews of the provisions of the relevant constituent instruments are under way, *inter alia*, in respect of improved access and in respect of the establishment and use of separate systems. In

order to enable the Commission to carry out the monitoring task assigned to it by the EC Treaty, instruments should be provided to help Member States to comply with the duty of cooperation enshrined in the first paragraph of Article 5, read in conjunction with Article 234 (2), of the Treaty.

22. In assessing the measures of this Directive, the Commission, in the context of the achievement of the fundamental objectives of the Treaty referred to in Article 2 thereof, including that of strengthening the Community's economic and social cohesion as referred to in Article 130 (a), will also take into account the situation of those Member States in which the terrestrial network is not yet sufficiently developed and which could justify the deferment for these Member States, as regards satellite services and to the extent necessary, of the date of full application of the provisions of this Directive until 1 January 1996,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 88/301/EEC is hereby amended as follows:

(a) The last sentence of the first indent is replaced by the following:

'Terminal equipment also means satellite earth station equipment'.

(b) The following indents are added after the second indent:

'— "special rights" means rights that are granted by a Member State to a limited number of undertakings, through any legislative, regulatory or administrative instrument, which, within a given geographical area,

— limits to two or more the number of such undertakings, otherwise than according t objective, proportional and non-discriminatory criteria, or

— designates, otherwise than according to such criteria, several competing undertakings, or

— confers on any undertaking or undertakings, otherwise than according to such criteria, any legal or regulatory advantages which substantially affect the ability of any other undertaking to import, market, connect, bring into service and/or maintain telecommunication terminal equipment in the same geographical area under substantially equivalent conditions;

— "satellite earth station equipment" means equipment which is capable of being used for the transmission only, or for the transmission and reception ("transmit/receive"), or for the reception only ("receive-only") of radiocommunication signals by means of satellites or other space-based systems'

2. The first paragraph of Article 2 is replaced by the following text.

'Member States which habe granted special or exclusive rights to undertakings shall ensure that all exclusive rights are withdrawn, as well as those special rights which

(a) limit two or more the number of undertakings within the meaning of Article 1, otherwise than according to objective, proportional and non-discriminatory criteria, or

(b) designate, otherwise than according to such criteria, several competing undertakings within the meaning of Article 1.'

3. The first indent of Article 3 is replaced by the following text:

'— in the case of satellite earth station equipment, refuse to allow such equipment to be connected to the public telecommunications network and/or to be brought into service where it does not satisfy the relevant common technical regulations adopted in pursuance of Council Directive 93/97/EEC (*) or, in the absence thereof, the essential requirements laid down in Article 4 of that Directive. In the absence of common technical rules of harmonized regulatory conditions, national rules shall be proportionate to those essential requirements and shall be notified to the Commission in pursuance of Directive 83/189/EEC where that Directive so requires.

— in the case of other terminal equipment, refuse to allow such equipment to be connected to the public telecommunications network where it does not satisfy the relevant common technical regulations adopted in pursuance of Council Directive 91/263/EEC (**) or, in the absence thereof, the essential requirements laid down in Article 4 of that Directive.

(*) OJ No L 290, 24. 11. 1993, p. 1.
(**) OJ No L 128, 23. 5. 1991, p. 1.'

Article 2

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

1. Article 1 is amended as follows:

(a) Paragraph 1 is amended as follows:

(i) the seconds indent is replaced by the following:

'— "exclusive rights" means the rights that are granted by a Member State to one undertaking through any legislative, regulatory or administrative instrument, reserving it the right to provide a telecommunication service or undertake an activity within a given geographical area.';

I/67

(ii) The following is inserted as the third indent:

'— "special rights" means the rights that are granted by a Member State to a limited number of undertakings through any legislative, regulatory or administrative instrument which, within a given geographical area,

— limits to two or more the number of such undertakings authorized to provide a service or undertake an activity, otherwise than according to objective, proportional and non-discriminatory criteria, or

— designates, otherwise than according to such criteria, several competing undertakings as being authorized to provide a service or undertake an activity, or

— confers on any undertaking or undertakings, otherwise than according to such criteria, legal or regulatory advantages which substantially affect the ability of any other undertaking to provide the same telecommunications service or to undertake the same activity in the same geographical area under substantially equivalent conditions.'

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

'— "telecommunications services" means services whose provision consists wholly or partly in the transmission and routing of signales on a public telecommunications network by means of telecommunications processes, with the exception of radio- and television-broadcasting to the public, and satellite services.'

(iv) The following indents are inserted after the fourth indent:

'— "satellite earth station network" means a configuration of two or more earth stations which interwork by means by means of a satellite;

— "satellite network services" means the establishment and operation of satellite earth station networks; these services consist, as a minimum, in the establishment, by satellite earth stations, of radiocommunications to space segment ("uplinks"), and in the establishment of radiocommunications between space segment and satellite earth stations ("downlinks");

— "satellite communications services" means service whose provision makes use, wholly or partly, of satellite network services;

— "satellite services" means the provision of satellite communications services and/or the provision of satellite networks services;'

(v) the second sentence of the sixth indent is replaced by the following text:

'Those reasons are security of network operations, maintenance of network integrity, and, in justified cases, interoperability of services, data protection and, in the case of satellite network services, the effective use of the frequency spectrum and the avoidance of harmful interference between satellite telecommunications systems and other space-based or terrestrial tecnical systems.'

(b) Paragraph 2 is replaced by the following:

'2. This Directive shall not apply to the telex service or to terrestrial mobile radiocommunications.'

2. Article 2 is amended as follows:

(a) The first paragraph is replaced by the following:

'Without prejudice to Article 1 (2), Member States shall withdraw all those measures which grant:

(a) exclusive rights for the supply of telecommunications services otherwise than voice telephony and

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

(c) special rights which designate, otherwise than according to such criteria, several competing undertakings to provide such telecommunication services.

They shall take the measures necessary to ensure that any operator is entitled to supply any such telecommunications services, otherwise than voice telephony'.

(b) The following paragraphs are added:

'Member States shall communicate the criteria on which authorizations are granted, together with the conditions attached to such authorizations and to the declaration procedures for the operation of transmitting earth stations.

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

3. Article 6 is amended as follows:

(a) The following paragraphs are added after the second paragraph:

'Member States shall ensure that any fees imposed on providers of services as part of authorization procedures, shall be based on objective, transparent and non-discriminatory criteria.

Fees, the criteria upon which they are based, and any changes thereto, shall be published in an appropriate and sufficiently detailed manner, so as to provide easy access to that information.

Member States shall notify to the Commission no later than nine months after publication of this Directive, and thereafter whenever changes occur, the manner in which the information is made available. The Commission shall regularly publish references to such notifications.'

(b) The following paragraph is added:

'Member States shall ensure that any regulatory prohibition or restrictions on the offer of space-segment capacity to any authorized satellite earth station network operator are abolished, and shall authorize within their territory any space-segment supplier to verify that the satellite earth station network for use in connection with the space segment of the supplier in question is in conformity with the published conditions for access to his space segment capacity.'

Article 3

Member States which are party to the international conventions setting up the international organizations Intelsat, Inmarsat, Eutelsat and Intersputnik for the purposes of satellite operations shall communicate to the Commission, at its request, the information they pass on any measure that could prejudice compliance with the competition rules of the EC Treaty or affect the aims of this Directive or of the Council Directives on telecommunications.

Article 4

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

Article 5

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

Article 6

This Directive is addressed to the Member States.

Done at Brussels, 13 October 1994.

For the Commission

Karel VAN MIERT

Member of the Commission

GL/I

Notice by the Commission concerning a draft Directive amending Commission Directive 90/388/EEC regarding the abolition of the restrictions on the use of cable television networks for the provision of telecommunications services

(95/C 76/06)

The Commission approved a draft Directive amending Commission Directive 90/388/EEC regarding the abolition of the restrictions on the use of cable television networks for the provision of telecommunications services.

The Commission intends to adopt the Directive after having heard the possible comments of all parties concerned.

The Commission invites interested third parties to submit their possible observations on the draft Directive published hereunder.

Observations must reach the Commission not later than two months following the date of this publication. Observations may be sent to the Commission by fax (No (32 2) 296 98 19) or by mail to the following address:

Commission of the European Communities,
Directorate-General for Competition (DG IV),
Directorate B,
Office 3/81,
150 Avenue de Cortenberg/Kortenberglaan 150,
B-1049 Brussels.

Draft Commission Directive amending Commission Directive 90/388/EEC regarding the abolition of the restrictions on the use of cable television networks for the provision of telecommunications services

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

WHEREAS:

1. Under the Directive 90/388/EEC on competition in the markets for telecommunications services, telecommunications services other than voice telephony to the general public (*) and those services specifically excluded from the scope of the directive (*) were opened to competition and the Member States were requested to take the measures necessary to ensure that any operator is entitled to supply such services (*). During the public consultation organized by the Commission in 1992 on the situation in the telecommunications sector (*), the effectiveness of the measures liberalizing the telecommunications sector and in particular the liberalization of data communications, value added services and the provision of data and voice services to corporate users and closed user groups, was questioned by many service providers and users of such services.

2. The regulatory restrictions preventing the use of alternative infrastructure for the provision of liberalized services are the main cause of this continued bottleneck situation, and in particular the restrictions on the use of cable TV networks. Potential service providers must now rely on transmission capacity — 'leased lines' — provided by the telecommunications organizations, which often are also competitors in the area of liberalized services. To remedy this problem, the European Parliament called upon the Commission to adopt as soon as possible the necessary measures to take full advantage of the potential of the existing infra-

(*) Council resolution 93/C 213/01 acknowledges that this exception can be terminated by 1 January 1998 with a transitional period for some Member States.

(*) The telex service, mobile communications and radio and television broadcasting to the public. Satellite communications were included in the scope of the Directive through Commission Directive 94/46/EC of 13 October 1994.

(*) OJ No L 192, 24. 7. 1990, p. 10.

(*) Following the communication by the Commission of 21 October 1992 'on the 1992 Review of the situation in the telecommunications sector' (SEC(92) 1048).

I/71

structure of cable networks for telecommunications services and to abolish without delay the existing restrictions in the Member States on the use of cable networks for non-reserved services (1).

3. Following this resolution the Commission has completed studies (2) on the use of cable TV networks and alternative infrastructures for the delivery of those telecommunications services which have already been opened to competition under Community law. The basic findings of these studies emphasize the potential role for, amongst other things, cable TV networks, in meeting the concerns raised about the slower pace of innovation and delayed roll-out of liberalized services in the European Union. Opening such networks would help to overcome the problems of high pricing levels and lack of suitable capacity, which result to a large extent from current exclusive provision of infrastructure in most Member States. The networks operated by authorized cable TV providers indeed offer opportunities for the supply of an increasing number of services, apart from TV broadcast, if additional investment is achieved. The example of the US market shows that new services combining image and telecommunications emerge when regulatory barriers are removed.

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

5. The current restrictions imposed by Member States on the use of cable TV networks for the provision of services other than the distribution of TV broadcast aim to prevent that public voice telephony be provided on networks other than the public switched telephone network, to protect the main source of revenues of the telecommunications organizations.

6. Since these restrictions are brought about by State measures and aim, in each of the national markets, to favour telecommunications organizations, which the Member States own and to which they have granted special or exclusive rights, these restrictions must be assessed under Article 90 (1) of the EC Treaty. This Article requires Member States not to adopt or maintain measures regarding such undertakings which remove the useful effect to Treaty provisions, and in particular of the competition rules. It includes a prohibition on maintaining measures regarding telecommunications organizations which result in limiting the free provision of services within the Union or lead to abuses of dominant position to the detriment of the users of a given service.

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

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

(1) Resolution of the European Parliament of 20 April 1993 (A3-0113/93), OJ No C 150, 31. 5. 1993, p. 39.

(2) 'The effects of Liberalization of Satellite Infrastructure on the Corporate and Closed User Group Market', Analysis, 1994;
'L'impact de l'ouverture de la fourniture de services de télécommunications libéralisés par les câblo-opérateurs' by IDATE, 1994.

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

10. In each national market the telecommunications organizations hold a dominant position for the provision of transmission capacity because they are the only ones with networks covering the whole territory of those States. Another factor of this dominant position concerns the peculiar characteristics of the market and in particular its highly capital intensive nature. Taking account of the amount of investment needed to duplicate a network, there is a high reliance on use of existing networks. This enhances the structural dominance of the telecommunications organizations and constitutes a potential barrier to entry. Thirdly, as a result of their market share, the telecommunications organizations further benefit from detailed information on telecommunications flows which is not available to potential new entrants. It includes information on subscribers' usage patterns, necessary to target specific groups of users, and on price elasticities of demand in each market segment and region of the country. Finally, the fact that the telecommunications organizations enjoy exclusive rights for the provision of voice telephony also contributes to their dominance.

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

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

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

13. Moreover, the State measures preventing the CATV operators from offering transmission capacity in competition with the telecommunications organizations for the provision of liberalized services restrict the overall supply of capacity in the market and eliminate incentives for telecommunications organizations to quickly increase the capacity of their networks, reduce average costs and lower tarrifs. The resulting high tariffs applied by the telecommunications organizations for, and lack of availability of, the basic infrastructure provided by these organizations over which liberalized services might be offered by third parties have delayed (1) widespread development of high speed corporate networks, remote accessing of databases by both business and residential users and the development of innovative services such as telebanking, distance learning, computer aided marketing etc. The networks of the telecommunications organizations currently fail to meet all potential market demand for transmission capacity for the provision of these telecommunications services, as emphasized by users and suppliers of such services (2). The current restrictions on the use of CATV networks for the provision of such services therefore create a situation in which the mere exercise by the telecommunications organization of their exclusivity to provide

(1) As shown in the communication by the Commission to the European Parliament and the Council (COM(94) 440 final) of 25 October 1994 'Green Paper on the liberalization of telecommunications infrastructure and cable television networks: Part One'.

(2) 'Communication to the Council and the European Parliament on the consultation on the review of the situation in the telecommunications sector' COM(93) 159 final of 28 April 1993, p. 5 point 2. These findings made during the review thus showed that the mere obligation to provide leased lines on demand was not sufficient to avoid restrictions on access to the markets in telecommunications services and limits on users' freedom of choice.

1/73

transmission capacity for public telecommunications services delays, in the sense of Article 86 (b) of the Treaty, the emergence of, in particular, new applications such as pay per view, interactive television and video on demand as well as multimedia services in the Community, combining both audiovisual and telecommunications, which cannot adequately be provided on the networks of the telecommunications organizations.

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

14. Lastly, as recalled by the Court of Justice of the European Community (1), a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured between the various economic operators. Reserving to one undertaking which markets telecommunications services the task of supplying the indispensable raw material, i.e. transmission capacity, to all companies offering telecommunications services proved, however, tantamount to conferring upon it the power to determine at will which service can be offered by its competitors, at which costs and in which time periods, and to monitor their clients and the traffic generated by its competitors, placing that undertaking in an obvious advantage over its competitors.

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

According to Directive 90/388/EEC, Member States may until a certain date continue to reserve the provision of voice telephony to their national telecommunications organization to guarantee sufficient revenues for the establishment of a universal telephone network. Voice telephony is defined in Article 1 of Directive 90/388/EEC as the commercial provision for the public of the direct transport and switching of speech in real time between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point.

It appears that a temporary prohibition of the provision of voice telephony on the cable TV network can be justified for the same reason. Besides the case of voice telephony no other restriction is justified pursuant to Article 90 (2), in particular taking into account the small contribution to the turnover of the telecommunications organizations of those services, currently provided on their own networks, which could be diverted towards the cable TV networks.

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

17. Notwithstanding the abolition of the current restrictions on the use of the cable networks, the broadcasting of TV channels to the general public via these networks will continue to be subject to specific rules adopted by Member States in accordance with Community law and is not, therefore, subject to the provisions of this Directive.

18. In order to allow for the monitoring of possible abusive cross-subsidies between the broadcasting tasks of the cable TV operators, which are often provided under exclusive rights, and their business as provider of capacity for telecommunications services Member States should guarantee transparency as regards the use of resources from one activity to enter in the other market. Given the complexity of the financial records of network providers, it is extremely difficult to determine the cross subsidies within it between the reserved activities and the

(1) Judgment of 19 March 1991, Case C-202/88 *France v. Commission* [1991] ECR I-1271, paragraph 50.

1/74

services provided under conditions of competition. It is thus necessary to require these cable TV operators to keep separate financial records, in particular identifying separately costs and revenues associated with the provision of the services supplied under their exclusive rights and those provided under competitive conditions. Thus hybrid services, made up of elements falling within the reserved and competitive services, should distinguish between the costs of each element.

19. Where Member States grant the right to establish both cable TV and telecommunications networks to the same undertaking, they put the relevant undertakings in a situation where they have no incentive to attract users to the network which is the best suited for the provision of the relevant service, as long as they have spare capacity on the other network. In that case, they have, on the contrary, an interest in overcharging the use of the cable infrastructure for the provision of non-reserved services, where allowed, to increase the traffic on their telecommunications networks. To allow the monitoring of such possible abusive behaviour, a clear separation of financial records between the two activities is also required.

20. In the case where no other delivery system to the home is authorized by the relevant Member State, in the meantime the Commission will in any event reconsider the effectiveness of separation of accounts to avoid abusive practices and assess whether such joint provision does not result in a limitation of the potential supply of transmission capacity at the expense of the services providers in the relevant area,

HAS ADOPTED THIS DIRECTIVE:

Article 1

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

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

The following is inserted after the last indent:

'— "cable TV networks" means any wire-based infrastructure authorized by a Member State for the delivery of radio and television broadcasting and which is available or adaptable for telecommunications purposes.'

2. Article 4 is amended as follows:

The following is inserted after the second paragraph:

'In addition Member States shall:

— withdraw all restrictions for the supply of transmission capacity on cable TV networks and allow operators to use the cable networks to deliver their services,

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

Article 2

When withdrawing restrictions for the use of cable-TV networks, Member States shall take the necessary measures to ensure transparency and non-discriminatory behaviour where a single operator provides both telecommunications and cable TV networks, and in particular the separation of financial accounts as concerns the provision of each network.

Where cable TV networks are used for telecommunications purposes, Member States shall also ensure that these cable TV operators keep separate financial accounts regarding their activity as network capacity provider for telecommunications purposes.

Where a single operator provides both networks as referred to in paragraph 1, the Commission will, by 1 January 1998, carry out an overall assessment of the impact of such joint provision in relation to the aims of this Directive.

Article 3

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

Article 4

The Directive shall enter into force on 1 January 1996.

Article 5

This Directive is addressed to the Member States.

DOCUMENTS ON THE APPLICATION OF THE COMPETITION RULES TO THE TELECOMMUNICATIONS SECTOR

II Commission Action in Individual Cases

Background Documents

I

(Information)

COMMISSION

COMMISSION NOTICE

on the distinction between concentrative and cooperative joint ventures

under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings

(94/C 385/01)

(Text with EEA relevance)

I. INTRODUCTION

1. The purpose of this notice is to provide guidance as to how the Commission interprets Article 3 of Regulation (EEC) No 4064/89 (1) (hereinafter referred to as 'the Merger Regulation') in relation to joint ventures.

2. This notice replaces the notice on the same subject adopted by the Commission on 25 July 1990 (2). Changes made in the current notice reflect the experience gained by the Commission in applying the Merger Regulation since its entry into force on 21 September 1990. The principles set out in this notice will be followed and further developed by the Commission's practice in individual cases.

3. Under the Community competition rules joint ventures are undertakings which are jointly controlled by two or more other undertakings (3). In practice joint ventures encompass a broad range of operations, from merger-like operations to cooperation for particular functions such as R&D, production or distribution.

4. Joint ventures fall within the scope of the Merger Regulation if they meet the requirements of a concentration set out in Article 3 thereof.

5. According to recital 23 of the Merger Regulation 'it is appropriate to define the concept of concentration in such a manner as to cover only operations bringing about a lasting change in the structure of the undertakings concerned . . . it is therefore necessary to exclude from the scope of this Merger Regulation those operations which have as their object or effect the coordination of competitive behaviour of undertakings which remain independent . . .'

6. The structural changes brought about by concentrations frequently reflect a dynamic process of restructuring in the markets concerned. They are permitted under the Merger Regulation unless they result in serious damage to the structure of competition by creating or strengthening a dominant position.

In this respect concentrations are to be contrasted with arrangements between independent undertakings whereby they coordinate their competitive behaviour. The latter do not, in principle, involve a lasting change in structure of undertakings. It is therefore appropriate to submit such arrangements to the prohibition laid down in Article 85 (1) of the EEC Treaty where they affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the common market, and they can be exempted from this prohibition only where they fulfil the requirements of Article 85 (3). For this reason, cooperative arrangements are dealt with under Regulation (EEC) No 17 (4), (EEC) No 1017/68 (5), (EEC) No 4056/86 (6) or (EEC) No 3975/87 (7) implementing Articles 85 and 86 (8).

7. The Merger Regulation deals with the distinction between concentrative and cooperative operations in Article 3 (2) (9) as follows:

'An operation, including the creation of a joint venture, which has as its object or effect the coordination of the competitive behaviour of undertakings which remain

(1) OJ No C 395, 30. 12. 1989, p. 1, corrected version OJ No L 257, 21. 9. 1990, p. 13.

(2) OJ No C 203, 14. 8. 1990, p. 10.

(3) The concept of joint control is set out in the notice on the notion of a concentration.

(4) OJ No 13, 21. 2. 1962, p. 204/62.

(5) OJ No L 175, 23. 7. 1968, p. 1.

(6) OJ No L 378, 31. 12. 1986, p. 4.

(7) OJ No L 374, 31. 12. 1987, p. 1.

(8) See Commission Notice concerning the assessment of cooperative joint ventures pursuant to Article 85 of the EEC Treaty, OJ No C 43, 16. 2. 1993, p. 2.

(9) Whilst Article 3 (2) first subparagraph, is not confined to joint ventures, its application to operations other than joint ventures is not dealt with in the context of the present notice.

independent shall not constitute a concentration within the meaning of paragraph 1 (b).

The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity, which does not give rise to coordination of the competitive behaviour of the parties amongst themselves or between them and the joint venture, shall constitute a concentration within the meaning of paragraph 1 (b).'

8. Although Article 3 (2), second subparagraph, refers to coordination between parent companies and the joint venture, this has to be interpreted in the light of recital 23 and Article 3 (2), first subparagraph, the purpose of which is to exclude from the scope of the Merger Regulation operations which lead to the coordination of behaviour between 'undertakings which remain independent'. For the purposes of the distinction between cooperative and concentrative joint ventures therefore, the coordination between the parent companies and the joint venture referred to in the second subparagraph is relevant only in so far as it is an instrument for producing or reinforcing the coordination between the parent companies.

II. JOINT VENTURES UNDER ARTICLE 3 OF THE MERGER REGULATION

9. In order to be a concentration within the meaning of Article 3 of the Merger Regulation an operation must fulfil the following requirements:

1. Joint control

10. A joint venture may fall within the scope of the Merger Regulation where there is an acquisition of joint control by two or more undertakings, that is, its parent companies (Article 3 (1) (b)). The concept of control is set out in Article 3 (3). This provides that control is based on the possibility of exercising decisive influence on an undertaking, which is determined by both legal and factual considerations.

11. The principles for determining joint control are set out in detail in the Commission's notice on the notion of concentration (*).

2. Structural change of the undertakings

12. Article 3 (2), second subparagraph stipulates that the joint venture must perform, on a lasting basis, all the functions of an autonomous economic entity.

13. Essentially this means that the joint venture must operate on a market, performing the functions normally carried out by other undertakings operating on the same market. In order to do so the joint venture must have sufficient financial and other resources including finance, staff, and assets (tangible and intangible) in order to operate a business activity on a lasting basis. In respect of intellectual property rights it is sufficient that these rights are licensed to the joint venture for its duration (*). Joint ventures which satisfy this requirement are commonly described as 'full-function' joint ventures.

14. A joint venture is not full-function venture if it only takes over one specific function within the parent companies' business activities without access to the market. This is the case, for example, for joint ventures limited to R&D or production. Such joint ventures are auxiliary to their parent companies' business activities. This is also the case where a joint venture is essentially limited to the distribution or sales of its parent companies' products and, therefore, acts principally as a sales agency. However, the fact that a joint venture makes use of the distribution network or outlet of one or more of its parent companies, normally will not disqualify it as 'full-function' as long as the parent companies are acting only as agents of the joint venture (*).

15. The strong presence of the parent companies in upstream or downstream markets is a factor to be taken into consideration in assessing the full-function character of a joint venture where this presence leads to substantial sales or purchases between the parent companies and the joint venture. The fact that the joint venture relies almost entirely on sales to its parent companies or purchases from them only for an initial start-up period does not normally affect the full-function character of the joint venture. Such a start-up period may be necessary in order to establish the joint venture on a market. It will normally not exceed a time period of three years, depending on the specific conditions of the market in question (*).

Where sales from the joint venture to the parent companies are intended to be made on a lasting basis the essential question is whether, regardless of these sales the joint venture is geared to play an active role on the market. In this respect the relative proportion of these sales compared with the total production of the joint venture is an important factor. Another factor is that sales to the parent companies are made on the basis of normal commercial conditions (*).

(*) Paragraphs 18 to 39

(*) Case IV/M.236, Ericsson/Ascom of 8 July 1992 (paragraph 11).

(*) Case IV/M.102, TNT/Canada Post etc. of 2 December 1991; Case IV/M.149, Lucas/Eaton of 9 December 1991.

(*) Case IV/M.394, Mannesmann/RWE/Deutsche Bank of 22 December 1993 (paragraph 9).

(*) Case IV/M.266, Rhône-Poulenc Chimie/SITA of 26 November 1992 (paragraph 15), to be contrasted with Case IV/M.168, Flachglas/VEGLA of 13 April 1992.

III/4

In relation to purchases made by the joint venture from its parent companies, the full-function character of the joint venture is questionable in particular where little value is added to the products or services concerned at the level of the joint venture itself. In such a situation, the joint venture may be closer to a joint sales agency. However, in contrast to this situation where a joint venture is active in a trade market and performs the normal functions of a trading company in such a market, it normally will not be an auxiliary sales agency but a full-function joint venture. A trade market is characterized by the existence of companies which specialize in the selling and distribution of products without being vertically integrated in addition to those which may be integrated, and where different sources of supply are available for the products in question. In addition, many trade markets may require operators to invest in specific facilities such as outlets, stockholding, warehouses, depots, transport fleets and sales personnel. In order to constitute a full-function joint venture in a trading market, it must have the necessary facilities and be likely to obtain a substantial proportion of its supplies not only from its parent companies but also from other competing sources (*).

16. Furthermore, the joint venture must be intended to operate on a lasting basis. The fact that the parent companies commit to the joint venture the resources described above normally demonstrates that this is the case. In addition, agreements setting up a joint venture often provide for certain contingencies, for example, the failure of the joint venture or fundamental disagreement as between the parent companies (*). This may be achieved by the incorporation of provisions for the eventual dissolution of the joint venture itself or the possibility for one or more parent companies to withdraw from the joint venture. This kind of provision does not prevent the joint venture from being considered as operating on a lasting basis. The same is normally true where the agreement specifies a period for the duration of the joint venture where this period is sufficiently long in order to bring about a lasting change in the structure of the undertaking concerned (*), or where the agreement provides for the possible continuation of the joint venture beyond this period. By contrast, the joint venture will not be considered to operate on a lasting basis where it is established for a short finite duration. This would be the case, for example, where a joint venture is established in order to construct a specific project such as a power plant, but it will not be involved in the operation of the plant once its construction has been completed.

(*) Case IV/M.179, Spar/Dansk Supermarked of 3 February 1992 (food retail); Case IV/M.326, Toyota Motor Corp / Walter Frey Holding/Toyota France of 1 July 1993 (car distribution).

(*) Case IV/M.408, RWE/Mannesmann of 28 February 1994 (paragraph 6).

(*) Case IV/M.259, British Airways/TAT of 27 October 1992 (paragraph 10).

3. Cooperative aspects

17. The creation of a full-function joint venture normally constitutes a concentration within the meaning of Article 3 of the Merger Regulation unless its object or effect is coordination of the competitive behaviour of independent undertakings which is likely to result in a restriction of competition within the meaning of Article 85 (1). In order to assess whether a joint venture is cooperative in nature it is necessary to determine whether there is coordination between the parent companies in relation to prices, markets, output or innovation. The coordination between the parent companies and the joint venture referred to in the second subparagraph of Article 3 (2) is relevant only in so far as it is an instrument for producing or reinforcing the coordination between the parent companies. Where there is a restriction of competition of this kind the Commission will have to examine the applicability of Article 85 to the whole operation by means of Regulation No 17. Where the factors leading to this restriction of competition can be separated from the creation of the joint venture itself, the former will be assessed under Regulation No 17, the latter under the rules on merger control (*).

3.1. *Product market*

18. The following typical situations illustrate where coordination of the competitive behaviour of the parent companies resulting in an appreciable restriction of competition may or may not occur:

— there is no possibility of coordination of the competitive behaviour of independent undertakings where the parent companies transfer their entire business activities to the joint venture or their total activities in a given industrial sector,

— coordination can normally be excluded where the parent companies are not active in the market of the joint venture or transfer to the joint venture all their activities in this market or where only one parent company remains active in the joint venture's market. The same is true where the parent companies retain only minor activities in the market of the joint venture,

— by contrast to the above, there is normally a high probability of coordination where two or more parent companies retain to a significant extent activities in the same product market as the joint

(*) Case IV/M.179, Spar/Dansk Supermarked of 3 February 1992 (paragraph 8).
Case IV/M.263, Ahold/Jeronimo Martins of 29 September 1992 (paragraph 8).

II/5

venture itself in so far as these activities are in the same geographic market (°),

— there is also a probability of coordination where the parent companies or the joint venture specialize in specific segments of an overall product market, unless these segments are of minor importance in view of the main activities of the parent companies or the joint venture respectively or there are objective reasons for the parent companies to retain their activities outside the joint venture, e.g. technology related to other activities of the parent companies. In the latter case each of the parent companies retains a genuine interest in their specific segments. The existence of the joint venture therefore does not normally of itself justify the assumption that they would coordinate their behaviour with regard to these activities,

— where a network of cooperative links already exists between the parent companies in the joint venture's market the main object or effect of the joint venture may be to add a further link and thereby strengthen already existing coordination of competitive behaviour (°°),

— where the parent companies are active in a market which is downstream from the joint venture's market coordination of their competitive behaviour may occur where the joint venture is their main supplier and relatively little further value is added at the level of the parent companies; equally, where the parent companies are active in a market which is upstream from the joint venture's market coordination of their competitive behaviour may occur where their main customer is the joint venture either in general or in a particular geographic market,

— where two or more parent companies have a significant activity in a neighbouring market and this neighbouring market is of significant economic importance compared with that of the joint venture, the collaboration within the joint venture may lead to the coordination of the parent companies' competitive behaviour on this neighbouring market (°°°). In this context a neighbouring market is a separate but closely related market to the market of the joint venture, both markets having common characteristics including technology, customers or competitors.

3.2. *Geographic market*

19. The parent companies and the joint venture may be active in the same product market but in different geographic markets. In this context two situations may be particularly relevant: the parent companies and the joint venture are each in different geographic markets, or the parent companies are in the same geographic market which is nevertheless different from that of the joint venture. In these situations coordination may or may not occur as follows:

— where the parent companies and the joint venture are all in different geographic markets, the Commission will examine closely the likelihood of coordination between the parent companies. In doing so the Commission will consider interaction between markets, and foreseeable developments in the emergence of wider geographic markets particularly in the light of the market integration process in the Community (°°°°). The same applies where one parent company and the joint venture are in the same geographic market while the other parent companies are all in different geographic markets,

— where the parent companies are in the same geographic market, which is different from that of the joint venture, there is scope for coordination of the competitive behaviour of the parent companies where the joint venture's activities have a substantial economic importance when compared with the parent companies' activities on their home market and where there is interaction between the parent companies' and joint venture's markets or such interaction is likely to evolve in the near future. By contrast, where the joint venture's activities account for only a small proportion of the overall activities of the parent companies in the products concerned, the conclusion that collaboration in the joint venture would lead to coordination on the parent companies' market would be justified only in exceptional cases,

— in any event, where the coordination of competitive behaviour of the parent companies takes place on geographic markets outside the Community or the EEA and has no appreciable effect on competition within the Community/EEA the joint venture is considered to be concentrative despite this coordination.

20. In relation to the abovementioned paragraphs, the fact that a joint venture leads to coordination of the competitive behaviour of the parent companies does not prevent the assumption of a concentration where these

(°) Case IV/M.088, Elf Enterprise of 24 July 1991 (paragraph 6); Case IV/M.117 Koipe — Tabacalera/Elosua of 28 July 1992 (paragraphs 10 to 14). In principle, the same would apply where, following the creation of the joint venture, the parent companies, while no longer active in the joint venture's market, nevertheless remain potential competitors in this market. However, this can normally be excluded since it is unlikely that the parents would re-enter the market on their own, in particular, where they have transferred their respective activities to the joint venture, or where they commit significant investment to the joint venture.

(°°) Case IV/M.176, Sunrise of 13 January 1992 (paragraph 34).

(°°°) Case IV/M.293, Philips/Thomson/SAGEM of 18 January 1993 (paragraph 19).

(°°°°) See Case IV/M.207, Eureko of 27 April 1992 (paragraph 16 (b)) which can be contrasted with Case IV/M.319, BHF/CCF/Charterhouse of 30 August 1993 (paragraph 6).

II/6

cooperative elements are only of minor economic importance relative to the operation as a whole (*de minimis*).

However a high accumulation of minor elements of coordination may lead to a situation where the operation as a whole has to be considered as cooperative.

III. FINAL

21. The Commission's interpretation of Article 3 with respect to joint ventures is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities.

COMMISSION NOTICE

on the notion of a concentration

under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings

(94/C 385/02)

(Text with EEA relevance)

I. INTRODUCTION

1. The purpose of this notice is to provide guidance as to how the Commission interprets the notion of a concentration under Article 3 of Regulation (EEC) No 4064/89 (1) (hereinafter referred to as the 'Merger Regulation'). It forms part of the initiatives which the Commission envisaged in its report (2) to the Council of Ministers of 28 July 1993 in order to improve the transparency and legal security of all decisions taken in application of the Regulation. This formal guidance on the interpretation of Article 3 should enable firms to establish more quickly whether and to what extent their operations may be covered by Community merger control in advance of any contact with the Commission's services.

This notice deals with paragraphs (1), (3), (4) and (5) of Article 3. The interpretation of Article 3 in relation to joint ventures, dealt with in particular under Article 3 (2), is set out in the Commission's notice on the distinction between concentrative and cooperative joint ventures (3).

2. The guidance set out in this notice reflects the experience of the Commission in applying the Merger Regulation since it entered into force on 21 December 1990. The principles contained here will be applied and further developed by the Commission in individual cases.

3. According to recital 23 of the Merger Regulation the concept of a concentration is defined as covering only operations which bring about a lasting change in the structure of the undertakings concerned. Article 3 (1) provides that such a structural change is brought about either by a merger between two previously independent undertakings or by the acquisition of control over the whole or part of another undertaking.

4. The determination of the existence of a concentration under the Merger Regulation is based upon qualitative rather than quantitative criteria, focusing on the notion of control. These criteria include considerations of both law and fact. It follows, therefore, that a concentration may occur on a legal or a *de facto* basis.

5. Article 3 (1) of the Regulation defines two categories of concentration:

— those arising from a merger between previously independent undertakings (point (a));

— those arising from a acquisition of control (point (b)).

These are treated respectively in sections II and III below.

II. MERGERS BETWEEN PREVIOUSLY INDEPENDENT UNDERTAKINGS

6. A merger within the meaning of point (a) of Article 3 (1) of the Merger Regulation occurs when two or more independent undertakings amalgamate into a new undertaking and cease to exist as different legal entities. A merger may also occur when a undertaking is absorbed by another, the latter retaining its legal identity while the former ceases to exist as a legal entity.

(1) OJ No L 395, 30. 12. 1989, p. 1, corrected version OJ No L 257, 21. 9. 1990, p. 13.

(2) Doc. COM(93) 385 final, as amended by COM(93) 385 final/2.

(3) Commission notice regarding the distinction between concentrative and cooperative joint ventures under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

II/7

7. A merger within the meaning of point (a) of Article 3 (1) may also occur where, in the absence of a legal merger, the combining of the activities of previously independent undertakings results in the creation of a single economic unit (*). This may arise in particular where two or more undertakings, while retaining their individual legal personalities, establish contractually a common economic management (*). If this leads to a *de facto* amalgamation of the undertakings concerned into a genuine common economic unit, the operation is considered to be a merger. A prerequisite for the determination of a common economic unit is the existence of a permanent, single economic management. Other relevant factors may include internal profit and loss compensation as between the various undertakings within the group, and their joint liability externally. The *de facto* amalgamation may be reinforced by cross-shareholdings between the undertakings forming the economic unit.

III. ACQUISITION OF CONTROL

8. Point (b) of Article 3 (1) provides that a concentration occurs in the case of an acquisition of control. Such control may be acquired by one undertaking acting alone or by two or more undertakings acting jointly.

Control may also be acquired by a person in circumstances where that person already controls (whether solely or jointly) at least one other undertaking or, alternatively, by a combination of persons (which control another undertaking) and/or undertakings. The term 'person' in this context extends to public bodies (*) and private entities, as well as individuals.

As defined, a concentration within the meaning of the Merger Regulation is limited to changes in control. Internal restructuring within a group of companies, therefore, cannot constitute a concentration.

An exceptional situation exists where both the acquiring and acquired undertakings are public companies owned by the same State (or by the same public body). In this case, whether the operation is to be considered as an internal restructuring or not depends in turn on the question whether both undertakings were formerly part of the same economic unit within the meaning of recital 12 of the Merger Regulation. Where the undertakings were formerly part of different economic units having an independent power of decision the operation will be deemed to constitute a concentration and not an internal restructuring (*). Such independent power of decision does not normally exist, however, where the undertakings are within the same holding company.

9. Whether an operation gives rise to an acquisition of control depends on a number of legal and/or factual elements. The acquisition of property rights and shareholders' agreements are important but are not the only elements involved: purely economic relationships may also be determinant. Therefore, in exceptional circumstances a situation of economic dependence may lead to control on a factual basis where, for example, very important long term-supply agreements or credits provided by suppliers or customers, coupled with structural links, confer decisive influence (*).

There may also be acquisition of control even if it is not the declared intention of the parties (*). Moreover the Merger Regulation clearly defines control as 'having the possibility of exercising decisive influence' rather than the actual exercise of such influence.

10. Control is nevertheless normally acquired by persons or undertakings which are the holders of the rights or are entitled to rights conferring control (point (a) of Article 3 (4)). There may be exceptional situations where the formal holder of a controlling interest differs from the person or undertaking having in fact the real power to exercise the rights resulting from this interest. This may be the case, for example, where an undertaking uses another person or undertaking for the acquisition of a controlling interest and exercises the rights through this person or undertaking, even though the latter is formally the holder of the rights. In such a situation control is acquired by the undertaking which in reality is behind the operation and in fact enjoys the

(*) In determining the previous independence of undertakings the issue of control may be relevant. Control is considered generally in paragraphs 12, *et seq.*, below. For this specific case minority shareholders are deemed to have control if they have previously obtained a majority of votes on major decisions at shareholders meetings. The reference period in this context is normally three years.

(*) This could apply for example, in the case of a 'Gleichordnungskonzern' in German law, certain 'Groupements d'Interêts Economiques' in French law, and certain partnerships.

(*) Including the State itself, e.g. Case IV/M.157 — Air France/Sabena, of 5 October 1992 in relation to the Belgian State, or other public bodies such as the Treuhand in Case IV/M.308 — Kali und Salz/MDK/Treuhand, of 14 December 1993.

(*) Case IV/M.097 — Péchiney/Usinor, of 24 June 1991; IV/M.216 — CEA Industrie/France Télécom/SGS-Thomson, 22 February 1993.

(*) For example in the Usinor/Bamesa decision adopted by the Commission under the ECSC Treaty. See also Case IV/M. 258 CCIE/GTE, of 25 September 1992.

(*) Case IV/M.157 — Air France/Sabena, of 5 October 1992.

II/8

power to control the target undertaking (point (b) of Article 3 (4)). The evidence needed to establish this type of indirect control may include factors such as the source of financing or family links.

11. The object of control can be one or more undertakings which constitute legal entities, or the assets of such entities, or only some of these assets (*). In the last mentioned situation, which could apply to brands or licenses, the assets in question must constitute a business to which a market turnover can be clearly attributed.

12. The acquisition of control may be of sole or joint control. In both cases control is defined as the possibility to exercise decisive influence on an undertaking on the basis of rights, contracts or any other means (Article 3 (3)).

1. Sole control

13. Sole control is normally acquired on a legal basis where an undertaking acquires a majority of the voting rights of a company. It is not in itself significant that the acquired shareholding is 50 % of the share capital plus one share (*) or that it is 100 % of the share capital (*). In the absence of other elements an acquisition which does not include a majority of the voting rights does not normally confer control even if it involves the acquisition of a majority of the share capital.

14. Sole control may also be acquired in the case of a 'qualified minority'. This can be established on a legal and/or *de facto* basis.

On a legal basis it can occur where specific rights are attached to the minority shareholding. These may be preferential shares leading to a majority of the voting rights or other rights enabling the minority shareholder to determine the strategic commercial behaviour of the target company, such as the power to appoint more than half of the members of the supervisory board or the administrative board.

A minority shareholder may also be deemed to have sole control on a *de facto* basis. This is the case, for example, where the shareholder is highly likely to achieve a majority in the shareholders' meeting, given that the remaining shares are widely dispersed (*). In such a situation it is unlikely that all the smaller shareholders will be present or represented at the shareholders' meeting. The determination of whether or not sole control exists in a particular case is based on the evidence resulting from the presence of shareholders in previous years. Where, on the basis of the number of shareholders attending the shareholders' meeting, a minority shareholder has a stable majority of the votes in this meeting, then the large minority shareholder is taken to have sole control (*).

Sole control can also be exercised by a minority shareholder who has the right to manage the activities of the company and to determine its business policy.

15. An option to purchase or convert shares cannot in itself confer sole control unless the option will be exercised in the near future according to legally binding agreements (*). However the likely exercise of such an option can be taken into account as an additional element which, together with other elements, may lead to the conclusion that there is sole control.

16. A change from joint to sole control of an undertaking is deemed to be a concentration within the meaning of the Merger Regulation because decisive influence exercised solely is substantially different to decisive influence exercised jointly (*). For the same reason, an operation involving the acquisition of joint control of one part of an undertaking and sole control of another part, are in principle regarded as two separate concentrations under the Merger Regulation (*).

17. The concept of control under the Merger Regulation may be different from that applied in specific areas of legislation concerning, for example, prudential rules, taxation, air transport or media. In addition, national legislation within a Member State may provide specific rules on the structure of bodies representing the organization of decision-making within an undertaking, in particular, in relation to the rights of representatives of employees. While such legislation may confer a certain power of control upon persons other than the shareholders, the concept of control under the Merger Regulation is related only to the means of influence normally enjoyed by the owners of an undertaking. Finally, the prerogatives exercised by a State acting as a public

(*) Case IV/M.286 Zerich/MMI, of 2 April 1993.
(*) Case IV/M.296 — Crédit Lyonnais/BFG Bank, of 11 January 1993.
(*) Case IV/M.299 Sara Lee/BP Food Division, of 8 February 1993.
(*) Case IV/M.025 Arjomari/Wiggins Teape, of 10 February 1990.
(*) Case IV/M.343 — Société Générale de Belgique/Générale de Banque, of 3 August 1993.
(*) Case T-2/93 *Air-France* v Commission (judgment of 19 May 1994, not yet published).
(*) This issue is dealt with in paragraphs 30 to 32 of the notice on the notion of undertakings concerned.
(*) Case IV/M.409 ABB/Renault Automation, of 9 March 1994.

II/9

authority rather than as a shareholder, in so far as they are limited to the protection of the public interest, do not constitute control within the meaning of the Merger Regulation to the extent that they have neither the aim nor the effect of enabling the State to exercise a decisive influence over the activity of the undertaking (*).

2. Joint control

18. As in the case of sole control, the acquisition of joint control (which includes changes from sole control to joint control) can also be established on a legal or *de facto* basis. There is joint control if the shareholders (the parent companies) must reach agreement on major decisions concerning the controlled undertaking (the joint venture).

19. Joint control exists where two or more undertakings or persons have the possibility to exercise decisive influence over another undertaking. Decisive influence in this sense normally means the power to block actions which determine the strategic commercial behaviour of an undertaking. Unlike sole control, wich confers the power upon a specific shareholder to determine the strategic decisions in an undertaking, joint control is characterized by the possibility of a deadlock situation resulting from the power of two or more parent companies to reject proposed strategic decisions. It follows, therefore, that these shareholders must reach a common understanding in determining the commercial policy of the joint venture.

2.1. *Equality in voting rights or appointment to decision-making bodies*

20. The clearest form of joint control exists where there are only two parent companies which share equally the voting rights to the joint venture. In this case it is not necessary for a formal agreement to exist between them. However, where there is a formal agreement, it must not contradict the principle of equality between the parent companies, by laying down, for example, that each is entitled to the same number of representatives in the management bodies and that none of the members has a casting vote (*). Equality may also be achieved where both parent companies have the right to appoint an equal number of members to the decision-making bodies of the joint venture.

2.2. *Veto rights*

21. Joint control may exist even where there is no equality between the two parent companies in votes or in representation in decision-making bodies or where there are more than two parent companies. This is the case where minority shareholders have additional rights which allow them to veto decisions which are essential for the strategic commercial behaviour of the joint venture (*). These veto rights may be set out in the statute of the joint venture or conferred by agreement between its parent companies. The veto rights themselves may operate by means of a specific quorum required for decisions taken in the shareholders' meeting or in the board of directors to the extent that the parent companies are represented on this board. It is also possible that strategic decisions are subject to approval by a body, e.g.: supervisory board, where the minority shareholders are represented and form part of the quorum needed for such decisions.

22. These veto rights must be related to strategic decisions on the business policy of the joint venture. They must go beyond the veto rights normally accorded to minority shareholders in order to protect their financial interests as investors in the joint venture. This normal protection of the rights of minority shareholders is related to decisions on the essence of the joint venture, such as, changes in the statute, increase or decrease of the capital or liquidation. A veto right, for example, which prevents the sale or winding up of the joint venture, does not confer joint control on the minority shareholder concerned (*).

23. In contrast, veto rights which confer joint control typically include decisions and issues such as the budget, the business plan, major investments or the appointment of senior management. The acquisition of joint control, however, does not require that the acquiror has the power to exercise decisive influence on the day-to-day running of an undertaking. The crucial element is that the veto rights are sufficient to enable the parent companies to exercise such influence in relation to the strategic business behaviour of the joint venture. Moreover, it is not necessary to establish that an acquiror of joint control of the joint venture will actually make use of its decisive influence. The possibility to use this influence and, hence, the mere existence of the veto rights, is sufficient.

(*) Case IV/M.493 — Tractebel/Distrigaz II, of 1 September 1994.

(*) Case IV/M.272 Matra/CAP Gemini Sogeti, of 17 March 1993.

(*) Case T-2/93, *Air France* v *Commission* (ibid). Case IV/M.0010 Conagra/Idea, of 3 May 1991.

(*) Case IV/M.062 — Eridania/ISI, of 30 July 1991.

II/10

24. In order to acquire joint control, it is not necessary for a minority shareholder to have all the veto rights mentioned above. It may be sufficient that only some, or even one such right, exists. Whether or not this is the case depends upon the precise content of the veto right itself and also the importance of this right in the context of the specific business of the joint venture.

Appointment of management and determination of budget

25. Normally the most important veto rights are those concerning decisions on the appointment of the management and the budget. The power to co-determine the structure of the management confers upon the holder the power to exercise decisive influence on the commercial policy of an undertaking. The same is true with respect to decisions on the budget since the budget determines the precise framework of the activities of the joint venture and, in particular, the investments it may make.

Business plan

26. The business plan normally provides details of the aims of a company together with the measures to be taken in order to achieve those aims. A veto right over this type of business plan may be sufficient to confer joint control even in the absence of any other veto right. In contrast, where the business plan contains merely general declarations concerning the business aims of the joint venture, the existence of a veto right will be only one element in the general assessment of joint control but will not, on its own, be sufficient to confer joint control.

Investments

27. In the case of a veto right on investments the importance of this right depends on, first, the level of investments which are subject to the approval of the parent companies and secondly, the extent to which investments constitute an essential feature of the market in which the joint venture is active. In relation to the first, where the level of investments necessitating parental approval is extremely high, this veto right may be closer to the normal protection of the interests of a minority shareholder than to a right conferring a power of co-determination over the commercial policy of the joint venture. With regard to the second, the investment policy of an undertaking normally is an important element in assessing whether or not there is joint control. However, there may be some markets where investment does not play a significant role in the market behaviour of an undertaking.

Market-specific rights

28. Apart from the typical veto rights mentioned above, there exist a number of other veto rights related to specific decisions which are important in the context of the particular market on the joint venture. One example is the decision on the technology to be used by the joint venture where technology is a key feature of the joint venture's activities. Another example relates to markets characterized by product differentiation and a significant degree of innovation. In such markets a veto right over decisions relating to new product lines to be developed by the joint venture may also be an important element in establishing the existence of joint control.

Overall context

29. In assessing the relative importance of veto rights, where there are a number of them, these rights should not be evaluated in isolation. On the contrary, the determination of the existence or not of joint control is based upon an assessment of these rights as a whole. However, a veto right which does not relate either to commercial policy and strategy or to the budget of business plan cannot be regarded as giving joint control to its owner (22).

2.3. *Common exercise of voting rights*

30. Even in the absence of specific veto rights, two or more undertakings acquiring minority shareholdings in another undertaking may obtain joint control. This may be the case where the minority shareholdings together provide the means for controlling the target undertaking. This means that the minority shareholders, together, will have a majority of the voting rights; and they will act together in exercising these voting rights. This can result from a legally binding agreement to this effect, or it may be established on a *de facto* basis.

31. The legal means to ensure the common exercise of voting rights can be in the form of a holding company to which the minority shareholders transfer their rights, or an agreement by which they engage themselves to act in the same way (pooling agreement).

32. Very exceptionally, collective action can occur on a *de facto* basis where strong common interests exist between the minority shareholders to the effect that they would not act against each other in exercising their rights in relation to the joint venture.

33. In the case of acquisitions of minority shareholdings the prior existence of links between the minority shareholders or the acquisition of the shareholdings by means of concerted action will be factors indicating such a common interest.

34. In the case where a new joint venture is established, as opposed to the acquisition of minority share-

(22) Case IV/M.295 — SITA-RPC/SCORI, of 19 March 1993.

II/ 11

holdings in an already existing company, there is a higher probability that the parent companies are carrying out a deliberate common policy. This is true, in particular, where each parent company provides a contribution to the joint venture which is vital for its operation (e.g. specific technologies, local know-how or supply agreements). In these circumstances the parent companies may be able to operate the joint venture in full cooperation only with each other's agreement on the most important strategic decisions even if there is no express provision for any veto rights. The greater the number of parent companies involved in such a joint venture, however, the likelihood of this situation occurring becomes increasingly remote.

35. In the absence of strong common interests such as those outlined above, the possibility of changing coalitions between minority shareholders will normally exclude the assumption of joint control. Where there is no stable majority in the decision-making procedure and the majority can on each occasion be any of the various combinations possible amongst the minority shareholders, it cannot be assumed that the minority shareholders will jointly control the undertaking. In this context, it is not sufficient that there are agreements between two or more parties having an equal shareholding in the capital of an undertaking which establish identical rights and powers between the parties. For example, in the case of an undertaking where three shareholders each own a third of the share capital and each elect a third of the members of the Board of Directors, the shareholders do not have joint control since decisions are required to be taken on the basis of a simple majority. The same considerations also apply in more complex structures, for example, where the capital of an undertaking is equally divided between three shareholders and whole Board of Management is composed of 12 members of which two are each elected by shareholders A, B and C, two by A B and C jointly, and the remaining four by the other eight members. In this case also there is no joint control, and hence no control at all within the meaning of the Merger Regulation.

2.4. Other considerations related to joint control

36. Joint control is not incompatible with the fact that one of the parent companies enjoys specific knowledge of and experience in the business of the joint venture. In such a case, the other parent company can play a modest or even non-existent role in the daily management of the joint venture where its presence is motivated by considerations of a financial, long-term-strategy, brand image or general policy nature. Nevertheless, it must always retain the real possibility of contesting the decisions taken by the other parent company, without which there would be sole control.

37. For joint control to exist, there should not be a casting vote for one parent company only. However, there can be joint control when this casting vote can be exercised only after a series of stages of arbitration and attempts at reconciliation or in a very limited field (23).

2.5. Joint control for a limited period

38. Where an operation leads to joint control for a starting-up period (24) but, according to legally binding agreements, this joint control will be converted to sole control by one of the shareholders, the whole operation will normally be considered as an acquisition of sole control.

3. Control by a single shareholder on the basis of veto rights

39. An exceptional situation exists where, in the course of an acquisition, only one shareholder is able to veto strategic decisions in an undertaking but this shareholder does not have the power, on his own, to impose such decisions. This situation occurs either where one shareholder holds 50 % in an undertaking whilst the remaining 50 % is held by two or more minority shareholders, or where there is a quorum required for strategic decisions which in fact confers a veto right upon only one minority shareholder (25). In these circumstances, a single shareholder, possesses the same level of influence as that normally enjoyed by several jointly — controlling shareholders, i.e. the power to block the adoption of strategic decisions. However, this shareholder does not enjoy the powers which are normally conferred on an undertaking with sole control, i.e. the power to impose strategic decisions. Since this shareholder can produce the same deadlock situation as in the normal cases of joint control he acquires decisive influence and therefore control within the meaning of the Merger Regulation (26).

(23) Case IV/M.425 — British Telecom/Banco Santander, of 28 March 1994.

(24) This starting-up period must not exceed three years. Case IV/M.425 — British Telecom/Banco Santander, ibid.

(25) Case IV/M.258 — CCIE/GTE, of 25 September 1992, where the veto rights of only one shareholder were exercisable through a member of the board appointed by this shareholder.

(26) Since this shareholder is the only undertaking acquiring a controlling influence only this shareholder is obliged to submit a notification under the Merger Regulation.

II/12

4. Changes in the structure of control

40. A concentration may also occur where an operation leads to a change in the structure of control. This includes the change from joint control to sole control as well as an increase in the number of shareholders exercising joint control. The principles for determining the existence of a concentration in these circumstances are set out in detail in the notice on the notion of undertakings concerned (*).

IV. EXCEPTIONS

41. Article 3 (5) sets out three exceptional situations where the acquisition of a controlling interest does not constitute a concentration under the Merger Regulation.

42. First, the acquisition of securities by companies, the normal activities of which include transactions and dealings for their own account or for the account of others, is not deemed to constitute a concentration if such an acquisition is made in the framework of these business and where the securities are held only on a temporary basis (point (a) of Article 3 (5)). In order to fall within this exception, the following requirements must be fulfilled:

— the acquiring undertaking must be a credit or other financial institution or insurance company the normal activities of which are described above,

— the securities must be acquired with a view to their resale,

— the acquiring undertaking must not exercise the voting rights with a view to determining the strategic commercial behaviour of the target or must exercise these rights at least only with a view to preparing the total or partial disposal of the undertaking, its assets or securities,

— the acquiring undertaking must dispose of its controlling interest within one year of the date of the acquisition, that is, it must reduce its shareholding within this one-year period at least to a level which no longer confers control. This period, however, may be extended by the Commission where the acquiring undertaking can show that the disposal was not reasonably possible within the one-year period.

43. Secondly, there is no change of control, and so no concentration within the meaning of the Merger Regulation, where control is acquired by an office-holder according to the law of a Member State relating to liquidation, winding-up, insolvency, cessation of payments, compositions or analogous proceedings (point (b) of Article 3 (5));

44. Thirdly, a concentration does not arise where a financial holding company within the meaning of the Fourth Council Directive 78/660/EEC (**) acquires control, provided that this company exercise its voting rights only to maintain the full value of its investment and does not otherwise determine directly or indirectly the strategic commercial conduct of the controlled undertaking.

45. In the context of the exceptions under Article 3 (5), the question may arise whether a rescue operation constitutes a concentration under the Merger Regulation. A rescue operation typically involves the conversion of existing debt into a new company, through which a syndicate of banks may acquire joint control of the company concerned. Where such an operation meets the criteria for joint control, as outlined above, it will normally be considered to be a concentration (***). Although the primary intention of the banks is to restructure the financing of the undertaking concerned for its subsequent resale, the exception set out in point (a) of Article 3 (5) is normally not applicable to such an operation. This is so because the restructuring programme normally requires the controlling banks to determine the strategic commercial behaviour of the rescued undertaking. Furthermore, it is not normally realistic to transfer a rescued company into a commercially viable entity and to resell it within the permitted one-year period. Moreover, the length of time needed to achieve this aim may be so uncertain that it would be difficult to grant an extension of the disposal period.

V. FINAL

46. The Commission's interpretation of Article 3 as set out in this notice is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities.

(*) Paragraphs 30 to 48.

(**) OJ No L 222, 14. 8. 1978, p. 11, as last amended by Directive 84/569/EEC, OJ No L 314, 4. 12. 1984, p. 28. Article 5 (3) of this Directive defines financial holding companies as 'those companies the sole objective of which is to acquire holdings in other undertakings, and to manage such holdings and turn them to profit, without involving themselves directly or indirectly in the management of those undertakings, the aforegoing without prejudice to their rights as shareholders'.

(***) Case IV/M.116 — Kelt/American Express, of 28 August 1991.

II/13

COMMISSION NOTICE

on the notion of undertakings concerned

under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings

(94/C 385/03)

(Text with EEA relevance)

I. INTRODUCTION

1. This Commission notice aims at clarifying the Commission's interpretation of the notion of undertakings concerned in Articles 1 and 5 of Regulation (EEC) No 4064/89 (1), as well as at helping to identify the undertakings concerned in the most typical situations which have arisen in cases dealt with by the Commission to date. The principles set out in this notice will be followed and further developed by the Commission's practice in individual cases.

2. According to Article 1 of the Merger Regulation, this Regulation only applies to operations that satisfy a double condition. First, several undertakings must merge, or one or more undertakings must acquire control of the whole or part of other undertakings through the proposed operation, which must qualify as concentrations within the meaning of Article 3 of the Regulation. Secondly, those undertakings must meet the three turnover thresholds set out in Article 1.

3. From the point of view of determining jurisdiction, the undertakings concerned are, broadly speaking, the actors in the transaction in so far as they are the merging, or acquiring and acquired parties; in addition, their total aggregate economic size in terms of turnover will be decisive to determine whether the thresholds are fulfilled. The concept of undertakings concerned is used only for the purposes of determining jurisdiction, as the Commission's assessment of the competitive impact of the operation on the market place will then focus not only on the activities of those undertakings concerned party to the concentration, but also on the activities of the groups to which these undertakings belong.

4. The Commission's interpretation of Articles 1 and 5 with respect to the notion of undertakings concerned is without prejudice to the interpretation which may be given by the Court of Justice or by the Court of First Instance of the European Communities.

(1) Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (hereafter referred to as 'the Merger Regulation'). OJ No L 395, 30. 12. 1989, p. 1, corrected version OJ No L 257, 21. 9. 1990.

II. THE NOTION OF UNDERTAKING CONCERNED

5. Undertakings concerned are the direct participants in a merger or acquisition of control. In this respect, Article 3 (1) of the Merger Regulation provides that:

'A concentration shall be deemed to arise where:

(a) two or more previously independent undertakings merge, or

(b) — one or more persons already controlling at least one undertaking, or

— one or more undertakings

acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more undertakings'.

6. In the case of a merger, the undertakings concerned will be the undertakings that are merging.

7. In the remaining cases, it is the concept of 'acquiring control' that will determine which are the undertakings concerned. On the acquiring side, there can be one or several companies acquiring sole or joint control. On the acquired side, there can be one or more companies as a whole or parts thereof, when only one of their subsidiaries or some of their assets are the subject of the transaction. As a general rule, each of these companies will be an undertaking concerned within the meaning of the Merger Regulation. However, the particular features of specific transactions require a certain refinement of this principle, as will be seen below when analysing different possible scenarios.

8. In those concentrations other than mergers or the setting up of new joint ventures, i.e. in cases of sole or joint acquisition of pre-existing companies or part of them, there is an important party to the agreement that gives rise to the operation who is to be ignored when identifying the undertakings concerned: the seller. Although it is clear that the operation cannot proceed without its consent, its role ends when the transaction is

II/14

completed since, by definition, from the moment the seller has relinquished all control over the company, its links with it disappear. Where the seller retains joint control with the acquiring company (or companies) it will be considered as one of the undertakings concerned.

9. Once the undertakings concerned have been identified in a given transaction, their turnover for the purposes of determining jurisdiction should be calculated according to the rules set out in Article 5 of the Merger Regulation (*). One of the main provisions of Article 5 is that where the undertaking concerned belongs to a group, the turnover of the whole group should be included in the calculation. All references to the turnover of the undertakings concerned in Article 1 should be therefore understood as the turnover of their entire respective groups.

10. The same can be said with respect to the substantive appraisal of the impact of a concentration in the market place. When Article 2 of the Merger Regulation provides that the Commission shall take into account 'the market position of the undertakings concerned and their economic and financial power', this includes the groups to which they belong.

11. It is important not to confuse the concept of undertakings concerned under Articles 1 and 5, with those other terms used in the Merger Regulation and in the Implementing Regulation (*) in referring to the various undertakings which may be involved in a procedure. These other notions are notifying parties, other involved parties, third parties and parties who may be subject to fines or periodic penalty payments. They are defined in Section III of the Implementing Regulation, along with their respective rights and duties.

III. IDENTIFYING THE UNDERTAKINGS CONCERNED IN DIFFERENT TYPES OF OPERATIONS

1. Mergers

12. In a merger, several previously independent companies come together to create a new company or, while remaining separate legal entities, to create a single economic unit. As mentioned earlier, the undertakings concerned are each of the merging entities.

2. Acquisition of sole control

2.1. *Acquisition of sole control of the whole company*

13. Acquisition of sole control of the whole company is the most straightforward case of acquisition of control; the undertakings concerned will be the acquiring company and the acquired or target company.

2.2. *Acquisition of sole control of part of a company*

14. The first subparagraph of Article 5 (2) of the Merger Regulation stipulates that when the operation concerns the acquisition of parts of one or more undertakings, only those parts which are the subject of the transaction shall be taken into account with regard to the seller. The concept of 'parts' is to be understood as one or more separate legal entities (such as subsidiaries), internal subdivisions within the seller (such as a division or unit), or specific assets which in themselves could constitute a business (e.g. in certain cases brands or licences) to which a market turnover can clearly be attributed. In this case, the undertakings concerned will be the acquirer and the acquired part(s) of the target company.

15. The second subparagraph of Article 5 (2) includes a special provision on staggered operations or follow-up deals, whereby if several acquisitions of parts by the same purchaser from the same seller occur within a two-year period, these transactions shall be treated as one and the same operation arising on the date of the last transaction. In this case, the undertakings concerned are the acquirer and the different acquired part(s) of the target company taken as a whole.

2.3. *Acquisition of sole control of previously reduced or enlarged companies*

16. The undertakings concerned are the acquiring company and the target company(ies), in their configuration at the date of the operation.

17. The Commission bases itself on the configuration of the undertakings concerned at the date of the event triggering the obligation to notify under Article 4 (1) of the Merger Regulation, namely the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. If the target company has divested an entity or closed a business prior to the date of the event triggering notification or where

(*) The rules for calculating turnover in accordance with Article 5 are detailed in the Commission Notice on Calculation of Turnover.

(*) Commission Regulation (EC) No 3384/94 of 21 December 1994 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 (hereafter referred to as the 'Implementing Regulation') (OJ No L 377, 31. 12. 1994).

II/15

such a divestment or closure is a pre-condition for the operation (*), then sales of the divested entity or closed business would not be included when calculating turnover. Conversely if the target company has acquired an entity prior to the date of the event triggering notification, the sales of the latter would be added (*).

2.4. *Acquisition of sole control through a subsidiary of a group*

18. Where the target company is acquired by a group through one of its subsidiaries, the undertakings concerned for the purpose of calculating turnover are the target company and the acquiring subsidiary. However, regarding the actual notification, this can be made by the subsidiary concerned or by its parent company.

19. All the companies within a group (parent companies, subsidiaries, etc.) constitute a single economic entity, and therefore there can only be one undertaking concerned within the one group — i.e. the subsidiary and the parent company cannot each be considered as separate undertakings concerned, either for the purposes of ensuring that the threshold requirements are fulfilled (for example, if the target company does not meet the ECU 250 million Community-turnover threshold), or that they are not (for example if a group was split into two companies each with a Community turnover below ECU 250 million).

20. However, even though there can only be one undertaking concerned within a group, Article 5 (4) of the Merger Regulation provides that it is the turnover of the whole group to which the undertaking concerned belongs that will be included in the threshold calculations (*).

3. Acquisition of joint control

3.1. *Acquisition of joint control of a newly-created company*

21. In the case of acquisition of joint control of a newly-created company, the undertakings concerned are each of the companies acquiring control of the newly set-up joint venture (which, as it does not yet exist, cannot yet be considered as an undertaking concerned and furthermore has no turnover of its own yet).

3.2. *Acquisition of joint control of a pre-existing company*

22. In the case of acquisition of joint control of a pre-existing company or business (*), the undertakings concerned are each of the companies acquiring joint control on the one hand, and the pre-existing acquired company on the other.

23. Where the pre-existing company was under the sole control of one company and one or several new shareholders acquire joint control but the initial parent company remains, the undertakings concerned are each of the jointly-controlling companies (including this initial shareholder) and the target company. This situation is a passage from sole to joint control. In so far as sole control and joint control have a different nature, the Commission has consistently considered that passing from one type of control to another normally constitutes a concentration.

3.3. *Acquisition of joint control in order to split assets immediately*

24. In the case where several undertakings come together solely for the purpose of acquiring another company and agree to divide up the acquired assets according to a pre-existing plan immediately upon completion of the transaction, there is no effective concentration of economic power between the acquirers and the target company as the assets acquired are only jointly held and controlled for a 'legal instant'. This type of acquisition in order to split assets up immediately will in fact be considered as several operations, whereby each of the acquiring companies acquires its relevant part of the target company. For each of these operations, the undertakings concerned will therefore be the acquiring company, and that part of the target which it is acquiring (just as if there was an acquisition of sole control of part of a company).

25. This scenario is referred to in the recital 24 of the Merger Regulation, which stipulates that the Merger

(*) See Judgment of the Court of First Instance of 24 March 1994 in Case T-3/93 — *Air France* v. *Commission* not yet published).

(*) The calculation of turnover in the case of acquisitions or divestments subsequently to the date of the last audited accounts is dealt with in the Commission Notice on Calculation of Turnover, paragraph 27.

(*) The calculation of turnover in the case of company groups is dealt with in the Commission Notice on Calculation of Turnover, paragraphs 35 to 42.

(*) i.e. two or more companies (companies A, B, etc) acquire a pre-existing company (company X). For changes in the shareholding in cases of joint control of an existing joint venture see Section III.6.

II/16

Regulation applies to agreements whose sole object is to divide up the assets acquired immediately after the acquisition.

4. Acquisition of control by a joint venture

26. In transactions where a joint venture acquires control of another company, the question arises whether or not, from the point of view of the acquiring party, the joint venture should be taken as a single undertaking concerned (the turnover of which would include the turnover of its parent companies), or whether each of its parent companies should individually be considered as undertakings concerned. In other words, the issue is whether or not to 'lift the corporate veil' of the intermediate undertaking (the vehicle). In principle, the undertaking concerned is the direct participant in the acquisition of control. However, there may be circumstances where companies set up 'shell' companies, which have no or insignificant turnover of their own, or use an existing joint venture which is operating on a different market from that of the target company in order to carry out acquisitions on behalf of the parent companies. Where the acquired or target company has a Community turnover of less than ECU 250 million the question of determining the undertakings concerned may be decisive for jurisdictional purposes (*). In this type of situation the Commission will look at the economic reality of the operation to determine which are the undertakings concerned.

27. Where the acquisition is carried out by a full-function joint venture, i.e. a joint venture which has sufficient financial and other resources to operate a business activity on a lasting basis (*), which is already operating on a market, the Commission will normally consider the joint venture itself and the target company to be the undertakings concerned (and not the joint venture's parent companies).

28. Conversely, where the joint venture can be regarded as a vehicle for an acquisition by the parent companies, the Commission will consider each of the parent companies themselves to be the undertakings concerned, rather than the joint venture, together with the target company. This is the case in particular where the joint venture is set up especially for the purpose of acquiring the target company, where the joint venture has not yet started to operate, where an existing joint venture has no legal personality or full-function character as referred to above; or where the joint venture is an association of undertakings. The same applies where there are elements which demonstrate that the parent companies are in fact the real players behind the operation. These elements may include a significant involvement by the parent companies themselves in the initiative, organization and financing of the operation. Moreover, where the acquisition leads to a substantial diversification in the nature of the joint venture's activities this may also indicate that the parent companies are the real players in the operation. This will normally be the case when the joint venture acquires a target company operating on a different product market. In those case the parent companies should be regarded as undertakings concerned.

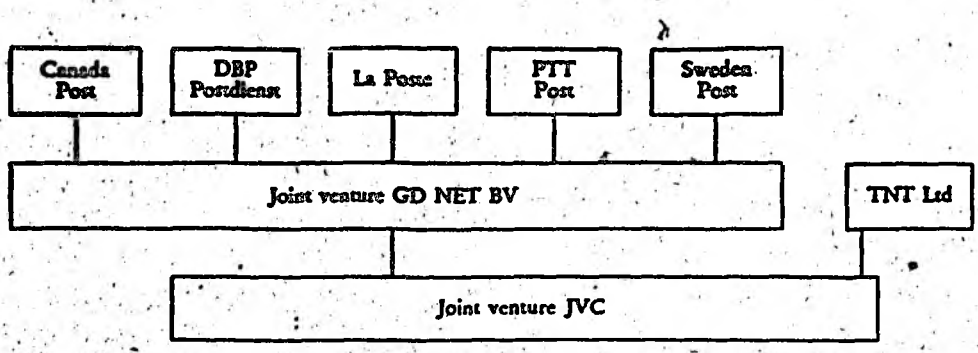
29. In the TNT case (**), joint control over a joint venture (JVC) was to be acquired by a joint venture (GD NET BV) between five postal administrations and another acquiring company (TNT Ltd) (see below). In this case, the Commission considered that the joint venture GD NET BV was simply a vehicle set up to enable the parent companies (the five postal administrations) to participate in the resulting JVC joint venture in order to facilitate decision-making amongst themselves and to ensure that the parent companies spoke and acted as one; this configuration would ensure that the parent companies could exercise a decisive influence with the other acquiring company, TNT, over the resulting joint venture JVC and would avoid the situation where that other acquirer could exercise sole control because of the postal administrations' inability to reach a unified position on any decision.

(*) The target company hypothetically has an aggregate Community turnover of less than ECU 250 million; and the acquiring parties are two (or more) undertakings, each with a Community turnover exceeding ECU 250 million. If the target is acquired by a 'shell' company set up between the acquiring undertakings, there would be only one company (the 'shell' company) with a Community turnover exceeding ECU 250 million, and thus one of the cumulative threshold conditions for Community jurisdiction would fail to be fulfilled (namely, the existence at least two undertakings with a Community turnover exceeding ECU 250 million). Conversely, if instead of acting through a 'shell' company, the acquiring undertakings acquire the target company themselves, then the turnover threshold would be met and the Merger Regulation would apply to this transaction.

(*) The rules determining the full-function nature of a joint venture are contained in the Commission Notice regarding the distinction between concentrative and cooperative joint ventures, paragraphs 13 to 15.

(**) Case IV/M.102 — TNT/Canada Post, DBP Postdienst, La Poste, PTT Post and Sweden Post, of 2 December 1991.

II/17



5. Passage from joint control to sole control

30. In the case of passage from joint control to sole control, one shareholder acquires the stake previously held by the other shareholder(s). In the case of two shareholders, each of them has joint control over the entire joint venture, and not sole control over 50 % of the joint venture; hence the sale of all of his shares by one shareholder to the other does not lead the sole remaining shareholder to pass from sole control over 50 % to sole control over 100 % of the joint venture, but rather to pass from joint control to sole control of the entire company (which, subsequently to the operation, ceases to be a 'joint' venture).

31. In this situation, the undertakings concerned are the remaining (acquiring) shareholder and the joint venture. As is case for any other seller, the 'exiting' shareholder is not an undertaking concerned.

32. The ICI/Tioxide case (*) was precisely such a passage from joint (50/50) control to sole control. The Commission considered that '... decisive influence exercised solely is substantially different to decisive influence exercised jointly, since the latter has to take into account the potentially different interests of the other party or parties concerned ... By changing the quality of decisive influence exercised by ICI on Tioxide, the transaction will bring about a durable change of the structure of the concerned parties ...'. In this case, the undertakings concerned were held to be ICI (as acquirer) and Tioxide as a whole (as acquired), but not the seller Coalson.

(*) Case IV/M.023 — ICI/Tioxide, of 28 November 1990.

6. Change in the shareholding in cases of joint control of an existing joint venture

33. The decisive element in assessing in the shareholding of a company is whether the operation leads to a change in the quality of control. The Commission assesses each operation on a case-by-case basis, but in certain hypotheses, there will be a presumption that the given operation leads, or respectively does not lead, to such a change in the quality of control, and thus constitutes a notifiable concentration.

34. A distinction must be made according to the circumstances of the change in the shareholding; first, one or more existing shareholder(s) can exit; secondly, one or more new additional shareholder(s) can enter, and thirdly, one or more existing shareholder(s) can be replaced by one or more new shareholder(s).

6.1. *Reduction in the number of shareholders leading to passage from joint to sole control*

35. It is not the reduction of shareholders *per se* which is important, but rather the fact that if some shareholders sell their stakes in a given joint venture, these stakes are then acquired by other (new or existing) shareholders, and thus that the acquisition of these stakes or additional contractual rights may lead to the acquisition of control or may strengthen an already existing position of control (e.g. additional voting rights or veto rights, additional board members, etc.).

36. Where the numer of shareholders is reduced, there may be passage from joint control to sole control (see Section III.5. also), in which case the remaining shareholder acquires sole control of the company. The undertakings concerned will be the remaining (acquiring) shareholder and the acquired company (previously the joint venture).

II/18

37. In addition to the shareholder with sole control of the company, there may be other shareholders, for example with minority stakes, but who do not have a controlling interest in the company; these shareholders are not undertakings concerned as they do not exercise control.

6.2. Reduction in the number of shareholders not leading to passage from joint to sole control

38. Where the operation involves a reduction in the number of shareholders having joint control, without leading to the passage from joint to sole control and without any new entry or substitution of shareholders acquiring control (see Section III.6.3.), the proposed transaction will normally be presumed not to lead to a change in the quality of control, and therefore not be a notifiable concentration. This would be the case where, for example, five shareholder initially have equal stakes of 20 % each, and where after the operation, one shareholder would exit, and the remaining four shareholders would each have equal stakes of 25 %.

39. However, this situation would be different where there is a significant change in the quality of control such as where the reduction of shareholders gives the remaining shareholders additional veto rights or additional board members which create a new acquisition of control by at least one of the shareholders, either through the application of the existing or a new shareholders' agreement. In this case, the undertakings concerned will be each of the remaining shareholders which exercise joint control and the joint venture. In Avesta II (*), the fact that the number of major shareholders decreased from four to three led to one of the remaining shareholders acquiring negative veto rights (which it had not previously enjoyed) because of the provisions of the shareholders' agreement which remained in force (**). This acquisition of full veto rights was considered by the Commission to represent a change in the quality of control.

6.3. Any other changes in the composition of the shareholding

40. Finally, in the case where following changes in the shareholding, one or more shareholders acquire control, the operation will constitute a notifiable operation as there is a presumption that the operation will normally lead to a change in the quality of control.

41. Irrespective of whether the number of shareholders decreases, increases or remains the same subsequent to the operation, this acquisition of control can take any of the following forms:

— entry of new shareholder(s) (either leading to the passage from sole to joint control, or situation of joint control both before and after the operation);

— acquisition of a controlling interest by minority shareholder(s) (either leading to the passage from sole to joint control, or situation of joint control both before and after the operation);

— substitution of shareholder(s) (situation of joint control both before and after the operation).

42. The question is whether the undertakings concerned are the joint venture and the new shareholder(s) who would together acquire control of a pre-existing company, or whether all of the shareholders (existing and new) are to be considered as undertakings concerned acquiring control of a new joint venture. This question is particularly relevant when there is no express agreement between one (or several) of the existing shareholders and the new shareholder(s), who might only have had an agreement with the 'exiting' shareholder(s), i.e. the seller(s).

43. A change in the shareholding through the entry or substitution of shareholders is considered as leading to a change in the quality of control. This is because the entry of a new parent company, or the substitution of one parent company for another, is not comparable to the simple acquisition of part of a business as it implies a change in the nature and quality of control of the whole joint venture, even when, both before and after the operation, joint control is exercised by a given number of shareholders.

44. The Commission therefore considers that the undertakings concerned in cases where there are changes in the shareholding are the shareholders (both existing and new) who exercise joint control and the joint venture itself. As mentioned earlier, non-controlling shareholders are not undertakings concerned.

(*) Case IV/M.432 — Avesta II, of 9 June 1994.

(**) In this case, a shareholder party to the shareholders' agreement sold its stake of approximately 7 %. As the exiting shareholder had shared veto rights with another shareholder who remained, and as the shareholders' agreement remained unchanged, the remaining shareholder now acquired full veto rights.

II/19

45. An example of such a change in the shareholding is the Synthomer/Yule Catto case (*), in which one of two parent companies with joint control over the pre-existing joint venture was replaced by a new parent company. Both parent companies with joint control (the existing one and the new one) and the joint venture were considered as undertakings concerned.

7. 'Demergers' and the break-up of companies

46. When two undertakings merge or set up a joint venture, then subsequently de-merge or break up their joint venture, and the assets (*) are split between the 'demerging' parties differently from under the original configuration, there will normally be more than one acquisition of control (see the Annex).

47. For example, undertakings A and B merge and then subsequently demerge with a new asset configuration. There will be the acquisition by undertaking A of various assets (which may have been previously owned by itself, as well as assets previously owned by undertaking B and assets jointly acquired by the entity resulting from the merger), with similar acquisitions for undertaking B. Similarly, a break-up of a joint venture can be considered as the passage from joint control over the joint venture's entire assets to sole control over the divided assets. (see Solvay-Laporte/Interox (*).

48. A break-up of a company in this way is 'asymmetrical'. For such a demerger, the undertakings concerned (for each break-up operation) will be, on the one hand, the original parties to the merger and on the other, the assets that each original party is acquiring. For the break-up of a joint venture, the undertakings concerned (for each break-up operation) will be, on the one hand, the original parties to the joint venture, each as acquirer, and on the other, that part of the joint venture that each original party is acquiring.

(*) Case IV/M.376 — Synthomer/Yule Catto, of 22 October 1992.

(*) By 'assets', reference is made to specific assets which in themselves could constitute a business (e.g. a subsidiary, a division of a company, in some cases brands or licences, etc.) to which a market turnover can clearly be attributed.

(*) Case No IV/M.197 — Solvay-Laporte/Interox, of 30 April 1992.

8. Swaps of Assets (*)

49. In those transactions where two (or more) companies exchange assets, regardless of whether these constitute legal entities or not, each acquisition of control constitutes an independent concentration. Although it is true that both transfers of assets in a swap are usually considered by the parties to be interdependent, that they are often agreed in a single document, and that they may even take place simultaneously, the purpose of the Merger Regulation is to assess the impact of the operation resulting from the acquisition of control by each of the companies. The legal or even economic link between those operations is not sufficient for them to qualify as a single concentration.

50. Hence the undertakings concerned will for each property transfer be the acquiring companies, and the acquired companies or assets.

9. Acquisitions of control by individual persons

51. Article 3 (1) of the Merger Regulation specifically provides that a concentration shall be deemed to arise, *inter alia*, where 'one or more persons already controlling at least one undertaking' acquire control of the whole or parts of one or more undertakings. This text indicates that acquisitions of control by individuals will only bring about a lasting change in the structure of the companies concerned if those individuals carry out economic activities of their own. The Commission considers that the undertakings concerned are the target company and the individual acquirer (with the turnover of the undertaking(s) controlled by that individual being included in the calculation of turnover).

52. This was the view taken in the Commission decision in the Asko/Jacobs/Adia case (*), where Asko, a German holding company with substantial retailing assets, and Mr Jacobs, a private Swiss investor, acquired joint control of Adia, a Swiss company active mainly in personnel services. Mr Jacobs was considered to be an undertaking concerned because of the economic interests he held in the industrial chocolate, sugar confectionary and coffee sectors.

(*) See footnote 15.

(*) Case IV/M.082 — Asko/Jacobs/Adia, of 16 May 1991.

II/20

10. Management buy-outs

53. An acquisition of control of a company by its own managers is also an acquisition by individuals, and what has been said above is therefore also applicable here. However, the management of the company may pool its interests through a 'vehicle company', so that it acts with a single voice and also to facilitate decision making. Such a vehicle company may be, but is not necessarily, an undertaking concerned. The general rule on acquisitions of control by a joint venture applies here (see Section III.4.).

54. With or without a vehicle company, the management may also look for investors in order to finance the operation. Very often, the rights granted to these investors according to their shareholding may be such that control within the meaning of Article 3 of the Merger Regulation will be conferred on them and not on the management itself, which may simply enjoy minority rights. In the CWB/Goldman Sachs/Tarkett decision (*), the two companies managing the investment funds taking part in the transaction were in fact those acquiring joint control, and not the managers.

11. Acquisition of control by a State-owned company

55. In those situations where a State-owned company merges with or acquires control of another company controlled by the same State (**), the question arises as to whether these transactions really constitute concentrations within the meaning of Article 3 of the Regulation or rather internal restructuring operations of the 'public sector group of companies' (*). In this respect, recital 12 of the Merger Regulation sets forth the principle of non-discrimination between the public and the private sectors and declares that 'in the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them'.

56. A merger or acquisition of control arising between two companies owned by the same State may constitute a concentration and, if it does, both of them will qualify as undertakings concerned, since the mere fact that two companies are both owned by the same State does not necessarily mean that they belong to the same 'group'. Indeed, the decisive issue will be whether or not these companies are both part of the same industrial holding and are subject to a certain coordinated strategy. This was the approach taken in the SGS/Thomson decision (*).

(*) Case IV/M.395 — CWB/Goldman Sachs/Tarkett, of 21 February 1994

(**) By 'State', reference is made to any legal public entity, i.e. Member States but also regional or local public entities such as provinces, departments, Länder, etc.

(*) See also Commission Notice on the notion of a concentration, paragraph 8.

(*) Case IV/M.216 — CEA Industrie/France Telecom/Finmeccanica/SGS-Thomson, of 22 February 1993.

II/21

ANNEX

'DEMERGERS' AND BREAK-UP OF COMPANIES (*)

Merger scenario

Before merger

Company A		Company B

After merger

Merged company
Combined assets

After breaking up the merger

Company A:	Company B:
Divided Assets of merged company: — some (initial) assets of A — some (initial) assets of B — some (subsequent) assets of the merged company	Divided Assets of merged company: — some (initial) assets of A — some (initial) assets of B — some (subsequent) assets of the merged company

Joint venture scenario

Before JV

Company A	Assets of A for the JV		Assets of B for the JV	Company B

After JV

Company A	——	Joint venture	——	Company B
		Combined assets		

After breaking up the JV

Company A	Divided Assets of joint venture: — some (initial) assets of A — some (initial) assets of B — some (subsequent) assets of the JV	Company B	Divided Assets of joint venture: — some (initial) assets of A — some (initial) assets of B — some (subsequent) assets of the JV

(*) By 'assets', reference is made to specific assets which in themselves could constitute a business (e.g. a subsidiary, a division of a company, in certain cases brands or licences) to which a market turnover can clearly be attributed.

II/22

COMMISSION NOTICE

on calculation of turnover

under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (*)

(94/C 385/04)

(Text with EEA relevance)

1. The purpose of this notice is to expand upon the text of Articles 1 and 5 of Council Regulation (EEC) No 4064/89 (hereinafter referred to as 'the Merger Regulation') and in so doing to elucidate certain procedural and practical questions which have caused doubt or difficulty.

2. This notice is based on the experience gained by the Commission in applying the Merger Regulation to date. The principles it sets out will be followed and further developed by the Commission's practice in individual cases.

3. The Merger Regulation has a two-fold test for Commission jurisdiction. One test is that the transaction must be a concentration within the meaning of Article 3 (*). The second comprises the three turnover thresholds contained in Article 1 and which are designed to identify those transactions which have an impact upon the Community and can be deemed to be of 'Community interest'. In particular, the world-wide turnover threshold is intended to measure the overall dimension of the undertakings concerned, the Community turnover threshold seeks to determine whether they carry on a minimum level of activities in the Community and the two-thirds rule aims to exclude purely domestic transactions from Community jurisdiction. Turnover is used as a proxy for the economic resources and activity being combined in a concentration, and it is allocated geographically to reflect the geographic distribution of these resources and activity.

4. The thresholds as such are designed to establish jurisdiction and not to assess the market position of the parties to the concentration nor the impact of the operation. In so doing they include turnover derived from, and thus the resources devoted to, all areas of activity of the parties, and not just those directly involved in the concentration. Article 1 of the Merger Regulation sets out the thresholds to be used to determine a concentration of 'Community dimension' while Article 5 explains how turnover should be calculated.

5. The fact that the thresholds of Article 1 of the Merger Regulation are purely quantitative, since they are only based on turnover calculation instead of market share or other criteria, shows that their aim is to provide a simple and objective mechanism that can be easily handled by the companies involved in a merger in order to determine if their transaction is of Community dimension and therefore notifiable.

6. The decisive issue for Article 1 of the Merger Regulation is to measure the economic strength of the undertakings concerned as reflected in their respective turnover figures, regardless of the sector where such turnover was achieved and of whether those sectors will be at all affected by the transaction in question. The Merger Regulation has thereby given priority to the determination of the overall economic and financial resources that are being combined through the merger in order to decide whether the latter is of Community interest.

7. In this context, it is clear that turnover should reflect as accurately as possible the economic strength of the undertakings involved in a transaction. This is the purpose of the set of rules contained in Article 5 of the Merger Regulation which are designed to ensure that the resulting figures are a true representation of economic reality.

8. The Commission's interpretation of Articles 1 and 5 with respect to calculation of turnover is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities.

I. 'ACCOUNTING' CALCULATION OF TURNOVER

1. Turnover as a reflection of activity

1.1. *The concept of turnover*

9. The concept of turnover as used in Article 5 of the Merger Regulation refers explicitly to 'the amounts

(*) OJ No L 395, 30. 12. 1989, p. 1, corrected version OJ No L 257, 21. 9. 1990.

(*) The concept of concentration is defined in the Notice on 'the notion of concentration'.

II/23

derived from the sale of products and the provision of services'. Sale, as a reflection of the undertaking's activity, is thus the essential criterion for calculating turnover, whether for products or the provision of services. 'Amounts derived from sale' generally appear in company accounts under the heading 'sales'.

10. In the case of products, turnover can be determined without difficulty, namely by identifying each commercial act involving a transfer of ownership.

11. In the case of services, the factors to be taken into account in calculating turnover are much more complex, since the commercial act involves a transfer of 'value'.

12. Generally speaking, the method of calculating turnover in the case of services does not differ from that used in the case of products: the Commission takes into consideration the total amount of sales. Where the service provided is sold directly by the provider to the customer, the turnover of the undertaking concerned consists of the total amount of sales for the provision of services in the last financial year.

13. Because of the complexity of the service sector, this general principle may have to be adapted to the specific conditions of the service provided. Thus, in certain sectors of activity (such as tourism and advertising), the service may be sold through the intermediary of other suppliers. Because of the diversity of such sectors, many different situations may arise. For example, the turnover of a service undertaking which acts as an intermediary may consist solely of the amount of commissions which it receives.

14. Similarly, in a number of areas such as credit, financial services and insurance, technical problems in calculating turnover arise which will be dealt with in section III.

1.2. *Ordinary activities*

15. Article 5 (1) states that the amounts to be included in the calculation of turnover must correspond to the 'ordinary activities' of the undertakings concerned.

16. With regard to aid granted to undertakings by public bodies, any aid relating to one of the ordinary activities of an undertaking concerned is liable to be included in the calculation of turnover if the undertaking is itself the recipient of the aid and if the aid is directly linked to the sale of products and the provision of services by the undertaking and is therefore reflected in the price (*). For example, aid towards the consumption of a product allows the manufacturer to sell at a higher price than that actually paid by consumers.

17. With regard to services, the Commission looks at the undertaking's ordinary activities involved in establishing the resources required for providing the service. In its Decision in the Accor/Wagons-Lits case (*), the Commission decided to take into account the item 'other operating proceeds' included in Wagons-Lits' profit and loss account. The Commission considered that the components of this item which included certain income from its car-hire activities were derived from the sale of products and the provision of services by Wagons-Lits and were part of its ordinary activities.

2. 'Net' turnover

18. The turnover to be taken into account is 'net' turnover, after deduction of a number of components specified in the Regulation. The Commission's aim is to adjust turnover in such a way as to enable it to decide on the real economic weight of the undertaking.

1.2.1. *The deduction of rebates and taxes*

19. Article 5 (1) provides for the 'deduction of sales rebates and of value added tax and other taxes directly related to turnover'. The deductions thus relate to business components (sales rebates) and tax components (value added tax and other taxes directly related to turnover).

20. 'Sales rebates' should be taken to mean all rebates or discounts which are granted by the undertakings during their business negotiations with their customers and which have a direct influence on the amounts of sales.

21. As regards the deduction of taxes, the Merger Regulation refers to VAT and 'other taxes directly related to turnover'. As far as VAT is concerned, its

(*) See Case IV/M.156 — Cereol/Continentale Italiana of 27 November 1991. In this case, the Commission excluded Community aid from the calculation of turnover because the aid was not intended to support the sale of products manufactured by one of the undertakings involved in the merger, but the producers of the raw materials (grain) used by the undertaking, which specialized in the crushing of grain.

(*) Case IV/M.126 — Accor/Wagons-Lits, of 28 April 1992.

II/24

deduction does not in general pose any problem. The concept of 'taxes directly related to turnover' is a clear reference to indirect taxation since it is directly linked to turnover, such as, for example, taxes on alcoholic beverages.

2.2. The deduction of 'internal' turnover

22. The first subparagraph of Article 5 (1) states that 'the aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4', i. e. those which have links with the undertaking concerned (essentially parent companies or subsidiaries).

23. The aim is to exclude the proceeds of business dealings within a group so as to take account of the real economic weight of each entity. Thus, the 'amounts' taken into account by the Merger Regulation reflect only the transactions which take place between the group of undertakings on the one hand and third parties on the other.

3. Adjustment of turnover calculation rules for the different types of operations

3.1. The general rule

24. According to Article 5 (1) of the Merger Regulation 'aggregate turnover within the meaning of Article 1 (2) shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services ...'. The basic principle is thus that for each undertaking concerned the turnover to be taken into account is the turnover of the closest financial year to the date of the transaction.

25. This provision shows that since there are usually no audited accounts of the year ending the day before the transaction, the closest representation of a whole year of activity of the company in question is the one given by the turnover figures of the most recent financial year.

26. The Commission seeks to base itself upon the most accurate and reliable figures available. As a general rule therefore, the Commission will refer to audited or other definitive accounts. However, in cases where major differences between the Community's accounting standards and those of a non-member country are observed, the Commission may consider it necessary to restate these accounts in accordance with Community standards in respect of turnover. The Commission is, in any case, reluctant to rely on provisional, management or any other form of provisional accounts in any but exceptional circumstances (see the next paragraph). Where a concentration takes place within the first months of the year and audited accounts are not yet available for the most recent financial year, the figures to be taken into account are those relating to the previous year. Where there is a major divergence between the two sets of accounts, and in particular, when the final draft figures for the most recent years are available, the Commission may decide to take those draft figures into account.

27. Notwithstanding paragraph 26, an adjustment must always be made to account for acquisitions or divestments subsequent to the date of the audited accounts. This is necessary if the true resources being concentrated are to be identified. Thus if a company disposes of a subsidiary or closes a factory at any time before the signature of the final agreement or the announcement of the public bid or the acquisition of a controlling interest bringing about a concentration, or where such a divestment or closure is a pre-condition for the operation (*) the turnover generated by that subsidiary or factory must be subtracted from the turnover of the notifying party as shown in its last audited accounts. Conversely, the turnover generated by assets of which control has been acquired subsequent to the preparation of the most recent audited accounts must be added to a company's turnover for notification purposes.

28. Other factors that may affect turnover on a temporary basis such as a decrease of the orders of the product or a slow-down of the production process within the period prior to the transaction will be ignored for the purposes of calculating turnover. No adjustment to the definitive accounts will be made to incorporate them.

29. Regarding the geographical allocation of turnover, since audited accounts often do not provide a geographical breakdown of the sort required by the Merger Regulation, the Commission will rely on the best figures available provided by the companies in accordance with the rule laid down in Article 5 (1) of the Merger Regulation (see Section II.1).

3.2. Acquisitions of parts of companies

30. Article 5 (2) of the Merger Regulation provides that 'where the concentration consists in the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings only the turnover relating to the parts which are the subject of the transaction shall be taken into account with regard to the seller or sellers'.

(*) See Judgment of 24 March 1994 of the Court of First Instance in Case T-3/93 — *Air France* v. *Commission* (not yet published).

31. This provision states that when the acquiror does not purchase an entire group, but only one or part of its businesses, whether or not constituted as a subsidiary, only the turnover of the part effectively acquired should be included in the turnover calculation. In fact, although in legal terms the seller as a whole (with all its subsidiaries) is an essential party to the transaction, since the sale-purchase agreement cannot be concluded without him, he plays no role once the agreement has been implemented. The possible impact of the transaction in the marketplace will exclusively depend on the combination of the economic and financial resources that are the subject of a property transfer with those of the acquiror and not on the part of the seller who remains independent.

3.3. *Staggered operations*

32. Sometimes certain successive transactions are only individual steps within a wider strategy between the same parties. Considering each transaction alone, even if only for determining jurisdiction, would imply ignoring economic reality. At the same time, whereas some of these staggered operations may be designed in this fashion because they will better meet the needs of the parties, it is not excluded than others could be structured like this in order to circumvent the application of the Merger Regulation.

33. The Merger Regulation has foreseen these scenarios in Article 5 (2), second subparagraph, which provides that 'two or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction'.

34. In practical terms, this provision means that if company A buys a subsidiary of company B that represents 50 % of the overall activity of B and one year later it acquires the other subsidiary (the remaining 50 % of B), both transactions will be taken as one. Assuming that each of the subsidiaries only attained a turnover in the Community of ECU 200 million, the first transaction would not be notifiable. However, since the second takes place within the two-year-period, both have to be notified as a single transaction when the second occurs.

35. The importance of the provision is that previous transactions (within two years) become notifiable with the most recent transactions once the thresholds are cumulatively met.

3.4. *Turnover of groups*

36. When an undertaking concerned in a concentration within the meaning of Article 1 of the Merger Regulation (*) belongs to a group, the turnover of the group as a whole is to be taken into account in order to determine whether the thresholds are met. The aim is again to capture the total volume of the economic resources that are being combined through the operation.

37. The Merger Regulation does not define the concept of group in abstract terms but focuses on whether the companies have the right to manage the undertaking's affairs as the yardstick to determine which of the companies that have some direct or indirect links with an undertaking concerned should be regarded as part of its group.

38. Article 5 (4) of the Merger Regulation provides the following:

'Without prejudice to paragraph 2 (acquisitions of parts) the aggregate turnover of an undertaking concerned within the meaning of Article 1 (2) shall be calculated by adding together the respective turnovers of the following:

(a) the undertaking concerned;

(b) those undertakings in which the undertaking concerned directly or indirectly:

— owns more than half the capital or business assets, or

— has the power to exercise more than half the voting rights, or

— has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or

— has the right to manage the undertakings' affairs;

(c) those undertakings which have in the undertaking concerned the rights or powers listed in (b);

(d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);

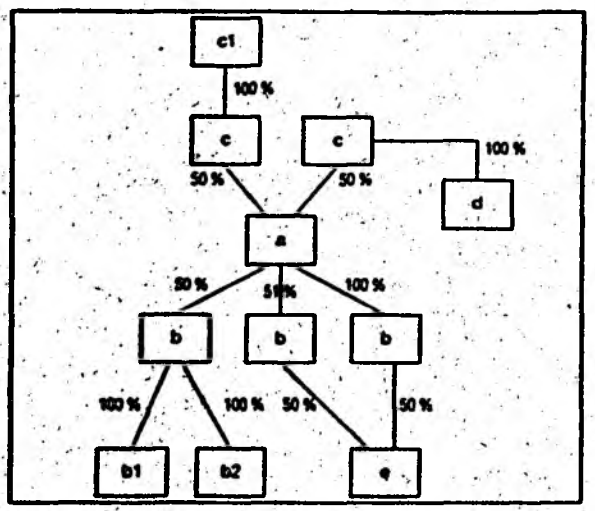
(e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b).'

(*) See Commission Notice on the notion of undertakings concerned.

II/26

This means that the turnover of the company directly involved in the transaction (subparagraph (a)) should include its subsidiaries (b), its parent companies (c), the other subsidiaries of its parent companies (d) and any other undertaking jointly controlled by two or more of the companies belonging to the group (e). A graphic example is as follows:

The undertaking concerned and its group:



a: The undertaking concerned

b: Its subsidiaries and their own subsidiaries (b1 and b2)

c: Its parent companies and their own parent companies (c1)

d: Other subsidiaries of the parent companies of the undertaking concerned

e: Companies jointly controlled by two (or more) companies of the group

Note: These letters correspond to the relevant subparagraphs of Article 5 (4).

Several remarks can be made from this chart:

(1) As long as the test of control of subparagraph (b) is fulfilled, the whole turnover of the subsidiary in question will be taken into account regardless of the actual shareholding of the controlling company. In the example, the whole turnover of the three subsidiaries (called b) of the undertaking concerned (a) will be included.

(2) When any of the companies identified as belonging to the group also control others, these should also be incorporated to in the calculation. In the example, one of the subsidiaries of a (called b) has in turn its own subsidiaries b1 and b2.

(3) When two or more companies jointly control the undertaking concerned (a) in the sense that the agreement of each and all of them is needed in order to manage the undertakings affairs, the turnover of all of them should be included (*). In the example, the two parent companies (c) of the undertaking concerned (a) would be taken into account as well as their own parent companies (c1 in the example). Although the Merger Regulation does not explicitly mention this rule for those cases where the undertaking concerned is in fact a joint venture, it is inferred from the text of subparagraph (c), which uses the plural when referring to the parent companies. This interpretation has been consistently applied by the Commission.

(4) Any intra-group sale should be subtracted from the turnover of the group (see paragraph 22).

39. The Merger Regulation also deals with the specific scenario that arises when two or more undertakings concerned in a transaction exercise joint control of another company. Pursuant to point (a) of Article 5 (5), the turnover resulting from the sale of products or the provision of services between the joint venture and each of the undertakings concerned or any other company connected with any one of them should be excluded. The purpose of such a rule is to avoid double counting. With regard to the turnover of the joint venture generated from activities with third parties, point (b) of Article 5 (5) provides that it shall be apportioned equally amongst the undertakings concerned, to reflect the joint control (*).

40. Following the principle of point (b) of Article 5 (5) by analogy, in the case of joint ventures between undertakings concerned and third parties, the Commission's practice has so far been to allocate to each of the undertakings concerned the turnover shared equally by all the controlling companies in the

(*) See Commission Notice on the notion of undertakings concerned for acquisitions of control by a joint venture (paragraphs 26 to 29).

(*) For example, company A and company B set up a joint venture C. These two parent companies exercise at the same time joint control of company D, although A has 60 % and B 40 % of the capital. When calculating the turnover of A and B at the time they set up the new joint venture C, the turnover of D with third parties is attributed in equal parts to A and B.

joint venture. In all these cases however, joint control has to be demonstrated.

41. It should be noted that Article 5 (4) refers only to the groups that already exist at the time of the transaction, i.e. the group of each of the undertakings concerned in an operation, and not to the new structures created as a result of the concentration. For example, if companies A and B, together with their repective subsidiaries, are going to merge, it is A and B and not the new entity that qualify as undertakings concerned, which implies that the turnover of each of the two groups should be calculated independently.

42. Since the aim of this provision is simply to identify the companies belonging to the existing groups for the purposes of turnover calculation, the test of having the right to manage the undertaking's affairs in Article 5 (4) is somewhat different to the test of control set out in Article 3 (3), which refers to the acquisition of control carried out by means of the transaction subject to examination. Whereas the former is simpler and easier to prove on the basis of factual evidence, the latter is more demanding because in the absence of an acquisition of control no concentration arises.

3.5 *Turnover of State-owned companies*

43. While Article 5 (4) sets out the method to determine the economic grouping to which an undertaking concerned belongs for the purpose of calculating turnover, the Article's provisions should be read in conjunction with recital 12 of the Regulation in respect of State-owned enterprises. This recital states that in order to avoid discrimination between the public and private sector, account should be taken 'of undertakings making up an economic unit with an independent power of decision irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them'. Thus the mere fact that two companies are both State-owned should not automatically lead to the conclusion that they are part of a group for Article 5 purposes. Rather it should be considered whether there are grounds to consider that both companies constitute an independent economic unit.

44. Thus where a State-owned company is not part of an overall industrial holding company and is not subject to any coordination with other State-controlled holdings, it should be treated as an independent group for the purposes of Article 5, and the turnover of other companies owned by that State should not be taken into account. Where, however, a Member State's interests are grouped together in holding companies, are managed together, or where for other reasons it is clear that State-owned companies form part of an 'economic unit with an independent power of decision', then the turnover of those businesses should be considered part of the undertaking concerned's group for the purposes of Article 5.

II. GEOGRAPHICAL ALLOCATION OF TURNOVER

1. General rule

45. The second and third thresholds set by Article 1 select cases which have sufficient Community turnover to be of Community interest and which are primarily cross-border in nature. They both require turnover to be allocated geographically to achieve this. The second subparagraph of Article 5 (1) provides that the location of turnover is determined by the location of the customer at the time of the transaction.

'Turnover, in the Community or in a Member State, shall comprise products sold and services provided to undertakings or consumers, in the Community or in that Member State as the case may be.'

46. The reference to 'products sold' and 'services provided' is not intended to discriminate between goods and services by focusing on where the sale takes place in the case of goods but the place where a service is provided (which might be different from where the service was sold) in the case of services. In both cases turnover should be attributed to the place where the customer is located because that is, in most cirumstances, where a deal was made, where the turnover for the supplier in question was generated and where competition with alternative suppliers took place (*). The second subparagraph of Article 5 (1) does not focus on where a good or service is enjoyed or the benefit of the good or service derived. In the case of a mobile good, a motor car may well be driven across Europe by its purchaser but it was purchased at only one place — Paris, Berlin or Madrid say. This is also true in the case of those services where it is possible to separate the purchase of a service from its delivery. Thus in the case of package holidays, competition for the sale of holidays through travel agents takes place locally, as with retail shopping, even though the service may be provided in a number of distant locations. This turnover is, however, earned locally and not at the site of an eventual holiday.

47 This applies even where a multinational corporation has a Community buying strategy and

(*) Where the place where the customer was located when purchasing the goods or service and the place where the billing was subsequently made are different, turnover should be allocated to the former.

sources all its requirements for a good or service from one location. The fact that the components are subsequently used in 10 different plants in a variety of Member States does not alter the fact that the transaction with a company outside the group occurred in only one country. The subsequent distribution to other sites is purely an internal question for the company concerned.

48. Certain sectors do, however, pose very particular problems with regard to the geographical allocation of turnover (see Section III).

2. Conversion of turnover into ecus

49. When converting turnover figures into ecus great care should be taken with the exchange rate used. The annual turnover of a company should be converted at the average rate for the 12 months concerned. This average can be obtained from the Commission. The audited annual turnover figures should not be broken down into component quarterly, monthly, or weekly sales figures and converted individually at the corresponding average quarterly, monthly or weekly rates and then the ecus figures summed to give a total for the year.

50. When a company has sales in a range of currencies, the procedure is no different. The total turnover given in the consolidated audited accounts and in that company's reporting currency is converted into ecus at the average rate for the 12 months. Local currency sales should not be converted directly into ecus since these figures are not from the consolidated audited accounts of the company.

III. CREDIT AND OTHER FINANCIAL INSTITUTIONS AND INSURANCE UNDERTAKINGS

1. Definitions

51. The specific nature of banking and insurance activities is formally recognized by the Merger Regulation which includes specific provisions dealing with the calculation of turnover for these sectors (*). Although the Merger Regulation does not provide a definition of the terms, 'credit institutions and other financial institutions' within the meaning of point (a) of Article 5 (3), the Commission in its practice has consistently adopted the definitions provided in the first and second banking directives:

— '*Credit institution* means an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account' (**).

— '*Financial institution* shall mean an undertaking other than a credit institution, the principal activity of which is to acquire holdings or to carry one or more of the activities listed in points 2 to 12 in the Annex' (***).

52. From the definition of 'financial institution' given above it is clear that on the one hand holding companies shall be considered as financial institutions and, on the other hand, that undertakings which perform on a regular basis as a principal activity one or more activities expressly mentioned in points 2 to 12 of the abovementioned Annex shall also be considered as financial institutions within the meaning of point (a) of Article 5 (3) of the Merger Regulation. These activities include:

— lending (*inter alia*, consumer credit, mortgage credit, factoring, . . .),

— financial leasing,

— money transmission services,

— issuing and managing instruments of payment (credit cards, travellers' cheques and bankers' drafts),

— guarantees and commitments,

— trading on own account or on account of customers in money market instruments, foreign exchange, financial futures and options, exchange and interest rate instruments, and transferable securities,

— participation in share issues and the provision of services related to such issues,

— advice to undertakings on capital structure, industrial strategy and related questions and advice and services relating to mergers and the purchase of undertakings,

(*) See Article 5 (3) of the Merger Regulation.

(**) First Council Directive (77/780/EEC) of 12 December 1977 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions, Article 1 (OJ No L 322, 17. 12. 1977, p. 30).

(***) Second Council Directive (89/646/EEC) of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions, Article 1 (6) (OJ No L 386, 30. 12. 1989, p. 1).

— money broking,

— portfolio management and advice,

— safekeeping and administration of securities.

2. Calculation of turnover

53. The methods of calculation of turnover for credit and other financial institutions and for insurance undertakings are described in Article 5 (3) of the Merger Regulation and examples are provided in guidance notes one and two respectively, annexed to Form CO. These provisions remain in force. The purpose of this section is to provide an answer to supplementary questions related to turnover calculation for the abovementioned types of undertaking which were raised during the first years of the application of the Merger Regulation.

2.1. *Credit and financial institutions (other than financial holding companies)*

2.1.1. General

54. There are normally no particular difficulties in applying the rule of one-tenth of total assets for the definition of the world-wide turnover to credit institutions and other kinds of financial institutions. However, difficulties may arise with regard to the calculation of Community-wide turnover and the determination of the turnover within Member States for the purpose of application of the two-thirds rule.

55. Difficulties also arise with some financial institutions which do not provide loans and advances *'stricto sensu'*, or when the credit granted, if any exists, is not a relevant indicator of the economic activity and weight of the undertakings concerned. This is the case, for example, with asset management companies, merchant banks, credit card companies, tradings in foreign exchange, money market instruments, financial futures and options, as the companies in question are mainly firms providing financial services rather than granting credit to business or individuals. In such cases, the determination of Community-wide turnover using the criteria established by the Merger Regulation cannot be applied meaningfully.

56. Therefore, with regard to the calculation of Community-wide turnover and turnover within a Member State, the concept of 'loans and advances' should be interpreted broadly in order to include any kind of activity which could be assimilated to some form of credit activity. For example, the fact that a financial institution has a portfolio of bonds and other interest-bearing securities has been assimilated for the purpose of the application of the Merger Regulation to a means of granting credit and therefore the securities held have been considered as loans and advances (13).

2.1.2. Turnover of leasing companies

57. There is a fundamental distinction to be made, for the purpose of application of point (a) of Article 5 (3) of the Merger Regulation, between financial leases and operating leases. Basically, financial leases are made for longer periods than operating leases and ownership is generally transferred to the lessee at the end of the lease term by means of a bargain purchase option included in the lease contract. Under an operating lease, on the contrary, ownership is not transferred to the lessee at the end of the lease term and the cost of maintenance, repair and insurance of the leased equipment are included in the lease payments. A financial lease therefore functions as a loan by the lessor to enable the lessee to purchase a given asset. A financial leasing company is thus a financial institution within the meaning of point (a) of Article 5 (3) and its turnover has to be calculated by applying the specific rules related to the calculation of turnover for credit and other financial institutions. Given that operational leasing activities do not have this lending function, they are not considered as carried out by financial institutions, at least as primary activities, and therefore the general turnover calculation rules of Article 5 (1) should apply (14).

2.1.3. Turnover of fund management companies

58. In the case of a fund management company, the relevant assets to be taken into account in the calculation of turnover by the one-tenth of assets rule are only those belonging to the fund management company itself and not the assets being managed on behalf of clients. The assets being managed do not belong to the fund management company; they are held on a fiduciary basis and therefore either they are booked in 'off balance sheet' accounts (not included in the total assets figure of the fund management company) or they have to be booked in financial statements completely independent of the accounts of the fund management company. However, commission generated by asset management should be counted, as such, as turnover of a fund management company. Hence the turnover of a fund management company, which manages both its own

(13) See Case IV/M.166 — Torras/Sarrió, of 24 February 1992.

(14) See Case IV/M.234 — GECC/Avis Lease, 15 July 1992.

II/30

assets and assets belonging to clients, will be calculated as follows:

Own assets × $^1/_{10}$	=	x
Commission or fees generated by management of clients' assets	=	y
Total turnover	=	x + y

2.2. *Insurance undertakings*

2.2.1. Gross premiums written

59. The application of the concept of gross premiums written as a measure of turnover for insurance undertakings has raised supplementary questions notwithstanding the definition provided in point (b) of Article 5 (3) of the Merger Regulation. The following clarifications are appropriate:

— 'gross' premiums written is the sum of received premiums (which may include received reinsurance premiums if the undertaking concerned has activities in the field of reinsurance). Outgoing or outward reinsurance premiums, i.e. all amounts paid and payable by the undertaking concerned to get reinsurance cover, are already included in the gross premiums written within the meaning of the Merger Regulation,

— wherever the word 'premiums' is used (gross *premiums*, net (earned) *premiums*, outgoing reinsurance *premiums* etc.) these premiums are related not only to new insurance contracts made during the accounting year being considered but also to all premiums related to contracts made in previous years which remain in force during the period taken into consideration.

2.2.2. Investments of insurance undertakings

60. In order to constitute appropriate reserves allowing for the reimbursement of claims, insurance undertakings, which are also considered as institutional investors, usually hold a huge portfolio of investments in shares, interest-bearing securities, land and property and other assets which provide an annual revenue which is not considered as turnover for insurance undertakings

61. However, with regard to the application of the Merger Regulation, a major distinction should be made between pure financial investments, in which the insurance undertaking is not involved in the management of the undertakings where the investments have been made, and those investments leading to the acquisition of a controlling interest in a given undertaking thus allowing the insurance undertaking to exert a decisive influence on the business conduct of the subsidiary or affiliated company concerned. In such cases Article 5 (4) of the Merger Regulation would apply, and the turnover of the subsidiary or affiliated company should be added to the turnover of the insurance undertaking for the determination of the thresholds laid down in the Merger Regulation (14).

2.3. *Financial holding companies*

62. A financial holding company is a financial institution and therefore the calculation of its turnover should follow the criteria established in point (a) of Article 5 (3) for the calculation of turnover for credit and other financial institutions. However, as the main purpose of a financial holding is to acquire and manage participation in other undertakings, Article 5 (4) also applies, (as for insurance undertakings), with regard to those participations allowing the financial holding company to exercise a decisive influence on the business conduct of the undertakings in question. In such cases, the turnover figures of those undertakings obtained directly from the audited financial statements, or requiring special calculations (for example, turnover of banking and insurance undertakings) are simply added together in order to obtain the relevant turnover which will be used to determine whether the case falls under the Merger Regulation.

63. In these cases different accounting rules, in particular those related to the preparation of consolidated accounts, which are to some extent harmonized but not identical within the Community, may need to be taken into consideration. This applies to any type of undertaking concerned by the Merger Regulation but it is particularly important in the case of financial holding companies (15) where the number and the diversity of enterprises controlled and the degree of control the holding holds on its subsidiaries, affiliated and participated companies requires careful examination.

64. This method of calculation, of which an example is given in the following paragraphs, may in practice prove onerous. Therefore a strict and detailed application of this method will be necessary only in cases where it seems that the turnover of a financial holding company is likely to be close to the Merger Regulation thresholds; in other cases it may well be obvious that the turnover is far from the thresholds of the Merger Regulation, and therefore the published accounts are adequate for the establishment of jurisdiction.

(14) See Case IV/M.018 — AG/AMEV, of 21 November 1990.

(15) See for example Case IV/M.166 — Torras/Sarrió, of 24 February 1992, Case IV/M.213 — Hong Kong and Shanghai Bank/Midland, of 21 May 1992, IV/M.192 — Banesto/Totta, of 14 April 1992.

II/31

Example of the calculation of turnover of financial holding companies

(a) Initially, it is necessary to consider the non-consolidated balance sheet of the financial holding company instead of the group consolidated accounts. Although this type of undertaking may have assets such as cash, plant property and equipment, the major part of the assets of a financial holding company are normally constituted by investments in shares, bonds and other interest bearing securities.

At the end of the most recent financial year the non-consolidated balance sheet of a financial holding company may be presented as follows, according to published financial statements:

(ECU million)

Assets		Liabilities	
Marketable Securities	2 000 (*)	Debt	1 500
Participations	2 000 (*)	Equity	2 500
Total Assets	4 000	Total Liabilities	4 000

(*) Marketable Securities are constituted by bonds and other interest bearing securities and shares held as pure financial investments in undertakings on which the holding company does not exercise any kind of influence.

(*) Participations represent investment in shares on a long-term basis in companies on which the holding company exerts some kind of influence.

(b) As the assets as presented do not provide the necessary information for the calculation of turnover under the Merger Regulation, a different breakdown of assets is required:

(ECU million)

(i) Bonds and other interest bearing securities		1 500
(ii) Shares in undertakings not controlled by the financial holding (*)		1 500
		3 000
(iii) Shareholding in undertakings controlled:		
of which insurance undertakings	500	
industrial undertakings	500	
	1 000	
Total Assets		4 000

(*) "Controlled" in the sense of Article 5 (4) (b) of the Merger Regulation.

The following additional details are required:

Total value of gross premiums written by insurance undertakings controlled (excluding intra-group contracts and after deduction of taxes)	ECU 300 Million
Total turnover of industrial undertakings controlled (not including intra-group sales and excluding VAT)	ECU 2 000 Million

(c) To calculate the aggregate world-wide turnover of the financial holding company account should be taken separately of the turnover of the different activities of the group (industrial, financial and insurance) and then the amounts should be added in order to get the final amount. Turnover for insurance and industrial activities are already given (ECU 300 million and 2 000 million respectively). Assets which are not related to shareholding in undertakings controlled amount to ECU 3 000 million (see (i) and (ii) above). Therefore total world-wide turnover is as follows:

	ECU Million
— Turnover related to financial activities $^1/_{10} \times 3\,000$	= 300
— Turnover related to insurance activities = gross premiums written	= 300
— Turnover of industrial activities	2 000
Total worldwide turnover Group ABC	2 600

Community-wide turnover and turnover in Member States calculations should follow the same principle. For Community-wide and Member States turnover calculations related to financial activities, bonds and other interest-bearing securities should be considered as loans and advances.

3. Geographical allocation of turnover of banking and insurance undertakings

65. The geographical turnover of banking and insurance undertakings is in principle allocated according to the place of residence of the beneficiaries of loans and

II/32

advances for credit and other financial institutions, and of customers who pay insurance premiums in the case of insurance undertakings as stated in Article 5 (3) of the Merger Regulation.

66. A particular problem which arises with financial institutions is how to allocate loans, and in particular the frequently large volumes of overnight interbank loans when the client is not a subsidiary as such, but a branch or division of a company or bank incorporated in a different country. Since the branch or division to which the loan is made is most likely to be the place where the loan will be used, it is only rational to allocate geographically that loan to the branch or division rather than the place of incorporation of the debtor company or bank, even if this is what the banks themselves take into account for risk assessment purposes (*).

(*) See Case IV/M.213 — Hong Kong and Shanghai Bank/Midland, of 21 May 1992.

67. The current practice of the Commission is to consider, for banking and insurance undertakings, that branches, divisions and other undertakings operating on a lasting basis but not having a legal personality should be considered as residents in the countries in which they have been established.

4. Ecu exchange rate applicable to credit and financial institutions

68. The question of the appropriateness of average annual exchange rates for financial institutions arises, since for such institutions turnover calculations are based on data derived from the balance sheet, which represents a financial situation at a particular date, rather than the profit and loss account which represents financial flows through time. However, in order to avoid using a separate method for this particular sector, the balance sheet asset values should be converted at the average rate for the 12 months preceding the balance sheet date, in conformity with the general rule.

UNIFORM APPLICATION OF THE COMBINED NOMENCLATURE (CN)

(Classification of goods)

(94/C 385/05)

Publication of explanatory notes made in accordance with Article 10 (1) of Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (1) as last amended by Regulation (EEC) No 2551/93 (2)

The 'Explanatory Notes to the combined nomenclature of the European Communities' (3) are amended as follows:

Page 218:

4805 60 10 Strawpaper and strawboard

Strawpaper and strawboard are sized papers and boards made mainly of unbleached straw pulp, generally weighing more than 100 g/m², naturally yellowish in colour or dyed throughout the mass. They are used as packing paper of board or — less often — for corrugated paper or board.

4805 60 90 Other

The text of the subheading is to be deleted.

(1) OJ No L 256, 7. 9. 1987, p. 1.
(2) OJ No L 241, 27. 9. 1993.
(3) OJ No C 342, 5. 12. 1994.

II/33

Communication pursuant to Article 5 of Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 85 (3) of the Treaty to categories of agreements and concerted practices

(94/C 178/03)

(Text with EEA relevance)

The Commission invites all interested parties to send their comments on the attached draft Commission Regulation (EC) on the application of Article 85 (3) of the Treaty to certain categories of technology transfer agreements by no later than 28 August 1994 to the following address:

Commission of the European Communities,
Directorate-General for Competition,
Directorate for General Competition Policy and Coordination,
150 Avenue de Cortenberg,
B-1049 Brussels.

Preliminary draft Commission Regulation (EC) of 30 September 1994 on the application of Article 85 (3) of the Treaty to certain categories of technology transfer agreements

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices (1), as last amended by the Act of Accession of Spain and Portugal, and in particular Article 1 thereof,

Having published a draft of this Regulation,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

1. Regulation No 19/65/EEC empowers the Commission to apply Article 85 (3) of the Treaty by Regulation to certain categories of agreements and concerted practices falling within the scope of Article 85 (1) which include restrictions imposed in relation to the acquisition or use of industrial property rights — in particular of patents, utility models, designs or trade marks — or to the rights arising out of contracts for assignment of, or the right to use, a method of manufacture or knowledge relating to the use or to the application of industrial processes.

2. The Commission has made use of this power by adopting Regulation (EEC) No 2349/84 of 23 July 1984 on the application of Article 85 (3) of the Treaty to certain categories of patent licensing agreements (2), as amended by the Act of Accession of Spain and Portugal, and Regulation (EEC) No 556/89 of 30 November 1988 on the application of Article 85 (3) of the Treaty to certain categories of know-how licensing agreements (3), both amended by Commission Regulation (EEC) No 151/93 of 23 December 1992 (4).

3. These two block exemptions ought to be combined into a single Regulation covering technology transfer agreements, and the rules governing patent licensing agreements and agreements for the communication of know-how to be harmonized and simplified as far as possible, in order to encourage the dissemination of technical knowledge in the Community and to promote the manufacture of technically more sophisticated goods.

---

(1) OJ No 36, 6. 3. 1965, p. 533/65.

(2) OJ No L 219, 16. 8. 1984, p. 15.
Corrigendum: OJ No L 280, 22. 10. 1985, p. 32.

(3) OJ No L 61, 4. 3. 1989, p. 1.

(4) OJ No L 21, 29. 1. 1993, p. 8.

The new Regulation should apply to the licensing of Member States' own patents, Community patents (1), and European patents (2) ('pure' patent licensing agreements). It should also apply to agreements for the communication of non-patented technical information such as descriptions of manufacturing processes, recipes, formulae, designs or drawings, commonly termed 'know-how' ('pure' know-how licensing agreements), and to combined patent and know-how licensing agreements, which are playing an increasingly important role in the transfer of technology ('mixed' agreements).

A number of terms are defined in Article 10.

4. Patent licensing agreements and agreements for the communication of know-how are agreements whereby one undertaking which holds a patent or know-how ('the licensor') permits another undertaking ('the licensee' to exploit the patent thereby licensed, or communicates the know-how to it, in particular for purposes of manufacture, use or putting on the market.

In the light of experience acquired so far, it is possible to define a category of licensing agreements covering all or part of the common market which are capable of falling within the scope of Article 85 (1) but which can normally be regarded as satisfying the conditions laid down in Article 85 (3), where patents are (essential) for the achievement of the objects of the licensed technology or where know-how — whether it is ancillary to patents or independent of them — is secret, substantial and identified in any appropriate form. These definitions are intended only to ensure that the communication of the know-how or the grant of the patent licence justifies a block exemption of obligations restricting the exploitation of the technology in Community Member States by the licensor or licensee, which obligations must be wholly or partly related to the exploitation of the licensed know-how or to patents registered in Member States, and must satisfy the other tests laid down in the Regulation.

5. It is appropriate to extend the scope of this Regulation to pure or mixed agreements containing ancillary provisions relating to intellectual property rights other than patents (in particular, trade marks, copyright and design rights).

However, such agreements, too, can only be regarded as fulfilling the conditions of Article 85 (3) for the purposes of this Regulation where patents are (essential) for the achievement of the objects of the licensed technology or the know-how is secret, substantial and identified.

6. Where such pure or mixed licensing agreements contain not only obligations relating to territories within the common market but also obligations relating to non-member countries, the presence of the latter does not prevent the present Regulation from applying to the obligations relating to territories within the common market.

However, where licensing agreements for non-member countries or for territories which extend beyond the frontiers of the Community have effects within the common market which may fall within the scope of Article 85 (1), such agreements should be covered by the Regulation to the same extent as would agreements for territories within the common market.

To the extent that licensing agreements to which undertakings in only one Member State are party are capable of affecting trade between Member States, it is appropriate to include them in the exempted category.

7. The objective being to facilitate the dissemination of technology and the improvement of manufacturing processes, the Regulation should apply only where the licensee himself manufactures the licensed products or has them manufactured for his account. The scope of the Regulation should therefore exclude agreements solely for the purpose of sale, which are governed by Commission Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive distribution agreements (3), except where the licensor undertakes for a preliminary period before the licensee himself commences production using the licensed technology to supply the licensed products for sale by the licensee. Also excluded from the scope of the regulation are agreements relating to marketing know-how communicated in the context of franchising arrangements and licensing agreements entered into in connection with arrangements such as joint ventures or patent pools and other arrangements in which a licence is granted in exchange for other licenses not related to improvements to or new applications of the licensed technology; such agreements pose different problems which cannot at present be dealt with in one Regulation (Article 5).

(1) Convention for the European patent for the common market (Community Patent Convention) of 15 December 1975, OJ No L 17, 26. 1. 1976, p. 1.

(2) Convention on the grant of European patents (European Patent Convention) of 5 October 1973.

(3) OJ No L 173, 30. 6. 1983, p. 1.

II/36

8. Given the similarity between sale and exclusive licensing, and the danger that the requirements of the Regulation might be evaded by presenting as assignments what are in fact exclusive licences restrictive of competition, the Regulation should apply to agreements concerning the assignment and acquisition of patents or know-how where the risk associated with exploitation remains with the assignor. It should also apply to licensing agreements in which the licensor is not the holder of the patent or know-how but is authorized by the holder to grant the licence (as in the case of sub-licences) and licensing agreements in which the parties' rights or obligations are assumed by connected undertakings (Article 6).

9. Exclusive licensing agreements, i.e. agreements in which the licensor undertakes not to exploit the licensed technology in the licensed territory himself or to grant further licenses there, may not be in themselves incompatible with Article 85 (1) where they are concerned with the introduction and protection of a new technology in the licensed territory, by reason of the scale of the research which has been undertaken, of the increase in the level of competition, in particular interbrand competition, and of the competitiveness of the undertakings concerned resulting from the dissemination of innovation within the Community. In so far as agreements of this kind fall, in other circumstances, within the scope of Article 85 (1), it is appropriate to include them in Article 1 in order that they may also benefit from the exemption.

In a similar way, export bans on the licensor and on the licensees may not in themselves be incompatible with Article 85 (1), by reason of the protection afforded by national legislations on patents or by the convention on the Community patent as from its entry into force. The exemption of these bans does not prejudice any developments in the jurisprudence of the Court in relation to these agreements, notably with respect to Articles 30 to 36 and 85 (1). This is also the case, in particular, regarding the limitation of the exemption to only a few years of a prohibition on the licensee from selling the licensed product in territories granted to other licensees (passive competition) foreseen by the present Regulation.

10. The obligations listed in Article 1 generally contribute to improving the production of goods and to promoting technical progress. They make the holders of patents or know-how more willing to grant licences and licensees more inclined to undertake the investment required to manufacture, use and put on the market a new product or to use a new process. This is true, in particular, of obligations on the licensor and on the licensee not to exploit the licensed technology in, and in particular not to export the licensed product into, the licensed territory in the case of the licensor and the territories reserved for the licensor in the case of the licensee; and it is also true of an obligation on the licensee not to manufacture or use the product or to conduct an active marketing policy on the territories of other licensees. Such obligations can be permitted under the Regulation in respect of territories where the licensed product is protected by parallel patents which already exist when the agreement is concluded or which are applied for within one year of that date, and as long as the patents remain in force. The Regulation should not apply to pure patent licensing agreements containing obligations which limit the exploitation of the technology in Member States where there are no parallel patents.

The point at which know-how ceases to be secret can be difficult to determine, so that in the case of territories where the licensed technology comprises know-how only, either because there never were any patents there or because the necessary patents have expired, it is appropriate to limit to a fixed number of years the periods of territorial protection of the licensor and the licensee from one another and of the licensee against manufacture, use or active sale by other licensees. Exemption under Article 85 (3) of longer periods of territorial protection, in particular to protect expensive and risky investment or where the parties were not already competitors before the grant of the licence, can only be granted by individual decision. On the other hand, parties are free to extend the term of their agreements to exploit any subsequent improvements and to provide for the payment of additional royalties. However, in such cases, further periods of territorial protection, starting from the date of licensing of the improvements in the Community, may be allowed only by individual decision, in particular where the improvements to or new applications of the licensed technology are substantial and not of significantly less importance than the technology initially granted or require new expensive and risky investment.

Since licensing agreements are frequently negotiated after the goods or services incorporating the licensed technology have proved successful on the market, it is appropriate to take as the starting-point for such a period in each licensed territory the date on which the product is first put on the market in the Community.

The Regulation should also allow an obligation on the licensee not to put the product on the market in the territories of other licensees in a period which should be limited to a few years from the date on which the licensed product is put on the market in the Community, irrespective of whether the licensed

II/37

technology comprises know-how, patents or both in the territories concerned (this obligation would ban not just active competition but passive competition too).

The exemption of territorial protection should apply for the whole duration of the periods thus permitted, as long as the patents remain in force or the know-how remains secret and substantial, enabling the parties to a mixed patent and know-how licensing agreement to take advantage in a particular territory of the period of protection conferred by a patent application or by the use of know-how, whichever is the longer.

11. The obligations listed in Article 1 also generally fulfil the other conditions for the application of Article 85 (3). Consumers will as a rule be allowed a fair share of the benefit resulting from the improvement in the supply of goods on the market. To safeguard this effect, however, it is right to exclude from the application of Article 1 cases where the parties agree to refuse to meet demand from users or resellers within their respective territories who would resell for export, or to take other steps to impede parallel imports, or where the licensee is obliged to refuse to meet unsolicited demand from the territory of other licensees ('passive' sales). The obligations referred to above thus do not impose restrictions which are not indispensable to the attainment of the abovementioned objectives. However, if dominant undertakings were to secure exclusive licenses they might prevent access by third parties to the market of the technology and eliminate competition in respect of a substantial part of the products in question; in order to ensure that this does not happen, the block exemption should not apply where the licensor undertakes to grant no other licenses for the licensee's territory, and the licensee's share of the market in the licensed products and goods considered by consumers to be similar exceeds a certain threshold at the time the agreement is concluded, or the parties are operating on an oligopolistic market. It can be presumed that there is such a market where the parties and one other competitor hold together more than 50 % of the market. In such cases an obligation of this kind on the licensor may be exempted only by an individual decision. In a similar way, undertakings that have a strong market position must also be excluded from the possibility of benefiting from the automatic exemption of export bans, thus contributing to a substantial apportionment of the markets.

The same applies in the case of agreements which grant exclusive licences for a territory covering the whole of the common market where there is the possibility of parallel imports from third countries, or where there are other competing technologies on the market, since the territorial exclusivity may lead to greater market integration and stimulate Community-wide interbrand competition.

12. It is desirable to list in the Regulation a number of obligations that are commonly found in licensing agreements but are normally not restrictive of competition, and to provide that in the event that because of the particular economic or legal circumstances they should fall within Article 85 (1), they too will be covered by the exemption. This list, in Article 2, is not exhaustive.

13. The Regulation must also specify what restrictions or provisions may not be included in licensing agreements if these are to benefit from the block exemption. The restrictions listed in Article 3 may fall under the prohibition of Article 85 (1), but in their case there can be no general presumption that they will lead to the positive effects required by Article 85 (3), as would be necessary for the granting of a block exemption. Such restrictions can be declared exempt only by an individual decision, taking account of the scale of the undertakings concerned and the degree of concentration on the relevant market.

The fact that an agreement contains restrictive clauses which fall outside Articles 1 and 2 of the Regulation but which are not listed in Article 3 does not prevent the exemption from covering any obligations which do fall within the scope of Articles 1 and 2, without prejudice to the application of national provisions on total or partial invalidity of contracts. These clauses however remain subject to the prohibition in Article 85 (1), and must, in accordance with the provisions of Council Regulation 17/62 (*), be notified to benefit from the protection afforded by Article 15 (5) of Regulation 17/62 and, where applicable, from the application of Article 85 (3). In the assessment of licensing agreements between parties whose market shares are relatively small, special attention will be paid to the beneficial effects such agreements can have on competition. But if the parties have appreciable market shares it will have to be considered carefully whether the adverse effects on competition outweigh the positive ones. This will be so particularly where the parties are competitors, or where the relevant market is an oligopolistic one, or where the agreement is between dominant undertakings.

(*) OJ No 13, 21. 2. 1962, p. 204/62.

14. If individual agreements exempted by this Regulation nevertheless have effects which are incompatible with Article 85 (3), the Commission may withdraw the benefit of the block exemption (Article 7).

15. The list in article 2 includes obligations on the licensee to cease using the licensed technology after the termination of the agreement ('post-term use ban') (Article 2 (1) (3)) and to make improvements available to the licensor ('grant-back clause') (Article 2 (1) (4)). The post-term use ban may be regarded as a normal feature of licensing, as otherwise the licensor would be forced to transfer his know-how or patents in perpetuity and this could inhibit the transfer of technology. Moreover, undertakings by the licensee to grant back to the licensor a licence for improvements to the licensed know-how and/or patents are generally not restrictive of competition if the licensee is entitled by the contract to share in future experience and inventions made by the licensor and the licensee retains the right to disclose experience acquired or grant licences to third parties where to do so would not disclose the licensor's know-how.

On the other hand, a restrictive effect on competition arises where the agreement contains an obligation on the licensee to assign to the licensor, rights to improvements of the originally licensed technology that he himself has brought about (Article 3 (6)).

16. The list in Article 2 also includes an obligation on the licensee to keep paying royalties until the end of the agreement or the regular expiry of the patents, independently of whether or not the licensed know-how or patents have entered into the public domain through the action of third parties (Article 2 (1) (7)). As a rule, parties do not need to be protected against the foreseeable financial consequences of an agreement freely entered into, and should therefore not be restricted in their choice of the appropriate means of financing the technology transfer and sharing between them the risks of exploitation, and particularly the risk that patents might be invalidated before the expiry of the period of protection conferred by the patent.

However, the setting of rates of royalty so as to achieve a restrictive objective which is excluded pursuant to Article 3 of the Regulation, and in particular the choice of methods of calculating royalties which are neither directly nor indirectly related to the exploitation of the licensed technology, would render the agreement ineligible for the block exemption.

17. An obligation on the licensee to restrict his exploitation of the licensed technology to one or more technical fields of application ('fields of use') or to one or more product markets is not caught by Article 85 (1) either (Article 2 (1) (8)). This obligation is not restrictive of competition since the licensor can be regarded as having the right to transfer the technology only for a limited purpose. Such a restriction must however not constitute a disguised means of customer allocation.

18. Restrictions whereby the parties allocate customers within the same technological field of use or the same product market, either by an actual prohibition on supplying certain classes of customer or through an obligation with an equivalent effect, would also render the agreement ineligible for the block exemption (Article 3 (4)).

This does not apply to cases where the patent or know-how licence is granted in order to provide a single customer with a second source of supply. In such a case, a prohibition on the licensee from supplying persons other than the customer concerned is necessary for the grant of a licence to the second supplier, since the purpose of the transaction is not to create an independent supplier in the market. The same applies to limitations on the quantities the licensee may supply to the customer concerned (Article 2 (1) (14)).

19. Besides the clauses already mentioned, the list in Article 3 also includes restrictions regarding the selling prices of the licensed product or the quantities to be manufactured or sold, since they limit the extent to which the licensee can exploit the licensed technology and particularly since quantity restrictions may have the same effect as export bans (Article 3 (1) and (5)). This does not apply where a licence is granted for use of the technology in specific production facilities and where both a specific know-how is communicated for the setting-up, operation and maintenance of these facilities and the licensee is allowed to increase the capacity of the facilities or to set up further facilities for its own use on normal commercial terms. On the other hand, the licensee may lawfully be prevented from using the licensor's specific know-how to set up facilities for third parties, since the purpose of the agreement is not to permit the licensee to give other producers access to the licensor's technology while it remains secret or protected by patent (Article 2 (1) (13)).

20. Agreements which come within the terms of Articles 1 and 2 and which have neither the object nor the effect of restricting competition in any other way need no longer be notified. Nevertheless, undertakings will still have the right to apply in individual cases for negative clearance pursuant to Article 2 of Regulation No 17 or for exemption pursuant to Article 85 (3).

II/39

HAS ADOPTED THIS REGULATION:

Article 1

1. Pursuant to Article 85 (3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 85 (1) of the Treaty shall not apply to pure patent licensing or know-how licensing agreements and to mixed patent and know-how licensing agreements, including those agreements containing ancillary provisions relating to intellectual property rights other than patents, to which only two undertakings are party and which include one or more of the following obligations:

1. an obligation on the licensor not to license other undertakings to exploit the licensed technology in the licensed territory;

2. an obligation on the licensor not to exploit the licensed technology in the licensed territory himself;

3. an obligation on the licensee not to exploit the licensed technology in territories within the common market which are reserved for the licensor;

4. an obligation on the licensee not to manufacture or use the licensed product, or use the licensed process, in territories within the common market which are licensed to other licensees;

5. an obligation on the licensee not to pursue an active policy of putting the licensed product on the market in the territories within the common market which are licensed to other licensees, and in particular not to engage in advertising specifically aimed at those territories or to establish any branch or maintain any distribution depot there;

6. an obligation on the licensee not to put the licensed product on the market in the territories licensed to other licensees within the common market;

7. an obligation on the licensee to use only the licensor's trade mark or get up to distinguish the licensed product during the term of the agreement, provided that the licensee is not prevented from identifying himself as the manufacturer of the licensed products;

8. an obligation on the licensee to limit his production of the licensed product to the quantities he requires in manufacturing his own products and to sell the licensed product only as an integral part of or a replacement part for his own products or otherwise in connection with the sale of his own products, provided that such quantities are freely determined by the licensee.

2. Where the agreement is a pure patent licensing agreement, the exemption of the obligations referred to in paragraph 1 is granted only to the extent that and for as long as the licensed product is protected by parallel patents, in the territories respectively of the licensee (points 1, 2, 7 and 8), the licensor (point 3) and other licensees (points 4 and 5). (The exemption of the obligation referred to in paragraph 1 (6) is granted for a period not exceeding five years from the date when the product is first put on the market within the common market by the licensor or one of his licensees, inasmuch and for as long as, in these territories, this product is protected by parallel patents.)

3. Where the agreement is a pure know-how licensing agreement, the period for which the exemption of the obligations referred to in paragraph 1 (1) to (5) is granted may not exceed 10 years from the date when the licensed product is first put on the market in the Community by the licensor or one of his licensees.

The exemption of the obligation referred to in paragraph 1 (6) is granted for a period not exceeding five years from the date when the product is first put on the market within the common market by the licensor or one of his licensees.

The obligations referred to in paragraph 1 (7) and (8) are exempted for the lifetime of the agreement.

However, the exemption in paragraph 1 shall apply only where the parties have identified in any appropriate form the initial know-how and any subsequent improvements to it, which become available to one party and are communicated to the other party pursuant to the terms of the agreement and for the purpose thereof, and only for as long as the know-how remains secret and substantial.

4. Where the agreement is a mixed patent and know-how licensing agreement, the exemption of the obligations referred to in paragraph 1 (1) to (5) shall apply in Member States in which the licensed technology is protected by (essential) patents for as long as the licensed product or process is protected in those Member States by such patents if the duration of such protection exceeds the periods specified in paragraph 3.

(The duration of the exemption provided under paragraph 1 (6) cannot exceed the five year period.)

However, these agreements qualify for the exemption in paragraph 1 only for as long as the patents remain in force and provided the know-how is identified and for as long as it remains secret and substantial.

5. The exemption in paragraph 1-(1) of the obligation on the licensor not to grant other licences shall apply only provided:

— that the products manufactured by the licensee which are capable of being improved or replaced by the contract products and other goods manufactured by

II/40

him which are considered by users to be equivalent in view of their characteristics, price and intended use account for no more than 40 % of the entire market in those products in the common market or a substantial part of it, and

— that the licensee is not operating on an oligopolistic market; for purposes of this regulation the market is to be considered as an oligopolistic one if on the relevant product and geographic market three undertakings or less hold together a market share of more than 50 %, or if five undertakings or less hold together a market share of more than two thirds and provided that the licensee is one of the undertakings which make up this group of companies and that it holds a market share of more than 10 %.

6. The exemption of the obligations referred to in paragraph 1 (2) to (6) shall apply only where the party which is protected by such obligations holds a market share of no more than 20 %.

7. The exemption provided for in paragraph 1 shall also apply where in a particular agreement the parties undertake obligations of the types referred to in that paragraph but with a more limited scope than is permitted by that paragraph.

Article 2

1. Article 1 shall apply notwithstanding the presence in particular of any of the following obligations, which are generally not restrictive of competition:

1. an obligation on the licensee not to divulge the know-how communicated by the licensor; the licensee may be held to this obligation after the agreement has expired;

2. an obligation on the licensee not to grant sub-licences or assign the licence;

3. an obligation on the licensee not to exploit the licensed know-how or patents after termination of the agreement in so far and as long as the know-how is still secret or the patents are still in force;

4. an obligation on the licensee to communicate to the licensor any experience gained in exploiting the licensed technology and to grant him a licence in respect of improvements to or new applications of that technology, provided that the communication or licence is not exclusive and that the licensor has accepted an obligation, whether exclusive or not, to communicate his own improvements to the licensee;

5. an obligation on the licensee to observe minimum quality specifications for the licensed product or to procure goods or services from the licensor or from an undertaking designated by the licensor, in so far as such quality specifications, products or services are necessary for:

(a) a technically satisfactory exploitation of the licensed technology; or

(b) for ensuring that the product of the licensee conforms to the quality standards that are respected by the licensor and other licensees;

and to allow the licensor to carry out related checks;

6. obligations:

(a) to inform the licensor of misappropriation of the know-how or of infringements of the licensed patents; or

(b) to take or to assist the licensor in taking legal action against such misappropriation or infringements;

7. an obligation on the licensee, in the event of the know-how becoming publicly known or the patents prematurely losing their validity other than by action of the licensor, to continue paying the royalties until the end of the agreement or the regular expiry of the patents, in the amounts, for the periods and according to the methods freely determined by the parties, without prejudice to the payment of any additional damages in the event of the know-how becoming publicly known or the patents losing their validity by the action of the licensee in breach of the agreement;

8. an obligation on the licensee to restrict his exploitation of the licensed technology to one or more technical fields of application covered by the licensed technology or to one or more product markets;

9. an obligation on the licensee to give the licensor the option to continue to use the improvements after the licensee's right to exploit the licensor's know-how comes to an end, if at the same time the licensor relinquishes the post-term use ban or agrees, after having had an opportunity to examine the licensee's improvements, to pay appropriate royalties for their use;

I/41

10. an obligation on the licensee to pay a minimum royalty or to produce a minimum quantity of the licensed product or to carry out a minimum number of operations exploiting the licensed technology;

11. an obligation on the licensor to grant the licensee any more favourable terms that the licensor may grant to another undertaking after the agreement is entered into;

12. an obligation on the licensee to mark the licensed product with an indication of the licensor's name or of the licensed patent;

13. an obligation on the licensee not to use the licensor's know-how to construct facilities for third parties: this is without prejudice to the right of the licensee to increase the capacity of his facilities or to set up additional facilities for his own use on normal commercial terms, including the payment of additional royalties;

14. an obligation on the licensee to supply only a limited quantity of the licensed product to a particular customer, where a know-how licence was granted at that customer's request so that he might have a second supplier inside a licensed territory; this provision shall also apply where the customer is the licensee, and the licence which was granted in order to provide a second source of supply provides that the customer is himself to manufacture the licensed products or to have them manufactured by a subcontractor.

2. In the event that, because of particular circumstances, the obligations referred to in paragraph 1 fall within the scope of Article 85 (1), they shall also be exempted even if they are not accompanied by any of the obligations exempted by Article 1.

3. The exemption in paragraph 2 shall also apply where in an agreement the parties undertake obligations of the types referred to in paragraph 1 but with a more limited scope than is permitted by that paragraph.

Article 3

Articles 1 and 2 (2) shall not apply where:

1. one party is restricted in the determination of prices, components of prices or discounts for the licensed products;

2. one party is restricted from competing with the other party, with undertakings connected with the other party or with other undertakings within the common market in respect of research and development, production, use or distribution of products deriving from research and development or from the exploitation of the interested party's own processes, without prejudice to an obligation on the licensee to use his best endeavours to exploit the licensed technology;

3. one or both of the parties are required:

(a) to refuse without any objectively justified reason to meet demand from users or resellers in their respective territories who would market products in other territories within the common market;

(b) to make it difficult for users or resellers to obtain the products from other resellers within the common market, and in particular to exercise intellectual property rights or take measures so as to prevent users or resellers from obtaining outside, or from putting on the market in the licensed territory products which have been lawfully put on the market within the common market by the licensor or with his consent;

or do so as a result of a concerted practice between them;

4. one party is restricted within the same technological field of use or within the same product market as to the customers he may serve, in particular by being prohibited from supplying certain classes of user, employing certain forms of distribution or, with the aim of sharing customers, using certain types of packaging for the products, save as provided in Article 1 (1) (7) and Article 2 (1) (14);

5. the quantity of the licensed products one party may manufacture or sell or the number of operations exploiting the licensed technology he may carry out are subject to limitations, save as provided in Article 1 (1) (8) and Article 2 (1) (14).

6. the licensee is obliged to assign in whole or in part to the licensor rights to improvements to or new applications of the licensed technology.

Article 4

If a pure or mixed licensing agreement includes obligations within the scope of Articles 1 and 2 and obligations which restrict competition but which do not fall within the scope either of Articles 1 and 2 or of Article 3, the presence of those restrictive obligations shall not prevent this Regulation from applying to the obligations

II/42

which do fall within the scope of Articles 1 and 2. The obligations which are not thus exempted shall continue to be governed by Articles 85 (1) and (2) of the Treaty.

Article 5

1. This Regulation shall not apply to:

1. agreements between members of a patent or know-how pool which relate to the pooled technologies;

2. licensing agreements between competing undertakings which hold interests in a joint venture, or between one of them and the joint venture, if the licensing agreements relate to the activities of the joint venture;

3. agreements under which one party grants the other a patent and/or know-how licence and the other party, albeit in separate agreements or through connected undertakings, grants the first party a patent, trade mark or know-how licence or exclusive sales rights, where the parties are competitors in relation to the products covered by those agreements;

4. agreements including the licensing of intellectual property rights other than patents (in particular trade marks, copyright and design rights) or the licensing of software except where these rights or the software are of assistance in achieving the object of the licensed technology and there are no obligations restrictive of competition other than those also attached to the licensed know-how or patents and exempted under the present Regulation.

2. This Regulation shall nevertheless apply:

1. to agreements to which paragraph 1 (2) applies, under which a parent undertaking grants the joint venture a patent or know-how licence, provided that the licensed products and the other products of the participating undertakings which are considered by users to be equivalent in view of their characteristics, price and intended use represent:

— in case of a licence limited to production not more than 20 %, and

— in case of a licence covering production and distribution not more than 10 %,

of the market for all such products in the common market or a substantial part thereof;

2. to agreements to which paragraph 1 (1) applies and to reciprocal licences within the meaning of paragraph 1 (3), provided the parties are not subject to any territorial restriction within the common market with regard to the manufacture, use or putting on the market of the licensed products or on the use of the licensed or pooled technologies.

Article 6

This Regulation shall also apply to:

1. agreements where the licensor is not the holder of the know-how or the patentee, but is authorized by the holder or the patentee to grant a licence or a sub-licence;

2. assignments of know-how, patents or both where the risk associated with exploitation remains with the assignor, in particular where the sum payable in consideration of the assignment is dependent on the turnover obtained by the assignee in respect of products made using the know-how or the patents, the quantity of such products manufactured or the number of operations carried out employing the know-how or the patents;

3. licensing agreements in which rights or obligations of the licensor or the licensee are assumed by undertakings connected with them.

Article 7

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation No 19/65/EEC, where it finds in a particular case that an agreement exempted by this Regulation nevertheless has certain effects which are incompatible with the conditions laid down in Article 85 (3) of the Treaty, and in particular where:

1. the effect of the agreement is to prevent the licensed products from being exposed to effective competition in the licensed territory from identical products or products considered by users as equivalent in view of their characteristics, price and intended use;

2. without prejudice to Article 1 (1) (6), the licensee refuses, without valid reason, to meet unsolicited demand from users or resellers in the territory of other licensees;

3. the parties:

(a) without any objectively justified reason refuse to meet demand from users or resellers in their respective territories who would market the products in other territories within the common market; or

(b) make it difficult for users or resellers to obtain the products from other resellers within the common market, and in particular where they exercise intellectual property rights or take measures so as to prevent resellers or users from obtaining outside, or from putting on the market in the licensed territory products which have been lawfully put on the market within the common market by the licensor or with his consent;

4. the parties were already competitors before the grant of the licence and obligations on the licensee to produce a minimum quantity or to use his best endeavours as referred to in Article 2 (1) (10) and Article 3 (2) have the effect of preventing the licensee from using competing technologies.

Article 8

1. For purposes of this Regulation:

(a) patent applications;

(b) utility models;

(c) applications for registration of utility models;

(d) certificats d'utilité and certificats d'addition under French law;

(e) applications for certificats d'utilité and certificats d'addition under French law; and

(f) supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained;

shall be deemed to be patents.

2. This Regulation shall also apply to agreements relating to the exploitation of an invention if an application within the meaning of paragraph 1 is made in respect of the invention for a licensed territory within one year from the date when the agreement was entered into.

Article 9

The prohibition in Article 85 (1) of the Treaty shall not apply in the period:

— 1 January to 30 June 1995 to agreements in force on 1 January 1995 and which satisfied the exemption conditions of Regulation (EEC) No 2349/84,

— 1 January 1995 to 31 December 1999 to agreements in force on 1 January 1995 and which satisfy the exemption Regulation (EEC) No 556/89.

Regulation (EEC) No 556/89 shall not apply to agreements which come into force after 1 January 1995.

Article 10

For purposes of this Regulation the following terms shall have the following meanings:

1. 'know-how' means a body of technical information that is secret, substantial and identified in any appropriate form;

2. the term 'secret' means that the know-how package as a body or in the precise configuration and assembly of its components is not generally known or easily accessible, so that part of its value consists in the lead which the licensee gains when it is communicated to him; it is not limited to the narrow sense that each individual component of the know-how should be totally unknown or unobtainable outside the licensor's business;

3. the term 'substantial' means that the know-how includes information which is of importance for the whole or a significant part of:

(a) a manufacturing process; or

(b) a product or service; or

(c) for the development thereof;

and excludes information which is trivial; such know-how must thus be useful, i.e. can reasonably be expected at the date of conclusion of the agreement to be capable of improving the competitive position of the licensee, for example by helping him to enter a new market or giving him an advantage in competition with other manufacturers or providers of services who do not have access to the licensed secret know-how or other comparable secret know-how;

4. the term 'identified' means that the know-how is described or recorded in such a manner as to make it possible to verify that it fulfils the criteria of secrecy and substantiality and to ensure that the licensee is not unduly restricted in his exploitation of his own technology; to be identified the know-how can either be set out in the licence agreement or in a separate document or recorded in any other appropriate form at the latest when the know-how is transferred or shortly thereafter, provided that the separate document or other record can be made available if the need arises;

II/44

5. necessary patents are patents which contribute to the putting into effect of the licensed technology in so far as, in their absence, the realization of the licensed technology would not be possible or would only be possible to a lesser extent or in more difficult or costly conditions;

6. the term 'licensed technology' means the initial know-how or the necessary patents, or both, existing at the time the first licensing agreement is concluded, and improvements subsequently made to the know-how or patents, irrespective of whether and to what extent they are exploited by the parties or by other licensees;

7. 'the licensed products' are goods or services the production or provision of which requires the use of the licensed technology;

8. 'market share' means the proportion which the licensed products, products capable of being improved or replaced by the contract products and other goods or services provided by the licensor or the licensee which are considered by users to be equivalent in view of their characteristics, price and intended use account for in all such products or services in the common market or a substantial part of it;

9. the term 'exploitation' refers to any use of the licensed technology in particular in the production, active or passive sales in a territory even if not coupled with manufacture in that territory, or leasing of the licensed products;

10. 'the licensed territory' is the territory covering all or at least part of the common market where the licensee is entitled to exploit the licensed technology;

11. 'territory reserved for the licensor' means territories in which the licensor has not granted any licences for patents he holds there or for his know-how;

12. 'parallel patents' means patents for the same invention as the term has been used by the Court of Justice;

13. 'connected undertakings' means:

(a) undertakings in which a party to the agreement directly or indirectly:

— owns more than half the capital or business assets, or

— has the power to exercise more than half the voting rights, or

— has the power to appoint more than half the members of the supervisory board, board of directors or bodies legally representing the undertaking, or

— has the right to manage the affairs of the undertaking;

(b) undertakings which directly or indirectly have in or over a party to the agreement the rights or powers listed in (a);

(c) undertakings in which an undertaking referred to in (b) directly or indirectly has the rights or powers listed in (a);

(d) undertakings in which the parties to the agreement or undertakings connected with them jointly have the rights or powers listed in (a): such jointly controlled undertakings are considered to be connected with each of the parties to the agreement.

14. 'ancillary provisions relating to intellectual property rights other than patents' are provisions relating to rights which contribute to the putting into effect of the licensed technology, where there are no obligations restrictive of competition other than those also attached to the licensed know-how or patents and exempted under the present Regulation.

Article 11

This Regulation shall enter into force on 1 January 1995.

It shall apply until 31 December 2002.

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

II/45

GUIDELINES ON THE APPLICATION OF EEC COMPETITION RULES IN THE TELECOMMUNICATIONS SECTOR

(91/C 233/02)

PREFACE

These guidelines aim at clarifying the application of Community competition rules to the market participants in the telecommunications sector. They must be viewed in the context of the special conditions of the telecommunications sector, and the overall Community telecommunications policy will be taken into account in their application. In particular, account will have to be taken of the actions the Commission will be in a position to propose for the telecommunications industry as a whole, actions deriving from the assessment of the state of play and issues at stake for this industry, as has already been the case for the European electronics and information technology industry in the communication of the Commission of 3 April 1991 (').

A major political aim, as emphasized by the Commission, the Council, and the European Parliament, must be the development of efficient Europe-wide networks and services, at the lowest cost and of the highest quality, to provide the European user in the single market of 1992 with a basic infrastructure for efficient operation.

The Commission has made it clear in the past that in this context it is considered that liberalization and harmonization in the sector must go hand in hand.

Given the competition context in the telecommunications sector, the telecommunications operators should be allowed, and encouraged, to establish the necessary cooperation mechanisms, in order to create — or ensure — Community-wide full interconnectivity between public networks, and where required between services to enable European users to benefit from a wider range of better and cheaper telecommunications services.

This can and has to be done in compliance with, and respect of, EEC competition rules in order to avoid the diseconomies which otherwise could result. For the same reasons, operators and other firms that may be in a dominant market position should be made aware of the prohibition of abuse of such positions.

The guidelines should be read in the light of this objective. They set out to clarify, *inter alia*, which forms of cooperation amount to undesirable collusion, and in this sense they list what is *not* acceptable. They should therefore be seen as one aspect of an overall Community policy towards telecommunications, and notably of policies and actions to encourage and stimulate those forms of cooperation which promote the development and availability of advanced communications for Europe.

The full application of competition rules forms a major part of the Community's overall approach to telecommunications. These guidelines should help market participants to shape their strategies and arrangements for Europe-wide networks and services from the outset in a manner which allows them to be fully in line with these rules. In the event of significant changes in the conditions which prevailed when the guidelines were drawn up, the Commission may find it appropriate to adapt the guidelines to the evolution of the situation in the telecommunications sector.

(') The European electronics and information technology industry: state of play, issues at stake and proposals for action, SEC(91) 565, 3 April 1991.

II/47

I. SUMMARY

1. The Commission of the European Communities in its Green Paper on the development of the common market for telecommunications services and equipment (COM(87)290) dated 30 June 1987 proposed a number of Community positions. Amongst these, positions (H) and (I) are as follows:

'(H) strict continuous review of operational (commercial) activities of telecommunications administrations according to Articles 85, 86 and 90 of the EEC Treaty. This applies in particular to practices of cross-subsidization of activities in the competitive services sector and of activities in manufacturing;

(I) strict continuous review of all private providers in the newly opened sectors according to Articles 85 and 86, in order to avoid the abuse of dominant positions;'.

2. These positions were restated in the Commission's document of 9 February 1988 'Implementing the Green Paper on the development of the common market for telecommunications services and equipment/state of discussions and proposals by the Commission' (COM(88)48) Among the areas where the development of concrete policy actions is now possible, the Commission indicated the following:

'Ensuring fair conditions of competition:

Ensuring an open competitive market makes continuous review of the telecommunications sector necessary.

The Commission intends to issue guidelines regarding the application of competition rules to the telecommunications sector and on the way that the review should be carried out.'

This is the objective of this communication.

The telecommunications sector in many cases requires cooperation agreements, *inter alia*, between telecommunications organizations (TOs) in order to ensure network and services interconnectivity, one-stop shopping and one-stop billing which are necessary to provide for Europe-wide services and to offer optimum service to users. These objectives can be achieved, *inter alia*, by TOs cooperating — for example, in those areas where exclusive or special rights for provision may continue in accordance with Community law, including competition law, as well as in areas where optimum service will require certain features of cooperation. On the other hand the overriding objective to develop the conditions for the market to provide European users with a greater variety of telecommunications services, of better quality and at lower cost requires the introduction and safeguarding of a strong competitive structure. Competition plays a central role for the Community, especially in view of the completion of the single market for 1992. This role has already been emphasized in the Green Paper.

The single market will represent a new dimension for telecoms operators and users. Competition will give them the opportunity to make full use of technological development and to accelerate it, and encouraging them to restructure and reach the necessary economies of scale to become competitive not only on the Community market, but worldwide.

With this in mind, these guidelines recall the main principles which the Commission, according to its mandate under the Treaty's competition rules, has applied and will apply in the sector without prejudging the outcome of any specific case which will have to be considered on the facts.

The objective is, *inter alia*, to contribute to more certainty of conditions for investment in the sector and the development of Europe-wide services.

The mechanisms for creating certainty for individual cases (apart from complaints and ex-officio investigations) are provided for by the notification and negative clearance procedures provided under Regulation No 17, which give a formal procedure for clearing cooperation agreements in this area whenever a formal clearance is requested. This is set out in further detail in this communication.

II. INTRODUCTION

3. The fundamental technological development worldwide in the telecommunications sector (*) has caused considerable changes in the competition conditions. The traditional monopolistic administrations cannot alone take up the challenge of the technological revolution. New economic forces have appeared on

(*) Telecommunications embraces any transmission, emission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, radio, optical and other electromagnetic systems (Article 2 of WATTC Regulation of 9 December 1988).

II/48

the telecoms scene which are capable of offering users the numerous enhanced services generated by the new technologies. This has given rise to and stimulated a wide deregulation process propagated in the Community with various degrees of intensity.

This move is progressively changing the face of the European market structure. New private suppliers have penetrated the market with more and more transnational value-added services and equipment. The telecommunications administrations, although keeping a central role as public services providers, have acquired a business-like way of thinking. They have started competing dynamically with private operators in services and equipment. Wide restructuring, through mergers and joint ventures, is taking place in order to compete more effectively on the deregulated market through economies of scale and rationalization. All these events have a multiplier effect on technological progress.

4. In the light of this, the central role of competition for the Community appears clear, especially in view of the completion of the single market for 1992. This role has already been emphasized in the Green Paper.

5. In the application of competition rules the Commission endeavours to avoid the adopting of State measures or undertakings erecting or maintaining artificial barriers incompatible with the single market. But it also favours all forms of cooperation which foster innovation and economic progress, as contemplated by competition law. Pursuing effective competition in telecoms is not a matter of political choice. The choice of a free market and a competition-oriented economy was already envisaged in the EEC Treaty, and the competition rules of the Treaty are directly applicable within the Community. The abovementioned fundamental changes make necessary the full application of competition law.

6. There is a need for more certainty as to the application of competition rules. The telecommunication administrations together with keeping their duties of public interest, are now confronted with the application of these rules practically without transition from a long tradition of legal protection. Their scope and actual implications are often not easily perceivable. As the technology is fast-moving and huge investments are necessary, in order to benefit from the new possibilities on the market-place, all the operators, public or private, have to take quick decisions, taking into account the competition regulatory framework.

7. This need for more certainty regarding the application of competition rules is already met by assessments made in several individual cases. However, assessments of individual cases so far have enabled a response to only some of the numerous competition questions which arise in telecommunications. Future cases will further develop the Commission's practice in this sector.

Purpose of these guidelines

8. These guidelines are intended to advise public telecommunications operators, other telecommunications service and equipment suppliers and users, the legal profession and the interested members of the public about the general legal and economic principles which have been and are being followed by the Commission in the application of competition rules to undertakings in the telecommunications sector, based on experience gained in individual cases in compliance with the rulings of the Court of Justice of the European Communities.

9. The Commission will apply these principles also to future individual cases in a flexible way, and taking the particular context of each case into account. These guidelines do not cover all the general principles governing the application of competition rules, but only those which are of specific relevance to telecommunication issues. The general principles of competition rules not specifically connected with telecommunications but entirely applicable to these can be found, *inter alia*, in the regulatory acts, the Court judgments and the Commission decisions dealing with the individual cases, the Commission's yearly reports on competition policy, press releases and other public information originating from the Commission.

10. These guidelines do not create enforceable rights. Moreover, they do not prejudice the application of EEC competition rules by the Court of Justice of the European Communities and by national authorities (as these rules may be directly applied in each Member State, by the national authorities, administrative or judicial).

11. A change in the economic and legal situation will not automatically bring about a simultaneous amendment to the guidelines. The Commission, however, reserves the possibility to make such an amendment when it considers that these guidelines no longer satisfy their

purpose, because of fundamental and/or repeated changes in legal precedents, methods of applying competition rules, and the regulatory, economic and technical context.

12. These guidelines essentially concern the direct application of competition rules to undertakings, i.e. Articles 85 and 86 of the EEC Treaty. They do not concern those applicable to the Member States, in particular Articles 5 and 90 (1) and (3). Principles ruling the application of Article 90 in telecommunications are expressed in Commission Directives adopted under Article 90 (3) for the implementation of the Green Paper (*).

Relationship between competition rules applicable to undertakings and those applicable to Member States

13. The Court of Justice of the European Communities (*) has ruled that while it is true that Articles 85 and 86 of the Treaty concern the conduct of undertakings and not the laws or regulations of the Member States, by virtue of Article 5 (2) of the EEC Treaty, Member States must not adopt or maintain in force any measure which could deprive those provisions of their effectiveness. The Court has stated that such would be the case, in particular, if a Member State were to require or favour prohibited cartels or reinforce the effects thereof or to encourage abuses by dominant undertakings.

If those measures are adopted or maintained in force *vis-à-vis* public undertakings or undertakings to which a Member State grants special or exclusive rights, Article 90 might also apply.

14. When the conduct of a public undertaking or an undertaking to which a Member State grants special or exclusive rights arises entirely as a result of the exercise of the undertaking's autonomous behaviour, it can only be caught by Articles 85 and 86.

When this behaviour is imposed by a mandatory State measure (regulative or administrative), leaving no discretionary choice to the undertakings concerned, Article 90 may apply to the State involved in association with Articles 85 and 86. In this case Articles 85 and 86 apply to the undertakings' behaviour taking into account the constraints to which the undertakings are submitted by the mandatory State measure.

Ultimately, when the behaviour arises from the free choice of the undertakings involved, but the State has taken a measure which encourages the behaviour or strengthens its effects, Articles 85 and/or 86 apply to the undertakings' behaviour and Article 90 may apply to the State measure. This could be the case, *inter alia*, when the State has approved and/or legally endorsed the result of the undertakings' behaviour (for instance tariffs).

These guidelines and the Article 90 Directives complement each other to a certain extent in that they cover the principles governing the application of the competition rules: Articles 85 and 86 on the one hand, Article 90 on the other.

Application of competition rules and other Community law, including open network provision (ONP) rules

15. Articles 85 and 86 and Regulations implementing those Articles in application of Article 87 of the EEC Treaty constitute law in force and enforceable throughout the Community. Conflicts should not arise with other Community rules because Community law forms a coherent regulatory framework. Other Community rules, and in particular those specifically governing the telecommunications sector, cannot be considered as provisions implementing Articles 85 and 86 in this sector. However it is obvious that Community acts adopted in the telecommunications sector are to be interpreted in a way consistent with competition rules, so to ensure the best possible implementation of all aspects of the Community telecommunications policy.

16. This applies, *inter alia*, to the relationship between competition rules applicable to undertakings and the ONP rules. According to the Council Resolution of 30 June 1988 on the development of the common market for telecommunications services and equipment up to 1992 (*), ONP comprises the 'rapid definition, by Council Directives, of technical conditions, usage

(*) Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment (OJ No L 131, 27. 5. 1988, p. 73).
Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ No L 192, 24. 7. 1990, p. 10).

(*) Judgment of 13. 7. 1966 in Case 229/83, Leclerc/gasoline [1985] ECR 17; Judgment of 11. 7. 1985 in Case 299/83, Leclerc/books [1985] ECR 2517; Judgment of 30. 4. 1986 in Cases from 209 to 213/84, Ministère public v. Asjes [1986] ECR 1425; Judgment of 1. 10. 1987 in Case 311/85, Vereniging van Vlaamse Reisbureaus v. Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten [1987] ECR 3801.

(*) OJ No C 257, 4. 10. 1988, p. 1.

conditions, and tariff principles for open network provision, starting with harmonized conditions for the use of leased lines'. The details of the ONP procedures have been fixed by Directive 90/387/EEC (*) on the establishment of the internal market for telecommunications services through the implementation of open network provision, adopted by Council on 28 June 1990 under Article 100a of the EEC Treaty.

17. ONP has a fundamental role in providing European-wide access to Community-wide interconnected public networks. When ONP harmonization is implemented, a network user will be offered harmonized access conditions throughout the EEC, whichever country they address. Harmonized access will be ensured in compliance with the competition rules as mentioned above, as the ONP rules specifically provide.

ONP rules cannot be considered as competition rules which apply to States and/or to undertakings' behaviour. ONP and competition rules therefore constitute two different but coherent sets of rules. Hence, the competition rules have full application, even when all ONP rules have been adopted.

18. Competition rules are and will be applied in a coherent manner with Community trade rules in force. However, competition rules apply in a non-discriminatory manner to EEC undertakings and to non-EEC ones which have access to the EEC market.

III COMMON PRINCIPLES OF APPLICATION OF ARTICLES 85 AND 86

Equal application of Articles 85 and 86

19. Articles 85 and 86 apply directly and throughout the Community to all undertakings, whether public or private, on equal terms and to the same extent, apart from the exception provided in Article 90 (2) (*).

(*) OJ No L 192, 24. 7. 1990, p. 1.

(*) Article 90 (2) states: 'Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community'.

The Commission and national administrative and judicial authorities are competent to apply these rules under the conditions set out in Council Regulation No 17 (*).

20. Therefore, Articles 85 and 86 apply both to private enterprises and public telecommunications operators embracing telecommunications administrations and recognized private operating agencies, hereinafter called 'telecommunications organizations' (TOs).

TOs are undertakings within the meaning of Articles 85 and 86 to the extent that they exert an economic activity, for the manufacturing and/or sale of telecommunications equipment and/or for the provision of telecommunications services, regardless of other facts such as, for example, whether their nature is economic or not and whether they are legally distinct entities or form part of the State organization (*). Associations of TOs are associations of undertakings within the meaning of Article 85, even though TOs participate as undertakings in organizations in which governmental authorities are also represented.

Articles 85 and 86 apply also to undertakings located outside the EEC when restrictive agreements are implemented or intended to be implemented or abuses are committed by those undertakings within the common market to the extent that trade between Member States is affected (*).

Competition restrictions justified under Article 90 (2) or by essential requirements

21. The exception provided in Article 90 (2) may apply both to State measures and to practices by undertakings. The Services Directive 90/388/EEC, in particular in Article 3, makes provision for a Member State to impose specified restrictions in the licences which it can grant for the provision of certain telecommunications services. These restrictions may be imposed under Article 90 (2) or in order to ensure the compliance with State essential requirements specified in the Directive.

(*) OJ No 13, 21. 2. 1962, p. 204/62 (Special Edition 1959-62, p. 87).

(*) See Judgment of the Court 16. 6. 1987 in Case 118/85, Commission v. Italy — Transparency of Financial Relations between Member States and Public Undertakings [1987] ECR 2599.

(*) See Judgment of the Court of 27. 9. 1988 in Joined Cases 89, 104, 114, 116, 117, 125, 126, 127, 129/85, Ahlström & others v. Commission ('Woodpulp'), [1988] ECR 5193.

II/51

22. As far as Article 90 (2) is concerned, the benefit of the exception provided by this provision may still be invoked for a TO's behaviour when it brings about competition restrictions which its Member State did not impose in application of the Services Directive. However, the fact should be taken into account that in this case the State whose function is to protect the public and the general economic interest, did not deem it necessary to impose the said restrictions. This makes particularly hard the burden of proving that the Article 90 (2) exception still applies to an undertakings's behaviour involving these restrictions.

23. The Commission infers from the case law of the Court of Justice (9) that it has exclusive competence, under the control of the Court, to decide that the exception of Article 90 (2) applies. The national authorities including judicial authorities can assess that this exception does not apply, when they find that the competition rules clearly do not obstruct the performance of the task of general economic interest assigned to undertakings. When those authorities cannot make a clear assessment in this sense they should suspend their decision in order to enable the Commission to find that the conditions for the application of that provision are fulfilled.

24. As to measures aiming at the compliance with 'essential requirements' within the meaning of the Services Directive, under Article 1 of the latter (10), they can only be taken by Member States and not by undertakings

The relevant market

25. In order to assess the effects of an agreement on competition for the purposes of Article 85 and whether there is a dominant position on the market for the purposes of Article 86, it is necessary to define the relevant market(s), product or service market(s) and geographic market(s), within the domain of telecommunications. In a context of fast-moving technology the relevant market definition is dynamic and variable.

(a) The product market

26. A product market comprises the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products in terms of price, usage and consumer preference. An examination limited to the objective characteristics only of the relevant products cannot be sufficient: the competitive conditions and the structure of supply and demand on the market must also be taken into consideration (11).

The Commission can precisely define these markets only within the framework of individual cases.

27. For the guidelines' purpose it can only be indicated that distinct service markets could exist at least for terrestrial network provision, voice communication, data communication and satellites. With regard to the equipment market, the following areas could all be taken into account for the purposes of market definition: public switches, private switches, transmission systems and more particularly, in the field of terminals, telephone sets, modems, telex terminals, data transmission terminals and mobile telephones. The above indications are without prejudice to the definition of further narrower distinct markets. As to other services — such as value-added ones — as well as terminal and network equipment, it cannot be specified here whether there is a market for each of them or for an aggregate of them, or for both, depending upon the interchangeability existing in different geographic markets. This is mainly determined by the supply and the requirements in those markets.

28. Since the various national public networks compete for the installation of the telecommunication hubs of large users, market definition may accordingly vary. Indeed, large telecommunications users, whether or not they are service providers, locate their premises depending, *inter alia*, upon the features of the telecommunications services supplied by each TO. Therefore, they compare national public networks and other services provided by the TOs in terms of characteristics and prices

(9) Case 15/71, Mueller-Hein [1971] ECR 723; Judgment of 11. 4. 1989 in Case 66/86, Ahmed Saeed [1989] ECR 803.

(10) '... the non-economic reasons in the general interest which may cause a Member State to restrict access to the public telecommunications network or public telecommunications services.'

(11) Case 322/81, Michelin v. Commission, 9 November 1983 [1983] ECR 3529, Ground 37.

29. As to satellite provision, the question is whether or not it is substantially interchangeable with terrestrial network provision:

(a) communication by satellite can be of various kinds: fixed service (point to point communication), multipoint (point to multipoint and multipoint to multipoint), one-way or two-way;

(b) satellites' main characteristics are: coverage of a wide geographic area not limited by national borders, insensitivity of costs to distance, flexibility and ease of networks deployment, in particular in the very small aperture terminals (VSAT) systems;

(c) satellites' uses can be broken down into the following categories: public switched voice and data transmission, business value-added services and broadcasting;

(d) a satellite provision presents a broad interchangeability with the terrestrial transmission link for the basic voice and data transmission on long distance. Conversely, because of its characteristics it is not substantially interchangeable but rather complementary to terrestrial transmission links for several specific voice and data transmission uses. These uses are: services to peripheral or less-developed regions, links between non-contiguous countries, reconfiguration of capacity and provision of routing for traffic restoration. Moreover, satellites are not currently substantially interchangeable for direct broadcasting and multipoint private networks for value-added business services. Therefore, for all those uses satellites should constitute distinct product markets. Within satellites, there may be distinct markets.

30. In mobile communications distinct services seem to exist such as cellular telephone, paging, telepoint, cordless voice and cordless data communication. Technical development permits providing each of these systems with more and more enhanced features. A consequence of this is that the differences between all these systems are progressively blurring and their interchangeability increasing. Therefore, it cannot be excluded that in future for certain uses several of those systems be embraced by a single product market. By the same token, it is likely that, for certain uses, mobile systems will be comprised in a single market with certain services offered on the public switched network.

(b) The geographic market

31. A geographic market is an area:

— where undertakings enter into competition with each other, and

— where the objective conditions of competition applying to the product or service in question are similar for all traders (11).

32. Without prejudice to the definition of the geographic market in individual cases, each national territory within the EEC seems still to be a distinct geographic market as regards those relevant services or products, where:

— the customer's needs cannot be satisfied by using a non-domestic service,

— there are different regulatory conditions of access to services, in particular special or exclusive rights which are apt to isolate national territories,

— as to equipment and network, there are no Community-common standards, whether mandatory or voluntary, whose absence could also isolate the national markets. The absence of voluntary Community-wide standards shows different national customers' requirements.

However, it is expected that the geographic market will progressively extend to the EEC territory at the pace of the progressive realization of a single EEC market.

33. It has also to be ascertained whether each national market or a part thereof is a substantial part of the common market. This is the case where the services of the product involved represent a substantial percentage of volume within the EEC. This applies to all services and products involved.

34. As to satellite uplinks, for cross-border communication by satellite the uplink could be provided from any of several countries. In this case, the geographic market is wider than the national territory and may cover the whole EEC.

As to space segment capacity, the extension of the geographic market will depend on the power of the satellite and its ability to compete with other satellites for

(11) Judgment of 14. 2. 1978 in Case 27/76, United Brands v. Commission [1978] ECR 207, Ground 44. In the telecommunications sector: Judgment of 5. 10. 1988 in Case 247/86, Alsatel-Novasam [1988] ECR 5987.

transmission to a given area, in other words on its range. This can be assessed only case by case.

35. As to services in general as well as terminal and network equipment, the Commission assesses the market power of the undertakings concerned and the result for EEC competition of the undertakings' conduct, taking into account their interrelated activities and interaction between the EEC and world markets. This is even more necessary to the extent that the EEC market is progressively being opened. This could have a considerable effect on the structure of the markets in the EEC, on the overall competitivity of the undertakings operating in those markets, and in the long run, on their capacity to remain independent operators.

IV. APPLICATION OF ARTICLE 85

36. The Commission recalls that a major policy target of the Council Resolution of 30 June 1988 on the development of the common market for telecommunications services and equipment up to 1992 was that of:

> '. . . . stimulating European cooperation at all levels, as far as compatible with Community competition rules, and particularly in the field of research and development, in order to secure a strong European presence on the telecommunications markets and to ensure the full participation of all Member States'.

In many cases Europe-wide services can be achieved by TOs' cooperation — for example, by ensuring interconnectivity and interoperability

(i) in those areas where exclusive or special rights for provision may continue in accordance with Community law and in particular with the Services Directive 90/388/EEC; and

(ii) in areas where optimum service will require certain features of cooperation, such as so-called 'one-stop shopping' arrangements, i.e. the possibility of acquiring Europe-wide services at a single sales point.

The Council is giving guidance, by Directives, Decisions, recommendations and resolutions on those areas where Europe-wide services are most urgently needed: such as by recommendation 86/659/EEC on the coordinated introduction of the integrated services digital network (ISDN) in the European Community (*) and by recommendation 87/371/EEC on the coordinated introduction of public pan-European cellular digital land-based mobile communications in the Community (**).

The Commission welcomes and fully supports the necessity of cooperation particularly in order to promote the development of trans-European services and strengthen the competitivity of the EEC industry throughout the Community and in the world markets. However, this cooperation can only attain that objective if it complies with Community competition rules. Regulation No 17 provides well-defined clearing procedures for such cooperation agreements. The procedures foreseen by Regulation No 17 are:

(i) the application for negative clearance, by which the Commission certifies that the agreements are not caught by Article 85, because they do not restrict competition and/or do not affect trade between Member States; and

(ii) the notification of agreements caught by Article 85 in order to obtain an exemption under Article 85 (3). Although if a particular agreement is caught by Article 85, an exemption can be granted by the Commission under Article 85 (3), this is only so when the agreement brings about economic benefits — assessed on the basis of the criteria in the said paragraph 3 — which outweigh its restrictions on competition. In any event competition may not be eliminated for a substantial part of the products in question. Notification is not an obligation; but if, for reasons of legal certainty, the parties decide to request an exemption pursuant to Article 4 of Regulation No 17 the agreements may not be exempted until they have been notified to the Commission.

37. Cooperation agreements may be covered by one of the Commission block exemption Regulations or Notices (***). In the first case the agreement is automatically exempted under Article 85 (3). In the latter case, in the Commission's view, the agreement does not appreciably restrict competition and trade between Member States and therefore does not justify a Commission action. In either case, the agreement does not need to be notified; but it may be notified in case of doubt. If the Commission receives a multitude of notifications of similar cooperation agreements in the telecommunications sector, it may consider whether a specific block exemption regulation for such agreements would be appropriate.

(*) OJ No L 382, 31. 12. 1986, p. 36.

(**) OJ No L 196, 17. 7. 1987, p. 81.

(***) Reported in 'Competition Law in the European Communities' Volume I (situation at 31. 12. 1989) published by the Commission.

II/54

38. The categories of agreements (*) which seem to be typical in telecommunications and may be caught by Article 85 are listed below. This list provides examples only and is, therefore, not exhaustive. The Commission is thereby indicating possible competition restrictions which could be caught by Article 85 and cases where there may be the possibility of an exemption.

39. These agreements may affect trade between Member States for the following reasons:

(i) services other than services reserved to TOs, equipment and spatial segment facilities are traded throughout the EEC; agreements on these services and equipment are therefore likely to affect trade. Although at present cross-frontier trade is limited, there is potentially no reason to suppose that suppliers of such facilities will in future confine themselves to their national market;

(ii) as to reserved network services, one can consider that they also are traded throughout the Community. These services could be provided by an operator located in one Member State to customers located in other Member States, which decide to move their telecommunications hub into the first one because it is economically or qualitatively advantageous. Moreover, agreements on these matters are likely to affect EEC trade at least to the extent they influence the conditions under which the other services and equipment are supplied throughout the EEC.

40. Finally, to the extent that the TOs hold dominant positions in facilities, services and equipment markets, their behaviour leading to — and including the conclusion of — the agreements in question could also give rise to a violation of Article 86, if agreements have or are likely to have as their effect hindering the maintenance of the degree of competition still existing in the market or the growth of that competition, or causing the TOs to reap trading benefits which they would not have reaped if there had been normal and sufficiently effective competition.

(*) For simplification's sake this term stands also for 'decisions by associations' and 'concerted practices' within the meaning of Article 85.

A. *Horizontal agreements concerning the provision of terrestrial facilities and reserved services*

41. Agreements concerning terrestrial facilities (public switched network or leased circuits) or services (e. g. voice telephony for the general public) can currently only be concluded between TOs because of this legal regime providing for exclusive or special rights. The fact that the Services Directive recognizes the possibility for a Member State to reserve this provision to certain operators does not exempt those operators from complying with the competition rules in providing these facilities or services. These agreements may restrict competition within a Member State only where such exclusive rights are granted to more than one provider.

42. These agreements may restrict the competition between TOs for retaining or attracting large telecommunications users for their telecommunications centres. Such 'hub competition' is substantially based upon favourable rates and other conditions, as well as the quality of the services. Member States are not allowed to prevent such competition since the Directive allows only the granting of exclusive and special rights by each Member State in its own territory.

43. Finally, these agreements may restrict competition in non-reserved services from third party undertakings, which are supported by the facilities in question, for example if they impose discriminatory or inequitable trading conditions on certain users.

44. (aa) *Price agreements:* all TOs' agreements on prices, discounting or collection charges for international services, are apt to restrict the hub competition to an appreciable extent. Coordination on or prohibition of discounting could cause particularly serious restrictions. In situations of public knowledge such as exists in respect of the tariff level, discounting could remain the only possibility of effective price competition.

45. In several cases the Court of Justice and the Commission have considered price agreements among the most serious infringements of Article 85 (**).

(**) PVC, Commission Decision 89/190/EEC, OJ No L 74, 17. 3. 1989, p. 1; Case 123/85, BNIC v. Clair [1985] ECR 391; Case 8/72, Cementhandelaren v. Commission (1972) ECR 977; Polypropylene, Commission Decision 86/398/EEC (OJ No L 230/1, 18. 8. 1986, p. 1) on appeal Case179/86.

II/55

While harmonization of tariff structures may be a major element for the provision of Community-wide services, this goal should be pursued as far as compatible with Community competition rules and should include definition of efficient pricing principles throughout the Community. Price competition is a crucial, if not the principal, element of customer choice and is apt to stimulate technical progress. Without prejudice to any application for individual exemption that may be made, the justification of any price agreement in terms of Article 85 (3) would be the subject of very rigorous examination by the Commission.

46. Conversely, where the agreements concern only the setting up of common tariff structures or principles, the Commission may consider whether this would not constitute one of the economic benefits under Article 85 (3) which outweigh the competition restriction. Indeed, this could provide the necessary transparency on tariff calculations and facilitate users' decisions about traffic flow or the location of headquarters or premises. Such agreements could also contribute to achieving one of the Green Paper's economic objectives — more cost-orientated tariffs.

In this connection, following the intervention of the Commission, the CEPT has decided to abolish recommendation PGT/10 on the general principles for the lease of international telecommunications circuits and the establishment of private international networks. This recommendation recommended, *inter alia*, the imposition of a 30 % surcharge or an access charge where third-party traffic was carried on an international telecommunications leased circuit, or if such a circuit was interconnected to the public telecommunications network. It also recommended the application of uniform tariff coefficients in order to determine the relative price level of international telecommunications leased circuits. Thanks to the CEPT's cooperation with the Commission leading to the abolition of the recommendation, competition between telecoms operators for the supply of international leased circuits is re-established, to the benefit of users, especially suppliers of non-reserved services. The Commission had found that the recommendation amounted to a price agreement between undertakings under Article 85 of the Treaty which substantially restricted competition within the European Community (*).

(*) See Commission press release IP(90) 188 of 6 March 1990.

47. (ab) *Agreements on other conditions for the provision of facilities*

These agreements may limit hub competition between the partners. Moreover, they may limit the access of users to the network, and thus restrict third undertakings' competition as to non-reserved services. This applies especially to the use of leased circuits. The abolished CEPT recommendation PGT/10 on tariffs had also recommended restrictions on conditions of sale which the Commission objected to. These restrictions were mainly:

— making the use of leased circuits between the customer and third parties subject to the condition that the communication concern exclusively the activity for which the circuit has been granted,

— a ban on subleasing,

— authorization of private networks only for customers tied to each other by economic links and which carry out the same activity,

— prior consultation between the TOs for any approval of a private network and of any modification of the use of the network, and for any interconnection of private networks.

For the purpose of an exemption under Article 85 (3), the granting of special conditions for a particular facility in order to promote its development could be taken into account among other elements. This could foster technologies which reduce the costs of services and contribute to increasing competitiveness of European industry structures. Naturally, the other Article 85 (3) requirements should also be met.

48. (ac) *Agreements on the choice of telecommunication routes*

These may have the following restrictive effects:

(i) to the extent that they coordinate the TOs' choice of the routes to be set up in international services, they may limit competition between TOs as suppliers to users' communications hubs, in terms of investments and production, with a possible effect on tariffs. It should be determined whether this restriction of their business autonomy is sufficiently appreciable to be caught by Article 85. In any event, an argument for an exemption under Article 85 (3) could be more easily sustained if common routes designation were

II/56

necessary to enable interconnections and, therefore, the use of a Europe-wide network;

(ii) to the extent that they reserve the choice of routes already set up to the TOs, and this choice concerns one determined facility, they could limit the use of other facilities and thus services provision possibly to the detriment of technological progress. By contrast, the choice of routes does not seem restrictive in principle to the extent that it constitutes a technical requirement.

49. (ad) *Agreements on the imposition of technical and quality standards on the services provided on the public network*

Standardization brings substantial economic benefits which can be relevant under Article 85 (3). It facilitates *inter alia* the provision of pan-European telecommunications services. As set out in the framework of the Community's approach to standardization, products and services complying with standards may be used Community-wide. In the context of this approach, European standards institutions have developed in this field (ETSI and CEN-Cenelec). National markets in the EC would be opened up and form a Community market. Service and equipment markets would be enlarged, hence favouring economies of scale. Cheaper products and services are thus available to users. Standardization may also offer an alternative to specifications controlled by undertakings dominant in the network architecture and in non-reserved services. Standardization agreements may, therefore, lessen the risk of abuses by these undertakings which could block the access to the markets for non-reserved services and for equipment. However, certain standardization agreements can have restrictive effects on competition: hindering innovation, freezing a particular stage of technical development, blocking the network access of some users/service providers. This restriction could be appreciable, for example when deciding to what extent intelligence will in future be located in the network or continue to be permitted in customers' equipment. The imposition of specifications other than those provided for by Community law could have restrictive effects on competition. Agreements having these effects are, therefore, caught by Article 85.

The balance between economic benefits and competition restrictions is complex. In principle, an exemption could be granted if an agreement brings more openness and facilitates access to the market, and these benefits outweigh the restrictions caused by it.

50. Standards jointly developed and/or published in accordance with the ONP procedures carry with them the presumption that the cooperating TOs which comply with those standards fulfil the requirement of open and efficient access (see the ONP Directive mentioned in paragraph 16). This presumption can be rebutted, *inter alia*, if the agreement contains restrictions which are not foreseen by Community law and are not indispensable for the standardization sought.

51. One important Article 85 (3) requirement is that users must also be allowed a fair share of the resulting benefit. This is more likely to happen when users are directly involved in the standardization process in order to contribute to deciding what products or services will meet their needs. Also, the involvement of manufacturers or service providers other than TOs seems a positive element for Article 85 (3) purposes. However, this involvement must be open and widely representative in order to avoid competition restrictions to the detriment of excluded manufacturers or service providers. Licensing other manufacturers may be deemed necessary, for the purpose of granting an exemption to these agreements under Article 85 (3).

52. (ae) *Agreements foreseeing special treatment for TOs' terminal equipment or other companies' equipment for the interconnection or interoperation of terminal equipment with reserved services and facilities*

53. (af) *Agreements on the exchange of information*

A general exchange of information could indeed be necessary for the good functioning of international telecommunications services, and for cooperation aimed at ensuring interconnectivity or one-stop shopping and billing. It should not be extended to competition-sensitive information, such as certain tariff information which constitutes business secrets, discounting, customers and commercial strategy, including that concerning new products. The exchange of this information would affect the autonomy of each TO's commercial policy and it is not necessary to attain the said objectives.

B. *Agreements concerning the provision of non-reserved services and terminal equipment*

54. Unlike facilities markets, where only the TOs are the providers, in the services markets the actual or

II/57

potential competitors are numerous and include, besides the TOs, international private companies, computer companies, publishers and others. Agreements on services and terminal equipment could therefore be concluded between TOs, between TOs and private companies, and between private companies.

55. The liberalizing process has led mostly to strategic agreements between (i) TOs, and (ii) TOs and other companies. These agreements usually take the form of joint ventures.

56. (ba) *Agreements between TOs*

The scope of these agreements, in general, is the provision by each partner of a value-added service including the management of the service. Those agreements are mostly based on the 'one-stop shopping' principle, i.e. each partner offers to the customer the entire package of services which he needs. These managed services are called managed data network services (MDNS). An MDNS essentially consists of a broad package of services including facilities, value-added services and management. The agreements may also concern such basic services as satellite uplink.

57. These agreements could restrict competition in the MDNS market and also in the markets for a service or a group of services included in the MDNS:

(i) between the participating TOs themselves; and

(ii) *vis-à-vis* other actual or potential third-party providers.

58. (i) *Restrictions of competition between TOs*

Cooperation between TOs could limit the number of potential individual MDNS offered by each participating TO.

The agreements may affect competition at least in certain aspects which are contemplated as specific examples of prohibited practices under Article 85 (1) (a) to (c), in the event that:

— they fix or recommend, or at least lead (through the exchange of price information) to coordination of prices charged by each participant to customers,

— they provide for joint specification of MDNS products, quotas, joint delivery, specification of customers' systems; all this would amount to controlling production, markets, technical development and investments,

— they contemplate joint purchase of MDNS hardware and/or software, which would amount to sharing markets or sources of supply.

59. (ii) *Restrictive effects on third party undertakings*

Third parties' market entry could be precluded or hampered if the participating TOs:

— refuse to provide facilities to third party suppliers of services,

— apply usage restrictions only to third parties and not to themselves (e.g. a private provider is precluded from placing multiple customers on a leased line facility to obtain lower unit costs),

— favour their MDNS offerings over those of private suppliers with respect to access, availability, quality and price of leased circuits, maintenance and other services,

— apply especially low rates to their MDNS offerings, cross-subsidizing them with higher rates for monopoly services.

Examples of this could be the restrictions imposed by the TOs on private network operators as to the qualifications of the users, the nature of the messages to be exchanged over the network or the use of international private leased circuits.

60. Finally, as the participating TOs hold, individually or collectively, a dominant position for the creation and the exploitation of the network in each national market, any restrictive behaviour described in paragraph 59 could amount to an abuse of a dominant position under Article 86 (see V below).

61. On the other hand, agreements between TOs may bring economic benefits which could be taken into account for the possible granting of an exemption under Article 85 (3). *Inter alia*, the possible benefits could be as follows:

— a European-wide service and 'one-stop shopping' could favour business in Europe. Large multinational undertakings are provided with a European communication service using only a single point of contact,

II/58

— the cooperation could lead to a certain amount of European-wide standardization even before further EEC legislation on this matter is adopted,

— the cooperation could bring a cost reduction and consequently cheaper offerings to the advantage of consumers,

— a general improvement of public infrastructure could arise from a joint service provision.

62. Only by notification of the cases in question, in accordance with the appropriate procedures under Regulation No 17, will the Commission be able, where requested, to ascertain, on the merits, whether these benefits outweigh the competition restrictions. But in any event, restrictions on access for third parties seem likely to be considered as not indispensable and to lead to the elimination of competition for a substantial part of the products and services concerned within the meaning of Article 85 (3), thus excluding the possibility of an exemption. Moreover, if an MDNS agreement strengthens appreciably a dominant position which a participating TO holds in the market for a service included in the MDNS, this is also likely to lead to a rejection of the exemption.

63. The Commission has outlined the conditions for exempting such forms of cooperation in a case concerning a proposed joint venture between 22 TOs for the provision of a Europe-wide MDNS, later abandoned for commercial reasons (*). The Commission considered that the MDNS project presented the risks of restriction of competition between the operators themselves and private service suppliers but it accepted that the project also offered economic benefits to telecommunications users such as access to Europe-wide services through a single operator. Such cooperation could also have accelerated European standardization, reduced costs and increased the quality of the services. The Commission had informed the participants that approval of the project would have to be subject to guarantees designed to prevent undue restriction of competition in the telecommunications services markets, such as discrimination against private services suppliers and cross-subsidization. Such guarantees would be essential conditions for the granting of an exemption under the competition rules to cooperation agreements involving TOs. The requirement for an appropriate guarantee of non-discrimination and non-cross-subsidization will be specified in individual cases according to the examples of discrimination indicated in Section V below concerning the application of Article 86.

(*) Commission press release IP(89) 948 of 14. 12. 1989.

64. (bb) *Agreements between TOs and other service providers*

Cooperation between TOs and other operators is increasing in telecommunications services. It frequently takes the form of a joint venture. The Commission recognizes that it may have beneficial effects. However, this cooperation may also adversely affect competition and the opening up of services markets. Beneficial and harmful effects must therefore be carefully weighed.

65. Such agreements may restrict competition for the provision of telecommunications services:

(i) between the partners; and

(ii) from third parties.

66. (i) Competition between the partners may be restricted when these are actual or potential competitors for the relevant telecommunications service. This is generally the case, even when only the other partners and not the TOs are already providing the service. Indeed, TOs may have the required financial capacity, technical and commercial skills to enter the market for non-reserved services and could reasonably bear the technical and financial risk of doing it. This is also generally the case as far as private operators are concerned, when they do not yet provide the service in the geographical market covered by the cooperation, but do provide this service elsewhere. They may therefore be potential competitors in this geographic market.

67. (ii) The cooperation may restrict competition from third parties because:

— there is an appreciable risk that the participant TO, i.e. the dominant network provider, will give more favourable network access to its cooperation partners than to other service providers in competition with the partners,

— potential competitors may refrain from entering the market because of this objective risk or, in any event, because of the presence on the market-place of a cooperation involving the monopolist for the network provision. This is especially the case when market entry barriers are high: the market structure allows only few suppliers and the size and the market power of the partners are considerable.

II/59

68. On the other hand, the cooperation may bring economic benefits which outweigh its harmful effect and therefore justify the granting of an exemption under Article 85 (3). The economic benefits can consist, *inter alia*, of the rationalization of the production and distribution of telecommunication services, in improvements in existing services or development of new services, or transfer of technology which improves the efficiency and the competitiveness of the European industrial structures.

69. In the absence of such economic benefits a complementarity between partners, i.e. between the provision of a reserved activity and that of a service under competition, *is not* a benefit as such. Considering it as a benefit would be equal to justifying an involvement through restrictive agreements of TOs in any non-reserved service provision. This would be to hinder a competitive structure in this market.

In certain cases, the cooperation could consolidate or extend the dominant position of the TOs concerned to a non-reserved services market, in violation of Article 86.

70. The imposition or the proposal of cooperation with the service provider as a condition for the provision of the network may be deemed abusive (see paragraph 98 (vi)).

71. (bc) *Agreements between service providers other than TOs*

The Commission will apply the same principles indicated in (ba) and (bb) above also to agreements between private service providers, *inter alia*, agreements providing quotas, price fixing, market and/or customer allocation. In principle, they are unlikely to qualify for an exemption. The Commission will be particularly vigilant in order to avoid cooperation on services leading to a strengthening of dominant positions of the partners or restricting competition from third parties. There is a danger of this occurring for example when an undertaking is dominant with regard to the network architecture and its proprietary standard is adopted to support the service contemplated by the cooperation. This architecture enabling interconnection between computer systems of the partners could attract some partners to the dominant partner. The dominant position for the network architecture will be strengthened and Article 86 may apply.

72. In any exemption of agreements between TOs and other services and/or equipment providers, or between these providers, the Commission will require from the partners appropriate guarantees of non-cross-subsidization and non-discrimination. The risk of cross-subsidization and discrimination is higher when the TOs or the other partners provide both services and equipment, whether within or outside the Community.

C. *Agreements on research and development (R&D)*

73. As in other high technology based sectors, R&D in telecommunications is essential for keeping pace with technological progress and being competitive on the market-place to the benefit of users. R&D requires more and more important financial, technical and human resources which only few undertakings can generate individually. Cooperation is therefore crucial for attaining the above objectives.

74. The Commission has adopted a Regulation for the block exemption under Article 85 (3) of R&D agreements in all sectors, including telecommunications (*).

75. Agreements which are not covered by this Regulation (or the other Commission block exemption Regulations) could still obtain an individual exemption from the Commission if Article 85 (3) requirements are met individually. However, not in all cases do the economic benefits of an R&D agreement outweigh its competition restrictions. In telecommunications, one major asset, enabling access to new markets, is the launch of new products or services. Competition is based not only on price, but also on technology. R&D agreements could constitute the means for powerful undertakings with high market shares to avoid or limit competition from more innovative rivals. The risk of excessive restrictions of competition increases when the cooperation is extended from R&D to manufacturing and even more to distribution.

76. The importance which the Commission attaches to R&D and innovation is demonstrated by the fact that it has launched several programmes for this purpose. The joint companies' activities which may result from these programmes are not automatically cleared or exempted as such in all aspects from the application of the competition rules. However, most of those joint activities may be covered by the Commission's block exemption

(*) Regulation (EEC) No 418/85, OJ No L 53, 22. 2. 1985, p. 5.

II/60

Regulations. If not, the joint activities in question may be exempted, where required, in accordance with the appropriate criteria and procedures.

77. In the Commission's experience joint distribution linked to joint R&D which is not covered by the Regulation on R&D does not play the crucial role in the exploitation of the results of R&D. Nevertheless, in individual cases, provided that a competitive environment is maintained, the Commission is prepared to consider full-range cooperation even between large firms. This should lead to improving the structure of European industry and thus enable it to meet strong competition in the world market place.

V. APPLICATION OF ARTICLE 86

78. Article 86 applies when:

(i) the undertaking concerned holds an individual or a joint dominant position;

(ii) it commits an abuse of that dominant position; and

(iii) the abuse may affect trade between Member States.

Dominant position

79. In each national market the TOs hold individually or collectively a dominant position for the creation and the exploitation of the network, since they are protected by exclusive or special rights granted by the State. Moreover, the TOs hold a dominant position for some telecommunications services, in so far as they hold exclusive or special rights with respect to those services (*).

80. The TOs may also hold dominant positions on the markets for certain equipment or services, even though they no longer hold any exclusive rights on those markets. After the elimination of these rights, they may have kept very important market shares in this sector. When the market share in itself does not suffice to give the TOs a dominant position, it could do it in combination with the other factors such as the monopoly for the network or other related services and a powerful and wide distribution network. As to the equipment, for example terminal equipment, even if the TOs are not involved in the equipment manufacturing or in the services provision, they may hold a dominant position in the market as distributors.

81. Also, firms other than TOs may hold individual or collective dominant positions in markets where there are no exclusive rights. This may be the case especially for certain non-reserved services because of either the market shares alone of those undertakings, or because of a combination of several factors. Among these factors, in addition to the market shares, two of particular importance are the technological advance and the holding of the information concerning access protocols or interfaces necessary to ensure interoperability of software and hardware. When this information is covered by intellectual property rights this is a further factor of dominance.

82. Finally, the TOs hold, individually or collectively, dominant positions in the demand for some telecommunication equipment, works or software services. Being dominant for the network and other services provisions they may account for a purchaser's share high enough to give them dominance as to the demand, i.e. making suppliers dependent on them. Dependence could exist when the supplier cannot sell to other customers a substantial part of its production or change a production. In certain national markets, for example in large switching equipment, big purchasers such as the TOs face big suppliers. In this situation, it should be weighed up case by case whether the supplier or the customer position will prevail on the other to such an extent as to be considered dominant under Article 86.

With the liberalization of services and the expansion of new forces on the services markets, dominant positions of undertakings other than the TOs may arise for the purchasing of equipment.

Abuse

83. Commission's activity may concern mainly the following broad areas of abuses:

A. *TOs' abuses:* in particular, they may take advantage of their monopoly or at least dominant position to acquire a foothold or to extend their power in non-reserved neighbouring markets, to the detriment of competitors and customers.

B. *Abuses by undertaking other than TOs:* these may take advantage of the fundamental information they hold,

(*) Commission Decision 82/861/EEC in the 'British Telecommunications' case, point 26, OJ No L 360, 21. 12. 1982, p. 36, confirmed in the Judgment of 20. 3. 1985 in Case 41/83, Italian Republic v. Commission [1985] ECR 873, generally known as 'British Telecom'.

II/61

whether or not covered by intellectual property rights, with the object and/or effect of restricting competition.

C. *Abuses of a dominant purchasing position:* for the time being this concerns mainly the TOs, especially to the extent that they hold a dominant position for reserved activities in the national market. However, it may also increasingly concern other undertakings which have entered the market.

A. *TOs' Abuses*

84. The Commission has recognized in the Green Paper the central role of the TOs, which justifies the maintenance of certain monopolies to enable them to perform their public task. This public task consists in the provision and exploitation of a universal network or, where appropriate, universal service, i.e. one having general coverage and available to all users (including service providers and the TOs themselves) upon request on reasonable and non-discriminatory conditions.

This fundamental obligation could justify the benefit of the exception provided in Article 90 (2) under certain circumstances, as laid down in the Services Directive.

85. In most cases, however, the competition rules, far from obstructing the fulfilment of this obligation, contribute to ensuring it. In particular, Article 86 can apply to behaviour of dominant undertakings resulting in a refusal to supply, discrimination, restrictive tying clauses, unfair prices or other inequitable conditions.

If one of these types of behaviour occurs in the provision of one of the monopoly services, the fundamental obligation indicated above is not performed. This could be the case when a TO tries to take advantage of its monopoly for certain services (for instance: network provision) in order to limit the competition they have to face in respect of non-reserved services, which in turn are supported by those monopoly services.

It is not necessary for the purpose of the application of Article 86 that competition be restricted as to a service which is supported by the monopoly provision in question. It would suffice that the behaviour results in an appreciable restriction of competition in whatever way. This means that an abuse may occur when the company affected by the behaviour is not a service provider but an end user who could himself be disadvantaged in competition in the course of his own business.

86. The Court of Justice has set out this fundamental principle of competition in telecommunications in one of its judgments (23). An abuse within the meaning of Article 86 is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking.

The Commission believes that this principle applies, not only when a dominant undertaking monopolizes other markets, but also when by anti-competitive means it extends its activity to other markets.

Hampering the provision of non-reserved services could limit production, markets and above all the technical progress which is a key factor of telecommunications. The Commission has already shown these adverse effects of usage restrictions on monopoly provision in its decision in the 'British Telecom' case (24). In this Decision it was found that the restrictions imposed by British Telecom on telex and telephone networks usage, namely on the transmission of international messages on behalf of third parties:

(i) limited the activity of economic operators to the detriment of technological progress;

(ii) discriminated against these operators, thereby placing them at a competitive disadvantage *vis-à-vis* TOs not bound by these restrictions; and

(iii) made the conclusion of the contracts for the supply of telex circuits subject to acceptance by the other parties of supplementary obligations which had no connection with such contracts. These were considered abuses of a dominant position identified respectively in Article 86 (b), (c) and (d).

This could be done:

(a) as above, by refusing or restricting the usage of the service provided under monopoly so as to limit the provision of non-reserved services by third parties; or

(b) by predatory behaviour, as a result of cross-subsidization.

87. The separation of the TOs' regulatory power from their business activity is a crucial matter in the context of the application of Article 86. This separation is

(23) Case 311/84, Centre belge d'études de marché Télémarketing (CBEM) SA v. Compagnie luxembourgoise de télédiffusion SA and Information Publicité Benelux SA, 3 October 1985 [1985] ECR 3261, Grounds 26 and 27.

(24) See Note (23).

II/62

provided in the Article 90 Directives on terminals and on services mentioned in Note 2 above.

(a) Usage restrictions

88. Usage restrictions on provisions of reserved services are likely to correspond to the specific examples of abuses indicated in Article 86. In particular:

— they may limit the provision of telecommunications services in free competition, the investments and the technical progress, to the prejudice of telecommunications consumers (Article 86 (b)),

— to the extent that these usage restrictions are not applied to all users, including the TOs themselves as users, they may result in discrimination against certain users, placing them at a competitive disadvantage (Article 86 (c)),

— they may make the usage of the reserved services subject to the acceptance of obligations which have no connection with this usage (Article 86 (d)).

89. The usage restrictions in question mainly concern public networks (public switched telephone network (PSTN) or public switched data networks (PSDN)) and especially leased circuits. They may also concern other provisions such as satellite uplink, and mobile communication networks. The most frequent types of behaviour are as follows:

(i) *Prohibition imposed by TOs on third parties:*

(a) to connect private leased circuits by means of concentrator, multiplexer or other equipment to the public switched network; and/or

(b) to use private leased circuits for providing services, to the extent that these services are not reserved, but under competition.

90. To the extent that the user is granted a licence by State regulatory authorities under national law in compliance with EEC law, these prohibitions limit the user's freedom of access to the leased circuits, the provision of which is a public service. Moreover, it discriminates between users, depending upon the usage (Article 86 (c)). This is one of the most serious restrictions and could substantially hinder the development of international telecommunications services (Article 86 (b)).

91. When the usage restriction limits the provision of non-reserved service in competition with that provided by the TO itself the abuse is even more serious and the principles of the abovementioned "Télémarketing" judgment (Note 23 *supra*) apply.

92. In individual cases, the Commission will assess whether the service provided on the leased circuit is reserved or not, on the basis of the Community regulatory acts interpreted in the technical and economic context of each case. Even though a service could be considered reserved according to the law, the fact that a TO actually prohibits the usage of the leased circuit only to some users and not to others could constitute a discrimination under Article 86 (c).

93. The Commission has taken action in respect of the Belgian Régie des télégraphes et téléphones after receiving a complaint concerning an alleged abuse of dominant position from a private supplier of value-added telecommunications services relating to the conditions under which telecommunications circuits were being leased. Following discussions with the Commission, the RTT authorized the private supplier concerned to use the leased telecommunications circuits subject to no restrictions other than that they should not be used for the simple transport of data.

Moreover, pending the possible adoption of new rules in Belgium, and without prejudice to any such rules, the RTT undertook that all its existing and potential clients for leased telecommunications circuits to which third parties may have access shall be governed by the same conditions as those which were agreed with the private sector supplier mentioned above (21).

(ii) *Refusal by TOs to provide reserved services (in particular the network and leased circuits) to third parties*

94. Refusal to supply has been considered an abuse by the Commission and the Court of Justice (22). This behaviour would make it impossible or at least appreciably difficult for third parties to provide non-reserved services. This, in turn, would lead to a limitation of services and of technical development (Article 86 (b)) and, if applied only to some users, result in discrimination (Article 86 (c)).

(21) Commission Press release IP(90) 67 of 29. 1. 1990

(22) Cases 6 and 7/73 Commercial Solvents v. Commission [1974] ECR 223; United Brands v. Commission (Note 13, above).

II/63

(iii) *Imposition of extra charges or other special conditions for certain usages of reserved services*

95. An example would be the imposition of access charges to leased circuits when they are connected to the public switched network or other special prices and charges for service provision to third parties. Such access charges may discriminate between users of the same service (leased circuits provision) depending upon the usage and result in imposing unfair trading conditions. This will limit the usage of leased circuits and finally non-reserved service provision. Conversely, it does not constitute an abuse provided that it is shown, in each specific case, that the access charges correspond to costs which are entailed directly for the TOs for the access in question. In this case, access charges can be imposed only on an equal basis to all users, including TOs themselves.

96. Apart from these possible additional costs which should be covered by an extra charge, the interconnection of a leased circuit to the public switched network is already remunerated by the price related to the use of this network. Certainly, a leased circuit can represent a subjective value for a user depending on the profitability of the enhanced service to be provided on that leased circuit. However, this cannot be a criterion on which a dominant undertaking, and above all a public service provider, can base the price of this public service.

97. The Commission appreciates that the substantial difference between leased circuits and the public switched network causes a problem of obtaining the necessary revenues to cover the costs of the switched network. However, the remedy chosen must not be contrary to law, i.e. the EEC Treaty, as discriminatory pricing between customers would be.

(iv) *Discriminatory price or quality of the service provided*

98. This behaviour may relate, *inter alia*, to tariffs or to restrictions or delays in connection to the public switched network or leased circuits provision, in installation, maintenance and repair, in effecting interconnection of systems or in providing information concerning network planning, signalling protocols, technical standards and all other information necessary for an appropriate interconnection and interoperation with the reserved service and which may affect the interworking of competitive services or terminal equipment offerings.

(v) *Tying the provision of the reserved service to the supply by the TOs or others of terminal equipment to be interconnected or interoperated, in particular through imposition, pressure, offer of special prices or other trading conditions for the reserved service linked to the equipment.*

(vi) *Tying the provision of the reserved service to the agreement of the user to enter into cooperation with the reserved service provider himself as to the non-reserved service to be carried on the network*

(vii) *Reserving to itself for the purpose of non-reserved service provision or to other service providers information obtained in the exercise of a reserved service in particular information concerning users of a reserved services providers more favourable conditions for the supply of this information*

This latter information could be important for the provision of services under competition to the extent that it permits the targeting of customers of those services and the definition of business strategy. The behaviour indicated above could result in a discrimination against undertakings to which the use of this information is denied in violation of Article 86 (c). The information in question can only be disclosed with the agreement of the users concerned and in accordance with relevant data protection legislation (see the proposal for a Council Directive concerning the protection of personal data and privacy in the context of public digital telecommunications networks, in particular the integrated services digital network (ISDN) and public digital mobile networks) (*).

(viii) *Imposition of unneeded reserved services by supplying reserved and/or non-reserved services when the former reserved services are reasonably separable from the others*

99. The practices under (v) (vi) (vii) and (viii) result in applying conditions which have no connection with the reserved service, contravening Article 86 (d).

100. Most of these practices were in fact identified in the Services Directive as restrictions on the provision of services within the meaning of Article 59 and Article 86 of the Treaty brought about by State measures. They are therefore covered by the broader concept of 'restrictions'

(*) Commission document COM(90) 314 of 13. 9. 1990.

II/64

which under Article 6 of the Directive have to be removed by Member States.

101. The Commission believes that the Directives on terminals and on services also clarify some principles of application of Articles 85 and 86 in the sector.

The Services Directive does not apply to important sectors such as mobile communications and satellites; however, competition rules apply fully to these sectors. Moreover, as to the services covered by the Directive it will depend very much on the degree of precision of the licences given by the regulatory body whether the TOs still have a discretionary margin for imposing conditions which should be scrutinized under competition rules. Not all the conditions can be regulated in licences: consequently, there could be room for discretionary action. The application of competition rules to companies will therefore depend very much on a case-by-case examination of the licences. Nothing more than a class licence can be required for terminals.

(b) Cross-subsidization

102. Cross-subsidization means that an undertaking allocates all or part of the costs of its activity in one product or geographic market to its activity in another product or geographic market. Under certain circumstances, cross-subsidization in telecommunications could distort competition, i.e. lead to beating other competitors with offers which are made possible not by efficiency and performance but by artificial means such as subsidies. Avoiding cross-subsidization leading to unfair competition is crucial for the development of service provision and equipment supply.

103. Cross-subsidization does not lead to predatory pricing and does not restrict competition when it is the costs of reserved activities which are subsidized by the revenue generated by other reserved activities since there is no competition possible as to these activities. This form of subsidization is even necessary, as it enables the TOs holders of exclusive rights to perform their obligation to provide a public service universally and on the same conditions to everybody. For instance, telephone provision in unprofitable rural areas is subsidized through revenues from telephone provision in profitable urban areas or long-distance calls. The same could be said of subsidizing the provision of reserved services through revenues generated by activities under competition. The application of the general principle of cost-orientation should be the ultimate goal, in order, *inter alia*, to ensure that prices are not inequitable as between users.

104. Subsidizing activities under competition, whether concerning services or equipment, by allocating their costs to monopoly activities, however, is likely to distort competition in violation of Article 86. It could amount to an abuse by an undertaking holding a dominant position within the Community. Moreover, users of activities under monopoly have to bear unrelated costs for the provision of these activities. Cross-subsidization can also exist between monopoly provision and equipment manufacturing and sale. Cross-subsidization can be carried out through:

— funding the operation of the activities in question with capital remunerated substantially below the market rate;

— providing for those activities premises, equipment, experts and/or services with a remuneration substantially lower than the market price.

105. As to funding through monopoly revenues or making available monopoly material and intellectual means for the starting up of new activities under competition, this constitutes an investment whose costs should be allocated to the new activity. Offering the new product or service should normally include a reasonable remuneration of such investment in the long run. If it does not, the Commission will assess the case on the basis of the remuneration plans of the undertaking concerned and of the economic context.

106. Transparency in the TOs' accounting should enable the Commission to ascertain whether there is cross-subsidization in the cases in which this question arises. The ONP Directive provides in this respect for the definition of harmonized tariff principles which should lessen the number of these cases.

This transparency can be provided by an accounting system which ensures the fully proportionate distribution of all costs between reserved and non-reserved activities. Proper allocation of costs is more easily ensured in cases of structural separation, i.e. creating distinct entities for running each of these two categories of activities.

An appropriate accounting system approach should permit the identification and allocation of all costs between the activities which they support. In this system all products and services should bear proportionally all the relevant costs, including costs of research and development, facilities and overheads. It should enable the production of recorded figures which can be verified by accountants.

II/65

107. As indicated above (paragraph 59), in cases of cooperation agreements involving TOs a guarantee of no cross-subsidization is one of the conditions required by the Commission for exemption under Article 85 (3). In order to monitor properly compliance with that guarantee, the Commission now envisages requesting the parties to ensure an appropriate accounting system as described above, the accounts being regularly submitted to the Commission. Where the accounting method is chosen, the Commission will reserve the possibility of submitting the accounts to independent audit, especially if any doubt arises as to the capability of the system to ensure the necessary transparency or to detect any cross-subsidization. If the guarantee cannot be properly monitored, the Commission may withdraw the exemption.

108. In all other cases, the Commission does not envisage requiring such transparency of the TOs. However, if in a specific case there are substantial elements converging in indicating the existence of an abusive cross-subsidization and/or predatory pricing, the Commission could establish a presumption of such cross-subsidization and predatory pricing. An appropriate separate accounting system could be important in order to counter this presumption.

109. Cross-subsidization of a reserved activity by a non-reserved one does not in principle restrict competition. However, the application of the exception provided in Article 90 (2) to this non-reserved activity could not as a rule be justified by the fact that the financial viability of the TO in question rests on the non-reserved activity. Its financial viability and the performance of its task of general economic interest can only be ensured by the State where appropriate by the granting of an exclusive or special right and by imposing restrictions on activities competing with the reserved ones.

110. Also cross-subsidization by a public or private operator outside the EEC may be deemed abusive in terms of Article 86 if that operator holds a dominant position for equipment or non-reserved services within the EEC. The existence of this dominant position, which allows the holder to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers, will be assessed in the light of all elements in the EEC and outside.

B. *Abuses by undertakings other than the TOs*

111. Further to the liberalization of services, undertakings other than the TOs may increasingly extend their power to acquire dominant positions in non-reserved markets. They may already hold such a position in some services markets which had not been reserved. When they take advantage of their dominant position to restrict competition and to extend their power, Article 86 may also apply to them. The abuses in which they might indulge are broadly similar to most of those previously described in relation to the TOs.

112. Infringements of Article 86 may be committed by the abusive exercise of industrial property rights in relation with standards, which are of crucial importance for telecommunications. Standards may be either the results of international standardization, or *de facto* standards and the property of undertakings.

113. Producers of equipment or suppliers of services are dependent on proprietary standards to ensure the interconnectivity of their computer resources. An undertaking which owns a dominant network architecture may abuse its dominant position by refusing to provide the necessary information for the interconnection of other architecture resources to its architecture products. Other possible abuses — similar to those indicated as to the TOs — are, *inter alia*, delays in providing the information, discrimination in the quality of the information, discriminatory pricing or other trading conditions, and making the information provision subject to the acceptance by the producer, supplier or user of unfair trading conditions.

114. On 1 August 1984, the Commission accepted a unilateral undertaking from IBM to provide other manufacturers with the technical interface information needed to permit competitive products to be used with IBM's then most powerful range of computers, the System/370. The Commission thereupon suspended the proceedings under Article 86 which it had initiated against IBM in December 1980. The IBM Undertaking (*) also contains a commitment relating to SNA formats and protocols.

(*) Reproduced in full in EC Bulletin 10-1984 (point 3.4.1). As to its continued application, see Commission press release No IP(88) 814 of 15 December 1988.

II/65

115. The question how to reconcile copyrights on standards with the competition requirements is particularly difficult. In any event, copyright cannot be used unduly to restrict competition.

C. *Abuses of dominant purchasing position*

116. Article 86 also applies to behaviour of undertakings holding a dominant purchasing position. The examples of abuses indicated in that Article may therefore also concern that behaviour.

117. The Council Directive 90/531/EEC (*) based on Articles 57 (2), 66, 100a and 113 of the EEC Treaty on the procurement procedures of entities operating in *inter alia* the telecommunications sector regulates essentially:

(i) procurement procedures in order to ensure on a reciprocal basis non-discrimination on the basis of nationality; and

(ii) for products or services for use in reserved markets, not in competitive markets. That Directive, which is addressed to States, does not exclude the application of Article 86 to the purchasing of products within the scope of the Directive. The Commission will decide case by case how to ensure that these different sets of rules are applied in a coherent manner.

118. Furthermore, both in reserved and competitive markets, practices other than those covered by the Directive may be established in violation of Article 86. One example is taking advantage of a dominant purchasing position for imposing excessively favourable prices or other trading conditions, in comparison with other purchasers and suppliers (Article 86 (a)). This could result in discrimination under Article 86 (c). Also obtaining, whether or not through imposition, an exclusive distributorship for the purchased product by the dominant purchaser may constitute an abusive extension of its economic power to other markets (see 'Télémarketing' Court judgment (Note 23 *supra*))

119. Another abusive practice could be that of making the purchase subject to licensing by the supplier of standards for the product to be purchased or for other products, to the purchaser itself, or to other suppliers (Article 86 (d)).

(*) OJ No L 297, 29. 10. 1990, p. 1.

120. Moreover, even in competitive markets, discriminatory procedures on the basis of nationality may exist, because national pressures and traditional links of a non-economic nature do not always disappear quickly after the liberalization of the markets. In this case, a systematic exclusion or considerably unfavourable treatment of a supplier, without economic necessity, could be examined under Article 86, especially (b) (limitation of outlets) and (c) (discrimination). In assessing the case, the Commission will substantially examine whether the same criteria for awarding the contract have been followed by the dominant undertaking for all suppliers. The Commission will normally take into account criteria similar to those indicated in Article 27 (1) of the Directive (*). The purchases in question being outside the scope of the Directive, the Commission will not require that transparent purchasing procedures be pursued.

D. *Effect on trade between Member States*

121. The same principle outlined regarding Article 85 applies here. Moreover, in certain circumstances, such as the case of the elimination of a competitor by an undertaking holding a dominant position, although trade between Member States is not directly affected, for the purposes of Article 86 it is sufficient to show that there will be repercussions on the competitive structure of the common market.

VI. APPLICATION OF ARTICLES 85 AND 86 IN THE FIELD OF SATELLITES

122 The development of this sector is addressed globally by the Commission in the 'Green Paper on a common approach in the field of satellite communications in the European Community' of 20 November 1990 (Doc. COM(90) 490 final). Due to the increasing importance of satellites and the particular uncertainty among undertakings as to the application of competition rules to individual cases in this sector, it is appropriate to address the sector in a distinct section in these guidelines.

(*) (See Note 26) Article 27 (1) (a) and (b). The criteria on which the contracting entities shall base the award of the contracts shall be: (a) the most economically advantageous tender involving various criteria such as delivery date, period for completion, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales services and technical assistance, commitments with regard to spare parts, security of supplies and price; or (b) the lowest price only.

II/67

123. State regulations on satellites are not covered by the Commission Directives under Article 90 of the EEC Treaty respectively on terminals and services mentioned above except in the Directive on terminals which contemplates receive-only satellite stations not connected to a public network. The Commission's position on the regulatory framework compatible with the Treaty competition rules is stated in the Commission Green Paper on satellites mentioned above.

124. In any event the Treaty competition rules fully apply to the satellites domain, *inter alia*, Articles 85 and 86 to undertakings. Below is indicated how the principles set out above, in particular in Sections IV and V, apply to satellites.

125. Agreements between European TOs in particular within international conventions may play an important role in providing European satellites systems and a harmonious development of satellite services throughout the Community. These benefits are taken into consideration under competition rules, provided that the agreements do not contain restrictions which are not indispensable for the attainment of these objectives.

126. Agreements between TOs concerning the operation of satellite systems in the broadest sense may be caught by Article 85. As to space segment capacity, the TOs are each other's competitors, whether actual or potential. In pooling together totally or partially their supplies of space segment capacity they may restrict competition between themselves. Moreover, they are likely to restrict competition *vis-à-vis* third parties to the extent that their agreements contain provisions with this object or effect: for instance provisions limiting their supplies in quality and/or quantity, or restricting their business autonomy by imposing directly or indirectly a coordination between these third parties and the parties to the agreements. It should be examined whether such agreements could qualify for an exemption under Article 85 (3) provided that they are notified. However, restrictions on third parties' ability to compete are likely to preclude such an exemption. It should also be examined whether such agreements strengthen any individual or collective dominant position of the parties, which also would exclude the granting of an exemption. This could be the case in particular if the agreement provides that the parties are exclusive distributors of the space segment capacity provided by the agreement.

127. Such agreements between TOs could also restrict competition as to the uplink with respect to which TOs are competitors. In certain cases the customer for satellite communication has the choice between providers in several countries, and his choice will be substantially determined by the quality, price and other sales conditions of each provider. This choice will be even ampler since uplink is being progressively liberalized and to the extent that the application of EEC rules to State legislations will open up the uplink markets. Community-wide agreements providing directly or indirectly for coordination as to the parties' uplink provision are therefore caught by Article 85.

128. Agreements between TOs and private operators on space segment capacity may be also caught by Article 85, as that provision applies, *inter alia*, to cooperation, and in particular joint-venture agreements. These agreements could be exempted if they bring specific benefits such as technology transfer, improvement of the quality of the service or enabling better marketing, especially for a new capacity, outweighing the restrictions. In any event, imposing on customers the bundled uplink and space segment capacity provision is likely to exclude an exemption since it limits competition in uplink provision to the detriment of the customer's choice, and in the current market situation will almost certainly strengthen the TOs' dominant position in violation of Article 86. An exemption is unlikely to be granted also when the agreement has the effect of reducing substantially the supply in an oligopolistic market, and even more clearly when an effect of the agreement is to prevent the only potential competitor of a dominant provider in a given market from offering its services independently. This could amount to a violation of Article 86. Direct or indirect imposition of any kind of agreement by a TO, for instance by making the uplink subject to the conclusion of an agreement with a third party, would constitute an infringement of Article 86.

VII. RESTRUCTURING IN TELECOMMUNICATIONS

129. Deregulation, the objective of a single market for 1992 and the fundamental changes in the telecommunications technology have caused wide strategic restructuring in Europe and throughout the world as well. They

have mostly taken the form of mergers and joint ventures.

(a) Mergers

130. In assessing telecom mergers in the framework of Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (*) the Commission will take into account, *inter alia*, the following elements.

131. Restructuring moves are in general beneficial to the European telecommunications industry. They may enable the companies to rationalize and to reach the critical mass necessary to obtain the economies of scale needed to make the important investments in research and development. These are necessary to develop new technologies and to remain competitive in the world market.

However, in certain cases they may also lead to the anti-competitive creation or strengthening of dominant positions.

132. The economic benefits resulting from critical mass must be demonstrated. The concentration operation could result in a mere aggregation of market shares, unaccompanied by restructuring measures or plans. This operation may create or strengthen Community or national dominant positions in a way which impedes competition.

133. When concentration operations have this sole effect, they can hardly be justified by the objective of increasing the competitivity of Community industry in the world market. This objective, strongly pursued by the Commission, rather requires competition in EEC domestic markets in order that the EEC undertakings acquire the competitive structure and attitude needed to operate in the world market.

134. In assessing concentration cases in telecommunications, the Commission will be particularly vigilant to avoid the strengthening of dominant positions through integration. If dominant service providers are allowed to integrate into the equipment market by way of mergers, access to this market by other equipment suppliers may be seriously hindered. A dominant service provider is likely to give preferential treatment to its own equipment subsidiary. Moreover, the possibility of disclosure by the service provider to its subsidiary of sensitive information obtained from competing equipment manufacturers can put the latter at a competitive disadvantage.

The Commission will examine case by case whether vertical integration has such effects or rather is likely to reinforce the competitive structure in the Community.

135. The Commission has enforced principles on restructuring in a case concerning the GEC and Siemens joint bid for Plessey (**).

136. Article 85 (1) applies to the acquisition by an undertaking of a minority shareholding in a competitor where, *inter alia*, the arrangements involve the creation of a structure of codperation between the investor and the other undertakings, which will influence these undertakings' competitive conduct (***).

(b) Joint ventures

137. A joint venture can be of a cooperative or a concentrative nature. It is of a cooperative nature when it has as its object or effect the coordination of the competitive behaviour of undertakings which remain independent. The principles governing cooperative joint ventures are to be set out in Commission guidelines to that effect. Concentrative joint ventures fall under Regulation (EEC) No 4064/89 (*).

138. In some of the latest joint venture cases the Commission granted an exemption under Article 85 (3) on grounds which are particularly relevant to telecommunications. Precisely in a decision concerning telecommunications, the 'Optical Fibres' case (**), the Commission considered that the joint venture enabled European companies to produce a high technology product, promoted technical progress, and facilitated technology transfer. Therefore, the joint venture permits European companies to withstand competition from non-Community producers, especially in the USA and Japan, in an area of fast-moving technology

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

(**) Commission Decision rejecting Plessey's complaint against the GEC-Siemens bid (Case IV/33.018 GEC-Siemens/Plessey), OJ No C 239, 25. 9. 1990, p. 2.

(***) British American Tobacco Company Ltd and RJ Reynolds Industries Inc. v. Commission (Joined Cases 142 and 156/84) of 17. 11. 1987 (1987) ECR 4487.

(*) OJ No C 203, 14. 8. 1990, p. 10.

(**) Decision 86/405/EEC, OJ No L 236, 22. 8. 86, p. 30.

II/69

characterized by international markets. The Commission confirmed this approach in the 'Canon-Olivetti' case (*).

VIII. IMPACT OF THE INTERNATIONAL CONVENTIONS ON THE APPLICATION OF EEC COMPETITION RULES TO TELECOMMUNICATIONS

139. International conventions (such as the Convention of International Telecommunication Union (ITU) or Conventions on Satellites) play a fundamental role in ensuring worldwide cooperation for the provision of international services. However, application of such international conventions on telecommunications by EEC Member States must not affect compliance with the EEC law, in particular with competition rules.

140. Article 234 of the EEC Treaty regulates this matter (**). The relevant obligations provided in the various conventions or related Acts do not pre-date the entry into force of the Treaty. As to the ITU and World Administrative Telegraph and Telephone Conference (WATTC), whenever a revision or a new adoption of the ITU Convention or of the WATTC Regulations occurs, the ITU or WATTC members recover their freedom of action. The Satellites Conventions were adopted much later.

Moreover, as to all conventions, the application of EEC rules does not seem to affect the fulfilment of obligations of Member States *vis-à-vis* third countries. Article 234 does not protect obligations between EEC Member States entered into in international treaties. The purpose of Article 234 is to protect the right of third countries only and it is not intended to crystallize the acquired international treaty rights of Member States to the detriment of the EEC Treaty's objectives or of the Community interest. Finally, even if Article 234 (1) did apply, the Member States concerned would nevertheless be obliged to take all appropriate steps to eliminate incompatibility between their obligations *vis-à-vis* third countries and the EEC rules. This applies in particular where Member States acting collectively have the statutory possibility to modify the international convention in question as required, e.g. in the case of the Eutelsat Convention.

141. As to the WATTC Regulations, the relevant provisions of the Regulations in force from 9 December 1988 are flexible enough to give the parties the choice whether or not to implement them or how to implement them.

In any event, EEC Member States, by signing the Regulations, have made a joint declaration that they will apply them in accordance with their obligations under the EEC Treaty.

142. As to the International Telegraph and Telephone Consultative Committee (CCITT) recommendations, competition rules apply to them.

143. Members of the CCITT are, pursuant to Article 11 (2) of the International Telecommunications Convention, 'administrations' of the Members of the ITU and recognized private operating agencies ('RPOAs') which so request with the approval of the ITU members which have recognized them. Unlike the members of the ITU or the Administrative Conferences which are States, the members of the CCITT are telecommunications administrations and RPOAs. Telecommunications administrations are defined in Annex 2 to the International Telecommunications Conventions as 'tout service ou département gouvernemental responsable des mesures à prendre pour exécuter les obligations de la Convention Internationale des télécommunications et des règlements' [any government service or department responsible for the measures to be taken to fulfil the obligations laid down in the International Convention on Telecommunications and Regulations]. The CCITT meetings are in fact attended by TOs. Article 11 (2) of the International Telecommunications Convention clearly provides that telecommunications administrations and RPOAs are members of the CCITT by themselves. The fact that, because of the ongoing process of separation of the regulatory functions from the business activity, some national authorities participate in the CCITT is not in contradiction with the nature of undertakings of other members. Moreover, even if the CCITT membership became governmental as a result of the separation of regulatory and operational activities of the telecommunications administrations, Article 90 in asso-

(*) Decision 88/589/EEC, OJ No L 52, 24. 2. 1988, p. 51.

(**) 'The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand and one or more third countries on the other, shall not be affected by the provisions of this Treaty. To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude ....'

ciation with Article 85 could still apply either against the State measures implementing the CCITT recommendations and the recommendations themselves on the basis of Article 90 (1), or if there is no such national implementing measure, directly against the telecommunications organizations which followed the recommendation (*).

144. In the Commission's view, the CCITT recommendations are adopted, *inter alia*, by undertakings. Such CCITT recommendations, although they are not legally binding, are agreements between undertakings or decisions by an association of undertakings. In any event, according to the case law of the Commission and the European Court of Justice (**) a statutory body entrusted with certain public functions and including some members appointed by the government of a Member State may be an 'association of undertakings' if it represents the trading interests of other members and takes decisions or makes agreements in pursuance of those interests.

The Commission draws attention to the fact that the application of certain provisions in the context of international conventions could result in infringements of the EEC competition rules:

— As to the WATTC Regulations, this is the case for the respective provisions for mutual agreement between TOs on the supply of international telecommunications services (Article 1 (5)), reserving the choice of telecommunications routes to the TOs (Article 3 (3) (3)), recommending practices equivalent to price agreements (Articles 6 (6) (1) (2)), and limiting the possibility of special arrangements to activities meeting needs within and/or between the territories of the Members concerned (Article 9) and only where existing arrangements cannot satisfactorily meet the relevant telecommunications needs (Opinion PL A).

— CCITT recommendations D1 and D2 as they stand at the date of the adoption of these guidelines could amount to a collective horizontal agreement on prices and other supply conditions of international leased lines to the extent that they lead to a coordination of sales policies between TOs and therefore limit competition between them. This was indicated by the Commission in a CCITT meeting on 23 May 1990. The Commission reserves the right to examine the compatibility of other recommendations with Article 85.

— The agreements between TOs concluded in the context of the Conventions on Satellites are likely to limit competition contrary to Article 85 and/or 86 on the grounds set out in paragraphs 126 to 128 above.

(*) See Commission Decision 87/3/EEC ENI/Montedison, OJ No L 5, 7. 1. 1987, p. 13.

(**) See Pabst & Richarz/BNIA, OJ No L 231, 21. 8. 1976, p. 24, AROW/BNIC, OJ No L 379, 31. 12. 1982, p. 1, and Case 123/83 BNIC v. Clair (1985) ECR 391.

II/71

DOCUMENTS ON THE APPLICATION OF THE COMPETITION RULES TO THE TELECOMMUNICATIONS SECTOR

II Commission Action in Individual Cases

A Commission Decisions under Council Regulation No. 17/62 (Articles 85 and 86)

II/73

II/74

COMMISSION DECISION

of 10 December 1982

relating to a proceeding under Article 86 of the EEC Treaty (IV/29877 — British Telecommunications)

(Only the English text is authentic)

(82/861/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

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 Greece, and in particular Article 3 thereof,

Having regard to an application lodged under Article 3 of Council Regulation No 17 on 22 June 1979 by Telespeed Services Limited against the United Kingdom Post Office,

Having regard to the decision of 18 April 1980 to open proceedings in this case,

Having given the United Kingdom Post Office the opportunity to make known its views on the objections raised by the Commission, in accordance with Article 19 of Council Regulation No 17, and with Commission Regulation No 99/63/EEC of 25 July 1963 (2) on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17,

After consultation with the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

A. British Telecommunications

British Telecommunications is a public corporation established under the Telecommunications Act 1981, an enactment of the United Kingdom Parliament.

British Telecommunications has, under the Telecommunications Act 1981, a statutory duty to provide telecommunication services and a statutory monopoly for the running of telecommunication systems throughout the United Kingdom.

(3) During most of the time in which the activities later described took place the telecommunication services now provided by British Telecommunications were provided by the United Kingdom Post Office under the Post Office Act 1969, also an enactment of the United Kingdom Parliament. British Telecommunications assumed the responsibilities of the United Kingdom Post Office for telecommunication services from 1 October 1981 under the Telecommunications Act 1981.

(4) The enactment of the Telecommunications Act 1981 formed part of the measures taken by the United Kingdom Government with the intention of encouraging competition in the telecommunication field.

(5) Both British Telecommunications and the United Kingdom Post Office are hereinafter referred to as 'BT'.

B. The International Telecommunication Convention and Union

(6) All EEC Member States are among the signatories of the International Telecommunication Convention (ITC) which lays down the purposes and structure of the International Telecommunication Union (ITU). The International Telegraph and Telephone Consultative Committee (CCITT) is one of the permanent organs of the ITU.

(7) Under Article 11.1 (2) ITC the duties of the CCITT shall be to study technical, operating and tariff questions relating to telegraphy and telephony and to issue recommendations on them. Members of the CCITT are the telecommunication administrations of all ITU member countries, as of right, and any recognized private operating agency which, with the approval of the member country which has recognized it, expresses a desire to participate in the work of the Committee. BT is such a recognized private operating agency.

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No 127, 20. 8. 1963, p. 2268/63.

II/75

(8) Under Article 44 ITC the Members are bound to abide by the provisions of the Convention and the Administrative Regulations and to take the necessary steps to impose the observance of these provisions upon private operating agencies authorized by them to establish and operate telecommunications and which engage in international services. Article 1.1 (2) of both Telegraph Regulations and Telephone Regulations provides that 'In implementing the principles of the Regulations, Administrations (or recognized private operating agencies) should comply with the CCITT Recommendations, including any Instructions forming part of those Recommendations, on any matters not covered by the Regulations.'

C. Retransmission of telephone and telex messages in the UK

(9) Charges, terms and conditions relating to telecommunication services in the United Kingdom were and are laid down by BT in 'Schemes', made under Section 28 of the Post Office Act 1969 and Section 21 of the Telecommunications Act 1981 respectively.

(a) *Telex Scheme 1971*

(10) The Post Office Telex Scheme 1971 contained the following provision which, in effect, prohibited the operation of commercial message-forwarding agencies:

'21. (2) Except as otherwise provided by any licence granted by the Post Office to the *(telex)* subscriber or with the consent in writing of the Post Office, neither the subscriber nor any other person shall receive any consideration either directly or indirectly in return for or otherwise howsoever on account of the use of the subscriber's installation by or on behalf of any person other than the subscriber (...)'.

(b) *Schemes T7/1975 and T1/1976*

(11) In recognition of the fact that message-forwarding agencies can perform a useful service for United Kingdom customers, the above provision was replaced in the Post Office Telex Scheme 1975 (Scheme T7/1975) by paragraph 43 (2) which provided *inter alia* that 'A subscriber may use his *(telex)* installation for the purpose of sending and receiving messages on behalf of other persons and may allow other persons to use his installation for the purpose of sending and receiving messages on their own behalf'. One condition laid down at paragraph 43 (2) (b) (iii) was that 'any amount charged by a subscriber in respect of the receipt and delivery of a message which both originates and is for delivery outside the United Kingdom or the Isle of Man shall not be such that it enables the originator of the message to send it more cheaply than if he had sent it by means of a telex call made by him directly to the person for whom the message was ultimately intended'.

(12) The above provisions were reiterated under the heading 'Restriction on assignment of telex service and use of telex installation', in Paragraph 70 (2) of the Post Office Telecommunication Scheme 1976 (Scheme T1/1976), which was in operation from 1 June 1976 to 20 January 1978.

(13) Concerning paragraph 43 (2) (b) (iii) of Scheme T7/1975, subsequently renumbered 70 (2) (b) (iii) in Scheme T1/1976, BT found it administratively impossible to monitor the situation to ensure that, for any telex traffic between third countries, message-forwarding agencies did not undercut the charges of other Administrations.

(c) *Message-forwarding agencies*

(14) Taking advantage of telecommunication tariffs which are lower, especially in relations with North America, from the UK than from some countries in mainland Europe (e.g. because of differences in tariff policies, such as lower rentals and higher call charges, and in the real costs), and of currency fluctuations which at some times made these UK tariffs still more attractive, a number of communications bureaux operating in the UK have in the last decade entered the business of retransmitting messages originating and for delivery outside the UK. There are approximately 100 message-forwarding agencies in the UK, 11 of which were believed to be engaged in the business of relaying traffic between third countries at the time of publishing Scheme T1/1978 (15 below). These message-forwarding agencies

(i) offer to receive messages by telex from persons or other telex forwarding agencies in one foreign country and send the messages on by telex to persons or other telex forwarding agencies in other countries. This service may be particularly useful when the same message (such as a detailed specification of goods for which tenders are invited) is required to be sent to a large number of foreign destinations; or

II/76

(ii) receive their customers' messages in data form by means of the public telephone system from computers abroad (mainly from the United States) and send them onwards to other countries as data to be received at their destination in visual form, either as printed out messages or as pictures on a visual display unit.

(d) *CCITT Recommendation F 60, Section 3.5*

(15) In October 1976 the CCITT passed Recommendation F 60 on Telex Operating Methods, whose Section 3.5 entitled 'Restriction on the use of a telex station' contains the following:

'Administrations and recognized private operating agencies should refuse to make the telex service available to a telegraph forwarding agency which is known to be organized for the purpose of sending or receiving telegrams for retransmission by telegraphy with a view to evading the full charges due for the complete route'. 'Administrations shall refuse to provide international telex service to a customer whose activity would be regarded as an infringement of the functions of an Administration in providing a public telecommunication service'.

(e) *Scheme T1/1978*

(16) In direct or indirect implementation of CCITT Recommendation F 60, Section 3.5, BT in Post Office Telecommunication Scheme (Scheme T1/1978) which came into operation on 21 January 1978, amended Scheme T1/1976 as follows (excerpts):

'44 (2) (a) unless the Post Office otherwise consents in writing, a *(telephone)* subscriber who is engaged in the business of sending and receiving messages on behalf of other persons by means of his telephone installation and/or allowing other persons to use his telephone installation for the purpose of sending and receiving messages on their own behalf shall not so use or allow his telephone installation to be so used for the purpose of sending to or receiving from a place outside the United Kingdom and the Isle of Man any message intended for ultimate reception in visual form'.

'70 (2) (b) any *(telex)* message which originates outside the United Kingdom and the Isle of Man shall not be sent onwards to a destination outside the United Kingdom and the Isle of Man;

(c) any message which originates outside the United Kingdom and the Isle of Man shall not be sent onwards to a destination within the United Kingdom and the Isle of Man unless it is received as a telex call made directly to the subscriber's installation by the originator of the message. (. . .);

(d) any message which originates in the United Kingdom or the Isle of Man shall not be sent onwards to a destination outside the United Kingdom and the Isle of Man unless it is sent as a telex call made from the subscriber's installation directly to the person for whom the message is ultimately intended by the originator of the message'.

(17) In August 1978 BT sent a standard letter to all communications bureau operators in the United Kingdom calling their attention to the above amendments and explaining that they mean, in effect, that private agency operators are prohibited from providing international services for their customers whereby:

— messages in data form are sent or received internationally by telephone and then converted into telecommunication messages for reception in telex, facsimile, written or other visual form,

— telex messages are forwarded in transit between places outside the United Kingdom and the Isle of Man,

— telex messages are sent or received via other message-forwarding agencies.

(18) BT also explained in this standard letter that 'Indeed, it is because we have managed to keep our international telex charges so low — much lower than in other countries — that it is attractive for other countries to send their telex messages through agencies in this country. (. . .). The activities of agencies which attract telex messages from other countries to transmit them from the United Kingdom to a third country, cause a serious loss of revenue to other countries and break the international agreements on which world cooperation in telecommunications is founded. They thus put at risk the arrangements we have been able to negotiate with other countries, and so endanger the low tariffs we at present charge to our own customers in the United Kingdom'.

II/77

(19) BT has written a further letter to those agencies believed to be forwarding traffic between telex subscribers in third countries. A written assurance was requested, stating that they understood and would comply with the new provisions. Nine of the 12 recipients gave such an assurance.

(20) BT has stated to the Commission that it had been under pressure from certain other national telecommunication authorities to prevent retransmission of telex messages between third countries by the UK message-forwarding agencies and that it had introduced the restrictions in order to, in its view, meet its international obligations to other administrations.

(21) Paragraph 11 (1) of Scheme T1/1976 provides that if a subscriber 'fails to observe or perform any of the provisions of the Scheme, or any obligation on his part arising thereunder, the Post Office may (without prejudice to any other right or remedy):

(a) without notice, temporarily disconnect any installation or any part of an installation;

(b) summarily cease to provide telecommunication service after giving notice of its intention to terminate service provided under the Scheme.'

BT maintains that it has the right to disconnect the facilities of those agencies which persist in ignoring the Scheme restrictions but it has not sought to enforce the restrictions by taking any such action.

(22) On 22 June 1979, Telespeed Services Limited, one of the UK message-forwarding agencies concerned by the restrictions introduced by BT on 21 January 1978, lodged an application under Article 3 of Regulation No 17 requesting the Commission to find that Articles 85 (1) or 86 of the EEC Treaty had been infringed and to require BT to bring such infringement to an end. The complainant submits that the actual effect of the BT restriction is to prohibit retransmission by a UK telex operator of messages originating outside the UK to destinations outside the UK even where there is no question of lower rates being charged or available. To the best of the complainant's knowledge its charges are the same as or higher than those ruling in the countries of its customers within the EEC.

(23) In November 1981, BT revoked and replaced all previous schemes by the Telecommunication Scheme 1981. The provisions of paragraphs 44 (2) (a) and 70 (2) (b) of Scheme T1/1978 were carried into the 1981 Scheme and re-numbered paragraphs 51 (2) (a) and 82 (2) (a) respectively.

(24) On 22 October 1982, BT wrote to the Commission as follows: 'it is now accepted that, in the context of this case, the CCITT Recommendation directly conflicts with Articles 85 (1) and 86 of the Treaty of Rome. Consequently, British Telecommunications has unilaterally decided to withdraw the particular restrictions at issue and will amend the Telecommunication Scheme accordingly and advise other administrations and UK message-forwarding agencies of this decision'.

II. LEGAL ASSESSMENT

A. Applicability of Article 86 of the EEC Treaty

Article 86 of the EEC Treaty prohibits as incompatible with the common market any abuse by one or more undertakings of a dominant position within the common market, or in a substantial part of it, in so far as such abuse may affect trade between Member States.

(a) *Undertaking in a dominant position*

(25) The United Kingdom Post Office and British Telecommunications are public corporations and economic entities carrying on activities of an economic nature. As such they are undertakings within the meaning of Article 86 of the EEC Treaty.

(26) British Telecommunications has a statutory monopoly, under the Telecommunications Act 1981, for the running of telecommunication systems throughout the United Kingdom and the Isle of Man. British Telecommunications therefore holds a dominant position in the United Kingdom, which constitutes a substantial part of the common market, for the provision of telex and telephone systems.

(27) Under the Telecommunications Act 1981 British Telecommunications became the legal successor of the United Kingdom Post Office in respect of the statutory monopoly for the running of telecommunication systems throughout the United Kingdom and of all rights and liabilities thereunder. British Telecommunications is therefore the successor to the United Kingdom Post Office for the purposes of this proceeding.

II/78

(b) *Abuse*

(28) Restrictions imposed by an undertaking in a dominant position, even under a power conferred on it by authority, may constitute an abuse of such a dominant position.

(29) Restrictions on the provision on behalf of third parties of telephone and telex services and on the use of telephone and telex installations in the United Kingdom are laid down by BT in 'Schemes' made under Section 28 of the Post Office Act 1969 and Section 21 of the Telecommunications Act 1981 respectively. Under Schemes T7/1975 and T1/1976, subscribers were free to use their installations for the purpose of sending or receiving messages on behalf of third parties.

(30) Until 20 January 1978, however, paragraph 43 (2) (b) (iii) of Scheme T7/1975 and paragraph 70 (2) (b) (iii) of Scheme T1/1976 provided that where a subscriber relayed a telex message both originating and for delivery outside the United Kingdom, the amount he charged should not be such as to enable the originator of the message to send it more cheaply than if he had sent it directly. In so far as it applied to the retransmission of telex messages originating in another EEC Member State for delivery to any country outside the United Kingdom, or originating in any country outside the United Kingdom for delivery to another EEC Member State, this provision was an abuse under Article 86 EEC as it

(i) limited message-forwarding agencies' activities to the prejudice of customers located in other EEC Member States;

(ii) applied dissimilar conditions to equivalent transactions with message-forwarding agencies by imposing a condition for the continuation of services that, of all telex messages submitted to BT, those for onward transmission outside the United Kingdom must either originate in the United Kingdom or be charged for by the agencies at a price that ensured that they were not cheaper for the sender than if he had sent them directly. This placed the agencies at a competitive disadvantage *vis-à-vis* the national telecommunication authorities and agencies in other Member States not subject to such restrictions; and

(iii) made the use of telephone and telex installations subject to the acceptance by message-forwarding agencies of an obligation to charge prices that had no connection with the type and quality of the telecommunication services provided by them but rather arose out of BT's desire to protect the revenues of other national telecommunication authorities.

It may be noted, however, that the above provision of Schemes T7/1975 and T1/1976 were never enforced (13 above) and were finally deleted on 11 January 1978 with effect on 20 January 1978.

(31) Scheme T1/1978, amending the principal Scheme T1/1976, came into operation on 21 January 1978. The new provisions of paragraphs 44 (2) (a) and 70 (2) (b), which were later carried into the 1981 Scheme as paragraphs 51 (2) (a) and 82 (2) (a) respectively, in effect prohibit message-forwarding agencies in the United Kingdom from retransmitting to destinations outside the United Kingdom

(i) messages intended for ultimate reception in visual form (such as telex, facsimile, printout or picture on a visual display unit) and received in data form via the telephone system from computers abroad; and

(ii) telex messages originating outside the United Kingdom.

(32) In so far as they apply to telephone and telex messages originating in another EEC Member State for delivery to any country outside the United Kingdom or originating in any country outside the United Kingdom for delivery to another EEC Member State, such prohibitions are an abuse under Article 86 of the EEC Treaty as they:

(i) limit the activities of United Kingdom telephone and telex subscribers acting as message-forwarding agencies to the prejudice of customers in other EEC Member States; and

(ii) make the use of telephone and telex installations subject to obligations which have no connection with the assignment of telephone or telex services.

II/79

(33) BT contends that it would not be an infringement of Article 86 of the EEC Treaty if BT were to prohibit telex forwarding agencies altogether in order to reserve to itself, in accordance with its monopoly, the sole right of providing international services. Therefore, there can be no justification for holding that the lesser restrictions which it has imposed on the activities of such agencies is an abuse of a dominant position. The Commission doubts that this contention is correct since the scope of BT's monopoly in the relevant legislation is the exclusive privilege of running telecommunication systems not the offering of services making use of such systems. However, even assuming that the contention is correct then BT must exercise the powers granted to it under the statutory monopoly in accordance with the EEC rules on competition (see paragraph 41 *et seq.*).

(34) With regard to paragraph 32 (i) above, the new restriction laid down in paragraph 44 (2) (a) of Scheme T1/1978, which prohibits UK message-forwarding agencies from using their telephone lines for relaying telex and other visual messages between countries outside the United Kingdom, is an abuse under Article 86 (b) of the EEC Treaty as it both limits the development of a new market and the use of new technology to the prejudice of relay operators and their customers who are thus prevented from making more efficient use of existing telecommunication systems. The fact that in so doing the message-forwarding agencies are simply exploiting the tariff differentials existing between telex and telephone services provided by the telecommunication authorities is irrelevant. Even if this were to result in fewer telex messages, thereby providing savings in costs to the users, this would not put the entire international telex system at risk. The maintenance of obsolete systems through measures taken by an undertaking in a dominant position is an abuse under Article 86 (b) of the EEC Treaty in that it limits technical development to the prejudice of consumers.

(35) With regard to paragraph 32 (ii) above, the new restriction laid down in paragraph 70 (2) (b) of Scheme T1/1978 is an abuse under Article 86 of the EEC Treaty as it makes the provision and continued provision of telecommunication services subject to the acceptance of an obligation not to deal with certain equivalent telex traffic according to its origin. It is in no way technically necessary nor in commercial usage to treat such traffic differently and as such it has no connection with the provision of telecommunication services. Rather, the obligation again arose out of BT's desire to protect the revenues of other national telecommunication authorities.

(36) BT's contention that the logical consequence of such a view would be that it would not be free to restrict the use which customers could make of its telecommunication systems can be seen to be unfounded. Any such restrictions imposed by BT in the form of supplementary obligations should fall outside the terms of Article 86 and in this case they have been shown not to do so. As to BT's contention that they do not have to tolerate competition in services which its monopoly was intended to cover, see paragraph 33 above.

(c) *Effect on interstate trade*

(37) The prohibitions imposed by BT on message-forwarding agencies in the United Kingdom against the forwarding of messages originating from or for delivery outside the United Kingdom may affect trade between Member States in so far as the countries of destination or origin of such messages are Member States of the European Community.

(38) Although the prohibitions relate to the use of telecommunication installations within the United Kingdom, they directly affect the provision of services by message-forwarding agencies in the United Kingdom to third parties located in other Member States, as such services may be provided only in direct relations (i.e. not those in transit) between the United Kingdom and other Member States and no longer in relations between Member States other than the United Kingdom or between those Member States and countries outside the European Community.

(39) Thus, there is a clear restriction on trade between Member States as the prohibition restricts message-forwarding agencies, in carrying on their business, from providing certain services for customers situated in other Member States. The Commission was informed by the complainant that of the 13 000 to 14 000 messages it received from abroad annually between 1976 and 1979 for onward transmission to destinations abroad 85 % originated from EEC countries and 85 % were destined for EEC countries.

II/80

(40) BT considers that it has the right to disconnect those agencies who persist in ignoring the prohibition and this would, of course, have the effect of preventing services of all kinds between Member States being offered by message-forwarding agencies. The complainant has further informed the Commission that it has not sought to develop the provision of these services, for which it saw a considerable potential, as a result of the threat of disconnection by BT. The prohibition has thus also affected the development of such trade between Member States.

B. Applicability of Article 90 (2) of the EEC Treaty

Article 90 (2) of the EEC Treaty provides that 'Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community'.

(41) Under the Post Office Act 1969 and the Telecommunications Act 1981, BT has been entrusted with the operation of services of general economic interest, namely the provision of telecommunication systems throughout the United Kingdom. The application of the Treaty rules on competition to BT would not and does not obstruct the performance of its duties in an efficient and economic way. For BT to be exempted from compliance with the rules on competition it is not sufficient that such compliance would make performance of its duties more complicated.

(42) BT has claimed, but not explained how, it would be obstructed in the performance of its duties. Indeed it would be in BT's interests to allow such traffic. Even if BT were to experience difficulties with other national telecommunication authorities for not preventing message-forwarding agencies in the United Kingdom from undercutting telex tariffs applied in other countries, such a situation would not 'obstruct' the performance of BT's particular task.

(43) The Commission accepts, in its broadest sense, the view held by BT that international cooperation and the honouring of international commitments are essential features in the provision of international communications in an efficient and economic way. However, this cooperation should not go so far as to violate the Treaty rules of competition.

(44) For the reasons set out above the restrictions on the use of telex and telephone facilities and services by BT constitute infringements of Article 86 of the EEC Treaty. BT should therefore be required to terminate any of the restrictions that are still in operation.

(45) Notwithstanding these infringements, the Commission does not consider that a fine should be imposed on BT in view of the special circumstances of the case and of the matters referred to in paragraph 20 above, and because BT did not enforce the restrictions by disconnecting the facilities of the message-forwarding agencies.

HAS ADOPTED THIS DECISION:

Article 1

The following provisions of the relevant Telecommunication Schemes of the United Kingdom Post Office and British Telecommunications constitute infringements of Article 86 of the Treaty establishing the European Economic Community:

1. Scheme T7/1975, paragraph 43 (2) (b) (iii)
2. Scheme T1/1976, paragraph 70 (2) (b) (iii)
3. Scheme T1/1978, paragraphs 44 (2) (a) and 70 (2) (b)
4. Scheme/1981, paragraphs 51 (2) (a) and 82 (2) (a).

Article 2

British Telecommunications shall within two months of the date of notification of this Decision bring the infringements found in Article 1 to an end in so far as those infringements have not already been brought to an end.

Article 3

This Decision is addressed to British Telecommunications, 2-12 Gresham Street, UK-London EC2V 7AG.

Done at Brussels, 10 December 1982.

For the Commission

Frans ANDRIESSEN

Member of the Commission

II/81

II/82

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 12 January 1990

relating to a proceeding under Article 85 of the EEC Treaty

(IV/32.006 — Alcatel Espace/ANT Nachrichtentechnik)

(Only the French and German texts are authentic)

(90/46/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

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 Spain and Portugal, and in particular Articles 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 28 July 1986 by Alcatel Espace SA, Courbevoie, and ANT Nachrichtentechnik GmbH, Backnang, concerning the agreement between them signed on 11 February 1986,

Having regard to the summary of the application and notification published (2) pursuant to Article 19 (3) of Regulation No 17,

After consultation with the Advisory Committee for Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

A. Introduction

(1) On 28 July 1986 Alcatel Espace SA, France (hereinafter ATES) and ANT Nachrichtentechnik GmbH, Germany (hereinafter ANT) notified an agreement to the Commission.

(2) The purpose of the agreement is to promote research and development (R&D) of certain space electronic equipment in the field of civil radio communications and broadcasting satellites and data transmission to, from and between satellites and/or space vehicles throughout the world, as well as to promote joint exploitation of the results and a degree of joint marketing.

(3) The object of the notification was to apply for negative clearance or alternatively to qualify for exemption under Article 85 (3) of the EEC Treaty, pursuant to Articles 2 and 4 of Regulation No 17.

B. The parties

(4) ATES is directly controlled by Alcatel Cit (France), a subsidiary of Alcatel NV the world No 2 manufacturer of communication equipment and systems. ATES is the principal manufacturer, in the Alcatel Group, of space electronic equipment carried on board satellites and/or space vehicles. The 1986 turnover of ATES was FF 813 million (ECU 120 million). During the same period ATES's turnover in the field covered by the agreement was FF 481,5 million (ECU 71 million).

(5) ANT is one of the leading companies in Germany in the field of telecommunication technology. The shareholders of ANT are Robert Bosch GmbH (83 %) and Allianz Versicherungs AG (17 %). In 1986, ANT achieved an overall turnover of DM 1 256 million (ECU 590 million), and during the

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No C 179, 15. 7. 1989, p. 9.

same period the turnover in the field covered by the agreement was DM 124 million (ECU 58 million).

C. The agreement

(6) The main provisions of the agreement are as follows:

(a) The *field* covered by the agreement is the space segment of communication systems using satellites and/or space vehicles and/or communication subsystems operating on board satellites and/or space vehicles for civilian use in the area of:

— civil satellite radio communication services, and direct broadcast television services,

— data transmission to, from and between satellites and/or space vehicles for the purpose of telemetry, tracking and command, observation or others.

(b) The parties will cooperate in research and development activities in the field, in order to avoid duplication of R&D effort, and will combine their resources for the exploitation of the results through rationalization of manufacturing, servicing and testing of such systems, as well as through cooperation in the bidding and negotiations for contracts in the field. This will normally be achieved by allocation of the development and production of each item of equipment to one or other party. The agreement contains guidelines for the allocation of the various items of equipment between the parties. However, given the large variations in the equipment carried on each individual satellite (or small set of satellites), these guidelines are supplemented by a procedure for allocating the work in any particular satellite project.

Nothing in the agreement prohibits either party from engaging in any activity outside the scope of the agreement which is not incompatible with the parties' obligations.

(c) *Procedures for the cooperation*

(i) Each party will normally make its best effort to specify satellite payloads and subsystems for which it is responsible in such a way that equipment developed by the other party can be used in the best possible conditions.

(ii) Both parties will regularly inform each other of their R&D programme regarding equipment in the field.

(iii) After final allocation, by mutual agreement, to one party of certain equipment, the procedure will be as follows:

— before commencing development of such equipment each party shall consult the other about the objectives to be achieved, in particular performance cost and delivery schedules,

— the developing party will be responsible for R&D funding,

— the developing party will be responsible for R&D activities and production of its allocated equipment, but will fully inform the other party of the results of its R&D,

— if the developing party subcontracts parts of the R&D or production of its allocated equipment, it will give priority to the other party,

— the other party will not independently develop the same equipment,

— the other party will procure equipment from the developing party. If the developing party's proposal does not meet the requirements in terms of performance, price and delivery schedule, competing proposals may be requested from other suppliers subject to prior consultation and close cooperation.

(d) Relevant patents owned by either party, and patents which a party is entitled to sublicense, will be communicated to the other party and the latter will have a royalty-free and non-exclusive licence to perform its activities in the field.

In the case of inventions conceived jointly by employees of both parties, patent applications for such inventions will be filed in the name of both parties.

(e) Each party agrees to keep secret the confidential information it receives from the other party, and to use and disclose it only for the purposes intended under the agreement. On expiry of the agreement, each party will return its copies of all confidential information it received from the other party. The confidentiality obligations will end five years after expiry of the agreement.

(f) Meetings between appropriate personnel of both parties will take place to discuss matters such as technical aspects, marketing and sales.

II/84

In addition, the parties will inform each other regularly of outside developments of a technical or commercial nature that have come to their attention and which may be pertinent to their R&D activities in the field or the exploitation of the results.

(g) (i) *Executive committee*

Each of the parties will appoint three members to an executive committee. The decisions of the executive committee will be taken unanimously and will bind both parties. The executive committee will be responsible for establishing general policies and guidelines relative to performance of the agreement and its future evolution.

(ii) *Steering committee*

The steering committee will also consist of three members representing each party. Its decisions must be taken unanimously and will be binding. If no unanimous decision can be reached, the matter will be submitted to the executive committee.

The role of the steering committee is to take — in compliance with execution committee guidelines — main decisions relating to the marketing, technical and industrial policies. Such decisions will include determination of projects and relevant strategies, cooperation in marketing activities, execution of cooperation in R&D and production activities, and decisions on sharing of equipment.

(h) *Exploitation of results*

The exploitation of results can be carried out in three ways:

(i) jointly marketed projects — which are activities where both parties manufacture and supply as the result of a successful bid submitted to a customer by both parties acting as co-contractors;

(ii) individually marketed projects — which are activities where only one party acts as main contractor/supplier;

(iii) independently marketed projects — which are activities where only one party manufactures and supplies equipment of its own manufacture.

In each case of jointly or individually marketed projects, including calls for tenders, the strategy and the determination of which party will be the main contractor will be decided by the steering committee.

The party acting as main contractor in any individually marketed projects will ensure as far as possible that the other party will be the subcontractor/supplier for all equipment concerned by the agreement, which the main contractor does not manufacture.

Either party remains free to pursue independently marketed projects.

Each party agrees to supply to the other party any equipment and spare parts thereof which the other party may request.

(i) The agreement has an initial term of five years. It will be automatically extended for three-year periods, unless terminated by one party giving at least one year's written notice.

After the notice of termination of the agreement, licence rights under patents may be extended by request of the licensed party, subject to the parties agreeing upon reasonable and non-discriminatory conditions.

(j) Should negotiation fail to resolve any dispute which may arise, the parties agree that it be finally settled by arbitration.

(k) Appendix 1 to the agreement lists and recommends a division of the following equipment between the parties:

— receiver (RCVR),

— input multiplexer (IMUX),

— channel amplifier (CAMP),

— high power amplifier (HPA),

— output multiplexer (OMUX),

— TTC transpondet.

This equipment covers only a relatively small part of the quipment covered by the agreement, and none of it can be considered as a final product, which are complete satellites. The listed devices are incorporated in subsystems such as repeater subsystems, tracking, telemetry and command subsystems. None of the equipment listed above can be used in areas outside space.

II/85

D. The product and the market

Nature of demand

(7) The markets for satellites and their components are unusual in that each satellite (or small set of satellites) is a unique project requiring newly developed, or at least highly adapted, components assembled to an individual design dependent on the particular requirements of the customer. This, when combined with the high technology involved, normally implies that each new satellite project requires a substantial input of R&D, which is closely integrated with the production of the satellite and its components, each of which is close to being a prototype. Moreover satellites obviously need to be robust and reliable, but as lightweight as possible. These factors, taken together, imply that satellite customers and their prime contractors insist on a very high degree of cooperation with all the parties involved in the development of any particular satellite.

Market shares and competitive position

(8) There are a large number of competitors for manufacturing and sales of the equipment covered by the agreement: about 18 in the EEC, three in Sweden, six in the United States, two in Canada and three in Japan.

The table gives estimates of the worldwide space related turnover of the principal satellite producers in Europe and the rest of the world:

(million ecus)

Non European	
Hughes	[...](*)
General Electric	[...]
European	
British Aerospace	[...]
Matra	[...]
Aerospatiale	[...]
MBB	[...]
Selenia Spazio	[...]
Alcatel Espace	[...]
Marconi	[...]
Aeritalia	[...]
ANT	[...]

As can be seen from these figures, Alcatel and ANT's combined turnover in this area is less than several other European manufacturers and is many times less than that of some non-European manufacturers.

(9) Even if the relevant market is narrowly defined as the items covered by the field of cooperation, and is geographically restricted to EC-based customers, the parties' combined market share is under 20 %. If account is taken of the worldwide market, or of the overall satellite market, their combined market share is much lower.

Moreover, there is thought to be a substantial 'learning curve' for all aspects of satellite production, so that the more similar space projets a firm is involved with (both civil and military), the more effectively it can develop and produce new satellites or their components. This effect particularly benefits the United States space industry, where the number of space projects is higher than in Europe, the overall budgets allocated to space activities in the United States and Europe in 1986 being as follows:

(billion US $)

USA	
— Department of Defense	14
— NASA	7
Total	21
Europe	
— National budgets	0,84
— European Space Agency (ESA)	1,36
Total	2,20

(Source: Euroconsult.)

Thus, taking advantage of their strong worldwide positions and of the size of their domestic market, certain non-European space manufacturers can afford R&D budgets and/or financial and commercial resources far exceeding those of their European competitors and can therefore cover a much wider range of activities in space electronic equipment, subsystems and systems.

This may explain why European manufacturers only compete at the subsytem level and at the equipment level, whilst other manufacturers compete at the full final product level, which naturally influences the structure of competition.

The share of the parties of the total cost of a satellite (launch excluded) may vary significantly from a very low percentage when their procurement is limited to a single device to, exceptionally, about half, if they are responsible for the whole payload of a telecommunications satellite.

For all these reasons, Community companies with only relatively small involvement in satellite

(*) In the published version of the Decision, some information has hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

II/86

technology find it difficult to compete with other larger non-European competitors.

These factors have allowed non-European competitors to win the contracts for a number of recent EC projects such as the Astra/SES and British Satellite Broadcasting direct broadcasting satellites.

The geographical market

(9) In view of the high prices of the final products, transport costs to the launch site are unimportant. So, except where legal restrictions or national purchasing preferences exist, Community (and other) satellite customers have no particular reason to buy from locally-based manufacturers.

The turnover of the parties in the field covered by the agreement is principally within the common market.

Legal restrictions

(10) The main legal restrictions existing on the market are as follows:

Cocom export control rules impose severe restrictions on space activities.

Further restrictions result from the 'Buy American Act' and similar regulations.

In Europe, the ESA 'geographical return' principle requires a balance between the financial contribution of each member country to the Agency and industrial share of business awarded under space programmes to manufacturers of those countries.

Main customers

(11) The main customers for the final products are:

— national telecommunications administrations worldwide (PTTs),

— space agencies an organizations such as:
  — Intelsat,
  — Inmarsat,
  — Eutelsat,
  — NASA,
  — DLR, DARA,
  — ESA,
  — CNES,
  — ISRO (India),
  — Nasda (Japan),
  — CAST (China),
  — Eumetsat,

— direct broadcast satellite consortia such as:
  — Astra/SES,
  — British Satellite Broadcasting.

E. Observations from third parties

The Commission did not receive any observations from third parties following the publication of the notice required by Article 19 (3) of Regulation No 17.

II. LEGAL ASSESSMENT

A. Article 85 (1) of the EEC Treaty

(12) The agreement signed on 11 February 1986 between Alcatel Espace and ANT Nachrichtentechnik is an agreement between undertakings within the meaning of Article 85 (1) of the Treaty.

The object of the agreement is cooperation in research and development activities and the combination of the parties' resources for the exploitation of these results through rationalization of manufacturing, servicing and testing of such equipment as well as through cooperation in the bidding and negotiation for contracts.

(13) Both parties have their own research and development divisions which carry out research in the field covered by the agreement and, except for projects that are subject to special legal restrictions, the parties are competitors.

(14) The following provisions of the agreement have the object and/or effect of restricting competition within the common market.

1. The allocation of devices between the parties for research and development and production purposes, introduces a measure of specialization in that those devices will be developed by one partner only, the other being bound not to develop its own. Although the agreement provides for royalty-free and non-exclusive cross licensing of patent rights and for joint patents in some cases, the consequence is nonetheless a restriction of competition in R&D as now only one of the two parties will undertake any specific R&D project, where previously both might have done this. This is of some significance in an industry in which virtually every new order calls for significant new R&D investment.

2. The procedure under the agreement for the procurement by one party of the equipment manufactued by the other party, although leaving the former the possibility of using another supplier, tends to eliminate the competition of third party suppliers.

3. The provisions of the agreement concerning the exchange of information between the parties on all the marketing possibilities and those assigning to common committees the decision-making process relating to marketing, technical and industrial policies, are also restrictive of competition.

II/87

Although provision is made for independently marketed projects, a jointly agreed R&D programme and common committees responsible for marketing decisions will certainly result in the choice of one of the two joint marketing methods whenever possible, hence eliminating one supplier from the market in all these cases.

Consequently, the effect of the agreement is to alter the previously autonomous position of the parties relating to planning, financing, research and development, production and marketing of the equipment covered by the agreement, the parties no longer being able to act independently.

(15) The parties are incorporated in different Member States and aim under the agreement to market jointly worldwide, hence obviously also at Community level, so the agreement will necessarily have an appreciable effect on trade between Member States.

(16) The agreement therefore falls within the scope of Article 85 (1) of the Treaty.

B. Regulation (EEC) No 418/85

(17) Commission Regulation (EEC) No 418/85 (1) provides that the categories of research and development agreements the contents of which are in accordance with its conditions, are exempted by category from the prohibition of Article 85 (1) of the Treaty. Moreover, the exemption may be extended to certain agreements containing other restrictions by means of an 'opposition' procedure.

The agreement establishes a cooperation structure between the parties that goes beyond the object and scope of Regulation (EEC) No 418/85 and the parties have not asked the Commission to apply the 'opposition' procedure. In fact, the cooperation between the parties is not limited to R&D and exploitation of the results, but extends to the marketing of the products. So, when they have agreed to bid jointly for the contract for a satellite, they obviously must agree on the bid price and so are restricted in their determination of prices. This implies, *inter alia*, that the agreement falls within the scope of Article 6 (d) of that Regulation. Therefore, even though the parties' Community market share is below 20 %, Regulation (EEC) No 418/85 is not applicable to the present case, nor could it be extended to cover this case by means of the opposition procedure.

(1) OJ No L 53, 22. 2. 1985, p. 5.

C. Article 85 (3) of the EEC Treaty

(18) The jointly agreed programme of research and development by the contracting parties is such as to promote technical and economic progress.

The equipment covered by the agreement is technically very sophisticated. Its development is extremely costly and requires a high degree of skill. The efforts and risks involved, if they could be supported independently by the parties, would most certainly not lead to results as rapid, efficient and economic as those envisaged.

The level of individual R&D investment is intended to remain the same for each party, which will lead to a more efficient use of this expenditure. The degree of specialization for certain equipment achieved by both parties by means of this optimization of R&D investment will enable the parties to develop a wider product range of equipment to be offered to customers.

Under every space programme each piece of equipment is developed as a prototype and the rationalization expected will lead to the supply of higher-quality equipment at lower costs. Moreover, repetitive development experience, on equipment prototypes belonging to the same class, may result in the parties reaching a level of production comparable to that already achieved by other manufacturers of satellites. Given the number and importance of other competitors in this field it is most unlikely that the reduction of competition between these two competitors will allow them to increase their prices in any significant way.

The cooperation deriving from the agreement is excepted to lead not only to improved and more rapid technical solutions, but also to avoid duplication of R&D effort, hence allowing the achievement of cost savings.

The agreement thus contributes to promoting technical progress. This benefit can be excepted to be passed on to customers in terms of improved products.

(19) The agreement only imposes restrictions on the parties which are indispensable to the attainment of these objectives.

The field covered by the agreement and the objectives of the R&D programme are well defined. Nothing under the agreement prohibits either party from engaging in any activity outside the scope of the agreement or constitutes a commitment to a final apportionment of the equipment covered by the agreement.

II/83

The slight preference given to the other party in terms of subcontracting is merely an element of the somewhat complex arrangement for specialization of R&D and production.

The fact that each party is bound not do to develop certain equipment entrusted to the other flows from that very rationalization which is the reason for their expected improved results and increased competitiveness.

(20) The nature of demand in this case implies that the option of joint R&D, joint manufacturing, but separate marketing is not practical. This results from the close cooperation that is necessary between the customer, prime stallite contractor and subcontractors (such as the parties). Customers and their prime contractors insist on knowing, in great detail, who has manufactured which items, and all the relevant technical detail as there is normally no way of repairing a satellite once in orbit. Competition normally takes place by customers' calling for tenders which are then submitted by consortia formed on a case-by-case basis. If separate marketing were attempted, then in any project for which both parties wished to bid, each party would have, at the same time, to promote its own package, and to assist the other in promoting that party's rival package to the final customer, either within one consortium or as part of rival consortia. Thus the same technical experts would have, twice over, to describe and promote an identical technical package to the same customer. In this context the customer may have doubts as to whether the two parties, having failed to cooperate commercially on a joint bid, could in fact successfully cooperate technically. This might lead them to buy elsewhere. This implies that, in this particular case, the benefits of joint R&D and joint manufacture can only be achieved if they are combined with a degree of joint marketing.

Moreover, the agreement allows for independent actions (independently marketed projects) and/or usual contractual schemes of relations, e.g. co-contracting (jointly marketed projects), subcontracting and/or purchasing (individually marketed projects). Competitive conditions in terms of performance, price and delivery schedules are required for procurement by and between the parties who are allowed to consider competing proposals from third parties and to purchase from them.

In the case of independently marketed projects, which either party is free to pursue, the party which did not develop an item of equipment can obtain it either by buying it from the developing party, or by procuring it from third parties who offer better conditions in terms of performance, price and delivery schedules.

The above implies that where, exceptionally, separate marketing is a viable option, the parties may choose it.

(21) The parties' market share, however defined, is not high, and there are many other large manufacturers both within the Community and elsewhere in the world who are active or potential competitors in the common market. Some of these have a larger range of products and far larger sales than the parties. Thus the agreement, on its own, could not allow the parties to eliminate competition in the common market for these products.

(22) Accordingly, all the conditions set out in Article 85 (3) of the EEC Treaty are fulfilled.

D. Article 8 of Regulation No 17

(23) Pursuant to Article 8 (1) of Regulation No 17, a decision in application of Article 85 (3) of the Treaty is to be issued for a specified period and conditions and obligations may be attached thereto.

(24) The agreement can be authorized under Article 85 (3) from the date of notification, namely 28 July 1986, and until termination of the agreement, but in any case not later than 31 December 1996.

(25) The conditions for exemption are fulfilled for the stated period, in the light of the special circumstances in this case.

(26) The exemption relates solely to the notified agreement, and does not cover any extensions in the scope of the agreement. In this case, the structure necessary to obtain the benefits of R&D cooperation and manufacturing specialization requires a much higher degree of coordination between the parties than would be acceptable in more usual specialization or R&D cooperation agreement, and in this respect may be closer to the degree of coordination achieved in a joint venture.

This makes it necessary for the Commission to monitor whether this agreement, in combination with other joint actions by the parties, may lead to a substantial reduction of competition, as such a reduction might imply that the conditions necessary for an exemption would no longer be valid. Accordingly this Decision must be conditional on

II/89

the parties promptly informing the Commission of the conclusion of any agreement or contract which modifies, replaces, or cancels the notified agreement; or any important joint activity by the parties relating to space electronic equipment outside the terms of the notified agreement,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 85 (3) of the EEC Treaty, the provisions of Article 85 (1) are hereby declared inapplicable to the agreement signed on 11 February 1986 between Alcatel Espace SA and ANT Nachrichtentechnik GmbH, and notified on 28 July 1986.

Article 2

The following obligation is attached to the declaration in Article 1:

— the parties shall inform the Commission without delay of contracts or agreements concluded between themselves by which the notified Agreement is modified, replaced or cancelled,

— each party shall further inform the Commission of any other contracts or agreements it concludes, either with third parties or with the other party, which relate to joint activities in the field of electronic space equipment, provided such contracts or agreements relate to major business issues (in volume or in strategic importance) and cannot be considered cooperation in respect of single projects.

Article 3

This Decision shall apply with effect from 28 July 1986 and shall apply until 31 December 1996.

Article 4

This Decision is addressed to:

1. Alcatel Espace SA, 11 avenue Dubonnet, F-92107 Courbevoie.
2. ANT Nachrichtentechnik GmbH, Gerberstraße 33, D-7150 Backnang.

Done at Brussels, 12 January 1990.

For the Commission

Leon BRITTAN

Vice-President

COMMISSION DECISION

of 27 July 1990

relating to a proceeding under Article 85 of the EEC Treaty

(IV/32.688 — Konsortium ECR 900)

(Only the English, Dutch and German texts are authentic)

(90/446/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

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 Spain and Portugal, and in particular Article 2 thereof,

Having regard to the notification of a cooperation agreement on 7. April 1988 by the firms AEG Aktiengesellschaft, Alcatel NV and Oy Nokia AB,

Having published a summary of the notification (2) pursuant to Article 19 (3) of Regulation No 17,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

A. Subject of the notification

On 7 April 1988, AEG Aktiengesellschaft, Alcatel NV and Oy Nokia notified a cooperation agreement concluded by them. The cooperation between the undertakings relates to the formation of a consortium, ECR 900, for the joint development and manufacture and the joint distribution of a pan-European digital cellular mobile telephone system. The cooperation does not include the end products (mobile telephones) through which users are connected to the system.

B. The undertakings concerned

(1) AEG Aktiengesellschaft ('AEG'), whose head office is in Frankfurt, Federal Republic of Germany, is a group owned on a majority holding basis by the Daimler-Benz AG group, whose head office is in Stuttgart-Untertürkheim, Federal Republic of Germany. AEG's activities include automation systems, electrical tools, energy distribution, household equipment and high-frequency, industrial, information and communications technology.

(2) Alcatel NV ('Alcatel'), whose head office is in Amsterdam, Netherlands, is owned on a majority holding basis by the CGE group, whose head office is in Paris, France. Alcatel's activities comprise communications systems and information technology.

(3) Oy Nokia AB ('Nokia'), whose head office is in Helsinki, Finland, does not belong to any other group, but is an independent group of undertakings. Its activities include information systems, telecommunications, mobile telephones and consumer electronics.

C. Description of the telephone system

(1) In the 'CEPT-Memorandum of Understanding' of 7 September 1987 (3), the signatories agreed to introduce a pan-European public digital cellular mobile telecommunications service in their countries in 1991. The planned telephone system, known as the GSM ('Groupe spécial mobile') system, is a new communications system which does not yet exist.

(2) The system uses a new, digital, cellular technique to improve communication between the users of a mobile telephone network in numerous respects: there is a substantial improvement in speech quality and an increase in the total number of users. The system allows additional data and information technology services to be linked up and new protective arrangements to be included (authentication to prevent misuse of users' appliances and encoding to prevent unauthorized interception of communications). The agreement of virtually all the network operators in Europe on the hardware and software interfaces of the system removes all the communication obstacles created by differences in systems across geographical frontiers and opens up the way for a single European communication network which would, for example, allow a user to be contacted anywhere in Europe ('roaming').

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No C 308, 7. 12. 1989, p. 5.

(3) CEPT = Conférence Européenne des Administrations des Postes et des Télécommunications

II/91

(3) Through predefinition of the GSM system on the basis of a uniform standard with two to three specified interfaces, it is ensured that the development work will result in a uniform system. However, the system does not require uniform technology, but allows room for the development of different system components. The differing specified interfaces allow the compatibility of all system components, which means that they provide the opportunity of combining parts from different manufacturers.

D. Demand and supply in respect of the GSM system

The only potential buyers in the network area covered by the GSM system are at present the national network operators in the CEPT countries and the undertakings acting on their behalf (in the Federal Republic of Germany, for example, Detecon, a telecommunications consultancy firm).

Demand for all and/or part of the system is channeled through invitations to tender. Thus, a series of invitations to tender was published in the *Supplement to the Official Journal of the European Communities* of 5 January 1988 (No 2/59).

The invitations to tender involve orders for supply and installation and not development orders. The objective is the delivery, installation and operation of the equipment by the first quarter of 1991. The mobile telephones themselves are not covered by the invitations to tender.

In addition to the undertakings making the notification, the following consortia and individual firms have emerged as suppliers:

— Philips/Siemens respectively Philips/Bosch/Siemens,
— Bosch/Philips,
— Matra-Ericsson,
— Ericsson/Orbitel,
— Ericsson/Matra/Ascom Hasler,
— Orbitel/Matra/Ericsson,
— Orbitel (Racal/Plessey),
— Motorola (employing system components acquired from third parties).

E. Content of the cooperation agreement

(1) The parties to the agreement have agreed to cooperate in the development and manufacture of the GSM system and parts thereof, in the further definition and adjustment of technical specifications and in the joint and exclusive distribution of the system and parts thereof in CEPT countries in accordance with the cooperation agreement.

(2) The parties are setting up a consortium known as ECR 900 for the purpose of the submission of tenders for the GSM system in invitations to tender.

Commitments in respect of CEPT countries require the prior written agreement of all the parties. However, if one of the parties does not wish to participate in a tender or contract, the other parties are free to do so.

(3) During the term of the agreement, the parties are prohibited from submitting other tenders or concluding contracts in the CEPT countries in respect of the GSM system.

(4) Outside of the CEPT countries, each party is entitled to pursue business in respect of those parts of the GSM system in whose development it was involved.

(5) (a) In the case of development activities in which several parties were involved, all the technical documentation is to be exchanged on a permanent and cost-free basis between the parties concerned until such time as the technical documentation for series production is completed.

(b) In the case of development activities in which only one party is involved, there will be no exchange of technical documentation.

(6) (a) Up until eight months before expiry of the agreement, the parties are prohibited from using technical documentation obtained pursuant to point 5 (a) in order to manufacture the GSM system or parts thereof for sale in CEPT countries.

(b) After expiry of the agreement, each party has the non-exclusive right to use the technical documentation obtained pursuant to point 5 (a) in order to manufacture the GSM system or parts thereof for sale in any country.

(c) Within a period of five years following expiry of the agreement, however, the grant to third parties of a sublicence in respect of the above-mentioned right requires the prior agreement of the party concerned, with any licence fees being divided equally between them.

After the end of such period, the parties are free to grant sublicences without sharing the fees.

(d) Where a party is excluded on the grounds of breach of contract, the party excluded loses the right to use the technical documentation acquired.

I/92

(7) The agreement may be terminated by each party for the first time on 31 December 1993 and thereafter at the end of each year. In such an event, the other parties may decide to continue the agreement.

The agreement ends automatically on 31 December 1992 if the French or German or any other important postal authority of a CEPT country has not selected the GSM system for its market.

F. The Commission did not receive any observations from interested third parties following publication of the notice required by Article 19 (3) of Regulation No 17.

II. LEGAL ASSESSMENT

Article 85 (1)

The cooperation agreement notified is not under the present circumstances caught by Article 85 (1).

(1) The parties to the agreement are undertakings, and the notified agreement is an agreement between undertakings within the meaning of Article 85 (1).

(2) The agreement does not have as its object or effect the restriction of competition within the common market, for the following reasons:

(a) *Joint development and manufacture of the GSM system*

The parties to the agreement have agreed to cooperate on the development and manufacture of the GSM system. Such an agreement does not constitute a restriction of competition. The facts show that development and manufacture by individual companies would not take place because of the high cost involved. The invitations to tender by the telecommunications administrations published on 5 January 1988 lay down tight deadlines. The invitation to tender for Denmark provides for the pilot system to be supplied by the end of October 1988, and the invitation to tender for the United Kingdom provides for the complete testing of the development system by 30 June 1989. By mid-1990, an initial pilot system is to have been set up for test purposes in the countries involved in the invitations to tender, and the supply, installation and operation of the equipment is scheduled for the first quarter of 1991. The parties to the agreement would therefore hardly be able to comply with the timetable laid down if they were to proceed individually.

Furthermore, the financial expenditure and the staff required in the development and manufacture of the GSM system is so great that realistically there is no scope for companies to act individually.

The development costs are estimated by the parties to the agreement at some DM 300 to 500 million. Because of the time schedule laid down, this amount cannot be spread over a longer period, but must be raised in the period up to the installation of the pilot system in 1990, while the amortization of the investment in the event of a bid award will be long term. In the event of a bid award to one of the competitors, amortization may indeed be entirely open to question. As far as the staffing requirements are concerned, only a limited number of sufficiently qualified engineers are available for the development of the GSM system, and this limited number cannot be increased in the short term.

Lastly, for objective economic reasons, the parties to the agreement cannot be expected to bear the financial risk involved in the development and manufacture of the GSM system alone.

The relevant market is characterized by narrowly limited demand. At present, the only potential customers are 15 national network operators in the CEPT countries, or the undertakings acting for them, with the result that the suppliers' prospects of achieving a bid award are only limited. Only if they achieve a bid award will the suppliers be able to amortize the extremely high development costs, since the results of the development work will have only limited use outside the field covered by the invitations to tender. This real and serious economic risk can be borne only if the parties to the agreement bear the costs jointly.

It is noteworthy in this context that, in their invitations to tender, the national telecommunications administrations expressly refer to consortia and bidding syndicates.

No single member of the consortium would therefore be able to use its own production improved by individual development in order to achieve a competitive advantage over the other members.

The obligation to engage in joint development and manufacture of the GSM system therefore does not restrict competition within the common market.

(b) *Joint distribution of the GSM system*

As a result of the joint distribution requirement in the CEPT countries, the parties to the agreement are prevented during the term of the agreement from competing with one another in the sale of the products in such countries, which include all the Member States. However,

II/93

this requirement does not amount to a restriction of competition. For the reasons specified above, the parties to the agreement acting on their own would not be in a position to provide a viable source of supply for individual distribution of the GSM system.

(c) *Ban on the use of technical documentation*

Where a party is excluded because of infringement of the agreement, such party loses the right to use the technical documentation supplied to him and hence the possibility of manufacturing and distributing competing products with the help of such documentation.

However, this ban does not create any restriction of competition within the meaning of Article 85 (1). The party in breach of the agreement, having failed to fulfil his obligations *vis-à-vis* the other parties and to perform his contribution to achieving the joint task, would, if allowed to use the technical documentation, receive unjustified benefits which would lead to an undeserved competitive advantage *vis-à-vis* the other parties. Such competition not based on performance is not protected by Article 85.

(3) This legal assessment is based on the circumstances set out above. Should there be any change in the actual circumstances, there is nothing to prevent the Commission from re-examining the case,

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts known to it, the Commission sees no reason to take any action under Article 85 (1) of the EEC Treaty against the cooperation agreement concluded by the firms AEG Aktiengesellschaft, Alcatel NV and Oy Nokia AB on 21 December 1987.

Article 2

This Decision is addressed to the following undertakings:

1. AEG Aktiengesellschaft
   Theodor-Stern-Kai 1
   D-6000 Frankfurt/Main 70,
2. Alcatel NV
   Strawinskylaan 537
   NL-1077 XX Amsterdam,
3. Oy Nokia AB
   Mikonkatu 15 A
   Helsinki, Finland.

Done at Brussels, 27 July 1990.

For the Commission

Leon BRITTAN

Vice-President

II/94

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 18 October 1991

relating to a proceeding pursuant to Article 85 of the EEC Treaty

(IV/32.737 — Eirpage)

(Only the English text is authentic)

(91/562/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

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 Spain and Portugal, and in particular Articles 4, 6 and 8 thereof,

Having regard to the application for negative clearance and the notification for exemption, submitted under Articles 2 and 4 of Regulation No 17 on 17 May 1988 by Bord Telecom Eireann and Motorola Ireland Ltd of a joint venture agreement and related agreements and documents, concerning the setting up, promotion and operation of a nationwide interconnected paging service,

Having regard to the summary of the application and notification published pursuant to Article 19 (3) of Regulation No 17 [2],

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

(1) On 17 May 1988, Bord Telecom Eireann ('Telecom') and Motorola Ireland Ltd ('Motorola') submitted for negative clearance or alternatively exemption, joint venture and accompanying agreements relating to the setting up, promotion and operation of a nationwide paging system interconnected to the public telecommunications network. In the company set up for this purpose in April of 1988, 'Eirpage Ltd', the parties pool their complementary skills, namely Telecom's technological expertise in the provision of telecom infrastructure and services and Motorola's marketing and product expertise in radio-paging services.

A. The parties and the service concerned

(2) Telecom was corporatized in 1984. Pursuant to Section 87 of the Postal and Telecommunications Services Act 1983 (the Act), in conjunction with the Telegraph Act of 1869, it continues to enjoy a statutory exclusive privilege with respect to telecommunications infrastructures and the provision of certain telecommunications services, subject to the powers of Telecom itself (Section 89) and of the Minister for Communications (Section 111) to grant licences to third parties to provide telecommunications services within the exclusive privilege of Section 87.

[1] OJ No 13, 21. 2. 1962, p. 204/62
[2] OJ No C 294, 24. 11. 1990, p. 1

II/95

Since becoming corporatized, Telecom has introduced a number of new telecommunications services such as Eirpac (data network) and Eircell (cellular radio/mobile telephones). The joint venture with Motorola to provide paging services is the first time that Telecom has cooperated with another company to enter a new field.

(3) Motorola is a wholly-owned subsidiary of Motorola Inc. of Illinois, USA, which, with a worldwide turnover of US $ 9 billion in 1989, is one of the world leaders in mobile communications equipment and services. Before embarking on the Eirpage joint venture, Motorola, which had a turnover of £ Irl 10,7 million and 120 employees in 1989, offered merely telecommunications equipment, including paging receiver units, and not paging services (1).

(4) The paging service offered by Eirpage falls within the broader category of mobile communication services in general, which includes mobile telephones and mobile radios. Paging is a one-way means of communicating with someone on the move who carries a pocket-sized receiving unit, which receives varying signals, such as tone (beep), voice, numerical or computerized messages, depending on the sophistication of the receiver. The person carrying the pager can only receive messages, not reply to calls.

Interconnected paging is a particular kind of paging whereby a telephone, telex or data message can be transmitted via the public network to the receiving unit. In other words, one can dial the numer of a paging receiver on a normal telephone to have access to the wearer. Where paging is not interconnected, it is operator-assisted, which means that an operator will intervene to receive the message to be paged from the caller and transmit it to the paging unit of the customer.

(5) In Ireland, the mobile communications sector is at present composed of traffic via mobile radios (35 %), mobile telephones (40 %) and pagers (25 %). Eirpage at present covers 13 % of mobile communications, and with 7 400 subscribers, approximately 60 % of the overall paging sector.

Aside from Eirpage, there are at least eight companies providing operator-assisted paging services mainly in the Dublin area or other population centres such as Cork and Limerick. The number of subscribers of these companies ranges from under 100 to approximately 2 000. Eirpage plans to cover virtually all regions of the country and aims at achieving 10 000 customers, nationwide, by 1992. By July of 1991, 87 % of the geographical surface of the Republic of Ireland, representing 90 % of the population, was covered with more than 30 transmitters in operation.

B. The agreements as originally notified

(6) The notification involves six docments:

1. *The joint venture agreement:*

In order to establish and promote a nationwide paging service, Telecom and Motorola agree to set up a joint venture company, Eirpage Ltd, to be owned 51 % by Telecom and 49 % by Motorola. In view of these shareholdings, Eirpage is a subsidiary of Telecom for the purpose of the Act and thus enjoys the exclusive privilege of engaging in telecommunications services bestowed on Telecom by Section 87 of the Act without the need for a licence.

As far as the management of the company is concerned, Telecom and Motorola have equal powers: three directors are appointed by Telecom, three by Motorola, and all decisions by the Board require a majority vote, while most of the business decisions of any consequence require unanimity.

The joint venture agreement provides that neither party will engage in a competing paging service, either independently or in association with others, during the term of the joint venture agreement and three years following termination thereof.

2. The *business plan* annexed to the joint venture agreement sets out Eirpage's basic objectives and the forecast agreed by the parties as to the projected financial outcome of Eirpage's first five years of operation.

(1) As of 1 August 1991, an independent company, Sigma Wireless Communications Ltd, has taken over Motorola's role as importer of Motorola products in Ireland and as Eirpage agent.

II/96

3. The *marketing service and business development agreement* between Telecom, Motorola and Eirpage relates to the provision of expertise by Motorola to Eirpage and by the latter to Telecom personnel.

4. The *operating agreement* between Telecom and Eirpage fixes the terms under which Telecom will provide access to the public network to Eirpage. Telecom agrees to install and maintain the physical attributes necessary to operate the paging system, namely antennas, transmitters and the paging exchange needed to interconnect to the public network, cumulatively referred to as the 'Facilities'. These Facilities belong to Telecom and form part of the public telecommunications network. Although the cost was initially estimated at less than £ Irl 1 million, the actual expenditure has risen to twice that amount due, *inter alia*, to a wider geographical coverage than originally planned. Telecom received approximately £ Irl 500 000 for the project under the Community's 'STAR' programme which aims at developing less forward regions by improving access to advanced telecommunications services.

In order to cover this capital expenditure, and in return for the use of these Facilities, Eirpage agrees to pay Telecom an annual operating fee which is calculated to fully amortize this paging network investment by Telecom over a 10-year period, together with a return of 5 % over investment. The annual fee, furthermore, covers other services provided by Telecom, namely, rental of a space for the antennas on a Telecom tower, use of leased lines, rental of space on Telecom's premises for the paging exchange, maintenance of the paging network and the interconnect charge; these services are charged at the normal, publicly-known commercial rates.

The operating agreement provides a proportionate reduction in the charges payable by Eirpage for the use of the Facilities in the event other paging operators share the use of the same Facilities.

5. The *standard agency agreement*:

Eirpage does not itself sell the paging service directly to customers, but does so via a network of independent, non-exclusive agents. Once an agent has found a new customer, the actual subscriber agreement is signed between the customer and Eirpage. The subscription rates and other conditions are fixed by Eirpage. Agents receive an on-going monthly commission ranging from 10 % to 30 %, depending on the number of subscribers they have found for Eirpage, and provided those subscribers remain 'live'. Agency agreements can be terminated by either party on an annual basis.

At the time Eirpage was launched, sellers of paging equipment, existing paging service providers and other interested parties were invited to become Eirpage agents. At present, there are 20 agents including three service providers which continue to offer their own operator-assisted, local rather than nationwide, paging services alongside finding subscribers for Eirpage. Among the sellers of paging equipment which act as Eirpage agents are TEIS, a Telecom subsidiary involved in the provision of terminal equipment, and Sigma Wireless Communications Ltd, which in August of 1991 took over Motrola's role as Eirpage agent.

Eirpage is obliged by the agency agreement not to discriminate amongst the agents. Sales leads which come to Eirpage are passed on to agents in a rotating alphabetical order.

Competition exists between the agents on various levels. As far as the Eirpage service is concerned, the fact that the subscription rates are necessarily fixed does not exclude price competition amongst the agents, who in practice are willing to discount on their commission in order to secure business, thereby offering advantageous subscription rates. Secondly, there is competition amongst agents with regard to the marketing and presentation of the Eirpage service. Finally, agents who are paging service providers in their own right continue to offer their own services alongside those of Eirpage.

Eirpage agents are free to sell whatever equipment they want, and with or without the Eirpage name or logo attached. In view of the fact that many agents are also paging equipment manufacturers and/or distributors, finding customers for Eirpage can have a direct beneficial effect on the sale of their own equipment.

II/97

6. The *standard subscriber agreement:*

the subscriber agreements are concluded directly between Eirpage and the customer found by an Eirpage agent. In order to cover the administrative costs of putting a new subscriber on the system, a minimum period of normally 12 months applies, after which notice can be given on a monthly basis. Subscribers pay a monthly charge to Eirpage which varies according to the sophistication of the pager being used and the geographical extent of the coverage desired by each individual subscriber, ranging from the home zone only up to full national coverage. Subscribers are free to use whatever type and brand of paging receive equipment they want, and may choose to rent or buy the pager, depending on the terms offered by the equipment provider, normally the agent through whom they wre brought into contact with Eirpage.

C. The agreements as amended or clarified following the Commission's intervention

(7) The arrangements as notified presented a number of problems from the point of view of competition policy which stood in the way of a favourable attitude on the part of the Commission. During the course of the notification procedure, the following issues were resolved in a satisfactory manner:

1. *Market entry by third parties*

The Commission has sought assurances from Telecom and the relevant licensing authorities that companies interested in competing directly with Eirpage in the wide-area interconnected paging sector will be treated on exactly the same footing as Eirpage. Successful market entry depends on: (a) the availability of facilities such as those used by Eirpage to operate the service; and (b) the procurement of licences, including the necessary frequency allocation.

(a) Telecom has given a written undertaking to make available to persons satisfying the relevant licensing and financial requirements the facilities necessary for operating a wide-area interconnected paging service, under the same conditions as those which apply to Eirpage. These include the obligation on the paging operator to use such equipment for not less than a specified period mutually agreed upon by the parties on the basis of the total investment made by Telecom and the payment to Telecom of an annual charge calculated to remunerate the cumulative capital cost fully amortized over that period together with a reasonable return over the capital cost; in respect of the provision by Telecom of interconnection, space and other services, such as maintenance, the standard commercial charges shall apply, as they do to Eirpage.

Telecom has agreed to make the full text of the undertaking available to interested parties and to inform the Commission of any requests made pursuant thereto and the outcome of such applications.

The facilities referred to in Telecom's undertaking form part of Telecom's telecommunications network and are owned exclusively by Telecom. The undertaking does not of course in any way prejudice other options which market entrants may prefer, such as the choice to buy the necessary equipment themselves, whereby the services required of Telecom such as the use of leased lines would be made available at the normal rates. Interconnection to the public switched telephone network (PSTN), telex and public switched data network (PSDN-Eirpac) is universally available on a non-discriminatory basis to those operators meeting the relevant licensing requirements.

Finally, the Commission has noted that pursuant to an order from the Minister for Communications under Section 110 of the Act, Eirpage could be obliged to share the Facilities established for its use with other service providers. To reflect more accurately the Minister's power in this respect, the parties have agreed to redraft the provision in the operating agreement between Telecom and Eirpage which limited Telecom's right to expand the Facilities;

(b) licensing and frequency allocation:

the administrative procedure which an applicant paging service provider must successfully complete consists of one or alternatively two elements, depending on the type of service envisaged:

(i) All paging service operators, regardless of whether the service offered is interconnected, operator-assisted, regional or

II/98

national, must receive a frequency allocation in the form of a licence under the Wireless Telegraphy Act 1926. Frequency/spectrum management is carried out under the sole competence of the Minister for Communications. Thus, Eirpage itself is dependent on the Minister for frequency allocation on the same footing as other paging service providers, and has received licences to that effect.

(ii) Companies interested in providing a paging service interconnected to the public telecommunications network require in addition to the frequency allocation licence, a licence under the Telecommunications Act 1983. This licence can be granted at the applicant's choice either by the Minister for Communications, after consultation of Irish Telecom, whose opinion is, however, not binding, or by Telecom itself; refusals by the latter are subject to appeal. Contrary to the licence under the 1926 Act, Eirpage did not require a licence under the 1983 Act because it is a subsidiary of Telecom and thus enjoys the exclusive privilege bestowed on the latter under Section 87.

At present, the frequency allocation and licensing requirements do not appear to constitute a barrier to entry to the paging sector for interested companies. On the spectrum management side, the Department for Communications has reserved the 153 to 154 MHz band solely for paging services. According to the Department, the approximately 40 channels consequently available for paging service providers should be adequate to meet any foreseeable needs in this sector. If necessary, a new band could be opened to meet channel requirements.

As far as the licence under the 1983 Act is concerned, the relevant authorities have confirmed that licences would be available for national interconnected paging services on the basis of objective criteria, such as the technical capacity and financial resources of the applicant and the likelihood of a continuous service. Normal judicial review would apply in case of a refusal. To date, Eirpage, which as noted above did not require a licence under the 1983 Act, is the only company providing interconnected paging services, so that an actual application of the licensing procedure has not yet taken place.

2. *Cross-subsidization and preferential tariffs*

Written assurances have been provided by a chartered accountant that Eirpage pays full cost and expenses to Telecom and to Motorola for staff, facilities and services. Telecom does not cross-subsidize Eirpage's activities through revenues from services reserved to Telecom as the national telecommunications organization, nor does Eirpage enjoy any preferential tariffs for the use of facilities provided by Telecom, such as leased lines. Eirpage operates at arm's length from both parent companies with its own separate offices and all expenditure is funded through a bank overdraft facility which is entirely separate from either parent company. Eirpage establishes its own financial statements, independent of Telecom's annual accounts.

3. *The paging equipment market*

Eirpage only provides a paging service and does not sell paging equipment. The parties have stated that the Eirpage system has been configured specifically to offer maximum compatibility with the products of all manufacturers. As stated above, Eirpage agents are free to sell whatever equipment they want, with or without the Eirpage name or logo attached. In case of enquiries to Eirpage concerning manufacturers' equipment, information is provided regarding all manufacturers or their representatives in Ireland. Only average prices are quoted to customers, not the prices of a particular brand of equipment.

In order to further reassure paging equipment manufacturers that the joint venture will not give an unfair advantage to sales of Motorola equipment, the parties have confirmed that:

(a) Eirpage will cooperate with all paging equipment manufacturers or dealers to the extent technically possible that their products can be used on the Eirpage system;

(b) Motorola pagers will be sold with the same discounts to all Eirpage agents subject to the normal commercial criteria based on volume and credit.

Furthermore, clarifications regarding the type-approval procedure for paging equipment have provided the necessary reassurances that manufacturers competing with Motorola cannot be discriminated against in any way. Contrary to a mistaken belief, it is not Telecom, but the Ministry for Communications which establishes the criteria for type-approval. Although Telecom does provide some type-approval services, this is done on an agency basis only, which means that the testing carried out by Telecom is an application of the standards established by the Ministry. Furthermore, a second testing agency, Eolas, exists, so that equipment manufacturers and importers have a choice. Finally, the Ministry for Communications has confirmed that although type-approval is strictly speaking still required for paging equipment, in practice such receive-only equipment which is not liable to harm the network in any way is not subjected to testing by either test house.

4. *The standard agency agreement*

Certain amendments were required to ensure that the agency agreements do not have restrictive effects, notably *vis-à-vis* paging service providers who continue to provide their own complementary services next to those of Eirpage. To this end, the parties have agreed to the following changes in the standard agency agreement (references are to the November 1988 version):

(a) clause 4 (a) has been redrafted in order to clarify that only sales leads which have been passed on to a given agent by Eirpage must first be used by that agent to promote the Eirpage service; if the latter is not suitable for the customer, the agent is subsequently free to promote his own service. In all other contacts with potential customers, the agent is free to promote his own service first or in any case on the same basis as the Eirpage service;

(b) clause 4 (c) which imposed an absolute obligation on agents of loyalty to Eirpage 'in all matters', was too broad and has been redrafted to reflect the agent's freedom to continue pursuing his own interests; Eirpage's instructions need only be followed in respect of specific Eirpage matters;

(c) clause 4 (f) obliged an agent to bring to the attention of Eirpage any information it received which was likely to be of benefit to Eirpage in marketing the services. This obligation could not be reconciled with an agent's legitimate wish to continue or start competing with Eirpage and has been deleted;

(d) in clause 4 (l), it has been clarified that the designation 'Eirpage Authorized Agent' is subsidiary to the agent's own denomination;

(e) the post-term non-compete obligation of Clause 9.7 (i), whereby agents were prevented for a period of three years following the termination of the agency agreement from soliciting persons who at the time of termination were Eirpage subscribers, has been deleted;

(f) direct competitors of Eirpage, i.e. paging companies providing interconnected paging services, should not be permitted as agents. This also means that existing agents who do not yet provide such services but decide to enter that specific sub-market at a later date, must at that point relinquish their position as an Eirpage agent. Furthermore, an Eirpage agent may not at the same time be the agent for other paging service providers offering interconnected paging services. Provisions reflecting the above have been added to the agency agreement.

5. *The parties' position after termination of the joint venture*

In the event the joint venture agreement is terminated, Telecom and Motorola must be free to compete with each other immediately. To that end, the post-term non-compete obligation provided for in Article 18.2 of the joint venture agreement has been deleted at the request of the Commission.

D. Third parties' observations

(8) The Commission did not receive any observations following publication of the notice required by Article 19 (3) of Regulation No 17.

II. LEGAL ASSESSMENT

A. Article 85 (1)

(9) Although Motorola owns 49 % of the joint venture company and is thus, strictly speaking, a minority shareholder, the Board of Directors which actually runs Eirpage consists of an equal number of directors representing each parent company, whereby all decisions of the Board require a majority vote and most business decisions of any consequence unanimity. Consequently, the two parties to the agreement, both of which are economic operators involved in commercial activities, in reality share joint control of the joint venture, so that the arrangements involve agreements between two independent undertakings and must thus be considered under Article 85 (1). In this context, it is not only the joint venture agreement itself which must be assessed, but the accompanying agreements which implement certain aspects of the cooperation, namely the operating agreement between Telecom and the joint venture company, the standard agency agreement which establishes the system whereby the service is offered to consumers and the standard subscriber agreement.

(10) The market directly concerned by the joint venture agreement is the provision of paging services, i. e. a one-way means of contacting someone on the move. Paging offers the advantage above other forms of mobile communications of being relatively — up to 50 % — cheaper in terms of the price of equipment and running costs. Also, mobile telephones are larger in size and thus more unwieldy than paging receive units. In this sense paging at present represents a distinct market. These factors could be expected to fade in the future, so that the choice between a mobile telephone and a pager would no longer depend on size or cost. Paging would, however, continue to exist as a separate option in the mobile communications sector because it offers one-way communications, a distinct advantage in keeping down the billing costs.

(11) Telecom and Motorola are potential competitors for the provision of paging services. Telecom's expertise in the provision of infrastructure has in the past facilitated its entry into markets for various value-added services, such as Eirpac and Eircell. Given Telecom's general know-how and more specifically and technological similarities between communicating by mobile telephone and paging, and in view of its financial position, this ease of entry would also apply with respect to the paging sector.

Although the Motorola company in Ireland did not provide paging services prior to Eirpage, but was solely a manufacturer of telecommunications hardware, including paging equipment, the Motorola group worldwide has extensive experience in this sector which is in fact available for the benefit of Eirpage pursuant to the Marketing Services and Business Development Agreement. Motorola is therefore a potential competitor for the provision of the service.

(12) Through the Eirpage joint venture, Telecom and Motorola have joined together to set up and provide a service which they could potentially have pursued individually; the joint venture agreement prohibits either party from engaging in a competing wide-area interconnected paging service either independently or in association with others. The consequence of these arrangements is that instead of two competing companies offering the service in question there is only one, which must be considered to be a restriction of competition. Also, the fact that potential competitors are faced by a joint venture between the national telecommunications company and a subsidiary of one of the world leaders in mobile telecommunications which will initially and indefinitely — until further licences are granted — be the only provider of interconnected paging services, may have a deterrent effect on potential market entrants and thus further restrict competition.

In view of the foregoing considerations, the agreements which form the basis for the creation and operation of the joint venture are deemed to constitute restrictions of competition falling within Article 85 (1). The same is true with regard to the system whereby intermediaries are used to offer the service to end-users, as laid down the standard agency agreement. These arrangements form an integral part of the operation of the joint venture. Moreover, the restrictions flowing from the agency system are reinforced by the fact that companies offering paging services in competition with the Eirpage service have been appointed as Eirpage agents.

(13) The notified arrangements relate to a service extending over the entire territory of the Republic of Ireland and as such are capable of affecting trade between Member States. The fact that an agreement has as its object only the marketing of products (or services) in a single Member State does not mean that trade between Member States cannot be affected. In the case at hand, both a detrimental and a beneficial impact on trade from other Member States can be envisaged as regards the paging service market. The fact that the joint venture company will initially be the only provider of interconnected wide-area paging services in Ireland may have a dissuasive effect on market entry by competitors from other Member States. Conversely, the promotion of the concept of paging as such which the joint venture company is committed to accomplishing, may be expected to attract other providers of (complementary) paging services also from other Member States, which are free to apply for the necessary licences and start operating once these have been obtained.

In the closely linked paging equipment market, which was, even before the inception of Eirpage, characterized by an overriding presence of distributors and subsidiaries of equipment manufacturers from other Member and non-Member States, the stimulation of sales brought about by the joint venture is likely to attract further imports or investments.

Furthermore, Motorola forms part of a group operating throughout Europe (and worldwide) in the mobile communications services and equipment markets; Motorola's activities in Ireland must be seen as part of the European operations of the group as such, which necessarily implies repercussions also outside Ireland.

In view of the foregoing circumstances, the joint venture arrangements can be expected to have an appreciable effect on intra-Community trade, and Article 85 (1) applies.

B. Article 85 (3)

(14) Subject to the changes implemented by the parties in the agreements as notified and in view of the undertakings provided with respect to a number of issues which originally stood in the way of a favourable decision, the Commission has concluded that the cooperation between Telecom and Motorola contributes to the development of telecommunications services in Ireland, thereby directly benefiting consumers of such services as well as undertakings involved in the telecommunications sector. These benefits could not have been achieved as rapidly and to the same extent in the absence of the joint venture and therefore outweigh the restriction of competition brought about by the joining together of two potential competitors.

(15) In a country where two-thirds of the population lives in sparsely populated rural areas, Eirpage has undertaken to provide a service beyond the more profitable urban areas in which existing paging service providers had hitherto concentrated their activities. By the end of 1991, 34 transmitters should be installed at strategic points throughout the national territory, thereby covering virtually all of Ireland. These truly nationwide communications links can be expected to contribute to business efficiency and especially enable small and medium-sized business to expand their activities geographically, thereby contributing to economic progress in Ireland.

Although the joint venture arrangements relate only to the provision of paging services, the directly connected paging equipment market can be expected to benefit from the increased number of paging service subscribers requiring paging receive units, thus stimulating production in this sector.

(16) A fair share of the benefits resulting from the cooperation accrue directly to consumers.

End-users, that is subscribers to the service, can benefit from an enhanced paging service which offers several features not available from existing paging companies, in particular nationwide coverage and interconnection to the public network. Furthermore, Eirpage offers a wider choice of services than previously available from one single source, ranging from the simplest tone only communication to the more sophisticated alphanumeric and voice messages. Within this

II/102

range of possibilities the individual needs and budgets of each user will allow him to opt for full nationwide or regional coverage, and for the simpler or the more sophisticated type of service. These options offer advantages for all users, namely those using the service primarily for private, e. g. family or social, purposes, and business users who can thus ensure varying degrees of communication to increase their operating efficiency.

The Eirpage service is offered to customers not by the joint venture company itself, but via a network of agents who have a direct financial interest in finding new clients and keeping existing ones, and therefore compete with each other. This agency system ensures that there is a choice for consumers as regards the agent with whom he wants to deal and the conditions he can enjoy for using the Eirpage service. Furthermore, the standard form agency agreement between Eirpage and its agents obliges the latter to ensure adequate maintenance and after-sales service, and perform guarantees with respect to the paging equipment supplied to subscribers. The maximum one-year duration of the standard subscriber agreement leaves consumers free to change to another service provider at reasonable notice.

Finally, the paging equipment market will automatically expand along with an increasing number of subscribers to paging services. This increased demand for paging receive units and the freedom of agents and subscribers to choose whatever brand they wish, can be expected to lead to a wider choice of products, and at lower prices.

(17) The arrangements between the parties contain no restrictions which are not indispensable to the attainment of the ensuing benefits for the duration of the exemption.

(18) The joint venture agreement itself was indispensable in enabling the parties to offer as rapidly as possible a service which in terms of technical features and geographic coverage represents a new option in this sector. Neither party acting on its own could have offered the service as rapidly and effectively as their cooperation has enabled them to do.

Having been corporatized relatively recently, Telecom's transition from a governmental department to a commercial operator has been gradual, and initially its activities centred on traditional telecommunications services. Although Telecom was admittedly able to set up a mobile telephone service (Eircell) by itself, selling telephones, which are familiar to everyone, is easier than selling the new and unknown concept of paging, especially in rural areas where the population may be less susceptible to new technologies. By way of comparison, Telecom's experience in launching Eirpac (data network) has been less favourable. Acting alone, Telecom could have set up a paging system in the Dublin area only, which would have deprived the general population of the enhanced services now offered by Eirpage nationwide.

Unlike Telecom, Motorola is a purely commercially driven company and does not have Telecom's determination to provide nationwide telecommunications services. Thus, even if Motorola had obtained a licence to provide a paging service interconnected to the public network, it would not have been interested in extending the service to marginally profitable rural areas; the same would have applied to any other purely commercial operator. Given the fact that two-thirds of the population lives in rural areas, this solution would have resulted in a much less extensive coverage. In fact, existing paging companies have until now confined their services to Dublin and the four or five other larger towns in Ireland where investment per customer is minimized.

Lesser geographic coverage of a service provided by Motorola alone would also have resulted in a more limited development of the paging concept as such, to the detriment of other service and equipment providers.

Finally, Motorola could not have been expected to bring to an independent venture Telecom's commitment to ensure maximum compatibility of all brands of paging equipment with its system.

The foregoing considerations have brought the Commission to the conclusion that in the absence of the combined efforts by the parties in setting up the Eirpage system, no nationwide enhanced interconnected paging service would have been available on the rapid timescale achieved as a result of their collaboration.

1/103

Furthermore, the Commission considers that the Eirpage system could not be set up or at least could not function satisfactorily, if the parties were not obliged for a limited period to refrain from engaging in directly competing projects. Also, it would be unreasonable to expect either party to invest its funds and expertise in the joint project, if there was a risk that the other would use those contributions either independently or in association with third parties who have not made the same commitment. In this context the Commission considers the non-competition obligation imposed by the joint venture agreement on the parties to be indispensable. It should be noted that this restriction is limited to the life of the agreement and applies only to one-way wide-area paging services interconnected to a fixed telecommunications network, which means that the parties remain free also during the term of the agreement to engage in other types of paging services, such as those referred to under recitals 4 and 5 above.

(19) Certain aspects of the notified agreements which were not indispensable for achieving the benefits thereof were eliminated by the parties at the Commission's request in order to bring the arrangements in line with the requirements of Article 85 (3).

In the joint venture agreement itself, the three-year post-term non-competition obligation has been deleted, so that in case of dissolution of the joint venture, the two parties would immediately be free to compete with each other and with third parties on the market.

A number of clauses in the original standard agency agreement likewise required amendment or suppression; these changes are listed above under point 4 of recital 7.

(20) The arrangements as they stand following the Commission's intervention during the course of the notification procedure do not afford the parties the possibility of eliminating competition in respect of a substantial part of the services and products in question.

In the first place, Eirpage is subject to actual competition from existing paging service providers, which account for 40 % of the paging sector and which in many cases offer a service complementary to that of Eirpage. Certain customers will prefer to opt for operator-assisted paging services, such as notably medical paging, and these services are thus unaffected by Eirpage. The same applies to purely local paging systems.

Secondly, nothing prevents licensed operators from competing directly with Eirpage in the provision of interconnected (nationwide) paging. In view of the undertaking which Telecom has given during the course of the notification procedure to make facilities similar to those used by Eirpage available to other operators (see above under point 1 (a) of recital 7), competitors can either use that possibility or invest directly in the necessary facilities, which would in that case belong to them and not to Telecom.

In the light of the assurances given by the Department for Communications, the licensing requirements involved in offering paging services which were examined during the course of notification procedure were found not to form barriers to market entry. Although the licensing procedures are not within the power of the parties who have sought clearance or exemption from the Commission, the latter would be obliged to consider withdrawing the exemption granted under the present Decision if in the future it appears that those procedures act as a barrier to entry or deterrent to competition in the paging sector.

The one-year duration of the Eirpage subscriber agreement allows customers to switch upon a reasonable period of notice to an Eirpage competitor, if they so wish.

Thirdly, the paging market is directly influenced by developments in the mobile telephone and radio markets, as well as new technologies which are at present developing, such as Personal Communication Networks (PCN). At present, paging represents 25 % of the mobile communications sector in general.

Finally, Eirpage cannot merely be expected not to eliminate competition in the paging sector, but may in fact stimulate development also for the benefit of other paging service providers. This circumstance is due to the fact that Eirpage's marketing and advertising efforts promote the concept of paging as such, and not merely Eirpage's own service.

Also, although the Eirpage service does not tie in the sale of paging equipment, the increased use of paging services which is expected to develop, both with regard to Eirpage subscribers and those of

other paging service providers, will stimulate competition in the paging receive equipment market.

(21) One issue which requires individual attention is the position of paging service providers who at the same time act as Eirpage agents. Of the eight paging service providers established in Ireland before Eirpage came on the market, three took the opportunity offered of becoming Eirpage agents. The services these companies offer can be distinguished from the Eirpage service in that they consist of operator-assisted as opposed to interconnected paging. One advantage of operated-assisted paging is that calls are screened by an operator; direct contact between the caller and the person carrying the paging unit is thus excluded. Certain categories of subscribers — such as doctors who do not want to be contacted directly by their patients — prefer this service above the direct communication made possible by interconnection. Also, the services of these companies are geographically limited to Dublin alone or a small number of other urban areas. Given the fact that the services provided by these companies fulfil different needs from those to which Eirpage caters, it can be expected that these three companies will continue to sell their own services next to those of Eirpage, whereby their independence has been improved by the various amendments in the standard agency agreement made at the Commission's request. Furthermore, by acting as Eirpage agents, these companies may be expected to acquire first-hand experience relating to interconnected paging services, thereby enhancing their competitive position if one day they decide to offer such services themselves in direct competition with Eirpage; in that case they could of course no longer act as Eirpage agents. Nevertheless, the Commission is aware of the potential conflict which may exist with respect to agents which offer their own services next to those of Eirpage, and will review the situation of these companies and any other paging service providers who become Eirpage agents within a short time-frame to assess whether this arrangement continues to fulfil the conditions of Article 85 (3).

C. Duration of the exemption and obligations

(22) Pursuant to Article 6 (1) of Regulation No 17, the Commission is required to specify the date from which an exemption is granted. The arrangements as notified on 17 May 1988 presented several aspects which prevented the granting of an exemption in this case. Following discussions with the Commission, the notifying parties made several firm proposals to meet the Commission's objections. These proposals concerned in particular the necessary amendments to the joint venture agreement itself, the operating agreement and the standard agency agreement. Furthermore, Telecom established the undertaking referred to above under point (1) (a) of recital 7 with regard to making available facilities similar to the Eirpage facilities, thus ensuring fair market entry to third parties interested in interconnected paging. Accordingly, the date on which the exemption takes effect will not be the date of notification, but 26 March 1990, the date by which all the required amendments and the undertaking by Telecom had been presented to the Commission.

(23) Article 8 (1) of Regulation No 17 provides that exemptions under Article 85 (3) may be granted only for a specific period and that conditions and obligations may be attached to them.

In view of the characteristics of the Irish market which is characterized, *inter alia*, by slow growth, the novelty of the service being established by the parties, and the emergence of competing new technologies, the development of the joint venture can be expected to require a substantial period of time. Also, a joint venture involving the provision of a service, as opposed to, for example, the production of goods, requires a certain continuity in the relationship between the joint venture parents and third parties.

The final capital investments involved in setting up the infrastructure of the nationwide paging network were made by July 1991, whereupon the 10-year formula according to which Telecom will be reimbursed by Eirpage for its expenditures went into effect.

In view of the foregoing considerations, the Commission has concluded that a period of exemption ending on 31 July 2001 is appropriate in this case.

(24) In order for the Commission to perform its supervisory functions pursuant to Article 8 (3) of Regulation No 17, the parties must comply with the following reporting requirements during the period of exemption:

II/105

1. Telecom must inform the Commission forthwith and on a continuing basis of any requests for paging facilities made to it by third parties pursuant to its undertaking referred to above under point 1 (a) of recital 7, and the outcome of such requests.

2. Eirpage must submit its annual financial statements to the Commission each year upon their issuance to allow for verification regarding cross-subsidization and preferential tariffs.

3. At the same time as the submission of the annual financial statements, Eirpage shall provide the Commission with an updated list of all agents selling the Eirpage service and indicate which agents are at the same time paging service operators in their own right.

4. In January 1995, the parties shall make available to the Commission information enabling it to review: (i) the development of the paging service market in Ireland; and (ii) the development of sales of Motorola paging receive equipment in Ireland compared to that of other brands.

5. All three parties are required to inform the Commission forthwith of any amendments or additions to the joint venture agreement itself, the operating agreement, the standard Eirpage agency agreement, the standard Eirpage subscriber agreement, and likewise any change in the scope, nature or extent of the cooperation between them.

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 85 (3) of the EEC Treaty, the provisions of Article 85 (1) are hereby declared inapplicable for the period 26 March 1990 to 31 July 2001 to the joint venture agreement dated 23 February 1988 between Bord Telecom Eireann (Telecom) and Motorola Ireland Ltd (Motorola) and the relevant notified accompanying agreements: the operating agreement between Telecom and the joint venture company, the standard Eirpage agency agreement and the standard Eirpage subscriber agreement.

Article 2

The declaration of exemption contained in Article 1 shall be subject to the following obligations:

(a) Bord Telecom Eireann shall inform the Commission forthwith and on a continuing basis of any requests made under the undertaking it has given to make paging facilities available to third parties;

(b) Eirpage Limited shall submit its annual financial statements to the Commission each year upon their issuance;

(c) Eirpage Limited shall at the same time as the submission of its annual financial statements provide the Commission with a list of all Eirpage agents and identify which agents are at the same time paging service operators in their own right;

(d) in January 1995, the parties shall submit a report to the Commission setting out (i) the development of the paging service market in Ireland, and (ii) the development of sales of Motorola paging receive equipment in Ireland compared to that of other brands;

(e) all three parties are required to inform the Commission forthwith of any amendments or additions to the agreements referred to in Article 1, and of any change in the scope, nature or extent of the cooperation between them.

Article 3

This Decision is addressed to the following undertakings:

1. Bord Telecom Eireann,
Merrion House,
Merrion Road,
IRL-Dublin 4.

2. Motorola Ireland Limited,
Unit 12C,
Santry Industrial Estate,
IRL-Dublin 9.

3. Eirpage Limited,
Anglesea House,
Donnybrook,
IRL-Dublin 2.

Done at Brussels, 18 October 1991.

For the Commission
Leon BRITTAN
Vice-President

II/105

COMMISSION DECISION

of 23 October 1991

making an initial allocation to the Netherlands of part of the resources to be charged to the 1992 budget year for the supply of food from intervention stocks to designated organizations for distribution to the most deprived persons in the Community

(91/563/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 3730/87 of 10 December 1987 laying down the general rules for the supply of food from intervention stocks to the most deprived persons in the Community (1),

Having regard to Commission Regulation (EEC) No 3744/87 of 14 December 1987 laying down the detailed rules for the supply of food from intervention stocks to the most deprived persons in the Community (2), as last amended by Regulation (EEC) No 583/91 (3), and in particular Article 2 (3) thereof,

Having regard to Council Regulation (EEC) No 1676/85 of 11 June 1985 on the value of the unit of account and the conversion rates to be applied for the purposes of the common agricultural policy (4), as last amended by Regulation (EEC) No 2205/90 (5), and in particular Article 2 (4) thereof,

Whereas on 3 October 1991, the Netherlands requested Commission authorization to initiate already in 1991 the action on its territory to be financed by resources chargeable to the 1992 budget and indicated the quantities of produce that it wished to distribute; whereas it is desirable to initiate the scheme now in the Netherlands by making an allocation to that country; whereas this allocation shall not exceed 50 % of the resources allocated by Commission decision to the Netherlands in respect of the plan for 1991;

Whereas in order to facilitate the implementation of this scheme it is necessary to specify the rate of exchange to be employed in converting the ecu into the national currency and to do so at a rate which reflects economic reality,

HAS ADOPTED THIS DECISION:

Article 1

1. The allocation for the Netherlands of the appropriations referred to in Article 2 (3) of Regulation (EEC) No 3744/87 to be charged to the 1992 budget shall be ECU 1 643 000.

This sum shall be converted into national currency at the rate applicable on 2 January 1991 and published in the C series of the *Official Journal of the European Communities*.

2. Subject to the limit set out in paragraph 1, the following quantities of produce may be withdrawn from intervention for distribution in the Netherlands:

— 50 tonnes of butter,

— 200 tonnes of beef.

3. The withdrawals referred to in paragraph 2 may be made from 1 November 1991.

Article 2

This Decision is addressed to the Member States.

Done at Brussels, 23 October 1991.

For the Commission

Ray MAC SHARRY

Member of the Commission

(1) OJ No L 352, 15. 12. 1987, p. 1.
(2) OJ No L 352, 15. 12. 1987, p. 33.
(3) OJ No L 65, 12. 3. 1991, p. 32.
(4) OJ No L 164, 24. 6. 1985, p. 1.
(5) OJ No L 201, 31. 7. 1990, p. 9.

II/107

COMMISSION DECISION

of 23 December 1992

relating to a proceeding pursuant to Article 85 of the EEC Treaty

(IV/32.745 — Astra)

(Only the English and French texts are authentic)

(93/50/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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 Spain and Portugal, and in particular Article 2 thereof,

Having regard to the notification for exemption submitted pursuant to Article 4 of Regulation No 17 on 3 June 1988 by British Telecommunications plc (hereinafter 'BT'), Société européenne des satellites SA (hereinafter 'SES') and BT Astra SA, of a series of agreements and related documents regarding the marketing and provision of television broadcasting services by satellite, which notification was subsequently amended by BT to include also an application for negative clearance,

Having decided on 3 April 1990 to open proceedings in the case,

Having given the undertakings concerned the opportunity to reply to the objections raised by the Commission pursuant to Article 19 (1) of Regulation No 17 and Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 (2),

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. FACTS

(1) On 3 June 1988, BT, SES and BT Astra SA notified to the Commission of the European Communities for exemption only a series of agreements and related documents regarding the marketing and provision of television broadcasting services by satellite; subsequently, in its reply to the Commission's statement of objections, BT argued that Article 85 (1) did not apply to the arrangements and by letter of 5 December 1990 formally requested the notification to be considered as amended in that respect.

A. The parties

(2) SES is a Luxembourg corporation established in 1985 for the purpose of operating satellites. Its first satellite, Astra 1A, launched in December 1988, was the first medium-powered satellite not owned by telecommunications organizations ('TOs') offering international television services in Europe. At the time of notification, SES did not yet have a turnover. Capital to cover the costs of purchasing the satellite, having it launched and other expenses such as marketing and insurance, were covered by the input of approximately twenty shareholders from various Member States and others, and State-guaranteed bank loans.

In 1991, SES's turnover rose to Lfrs 3 471 954 747. A second medium-powered SES satellite, Astra 1B, was launched in February of 1991.

(3) BT has a number of subsidiaries, none of which is involved in the satellite sector. BT's total turnover for the year ended March 1992 was ± £ 13 337 000 000.

BT is a licensed operator, entitled to carry out telecommunications activities in the United Kingdom, which includes uplinking signals to satellites.

According to Condition 1.1 of BT's licence granted under Section 7 of the Telecommunications Act 1984, the 'Universal provision of telecommunications services' is imposed on BT *vis-à-vis* every person who requests such services; Condition 5 further requires BT to take all steps to provide international connection services to its customers to the extent necessary to meet all reasonable demands for such services. Condition 53-5-b provides for exceptions and limitations to

(1) OJ No 13, 21. 2. 1962, p. 204/92.
(2) OJ No 127, 20. 8. 1963, p. 2268/63.

II/109

these obligations in certain cases, i.e. if the demand for such services in a given area is, or seems likely to be, insufficient to cover the costs of setting up that service there.

Television distribution by satellite

(4) TV channels are transmitted by various means, such as terrestrial broadcasting, cable and satellite. A combination is also possible, for example via a satellite to a cable operator who transmits it to the end-viewers. Transmission by satellite involves the following steps:

1. television channels are prepared by a 'programme provider';

2. the signals are transmitted from the television studio to an earth station from where the 'uplink' to the satellite takes place; programme providers must contract for such uplink services with a licensed operator, which in most EC countries is exclusively the TO;

3. on the satellite, the signals are received and amplified by a 'transponder', and then beamed back to earth. Satellites are covered by several such transponders, 16 in the case of the Astra I A satellite;

4. when the signals are 'downlinked' to the earth, they are caught by a satellite receive dish; the receiver can be:

   (a) a cable operator who then transmits the signal by cable to the TV viewers;

   (b) SMATV (satellite master antenna TV) systems which distribute to residents of a hotel or apartment building; or

   (c) TV viewers who receive the signals directly by placing satellite dishes on their rooftop; the latter is referred to as direct-to-home (DTH) reception.

The size of the receive dish depends on the strength of the satellite being used. Low-powered satellites require very large receiving dishes, more than 1,5 metres in diameter, while the signals from medium- and high-powered satellites can be caught by much smaller dishes, suitable for individual rooftops.

As to geographical coverage, or the satellite 'footprint', low- and medium-powered satellites can cover all of Europe, whereas high-powered satellites are generally limited to reception in individual countries.

(5) Until the launch of Astra I A all satellites in Europe were operated by TOs, individually or collectively. The various steps in the transmission of TV channels are covered by exclusive rights bestowed on TOs by international treaties and domestic laws:

1. The uplink

According to the Radio Regulations of the International Telecommunications Union and domestic telecommunication laws in the Member States, only 'licensed operators' are allowed to uplink signals to satellites. In most countries in Europe, at the time of the notification there was only one licensed operator: the TO. In the UK, the duopoly created by the 1984 Telecommunications Act resulted in two licensed uplink providers, BT and Mercury Communications Ltd; seven other licences to provide uplink services were granted in 1988 to 1989 and a class licence was introduced subsequently. At the time the joint venture agreement was concluded, however, BT was the only licensed operator in the UK actually providing uplink services for international television distribution. SES is likewise a licensed uplink provider in Luxembourg.

2. The space segment (satellites)

The geostationary satellites in orbit for telecommunication purposes are for the most part owned and operated by international organizations, such as Intelsat (International Telecommunications Satellite Organization), Eutelsat (European Telecommunications Satellite Organization), Inmarsat (International Marine Satellite Organization) or by domestic TOs.

The Intelsat and Eutelsat treaties, which have been signed by *inter alia* all Member States, restrict other persons from operating satellites alongside Intelsat and Eutelsat satellites without having gone through an approval or 'coordination' procedure. In the notification and subsequent proceedings, the parties referred primarily to the Eutelsat procedure.

Eutelsat was established in 1982 by an intergovernmental Convention, at present signed by 32 European Governments (called the 'parties').

I/110

Next to the convention there is an 'Operating Agreement' signed by the TOs (called the 'signatories') from the States who are parties to the convention. Each member country designates one 'signatory'; in the UK, BT is the Eutelsat signatory.

TO signatories finance the Eutelsat satellites in proportion to their utilisation thereof, in other words the more a TO uses transponder capacity on a Eutelsat satellite, the more its contribution will be; signatory TOs also share in the revenue in the same proportion. At the time the joint venture was established, BT had the largest investment share.

At the outset Eutelsat operated four low-powered telecommunications satellites. The first of the Eutelsat II series of medium-powered satellites of the same kind as Astra (i.e. enabling reception by a 60 to 90 cm dish) was launched in August 1990.

Pursuant to the Eutelsat Convention, when a Party or TO becomes aware that an entity wishes to operate satellites and/or satellite uplinking and downlinking equipment independently from Eutelsat within the Party's jurisdiction, that Party or TO is obliged to furnish all relevant information to Eutelsat. The Eutelsat authorities must then determine whether the operation of that non-Eutelsat satellite:

— will be technically compatible with the Eutelsat satellites,

— will not cause the Eutelsat system significant economic harm (*).

With respect to the Astra satellite, the Eutelsat Assembly concluded that no significant harm would be caused to the Eutelsat system provided that, *inter alia*

— Astra would be used for one-way television transmission only,

— no more than four Eutelsat channels switched from Eutelsat's satellites to Astra.

(*) Article XVI (a) of the Eutelsat Convention.
In 1992, Eutelsat's Assembly of Parties adopted a Resolution according to which only those non-Eutelsat satellite systems providing 'reserved services' will be subject to the full Article XVI (a) consultation procedure.

The SAO

Following scrutiny of BT's role as Eutelsat signatory, the Office of Telecommunications, Oftel, announced in November of 1989 that a Signatory Affairs Office (SAO) would carry out BT's functions as signatory independently from BT's commercial arm; this means that UK licensed operators now have access to Eutelsat (and Intelsat) space segment capacity on the same footing as BT.

3. The downlink

The laws of most Community countries require a satellite operator to obtain the consent of the local TO for the reception in that TO's territory of downlink signals from satellites. Furthermore, in the case of Astra, Eutelsat required coordination not only in respect of the uplink to and operation of the satellite, but also with regard to the downlink into any countries party to Eutelsat.

The joint venture

(6) SES's Astra 1A satellite has a total number of 16 transponders for which customers had to be found. As the satellite television market was characterized by a predominance of English-language channels, SES concluded that a majority of the channel providers (potentially) interested in broadcasting via Astra would be located in the UK. Consequently, before the satellite was launched, the decision was taken to allocate a minimum of nine and a maximum of 11 of the 16 transponders to a joint-venture established by BT and SES, whose stated aim would be to:

— offer operators of UK-originated TV programmes a packaged service consisting of a BT uplink in the UK and transponder space on SES's satellite,

— stimulate the development of the satellite market by:

(a) encouraging manufacturers of satellite dishes suitable for so-called 'direct-to-home' (DTH) reception to increase production;

(b) encouraging retailers to promote and sell this equipment; and

II/111

(c) encouraging home-viewers to buy such dishes so that they can receive Astra's signals directly on their roof-tops.

(7) The following agreements and other documents were examined during the notification procedure:

— the main or joint-ventures agreement of 17 December 1987 between SES and BT, in which they agreed to set up the 50/50 joint-venture company BT Astra SA, and whereby SES undertook to lease transponders to the joint venture company for further disposal via a UK licensed operator (thus not necessarily BT) to final customers as a packaged contract including the uplink,

— four side-letters dated 17 December 1987 relating to:

— the allocation of options to BT of transponders on the Astra satellite,

— SES's undertaking in relation to Clause 6 (4) of the agreement concerning its obligation not to divert satellite business from the UK,

— the formation of a joint marketing company (Satellite Promotions SA),

— SES's franchise from the Luxembourg Government as to the use of the Astra satellite,

— the BT/SES joint-venture marketing plan, which detailed the marketing activities to be undertaken by the parties: BT would concentrate on facilities marketing, i.e. finding customers for the service, and SES would concentrate on retail marketing, i.e. the receiver equipment industry and end-users,

— the main services and separate services agreements, likewise relating to the marketing activities,

— the agreements between BT and television programme providers. These agreements are not uniform. Most are for a period of 10 years, with a lump sum being paid in advance by the customer for the full period covering both uplink and transponder lease; the price paid decreases in proportion to the number of transponders leased. One agreement is for three years, with the possibility of extending to 10 years; in the first three year period, the customer is charged monthly, thereafter a lump sum is paid. Only in one agreement is a distinction made in the amounts being paid for the uplink and the transponder lease.

The joint venture arrangements were to continue for as long as the Astra satellite would remain technically 'alive', i.e. normally 10 years.

(8) Individual provisions which were of relevance in the Commission's examination were:

1. Clause 3. The transponders covered by the joint-venture agreement between SES and BT were leased to BT Astra SA, which in turn would lease them to a 'licensed UK operator'. Pursuant to a side-letter of 17 December 1987 between the parties, SES agreed that the Joint Venture would grant BT options over 9 transponders, to be disposed of within a stated period. BT in its turn would offer a single contract to programme providers comprising both the uplink by BT and a space on the Astra satellite.

2. Clause 5 covered BT's rights and obligations 'where it is the licensed UK operator'. Sub (1) provided that although BT had the right to determine the component for the uplink service to be included in the total price to the customer, it would consult with SES in setting this price.

3. Clause 6 covered SES's rights and obligations. Clause 6 (1) provided that although SES had the right to determine the price which was charged to UK customers for the use of transponder space on the Astra satellite, it would consult with BT in setting that price even where BT was not the 'licensed operator'.

4. Clause 5 (2) obliged BT to make the Astra satellite the satellite of first choice in marketing TV services, and not to discourage use of Astra in its pricing and marketing, for

II/112

example by charging customers using the new medium-powered Eutelsat II series of satellites (at the time of the joint venture not yet launched) lower margins or uplink fees than those using Astra.

5. Similarly, Clause 6 (5) obliged SES to use its best efforts to ensure the use of BT's uplink services to the transponders, which was consistent with the 17 December 1987 side-letter whereby SES granted options with respect to nine transponders to BT.

6. Clause 6 (4) obliged SES not to seek to divert UK-originated programmes, i.e. programmes physically prepared primarily in a UK studio, to uplink outside the UK. According to the side-letter of 17 December 1987 with regard to Clause 6 (4), SES also had to refrain from encouraging programme providers to prepare their English-language programmes in studios outside the UK. Specifically, SES was obliged not to induce programme providers to use studios in and uplink from Luxembourg by providing commercially preferential terms 'either for the satellite capacity or for the uplink services' (SES being licensed to provide uplink services in Luxembourg).

7. Clauses 5 (3), 6 (2) and 7 contained provisions aimed at facilitating transfer to the Astra satellite of customers hitherto using satellite services on other satellites. In this context, BT could provide its existing customers (transmitting via the Intelsat I or Eutelsat I satellites) the facility of 'double-illumination', i.e. simultaneous transmission to both satellites. As customers would be hesitant to 'double-illuminate' if that meant paying for two full leases, these arrangements provided for BT and SES to bear part of the costs. Furthermore, BT undertook under certain conditions to facilitate early termination by customers of existing contracts.

8. Although SES was contractually free to market the transponders not covered by the joint venture arrangements as it saw fit, its freedom was limited by Clause 6 (4) which provided that all UK originated programmes (i.e. prepared in studios in the UK) uplinked to the Astra satellite had to be marketed through the joint-venture and by Clause 6 (5) which determined that where a customer planned to uplink from the UK, the terms offered to that third party could not be more favourable than those offered to the JV. Furthermore, SES would endeavour to ensure that the service offered by BT Astra in the UK was not 'mutually inconsistent' with the service offered by SES in other countries.

9. Clause 6 (6) provided that unless otherwise agreed between BT and SES, SES would not utilize transponders on satellites other than Astra 1A for programmes prepared in or uplinked from the UK while any of the transponders covered by this Agreement remained available for use.

10. Pursuant to Clause 9 of the joint-venture agreement and the terms of the customer contracts, the channel provider paid BT a lump sum covering the uplink service and the transponder lease. The latter amount was passed on in its entirety by BT to BT Astra SA, which in the turn passed on 90 % to SES; 10 % went back to BT as the 'BT Service Charge'. In other words, for its involvement in the joint venture BT received;

— the uplink fee,

— the 10 % BT service charge on the transponder lease.

Clause 9 also referred to a 'Eutelsat payment' to be made per transponder by SES to Eutelsat; in reply to a request for information from the Commission, the Director-General

II/113

of Eutelsat stated that 'there are no payments to Eutelsat whatsoever, nor indeed any other arrangement of payment in kind rather than cash, nor any exchange or transaction of any kind possessing any value, as between Eutelsat and SES or any other party which could be deemed as related to utilization of the GDL (Astra) satellite. We have not seen and are not aware of the contents of the joint-venture agreement of 17 December 1987 referred to in your letter'.

As the joint-venture agreement did not bestow any absolute exclusivity on BT, in theory any other 'licensed UK operator' could have leased the transponder capacity from BT Astra and conclude the customer contracts comprising uplink and transponder space with the programme providers. However, in that event the 10 % 'BT service charge' would continue to be paid by BT Astra to BT; the 'licensed operator' in fact carrying out the coordinating function would only receive the fees for its uplinking activities, while BT would still receive 10 % for an operation in which it played no apparent role, except that of being part owner of the joint-venture company.

Termination of the joint-venture

(9) On 3 April 1990, the Commission initiated proceedings under Regulation No 17, having come to the preliminary conclusion that the notified arrangements fell under Article 85 (1) of the EEC Treaty and could not benefit from an exemption under Article 85 (3). Subsequently, the parties presented a proposal whereby the joint-venture agreement and related side letters and service agreements would be terminated, but the customer agreements concluded under the joint-venture arrangements would remain in place pursuant to a novation resulting in direct transponder leases from SES to BT instead of via the joint-venture company. As the removal of the joint-venture company from the chain of transponder leases from SES to, ultimately, the programme providers, did not in reality change the *status quo*, the Commission, on 26 July 1990, sent a statement of objections to the parties, who presented their views in writing and orally at a hearing held for that purpose on 13 and 14 November 1990.

(10) On 30 January 1991, the parties signed an agreement terminating their joint-venture arrangements, subject to the same conditions as contained in the proposal referred to above in recital 9.

II. LEGAL ASSESSMENT

A. Article 85 (1)

(11) The arrangements between the parties restricted competition in the markets both for the provision of satellite transponder capacity for the distribution of television channels and for uplink services. The effects of the cooperation between the parties were felt both in the United Kingdom and elsewhere in the Community.

1. Restriction in the market for space segment capacity

(12) SES and BET are direct competitors in the European market for the provision of space segment capacity for the transmission of television channels.

(13) As the owner of the Astra 1 A satellite, SES could offer 16 transponders to programme providers seeking satellite transmission.

(14) BT has since 1983 been offering space segment capacity on Eutelsat (and Intelsat) satellites to programme providers. Pursuant to Article 16 of the Eutelsat operating agreement, all applications for the allotment of Eutelsat space segment capacity to programme providers passes through the signatories, in the UK BT. BT arranged for the ultimate disposal of the transponders and concluded the customer contracts, direct contacts between the latter and Eutelsat being excluded by the terms of the operating agreement. Although the final allotment of space segment capacity is determined not by the individual signatory but by the Board of signatories, BT was at the time the joint-venture was concluded the signatory with the largest investment share. According to the notification, BT was providing more TV distribution services by satellite than any other European telecommunications organization; the fact that BT did not actually own the space segment capacity offered to customers does not mean, as it has argued, that it was not in competition with SES, given the context of the Eutelsat arrangements.

II/114

It is illustrative to note that the Eutelsat Assembly stated as a condition for Astra's coordination that there is an increased joint effort and aggressiveness by signatories ... in a drive to find new business ... in order particularly to make up for the loss of revenues originating from the implementation of the GDL (Astra) satellite. BT, as the UK signatory, had to reconcile this commitment with its obligation under the agreement with SES to make Astra the satellite of first choice.

(15) BT has furthermore stated that BT and SES could not be regarded as competitors because BT could not, in 1986 to 1987, offer customers medium-powered capacity, but only low-powered Intelsat and Eutelsat capacity; it was not until the middle of 1990 that the first medium-powered Eutelsat II series satellite was launched. This argument must be rejected in that it presupposes that there are distinct separate markets for low-powered and medium-powered capacity. In fact, low-powered and medium-powered satellites offer customers the same possibilities as far as geographic coverage is concerned and as regards transmission to cable head-ends; medium-powered satellites simply offer the added feature of enabling DTH reception by relatively small receive dishes. DTH transmission and transmission by cable can however take place simultaneously. In countries with well-developed cable systems where there is thus less need for individual reception, cable subscribers will not know whether the programmes they receive are being transmitted via low- or medium-powered satellites — or in fact by other means.

Recent statistics (*) indicate that 73 % of all European homes receiving Astra channels do so via cable (and smatv), the percentage in highly-cablized countries such as Belgium and the Netherlands going up to nearly 100 %.

BT itself stated in its reply to the statement of objections: it is clear that medium-powered satellites were competing with low-powered capacity, referring in that context to the Eutelsat coordination procedure aimed at determining the competitive impact of medium-powered capacity on low-powered capacity.

(16) Pursuant to the joint venture agreement and in particular Clause 6 (4) which provided that all UK originated programme channels uplinked to the Astra satellite would be marketed through the joint venture, SES agreed not to enter the market in question independently but in cooperation with a direct competitor, BT. The restriction of competition flowing from Clause 6 (4) was reinforced by specific clauses in the main agreement between the parties, which also constituted restrictions of competition in the sense of Article 85 (1), viz:

— Clause 6 (1), which obliged SES to consult with BT in setting the price charged to UK customers for the use of transponder space on the Astra satellite,

— Clause 5 (2) which obliged BT not to offer more favourable terms with respect to the use of other satellites for TV services than Astra.

Through these two provisions, the conditions for the use of transponder capacity on Astra and all satellites on which BT leased capacity could be aligned: Clause 6 (1) achieved such alignment with respect to other existing satellite capacity and Clause 5 (2) for future satellite capacity. Although Clause 5 (2) referred to the Eutelsat II satellites, this was by way of example only, and BT's obligation not to discriminate against the Astra satellite by its pricing policy or other policies extended to all other satellites for TV services. These arrangements involved an all-over and far-reaching price coordination between the two parties and deprived customers of a new, alternative source of supply for transponder capacity in the UK.

The gravity of this alignment was reinforced by the consideration that aside from its role in Eutelsat, BT was also in its own right a direct potential competitor of SES: given BT's financial position as well as its technical and commercial know-how in the satellite sector, BT would not experience any barriers to entering the market for the operation of satellites independently; its unwillingness until now to do so, which BT argued indicated it was not a potential market

(*) Cable & Satellite Express, 10. 7. 1992.

II/115

entrant, is a purely subjective consideration and cannot be relied upon in determining potential competition.

Furthermore, the restrictions regarding the supply of transponder capacity extended beyond:

1. the transponders covered by the agreement between BT and SES,

2. the UK and

3. the Astra satellite itself:

re 1. and 2.: Clause 6 (4) provided that all UK-originated programmes must be marketed through the joint venture with BT and that SES would not seek to divert UK-originated programmes to uplink outside the UK.

As clarified by one of the side letters, SES had also to refrain from encouraging programme providers to prepare their English language programmes in studios outside the UK. Even if customers were to do so, Clause 6 (5), which determined that customers uplinking from the UK outside the joint venture could not enjoy more favourable terms than joint-venture customers, ensured that there would be no benefit in circumventing the joint venture.

re 3.: Clause 6 (6) obliged SES not to utilize transponders on satellites other than the Astra 1A satellite for programmes prepared in or uplinked from the UK while any of the transponders covered by the joint venture agreement remained available.

2. *Restrictions in the uplink market*

(17) UK programme providers who wished to lease transponder capacity on the Astra satellite were obliged do so via the joint venture. Although theoretically a licensed operator other than BT could have been used, SES's obligation to ensure the use of BT's uplink to the transponders (Clause 6 (5)), and the fact that the 10 % BT service charge would go to BT regardless of the licensed operator to whom BT Astra SA ultimately leased the transponder for further disposal to customers, meant that in reality the contract partner with whom programme providers were faced for access to Astra was BT. Pursuant to Clause 3 (1), the service offered to customers by the licensed operator comprised the transponder (s) and the uplink. Induced by more favourable conditions in the event they opted for long term leases, most customers (i.e. representing eight out of nine transponders leased at 1 December 1989) concluded 10 year customer contracts with BT. The arrangements involved the following restrictions:

Restrictions between the parties

— competition for uplink services between the parties: BT and SES are direct competitors in the uplink market, as both are licensed to provide uplinking services. Although the licences of BT and SES related only to their respective national territories, programme providers are not bound by national boundaries and could either transmit their programmes by conventional or other means to another territory for uplinking or establish studios in the locality where the conditions are the most favourable. At the oral hearing, SES has confirmed that four German television programmes were uplinked to satellites other than Astra in Germany, downlinked in Luxembourg and then uplinked again to the Astra 1A satellite by SES. RTL-4, previously RTL-Véronique, a channel aimed primarily at Dutch-speaking audiences, set up a studio in Luxembourg to allow direct uplinking by SES to Astra 1A.

However, various clauses in the main agreement between BT and SES eliminated any real competition between them as far as the uplink service was concerned: Clause 5 (1) obliged BT to consult with SES in setting the price for the uplink component, Clause 5 (2) obliged BT not to charge lower uplink fees in the event of uplink services to other satellites, e.g. Eutelsat II satellites, and Clause 6 (4) and 6 (5) sought to restrain SES from inducing programme providers to use its uplink facilities

II/116

in Luxembourg by providing commercially preferential terms either for the satellite capacity or for the uplink services.

Both parties have argued that these provisions did not have any practical consequences, as UK programme providers would not have been interested in an uplink by SES in Luxembourg anyway, either following transmission from the UK or directly in the case of relocation of TV studios. Transfrontier movement in the uplink market is, however, possible, as illustrated by the case of the German and Dutch television channels referred to above. The provisions of the joint venture and notably the side-letter to Clause 6 (4) were indeed precisely aimed at preventing this type of movement and cannot, as the parties suggest, have been without any practical significance. In fact, BT subsequently confirmed that the restrictions on SES as regards its uplinking activities in Luxembourg were inserted because there was a concern that there could be dumping of uplink prices which would then distort what would be the decision of an economically rational TV company ... It might have been in Luxembourg's interest given that most of the customers were distant to have priced that (uplink) capacity at an unrealistically low rate,"

Restrictions vis-à-vis third parties

— foreclosure of other (potential) uplink providers: the fact that under the joint venture, most programme providers who signed the BT customer contracts are bound to BT for the uplink services during a period of 10 years represents an absolute 10-year foreclosure for other licensed UK operators from providing this service as regards the Astra satellite, which until three years after the arrangements were concluded was the only medium-powered European satellite. Furthermore, pursuant to Clause 6 (6), SES could not use transponders on other satellites (e.g. Astra 1B) for programmes originated or uplinked in the UK as long as any of the transponders covered by the joint venture agreement remained available. Also, until the SAO arrangements referred to above under recital 5 (2) were introduced, other uplink providers did not have access to Eutelsat or Intelsat space segment capacity,

— limitation of customer choice: UK customers interested in broadcasting via Astra were obliged to accept the uplink service provided by BT, whereas they may have found or may find more favourable terms elsewhere. The tying of BT's uplink service to the satellite capacity on Astra was aggravated by the fact that under the customer contracts, most customers were obliged to pay one lump sum covering both elements of the contract; unaware of the price being charged for the uplink, respectively transponder capacity, customers were thus not in a position to negotiate the conditions imposed on them.

3. *Appreciability and effect on trade between Member States*

(18) For the above reasons, the agreements resulted in serious restrictions of competition which given the size of all parties concerned, including the customers involved, were appreciable. By the very nature of the service in question and also in view of the individual clauses aimed at discouraging or preventing cross-border activities in both the transponder and uplink markets, trade between Member States was affected and Article 85 (1) of the EEC Treaty was therefore applicable.

B. Article 85 (3)

(19) In order for the Commission to declare the prohibition of Article 85 (1) inapplicable pursuant to Article 85 (3), the requirements provided for in Article 85 (3) must all be met. In the first place, the restrictive agreement must result in certain benefits in terms of improving production or distribution, or promoting technical or economic progress, which outweigh the disadvantages for competition.

As a general argument, the parties have stated that any restrictions of competition resulting from their cooperation were outweighed by the benefits which ensued in terms of economic progress in the provision of satellite television services and

I/117

improved distribution thereof. Admittedly, Astra, as the first privately-owned satellite for international television services to compete with the Intelsat and Eutelsat satellites, and furthermore the first medium-powered satellite, contributed to increasing competition on the market for television transmission by satellite. However, in the Commission's view these benefits were a result of the existence of the Astra satellite as such and not of the arrangements concluded between BT and SES for the purpose of marketing and operating the satellite. The question is thus whether SES could have entered the market with the Astra 1A satellite independently of the arrangements with BT or, rather, as the parties have argued, that those arrangements were indispensable to enable a new competitor to the existing Eutelsat and Intelsat systems to emerge successfully.

(20) The parties did not argue that SES needed to cooperate with BT in order to overcome the first hurdles facing new market entrants in this sector, namely the heavy costs involved in acquiring the satellite itself and the costs of launching it. These costs SES was able to bear by itself and it has indeed stated that it had no wish to enter the market for the provision of satellite capacity for the transmission of television channels with any partner. However, the particular features of this market represented obstacles to market entry which SES concluded could only be overcome through the arrangements with BT.

(21) Specifically, the parties have argued that in order for SES to exploit UK demand, it had no alternative but to conclude a joint venture with BT, because:

— BT's position as the UK Eutelsat signatory enabled SES ultimately to obtain Eutelsat approval for the operation of the satellite; Eutelsat requires two signatories to embark on the coordination procedure, so that SES needed another signatory aside from the Luxembourg PTT, which supported the Luxembourg-based company. In view of the considerations regarding English language programmes (see recital 6 above) and BT's apparent interest in providing uplink services, BT was chosen,

— BT's position at the time the arrangements werde made as the sole effective uplink provider in the UK ensured potential customers that there would be no problem in obtaining the necessary uplink to the Astra satellite.

Although these considerations may well have resulted in SES's point of view at the time, they do not constitute valid objective reasons for the restrictive arrangements between the parties.

(22) The parties have submitted that although there are no provisions to this effect in the Eutelsat Convention, SES required a second signatory in order to embark successfully on the Eutelsat coordination procedure. It has also been established that more than a year before the main agreement was concluded, BT offered to contribute to the commercial success of the then-planned SES Astra satellite system by *inter alia* serving as the required second Signatory. BT clearly stated that this assistance would be given in the context of an agreement between BT and SES. It is therefore understandable that SES, as it has stated in reply to the Commission's statement of objections, did not expect BT to provide its services as signatory without some form of compensation.

There were, however, no objective reasons to justify the imposition of a partnership on SES as a *quid pro quo* for BT's assistance in the coordination procedure. Article XVI of the Eutelsat Convention merely states that a Signatory which becomes aware of any person within its territory intending to utilize non-Eutelsat space segment equipment, must furnish all relevant information in order to allow the Parties to establish whether there is likely to be any significant harm to Eutelsat. This provision does not in any way require the Signatory engaged in the coordination procedure to enter into some form of cooperation agreement with the applicant market entrants, nor are there any other provisions in the Convention or Operating Agreement which do so. In fact, as noted above under recital 8 (10), the Director-General of Eutelsat stated not to have any knowledge of the arrangements between BT and SES. In other words, when BT became aware of customer interest in the Astra satellite in the UK, that fact alone gave rise to BT's obligation to

II/118

coordinate under Article XVI; BT has submitted correspondence with programme providers dating back to well before the conclusion of the agreement with SES in which such interest was clearly expressed. One programme provider in a letter dated 9 October 1986 formally advised BT as the UK Signatory to Eutelsat of its very real interest in using Astra and expressed its concern that BT had not registered that interest at a previous Eutelsat meeting.

SES has noted that according to the OFTEL statement on the setting up of the SAO (see above recital 5 (2)) BT is entitled to a fee equivalent to 7 % of the space segment charge to cover its costs in providing its services as signatory; SES compared this fee to the 10 % BT service charge due under the notified arrangements. The Oftel statement cannot, however, be used as a point of reference in this case in that it refers to situations in which BT acts as an intermediary for applicants seeking space segment capacity on Eutelsat (and Intelsat) satellites and involves a far broader range of Signatory activities than its involvement in the coordination procedure alone. Furthermore, the arrangements between BT and SES went much further than the mere payment of the BT service charge and resulted in the serious restrictions of competition referred to in recitals 12 *et seq.*

In any event, an agreement concluded for the purpose of facilitating or complying with a procedure in which the entry of new competitors is subject to the approval of existing competing market participants cannot benefit from an exemption under Article 85 (3), the requirements of which relate to objective advantages such as improvements in production, distribution or technical and economic advances.

(23) The Commission cannot accept that the arrangements between BT and SES were indispensable in order to ensure that UK programme providers would be provided with the necessary uplinking services by BT, at that time the only *de facto* provider of such services for television distribution via satellite in the UK.

In the Commission's view, BT was obliged both by Conditions 1 and 5 of its licence under the Telecommunications Act 1984, and by the provisions of Community law, in particular Article 86, to provide the uplinking services without requiring to participate in the leasing of transponders on SES's satellite to customers, thereby collecting the 10 % BT service charge to be deducted from SES's revenues for the lease of the satellite capacity.

In reply to the Commission's statement of objections, SES argued that at the time the arrangements were concluded, it was far from clear that it could count on an obligation on the part of BT under its licence to provide uplinking services. It noted that Oftel's decision in the PanAmSat case, whereby it was established that BT's obligations arise as soon as it receives a request from a person in the UK for a given service, provided the customer is willing to pay a reasonable price, was not issued until March 1988. Furthermore, SES argued that even if Oftel's position on this point had been clear in the period preceding the conclusion of the joint venture agreement in December 1987, BT would probably not have been obliged to build an earth station if customers had not already entered into contracts for the supply of the service.

SES's arguments cannot be accepted. In the first place, if BT's obligations under its licence were not clear at the time SES needed to reassure customers that uplinking to the Astra satellite would be provided for, it was not by entering into restrictive arrangements with BT that the situation would be clarified. PanAmSat, which actually experienced difficulty in obtaining uplink services by BT, did not enter into a joint venture with the latter, but made representations to Oftel. SES, however, never put the issue to the test. Well before the arrangements between the parties were concluded, BT engaged in correspondence with programme providers who expressed a clear interest in the Astra IA satellite; in October 1986, one potential Astra client formally advised BT that it had a very real interest in using Astra (see above recital 22) even on the basis of restricted downlink reception possibilities in northern European countries. In the absence of other uplink providers for television distribution at that time, all uplinking services to the Astra IA satellite from the UK would necessarily accrue to BT. However, before those customers could translate their interest into commitments firm enought to actuate BT's uplinking obligation (according to Condition

I/119

53.6 of BT's licence it is not necessary that a contract actually be concluded), the arrangements between BT and SES were finalized. Again, the issue was not put to the test. Furthermore, it is not clear why simply by virtue of the joint venture agreement with SES, BT did decide that the building of a dedicated earth station was justified; BT itself has stated that it installed a new dedicated uplink terminal to access the Astra IA satellite ... prior to BT securing any customers for service on the Astra IA satellite.

Finally, BT's capital investment in these installations represented ± 3 % of SES's total expenditure in satellite construction and launching costs. Some arrangement far less restrictive than the joint venture agreement must have been possible to ensure BT that it would recoup this investment.

As far as Community law is concerned in this connection, as a matter of general principle, it should be clear that in the telecommunications sector, characterized by activities which can only be carried out by operators such as BT licensed to do so, the provision of services under licence to market participants must be freely available and cannot be made subject to market entrants concluding restrictive agreements with the licensed operator. The fact that SES was not satisfied that Community law was sufficient to compel BT to provide uplink services does not justify the solution it finally opted for. Again, SES did not put the issue to the test.

(24) From the outset, the parties were informed that on the basis of the above arguments relating to Eutelsat coordination and uplinking services, the requirements of Article 85 (3) did not seem to be met. A further line of argumentation in support of the arrangements was subsequently developed, relating to:

— the benefits of a single packaged customer contract covering both uplink and transponder capacity,

— the need for BT's involvement in finding customers in the UK for Astra I A.

(25) According to the parties, a single customer contract comprising uplink facilities and satellite capacity placed the sole responsibility for the entire service on one entity, BT. For the customer, this was not only convenient but could lead to a quicker resolution of technical problems; under the packaged arrangement, BT would be most likely to take measures to restore degradations in signal quality, regardless of their origin, for example by strengthening the uplink signal in order to compensate for a weaker downlink signal, the latter deficiency otherwise not falling under BT's responsibility. If there were two separate contracts, the uplinker (BT) and the satellite provider (SES) would only monitor their own responsibilities and there would be no control of the service as a whole. Neither would be willing to take corrective action until it had been established on which part of the transmission path the fault lay.

(26) In the Commission's view, however, no reasons have appeared why a bundled contract offers technical advantages not available in the case of two separate contracts. In fact the following considerations run counter to this argument:

(a) in order to provide uplink services, an operator such as BT must have the benefit of a licence. In return for the privilege of being allowed to provide such services, the licensed operator must ensure, to the extent he is capable of doing so, that the service actually reaches the viewer in the form of clear and continuous reception of the television programmes on his screen. If the uplink provider is capable of influencing the quality of the end product ultimately received by the viewer, he is, in the Commission's opinion, obliged to do whatever is necessary in that respect. If it subsequently appears that extra efforts by the uplink provider were necessitated by defects in parts of the transmission path for which he is not directly responsible, the uplink provider is of course entitled to compensation from the entity responsible for the deficiency;

(b) the parties' contention that separate contracts would tend to slow down the remedying of signal problems ignores the fact that even under a packaged contract, whatever party

I/120

turns out to be responsible for the deficiency will be liable *vis-à-vis* the other party for any loss of revenue. It is thus directly in the interest of each party that faults are detected and remedied immediately, in order to limit their potential ultimate liability. This interest is not in any way linked to the presence of a bundled contract;

(c) in the statement by the Director-General of Oftel regarding the independent PanAmSat satellite (see above recital 23), reference is made to Condition 35 of BT's licence, which contains a general prohibition of linked sales. The Director-General notes that although in the case of Intelsat satellites (and the same reasoning would apply with respect to Eutelsat), users have no direct access to the satellite sector and BT as signatory is permitted to provide both the uplink and the satellite sector, this argument would no longer hold with the advent of independent satellite systems ... and unbundling would be required. If there was an alternative satellite system, ... customers would be free to make their own arrangements with the independent satellite operator. Nowhere in the Director-General's remarks is there any mention of a technical reason why uplink and satellite sector should be provided by the same entity.

The Commission's position was confirmed by programme providers using the Astra IA satellite. Users together leasing the largest number of transponders denied that there were any technical advantages to a bundled contract. To illustrate the fallacy of the argument that BT would be the single point of contact for customers in case of problems, programme providers cited the case of a technical incident which occurred in the spring of 1989. Having contacted BT as directly responsible under the customer contracts, one programme provider was subsequently advises to contact SES to solve the problem, while another programme provider stated that at a later stage it also discussed the problem directly with SES because BT had been tardy in dealing with the matter.

(27) Also in support of the bundled customer contracts, the parties argued that it is contractually efficient to negotiate only one contract covering an entire service rather than engaging in separate contract negotiations for each element. Furthermore, a customer with a single contract for both uplink and transponder capacity is better placed to secure compensation for faults. For example, if the uplink service fails due to BT's fault, the customer will receive a rebate for the satellite part of the service as well as for the uplink. In the case of two separate contracts, one party would not be likely to make a rebate for the failure of the other party's service.

In the Commission's view, the efficiency which may result from negotiating only one contract does not outweigh the disadvantages which such tying arrangements entail, both for customers who are faced by bundled services and for competitors in the services concerned who are thereby foreclosed. With regard to the compensation for faults, the contractual arrangements involved in the case of separate contracts would admittedly have to contain provisions which ensure that customers are not obliged to pay for a service A they have not been able to enjoy not through any fault of their own but because a third entity providing a service B on which the execution of service A depends has not performed that service B satisfactorily or at all.

(28) In conclusion, the Commission considers that the bundled contract does not bring about any benefits which justify the arrangements between the parties. In reaching this conclusion, the Commission took into consideration the views expressed by the four programme providers using the Astra IA satellite via customer contracts with BT:

1. programme provider X which leased several transponders on Astra IA stated The principal issue raised in the meeting 'with Commission officials' is X's dissatisfaction with the

II/121

'bundling' of services in its agreement with ... BT ... The lack of transparency in packaging the uplinking and the transponders is a major objection; X came to agreement with BT only because it had no alternative ... The reason for this is that BT obtained exclusive rights to market a number of transponders on the Astra satellite to UK customers; As a buyer, X would have preferred dealing with SES;

2. programme provider Y stated that it would have preferred two contracts, because then there would have been room for negotiating different prices. Several months before finally signing a contract with BT for two transponders on Astra IA, Y wrote to Oftel concerning the severe problems we are having in obtaining competitive quotations for the provision of medium power satellite capacity ...; we at Y, along with other satellite television companies, have invited Eutelsat and SES Astra to submit bids for the provision of such capacity. Both organisations have informed us that we must deal through British Telecom International; What makes matters worse for us is that BTI require as part of the contract for satellite capacity that we use their earth station uplink site at Woolwich. We believe this is using their monopoly to make a linked sale;

3. programme provider Z stated that the view was taken that it was better to deal with one person for the overall contract and service. In assessing this statement, the Commission took into consideration

— the fact that no reasons were given why this view was taken; with regard to the technical advantage of dealing with one entity, Z's first reaction as to whom it would contact in case of problem was SES,

— Z was 25 % owned by BT at the time the customer contract was concluded; all important decisions, such as transponder leases, were taken unanimously by the three shareholders;

4. programme provider Q is a non-UK company which already prior to the emergence of Astra IA was obliged to locate its studios in London because it was not clear whether the TO in its own territory would provide uplink services to Intelsat space segment capacity, a service which BT was willing to provide. Q stated that as it had already located its transmissions to London, British Telecom was the only one who could provide Astra capacity. Although Q does cite certain advantages in having a bundled contract, its starting point appears to have been that capacity on Astra could only be acquired through BT; also, the advantages it cited had never been put to the test in practice.

The parties have argued that there was no customer interest in an unbundled service at the time and that statements made by programme providers now when market conditions have changed do not necessarily reflect what they requested at the time the agreements were concluded. It is true that the Commission has not found any evidence of written requests by customers to BT and SES for separate, unbundled services. As BT noted during the course of the procedure, however, BT was engaged in oral discussions concerning Astra IA with programme providers before the arrangements with SES were concluded, which were not, however, evidenced by any 'correspondence in the file'. In a letter to Oftel, however, quoted above under 2., one programme provider stated that it and others had applied to SES directly for the provision of satellite capacity, but had been referred to BT as the entity to deal through. In any event, customers would necessarily have been denied unbundled services in view of Clause 3 (1) of the main agreement which stated that 'The service offered to customers will comprise the transponders covered by this agreement and the addition of the uplink'.

SES has stated that by choosing for long-term contracts, customers have indicated that they were not injured by the bundled service. In the Commission's view, however, it was more likely the up to 50 % savings programme providers

II/122

enjoyed by opting for a long-term contract which prompted their choice.

(29) On the marketing side, the parties argued that the pooling of their respective skills, resources and experience was required in order to promote the use of the Astra satellite. BT with several years of experience in marketing and providing satellite services to UK television programme providers was responsible for finding customers, while SES's marketing responsibilities related to promoting the retail side, including both equipment manufacturers and viewers.

The Commission does not agree that SES could not have found customers itself in the United Kingdom, independently of BT's marketing efforts. The total number of television programme providers interested in satellite television in the UK was less than 10 at the time the joint venture was concluded, and there is no apparent reason why SES's commercial team could not have approached these potential customers itself. In fact, one programme provider has stated that SES's commercial director was very actively promoting the Astra satellite in the UK himself, several years before it was launched and before the joint venture was established. SES has argued that its initial contacts with customers were only translated into binding contracts with BT's assistance. Given the fact that potential customers were already at an early stage informed that they must deal through BT, well before the first customer contracts were signed, it is not possible to establish in retrospect whether customers felt BT's involvement was indispensable in this respect. It should be noted, however, that SES has sold the transponders not covered by the joint venture arrangements directly to programme providers in a number of countries, without the need for a joint venture with the local telecommunications organization.

Finally, BT's involvement in the sale of transponders on the Astra satellite admittedly facilitated the transfer of BT's Eutelsat and Intelsat customers to Astra thanks to the joint venture agreement provisions on double-illumination and early termination of existing customer contracts. However, several customers have noted that they believe the reduction in the satellite price which could have been achieved in the absence of BT's involvement in the Astra satellite would have amply offset the extra costs they would have had to bear in the absence of free of charge 'double-illumination'.

(30) The 'retail' marketing being carried out by SES is a continuation of an area of activity in which, according to the parties, it 'had already been active on a pan-European basis including the UK', and which in any event it would have pursued, also in the absence of the arrangements with BT.

Conclusion

(31) In view of the foregoing, the Commission has concluded that as the arrangements between BT and SES:

— did not bring about any improvements and benefits on the market in question, and

— were not indispensable in order to ensure SES's entry into the market for the provision of space segment capacity,

the notified arrangements were not eligible for exemption.

Under these circumstances, it is not necessary to examine whether the other requirements of Article 85 (3) are met.

C. Article 3 of Regulation 17

(32) Pursuant to Article 3 of Regulation 17, the Commission may, by decision, find that there is an infringement of Article 85 of the EEC Treaty and require the undertakings concerned to bring such infringement to an end. This implies not only the termination of restrictive agreements between the parties, but also the elimination of restrictive effects residing in contracts which have been concluded with third undertakings under the terms of the aforesaid restrictive agreements.

In the case at hand, after the parties had been heard in accordance with Article 19 (1) and (2) of Regulation No 17, they informed the Commission that the joint-venture agreement between themselves, and various ancillary agreements and side letters, were terminated on 30 January 1991; under the provisions of the termination agreement, existing customer contracts will remain in force, whereby the transponder lease takes place directly from SES to BT instead of passing through the

joint-venture company; upon expiry of such contracts, BT shall have no further rights with respect to the transponders concerned nor any others on Astra I A or Astra I B.

(33) The termination of the joint-venture agreement ensures the commercial autonomy of the parties for the future. However, the customer contracts which were concluded by BT under the joint-venture arrangements continue to be in force pursuant to Clause 5.1 (1) of the termination agreement without any modification.

These contracts perpetuate the restrictive effects resulting from the joint-venture agreement because customers who wished to transmit their programmes via the Astra IA satellite were not given the choice of concluding separate contracts for, on the one hand, uplink services and, on the other hand, the lease of transponder capacity. Furthermore, the terms of those customer contracts were determined by BT and SES in the context of the joint-venture arrangements, i.e. under conditions of distorted competition. This does not mean that the customer contracts, simply because of their links with the restrictive horizontal agreements, are also caught by Article 85 (1). However, the restrictive effects which these contracts perpetuate can only be eliminated when the customers have been given the right of readjustment. Therefore, they must have the option to remain committed to the customer contracts as signed with BT, to terminate those contracts or renegotiate the terms thereof. To this end, and within one month of the notification of this Decision to them, BT and SES shall inform programme providers who signed contracts with BT for international TV distribution services via the Astra IA satellite prior to 30 January 1991, that during the four months after having been so informed, they may, if they so wish,

— renegotiate the terms of the contract, or

— terminate the contract, taking into account a reasonable period of notice.

Customers who choose to renegotiate or terminate must in any event be ensured that the uplink services and the use of the transponder capacity will continue to be provided to them without interruption during the transitional period.

Customer contracts which at the choice of the customer continue to run under the original terms would only be restrictive of competition if they result in the foreclosure of uplink providers other than BT. However, in the light of current market conditions, in particular the accessibility of UK uplink providers to Eutelsat and Intelsat space segment capacity through the SAO and additional new space segment capacity, such as Astra IB, which has in the meantime become available, such a foreclosure would seem unlikely. If new elements were to appear, proceedings independent of those which have led to this Decision could be called for,

HAS ADOPTED THIS DECISION:

Article 1

The main agreement of 17 December 1987 between Société Européenne des Satellites SA and British Telecommunications plc, and all related side letters and agreements regarding the arrangements whereby the two parties cooperated in the joint provision of a television distribution service by satellite (collectively referred to as the agreements), constituted an infringement of Article 85 (1) of the EEC Treaty until 30 January 1991, the date on which those agreements were terminated.

Article 2

An exemption pursuant to Article 85 (3) of the EEC Treaty for the agreements referred to in Article 1 is hereby refused for the period during which they were in force.

Article 3

Within one month from the date of notification of this Decision, British Telecommunications plc (BT) and Société Européenne des Satellites SA (SES) shall inform television programme providers who concluded contracts with BT for television distribution services via the Astra I A satellite prior to 30 January 1991 in writing of the Commission's Decision and in particular Articles 1 and 2

thereof, and advise them that during a period of four months after having been so informed, such television programme providers are entitled, if they so wish, to

— renegotiate the terms of those contracts, or

— terminate those contracts, subject to a reasonable period of notice given by them to BT, which in its turn shall forthwith inform SES that such notice has been given.

When the letter pursuant to this Article is sent to television programme providers within the one-month time-limit referred to above, a copy of such letter shall at the same time be submitted to the Commission.

Article 4

This Decision is addressed to the following undertakings:

(a) British Telecommunications plc,
British Telecom Centre,
81 Newgate Street,
GB-London EC1A 7AJ;

(b) Société européenne des satellites SA,
Château de Betzdorf,
L-6815 Luxembourg.

Done at Brussels, 23 December 1992.

For the Commission

Leon BRITTAN

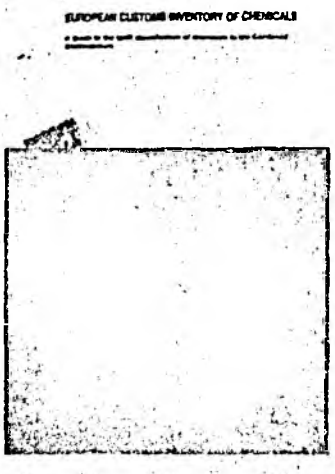
Vice-President

OFFICE FOR OFFICIAL PUBLICATIONS
OF THE EUROPEAN COMMUNITIES
Luxembourg

EUROPEAN CUSTOMS INVENTORY OF CHEMICALS

A guide to the tariff classification of chemicals in the combined nomenclature

English version - Amended version - Combined nomenclature 1991



This work includes:

— more than 32 000 chemical names (internationally accepted common names, systematic names and synonyms).

Features of this publication are:

— the classification (heading and subheading) of a chemical in the customs tariff of the European Communities can be ascertained immediately from its name, its CAS number (Chemical Abstracts Service Registry Number or its CUS number (Customs Union and Statistics),

— the nomenclature of this tariff (combined nomenclature) is based on the nomenclature of the 'harmonized commodity description and coding system' which is used on a worldwide basis.

ORDER FORM TO BE SENT TO:
Office for Official Publications of the European Communities
2, rue Mercier, L-2985 Luxembourg

Please send me ..... copy/copies of EUROPEAN CUSTOMS INVENTORY OF CHEMICALS

1991 — 643 pp.
ISBN: 92-826-0529-9
Catalogue number: CM-60-91-654-EN-C
Price (excluding VAT) in Luxembourg: ECU 66,00

Name: _____

Address: _____

_____ Tel: _____

Date: _____ Signature: _____

1 ECU = BFR 42,5 = DRA 230 = IRL 0,78 = UKL 0,73 = USD 1,20

I/125

COMMISSION

COMMISSION DECISION

of 27 July 1994

relating to a proceeding pursuant to Article 85 of the EC Treaty and Article 53 of the EEA Agreement

(Case IV/34.857 — BT-MCI)

(Only the English text is authentic)

(Text with EEA relevance)

(94/579/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 Spain and Portugal, 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, as converted on 18 September 1993 from the original notification pursuant to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (2),

Having regard to the request made by the parties on 10 February 1994, to extend the application and notification to Article 53 of the Agreement on the European Economic Area,

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 (3),

After consultation with the Advisory Committee for Restrictive Practices and Dominant Positions,

Whereas :

I. THE FACTS

A. INTRODUCTION

(1) The present case was oiriginally notified as a concentration pursuant to Regulation (EEC) No 4064/89. However, the Commission concluded that none of the transactions notified constituted a concentration. The parties were so informed by the decision of 13 September 1993. Consequently, and at the request of the parties, the notification was converted into a notification for negative clearance and/or exemption pursuant to Regulation 17.

Following the entering into force of the Agreement on the European Economic Area (EEA Agreement), the parties requested the Commission to extend the notification to cover also Article 53 of the EEA Agreement. Given that the notified agreements will have a relevant impact on the EFTA countries and that such impact is expected to be very similar to that the notified agreements will have on the Community, the Commission will also apply Article 53 of the EEA Agreement in the present case.

(2) The notified operation actually comprises two main transactions :

(i) British Telecommunications plc (BT) is to take a 20 % stake in MCI Communications Corporation (MCI), worth US$ 4,3 billion. BT will acquire new equity and will become the largest single shareholder in MCI, with proportionate

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No L 395, 30. 12. 1989, p. 1 (corrected version OJ No L 257, 21. 9. 1990, p. 13).
(3) OJ No C 93, 30. 3. 1994, p. 3.

board representation and investor protection. As will be further detailed later, several provisions have been included in the relevant agreement to impede BT from controlling or influencing MCI;

(ii) the creation of a joint-venture company, Newco, for the provision of enhanced and value-added global telecommunications services to multinational (or large regional) companies. The parties will contribute their existing non-correspondent international network facilities, including Syncordia, BT's existing outsourcing business, to Newco.

In the framework of the operation, the parties will rationalize their respective holdings in other telecommunications operators (TOs) and groupings in the world. In this respect, MCI has already acquired most of BT's existing business in North America.

B. THE PARTIES

(3) BT, the former UK monopolist telecommunications operator, and now a publicly quoted company, supplies telephone exchange lines to homes and businesses; local, trunk and international (to and from the United Kingdom) telephone calls; other telecommunications services and telecommunications equipment for customers' premises.

Worldwide turnover for BT in 1993 was ECU 17 952 million, a figure that shows a slight decrease in respect of 1992 (ECU 18 080 million). Over 95 % of BT's turnover was obtained in the EEA, mainly (over 94 %) in the United Kingdom. Outside the United Kingdom, BT has an established presence in France, the Netherlands, Germany and Spain, where it has recently announced a joint-venture agreement with Banco de Santander to provide data transmission services in Spain, where it has recently announced a joint-venture agreement with Banco de Santander to provide data transmission services in Spain in competition with the local TO.

BT is the world's fourth largest telecommunications company in terms of traffic (minutes of telecom traffic).

(4) MCI is a telecommunications common carrier in the United States of America providing a broad range of US and international voice and data communications services, including long-distance telephone, record communications and electronic mail services to and from the US.

Worldwide turnover for MCI in 1992 was ECU 8 137 million. MCI's turnover in the Community for the same year was said by MCI to be ECU 326,27 million.

MCI is the second largest long-distance operator in the United States of America after AT&T and the world's fifth largest in terms of traffic.

C. THE RELEVANT MARKET

1. Newco

(5) The market Newco will address is the emerging market for value-added and enhanced services to large multinational corporations, extended enterprises and other intensive users of telecommunications services provided over international intelligent networks. This market will cover a wide range of existing global trans-border services, including virtual network services, high-speed data services and outsourced global telecommunications solutions specially designed for individual customer requirements. Initially, however Newco will focus its development efforts on the biggest [. . .] (*) multinationals.

(6) In this market, Newco is expected to offer a portfolio of global products included in six categories of service offerings. Those global products will originally be based on a blend of existing products of the parent companies.

The six categories are the following:

— data services: low-speed packet, high-speed packet and frame relay services, pre-provisioned, mananged and circuit switched bandwidth,

— value-added application services: value-added messaging and video conferencing services,

— traveller services: global calling card services,

— intelligent network services,

— other services: Integrated VSAT network services,

— global outsourcing that will allow the distibutor to offer its customers the ability to transfer responsibility and ownership of their global networks to either the distibutor or Newco. In this respect, Newco will be able to integrate within its own offerings third-party products already owned by customers that they want to keep.

(*) Blanks between square brackets indicate buisiness secrets deleted pursuant to Article 21 (2) of Regulation No 17.

II/128

Given the needs of big companies to link locations geographically dispersed over the world (that means also providing broad coverage of delivery capacity and in-country support), those products must be global in nature and respond to a very particular set of requirements.

For a product to be global, it must have a number of special characteristics that make it different from similar products. Those characteristics are :

— to provide ubiquitous service across multiple borders,

— to provide consistent service levels and flexible delivery schedules,

— to make time-zones, languages and currencies irrelevant,

— to overcome inadequacies of local infrastructures,

— to make customers assume service is local when it is actually being provided from the other side of the world.

(7) The requirements of big companies that a provider of services must meet, and that refer to all products or services being provided are :

— a single point of contact accountable for assuring service levels,

— seamless, uniform, flexible features/functionality across geography,

— end-to-end provisioning, installation, fault management and service support,

— reliable service,

— customized billing, management information, reporting with language and currency flexibility,

— speed, ease of implementation,

— products that meet existing and evolving needs.

Generally speaking, those requirements have not been adequately satisfied under the still existing structure of the global telecommunications market based on national monopolies. A national TO does not provide real one-stop-shop, end-to-end or seamless services to customers' premises located outside the national borders. What a TO was doing up to now was to cooperate with other TOs to link their respective networks. Doing so meant that customers were billed separately and in different currencies by the TO of each country where they had facilities, that services and features available in each country were different (or at least that some features available at home were not available abroad), and that they had to face many other problems linked to the differences in culture or language.

(8) This situation began to change because of two elements. The starting up, first in the United States of America, then in the United Kingdom and now in the rest of the Community, of the gradual liberalization process of the global telecommunications market, and, secondly the rapid convergence of telecommunications and information technology. Both elements enabled the introduction of new services and products which vastly improved quality and range. One result was that multinationals and other big companies began to construct their own private networks. However, those private networks were costly because they eliminated scale economies of service and personnel, and because telecommunications was not the core business of those companies. For those reasons, now that the continued evolution of the said two elements has substantially changed the overall situation, those companies may consider turning to telecommunication service providers such as Newco.

(9) In addition, as regulation eases and technology advances, the border between services still under monopoly and liberalized services fades away. This fact adds further uncertainty to the market.

(10) In this context, what BT and MCI intend to offer through Newco is what the existing technology allows them to offer within the current regulatory limits. New products within existing categories and new categories of products could be offered by Newco in the years to come, that could include public basic telecommunications services.

(11) However, this Decision relates only to Newco's range of products and business scope as notified. Any substantial change thereof in the years to come, and in particular the offering by Newco of public basic telecommunications services will then require a new notification.

Structure of the market

(12) It is particularly difficult to give a precise picture of the existing structure of this emerging market because its principal feature is that it is in constant evolution. What is certain is that there is a very significant growth potential in the segment to be addressed by Newco, due to the continuing emergence of new technologies, improvements in basic infrastructure, the increasing standardization of services across borders, the increasing sophistication of customers and their reliance on telecommu-

II/129

nications as a transport vehicle for information. All this is in the framework of a rapidly changing telecommunications regulatory environment, which, in the Community, will mean full liberalization telephony in 1998 (2003 for some Member States).

2. BT's investment in MCI

(13) The acquisition by BT of new equity equivalent to a 20 % stake in MCI is intended to serve a common interest expressed by the parties to go global to better serve (and keep) their existing customers and to better address new areas of the market.

(14) The telecommunications market is developing fast and there is a high degree of uncertainty about how it will look in a few years' time : the prospect of full liberalization is pushing TOs to take positions, in order to be in the best possible situation when full liberalization comes. Many alliances are being announced, and most of them include provisions to enter the value-added segment, as a first step (in the EEA, value-added and enhanced services have already been liberalized), in particular as regards the provision of advanced value-added services to big multinationals. In this respect, the creation of Newco and the investment of BT in MCI are steps taken by the two parent companies to pre-position themselves for when full liberalization is in place, steps that are being followed by many TOs who are creating sets of products comparable to those of Newco.

3. Geographic scope

(15) The geographic market to be addressed by Newco, and to be considered in respect of the investment of BT in MCI, is global. Such conclusion is based on the two following arguments.

Although national borders are still in place as regards the provisions of most telecommunicatsons services, strategic alliances like the present one are being created now in anticipation of a market situation where national boundaries will have substantially disappeared.

In addition, both the services that Newco is going to offer, as indicated in definition of the business scope of Newco (see recital 23), and the customers it intends to serve are by nature international; consequently Newco will not be involved in the provision of services within one country only.

4. Market shares of Newco

(16) Newco's addressable market has been estimated by the parent companies at ECU [...] billion in 1994 and is projected to achieve over [...] annual growth over its first five years to achieve ECU [...] billion in 1999. It is also estimated that the Community will account for [...] of the market in 1994/95, rising to [...] in 1998/99.

According to Newco's business plan its market share, considering all categories of services together, will be [...] in 1994 and grow to over [...] by 1999 (assuming no dramatic change in the categories of products offered).

5. Main competitors of Newco

(17) Many companies, on their own or in cooperation with other partners, have entered or are entering the market for international value-added services (the precise set of services being offered is never exactly the same). Among them, the most important are : AT&T Worldsource, AT&T Istel, GEIS, International Private Satellite Partners (limited to North America and Europe), Eunetcom, Unisource, Infonet, Sprint International, FNA (limited to financial services), and IBM (through IBM's connect programme). Some of those projects are the current expression of strategic alliances between TOs, the real scope of which is not well determined yet, but which are similar to the present one between BT and MCI in that they are actions intended to position their partners with a view to the full liberalization to come and are not limited to the provision of value-added services.

In addition, almost every TO in Europe and in North America is trying to offer to its existing customers, at a national or a limited international level, an improved set of value-added and enhanced services.

For many of them, the range of specific products they want to offer and the kind of customers they want to serve are not clear yet. However, a substantial number intends to address the needs of the same companies Newco sees as potential customers, so that it is anticipated that there is going to be substantial competition at least at that level.

It should also be noted that a substantial number of major companies whose needs Newco intends to address have installed or are in the process of installing their own internal networks built on circuits leased from TOs. Those networks will be close substitutes of the Newco's services, in so far as they are to be offered to third parties.

6. Position of buyers

(18) The customers that Newco intends to serve are multinational corporations, extended enterprises, and other intensive users of telecommunications and in particular the biggest [...] of them. Many of them have huge telecommunication needs. In addition many have developed experience in the management of their own internal networks. They will only switch to providers such as Newco, if so doing proves to be cost-effective. Finally, given their knowledge of the market they are in a position to request offers from different competitors. All those factors give them considerable bargaining power which will give rise to pressure on margins and an expected high level of competition between suppliers.

D. THE TRANSACTION: THE NOTIFIED AGREEMENTS

(19) The complexity of the operation concluded between BT and MCI is reflected by the substantial number of agreements notified to the Commission. Those agreements are summarized below:

1. Agreements regarding Newco

(i) *The joint-venture agreement* (JVA)

This is the principal document creating Newco. Under it, the parent companies indicate their intention to achieve joint success in the global telecommunications market and to offer a seamless set of global enhanced and value-added products to the customers of MCI and BT.

(ii) *The intellectual property agreement* (IPA) concluded by BT, MCI and Newco concerning the licensing to Newco of the parent companies' technical information and intellectual property rights needed by Newco to carry out the business, and the licensing of Newco's technical information to the parent companies.

(iii) *The BT/MCI services agreements* (SA), under which Newco and each parent company (acting as supplier) agree on the terms and conditions of supply of support services to be provided by each parent company to Newco, related to the establishment by Newco of the global platform and on the provision by Newco of the global products and services.

(iv) *The BT/MCI distribution agreements* (DA) under which Newco appoints each parent company (acting as distributor) as its exclusive distributor for global products in the Americas, in the case of MCI, and in the rest of the world, in the case of BT.

(v) *The agreement for the sale and purchase of the business of Syncordia (with a disclosure letter)* concluded between Newco and BT setting the terms and conditions of the sale of the assets and business included in Syncordia, which up to now was BT's outsourcing unit.

(vi) *The Infonet indemnity agreement*, concluded between BT and MCI under which MCI undertakes to indemnify and hold BT harmless from and against any legal action by Infonet against MCI, arising from MCI's ownership in Infonet.

2. Agreements regarding BT's investment in MCI

(20) (i) *The investment agreement* (IA) under which BT has agreed to purchase 20 % of the outstanding shares of common stock of MCI.

(ii) *The registration rights agreement* concluded between BT and MCI, required in order for each party to effect the transactions contemplated by the IA.

(iii) *The McCaw indemnity agreement* under which BT undertakes or indemnify MCI and hold it harmless in respect of any legal action by the cellular phone company McCaw against BT as owner of a number of shares in McCaw.

II/131

(iv) Finally, the transaction also includes three agreements relating to the sale by BT to MCI of most of its existing activities in the United States of America and Canada.

3. Contractual provisions

(21) Relevant provisions of the agreements from a competition point of view are further detailed below.

A. *Concerning Newco*

(i) Structure of Newco

(22) Newco is an international joint-venture company, and according to the parties, the central focus of their alliance. Following the incorporation of Newco, 75,1 % of its share capital will be owned by BT and 24,9 % by MCI. Each party will have the right to appoint Newco board directors in accordance with its shareholding. Thus BT will be entitled to nominate six out of eight directors (the A directors) and MCI two out of eight (the B directors).

Most decisions of the board are to be adopted by simple majority of the directors present at any board meeting. However, a number of important decisions cannot be adopted without the prior consent of both shareholders. Most important of those decisions are changes in business direction, management appointments (including the appointment of the chief executive officer) and approval of the five-year business plan and annual operating plan and budget, so that MCI has joint control of the company (this was the conclusion of the Commission in its decision of 13 September 1993).

The day-to-day management and operations of Newco will be delegated to a chief executive officer who will be responsible to the board for all matters in the ordinary course of business.

Newco will be incorporated in the United Kingdom with day-to-day management vested in a US-based service company. It is expected to employ around [...] people. It is anticipated that over the five initial years, the parent companies will invest US$ [...] billion (ECU [...] billion) in Newco including the assets which will be transferred to it prior to closing. BT will invest US$ [...] million and MCI US$ [...] million.

(ii) Purpose and activities of Newco

(23) Newco has been created for the provision of enhanced and value-added telecommunications services and outsourcing to big companies. By enhanced and value-added telecommunication services the parties mean any international telecommunication service (collectively referred to as global products) which the regulatory framework permits to be offered between two or more countries by members of a single group and which the regulatory framework permits to be managed on an end-to-end basis (1).

To achieve that goal, Newco's precise activities can be split into planning and management on the one hand, and support and marketing on the other hand.

1. Provisions concerning planning and management

In respect of planning and management activities, Newco will be responsible for:

(a) the planning and development of global products. As part of this function, Newco will review the current products of the parent companies and the regulatory constraints still existing at any given moment;

(b) the establishment of a global platform (i.e. a software package) over which the global products will be provided. Newco will provide a 'best-of-breed' platform comprised of a combination of any or all of transmission, switching, signalling, network intelligence and service management services. The architecture, design and continuing development shall be at the discretion of Newco, although it shall ensure that those parts of the distributor domestic system used are compatible with the overall design. Such platform will be based initially on the existing systems of the parent companies. Thus interworking those systems will consume the most important part of Newco's time and efforts in its early years of operation;

(c) the provision of telecommunications services management to customers, including the acquisition and management of assets and staff from customers (global outsourcing) (2).

(1) The following services are excluded from the definition: (i) voice international simple resale (ii) international direct distance dialling provided on a correspondent basis (iii) the provision of international private leased circuits and (iv) any services which for regulatory reasons must be offered on a correspondent basis.

(2) In this respect, Syncordia, BT's existing outsourcing unit, will continue to exist, either as a division or as a separate branch within Newco.

II/132

In order to carry out the foregoing, Newco will have a budget for R&D activities. However, as Newco will not have its own in-house facilities, the R&D activities will actually be undertaken mainly by the parent companies, under contract with Newco. The former will keep the ownership of their laboratories and of the existing technology being licensed to Newco.

2. Support and marketing

Newco will derive its revenue from selling its services to its parent companies who will be the exclusive distributors of the Newco products. In this respect, it will not have direct contact with customers except as regards the provision and sale of global outsourcing services. Newco will nevertheless have a number of responsibilities and obligations towards the distributors:

(a) it will decide, according to principles set out in the business plan, who is going to be the main or 'lead' distributor in each contract for global products;

(b) it will provide technical and commercial support to each distributor in sales and marketing activities including assisting in identifying potential customers, advising on the most suitable means of meeting the requirements of a customer, supporting account management and assisting in the preparation of proposals to customers;

(c) it will provide billing services to distributors;

(d) it will provide second-level customer service in support of the first-level support provided by the distributors;

(e) it will carry out global market analysis and an annual products development plan.

(iii) Provisions concerning dealings with/by Newco

(24) Pursuant to Article 17 (1) of the JVA, transactions between Newco and a shareholder are to be on terms and conditions substantially as favourable to Newco as if such transaction had been entered into with a third party on an arm's-length basis (cost plus a reasonable market rate of return) but no more than that.

Pursuant to Article 17 (3) of the JVA, Newco is to purchase all products, services and facilities from the parent companies only if in each case the relevant parent company can provide the same on terms at least as favourable as regards price, quality and service to Newco as would be obtainable in an arm's-length transaction from a supplier not related to Newco or the parent companies.

(iv) Non-compete provisions

(25) Pursuant to Article 18 (1) (a) of the JVA, and except in accordance with the DA, each shareholder and its ultimate parent company undertakes to Newco and the other shareholder and its ultimate parent company that it will not carry on or be engaged or interested in the provision of enhanced and value-added telecommunication services anywhere in the world or international outsourcing services or appoint any person to be a director of a business which provides such services other than as director of Newco or its subsidiary undertakings. In addition, and except in accordance with the distribution agreement, they also undertake not to solicit the custom of any person for the purpose of offering to it enhanced and value-added telecommunication services or international outsourcing services.

However, neither BT nor MCI will be in breach of the non-compete provision as a consequence of any actions undertaken by either of them in compliance with the licence granted to BT by the Secretary of State, or any applicable regulatory certificate, licence or any obligation imposed upon MCI by any authority in the United States of America (Articles 18 (3) and 18 (4) of the JVA). It has to be noted, however, that in such a case, and provided that the parent company involved cannot find an alternative means of complying with the non-compete provision, it shall pay to Newco an amount equal to any profits made as a result of such action (Article 18 (5) of the JVA).

Finally, Articles 18 (9) and 18 (10) of the JVA ensure that in the case of deregulation of the US/UK (and vice versa) route for the provision of international voice services, BT and MCI will receive from each other the necessary support to compete; however, if the two parent companies cannot agree on a method to effectively compete with third parties except by means of international voice resale, then Newco will be authorized to offer basic international voice services on that deregulated route. As indicated in recital 11 should this occur, a new notification will be required.

(v) Licences granted to Newco and by Newco to the distributors

(26) Pursuant to Article 3 (3) of the ITA, each parent company grants to Newco irrevocable, perpetual, non-exclusive, non-transferable licences to use the technical information solely for the purposes of the business. However, it has to be noted that the term 'technical information' excludes confidential information (the sharing of which between and among the parties is substantially restricted by the terms of a Data Segregation Schedule of the JVA) and trade secrets of a commercial nature.

Newco has the right to grant the following sublicences to its parent companies:

(a) to BT solely for its territory (i.e. the world excluding the Americas) and to MCI solely for the Americas, to use the technical information licensed from the parent companies in the distribution of Newco's products (Article 3 (4) (a) (i) of the IPA). In addition, each distributor has the right to grant similar sub-sublicences to customers and an outside party for the sole purpose of discharging, in whole or in part, the licensed distributor's obligations under the relevant distribution agreement (but in any event restricted to the territory of that distributor);

(b) to the so-called non-owning parent company (i.e. the parent company that does not own a specific technical intellectual property right), to use the licensed technical information in respect of products other than global products provided by Newco to customers connected to/or served by such parent company but limited to that parent company's territory as distributor (Article 3 (4) (c) of the IPA).

Newco itself cannot sublicence an outside party with two exceptions:

(a) where the distribution agreement has become non-exclusive (Article 3 (5) (a) of the IPA);

(b) where Newco is providing directly to any customer global outsourcing directly to any customer.

Furthermore, Newco grants to each parent company, upon request, similar licences to use the technical intellectual property rights (Article 6 of the IPA) of Newco.

Finally, it has to be noted that the sublicences granted to BT or to MCI under their respective technical intellectual property rights will survive termination of the agreement as irrevocable, perpetual and worldwide licences unrestricted as to use and licensing (Article 13 (1) (b) and 13 (2) (b) of the IPA), subject only to the payment by each parent company to the other of a given royalty during four years. In addition, they also receive similar licences for Newco's own intellectual property rights.

(vi) Ownership by Newco of new technology

(27) Pursuant to Article 7 (1) of the IPA, Newco may be the owner of the technical intellectual property rights in new developments. In such a case, and assuming that a given development was actually made by one parent company under contract by Newco, such parent company (Newco does not have its own R&D activities) will receive from Newco a non-exclusive, irrevocable, perpetual licence to use that development for any purpose (Article 7 (2) of the IPA). Conversely, where the new development is owned by the parent company that effected it, that parent company will grant a similar licence to Newco (Article 7 (3) of the IPA).

(vii) Trade mark provisions

(28) Pursuant to Article 12 (3) (a) and (b) of the IPA each parent company grants the other (this time without any intervention by Newco) a non-exclusive licence to use and license the trade marks of the one in the territory of the other in connection with the sale, distribution, provision or performance of global products only.

(viii) Provisions regarding the distribution of Newco products

(29) Pursuant to Article 2 (1) of each DA, Newco appoints the distributor as its exclusive distributor in the territory. Such appointment means that the distributor has the exclusive right to promote, sell and distribute services in the territory (Article 3 (1) of the DA) and the corresponding obligation to promote the sale of the global products in the territory (Article 8 (1)). In addition, the distributor agrees to obtain from Newco, with some exceptions, all requirements for global products (Article 5 (1)). Finally, in consideration of the provision of the services, the distributor pays to Newco (i) a variable annual charge based on the forecast that each distributor is obliged to provide to Newco each

year of the aggregate requirements of its own customers for the following 12 months (1), and (ii) a usage charge. Also, in consideration of the licences granted by Newco to the distributor pursuant to the intellectual property agreement, the distributor shall pay Newco an annual charge that for the first financial year will amount to US$ 6,5 million (Article 16).

Newco undertakes not to sell global products directly or indirectly in the territory other than to the distributor (Article 4 (1)). However, Newco can sell global outsourcing services directly to customers when it is desirable to do so for tax or other reasons and assuming that in such a case the distributor releases Newco from its undertaking in Article 4 (1) (Article 4 (2)). The provision of the global products to the distributor includes the provision by Newco of all necessary use of remote networks on the most competitive terms available, where the products are to be provided at one or more sites of one customer located outside the territory (Article 6 (5)), and the provision by Newco of reasonable technical and commercial support to the distributor in sales and marketing activities (Article 9).

B. *Concerning BT's investment in MCI*

(i) Restriction on transfer of shares by BT and limits to the ability of BT to increase its shareholding in MCI

(30) Pursuant to Article 5 (1) of the IA, BT undertakes not to dispose of its shares in any manner whatsoever for four years from the closing date. After that date, BT can sell, but must give a right of first refusal to MCI (Article 5 (3) of the IA).

Pursuant to Article 6 (1) of the IA, BT is granted the right to acquire any new shares issued by MCI necessary to maintain the percentage it has in MCI at that time or to increase it assuming that such purchase does not breach any foreign ownership restrictions under US law applicable at the relevant time (Articles 6 (2) (d) and 6 (4) of the IA).

However, pursuant to under Article 7 (1) of the IA, BT has agreed not to acquire, directly or indirectly, the ownership of any additional equity of MCI to exceed 20% thereof until the 10th anniversary of the closing date. Furthermore, during the same period, BT has expressly undertaken not to seek to control or influence the company (Article 7 (3) of the IA).

Once the 10-year 'standstill' period has expired, BT can increase its shareholding up to the level then fixed by the US Communications Act as regards foreign ownership. However, even if those restrictions were completely eliminated, BT would generally only be allowed to exceed a 35 % stake in MCI by a tender offer or business combination that has been approved by a majority of the independent directors and by a majority of the shareholders (other than BT) (Article 7 (4) of the IA).

(ii) BT's consent rights and board representation

(31) The MCI board is to be composed of 15 directors. BT's representation on the MCI board will remain in proportion to its shareholding. BT is currently entitled to three directors. Four directors can be executive officers of MCI. There is a similar representation on most MCI board committees. At least eight members of the MCI board must be fully independent of MCI and BT (Articles 9 (7) and 9 (9) of the IA).

BT, as the sole holder of MCI's class A common stock, has been granted substantial consent rights with respect to certain corporate actions of MCI concerning equity issuances, acquisition of core and of non-core business, sales of assets and borrowing above certain specified limits.

(iii) Loss of rights provisions

(32) Pursuant to Article 9 (12) of the IA, in the event that either BT or MCI engages, directly or indirectly, in the core business (2) of the other (in the Americas in the case of BT and outside the Americas in the case of MCI) or transfers or provides sales and marketing in connection with any person or acquires an interest in any person who is engaged in the core business of the other, then the engaging party will lose certain rights.

(1) It has to be noted that if the actual requirements of the distributor are less than those stated in the forecast, no part of the charge will be refunded by Newco.

(2) Defined as all telecommunications and other electronic information services and equipment for the provision of such services, as they exist on the date of this agreement or hereafter exist, including (but not limited to) all forms of telecommunication access and egress; and value-added consumer and business services generated through or as a result of underlying telecommunications services using all technology (voice, data and image) and physical transport, network intelligence, and software applications, and including (i) information processing, (ii) systems integration and outsourcing, (iii) transaction processing and (iv) cable television.

In the case of BT, its shares in MCI will be converted into common stock and it will lose its voting and consent rights and its board representation in MCI.

In the case of MCI, BT will cease to be bound by various obligations concerning future share transfers, voting or the standstill provisions mentioned above.

In any event, the loss of rights provisions will not be automatically triggered; there are a number of exceptions (listed in Article 9 (12) (b) and (d) which include without limitation correspondent relationships in the ordinary course of business and any activities in connection with the ownership of Newco) and a procedure to be followed (including arbitration in case of disagreement) before a loss of rights is deemed to exist.

E. THIRD PARTY OBSERVATIONS

(33) Following the publication of a notice pursuant to Article 19 (3) of Regulation 17 and to Article 3 of Protocol 21 of the EEA Agreement, comments were received from two interested third parties. One of them requested its comments and identity to remain confidential. The other set of comments received focused on the ability of BT to distort competition in the provision of enhanced and value-added services throughout Europe, given its control of local access facilities in the United Kingdom and on the necessity for the Commission to impose undertakings on the parties with respect to non-discriminatory treatment of competitors and cross-subsidization of competitive services with revenues derived from non-competitive operations, to facilitate the development of effective competition in the telecommunications market.

The Commission studied carefully the comments received and concluded that concerns expressed by those third parties had already been raised by the Commission and discussed in detail with BT and MCI, who had provided adequate answers and safeguards. Consequently, those comments have not caused the Commission to modify its substantive position indicated in the Article 19 (3) notice and expressed below, as regards the notified agreements.

II. LEGAL ASSESSMENT

A. APPLICATION OF ARTICLES 85 (1) OF THE EC TREATY AND 53 (1) OF THE EEA AGREEMENT TO THE CREATION OF NEWCO AND TO BT's INVESTMENT IN MCI

1. The creation of Newco

(a) *Competition between the parent companies and/or Newco*

(34) The parent companies must be considered potential competitors of Newco and of each other in respect of the global products to be offered by Newco and actual competitors in the overall telecommunications market.

The inherent evolving nature of the business scope of Newco will have an effect on the issue of potential/actual competition; it is therefore considered that when (and if) Newco begins to offer some basic services (recital 11), the parent companies will become actual competitors of Newco.

(35) The abovementioned conclusions are based on the following arguments:

(aa) potential competition in international value-added and enhanced services

(36) Newco's offering will consist of a mixture of the parent companies' existing products and networks. Prior to the incorporation of Newco, the parent companies were competitors, at least to a limited extent, for obtaining contracts for similar sets of products and services. Thus, BT won a contract with Hewlett Packard North America for the development of a global communications strategy focused mainly on Europe and Asia Pacific. In addition, customers of MCI for value-added services in the United States of America with branches abroad could obtain basically the same features (with some limitations depending on the number of locations abroad) in respect of these value-added services when entering into contact with their facilities abroad as when doing the same in the United States of America. Although many of those services are provided on a correspondent basis — i.e. by means of connecting MCI to another TO's network — some of them — MCI mail, for instance — are provided on a non-correspondent basis.

IL/136

(37) The parties have indicated that they have withdrawn from the market that Newco will address. However, Newco has in fact received a licence from the parent companies to use the technologies and the latter retain the ownership of their respective know-how and intellectual property rights and also keep intact their respective R&D capabilities.

Newco will not do any research and development on its own but will award contracts mainly to its parent companies to do so. It is therefore considered that the parent companies will certainly keep and increase their proficiency and know-how in respect of the technologies required to stay in (or to re-enter) the market.

In addition, although the ownership of any new development could be awarded to Newco, it is possible (depending on the specific arrangements made in each case) that the developing parent company obtains the ownership, and, in any event, the parent companies will receive licences from Newco for using any such developed technology for any non-global product.

(38) The parties have declared that they intend to offer to their intranational customers (that will usually be the national facilities of Newco's international customers) a set of services that for the customers will have an identical look and feel to the services offered by Newco in the international arena. For so doing they will receive from the other parent company through Newco the appropriate licences. Neither BT nor MCI are prevented, within their own territories, from setting up local subsidiaries in any given country to serve the local needs of companies in those countries. As a result a customer could be contracting at the same time with BT (or MCI), outside Newco, for its local needs and with BT (or MCI) as exclusive distributor of Newco for the customer's international needs.

(39) Furthermore, customers may be international, but have such a concentration of traffic in either the United Kingdom or the United States of America that the relevant parent company's offering could be in direct competition with that of Newco were the customer to decide to forego Newco's international spread in order to get a good deal on domestic telecommunications which formed the bulk of its needs.

(40) Finally, the parent companies will maintain their commercial presence and reputation intact. They will also keep, in particular because they will be the exclusive distributors of Newco, and increase their knowledge of the market in terms, for instance, of customers' needs.

All the above elements make the probability of such a (re)entry more credible.

(a.b) Actual or at least potential competition in the overall market for telecommunications services

(41) BT and MCI are the fourth and fifth largest telecommunications companies in the world in terms of traffic. BT, as the former monopolist in the United Kingdom, still keeps a very substantial amount of market power in that Member State as reflected by BT's overall market share (around 90 % of the UK market). MCI is the second largest long-distance carrier in the United States of America, although significantly behind AT&T.

Under a traditional approach based on the state of international telecommunications prior to liberalization, TOs were limited to activities on their respective domestic markets and thus did not compete. However, this view cannot be maintained any longer, at least as far as large users of telecommunications are concerned. The different networks compete on features and prices for the installation of the telecommunication hubs of those large users. The intensity of this competition is bound to increase in the coming years as long as the liberalization process continues.

(42) Both MCI and BT develop direct activities outside their home markets by means of subsidiaries and/or their activities in international organizations.

MCI employs 150 people in Europe and has several subsidiaries in different Member States (Germany, Belgium, France, Italy and the United Kingdom). Those subsidiaries provide the liaison office with the local TO involved, and also provide maintenance and repair of customer-based equipment, and coordination of billing information with multinational customers. They also support the sale of several of MCI's services (i.e. MCI Call USA, Vnet) which are available to European users and in competition with international direct dial services offered by BT or by other TOs in their respective home markets. Apart from the subsidiaries already mentioned, MCI has a branch office in the United Kingdom, MCI Ltd, to hold the name only, and

another in the Netherlands, MCI Global Ventures BV, intended to be the holding company of a project that did not materialize. In addition, in Greece, Ireland, Spain and the Netherlands, MCI conducts liaison activities and sales support for services through independent contractors.

MCI currently provides enhanced private line services between the United States of America and the United Kingdom pursuant to a telecommunications services licence in the United Kingdom. In addition, MCI also provides data-only services for one customer's worldwide reservation system using VSAT licences issued in Germany and France to Overseas Telecommunications Inc., an MCI subsidiary.

Finally, MCI has a 8,5 % participation in the Financial Network Association (FNA), an association formed for the purpose of helping the supply, on a correspondent basis, of specialized telecommunication services to the global financial community. In addition, MCI had a 25 % stake in Infonet, but has divested itself thereof.

BT has substantial activities in some Member States, in particular, France, the Netherlands, Germany and Spain (where it has recently created, together with the Spanish Banco de Santander, a joint venture to offer data services in Spain). However, the bulk of BT's activities abroad prior to the transaction with MCI was in the United States of America. As a result of the operation, most of British Telecom North America (BTNA) activities will be sold to MCI, and Syncordia will be transferred to Newco. Nonetheless, BT will keep a residual staff pretence in the United States of America and BT USA Holdings, the US holding company. Apart from these, BT will retain BT US Capital Corporation (which is used by BT for obtaining funds in the US market), BT US Paging Inc., BT US Ventures Inc. and BT US Cableships. Finally, BT has held a 25 % shareholding in McCaw but this has now been sold to AT&T in exchange for 2 % of the outstanding voting power of AT&T, worth in the region of US$ 2 billion, which does not give BT any influence over AT&T's commercial strategy and which BT has declared it expects to sell at the appropriate time.

(b) Applicability of Article 85 of the EC Treaty and Article 53 of the EEA Agreement to the creation of Newco

(43) Having concluded that BT and MCI are, and for the foreseeable future will continue to be, at least potential competitors in the two markets concerned, it is necessary to assess whether the creation by them of Newco falls under Article 85 (1).

It has not been demonstrated conclusively that the creation of Newco is the only objective means for the parent companies to enter and stay in the market for international and enhanced value-added services, because both parent companies are companies that currently have substantial activities in similar fields, including the provision of services to customers abroad, sometimes on a non-correspondent basis, and that have the financial and technological capacities required to enter the relevant market on their own. In doing so, they will be facing substantially the same constraints, in terms, for instance, of regulation, that Newco will be facing, when trying to enter the relevant market. In addition, the creation of Newco means that each parent company is unlikely itself to develop a similar set of products for use in the relevant market on its own. For these reasons, the creation of Newco falls within the scope of Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement.

In addition, under its present structure, Newco can be considered as a vehicle for the parent companies to pool their respective intellectual property rights and to cross-license each other and Newco on an exclusive basis as far as the services to be offered by Newco are concerned, given in particular the non-compete provision, but also given the intellectual property agreements, the geographical scope of the licences granted to Newco by the parent companies and by Newco to them, and the terms of the exclusive distribution agreements. The Commission has indicated, in respect of reciprocal licences between competitors on an exclusive basis, that the benefits of the block exemption regulations on patent and know-how licence agreements to such licences are conferred only if the parties are not subject to any territorial restriction within the Community, including restrictions that isolate the Community against imports from non-member countries and thereby adversely effect the conditions of competition within the Community.

For the abovementioned reasons it is concluded that Newco falls within the scope of Article 85 (1) of the EC Treaty and of Article 53 (1) of the EEA Agreement.

2. BT's investment in MCI

(44) As a general rule, both the Commission and the Court of Justice have taken the view in the past that Article 85 (1) does not apply to agreements for the sale or purchase of shares (1) as such. However, it might do so, given the specific contractual and market contexts of each case, if the competitive behaviour of the parties is to be coordinated or influenced.

The Commission consequently assessed whether the presence of BT's nominees to the board of MCI could give rise to coordination of the competitive behaviour of the two companies, in particular given the access that BT will have to MCI's confidential information. In this respect, the IA has been drafted in such a way that BT does not have the possibility to seek to control or influence the company. This is particularly so in the case of the obligations found in Articles 7 (1) (not to increase shareholding for 10 years) and 7 (3) (not to seek to control or influence the company).

In addition both American corporate and antitrust laws would impede any misuse of (or even the access to) any piece of confidential information of MCI by BT.

For the reasons mentioned above, it is concluded that the investment by BT in MCI does not fall within the scope of Article 85 (1) of the EC Treaty or Article 53 (1) of the EEA Agreement.

B. APPLICATION OF ARTICLE 85 (1) OF THE EC TREATY AND ARTICLE 53 (1) OF THE EEA AGREEMENT TO CONTRACTUAL PROVISIONS

(45) The following provisions restrict competition:

(a) the appointment of BT as exclusive distributor of Newco (Article 2 (1) of BT's DA) within the EEA;

(b) the obligation on the parties to obtain from Newco all requirements for global products (Article 3 (1) of each DA);

(c) the non-compete provision as regards the activities of Newco (Article 18 (1) of the JVA);

(d) the 'loss of rights' provisions pursuant to Article 9 (12) (c) of the IA, as regards the activities of MCI in the territory of the EEA.

(1) See the Decision in Philip Morris/Rembrandt/Rothmans referred to the 14th Report on Competition, points 98 to 100 and Joined Cases 142/84 and 156/84, BAT and Reynolds v. Commission, [1987] ECR 4487.

(46) Of these restrictions, the non-compete provision and the obligation to buy all requirements for global products from Newco are ancillary to the creation and successful initial operation of Newco. In this respect, they are considered to be subsumed under the joint venture and, consequently, they will not be assessed pursuant to Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement separately from the joint venture itself.

Newco is the way chosen by BT and MCI to enter the relevant market. In this respect, both restraints are different expressions of the same firm commitment made by the two parent companies towards each other and towards Newco, and required for Newco to successfully enter the market, considering the characteristics of the emerging market for global value-added and enhanced services (and those of the overall market for telecommunications), in terms of uncertainty and associated risks, substantial investments required, and level of competition from similar ventures. Those characteristics are reflected in the fact that Newco is expected to incur substantial losses at least during its early years of operation.

The non-compete clause is aimed at ensuring that BT and MCI will concentrate their efforts on Newco, as regards the services to be offered by the joint venture; thus parallel activities by them (for instance in cooperation with other TOs) do not frustrate Newco's success in entering the relevant market.

The obligation on BT and MCI, as the exclusive distributors of Newco, to buy all requirements for global products from Newco, is aimed at ensuring a steady stream of funds for Newco and at increasing the credibility and market reputation of Newco; if the parent companies were free to obtain global products from other sources, in particular in cases where Newco could adequately satisfy a particular requirement, that might severely affect the credibility of Newco and its financial position. It has also to be noted that Newco itself is not obliged to obtain from its parent companies all of its requirements for telecommunications and other products and services.

Ancillary provisions are usually accepted for a limited period of time. In the present case, however, in view of the particular circumstances of the market in which Newco will be operating, including the substantial investements involved and the associated risks, those provisions will be accepted as ancillary for the entire duration of the exemption granted by this Decision to the joint venture.

II/139

(47) The appointment of BT as exclusive distributor of Newco within the EEA falls under Article 85 (1) of the Treaty and under Article 53 (1) of the EEA Agreement because it has as its object or produces as its effect the isolation of the EEA against imports of the relevant services, as offered by Newco, from outside the EEA. Such fact will adversely affect the conditions of competition within the EEA. In addition, it cannot be considered ancillary to the creation of the joint venture taking in particular into account that the agreements foresee the possibility of the distribution becoming non-exclusive (Article 3 (5) (a) of the IPA).

As to the appointment of BT as exclusive distributor of Newco in the BT territory outside the EEA territory and the corresponding provision under MCI's distribution agreement concerning the Americas, these provisions do not produce any appreciable effect in the EEA. For that reason they do not fall under either Article 85 (1) of the EC Treaty or Article 53 (1) of the EEA Agreement.

(48) In view of the current state of development of the overall market for telecommunications, the 'loss of rights' provision affecting BT (Article 9 (12) (a) of the IA) and, in so far as the territory of the EEA is not concerned, the 'loss of rights' provision affecting MCI (Article 9 (12) (c) of the IA), will not produce any appreciable effect in the EEA. For that reason these provisions do not fall under either Article 85 (1) of the Treaty or Article 53 (1) of the EEA Agreement.

On the contrary, in so far as the territory of the EEA is concerned, the 'loss of rights' provision pursuant to Article 9 (12) (c), already has an appreciable effect in the EEA and cannot be considered ancillary either to the investment of BT in MCI or the incorporation of Newco. It has as its object or produces the effect of significantly impeding any entry by MCI into the territory of the EEA using its existing technologies, in segments of the telecommunications market, that are currently outside the business scope of Newco but within the widely defined 'core business' of BT. In this respect, this provision, although it is not a 'non-compete provision as such, because MCI is not actually prevented from competing on its own in BT's territory (the effect of the provision is to make MCI pay a high price in case it decides to compete with BT in fields different from those covered by Newco), will nevertheless produce a practical effect very close to a non-compete obligation.

As a result, MCI might for instance in practice feel dissuaded from setting up a local company in any country within BT's territory to provide non-international value-added services, eve though only using its existing range of products and services (that is, without infringing any intellecutal property right belonging to BT or to Newco), within that country.

Any agreement which presents undertakings in third countries from becoming suppliers or competitors within the Community falls within the scope of Article 85 (1) of the Treaty (and under Article 53 (1) of the EEA Agreement). The assessment of the case has not shown the existence of any reason that would justify departing from that established practice.

In addition, a non-compete provision that extends beyond the field of activity of a joint venture cannot be accepted as such (1).

For those reasons, the 'loss of rights' provision for MCI pursuant to Article 9 (12) (c) of the IA falls under Article 85 (1) of the Treaty (and Article 53 (1) of the EEA Agreement) in so for as the territory of the EEA is concerned.

C. EFFECT ON TRADE BETWEEN MEMBER STATES AND BETWEEN MEMBER STATES AND EFTA COUNTRIES

(49) In point 39 (i) of the Guidelines on the application of EEC competition rules in the telecommunications sector (2) issued by the Commission, it is stated that as in the entire Community non-reserved services, equipment and space segment infrastructure are traded, any agreement concerning them may affect trade between Member States. This is the situation in the present case as Newco will cover the provision of value-added services not only between the EEA and abroad, but also between any two EEA countries. Such effect on trade between Member States, and between Member States and the EFTA countries, is going to be substantial in view of the growing size of the market, and of the further expansion expected for the coming years.

(1) See Article 3 (3) of Commission Regulation (EEC) No 2349/84, Article 6 (a) of Commission Regulation (EEC) No 418/85 and Article 3 (5) of Commission Regulation (EEC) No 556/89.
(2) OJ No C 233, 6. 9. 1991, p. 2.

As regards non-ancillary provisions, they also affect trade between Member States, and between Member States and the EFTA countries, because they tend to insulate the entire EEA by impeding the development of existing or new activities by MCI within it, not only in respect of the products and the geographic areas within the business scope of Newco (as a result of the exclusive distribution arrangements) but also in respect of products or geographic areas that are outside the business scope of Newco (as a result of the 'loss of rights' for MCI).

As the provision of services between any two EEA countries is included in the business scope of Newco, such effect on trade is substantial.

D. CONCLUSION IN RESPECT OF ARTICLE 85 (1) OF THE EC TREATY AND OF ARTICLE 53 (1) OF THE EEA AGREEMENT

(50) In conclusion it is considered that the creation of Newco falls under Article 85 (1) of the Treaty and Article 53 (1) of the EEA Agreement, and that this is also the case of the non-ancillary provisions mentioned above. The restrictive effect on competition and on trade between Member States is considered to be substantial.

E. APPLICATION OF ARTICLE 85 (3) OF THE EC TREATY AND ARTICLE 53 (3) OF THE EEA AGREEMENT

(51) The objectives of the parent companies in entering this set of transactions are somewhat different. BT wants to become a leading global provider of international value-added and enhanced telecommunications services in the world, but with a particular emphasis in Europe and in the United States of America. Collaboration with a major American player was particulary important for BT to achieve those goals, and in particular to enter the US market, where 40 % of multinational companies are located.

MCI's main interest was to maintain its competitive position in the Americas, in particular against AT & T. In order to do so, as customers' demand for global services was increasing, MCI concidered it necessary to add a global dimension to its services but without having to establish itself abroad; it therefore chose the joint venture alternative. MCI first entered into Infonet, but finally opted for an alliance with another TO. In this respect, after negotiating with different TO's it turned to BT. As a result of the transactions it will obtain the financial means to finance the improvement of its infrastructure in the United States of America.

(52) The agreements notified, in so far as they fall under Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement, satisfy the conditions for exemption laid down in Article 85 (3) of the Treaty and Article 53 (3) of the EEA Agreement.

(a) Improvements

(53) It is considered that Newco will improve telecommunications services and technical/economic progress in the Community in the following ways:

— The combination of BT and MCI technologies will allow Newco to offer new services, based on the existing services of the parent companies, more quickly, cheaply and of a more advanced nature than either BT or MCI would have been capable of providing alone under their existing technologies. Such combination will nevertheless require a very costly and time consuming effort as demonstrated by the fact that the set of services that Newco will offer will not be fully operational within five years. In addition, as a related consequence, MCI technology, which is said to be one of the most credible and user friendly in the world, will be made available to European customers of Newco (within the limits imposed by the non-ancillary provisions to be discussed below).

— The strategy of Newco for entering the market is to add value to basic transmission capacity (international private leased lines) obtained from local TOs. However, Newco will not use the features of each national network involved but will instead add its own switching systems, call prosessing/routing, signalling and databases as well as software to provide the international services on a truly seamless basis. This is considered to be a real advantage over existing international services that are provided (this is the case of BT and MCI) by interconnecting national networks that are usually incompatible in terms of structure, software, hardware and management systems. The result of a combined network so creative, is as strong as its weakest link and so the number of services and the features thereof are those supported by the less performant national network involved.

— In addition, if succesful, Newco could allow the Community's most important companies to achieve levels of telecommunications performance on an international level currently only available at some national/local levels, that

II/141

could enable them to better withstand global competition from other corporations operating from parts of the world where technological advance in telecommunications is becoming common-place.

— Finally, Newco will allow cost savings resulting from its operation of a single network architecture reflecting economies of scale at a technological and operational level, and possibly from cheaper interconnections obtained from TOs given Newco's expected size. In this respect, Newco will no doubt generate competition between the providers of international basic transmission capacity in order to obtain the lowest costs for its business, and will try to direct traffic over alternative routes in order to achieve the lowest cost routing available.

(54) Both the exclusive distribution arrangements in respect of BT and the 'loss of rights' for MCI as regards the EEA, are aimed at ensuring that each parent company concentrates its marketing efforts, in terms of prospecting for customers, investments on regional and/or national networks and other facilities, within its respective territory, as required by a successful market entry by Newco. At the same time, Newco will benefit from the reputation and track-record of its parent companies, *vis-a-vis* its potential customers.

(b) Consumers

(55) The incorporation of Newco will mean that consumers in general will benefit more rapidly from a set of new advanced services than Newco's parent companies would have been capable of providing separately.

In addition, consumers, big companies in this case, will benefit directly through the provision of:

— a greater product portfolio of developed and new services allowing them to operate more effectively on a global scale and to better compete with their global as well as with their Community and EEA competitors, and

— lower pricing resulting from the cost savings to be made by Newco as a result of operational efficiencies or pressure on local TOs.

Such advantages will improve the competitive position of those company users in their respective markets, in particular against competitors that have at their disposal more advanced telecommunications.

In this respect, the exclusive distribution arrangements for BT will ensure in respect of its customers that there is a single person to contact in case of any kind of difficultes related to the continuous provision of the services anywhere in the world. In addition, the 'loss of rights' for MCI, seen as a means of permitting confidence between the parent companies to grow (see recital 62) would guarantee the necessary stability of the underlying relationship between BT and MCI necessary for it to be succesful. A succesful entry by Newco will increase the level of competition in the relevant market, and hence the possibilities of choice available for customers. Such stability is also a very important element for customers when considering giving a potential supplier responsability over a strategic element as to their telecommunications needs.

(c) Remaining competition

(56) The creation of Newco will not afford the parties the possibility of eliminating competition in respect of the categories of services to be offered by Newco. Such conclusion is also applicable to the non-ancillary restrictions identified above, and is based on the following arguments:

— At Newco's level there will be significant third-party competition coming first of all from AT & T's Worldsource and from Eunectom (or from any enhancement of Eunectom if plans for a closer cooperation between Deutsche Bundespost Telekom and France Télécom go ahead). There will also be competition from other existing alliances, such as Unisource or IPSP, or from alliances to be concluded between TOs that have not taken a position until now (like Sprint, and the 'Baby Bells' in the United States of America, NTT in Japan and some significant European TOs like Telefónica, Belgacom, Mercury or STET). Finally, the parties also expect competition, at least for components of global value-added telecommunications services, coming from other players including computer and data processing companies (like IBM, DEC and EDS) and information service companies (like Geis and Compuserve).

— Multinational or other big companies are sophisticated purchasers with the ability to build their own private network solutions or to attract offers from competitors of Newco. This gives the multinationals considerable bargaining power reflected in intense pressure on margins, and competition between the suppliers for customers.

(57) In this context, the Commission has examined in detail and discussed with the parties, the extent to which access to MCI and BT networks by third parties is possible. This is an important question that can become of particular relevance in the near future, as is also the issue of possible cross-subsidization of Newco by BT, an issue that the Commission has also examined in detail.

In this respect, existing regulation to which BT and/or MCI are subjected in their respective countries prevents such cross-subsidization and/or discrimination from taking place.

As regards MCI, under the requirements of the Communications Act of 1934, as enforced by the Federal Communication Commission (FCC), MCI's network arrangements and services are described in publicly available tariff schedules or contracts.

The Communications Act and the FCC's policies prohibit MCI from making any unjust or unreasonable discrimination in the provision of its services including access to these services by MCI's competitors and foreign correspondents. In addition the FCC has a complaint process, should any party feel aggrieved by MCI's actions or inactions (or by those of any other TO in the United States of America).

The situation is similar as regards BT because under the terms of the Public Telecommunications Operator Licence that BT received under the Telecommunication Act 1984, which is enforced by the Office of Telecommunications (Oftel), BT cannot show undue preference or discrimination in the provision of certain services towards other persons, nor unfairly favour any part of its own business against competitors. In addition, a prohibition on exclusive dealing in the provision of international telecommunications services prevents BT from making arrangements with overseas correspondents, including MCI, which would exclude them from dealing with other operators in the United Kingdom. Finally, condition 18 of BT's licence (together with condition 38, in so far as the confidentiality of customer information is concerned (*)), empowers Oftel to act against any unfair cross-subsidy by BT and imposes upon BT an obligation to keep records of any material transfer between any parts of its business.

Those regulatory constraints are reflected in the agreements, so that actions undertaken by MCI or BT in complying with their respective obligations are excluded from the non-compete provision in the JJVA (Articles 18 (3) and 18 (4)) and from the 'loss of rights' provisions in the IA (Articles 9 (12) (b) (iii) and 9 (12) (c) (iiii)).

The abovementioned regulatory constraints, together with the additional explanations provided by the parties, have permitted the Commission to conclude that it is not necessary for it to take any further action as of now, including requesting the parties to make appropriate undertakings to the effect that they will neither discriminate nor cross-subsidize. However, should this conclusion prove to be wrong in the future, the Commission will immediately apply the competition rules of the EC Treaty (and if applicable those of EEA Agreement) as required.

(d) Indispensability

(i) *Newco*

(58) The formation of Newco itself is indispensable for the parent companies to successfully enter the relevant market:

— Newco will allow the time required for the relevant services to be marketed to be substantially shortened. As many other companies (mainly alliances) are entering the relevant market, the time required for being in the market with a comprehensive set of services is a competitive factor of the utmost importance.

— In addition, Newco will allow each parent company to substantially reduce the costs and risks inherently associated with the complex organization required to offer such services at the scale and with the other features required by multinationals and other big international users.

— Finally, as indicated in recital 7, Newco is a means to quickly overcome the inadequacies associated with the provision of the services and features (one-stop-shop, end-to-end and seamless basis, etc.) required by multinationals and other big international users, under the existing framework of cooperative relationships established by TOs.

(*) The use of such information is also restricted by the Data Segregation Schedule of the JVA, to which reference is made in recital 26.

II/143

(ii) *Exclusive distribution*

(59) Under BT's distribution agreement, BT is appointed by Newco as the exclusive distributor for Newco's products in a wide territory, covering the entire world excluding the Americas.

Such exclusivity is reinforced by the licensing provisions in the IPA. Thus, pursuant to Article 3 (4) (a) (i), Newco sublicenses BT solely for the 'territory' and MCI solely for the Americas to use the combined technology it has received from its parent companies in the distribution of Newco's products. In addition, each parent company (or distributor) receives directly from the other a non-exclusive licence to use and license the trademarks of the latter within its own territory. Thus, BT grants MCI such a licence for the trademarks of BT but limited to the Americas (Article 12 (3) (a) and (b)) and vice versa.

The parties have provided the Commission with an array of arguments supporting the indispensability of the exclusive distribution arrangements for BT in the transaction. Both have particularly stressed the protection of the valuable intellectual property rights they have contributed to the joint venture against outsiders but, in particular, against each other. In this context, both parties have stressed that they have not found a more efficient manner of organizing the distribution of the products in a balanced way.

Taking those facts into consideration, together with the high level of competition that the parent companies will be facing (as distributors of Newco) and the substantial bargaining power of customers, the exclusive distribution arrangement for BT (including here those provisions in the IPA that reinforce it) can be accepted as being indispensable to the positive effects (in particular the distribution of the products in an efficient manner) resulting from the restrictive clauses, provided that at least a possibility for passive sales is available for EEA customers. By passive sales is understood, as regards MCI, the possibility offered to a EEA customer of addressing himself to MCI for the provision of Newco products in the EEA with the support of Newco (as regards, for instance, the availability of leased lines or the required customer service) but without the intervention of BT or with the intervention of BT only as support distributor.

(60) The Commission has therefore examined the extent to which such passive sales are possible for all kinds of customers. The parties have confirmed that passive sales (1) will be possible irrespective of the actual size and location of customers, and the Commission considers (and the parties have recognized) that passive sales by each distributor to customers in the exclusive territory of the other are indeed a genuine possibility (2). Thus, any potential European customer, with activities in at least two Member States, but no presence in the United States of America, can contract with MCI (instead of BT, the exclusive distributor for the EEA) the provision of Newco services in the EEA only. MCI will conclude the sale in America (without infringing any licence granted to it by Newco or any trademark licence granted by BT) and will then ask Newco to procure all necessary use of remote networks (third-party networks) on the most competitive terms available. For so doing, Newco could, in some cases, engage BT's services (in particular as regards regulated services still provided by BT), but will always be obliged to obtain supplies on a competitive basis. In addition, MCI will be responsible for that customer.

In conclusion, the exclusivity is considered indispensable within the meaning of Article 85 (3) of the EC Treaty (and pursuant to Article 53 (3) of the EEA Agreement).

(ni) *MCI's 'loss of rights' pursuant to Article 9 (12) (c) of the IA*

(61) As explained above, Article 9 (12) (c) of the IA provides for MCI to lose certain rights in the event that MCI becomes engaged in the core business of BT in a territory defined as 'the rest of the world', which includes the entire EEA.

(1) The latest available version of the business plan even makes a distinction between 'remote sales' (where a customer requests a bid from one distributor for services in the other distributor's territory) and 'passive sales' (where a customer requests bids from a distributor which is not responsible for that territory or customer). Both sales can be effected. The relevant distributor will independently prepare a bid without consulting the other, and Newco, to the extent that it will be involved will not disclose to one distributor the prices or conditions it has provided to the other or any confidential information regarding the customer.

(2) In addition, differences in MCI and BT prices for Newco services will occur in so far as each will be related to local conditions and supply costs.

II/144

(62) This provision has to be considered against the imbalance between the very high value for each parent company of its proprietary software licensed to Newco (and to each other within their respective territory) and the low level of protection to which the software is entitled under most intellectual property laws in force. Basically, the same software is going to be used by Newco to serve the needs of its international customers and by each parent company to serve the intra-national needs of their customers within their respective territories. In addition, it has to be taken into account that through Newco (and the licences that Newco will grant to its parent companies in respect of any new development) the technologies of both parties will be increasingly interlinked and, hence, will be increasingly difficult to separate.

For these reasons, the parties decided not to include a termination provision in the IPA in case of infringement, and instead to include the 'loss of rights' provisions in the IA. In this respect, the latter can be seen as analogous to the territorial licensor protection permitted under both the patent licensing block exemption regulation (Regulation (EEC) No 2349/84) and the know-how licensing block exemption regulation (Regulation (EEC) No 556/89).

From this point of view, the 'loss of rights' pursuant to Article 9 (12) (c) of the IA are indispensable in particular as a means of permitting confidence between the parent companies to grow and, consequently, to permit the necessary transfer of technology so as to allow Newco to succeed.

(63) However, as indicated above, such provision will also produce the effect of substantially preventing MCI from entering the EEA using only its own proprietary technology. The Commission sees no justification for accepting this restrictive effect for as long as the agreements are in force.

For that reason, and following discussions with the Commission, the parties have modified the agreements so that the 'loss of rights' provision pursuant to Article 9 (12) (c) of the IA, in so far as the EEA is concerned, will apply only for a period of five years. Once the five-year period in respect of those rights has expired, MCI's 'loss of rights' will be terminated in relation to the EEA.

This five-year period is adequate taking into account that the existing business plan for Newco commits the parent companies for five years and that, in addition, five years is the time required for the set of services to be marketed by Newco to be fully operational.

In view of this modification, the Commission considers that Article 9 (12) (c) of the IA now fulfils the conditions for the granting of an exemption pursuant to both Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement.

(c) Conclusion

(64) It is concluded that all the four conditions for the granting of an individual exemption pursuant to Article 85 (3) of the EC Treaty and pursuant to Article 53 (3) of the EEA Agreement in respect of the creation of Newco and in respect of the indispensable restrictions indentified above are satisfied.

F. DURATION OF THE EXEMPTIONS

(65) Pursuant to Article 8 of Regulation No 17, a decision in application of Article 85 (3) of the EC Treaty (and pursuant to Protocol 21 of the EEA Agreement in so far as Article 53 (3) of the EEA Agreement is concerned) shall be issued for a specified period. Pursuant to Article 6 of that Regulation, 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, should take effect:

— from the date the notification was complete, that is from 16 November 1993 to 15 November 2000 as regards the joint venture created between BT and MCI, and the appointment of BT as exclusive distributor of Newco in the EEA,

— as regards the 'loss of rights' for MCI pursuant to Article 9 (12) (c) of the IA, until the end of the fifth year from the date of the adoption of this Decision,

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in its possession, the Commission has no grounds for action pursuant to Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement in respect of the agreements as notified, relating to the acquisition by BT of a 20 % stake in the sharecapital of MCI, to the appointment of MCI as exclusive distributor of Newco in the Americas pursuant to Article 2 (1) of MCI's Distribution Agreement, to the appointment of BT

as exclusive distributor of Newco in the rest of the world excluding the EEA territory, to MCI's 'loss of rights' pursuant to Article 9 (12) (c) of the Investment Agreement in so far as the territory of the EEA is not concerned, and to BT's 'loss of rights' pursuant to Article 9 (12) (a) of the Investment Agreement.

Article 2

On the basis of the facts in its possession, the Commission has no grounds for action pursuant to Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement for the duration of the exemption granted to the joint venture in respect of the obligation on BT and on MCI to obtain from Newco all requirements for global products pursuant to Article 3 (1) of each Distribution Agreement and in respect of the non-compete provision as regards the activities of Newco pursuant to Article 18 (1) of the Joint-Venture Agreement.

Article 3

Pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement, the provisions of Article 85 (1) of the EC Treaty and of Article 53 (1) of the EEA Agreement are hereby declared inapplicable for the period from 16 November 1993 to 15 November 2000 to the joint venture, Newco, created between BT and MCI, as notified to the Commission, and to the appointment of BT as the exclusive distributor of Newco within the territory of the EEA pursuant to Article 2 (1) of BT's Distribution Agreement.

Article 4

Pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement, the provisions of Article 85 (1) of the EC Treaty and of Article 53 (1) of the EEA Agreement are hereby declared inapplicable for a period of five years from the date of the adoption of this Decision to Article 9 (12) (c) of the Investment Agreement.

Article 5

This Decision is addressed to:

British Telecommunications plc,
81 Newgate Street,
UK-London EC1A 7AJ.

MCI Communications Corporation,
1801 Pennsylvania Avenue, NW,
Washington, DC 20006,
USA.

Done at Brussels, 27 July 1994.

For the Commission

Karel VAN MIERT

Member of the Commission

II/146

COMMISSION DECISION

of 15 December 1994

relating to a proceeding pursuant to Article 85 of the EC Treaty and Article 53 of the EEA Agreement

(IV/34.768 — International Private Satellite Partners)

(Only the English and Italian texts are authentic)

(Text with EEA relevance)

(94/895/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 Spain and Portugal, 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 28 June 1993 by the parties concerned below,

Having regard to the request made by the parties on 14 February 1994, to extend the application and notification to Article 53 of the EEA Agreement,

Having regard to the summaries of the application and notification published (2) pursuant to Article 19 (3) of Regulation No 17,

After consultation with the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

A. INTRODUCTION

(1) On 28 June 1993, 20 agreements relating to the creation of a company were notified to the Commission. The company, International Private Satellite Partners (hereinafter referred to as IPSP) has been created under the form of a limited partnership organized under United States law, and has been formed to provide (a) international business telecommunications services to businesses in Europe and North America using its own satellite system on a one-stop shop basis; and (b) to offer bulk transmission capacity to third parties, to the extent that the capacity of the satellites is not fully utilized by IPSP or its partners.

Following the entering into force of the EEA Agreement, the parties requested the Commission on 14 February 1994 to extend the notification to cover also Article 53 of the EEA Agreement. Following such request the Commission started the relevant cooperation procedure with the EFTA Surveillance Authority.

B. THE PARTIES

(2.a) *The partners*

(2) Orion Satellite Corporation (hereinafter referred to as 'OrionSat'), which is a company organized under the laws of the State of Delaware, created by its ultimate parent company, Orion Network Systems, to serve as the general partner in IPSP. It holds the United States Federal Communications Commission (hereinafter referred to as 'the FCC') licence to construct, launch and operate IPSP's two satellites and has broad authority to manage and control IPSP's development and operations.

Orion Network Systems, which is also a limited partner in IPSP, provides telecommunications facilities and services, in particular point-to-point transmission services using subleased capacity.

OrionSat, as general partner, has a [. . .] (1) interest in the partnership that has to be added to an additional [. . .] held by Orion Network Systems.

(3) British Aerospace Communications, which is a limited partner of IPSP belonging to the British Aerospace group (hereinafter referred to as 'BAe') of companies, and formed by the latter specifically for the purpose of investing in IPSP.

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No C 305, 11. 11. 1993, p. 13 and OJ No C 159, 10. 6. 1994, p. 2.

(1) [. . .] Blanks between square brackets indicate business secrets deleted pursuant to Article 21 (2) of Regulation No 17.

It holds a [...] interest in IPSP. The British Aerospace Group is mainly engaged in the design and manufacture of civil and military aircraft, guided weapon systems, satellites and sub-systems, payloads and launch vehicle equipments and motor vehicles. In particular, it is the prime contractor for the IPSP satellites.

The total turnover of the BAe group in 1992 was £ 9 977 million (ECU 13 000 million).

(4) COM DEV Satellite Communications Ltd, which is a limited partner of IPSP in which it holds a [...] interest. It was incorporated specifically by its ultimate parent company, COM DEV Ltd, for the purpose of investing in IPSP.

The COM DEV group is an important supplier of satellite payloads subsystems for communications, space science and remote sensing applications.

(5) General Dynamics Commercial Launch Services, which is a limited partner of IPSP in which it holds a [...] interest. It provides spacecraft launch services and will also provide such services for the IPSP satellites.

It belongs to the General Dynamics Co. which is engaged in the manufacture and sale of weapon systems and platforms, space transportation, and building materials. The consolidated turnover of General Dynamics Co., in 1991 was US $ 8 751 million (ECU 7 250 million).

(6) Kingston Communications International Ltd (hereinafter referred to as 'Kingston'), which is a limited partner of IPSP in which it holds a [...] interest. It was incorporated specifically by its parent company, Kingston Communications (Hull) plc, for the purpose of investing in IPSP.

Kingston Communications (Hull) plc is a United Kingdom company, being the licensed operator of the public switched telephone network in the city of Hull and its surrounding area.

Kingston Communications (Hull) plc and BAe have incorporated a jointly controlled joint venture, Kingston Satellite Services Ltd, intended to act as the agent of both parent companies in discussions with IPSP concerning the offering of IPSP services.

The 1991 total turnover of the Kingston group was £ 59 million (ECU 77 million).

(7) MCN Sat. US, which is a United States corporation formed with the primary purpose of holding the investment of the French group Matra-Hachette in IPSP where it holds a [...] interest.

The Matra-Hachette group is active in aerospace, in particular in the manufacture of various types of satellites (through Matra Marconi Space), defence, telecommunication and CAD-CAM equipment, automobile transportation, publishing, broadcasting, movie production and advertising. Its overall turnover in 1992 was FF 55 000 million (ECU 8 350 million).

(8) STET — Società Finanziaria Telefonica per Azioni, which is an Italian company whose majority shareholder is the Istituto per la Ricostruzione Industriale (hereinafter referred to as 'IRI'), the largest Italian State company. STET's institutional function, as IRI's holding company for the telecommunications sector, is to guarantee the coordination of financial and commercial aspects in the provision of telecommunications services, manufacturing products and network installation. STET as limited partner holds a [...] interest in IPSP.

As will be described later, STET will have the exclusive responsibility for promoting the sale of IPSP satellite capacity and international business telecommunications services in Italy and 'Eastern Europe'.

(9) Trans-Atlantic Satellite, Inc., which is a subsidiary of the Japanese company Nissho Iwai Co., formed mainly for the purpose of investing in IPSP where it holds a [...] interest. In addition it will also work as a subcontractor to BAe for certain components of the IPSP satellites. In this respect it obtained a turnover of US $ 3 million (ECU 2,5 million) for the year ending 31 March 1992.

Nissho Iwai Co. is a general trading company active in trade in, and import and export of all types of domestic Japanese and foreign merchandise. Its turnover in the year ending 31 March 1992 was ECU 86 700 million. The Nissho Iwai Group has a substantial interest in a number of companies in the telecommunications business. In particular, it participates in the capital of Satellite Japan Corporation, a Japanese satellite operator, the main business of which is to sell bulk transponder capacity in Japan only. This company was merged with the Japanese company JC-Sat. The merger was cleared by the Commission last year.

(b.b) *The limited partnership*

(10) IPSP has been organized first to provide international business telecommunications services (e.g. internal corporate networks, bulk data transfer, data collection and transport, fax and electronic document distribution, and network services by satellite and using very small aperture terminals (hereinafter referred to as 'VSATs') to multinational companies on a 'one-stop shop',

'end-to-end' basis covering North America and Europe; and secondly, to offer transmission capacity on its satellites to the extent capacity is not fully utilized by IPSP and its partners.

(11) The closing of IPSP under the notified structure started in 1982 when OrionSat filed an application with the FCC for a licence to operate an international satellite system. Following the granting of the licence, OrionSat initiated, in 1988, the process of consultation with Intelsat. The consultation lasted one year and, once finished in 1989, OrionSat entered into a contract with BAe as prime contractor for the construction and launch of the satellite system. At the same time and through the closing of the partnership, at the end of 1991, OrionSat held discussions and negotiations with prospective partners and negotiated a loan financing package from an international consortium of banks.

(12) Under the terms of the FCC's licence, IPSP or its customers were not allowed to interconnect the IPSP satellite facilities with a switched telephone network for the purpose of providing telecommunications services. However, in December 1993, the FCC adopted a new policy pursuant to which it is now possible for separate satellite systems (like IPSP) to apply to carry up to 1 250 64-kbps equivalent circuits of public switched traffic.

1. Service and facilities

(13) IPSP intends to build, launch and operate high-power Ku-band telecommunication satellites to be positioned in orbital positions 37°5 W and 47° W longitude. The first satellite, built using the Eurostar platform — developed jointly by BAe and Matra Marconi Space through a joint venture called Satcom International — will contain 28 transponders of 54 MHz bandwidth and six transponders of 36 MHz bandwidth, that will make 1 728 MHz of usable communications capacity per satellite. The geographical reach ('footprint') of the satellites will cover much of North America, much of the EEA and portions of central and eastern Europe.

(14) It is expected that the first satellite will be operational by December 1994 and the second sometime thereafter. Their design life will be 12 years.

(15) Prior to the launching and operation of its own satellites, IPSP will provide the services by relying on leased facilities.

(16) In addition, IPSP will operate its own tracking, telemetry and command facilities being built in the US to control the satellites, that will be backed up by additional facilities to be built in Italy.

(17) Customers of IPSP will have to install two-way VSATs on their premises in order to access the services.

2. Financial contribution

(18) The complex financial arrangements supporting IPSP are as follows:

(a) the partners have invested a total of US $ 90 million in equity distributed according to their respective interests in IPSP. OrionSat's contribution as general partner amounts to US $ 30 million made up of the FCC licence, certain contract rights and other tangible and intangible assets;

(b) in addition they have obtained a senior debt facility of up to US $ 251 million for the first satellite from a syndicate of international banks;

(c) certain of IPSP's partners have committed additional funds for an amount of US $ 9 million;

(d) furthermore, with a view to guaranteeing IPSP a sufficient level of utilization of the satellites' capacity, the limited partners have also agreed to lease capacity on the satellites up to a total amount of [. . .], and of [. . .] transponders. As will be described later that capacity could be re-leased by the limited partners to customers of IPSP;

(e) finally, the limited partners have entered into additional contingent lease capacity contracts with IPSP that will require them to make additional contributions to IPSP in exchange for additional transmission capacity up to [. . .] transponders, in case of negative cash flow, to allow IPSP to service the senior debt.

3. Central management and integrated operations

(19) As IPSP has been created to provide services to customers on the basis of a fully interconnected network enabling the provision of uniform services at uniform prices, the general partner is given exclusive responsibility for management and control of IPSP and, subject to certain limited rights of review and approval by the limited partners, has broad authority to carry out the development, operation and marketing and promotion of IPSP's business.

(20) This control by OrionSat is also a requirement of the FCC in order that the licence that OrionSat holds can be transferred to IPSP.

II/149

4. Marketing and distribution

(21) IPSP will market and distribute its services with the assistance of a number of local marketing and operating companies that will be nominated by IPSP as representative agents or distributors. Apart from STET, which is the exclusive distributor for Italy and the exclusive representative agent for a group of countries collectively referred to in the agreements as 'eastern Europe' (Austria, Hungary, Poland, Romania, Bulgaria, Malta, the former USSR, the former Czechoslovakia and the former Yugoslavia), such agents or distributors will work on a non-exclusive basis. They may, but need not, be limited partners. As in some Member States licences to provide uplink services are not available yet, IPSP will have to work with the national telecommunications operators (hereinafter referred to as 'TOs') which will act as agents. This situation is expected to last until the Community's liberalization of satellite services is effective and implemented.

C. THE RELEVANT MARKET

(a.a) *Product market(s)*

(22) IPSP will compete in two markets:

— that of international private business telecommunications services,

— that of the offer of bulk satellite transmission capacity.

1. International business private telecommunications services

(23) Services of the kind that IPSP will offer to its customers are intended to address the growing need of multinational companies for advanced end-to-end communications between their geographically dispersed locations around the world and/or between them and their customers and suppliers of raw materials and intermediate products. The services include, among others, voice calling, high-speed fax, data storage and transport and video conferencing.

(24) Such services can be included in the emerging market for international (or even global) value-added services to large corporations and other intensive users of advanced telecommunications services.

(25) This is one of the segments of the overall telecommunications market with the biggest potential for growth in the years to come, taking full advantage of the current ongoing process of liberalization of telecommunications and of the growing convergence of telecommunications and electronics, in particular software.

It is significant that most of the alliances in the telecommunications field being announced nowadays include provisions to enter the value-added segment (sometimes as a first step of a broader alliance), and in particular the provision of advanced value-added services to the world's biggest corporations.

(26) The services can be provided to customers either using terrestrial facilities and establishing physical links by means of coaxial or optical-fibre cables, or using satellite facilities and VSATs. It is widely accepted that satellites are particularly recommended as regards customers' locations in remote territories and in areas having a very poor terrestrial infrastructure.

(27) Although some of the other alliances being announced include also the provision of services by satellite — as part of a basket of services to be provided mainly through cables — IPSP is the first venture that will offer services only through satellites.

(28) Another particularity of IPSP is that contrary to most of the alliances being announced — that are formed by incumbent TOs — IPSP's partners are (apart from STET and Kingston) private companies not previously active in the telecommunications field.

(29) According to the parties, this lack of private initiative is due to the fact that such companies still face significant barriers to entry arising from:

— the remaining regulation of telecommunication services in many countries notwithstanding the substantial changes that are taking place. That means that IPSP will not be able to operate on its own where exclusive rights still exist and that it will have to apply for licences to provide uplink/downlink services where total liberalization of the satellites' earth segment is not achieved. In addition, IPSP will have to coordinate with the international satellite organizations to provide services via separate satellite systems,

— the size of the investment necessary to enter the market, in particular if the entrant is acquiring its own transmission facilities. In this respect, the cost of the construction, testing and launch of the two IPSP satellites alone is budgeted at a minimum cost of US $ 425 million,

— the difficulty, cost and length of time necessary to establish a business of sufficient size and reputation, including building up brand familiarity and a customer base, in this market in particular.

2. Offering of bulk satellite transmission capacity

(30) This is a market of secondary importance for IPSP. The parties have declared that they will be active

on it only in case demand for IPSP's services is less than expected.

(31) Up to now, the supply of space segment capacity is mainly in the hands of three international satellite organizations (hereinafter referred to as 'ISOs'): Intelsat, Eutelsat and Inmarsat. They are the ultimate owners of a considerable number of telecommunication satellites in orbit (Intelsat for instance currently operates 13 geostationary satellites). All three have a very similar structure, e.g. they are organizations implemented by a number of agreements signed by sovereign States, represented by their governments or by their designated public or private telecommunications operators (known as 'signatories'), to provide space segment required (a) for international public telecommunication services either to all areas of the world (Intelsat) or to Europe (Eutelsat) or (b) for improved maritime and aeronautical communications (Inmarsat).

(32) Under ISOs' respective conventions, direct access to satellite segment capacity and earth station terminal facilities are reserved to the signatories (who also own the terrestrial networks), so that private satellite operators, who are in competition with signatories, are compelled to ask them for obtaining the capacity. This situation places signatories in a very strong position that further reinforces their already strong position in the telecommunications market as a whole.

(33) In addition, owners of separate satellite systems, such as IPSP, have to undergo (i) a consultation process with Intelsat (and/or Eutelsat) designed to ensure that such separate satellite systems will cause no significant economic harm to ISOs' system and (ii) a technical coordination process, also with the relevant ISOs, to ensure the technical compatibility of the new facilities and their operation with the use of the frequency spectrum and orbital space used by the existing and planned ISOs' space segment.

To date, and following the consultation process carried out by IPSP with Intelsat, Sweden, Denmark, Germany, Belgium, Luxembourg, Italy, Ireland, Austria, the United States and the United Kingdom have currently granted landing rights to IPSP or its representative. In addition, IPSP has also initiated the consultation process with Eutelsat with the support of the United Kingdom, Italy and Ireland.

(b.b) *Geographic market*

(34) IPSP will be active primarily in the area covered by the geographic reach of the satellites, i.e. much of North America, much of the EEA, and portions of Central and Eastern Europe. It is considered that this would be the geographic market covered by the agreements. This area would however be further extended by using terrestrial links and networks to cover customers' premises located outside the footprints of the satellites.

(c.c) *Position of IPSP in the market*

(35) IPSP estimates that the total private line service market represented approximately ECU 8,4 billion in 1990, of which private corporate communications for transatlantic and intra-European services accounted for ECU 1,4 billion. IPSP's projections for 1995 anticipate the latter figure to grow to ECU 3,5 billion of which IPSP will account for some ECU [...] or a [...] market share.

D. THE NOTIFIED AGREEMENTS

(a.a) *List of agreements*

(36) IPSP in its present form is a result of a lengthy and complex negotiation by and between its current partners. This complexity is clearly reflected by the number of agreements included in the notification intended to covet the organization and financing of IPSP, the satellites, arrangements for IPSP to obtain the assistance of its partners and others in marketing and so on. They are the following:

— Second Amended and Restated Agreement of Limited Partnership (and related further amendments), which sets forth the basic principles under which IPSP has been organized and will be operating.

— Communications Satellite Capacity Agreements and Contingent Communications Satellite Capacity Agreements concluded between IPSP and each of the limited partners (or the affiliates thereof) through which the latter have entered into seven-year commitments for substantial capacity on the IPSP satellite system for their own internal needs but also for resale to third parties through IPSP and intended to ensure a minimal use of the satellites' capacity, and have also undertaken to use and pay for either additional contingent capacity or make capital contributions in case a cash flow deficit occurs. The letter agreements have been concluded to respond to requirements made for IPSP's senior debt lenders.

— Agreement of Principles setting forth the general principles under which IPSP will offer

its services to customers, including also the general terms upon which it may obtain the assistance of local marketing and operating companies as representative agents or distributors of IPSP.

— Amended and Restated Preferred Bidder Agreement under which IPSP will give preference to partners in procuring various products and services to the extent that such partners' bids for the products are at least as favourable to IPSP as those of other bidders.

— Service Provision and Distribution Agreement for Italy between IPSP and STET under which STET, for as long as the provision in Italy of international business telecommunications is regulated so that, under Italian law, only STET can provide them, is designated the exclusive distributor for IPSP in Italy. Once deregulation has occurred, and provided that STET complies with certain performance criteria, STET will keep the exclusive right to promote the sale of IPSP's services in Italy.

— First Refusal Agreement for Italy between IPSP and STET under which IPSP will give STET a right of first refusal for the provision of bulk satellite capacity to customers in Italy for services in Italy. This agreement will become effective if and when the provision of satellite capacity in Italy becomes liberalized.

— Representative Agent Agreement for the Sale of Satellite Capacity in eastern Europe between IPSP and STET which sets forth the terms and conditions (including targets to be met by STET) under which STET is designated the exclusive agent of IPSP for the sale of bulk satellite capacity in 'eastern Europe'.

— Service Provision and Representative Agent Agreement for eastern Europe between IPSP and STET under which STET is appointed the exclusive and representative agent of IPSP in 'eastern Europe' for the provision of services provided that STET complies with a number of performance criteria set forth in the agreement.

(b.b) *Details of the specific arrangements*

1. Provisions concerning the management and structure of IPSP

(37) The agreements contain, in particular, the following provisions:

(38) — Under Article 7.01(a) of the Limited Partnership Agreement, the general partner of IPSP is given full, exclusive and complete discretion in the management, operation and control of the business and affairs of IPSP. Conversely, limited partners are prohibited from taking part in the day-to-day management of IPSP except as expressly provided in the agreements (Article 7.10 of the Limited Partnership Agreement, and Article 2 of the Agreement of Principles). This discretion of the general partner extends also to the setting up of IPSP prices and other commercial conditions.

(39) — Notwithstanding the above, limited partners can exert a certain influence on the management of IPSP through a permanent structure that is created and composed of the following committees:

(a) Partners Planning and Policy Review Committee

Created under Article 7.11(a) of the Limited Partnership Agreement, this Committee consists of one member nominated by each partner. The general partner is to submit a number of actions to the Committee, which has the right to approve or disapprove them by a majority vote. Most important of those actions are:

— the establishment of any pricing policy with respect to IPSP's sale of services which is intended to result in the sale of satellite transmission capacity to customers generally at prices which are lower than those charged to limited partners or the sale of satellite transmission capacity to certain IPSP partners at prices or terms materially different from the prices and terms offered or available to IPSP partners generally,

— the decision by the general partner to increase the budget above a given percentage,

— the approval of business plans for IPSP services concerning (i) IPSP resources, (ii) additional funding, and (iii) the initiation of IPSP services prior to the launch of the satellites.

(b) Technical Committee (Article 7.15 (b) of the Limited Partnership Agreement).

This is an advisory committee on all matters relating to the technology and operation of the IPSP satellite system and transmission networks. In particular, and with regard to IPSP services, it recommends technical standards for the equipment and operations.

(c) Under Article 7.04 of the Limited Partnership Agreement, certain major decisions by the general partner that would

have a significant impact on the limited partners' investments, are subject to a majority vote by them. They include dissolution of IPSP, its merger or consolidation with another entity, and the sale of a material portion of IPSP's assets.

(40) — In order to ensure that OrionSat devotes its full-time efforts to the management of IPSP, under Article 7.06 of the Limited Partnership Agreement, the general partner is prevented from engaging in any business other than the management of the partnership without the prior written unanimous consent of the limited partners. In addition, neither OrionSat nor Orion Network Systems, Inc. may have other business interests or may engage in other business ventures that compete directly or indirectly with IPSP.

Conversely, limited partners are free to compete with IPSP in the provision of services to customers. They also remain free to acquire business interests or engage in other business ventures with competitors of IPSP or limited partners thereof (Article 7.06 of the Limited Partnership Agreement and Article 7 of the Agreement of Principles.

2. Most favoured provisions

(41) The agreements contain a number of provisions referred to as 'most favoured nation' under which IPSP warrants that limited partners will get the best prices, terms and other conditions that IPSP is offering to each of its customers for similar capacity and/or services. Such provisions are included in Article 16.02 of the Limited Partnership Agreement and also in Articles 16.01 of the various Capacity Agreements, 21.01 of the various Contingent Capacity Agreements, and in Articles 4.5 and 15.1 of the Service Provision and Distribution Agreement for Italy, 3.5 of the Capacity Sale Agreement for eastern Europe and 4.4 and 15.11 of the Service Provision Agreement for eastern Europe.

These provisions in turn give IPSP comparable protection as to services and equipment it obtains from partners in order to enable it to function at a competitive cost level. This protection, however, does not apply in the case of contracts between a limited partner and Intelsat, Eutelsat, Inmarsat and domestic satellite systems.

3. Sales of satellite capacity at prices below those paid by limited partners

(42) Under Articles 16.01 (b) of the Capacity Agreements and 21.01 (b) of the Contingent Capacity Agreements, if IPSP wants to sell or lease satellite capacity to third party customers at a pro rata price per MHz per month that is below the one that limited partners have agreed to pay to IPSP under the abovementioned agreements, then IPSP must offer them the same amount of additional transponder capacity being offered to customers at the same price but with a 10 % discount and on the same other terms and conditions.

4. Use by IPSP of satellite capacity contracted by limited partners

(43) Under Article 8 of the Agreement of Principles, and as long as IPSP is generating sufficient positive cash flow to cover senior debt service, IPSP undertakes to make use first of capacity which limited partners have contracted on a firm commitment basis — i.e. under their respective capacity agreements — and which they are unable to use for their internal needs.

5. Calls for tenders by IPSP

(44) Under Article 2 of the Preferred Bidders Agreement, when IPSP calls for tenders worth more than US $ 1 million, if one or more limited partners supplies a bid which is no less favourable to IPSP than third party proposals with regard to price, design, performance, payment, delivery schedule and other terms and conditions, then, subject to a possible 'best and final' round of bids, IPSP is to award the contract to the limited partner(s) whose bid(s) achieve those criteria, terms and conditions.

6. Marketing and distribution conditions

(a) *General*

(45) The marketing and distribution of IPSP services will be centrally planned and managed but implemented in a decentralized manner. In addition, services will be offered at a uniform price and quality level.

(46) These principles are implemented through the following specific arrangements:

— IPSP has sole and exclusive control and operation of the satellite system (Articles 7.01 and 7.10 of the Limited Partnership Agreement, 8.01 of the Capacity Agreements and 13.01 of the Contingent Capacity Agreements),

— the marketing and distribution of international business telecommunications services are the responsibility of the general partner (Article 2 of the Agreement of Principles), who will also establish all prices for IPSP services (except where prohibited by law, given exclusive rights granted to the TO in certain countries to do so). In addition sales of services will be centrally managed by the general partner but primarily undertaken by representative agents chosen by the general partner (and that could include limited partners). In contracting with

agents or distributors, the general partner is to obtain competitive prices, terms and conditions and provide performance criteria and goals for such agents. Finally, contracts will be made in the name of IPSP,

— Attachment A of the Agreement of Principles provides that where IPSP services are to be provided in a territory where exclusive or special rights exist relating to the provision of such services, the IPSP services will be provided to the customer under a separate contract, drawn up in accordance with the laws applicable in that territory and concluded between the customer and IPSP's agent, that in such cases will normally be the national TO.

(b) *Specific arrangements with regard to STET*

(b.1) Regarding the Italian territory

(47) Under Article 2 of the Service Provision and Distribution Agreement for Italy, STET is appointed as IPSP's exclusive distributor in Italy for as long as the Italian telecommunications market is regulated (1).

If the Italian territory becomes deregulated, the exclusive right of STET will be converted into an exclusive right to promote the sale of IPSP's services in Italy. This right will be dependent upon STET's compliance with certain performance criteria expressed in terms of revenue targets. In case STET fails and does not take all reasonably necessary steps to remedy such failure within a period of 18 months, then IPSP is to be permitted to appoint other distributors in the Italian territory on a non-exclusive basis. However, STET will still be a non-exclusive distributor.

Conversely, STET undertakes not to promote IPSP services outside the Italian territory with the exception of the 'eastern European' territory (2) (Article 2.3. of the Service Provisions Agreement).

In spite of such exclusivity, if IPSP or one of its agents, distributors or partners after the Italian territory has been deregulated, is requested to provide services in Italy, they can do so.

Once deregulation is in place, if a customer located in Italy wants to purchase from IPSP a comprehensive package of international business telecommunications services, also including ground operations services with respect to its Italian site(s), then IPSP will in principle subcontract with STET for the purpose of providing ground operations services in Italy. However, the final decision as to the use of STET's ground operation services lies in the hands of customers; so that, if for cost or other reasons, customers prefer to obtain the ground operations services elsewhere, then IPSP would provide the package of services without the ground operations services.

(48) In addition, under the First Refusal Agreement for Italy, when the provision of satellite capacity in Italy becomes liberalized, IPSP is to give STET the opportunity, during a 60-day period, to provide the bulk satellite capacity requested by a customer located only in the Italian territory or, if the customer prefers to acquire the capacity from IPSP, to provide such capacity to IPSP on the same terms and conditions agreed with the customer. In any case, the capacity referred to is the capacity committed by STET and the IPSP's satellites. The purpose of this provision is to give STET a certain priority in discharging the risks it has assumed in undertaking such commitment. However, the price and terms of the lease or sale of satellite capacity to customers, and also to Italian customers, are determined by IPSP.

(49) Finally, under Article 3.3 of the Service Provision and Distribution Agreement for Italy, IPSP undertakes to forward to STET inquiries from prospective customers who wish to receive telecommunications services within the Italian territory and not extending beyond it.

(b.2) Regarding the countries collectively referred to as 'eastern Europe'

(50) The two relevant agreements are very similar to those regarding Italy except that in the present case STET is being appointed IPSP's exclusive representative agent for the purpose of offering IPSP's bulk satellite capacity and services.

(51) According to that exclusivity, and for as long as the countries concerned are regulated (and during the first year following their deregulation), IPSP and the limited partners undertake not to promote the sale of either bulk satellite capacity (3) obtained from IPSP or satellite telecommunications services offered on other satellite systems and satelite telecommunication services provided by IPSP or that are reasonably equivalent to the IPSP services promoted by STET.

(1) For the meaning in the text of the words 'regulated' or 'deregulated' as regards Italy, see recital (36), fifth indent.

(2) However, this provision does not prevent STET from engaging in passive sales outside Italy.

(3) This agreement applies only to customers located in the eastern European territory, and not to customers located elsewhere who require capacity for a number of sites, also including one or more sites in the eastern European territory.

II/154

(52) However, IPSP can sell bulk capacity in the countries independently from STET and limited partners are free at any time to market satellite capacity obtained from other satellite systems, international business telecommunications services provided using capacity on the IPSP's satellites, provided that the services are not reasonably equivalent to the IPSP's services marketed by STET. Furthermore, following one year after deregulation in the countries concerned, limited partners will be allowed to offer additional bulk satellite capacity obtained from IPSP and/or services that are equivalent to those marketed by STET, provided nonetheless that no logo or trade name belonging to IPSP is used.

Finally, any third person or entity having purchased satellite capacity from IPSP would be free at any time to sell the capacity or any satellite telecommunication services, provided that no logo or trade name belonging to IPSP is used.

(53) STET's exclusive rights under the two agreements will continue for as long as it meets certain performance criteria defined in the agreements.

7. No third-party observations

(54) Following the two publications pursuant to Article 19 (3) of Regulation No 17 made to cover Article 85 of the EC Treaty and Article 53 of the EEA Agreement respectively, no comments were received from third parties.

II. LEGAL ASSESSMENT

A. APPLICATION OF ARTICLES 85 (1) OF THE EC TREATY AND 53 (1) OF THE EEA AGREEMENT TO IPSP

(55) On the basis of arguments developed below, partners of IPSP are not to be considered as actual or potential competitors in the relevant markets to be addressed by IPSP.

(a) In order for IPSP to enter the market as a facilities-based provider, it has been necessary to obtain a number of authorizations and licences, and to arrange for the financing, construction, launch and operation of two satellites. In this respect, it is considered that none of the partners is in a position to meet all of those requirements alone but only through cooperation in a venture like the present one. In this respect,

— only IPSP's general partner, OrionSat, has the necessary authorizations and licences from the FCC and Intelsat to launch and operate the satellites. Moreover, the terms of the FCC licence prevent the general partner from releasing control over it without prior FCC approval and define very clearly the kind of services that IPSP would be allowed to provide (see recital (12)),

— none of the IPSP partners holds the necessary authorizations and licences to provide international telecommunications services in all the countries inside the footprint of the satellites. Only STET and Kingston (apart from OrionSat itself) hold any licence to offer telecommunications services but STET is limited to Italy, and Kingston to the town of Hull and the surrounding area. As regards the other limited partners, they (or their ultimate parent companies) are industrial companies active in different segments of the aerospace market and have neither the licences nor the experience required in providing communication services to other companies on a competitive basis (although some of them have gathered some experience by managing their own internal networks).

(b) None of the IPSP partners could reasonably be expected to make the investment, and assume the substantial risk associated with it, required to enter the market. The very high barriers to entry, the substantial amount of market power in the hands of the incumbent TOs in the overall telecommunications market and of ISOs in the satellite transmission market, the advanced technologies involved, the substantial inherent risk of failure associated with space operations and the broad geographic area covered, together with the amounts required and the bargaining power of customers (in particular the big multinational corporations), make this venture very risky. In view of the above, it is not realistic to consider, from an economic point of view, that any of the partners would enter the market alone.

(c) In addition, as regards marketing and distribution, the principle of uniform prices and other conditions in different territories, together with the implementation of such marketing in a decentralized manner, seems appropriate to fulfil the needs for world-wide telecommunications services, on a one-stop-shopping and billing basis, of customers having branches or subsidiaries dispersed in different territories.

The provision of such services is not adequately guaranteed by the existing bilateral arrangements between TOs, under which each one provides its own facilities within its own country. This means that each national TO prices its portion of the network separately, contracts with the customer seperately, and bills it separately, for a set of services that is often not uniform in all territories involved given the different technical features of each network involved. In this respect, the result of a combined network so created is as strong as its weakest link and so, the number of services and the features thereof are those supported by the less performant national network involved. In addition, operational matters such as monitoring quality, correcting faults and providing customer service are also performed separately.

National TOs are becoming increasingly aware of the importance of the market for international business telecommunications and of the inconveniences resulting from the situation described. As indicated, they are trying to overcome them by forming consortia with other TOs to offer such services (and, in most cases, to do other things). Some of them have already been notified to the Commission.

(56) The creation and implementation of IPSP, by introducing a new competitor, may be expected to increase the level of competition in a fast-growing segment of the overall telecommunications market, until very recently reversed to companies holding exclusive rights. This would help to accelerate the pace at which new and uniform services are offered to customers and to improve their price and performance.

(57) The impact in the market for bulk satellite transmission capacity is expected to be positive as well as quite imporant, in parmcular, because the creation of IPSP means creating an alternative, and private, supplier of space segment capacity to the incumbent and very strong ISOs and to national systems controlled by national TOs. Thus, IPSP would mean increasing the choice available to service providers demanding space segment capacity.

(58) In conclusion, the implementation of IPSP, one of the first private ventures to enter the evolving telecommunications market, falls outside the scope of both Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement.

B. APPLICATION OF ARTICLE 85 OF THE EC TREATY AND ARTICLE 53 OF THE EEA AGREEMENT TO CONTRACTUAL PROVISIONS

(59) The following provisions fall outside both Article 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement:

— the fact that STET is nominated exclusive distributor of IPSP's services in Italy while the Italian market is regulated. This provision merely reflects the fact that under Italian law STET still enjoys exclusive rights in some of the areas to be addressed by IPSP. Even in the absence of the agreement, no other company would have been able to distribute IPSP's services in Italy,

— provisions concerning the nomination of STET as exclusive representative agent in 'eastern Europe' apart from Austria. As the countries concerned are outside the EC and the EEA, these provisions do not produce any appreciable effect in the EEA.

(60) The following provisions are to be considered as non-appreciable restrictions of competition:

— As regards the agreements relating to the Italian territory, the exclusive right to promote the sale of IPSP's services in Italy granted to STET after deregulation has occurred is not an appreciable restriction of competition because:

(a) IPSP's services are by definition international, so that Italian customers can sign a contract for the same services with agents or distributors not located in Italy through their subsidiaries or facilities outside Italy,

(b) potential customers of IPSP will be big corporations often having facilities in several countries,

(c) as the only exclusivity remaining after liberalization will be the exclusivity to promote the sale of the IPSP's services in Italy, IPSP's agents and distributors other than STET will be free to sell the IPSP's services in Italy,

(d) STET is not prevented from dealing with competitors of IPSP, and

(e) most importantly, IPSP is expected to have a market share below 5% of the two markets concerned.

— As regards the agreements relating to the Austrian territory, the above reasoning concerning the Italian territory is also valid. In addition, the exclusive rights that STET has, as agent for IPSP, are more limited than those STET has as regards Italy (see recitals 51, 52 and 53), given that IPSP can address itself directly to customers and that limited partners can market capacity and/or services obtained from other satellite systems and even services making use of satellite capacity obtained from IPSP.

(61) For the following reasons, the provisions detailed below, while putting restraints on the partners' freedom of action, are concluded to be directly related and necessary to IPSP, and do not exceed what the creation and operation of IPSP requires. Consequently they are to be treated, under the competition rules of the EC Treaty and of the EEA Agreement, as ancillary restraints.

(a) The non-competition provision is ancillary because it refers only to the general partner and is a logical consequence of the sole responsibility granted to it. The provision is aimed at ensuring that the general partner devotes itself to the management of IPSP's business on a full-time basis. As for limited partners, as indicated above, they are free to compete with IPSP.

(b) The 'most favoured nation' provisions are ancillary because they are intended to ensure that IPSP treats each limited partner, which will normally also be a customer of IPSP, on an equal basis — but not on more favourable terms — as regards the other limited partners and, in particular, third party customers, with no investment made in IPSP.

(c) The preference to be given to limited partners in respect of certain calls for tenders issued by IPSP, under the Preferred Bidder Agreement, can also be considered ancillary on the basis that a certain preference towards limited partners seems natural, in exchange for the substantial amounts of money they have invested in the venture, and considering that most of them are themselves active in different segments of the aerospace market, and so are manufacturers of equipment of the same kind as that required by IPSP. It has also to be noted that the provision, as it reads, does not give limited partners any advantages as to price or other terms and so it is not expected to produce any appreciable foreclosure effect affecting the competitive position of third parties. In any event, and given both the structure of the relevant markets and in particular the presence of powerful incumbent companies, any abusive interpretation of this provision seems to be excluded if the venture is to succeed in gaining a presence in the markets it will address.

(62) Ancillary restraints are to be assessed together with the company created. In this respect, as IPSP has been concluded not to fall within the scope of Article 85 (1) of the EC Treaty and of Article 53 (1) of the EEA Agreement, then neither do the provisions detailed above,

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in its possession, the Commission has no grounds for action under Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement in respect of the notified agreements relating to the creation of the International Private Satellite Partners/company (IPSP).

Article 2

On the basis of the facts in its possession, the Commission has no grounds for action under Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement in respect of the non-competition obligation on the general partner under Article 7.06 of the Limited Partnership Agreement, the 'most favoured nation' provisions under Article 16.02 of the Limited Partnership Agreement, under Article 16.01 of each Capacity Agreement, under Article 21.01 of each Contingent Capacity Agreement, under Articles 4.5 and 15.1 of the Service Provision and Distribution Agreement for Italy, under Article 3.5 of the Capacity Sale Agreement for Eastern Europe and under Articles 4.4 and 15.11 of the Service Provision Agreement for Eastern Europe, and in respect of the preference to be given to limited partners under Article 2 of the Preferred Bidder Agreement, the appointment of STET as exclusive distributor of IPSP in Italy under Article 2 of the Service Provision and Distribution Agreement for Italy and the appointment of STET as exclusive representative agent of IPSP under Articles 2 of the Representative Agent Agreement for the Sale of Satellite Capacity in Eastern Europe and of the Service Provision and Representative Agent Agreement for Eastern Europe.

Article 3

This Decision is addressed to:

International Private Satellite Partners, L.P.,
2440 Research Boulevard, Suite 400
Rockville, Maryland 20850
USA

Orion Satellite Corporation
2440 Research Boulevard, Suite 400
Rockville, Maryland 20850
USA

II/157

British Aerospace Communications Inc.,
Suite 500, 13873 Park Center Road
Herndon, Virginia 22071
USA

COM DEV Satellite Communications Ltd
155 Sheldon Drive
Cambridge, Ontario N1R 7H6
Canada

Kingston Communications International Limited
Telephone House,
Carr Lane
GB-Hull HU1 3RE

MCN SAT U.S., Inc.,
c/o Matra Aerospace, Inc.,
1735 Jefferson Davis Highway
Suite 810
Arlington, Virginia
USA

Orion Network Systems
2440 Research Boulevard, Suite 400
Rockville, Maryland 20850
USA

STET — Società Finanziaria Telefonica per Azioni
Corso d'Italia 41
I-00198 Rome

Trans-Atlantic Satellite, Inc.,
c/o Nissho Iwai American Corporation
1211 Avenue of the Americas
New York, N.Y. 10036
USA

General Dynamics Commercial Launch Services, Inc.,
9444 Balboa Avenue
San Diego, California 92123
USA.

Done at Brussels, 15 December 1994

For the Commission
Karel VAN MIERT
Member of the Commission

DOCUMENTS ON THE APPLICATION OF THE COMPETITION RULES TO THE TELECOMMUNICATIONS SECTOR

II Commission Action in Individual Cases

B Other Commission Action

Notice pursuant to Article 19 (3) of Council Regulation No 17 (1) concerning Case No IV/33.361 — Infonet

(92/C 7/05)

Introduction

1. On 20 August 1990, Infonet Services Corporation ('Infonet') submitted for negative clearance or alternatively exemption, agreements relating to the organization of Infonet and the relationship between Infonet and its shareholders in relation to the supply by Infonet of telecommunications services in many countries around the world including all Member States. Infonet is owned by five telecommunications organizations ('TOs') (2) of the Community (the 'Community TOs') as well as public and private telecommunications operators from outside the Community.

A. The Parties

2. From 1969, Infonet operated as a business unit of Computer Sciences Corporation ('CSC'), a US corporation primarily engaged in the computer services business. In 1988 it was incorporated as a wholly-owned subsidiary of CSC. CSC subsequently and gradually sold all its shares in Infonet which specializes in telecommunications services. The current shareholders of Infonet and their respective shareholdings are as follows:

(1) The following Community TOs:

— Transpac, a wholly-owned subsidiary of France Telecom, the public telecommunications operator in France, with 16,17 %,

— Deutsche Bundespost Telekom, the public telecommunications operator in Germany, with 16,17 %,

— Telefonica International Holding BV, a subsidiary of Telefonica, the public telecommunications operator in Spain with 5,38 %,

— Régie des Télégraphes et Téléphones, the public telecommunications operator in Belgium, with 5,38 %,

— PTT Telecom BV, a subsidiary of Koninklijke PTT Nederland NV, the public telecommunications operator in the Netherlands with 5,38 %,

(2) The following non-Community TOs:

— MCI Telecommunications Corporation, a US corporation ('MCI'); with 25 % of the shares, MCI is the largest shareholder of Infonet. MCI is a recognized private operating agency ('RPOA') (3) and is the second largest long-distance telecommunications company in the US,

— Telecom Australia, the Australian public telecommunications operator, with 5,38 %,

— Singapore Telecom International PTE, the Singapore public telecommunications operator, with 5,38 %,

— Swedish Telecom International, a company under the control of the Swedish public telecommunications operator, with 5,38 %,

— Swiss PTT, the public telecommunications operator in Switzerland, with 5,38 %,

— Kokusai Denshin Denwa Co. Ltd, an RPOA in Japan, with 5 %.

3. Infonet has operations located in 42 countries including subsidiaries in Belgium, in charge of coordinating European activities, Germany and the UK. Infonet also has a 20 % shareholding in Interpac SA, a subsidiary of Transpac and France Cable and Radio (itself a subsidiary of France Telecom) set up with the purpose of marketing and supporting Infonet services in France and a 5 % shareholding in Interpac Belgium SA/NV, a subsidiary of the Régie des Télégraphes et Téléphones set up to accomplish the same functions in Belgium. In its fiscal year 1990 (1 April 1989 to 31 March 1990), Infonet had a worldwide turnover of US $ . . . million and a Community turnover of US $ . . . million.

(1) OJ No 13, 21. 2. 1962, p. 204/62.

(2) As defined 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).

(3) As defined in Annex 1 to the Constitution of the International Telecommunications Union, final acts of the Plenipotentiary Conference, Nice 1989.

II/161

B. The services

4. Infonet offers global value-added network services (commonly known as 'VANS') on a one-stop shopping basis (which means that a customer has a single point of contact with a supplier of an international service notably for ordering and billing reasons, instead of contacts with multiple suppliers in the various countries involved). Those services include data communications services such as network services based on X-25 and other protocols, X.400 services, electronic mail, electronic data interchange ('EDI'), store and forward fax and telex services and videotex services. It also includes voice communications services such as in private networks. Infonet also provides computer services such as computer timesharing.

5. Infonet operates its data communications services, which are the largest part of its business, on the basis of an international packet-switched network, constructed with lines leased from the TOs and other operators throughout the world and nodes belonging to Infonet. Amongst such TOs and operators are its shareholders listed in paragraph 3 above which have exclusive or special rights for the leasing of lines to telecommunications services suppliers like Infonet.

6. The major suppliers of global value-added network services having a significant presence in the Community include AT&T, which acquired Istel in 1989, a UK systems integrator and network services provider; EDS; General Electric Information Services which has alliances with British International Computers of the UK and STET of Italy; IBM; Sprint; and Tymnet now owned by British Telecommunications. As demonstrated by the presence of those suppliers in the Community, the VANS markets are becoming more and more competitive, in large part as a result of the Community policy of liberalization and harmonization of the telecommunications markets. Although no reliable statistics for the market share of Infonet or its competitors have been provided by the parties, it seems that with its US $ ... million turnover in the EC in 1990, Infonet currently has a small market share in the Community.

C. The Agreements as originally notified

7. The notification included six documents (herein described as the 'Agreements');

(1) the By-laws of Infonet amended and restated as of 17 January 1990;

(2) a Stockholders Agreement of 6 September 1988 and five amendments thereto. The Stockholders Agreement notably deals with the participation of the shareholders in the management of Infonet and the distribution of Infonet services by the shareholders. Concerning the management of Infonet, it is provided that Infonet is managed by and under a Board of Directors consisting of 12 directors. Concerning the distribution of Infonet services, it is provided that each shareholder will establish a local organization for the marketing and support of Infonet data transmission services in its home country. Shareholders remain free to commercialize other competing services. It is also provided that each shareholder will utilize Infonet on a non-exclusive basis in order to supply end-to-end international data transmission services to its customers. Distribution arrangements in other countries are described in paragraph 8 below. Finally the Stockholders Agreement gives a right of first refusal to each shareholder in case of any sale, pledge, transfer or assignment by another shareholder of any of the outstanding capital in Infonet;

(3) the Intercompany Agreement of 1 April 1988 between CSC and Infonet, had the purpose of facilitating CSC's sale of the shares in Infonet in connection with CSC's exit from the public data transmission market. In this context, the Intercompany Agreement contains a covenant not to compete whereby CSC undertakes not to develop or offer anywhere in the world, without Infonet's prior consent, public data transmission services in competition with Infonet during five years and, during the following two years, not offer anywhere in the world any such network that utilizes protocols and services which are the same as those utilized by Infonet's network;

(4) under the Master Marketing and Teaming Agreement of 6 September 1988 between CSC and Infonet, the Parties agree to cooperate for the marketing and the provision of complementary services which each provides, primarily in the US. The Parties agreed that CSC shall consider Infonet as its preferred provider so long as its prices and services are competitive and that each Party shall attempt to include the other Party, so long as its prices and services are competitive, as a subcontractor on all new business opportunities involving services of the type offered by such other Party. Finally, it is provided that, wherever and whenever possible, the Parties shall conduct joint marketing activities. This Agreement is now largely in disuse;

(5) the Services Agreement of 6 September 1988 between Infonet and CSC is a transitional agreement, whereby CSC agreed to provide certain services (such as the provision of warehousing facilities and administrative assistance) in order to assist Infonet to act as a separate independent company. The Agreement is now largely in disuse;

II/162

(6) the Marketing Agreement between Infonet and MCI was entered into on 16 January 1990 when MCI became a shareholder of Infonet. The purpose of the Agreement is cooperation between Infonet and MCI for the marketing of the provision of complementary services which each provides. Under the Agreement, MCI agrees to endeavour to use Infonet as the primary underlying carrier of packet switch services for its customers and as a preferred third party provider of end-user solutions which can be offered by Infonet. MCI also agrees generally to promote Infonet services. The parties undertake to determine what MCI services may best be licensed to Infonet for sale to its customers. Infonet agrees to consider MCI as its preferred third party provider of telecommunications solutions of which MCI has capabilities. However, each Party will continue to market its services itself. Finally MCI agrees to refrain while it is a shareholder of Infonet from offering to end-users public packet switch services competing with those offered by Infonet.

D. Further information on Infonet

8. The notification contains further information more particularly on (1) the use by Infonet of facilities provided by the Community TOs and (2) the distribution of Infonet services.

(1) The use of Community TOs' facilities

Infonet's data transmission services are provided on a network composed of nodes installed in the countries where Infonet services are offered, which connect lines leased from the TOs around the world including the TOs and operators which are shareholders of Infonet. In the Community, Infonet leases lines from Transpac, Deutsche Bundespost Telekom, Telefonica, the Régie des Télégraphes et Téléphones and PTT Telecom. Infonet also uses satellite transmission provided by the TOs.

(2) Distribution of Infonet services

Infonet has non-exclusive distribution arrangements in many countries including the 12 Member States under which distributors are granted the right to sell Infonet services within their territory (and are not prevented from selling the services outside their territory) and have the primary responsibility to do so in relation to multinational customers based in their territory. As indicated under paragraph 7, the shareholders act as distributor in their home countries. In other countries, similar distribution arrangements have been made with third parties.

E. Undertakings given to the Commission following its intervention

9. The Agreements as notified presented some problems from the point of view of competition policy which stood in the way of a favourable attitude on the part of the Commission. Those problems related essentially to the risks of cross-subsidization by the Community TOs in favour of Infonet and discrimination by the Community TOs in favour of Infonet against other services suppliers. During the course of the notification procedure, those issues were resolved in a satisfactory manner by way of undertakings given to the Commission.

(1) Discrimination

In order to provide services of the type described under paragraph 4, Infonet or any other supplier must rely on the use of the public telecommunications network and possibly other reserved services (1) (hereafter 'reserved services') provided by the Community TOs since the latter have exclusive or special rights in this respect in their respective countries. Because those Community TOs are shareholders of Infonet it is essential for the safeguarding of fair competition between Infonet and other existing or potential telecommunictions services suppliers, to eliminate the risk that the former is granted more favourable treatment in relation to access and use of the public telecommunications network or reserved services. In order to ensure the absence of discrimination, the Community TOs and Infonet itself have agreed that:

(a) *Terms and conditions.* The terms and conditions applied by the Community TOs to Infonet for the provision of reserved services (e.g. the provision of leased lines) in order to supply services as described under paragraph 4 shall be similar to the terms and conditions applied to other suppliers of similar services. This relates, for instance, to price, quality of service, usage conditions, timing of installation of facilities, repairs and maintenance.

(b) *Scope of services to be offered.* Infonet will not be granted terms and conditions, more particularly in relation to usage restrictions, for reserved services which would allow it to offer services which other suppliers are prevented from offering.

(c) *Technical information.* The Community TOs will not discriminate between Infonet or its distribu-

(1) Reserved services are services which are provided pursuant to special or exclusive rights granted by the Community Member States to the Community TOs in compliance with EEC law.

I/163

tors and any other supplier of services competing with Infonet services in relation to the release of any decision to make substantial changes to technical interfaces providing the means of access to reserved services or in the release of other technical information relating to the operation of the public telecommunications network.

(d) *Commercial information.* The Community TOs will not discriminate between Infonet or its distributors and any other supplier of services of the type described under paragraph 4 in relation to the provision of certain categories of commercial information. This means that the Community TOs will not provide to Infonet or its distributors systematic and organized customer information derived exclusively from the exploitation of the public telecommunications infrastructure or the operation of reserved services if such information confers a substantial competitive advantage and is not readily and equally obtainable elsewhere by Infonet's competitors.

(2) Cross-subsidization

In order to avoid that Infonet or its distributors benefit from cross-subsidies deriving from the exploitation of the public telecommunications infrastructure and the operation of reserved services by the Community TOs, the Community TOs have agreed with Infonet that the latter will operate at arm's length from the former. In particular, Infonet and its distributors will be charged on an arm's length basis the costs relating to services provided by the Community TOs including the provision of facilities, personnel and loans. Conversely, any services supplied by Infonet or its distributors to Community TOs would also be charged on an arm's length basis.

(3) Recording and reporting obligations

In order to allow the Commission to monitor compliance with the agreements of non-discrimination and non-cross-subsidization, the following has been agreed by the parties:

(a) *Recording obligations.* Each Community TO has agreed to keep its records of each application by Infonet or its distributors for reserved services by such Community TO readily available for inspection by the Commission for a period of three years following such application. Such records will include the following items: when the application has been made, what has been applied for, e.g. type of leased line or reserved service, when it has been satisfied and under what terms and conditions including price and usage condition.

(b) *Reporting obligations.* Infonet gave an undertaking to the Commission to supply yearly a report containing the following information: a summary of the records kept by the Community TOs pursuant to paragraph 9 (3) (a); a summary of any financial transactions exceeding an aggregate of ECU 2 million in value between Infonet and any Community TO and any other facilities provided by a Community TO to Infonet; details of any new agreement entered into by Infonet with any Community TO and relating directly to the notified agreements.

The Commission's intentions

10. On the basis of the foregoing, the Commission intends to take a favourable position pursuant to Article 85 (3) of the EEC Treaty and to close the procedure with the sending by the Commission's Directorate-General for Competition of an administrative letter ('comfort letter'). Before doing so, the Commission invites interested third parties to send their observations within one month from the publication of this notice to the following address, quoting the reference IV/33.361 — Infonet:

Commission of the European Communities,
Directorate-General for Competition (IV),
Directorate for Restrictive Practices, Abuse of Dominant Positions and other Distortions of Competition I,
Rue de la Loi 200,
B-1049 Brussels.

II 164

Notice pursuant to Article 19 (3) of Council Regulation No 17 (1) concerning a request for negative clearance or an exemption pursuant to Article 85 (3) of the EEC Treaty (Case No IV/34.282 — Intrax)

(93/C 117/04)

1. On 10 April 1992, PTT Telecom BV (The Hague, the Netherlands), hereinafter 'PTT Telecom' and Nederlands Omroepproduktie Bedrijf NV (Hilversum, the Netherlands), hereinafter 'NOB', submitted to the European Commission for negative clearance or alternatively exemption, a cooperation agreement in the field of Satellite News Gathering services. In the company set up for this purpose, Intrax BV, the parent companies pool their complementary skills, namely NOB's experience as a provider of television facilities services and PTT Telecom's experience with respect to the uplinking of (television) signals to satellites.

I. THE PARTIES

2. PTT Telecom is 100 % owned by Koninklijke PTT Nederland NV (the Netherlands), which with activities in both the postal and telecommunications domains, achieved a turnover of Fl 13,6 billion in 1990. PTT Telecom is the public telecommunications organization (TO) in the Netherlands.

PTT Telecom has two other subsidiaries involved in satellite services, Satellite Business Television BV and Unisource Satellite Services (formerly Vesatel) BV: the first company is involved in providing internal business communications and information via satellite to groups of companies and organizations, while the second operates in the area of fixed, not mobile, satellite communications.

3. NOB and its subsidiaries provide the technical facilities required for the preparation and transmission of radio- and television programmes. In 1990, NOB achieved a turnover of Fl 402 million.

4. Intrax BV (Intrax) of Hoofddorp, the Netherlands, was set up by PTT Telecom and NOB to provide international satellite news gathering services. For financial reasons, the initial shareholding reflects an 80 % participation by PTT Telecom and 20 % by NOB, with the agreed intention of achieving a 50:50 relationship by 1994. Intrax is run by a board of directors under the supervision of a supervisory board (raad van commissarissen) consisting of an equal number of members appointed by PTT Telecom and NOB respectively. At present, the board of directors consists of one member, appointed by the annual shareholders' meeting; as long as the director is appointed by PTT Telecom, the president of the supervisory board, currently consisting of two members, shall be the member appointed by NOB. Business decisions of any importance to be taken by the (board of) director(s) require the prior approval of the supervisory board.

II. THE SERVICES INVOLVED

5. Satellite news gathering is a relatively new form of communication which is built on two existing, complementary services, (i) those provided by facilities houses such as NOB and (ii) the uplinking of signals to satellites from groundstations, traditionally a telecommunications activity.

Television (and radio) facilities

6. Services relating to television and radio facilities involve the provision of the technical attributes and activities required to prepare and emit television (and radio) programmes. Physical attributes used for television facilities include studios, cameras, editing equipment, music libraries, audiovisual archives, orchestras and choirs; the services include the maintenance of these attributes and the provision of manpower — for example cameramen and editors — for the operation thereof.

7. Until 1988, the provision of technical facilities for the preparation and emission of television programmes was carried out by the 'facilities branch' of the Nederlandse Omroep Stichting (NOS), the association of public broadcasting organizations in the Netherlands. To carry out its tasks, including those of its facilities branch, the NOS used general broadcasting revenues, namely income from advertisements and contributions made to the broadcasting organizations. According to the then existing Omroepwet (Broadcasting Act), the public broadcasting organizations were obliged to acquire the technical facilities they needed to prepare and emit their programmes exclusively from the facilities branch of the NOS. In other words, the facilities branch of the NOS enjoyed a legal monopoly for the provision of television facilities to the public broadcasting organizations.

On 1 January 1988, the facilities branch of the NOS was converted into an autonomous company, Nederlands Omroepproduktie Bedrijf NV (NOB), which is of course one of the parties involved in the notified arrangements. During a transitional period, the public broadcasting organizations continued to be obliged to use the services of NOB for a certain percentage of their requirements. As of 1 January 1991 as regards television and 1 January 1992 as regards radio, the provision of technical facilities is wholly open to competition. NOB's position on the

(1) OJ No 13, 21. 2. 1962, p. 204/62.

market for television facilities has, however, continued to be very strong in the two years following liberalization.

Uplinking

8. Uplinking is the transmission of signals from a satellite groundstation to a satellite, from which the signal is subsequently downlinked to receive dishes. Uplinking is a telecommunications activity which in most Member States is exclusively reserved to the national telecommunications organization (TO).

Satellite news gathering

9. Satellite news gathering (SNG) represents an integration of the provision of technical audio-visual facilities and uplinking services. SNG facilities have been developed to allow the rapid on the spot collection and transmission of audiovisual news and data at remote locations normally not or not regularly served by the terrestrial network, for example: the scenes of disasters, sports events and other newsworthy happenings which require or warrant immediate coverage and conveyance to the general public or a specific audience.

10. Successful news gathering of this type depends on the speed and efficiency with which the event in question can be audio-visually recorded, if necessary edited and then communicated to the customers, for example press bureaus and broadcasting organizations, for further incorporation into their news programmes. For this purpose, the integrated use of transportable audio and video production facilities and small, transportable uplinking facilities allow for the on-the-spot preparation and editing of news shots which can subsequently be uplinked immediately and transmitted via satellite to one or several points.

11. SNG services are a recent phenomenon on the European market, the value of which the parties roughly estimate to be a few million Dutch guilders in the Netherlands and Fl. 10 to 30 million in Europe. SNG-service providers from the United States and Japan enjoy a headstart from which they will benefit once the European market is liberalized. In the Netherlands, as explained below, there are no longer any barriers to entering the market for SNG services, and Intrax can expect to face competition from experienced American and Japanese SNG-service providers as well as from European organizations such as press bureaus, broadcasting organizations and TOs who are actually providing such services elsewhere or are in a position easily to do so.

III. THE SNG SERVICES PROVIDED BY INTRAX

12. To carry out its basic SNG activities, Intrax requires

(i) transportable registration- and editing equipment and personnel;

(ii) a transportable satellite groundstation for uplinking purposes and uplinking personnel; the uplinking equipment is located in a so-called SNG-unit, a small truck with the groundstation on its roof and the necessary hardware and software inside; the market value of a SNG-unit is approximately ECU 430 000;

(iii) transponder capacity on a satellite to relay the uplinked signals to their point of destination, e.g. a broadcasting studio.

13. NOB agrees to provide Intrax, at the latter's request, with the transportable registration- and editing equipment, personnel and expertise during the term of the agreement, for which Intrax will be charged the normal commercial rates, in other words at arm's length. Intrax is thus contractually free to acquire these facilities from sources other than NOB, and NOB in its turn is not obliged to reserve such facilities for use by Intrax.

14. As far as the SNG-unit is concerned, the agreement provides for an arm's length sale of one unit by PTT Telecom to Intrax, while a second unit will remain available for Intrax's use at the latter's request, also at the normal commercial rates. Aside from the initial SNG-unit to be acquired from PTT Telecom, Intrax is thus contractually free to acquire further units from sources other than PTT Telecom.

15 In order to provide SNG services, Intrax requires the occasional use of capacity on satellites. Intrax is contractually free to acquire such capacity from any of the available sources, which include international satellite consortia such as Eutelsat and Intelsat, individual telecommunications organizations and private satellite operators.

16. The cooperation agreement between PTT Telecom and NOB is non-exclusive, which means that (i) PTT Telecom is free to provide uplinking services to parties other than Intrax, (ii) NOB is free to provide technical facilities to parties other than Intrax and (iii) both PTT Telecom and NOB are free to compete directly with Intrax in the provision of SNG services.

17. It is the parties' intention that Intrax will carry out its activities both within and outside of the Netherlands.

18. The cooperation agreement which forms the basis of Intrax's activities was concluded on 21 October 1991 for an unlimited duration.

IV. THE REGULATORY SITUATION WITH RESPECT TO SATELLITE COMMUNICATIONS

19. The various steps involved in the transmission of signals to satellites are generally covered by exclusive rights bestowed by international conventions and domestic laws on the TOs. In most Member States, uplinking is a service reserved exclusively for the national TO, while access to the satellites of international consortia such as Eutelsat is only possible via the TO signatories. In order to determine whether PTT Telecom's position as the TO in the Netherlands and signatory in the context of the international consortia would result in a *de facto* monopoly for Intrax because potential competing SNG-service providers would not have the benefit of PTT Telecom's partnership, it is necessary to examine the existing regulatory situation in the Netherlands and PTT Telecom's policy as Eutelsat (and Intelsat) signatory.

Uplinking

20. Of crucial importance with respect to the factual setting of the notified arrangements is the liberalization of certain uplinking services in the Netherlands. On 14 November 1991, the Dutch Minister in charge of telecommunications issued a communication in which it is stated that Koninklijke PTT Nederland NV as national concession-owner for satellite groundstations has agreed *vis-à-vis* the Minister to refrain from invoking its right of first refusal as conferred by the Dutch Telecommunications Act (Wet op de Telecommunicatievoorzieningen) with respect to the operation of three types of groundstations, which are specified as: 1. VSATs (Very Small Aperture Terminals) and 2. VSAT-hubstations providing a maximum speed of data-transmission with a maximum diameter of 4 to 10 metres respectively, and 3. SNG-groundstations with a maximum diameter of 4 metres. With respect to these categories, the Minister's communication states that third parties other than the national concession-owner are eligible for licences to operate such groundstations, subject to statutory provisions provided for in certain acts such as the Telecommunications Act and the Media Act.

21. Licences for the operation of SNG-groundstations are issued by the Direction for Telecommunications and Post of the Ministry for Transport on the basis of objective criteria, and there is no involvement whatsoever of PTT Telecom in the licensing procedure. Licences are granted for one year, and a licence fee of Fl 100 per licence, which means per groundstation, is charged. Intrax has applied for and been granted a licence on the same basis as any other applicant not having the corporate ties with PTT Telecom which Intrax has.

22. Intrax plans to offer SNG services also outside the Netherlands. To the extent the uplinking of signals to satellites has not yet been liberalized in other countries where it wishes to operate, Intrax will be obliged to contract for uplinking services from the national TO and in that respect will be in the same situation as any (potential) competitors.

Availability of transponder capacity

23. Eutelsat (European Telecommunications Satellite Organization) is an international consortium set up by an intergovernmental convention signed by 32 governments, the 'parties', and effectively operated by the 'signatories', normally the national TOs, who have signed an operating agreement to that effect. Eutelsat is a major operator of telecommunications satellites in the European Community. Under the terms of the Convention, space segment capacity on its satellites can be rented only to its signatories, who can in their turn rent such capacity to third parties; in other words, companies wishing space segment capacity on Eutelsat satellites are not in a position to have direct contracts with Eutelsat to that effect, but must acquire such capacity via a signatory. PTT Telecom was designated by the Dutch government to be the Eutelsat signatory.

24. PTT Telecom has given assurances to the Commission that in the event capacity on Eutelsat satellites is scarce, for example when there is a sudden momentary increase in demand due to an exceptional occurrence, PTT Telecom will ensure that the allotment of such capacity will be carried out without any discrimination because applications will be dealt with strictly in the order in which they come in. PTT Telecom has specifically confirmed that Intrax will not enjoy any preferential treatment for rental of capacity on Eutelsat satellites. PTT Telecom's position in this respect will apply *mutatis mutandis* to applications for capacity on Intelsat satellites, a consortium similar to Eutelsat but operating on a world-wide basis.

25. Although the Eutelsat Convention does not bestow any explicit territorial exclusivity on the signatories, in practice until recently third parties transmitting signals to satellites from the national territory of a given signatory would also lease the required space segment capacity from Eutelsat via that signatory. In September 1992, the parties and signatories from the Netherlands, the United Kingdom, France and Germany, agreed to allow telecommunications service providers seeking access to Eutelsat space segment capacity to choose freely from which signatory they wish to lease such capacity. This means that competitors of Intrax who have a licence to provide uplinking, including SNG services in the Netherlands are not bound to lease

Eutelsat capacity from PTT Telecom, but can likewise do so from the three other signatories who have agreed on the abolition of any territorial restrictions in this respect. Other Eutelsat signatories may be expected to adhere to these arrangements in the future.

26. Finally, as noted before, space segment capacity is available from a number of sources other than the international satellite consortia. Thus, in conclusion, with respect to space segment capacity, companies competing with Intrax in the Netherlands will have access to Eutelsat (and Intelsat) capacity via PTT Telecom on a non-discriminatory basis, they will have access to Eutelsat capacity via at least three Eutelsat signatories other than PTT Telecom and they will have access to satellites belonging to organizations other than Eutelsat. In countries other than the Netherlands, Intrax will be subject to the same operational constraints as its (potential) competitors.

V. CONCLUSIONS

27. In conclusion, the Commission is of the preliminary opinion that the notified arrangements allow for a rapid introduction of an enhanced telecommunications service, while the regulatory situation in the Netherlands, the stated policy of PTT Telecom with respect to its allotment of Eutelsat (and Intelsat) space segment capacity and the non-exclusive character of the cooperation should ensure that competing SNG-service providers are not faced by any barriers to entry on the Dutch market. Outside the Netherlands, Intrax will be in the same position as other SNG-service providers.

The Commission therefore proposes to take a favourable position with respect to the cooperation arrangements between PTT Telecom and NOB. Before doing so, it invites all interested parties to send their observations within one month of the publication of this notice to the following address, quoting the reference IV/34.282 — Intrax:

Commission of the European Communities,
Directorate-General IV (Competition),
Directorate for Restrictive Practices,
Abuse of Dominant Positions and other Distortions of Competition,
200, Rue de la Loi,
B-1049 Brussels.

Recapitulation of current tenders, published in the *Supplement to the Official Journal of the European Communities*, financed by the European Economic Community under the European Development Fund (EDF) or the European Communities budget

(week: 20 to 24 April 1993)

(93/C 117/05)

Invitation to tender No	Number and date of 'S' Journal	Country	Subject	Final date for submission of bids
3653	S 76, 20. 4. 1993	Senegal	SN-Dakar: Bouteilles à gaz	16. 6. 1993
3654	S 78, 22. 4. 1993	Botswana	BW-Selebi-Phikwe: slipring induction motor with automatic liquid starter and cable	30. 6. 1993
3649	S 79, 23. 4. 1993	Belgium	B-Brussels: prequalification of consultants	21. 5. 1993
3616	S 80, 24. 4. 1993	Zimbabwe	ZW-Harare: vehicles and earthmoving equipment	14. 7. 1993

II/168

Commission notice pursuant to Article 19 (3) of Council Regulation No 17 on Case No IV/34.422 — Aérospatiale/Alcatel Espace

(94/C 47/06)

(Text with EEA relevance)

I. INTRODUCTION

On 6 August 1992 Aérospatiale and Alcatel Espace notified the Commission of an agreement concluded on 1 March 1991 on telecommunications satellites and satellites having related, and in particular military, applications. The cooperation between the parties might be extended to other areas such as earth observation.

The agreement provides for business cooperation coupled with technical and industrial specialization. The agreement, aimed at rationalizing the activities of the parties, does not provide for integration of their production lines. Consequently, as regards their 'space' activities, they remain separate entities having their own research and production facilities.

The parties have in the past been associated frequently in carrying out satellite programmes, either as co-contractors or as prime contractor and subcontractor. The agreement establishes almost systematic cooperation between the parties going beyond the *ad hoc* consortia which they have hitherto formed (for example, for Eutelsat 2, TDF I/II, Turksat and Arabsat 2).

The agreement forms part of a strategy of alliances pursued by the parties with regard to satellites, on the one hand with Alenia and with DASA and, on the other, by all four with the American company SS/Loral, with the aim of establishing a vertically integrated industrial facility of sufficient size to meet the requirements of a rapidly developing world market.

II. THE PARTIES

Aérospatiale is a French public undertaking operating in the aerospace industry. It produces planes (Airbus), military and civilian helicopters, missiles and, as far as space is concerned, launchers (it is the system integrator and principal stage contractor for the Ariane launcher) and satellites. Aérospatiale's total turnover in 1991 amounted to FF 48 600 million, of which space activities represented FF 4 755 million, with FF 1 528 million of this latter figure being accounted for by civilian satellites.

Alcatel Espace is controlled by the Alcatel Alsthom Group through Alcatel NV. Alcatel is active in communication systems, energy and transport, electrical engineering, accumulators and other services. The turnover of Alcatel NV in 1991 was ECU 15 746 million. The turnover of Alcatel Espace during the same period was FF 1 639 million. Alcatel NV's space activities extend beyond those of Alcatel Espace: six other group companies or divisions of companies work in the space sector, onboard electronics and ground electronic equipment, with a total space turnover of ECU 56 million in 1990.

As far as the agreement is concerned, Aérospatiale is the prime contractor for satellites and the supplier of satellite platforms and optical payloads. Similarly, it has a large turnover in the prime contracting of 'turnkey' satellite systems. Alcatel Espace is the prime contractor of satellite telecommunications systems (onboard and ground) and the supplier of payloads, notably telecommunications payloads, and of sub-systems and associated equipment.

III. THE MARKET

A. The product market

The relevant product market in this case is that for telecommunications satellites, both civilian and military.

— *Supply*

Satellites are highly complex spacecraft involving many different technologies. A standard satellite consists of two basic parts: the platform and the payload. The platform is the physical structure of the satellite and thus incorporates a number of control and propulsion systems whose job it is to ensure the stability of the satellite and maintain the orbit in which it was placed, to supply electrical energy and ensure thermal control of the satellite. The payload consists of specialized systems designed to perform the particular task for which it was placed in orbit.

The spatial environment in which satellites must operate and the virtual impossibility of repairing a malfunctioning satellite once it is in orbit impose very strict manufacturing and test conditions which require manufacturers to invest very large amounts both in production lines and in assembly and test facilities.

In addition, products used in space are largely made to measure. Consequently, although manufacturers endeavour to standardize their products as far as possible so as to spread their R&D expenditure over the broadest possible series of products, each new satellite entails a substantial amount of new R&D expenditure, which firms are virtually unable to recover in full, whether by obtaining a contract or by using the results in other projects.

Lastly, since a manufacturer is rarely able to provide alone all the systems which go to make up a satellite, the suppliers of different systems very often work together under the wing of a manufacturer acting as the prime contractor, who deals with the customer.

— *Demand*

Demand is almost always channelled through invitations to tender published by customers. Customers are either governments/national agencies or telecommunications operators, international satellite organizations (ISOs) such as Intelsat, organizations of a military nature such as NATO and, increasingly, private companies (sometimes consortia) set up for the purpose of operating satellites (such as SES and the Astra satellites).

In general, the customers are very well informed of the state of the required technology and their precise requirements and in addition have very considerable purchasing power.

The content of the invitations to tender varies widely. While some include only ground-delivered satellites, others ('turnkey' projects) also include services allowing delivery in orbit (launching), ground stations and even the operation of the satellite in orbit.

B. Geographic market

The scale of the market depends largely on the type of final consumer of the satellite(s). The international satellite organizations (ISOs) such as Intelsat and Inmarsat are not bound by any nationality criteria in purchasing their satellites. The same goes for private consumers and for countries which do not have a sufficiently developed national aerospace industry. As far as such countries and such organizations are concerned, competition between manufacturers has always been open and very intense, and, since transport costs are scarcely significant, the market is worldwide.

However, certain regional satellite organizations or space agencies pursue a declared or tacit policy of buying their satellites only from their members. This is the case with the European Space Agency (ESA), which operates on the basis of the principle of a fair return, providing the industries of each member state of the ESA organization with contracts equivalent in amount to its financial contribution to the organization. Similarly, given the strategic importance of the aerospace industry for certain countries, those which have national space programmes founded on a well developed industrial base allocate considerable proportions of their programmes to their own industries, the extent to which they do so being in proportion to the relevant national industry's capacity. The United States (with its 'Buy American Act'), Japan and most of the Member States pursue such a policy. Consequently, as far as the Community is concerned, apart from European participation within the ISOs and the growing activity of private operators, national markets were until very recently largely compartmentalized and separate, except in the case of components.

However, the market situation in the western countries, and in the Community in particular, is evolving very rapidly towards the disappearance of barriers between Member States and, consequently, towards a unified market. Three essential factors are at work here:

— certain satellite applications and, in particular, those relating to telecommunications and especially the broadcasting of television and radio signals, have largely reached the commercial stage. In addition, the surface covered by a satellite in geostationary orbit obviously exceeds the frontiers of any one country,

— the current deregulation of telecommunications in Europe and the rapid development of the technological possibilities of telecommunications in general has parallel effects on satellites and also makes it easier for a range of new actors to gain access to the space market, both as service suppliers and on the demand side as customers for space capacity,

— lastly, the recent entry into force of the Directive on public procurement will help to ensure equality of opportunities for the various suppliers in obtaining public contracts, to the detriment of national preferences.

It must therefore be concluded that the relevant geographic market is at least the Community, except where contracts have been concluded for a specific programme with certain organizations or any national agency and may comprise constraints of various kinds linked to nationality or to a fair return.

C. The market position of European satellite manufacturers

The growing reliance of customers (particularly in telecommunications and the broadcasting of television and radio signals) on purely commercial criteria in their invitations to tender means, firstly, that manufacturers must make very considerable efforts in terms of prices and financing and insurance terms, delivery dates and involvement not only in the manufacture of satellites, but also in placing them in orbit and operating them once they are in space so as to make their tenders more attractive. Secondly, it also means that an effort must be made to reduce production costs through standardization and synergy.

The market therefore favours large-scale undertakings with a very high degree of vertical integration.

The supply side of the satellite market in Europe is at present highly fragmented and involves a very large number of firms engaged in 'space' activities either as prime contractors or as payload, sub-system or component manufacturers. This fact, which is due to the historical compartmentalization of national markets in Europe, contrasts with the situation of the industry in the United States, which is at present dominated by a limited number of companies (notably Hughes and GE

Astro and TRW and Lockheed in both the civilian and the military sectors which are very large and vertically integrated (Hughes, for example, through its subsidiary Hughes Communications, is one of the major suppliers of space capacity in the United States).

The American companies have the benefit of a large, deregulated and unified domestic market and of government space programmes — both in the civilian sector (notably NASA) and in the military sector — which are much larger than those available to European companies both at national level and through the European Space Agency (ESA).

The involvement of American companies outside the United States has been very great as regards the ISOs and third countries, but more limited as regards Europe. However, with barriers to entry in Europe falling, competition from the United States will certainly grow in the near future.

In addition to American companies, it may also be expected that manufacturers in the former Soviet Union will become increasingly active on both the world and European markets. The recent launcher agreements concluded between Russia and the United States on the one hand and Russia and Europe on the other are a first step in this direction.

The European companies' response to such market developments is twofold, namely to increase in size and to pursue vertical integration, through mergers or large-scale strategic alliances. The setting up of the German company DASA, the Franco-British company Matra-Marconi Space NV and the series of agreements concluded between Aerospatiale, Alcatel, Alenia and DASA and with the American company Space Systems Loral in the satellite sector, of which this agreement forms an integral part, are very clear examples of this.

IV. THE NOTIFIED AGREEMENT

The cooperation agreement concluded between the parties is intended initially to cover civilian and military telecommunications satellites. The parties also envisage the possibility of broadening it later to cover observation, meteorological and scientific satellites.

The aims of the agreement are, firstly, to improve competitiveness through optimum verticalization and to cover satellite activities as widely as possible and, secondly, to improve profitability and increase market shares through close business collaboration between the parties.

The agreement has been concluded for an initial period of 10 years. However, after five years, each party may terminate the agreement subject to minimum notice of one year.

The main features of the agreement are as follows:

(a) Technical and industrial specialization

In order to exploit to the full the high degree of complementarity in their activities, the parties have decided to allocate their technical and industrial activities in accordance with a specialization table. They will thus not have to stop any of their current activities.

For the rest, Aérospatiale and Alcatel will remain separate entities having their own research and production facilities.

(b) Industrial property

Each party will remain the owner both of the industrial property owned by it prior to the signature of the agreement and of the results of its research activities under the agreement.

Nevertheless, licences may be granted by each of the parties to the other, the terms of which will be established on a case-by-case basis and must be acceptable to each of them.

As far as inventions resulting from joint work are concerned, it is provided that only one of the parties will file any patent applications and will grant the other a licence under terms which will also be established on a case-by-case basis.

(c) Management committee

A management committee consisting of four members, two appointed by each party, has been set up. It will be responsible for exchanges of information and for taking decisions regarding cooperation, in particular extending the field covered, policy coordination on product development, the approval of joint tenders and their terms and, where appropriate, separate tenders.

The committee has to take its decisions unanimously. However, if it proves impossible to reach agreement on a decision, the committee in the first place, and subsequently the management of Aérospatiale and Alcatel, will decide on the desirability of each party acting independently.

In addition, a number of working groups have been set up for the exchange of relevant information on research and development and on product policy.

(d) Cooperation procedure

This is the key clause in the agreement. It establishes, firstly, a general principle of mutual provision of information and consultation between the parties on all measures relating to the areas covered by the agreement.

II/171

Secondly, it provides for joint commercial action, notably through the drawing up of a business action plan that will include all existing or new projected invitations to tender to which a joint response is to be made.

As regards the first aspect, the committee will coordinate the parties' product development policies and will examine planned industrial alliances with other companies.

As regards the second aspect, the parties undertake not to participate in any other response to the projected invitations to tender that have been included in the business action plan with the agreement of the two parties. It should also be noted, however, that there is nevertheless a substantial margin for independent action by each party:

1. In the case of an invitation to tender for which a joint bid has been submitted, each party is free to submit tenders for equipment and/or sub-systems to the customer or third parties provided that (i) the value of the tenders does not exceed 15 % of the selling price of the satellite, (ii) the management committee is informed and (iii) the terms of the tender are 'compatible' with the legitimate interest of the parties under the joint proposal.
2. The management committee may decide for 'strategic reasons' to have each of the parties submit a tender separately.
3. In addition, the agreement provides that a number of contracts will be excluded from the business action plan.
4. Lastly, when one of the parties does not intend to include a projected invitation to tender in the business action plan, the other party is free to act separately.

The Commission intends to take a favourable view of the agreement notified. Before doing so, it invites interested third parties to send their comments on the case within one month of publication of this notice to the following address, quoting reference IV/34.422 Alcatel — Aérospatiale:

Commission of the European Communities,
Directorate-General for Competition (DG IV),
Directorate for Restrictive Practices, Abuse of Dominant Positions and Other Distortions of Competition I,
200 Rue de la Loi,
B-1049 Brussels.

Commission communication pursuant to Article 9 (1) of Council Regulation (EEC) No 3832/90 of 20 December 1990 applying generalized tariff preferences for 1991 in respect of textile products originating in developing countries (extended for 1994 by Regulation (EC) No 3668/93)

(94/C 47/07)

Pursuant to the provisions of Council Regulation (EEC) No 3832/90 (1), extended for 1994 by Regulation (EC) No 3668/93 (2), the Commission gives notice that the following fixed duty-free amounts, applicable from 1 January to 30 June 1994, have been exhausted:

Order No	Category	Origin	Fixed duty-free amount	Date of exhaustion
40.0040	4	Philippines	941 500 pieces	12. 1. 1994
40.0070	7	Pakistan	486 000 pieces	12. 1. 1994
40.0220	22	Brazil	324,5 tonnes	10. 1. 1994
40.0280	28	South Korea	11 000 pieces	10. 1. 1994
40.0360	36	Belarus	14,5 tonnes	4. 1. 1994

Imports beyond these amounts are liable to payment of the normal duties of the Common Customs Tariff.

(1) OJ No L 370, 31. 12 1990, p 39
(2) OJ No L 338, 31. 12. 1993, p. 22

Notification of a technical cooperation agreement between telecommunications organization

(Case No IV/34.820 — GEN)

(94/C 55/03)

(Text with EEA relevance)

1. On 9 August 1993, the telecommunications organizations of France, Germany, Italy and Spain (1), and British Telecommunications plc. submitted to the Commission for examination under the competition rules, technical cooperation arrangements referred to as 'GEN' (Global European Network), aimed at improving the quality and availability of international leased lines mainly through more efficient operational mechanisms.

2. The GEN operation agreement (OA) which contains the terms and conditions upon which this cooperation will take place has been concluded for five years and is renewable.

3. Each GEN operator agrees to dedicate a certain amount of its fibre optic capacity (the 'bearers') to GEN and to install on its network at least one 'node' (or network access system, NAS) and associated data packet transmission links conforming to the X25 standard.

The bearers form the physical links between the nodes through which each GEN operator obtains access to the overall capacity operated under the framework of the GEN OA. It is also the link between that capacity and the GEN operator's local network.

The nodes are interconnected to a network control system (NCS) whose computers manage and supervise the overall capacity. The NCS hardware and related software comprise the network management system (NMS).

Within the framework of the GEN OA, each GEN operator is able to operate and manage its own sub-network(s). In this way, for example, DBP-T would be able to gain access to its sub-network in France via France Telecom's node in Paris.

4. A management committee consisting of one representative per GEN operator has been created to oversee the implementation and operation of GEN. The overall network is run by the GEN manager and a limited number of dedicated personnel under the overall direction of the GEN management committee. The position of GEN manager rotates between the GEN operators.

The common operating costs of GEN are apportioned between the GEN operators according to the percentage of the total GEN capacity under the operational control of a GEN operator.

When a new GEN operator joins, the above costs are reapportioned under the terms of the GEN OA.

5. GEN, not being a legal entity, does not own any equipment. Therefore, under the OA, each GEN operator agrees to dedicate an initial amount of fibre optic capacity for use on GEN. Any further quantities, qualities and routes of bearers to be dedicated under the GEN OA are a matter for negotiation between the GEN operators.

The terms and conditions for providing the bearers are not determined by the GEN OA but are a matter for bilateral agreement between the GEN operator providing the bearer and the GEN operator using it. The parties have agreed that the charges shall be calculated on the basis of the cost of providing and maintaining the bearer plus a reasonable rate of return and that charges will be applied in a non-discriminatory manner.

6. Admission to GEN is open to all applicants who fulfil certain criteria and will take place in order of application. The criteria are:

(a) the applicant must be a telecommunications organization,

(b) the applicant must be willing and able to procure, install and test a node and an appropriate part of X25 and to purchase an NMS software sub-licence and test overall interconnection with the existing GEN network,

(c) the applicant must have the appropriate regulatory authorization under its own national law;

(d) the applicant must be able to establish the minimum level of interconnection via GEN (to ensure re-routing if necessary);

(e) the applicant must be able to meet technical requirements necessary to prevent deterioration of quality, efficiency and speed; and

(f) the applicant must be capable of fulfilling the financial, technical and legal commitments under the GEN operation agreement.

(1) France Telecom, Deutsche Bundespost Telekom, STET, Ireri und Telefónica

II/173

As presently configured, there is a technical limitation on the number of GEN operators. From the technical point of view, GEN can accommodate up to 20 nodes. Beyond that there would be significant deterioration in the quality, efficiency and speed of operation of GEN. It is, however, possible to enhance the management system capacity to increase the number of nodes with investment and the commitment of time and resources.

7. After preliminary scrutiny, the Commission considers that the application must be examined under the provisions of Council Regulation No 17 (1).

(1) OJ No 13, 21. 2. 1962, p. 204/62.

8. The Commission invites interested third parties to send any observations they may have regarding these arrangements. In accordance with Article 20 of Regulation No 17, such observations will be protected by professional secrecy. Observations must reach the Commission within 30 days of the date of this notice, quoting the reference: IV/34.820 — GEN.

Send observations to:
Commission of the European Communities,
Directorate-General for Competition (DG IV),
Directorate for restrictive practices, abuse of dominant positions and other distortions of competition I,
200 rue de la Loi,
B-1049 Brussels.

Recapitulation of current tenders, published in the *Supplement to the Official Journal of the European Communities*, financed by the European Community under the European Development Fund (EDF) or the European Communities budget

(week: 15 to 19 February 1994)

(94/C 55/04)

Invitation to tender No	Number and date of 'S' Journal	Country	Subject	Final date for submission of bids
3812	S 35, 19. 2. 1994	Germany	D-Berlin technical assistance for an environmental information programme	6. 4. 1994
3775	S 35, 19. 2. 1994	Sudan	SD-Khartoum: various supplies	19. 4. 1994

Notification (Case No IV/35.038 — Jetphone)

(94/C 134/04)

(Text with EEA relevance)

1. On 5 April 1994 the Commission received an application for negative clearance and a notification with a view to exemption, pursuant to Articles 2 and 4 respectively of Council Regulation No 17 (1) of a joint venture agreement between BT Jersey (a subsidiary of British Telecom) and France Cables et Radio (a subsidiary of France Telecom) under which the parties are to develop, through a joint venture (Jetphone), telecommunications services operating on board aircraft and relayed by terrestrial means (TFTS: terrestrial flight telephone system).

2. The notified arrangement consists mainly in:

— a 50/50 joint venture agreement of unlimited duration,

— ancillary agreements setting out the framework within which the joint venture is to operate.

3. The Commission invites interested third parties to submit to it any observations they may wish to make on the subject.

Observations must reach the Commission not later than ten working days from the date of publication of this notice. They may be sent either by fax or by post, quoting reference No IV/35.038 — Jetphone, to the following address:

Commission of the European Communities,
Directorate-General for Competition (DG IV),
Directorate IV/B,
Office 3/062,
150 avenue de Cortenberg,
B-1049 Brussels,
(Fax No (32 2) 296 98 09).

---

(1) OJ No 13, 21. 2. 1962, p. 204/62.

II/175

Notice pursuant to Article 19 (3) of Council Regulation 17 (1) concerning a request for negative clearance or an exemption pursuant to Article 85 (3) of the EC Treaty

Case No IV/34.792 — CMC-Talkline

(94/C 221/06)

(Text with EEA relevance)

I. Introduction

1. On 15 July 1993, Matra Communications SA (France) and Talkline PS PhoneService GmbH (Germany) notified to the Commission an agreement whereby Communications de Mobile Cellulaire SA (France) 'CMC', the company jointly set up by Matra Communications SA and Cellcom Ltd (United Kingdom), was authorized to issue capital to two more shareholders, Talkline PS PhoneService GmbH and Norauto SA (France).

The shareholders of CMC are now therefore Matra Communications, Cellcom, Talkline and Norauto. CMC, Cellcom and Talkline act as service providers in the field of mobile telephony in their respective countries of incorporation. The agreement involves important changes in the capital structure of CMC. However, control of the joint venture company remains as before in the hands of Matra and Cellcom, and the activities of the parent companies are not affected by the notified agreement (following modifications made at the Commission's request).

During the course of the notification procedure, additional information was provided by the parties, notably relating to a Memorandum of Understanding whereby the joint venture and those of the parties which operate in the field of mobile telephony air-time reselling agree to cooperate for the purpose of providing a pan-European distribution of mobile telephony services. As the Memorandum of Understanding was not formally notified to the Commission, a description of its essential features is given in this notice purely by way of background information.

II. The Parties

2. Four Parties have signed the shareholders agreement relating to the capital increase of CMC

— Matra Communications SA (Matra), a French company belonging to the Matra-Hachette Group, involved in the manufacture of telecommunication equipment (e.g. telephone handsets, PBX, cellular network infrastructure equipment, trunk systems),

— Cellcom Ltd (Cellcom), a British company, licensed in the United Kingdom by both mobile phone network operators (Cellnet and Vodafone) to act as a service provider,

— Talkline PS PhoneService GmbH (Talkline), a German company belonging to the Preussag Group, licensed in Germany by both mobile phone network operators (Mannesmann Mobilfunk and Deutsche Telekom Mobil) to act as a service provider,

— Norauto SA (Norauto), a French company acting as a retailer of automobile accessories and servicing cars in its outlets throughout France. Norauto intends to act as a non-exclusive dealer for the joint-venture company.

3. In addition to those of the above companies which act as service providers in the field of mobile telephony services, i.e. Cellcom and Talkline, two more parties have signed the Memorandum of Understanding relating to pan-European services:

— the joint venture company itself, Communications de Mobile Cellulaire SA (CMC), a French company which is licensed by both French mobile network operators (France Télécom Mobiles and Société Française du Radiotéléphone) to act as a service provider. Although CMC is licensed for both GSM (2) and analogue services, it intends to focus its marketing efforts on GSM,

— Talkline Nordic, a Danish company, acting as a retailer of telecommunication equipment.

III. The relevant market

4. Certain operators of mobile phone networks have elected to market a share of their services through service providers (also known as 'air-time resellers'). A service provider acts as a relay between the individual subscriber and the network operator.

This relationship is established through a contract (usually referred to as a 'licence') between the network operator and the service provider, whereby customers subscribing to the service available on the operator's network will pay a fixed monthly fee and a variable fee

(1) OJ No 13, 21. 2. 1962, p. 204/62.

(2) GSM, originally 'Groupe Spécial Mobile', and now standing for 'Global System for Mobile Communications', is an ETSI standard for digital mobile telephony in the 900 Mhz frequency range.

II/177

for the communications they initiated to the service provider who, in turn, will pay the largest part of these monies to the operator. In other words, a service provider assumes the liability for recovering the sums due by the customers in exchange for a percentage of the telecommunication turnover that his customers generate. This percentage depends on the terms of the contract binding the service provider to the operator, and usually increases with the telecommunication turnover secured by the service provider.

Amongst the duties falling to the service provider are: taking subscriptions from individual customers to the operator's network, promoting the service available on the operator's network, customer care and billing of customers.

5. Whereas in the current regulatory context, mobile telephony networks are limited to national borders, nothing prevents service providers from acting for different network operators in different countries. This possibility of establishing trans-European billing and distribution organizations is especially relevant in the context of the GSM mobile telephony system. Unlike analogue telephony, GSM systems are technically compatible throughout Europe, so that a customer who subscribed to the services offered by one network can use his phone on any other GSM network. At the moment, this possibility of using one's phone in a country different from the country of subscription depends on the existence of 'roaming agreements' between network operators, whereby the network operator who took the subscription (the home network) pays the network operator for the calls performed on the latter's network, i.e. that in which the customer 'roams' (the visited network).

6. Some operators of 'visited' networks add a surcharge to the price they would otherwise charge to their own subscribers, and this surcharge is eventually passed on to the final customer. They justify this surcharge by the fact that only the home network receives a monthly payment for the subscription, whereas the visited network can only charge calls performed. This surcharge, although it varies from one operator to another, can constitute a disincentive for customers to use their phone on a network on which they have no subscription.

7. The Parties to the agreement have expressed their intention, in a Memorandum of Understanding, to offer via each other the air-time they purchase from their respective operators. This approach, if proved successful, would change the structure of the mobile telephony services market: at the moment, service providers bill their customers for a service which is typically one provided by a single operator, operating within one country. Therefore, in the opinion of the Commission, different reference markets should be considered with respect to the agreements which have been notified:

— a European-wide market of GSM mobile telephony services, in which service providers purchase high-volumes of air-time from several operators throughout Europe, effectively bringing a one-stop-shop service at affordable prices to individual customers,

— a series of national markets defined by the scope of the licence granted to each mobile phone network operator by relevant national authorities; in these markets, national network operators provide access to their GSM telephony services on a wholesale basis to service providers.

IV. The shareholder agreement

8. The shareholder agreement (SA) is concluded for a duration of 20 years, and is subject to tacit renewal.

9. The SA originally prohibited the parent companies from competing with the joint-venture company. These provisions have now been deleted from the SA.

10. The SA originally restricted the joint venture company CMC to operate only in France as air-time reseller. At the Commission's request, these provisions have been deleted from the SA.

V. The Memorandum of Understanding

11. The Memorandum of Understanding (MoU) was signed in June 1993 by Cellcom, CMC, Talkline, and Talkline Nordic. The MoU aims at establishing a one-stop shopping and billing service to any customer of the Parties:

— the Parties intend to jointly procure terminal equipment, to establish regional stocks, and to apply common distribution methods allowing a customer of any Party to the MoU to receive after-sales service for the equipment in any country in which another party to the MoU operates,

— a customer of one Party will have access to SIM-cards (subscriptions to the service) and mobile phone services provided by any other Party of the MoU; accordingly, after-sales service for a subscription taken from one Party (e.g. the replacement of a SIM-card) will be performed by any Party,

— the Parties intend to share know-how and software applications for subscriber handling, billing and customer service, in so far as this does not infringe

the rights and title or the commercial interest of any Party; the Parties intend to jointly develop a European SIM-card enabling cooperative services,

— the Parties will adopt a joint training programme, recruit foreign language-speaking staff and exchange trading concepts and materials in so far as this does not infringe the rights and title or the commercial interest of any Party.

The Commission intends to take a favourable view towards the notified transaction under the competition rules of the EC Treaty. Before doing so, it invites interested third parties to send their observations within one month of the publication of this notice, to the following address, quoting the reference 'IV/34.792 CMC-Talkline'. In accordance with Article 20 of Regulation No 17, such observations will be protected by the provisions on professional secrecy.

Observations should be sent to:
European Commission,
Directorate-General for Competition (DG IV),
Directorate for restrictive practices, abuse of dominant positions and other distortions of competition I,
Electrical and electronic manufactured products, information industries and telecommunications,
200 rue de la Loi,
B-1049 Brussels.
Fax: (32 2) 296 98 09.

Prior notification of a concentration

(Case No IV/M.492 — Klöckner & Co./Computer 2000 AG)

(94/C 221/07)

(Text with E.E.A. relevance)

1. On 1 August 1994, the Commission received a notification of a proposed concentration pursuant to Article 4 of a Council Regulation (EEC) No 4064/89 (1) by which the undertaking Klockner & Co. AG belonging to the Viag/Bayernwerk-Group acquires within the meaning of Article 3 (1) (b) of that Regulation control of the whole of Computer 2000 AG.

2. The business activities of the undertakings concerned are:

— for Klockner & Co. AG: distribution of steel, chemicals, textiles and fuels,

— for Computer 2000 AG: distribution of computer hardware and software.

3. Upon preliminary examination, the Commission finds that the notified concentration could fall within the scope of the abovementioned Regulation. However, the final decision on this point is reserved.

4. The Commission invites interested third parties to submit their possible observations on the proposed operation to the Commission.

Observations must reach the Commission not later than 10 days following the date of this publication. Observations can be sent to the Commission by fax (fax No 32-2-296 43 01) or by post, under reference number IV/M.492 — Klöckner & Co./Computer 2000 AG, to the following address:

Commission of the European Communities,
Directorate General for Competition (DG IV),
Merger Task Force,
150, Avenue de Cortenberg,
B-1049 Brussels

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

II/179

II/180

Notice pursuant to Article 19 (3) of Council Regulation No 17 (1) concerning case No IV/35.006 — ETSI interim IPR policy

(95/C 76/05)

(Text with EEA relevance)

I. Introduction

1. On 22 February 1994, the European Telecommunications Standards Institute ('ETSI') submitted to the Commission of the European Communities for negative clearance and or exemption pursuant to Article 85 of the EC Treaty and Article 53 of the EEA Agreement, the ETSI interim intellectual property rights ('IPR') policy ('the policy') and the ETSI intellectual property rights undertaking ('the undertaking') as approved by the 15th ETSI General Assembly of 18 March 1993.

2. Following a vote by mail ballot decided on by ETSI's 20th General Assembly on 22 July 1994, the required majority of ETSI's members voted in favour of abandoning the undertaking; subsequently, ETSI amended the notification so as to exclude any consideration of the undertaking. As far as the interim policy is concerned, a new version was approved by ETSI's members at ETSI's 21st General Assembly on 22 and 23 November 1994; this revised version, which went into effect on 23 November 1994, takes into account and reflects the abandonment of the Undertaking. The present notice thus relates only to the interim IPR policy as revised.

II. The Parties

3. The creation of a European standardization body for the telecommunications sector was recommended by the Commission in its 1987 Green Paper on the development of the common market for telecommunications services and equipment (Towards a dynamic European economy) (2). Such a body was established in 1988 in Sophia-Antipolis (France) as the European Telecommunications Standards Institute ('ETSI'), a non-profit association under French law. ETSI was formally recognized as a European Standards Institute by the Community in 1992 (3).

ETSI's task is to establish common European standards in the telecommunications sector; ETSI standards in many instances play a specific role under Community law; in particular, they must be used *inter alia* (i) in connection with the mutual recognition for type approval of terminal equipment pursuant to Directive 91/263/EEC on the mutual recognition of terminal equipment (4), and (ii) in relation to public procurement by telecommunications operators (5).

4. According to ETSI's Statutes, membership of ETSI is open to entities falling within five defined categories, namely (i) Administrations, administrative bodies and national standards organizations, (ii) Public network operators, (iii) manufacturers, (iv) Users and (v) Private services providers, research bodies, consultancy companies and others. All members must be established on the territory of a country falling within the geographical area of the European Conference of Posts and Telecommunications Administrations (CEPT). At present, ETSI has approximately 365 members; legal or natural persons entitled to full membership may alternatively become an observer, which carries with it the right to attend and participate in the meetings of ETSI Assemblies (General and Technical), but not the right to vote.

5. ETSI's sovereign body is the General Assembly, which meets twice a year and on an extraordinary basis at the convocation of the chairman; the General Assembly adopts the definitive standards and decides on more general issues such as the IPR policy. ETSI's Technical Assembly approves the work programmes on draft standards, which are prepared by ETSI's Technical Committees. Voting both within the General Assembly and the Technical Assembly takes place on a weighted basis connected to the annual turnover in telecommunications of the entity in question, or in the case of administrations, the national GDP.

III. The background to the present interim IPR policy

6. The development and ultimate application of a given standard can be held up or even made impossible if the standard incorporates proprietary technology and the owner of that technology is not willing to make it

(1) OJ No 13, 21. 12. 1962, p. 204/62.
(2) COM(87) 290, 30. 6. 1987.
(3) Commission Decision 92/400/EEC of 15 July 1992, amending Directive 83/189/EEC OJ No L 221, 6. 8. 1992.
(4) Council Directive 91/263/EEC of 29 April 1991 on the approximation of the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition of their conformity, OJ No L 128, 23. 5. 1991.
(5) Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ No L 199, 9. 8. 1993; Article 18 (2) specifies that 'technical specifications shall be defined by reference to European specifications where these exist'.

II/181

available for third parties wishing to manufacture products complying with the standard. This problem has been addressed in a general context, i.e. not relating exclusively to the telecommunications field, in the Commission's communication on intellectual property rights and standardization (1), which sets out a number of relevant policy considerations.

7. In order to reduce the risk of investment in the preparation, adoption and application of standards being wasted because of the unavailability of an IPR and with a view to finding the appropriate balance between the needs of standardization for public use in the field of telecommunications on the one hand and the legitimate interest of the owners of intellectual property rights in deciding whether or not their technology will be available for others or not on the other hand, ETSI soon after its creation set up an intellectual property rights Committee in order to propose solutions.

8. The culmination of the discussions within ETSI on these IPR issues was the adoption by ETSI's General Assembly on 18 March 1993 of an interim IPR policy and an IPR undertaking. In very broad lines, the IPR arrangements adopted at that time foresaw a system in which members would agree in advance to allow their IPRs deemed 'essential' (i.e. equipment complying with the standard could not be made without infringing that IPR) for an ETSI standard, to be included in that standard, unless the IPR-owner had identified any IPR it wished to withhold within a certain period (six months) as of the date on which the Technical Committee had decided to include the draft standard in the ETSI work programme. Aside from establishing what has been referred to as the 'licensing-by-default' obligation, which differs (as did a number of other aspects of the undertaking) from the practice in other standard-making bodies where IPR holders must explicitly agree to have their technology included in a standard, the ETSI IPR undertaking set forth certain obligations regarding the terms of the licence to be granted to other members, *inter alia* (i) that the licence be for monetary consideration, unless agreed otherwise by both licensee and licensor, (ii) the obligation for the IPR holder to notify to the Director of ETSI the maximum royalty rate it would apply and (iii) the obligation to grant non-exclusive licences covering the area of the CEPT, as well as of the Associate Members (e.g. Australia, New Zealand and Israel; other countries would be included on a standard-by-standard basis, depending on whether an officially recognized national standardization body had formally adopted the standard and implemented it, or whether a major telecommunications network operator had or was about to procure on a substantial scale equipment to a specification compliant with that standard).

(1) COM(92) 445 final, 27. 10. 1992.

9. The arrangements described briefly in point 8 above gave rise to a complaint lodged on 22 June 1993 by the Computer and Business Equipment Manufacturers Association (CBEMA), most of whose members are also members of ETSI, alleging infringements of both Articles 85 and 86 resulting from ETSI's IPR arrangements, i.e. the obligation on members to sign the undertaking which in CBEMA's view amounted to a compulsory licensing scheme, and the other licensing conditions mentioned above under point 8.

The issues raised by this complaint were never decided on formally by the Commission, in view of the fact that the undertaking and any references thereto in the policy were abandoned by ETSI's General Assembly of 22 and 23 November 1994 in order to achieve greater consensus amongst ETSI members, and the complaint subsequently withdrawn.

IV. The relevant market

10. Article 2 of ETSI's Statutes states that ETSI's objective is to produce the technical standards which are necessary to achieve a large unified European telecommunications market; according to Article 3, ETSI's activities shall be technical pre-standardization and standardization at the European level in the telecommunications and related areas. On this basis, two directly affected markets can be identified, namely the market for telecommunications standards and the downstream markets which use those standards, i.e. the telecommunications equipment and services markets. For the purpose of an assessment under the competition rules of the EC Treaty and the EEA Agreement, the geographic scope of the IPR arrangements can be deemed to be at least the entire EEA, although ETSI standards may in fact be adopted and applied also outside the EEA.

V. ETSI'S interim IPR policy

11. The interim IPR policy adopted by ETSI's 21st General Assembly on 22 and 23 November 1994 contains the following provisions which may be relevant for an assessment pursuant to Article 85 of the EC Treaty and Article 53 of the EEA Agreement:

Provisions relating to ETSI members

(i) Each member shall use its reasonable endeavours to inform ETSI in a timely manner of essential IPRs it becomes aware of; in particular, a member submitting a technical proposal for a standard shall on a *bona fide* basis draw ETSI's attention to any of its IPRs which might be essential if that proposal is adopted. These obligations do not however imply any obligation on members to conduct IPR searches (clauses 4.1 and 4.2 of the policy).

II/182

(ii) Where a member notifies ETSI that it is not prepared to license an IPR in respect of a standard, the Technical Assembly shall review the requirement for that standard and satisfy itself that a viable alternative technology is available for the standard which is not blocked by that IPR and satisfies ETSI's requirements; where in the opinion of the Technical Assembly no such viable alternative technology exists, work on the standard shall cease, and the Director of ETSI shall request that member to reconsider its position. If it does not, it shall inform the Director of ETSI of its decision and provide a written explanation of its reasons for refusing to license that IPR; the Director shall send the member's explanation to the ETSI Counsellors (this includes the European Commission) for their consideration (clause 8.1.1 and 8.1.2).

(iii) Any violation of the policy by a member shall be deemed to be a breach by that member of its obligations to ETSI. The ETSI General Assembly shall have the authority to decide the action to be taken, if any, against the member in breach in accordance with ETSI's Statutes (clause 14).

Provisions relating to members and non-members

(i) IPR holders whether members of ETSI or third parties, should be adequately and fairly rewarded for the use of their IPRs in the implementation of standards (clause 3.2).

(ii) When an essential IPR relating to a particular standard is brought to the attention of ETSI, ETSI's Director shall request the owner to give within three months an undertaking in writing that it is prepared to grant irrevocable licenses on fair, reasonable and non-discriminatory terms and conditions to manufacture, sell lease or otherwise dispose of equipment so manufactured (clause 6.1).

(iii) Where ETSI becomes aware that licences in respect of a standard are not available from a third party, the standard shall be referred to the Director of ETSI for further consideration in accordance with a procedure described in clause 8.2, which includes discussion in the Technical and General Assemblies and consultation with ETSI's Counsellors, and may culminate in a request to the European Commission by the General Assembly to see what further action may be appropriate, including non-recognition of the standard in question.

Provisions relating to ETSI and general issues

(i) ETSI shall take reasonable measures to ensure that its activities which relate to the preparation, adoption and application of standards, enable standards to be available to potential users in accordance with the general principles of standardization (clause 3.3).

(ii) At the request of the European Commission and/or the EFTA-Secretariat and subject to the latter two organizations meeting all reasonable expenses, ETSI shall arrange to have carried out an investigation including an IPR search, with the objective of ascertaining whether IPRs exist or are likely to exist which may be or may become essential to a proposed standard and the possible terms and conditions of licences for such IPRs (clause 6.2).

(iii) Any published standard shall include information pertaining to essential IPRs which are brought to the attention of ETSI prior to such publication; ETSI shall establish appropriate procedures to allow access to information at any time with respect to essential IPRs which have been brought to its attention (clause 7).

(iv) The proceedings of ETSI committees shall be regarded as non-confidential and information submitted to a committee shall be available for public inspection, unless the information is in written or other tangible form, it is identified as being confidential when it is submitted and it is first submitted to and accepted by the chairman of the committee as being confidential (clause 10).

(v) ETSI and its members will endeavour to formulate a definitive IPR policy, which will include an evaluation of the application of the interim policy by the General Assembly not later than four years from the date of adoption of the interim policy; the interim policy came into effect on 23 November 1994 for a minimum duration of two years and will remain in effect thereafter unless terminated by a 71 % majority of a weighted individual member vote confirmed by a 71 % majority of the weighted national vote.

Conclusion

12. The Commission intends to take a favourable view pursuant to Article 85 of the EC Agreement and Article 53 of the EEA Agreement towards the ETSI interim IPR policy; before doing so, it invites all interested third parties to submit their observations within 30 days of the publication of this notice to the following address quoting the reference IV/35.006 — ETSI interim IPR policy:

Commission of the European Communities,
Directorate-General for Competition (DG IV),
Directorate for restrictive practices, abuse of dominant positions and other distortions of competition I,
200 Rue de la Loi/Wetstraat 200,
B-1049 Brussels.

II/184

DOCUMENTS ON THE APPLICATION OF THE COMPETITION RULES TO THE TELECOMMUNICATIONS SECTOR

II Commission Action in Individual Cases

C Merger Decisions

II/185

II/185

COMMISSION DECISION
of 12 April 1991
declaring the compatibility of a concentration
(Case No. IV/M042 - Alcatel/Telettra)
Council Regulation (EEC) No. 4064/89

(Only the English text is authentic)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings[1], and in particular Article 8(2) thereof,

Having regard to the Commission Decision of 21 January 1991 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the obligations proposed by the Commission,

After consulting the Advisory Committee on Concentrations,

Whereas:

I. FACTS

Nature of the proceeding

1. This proceeding concerns a proposed concentration which was notified on 10 December 1990 pursuant to Article 4 of Council Regulation (EEC) No. 4064/89, consisting of the acquisition by Alcatel N.V. (Alcatel) from Fiat Spa (Fiat) of a controlling interest of 69.2% of the shares of Telettra Spa (Telettra). Telettra will in turn acquire 100% of Alcatel Face Spa, which is a subsidiary of Alcatel. Fiat will still own 25.4% of Telettra. The balance of the shares in Telettra are currently owned by the Spanish telecommunications operator, Telefonica de España (Telefonica).

The parties

2. Alcatel is 70% owned by Alcatel Alsthom Compagnie Générale d'Electricité (Alcatel Alsthom), formerly known as CGE. Alcatel is principally a supplier of telecommunications systems and equipment, and in 1989 had a worldwide turnover of 12.8 billion Ecu. Alcatel Alsthom had a consolidated worldwide turnover of 20.7 billion Ecu in 1989, the balance deriving mainly from the energy and transportation, nuclear, electrical engineering, and batteries sectors. The Community-wide turnover of Alcatel Alsthom in 1989 was 16.5 billion Ecu. Not more than two-thirds was achieved in any one Member State.

3. Telettra is principally a supplier of telecommunications systems and equipment. In 1989, it had a worldwide turnover of 1.1 billion Ecu, 0.95 billion Ecu of which arising in the Community. Not more than two-thirds of its Community-wide turnover was achieved in any one Member State.

Context of the agreement

---

[1] OJ L 395, p 1, rectified version
OJ L 257, 21.9.1990

4. The agreement on the acquisition of control in Telettra is one of the components of the "Accord Cadre" entered into between Fiat and Alcatel Alsthom. The other components of the "Accord Cadre" are:

- -the acquisition by Magneti Marelli, a subsidiary of Fiat, of a controlling interest in Alcatel Alsthom's batteries subsidiary, CEAC. This proposed concentration, which is subject to completion of the Alcatel/Telettra agreement, has been notified and is being dealt with separately under case no. IV/M043[2];

- the planned acquisition of a controlling interest in Fiat's railway equipment subsidiary, Fiat Ferroviaria, by GEC-Alsthom which is jointly controlled by GEC and Alcatel Alsthom;

- the creation of a European holding company which will be jointly owned by Fiat and Alcatel Alsthom, with the intention of developing initiatives of mutual interest in research and development.

The various components of the "Accord Cadre" fall to be separately assessed under Regulation (EEC) No. 4064/89 or Article 85 of the EEC Treaty.

The affected product markets

5. Four product markets within the telecommunications systems and equipment sector are affected by the concentration, these being public switching, line transmission systems, microwave systems, and private switching.

These four markets represent 72% of the total telecommunications equipment market which had a value of 16.7 billion ECU in the EC in 1989, including other telecommunications equipment areas such as radiotelephony, subsets, earth stations and telecommunications cables.

In terms of value, the most important telecommunications market is the market for public switching with a value of 5.6 billion Ecu in 1989 which represents 34% of the total telecommunications equipment market. In the same year, the market for line transmission systems had a value of 3.9 billion Ecu (23%), private switching a value of 2 billion Ecu (12%), and microwave systems a value of 0.6 billion Ecu (3%).

6. Market shares of the parties and of their main competitors in these product markets in 1989 are reproduced in Annex[3].

The public telecommunications equipment markets

7. The telecommunications equipment supply industry is characterised by a steadily increasing and very high level of R&D expenditure, due to the increasing software content of telecommunications products and the shortening of product life cycles. Technically, Telettra fits in well with Alcatel's existing product base, and the acquisition gives Alcatel access to Telettra's cross-connect technology.

8. Public switching, line transmission equipment and microwave equipment are largely public telecommunications equipment markets where the telecommunications operators are the only or by far the most important customers. The Spanish telecommunications operator, Telefonica for example, is the only buyer in Spain of public switches, and buys 90% of the line transmission equipment and currently 60% of the microwave equipment in that Member State.

9. Public telecommunications operators in principle operate diversified supplier policies which aim to strike

---

[2] OJ C 315, 14.12.1990, p.14

[3] This annex constitutes business secrets which have been deleted in accordance with Article 20(2) of Regulation (EEC) No. 4064/89 for publication.

a balance between creating and maintaining competition between suppliers on the one hand, and minimising costs arising from product differences on the other hand. For public switching, for example, it is generally not considered feasible to have more than two or three suppliers because of the high cost and technical complexity of this type of equipment. For transmission equipment, in general terms, it is usual to have more suppliers, say three to five, but there would still be a practical limit to the number which could be sustained.

10. Procurement practices vary from one operator to another, and from one category of equipment to another, but are in principle based on a combination of negotiated contracts and tenders.

11. Procurement practices of the EC telecommunications operators are evolving. Traditionally, in all Member States public networks were operated by state-owned telecommunications authorities which gave their orders for telecommunications equipment to a small group of national suppliers. This was often accompanied by specific national technical standards, which created adaptation costs for non-domestic suppliers.

12. The actual pace of change in procurement policy varies quite significantly from one Member State to another. In this context, a process of liberalisation and deregulation of the telecommunications sector has been initiated in the framework of the achievement of the single market. The Commission's Directives on liberalisation of telecommunications services, for example, aim to create more competition by breaking up the monopolies of the network operators in the provision of services. On the supply side, Directives on public procurement and on mutual recognition of terminal type approval aim to open markets to competitors from other Member States. Furthermore, there are efforts to achieve a Community-wide standardisation of telecommunications equipment in the framework of European Telecommunications Standards Institute (ETSI).

13. It is anticipated that the application of the provisions of Council Directive 90/531/EEC[4] on public procurement will contribute to further breaking down the traditional nationally-based buying policies of the telecommunications operators. Member States have to implement this Directive by 1 January 1993, with the exception of Spain, which must implement it by 1 January 1996, and Greece and Portugal by 1 January 1998.

14. As to standardisation of products in the markets under consideration, ETSI, which was set up in 1987, plans to issue 22 standards and 11 technical reports in the transmission area in its work programme for 1990-1993. Adoption of ETSI standards by the telecommunications operators in this area is voluntary for the time being, and commitment to this varies However, from the date of implementation of Directive 90/531/EEC, use of European Telecommunications Standards (ETS) by telecommunications operators will be mandatory in the specification of their calls to tender.

15. The extent of national specifications which exist varies from one Member State to another and according to product. National specifications for transmission equipment for example are low or non-existent in Spain but quite significant in Italy.

---

[4] OJ L 297, 29.10.1990, p 1.

Transmission markets in Spain

16. Because of the significance of Alcatel and Telettra as competitors for the supply of line transmission equipment in Spain, the Commission has carried out a detailed enquiry as to the structural impact of the concentration in this Member State.

17. Spain is at present the fastest growing telecommunications market in the EC, with overall growth expected to continue at around 5% in real terms per annum for the next 5 years because of the modernisation programme under way. In 1989 the value of the line transmission equipment market was 531 million ECU (13% of the total EC market) and that of the microwave equipment market 117 million ECU (20% of EC). Against the overall trend in the other telecommunications equipment markets, the microwave equipment market is generally declining.

Ability of Telefonica to react to the concentration

18. The telecommunications operator most concerned by the concentration, Telefonica, has raised no objection. Like other telecommunications operators, Telefonica has a diversified supplier policy so as not to be overly dependent on any one supplier. In its initial reply to the Commission's enquiries, Telefonica stated that it considered that the concentration between Alcatel and Telettra would not affect this policy.

19. In response to the Commission's subsequent enquiries Telefonica has specified that its policy of diversified transmission equipment purchasing is based, inter alia, on the following principles:

- Orders are placed on the basis of annual or two-yearly programmes and product suppliers are aware of invitations to tender for products. The factors taken into account in awarding contracts are quality, the delivery period, reliability and price.

- Telefonica is willing both to arrange any contacts that suppliers wish to have and to provide them with the information they deem necessary in order to be able to tender on an equal footing.

- New or potential suppliers may freely request technical approval of their products. Products which have successfully undergone technical testing are included in Telefonica's catalogue of suitable products which can be purchased. The ultimate choice of products is made in accordance with a combination of parameters, of which technical performance is one.

- An industrial presence in Spain will not henceforth be a decisive factor; it will, however, be necessary to maintain back-up in the country.

- The company's strategic plan for 1991-95 provides among other things for the opening-up of the market to new suppliers

20. Telefonica has minority shareholdings in some of its suppliers. In particular, it has a shareholding of 21% in Alcatel Standard Electrica S.A. which is a subsidiary of Alcatel, a shareholding of 10% in Telettra Española S.A. which is a subsidiary of Telettra, and a shareholding of 5.4% in Telettra itself.

21. An agreement which is conditional on the acquisition of Telettra by Alcatel has already been entered into whereby Alcatel will acquire Telefonica's 5.4% shareholding in Telettra. The same agreement contains a provision whereby Alcatel has a call option to acquire Telefonica's shareholding in Telettra Española S.A.

Furthermore, Telefonica has stated that there is no longer a strategic reason to retain minority shareholdings in its suppliers, and that it is willing to consider suitable offers.

22. Accordingly, on 6 February 1991, Alcatel made the following commitments to the Commission:

- to acquire Telefonica's 5.4% shareholding in Telettra when control in Telettra is acquired;

- to exercise the call option to acquire the 10% shareholding of Telefonica in Telettra Española S.A.;

- to enter immediately into good faith negotiations with Telefonica so as to acquire at a fair price Telefonica's 21% shareholding in Alcatel Standard Electrica S.A.

Ability of competitors to react to the concentration

23. American Telephone and Telegraph Company (AT&T) is the world's leading line transmission equipment supplier. It conducts its business in Spain through a joint venture company, AT&T-NS España, which was set up in 1987. This company is 51% owned by AT&T and 49% owned by Amper S.A. The joint venture's first transmission sales were in 1988, with strong increases following in 1989 and 1990. AT&T-NS España today offers the full range of line transmission products in Spain.

AT&T considers that it is possible for it to sell a higher than anticipated level of transmission equipment in Spain. AT&T-NS España has the ability and spare capacity to do this, and AT&T could supply products from other subsidiaries into this market.

AT&T does not currently sell microwave transmission products in Spain. AT&T-NS España is said to continue to pursue public tender opportunities for microwave radio equipment.

24. Telefonaktiebolaget LM Ericsson (Ericsson) is a Swedish company which, because of its relatively small domestic market base, has always been an active international competitor. Almost 50% of its overall turnover now arises in Europe, excluding Sweden. Ericsson is already established in Spain. Although principally a supplier of public switching equipment to Telefonica, it also supplies digital transmission equipment products. Ericsson considers that it could strengthen the existing product offering, and easily expand local capacity if necessary, or supply products from other subsidiaries.

Ericsson currently has limited sales of a small capacity short distance radio link in the microwave equipment market in Spain. It states that it is intended to develop its position in this Member State and that essentially there is no product adaptation requirement for further development.

25. Siemens has currently only a marginal position in the transmission markets in Spain, accounted for by sales of around 10m ECU of microwave equipment in 1989. Siemens is the third largest telecommunications equipment supplier worldwide, just behind Alcatel and AT&T, and is therefore a significant potential competitor for the transmission markets in Spain.

In response to the Commission's enquiries, Siemens considers that there are currently two important trade barriers to the Spanish markets. These are the vertical integration of Telefonica with suppliers, and the fact that on public procurement Directive 90/531/EEC does not have to be applied in Spain until 1996.

26. Alcatel in its notification cites the possibility of significant entry into the Community's markets by other large companies, notably Northern Telecom of Canada, and Fujitsu and NEC of Japan. For these companies however, the costs of product adaptation are substantial, since there exist currently substantial differences in technical specifications.

II. LEGAL ASSESSMENT

Concentration

27. The notified operation is a concentration within the meaning of Article 3(1)(b) of Regulation No. 4064/89 since by acquiring 69.2% of the shares in Telettra, Alcatel will acquire control of Telettra.

Community dimension

28. The thresholds of Article 1(2) of Regulation No 4064/89 are met since the combined aggregate worldwide turnover of Alcatel Alsthom and Telettra is more than 5 billion Ecu, and the aggregate Community-wide turnover of each is more than 250 million Ecu, of which not more than two-thirds is achieved within one and the same Member State. The concentration therefore has a Community dimension.

Compatibility with the common market

(i) Relevant product markets

29. The concentration leads to an increase in market shares in four markets: public switching, line transmission equipment, microwave equipment and private switching. Each of these markets is a relevant product market for the purposes of assessment under Regulation No. 4064/89.

(ii) Geographical markets

30. It is considered that up to now the telecommunications markets in the EC have been largely fragmented

in national markets. The main reasons for this have been, inter alia:

- the operation of the public networks by national telecommunications authorities which have traditionally given their orders for telecommunications equipment to a small group of national suppliers, and

- different national standards which created high costs of adaptation for non-domestic suppliers.

This situation is evolving as described in recitals 7 to 15 above.

31. In very broad terms, standardisation is progressing faster for transmission equipment than for public switching for example. Furthermore, the replacement of analogue technology by digital will break down some of the existing technical barriers further in the medium to long term.

32. Although it is anticipated that in the medium term the technical barriers will become less significant, the actual pace of change of commercial policy of the network operators varies substantially from one Member State to another.

33. The combination of Alcatel and Telettra has a significant impact on competition only on the transmission markets in Spain. It is sufficient therefore to examine whether the Spanish markets have to be considered as relevant geographical markets.

34. The most significant structural characteristics up to now have been that:

- the Spanish telecommunications operator, Telefonica, traditionally purchased from locally established suppliers, although this has started to change;

- there is no legal obligation in Spain for the next five years to apply the procurement procedures provided for in Council Directive 90/531/EEC;

- there are vertical links between Telefonica and its major equipment suppliers and in particular Alcatel and Telettra, by means of minority shareholdings. Vertical links between telecommunications operators and their suppliers can distort normal conditions of competition by giving those suppliers a privileged position on the market. This can be the case even where telecommunications operators only have minority shareholdings, since such links would normally put other suppliers without such links at a disadvantage.

35. Given the current structural characteristics of the transmission markets in Spain, it is concluded that Spain has to be considered as a separate relevant geographical market, for the purpose of assessing whether the concentration could give rise to a dominant position which would significantly impede effective competition within the meaning of Article 2(2) of Regulation (EEC) No. 4064/89.

(iii) Impact of the proposed concentration

Overall impact

36. For public switching, there is only an impact in Italy, where Alcatel and Telettra together would have 21% of the market based on 1989 figures. Since Italtel is by far the leading competitor on the Italian market, having maintained a market share of 50% for the last few years, the creation of a dominant position for the combined entity in this product market by the concentration is excluded, even if Italy were to be considered the relevant geographic market.

For private switching, Telettra is not a significant competitor in any Member State since it has a marginal presence only on the Italian market. The concentration produces no significant structural effect on either the Italian or wider EC market.

Accordingly, only the impact of the concentration on the markets for line transmission equipment and microwave equipment (the transmission markets) in Spain has to be considered.

Transmission markets in Spain

37. On the basis of the actual market shares of Alcatel and Telettra in 1989, the concentration leads to very high combined market shares on the transmission markets in Spain for the new entity, because the two companies are the two current principal suppliers to Telefonica.

The figures are as follows:

- line transmission equipment: Alcatel 40%, Telettra 41%
- microwave equipment: Alcatel 18%, Telettra 65%.

Contestability of the transmission markets

38 A very high share of any market could indicate that a dominant position exists. Such an indication in the case of a supplier may nevertheless be countered, for example by the buying power of a monopsonistic purchaser.

In the present case, the high market shares of Alcatel and Telettra in the transmission markets in Spain result from Telefonica's choice of these companies as its main suppliers. This choice was however made on the basis of Alcatel and Telettra being active competitors in the past.

39. Since Telefonica has maintained a diversified purchasing policy up to now, it is not probable that the new combined entity will sustain the same market shares as achieved by the parties as competitors.

40 It is possible for Telefonica to increase its purchases from other suppliers of transmission equipment in order to prevent any dependence on the new entity.

AT&T is immediately capable of increasing its deliveries across the entire range of line transmission equipment products. AT&T is not yet supplying microwave products in Spain, but AT&T-NS España is continuing to pursue some public tender opportunities.

Although Ericsson does not cover the whole range of line transmission products, it is capable of increasing deliveries of digital products, these products being the most important segment for new installations. Ericsson currently only has limited sales of microwave equipment in Spain. It has stated however that it is intended to develop its position in that Member State.

The two principal actual competitors are therefore capable of increasing supply.

41 Furthermore, it would seem possible for some competitors not currently present to a significant extent in Spain to become suppliers in the changed environment. Although the procedures envisaged in Directive 90/531/EEC do not yet have to be introduced, Telefonica has stated that:

- it is willing both to arrange any contacts that suppliers wish to have and to provide them with the information they deem necessary in order to be able to tender on an equal footing.

- new or potential suppliers may freely request technical approval of their products. Products which have successfully undergone technical testing are included in Telefonica's catalogue of suitable products which can be purchased The ultimate choice of products is made in accordance with a combination of parameters, of which technical performance is one.

- an industrial presence in Spain will not henceforth be a decisive factor.

42. On this basis, there would be no significant barrier from the demand side for strong competitors such as Siemens to enter into Spain Siemens is already present to some extent in the microwave equipment market.

The technical costs of adaptation do not today in themselves constitute an appreciable barrier to entry

for European-based competitors. There is no indication either for the time being that proprietary intellectual property rights could be exploited in such a way as to amount to a barrier to such competitors. Within the framework of standardisation in ETSI the Commission has a strong interest in preventing such a barrier emerging.

43. Consequently, as to hitherto non-European based competitors such as Northern Telecom, Fujitsu and NEC, it is not necessary to determine whether these are realistic potential competitors in Spain in the foreseeable future in the line transmission equipment market. It is likely that a technical barrier to entry will remain until the Community's standardisation programme comes into effect and Telefonica fully adopts the standards which will be defined by ETSI in this area. The North American and Japanese standards are currently significantly different from those adopted by the various European network operators. Once common European standards are defined and implemented, the necessary minimum volume to justify adaptation may become a more realistic possibility.

Structural links between Telefonica and the parties to the concentration

44 In the context of the present case, the participation of Telefonica in the capital of Alcatel and Telettra, given their strong position on the transmission markets in Spain, is considered to amount to a barrier for other competitors.

45 Alcatel has entered into a commitment vis-à-vis the Commission whereby Alcatel will acquire from Telefonica the minority shareholdings in Telettra and Telettra España S.A. and will enter into negotiations to acquire from Telefonica the minority shareholding in Alcatel Standard Electrica S.A. The vertical links between Telefonica and Telettra will therefore disappear and given Telefonica's willingness to consider appropriate offers, there is a probability that the vertical link between Telefonica and Alcatel will also be removed, given Alcatel's commitment in this respect.

46 Alcatel's commitments relate to the removal of a significant structural barrier to the transmission markets in Spain, and it is considered necessary therefore for the Commission to ensure that these commitments are complied with as soon as possible after completion of the concentration by attaching appropriate obligations to its Decision

(iv) Conclusion

47 For the reasons outlined above, it appears that competitors of Alcatel and Telettra are capable in the near future of increasing their supply to Telefonica in the transmission markets. Because of its diversified purchasing policy and removal of vertical links with Alcatel and Telettra, it also appears that Telefonica is capable in the near future of increasing its purchases from other suppliers.

48 In these circumstances, it is not considered that the current high market shares of Alcatel and Telettra on the transmission markets in Spain will enable the new entity to behave to an appreciable extent independently of its competitors and main customer

49 The concentration does not therefore create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or a substantial part of it.

HAS ADOPTED THIS DECISION

Article 1

Subject to the obligations defined in Article 2, the proposed concentration between Alcatel and Telettra is declared compatible with the common market

Article 2

The following obligations are attached to this Decision

(a) That Alcatel acquires Telefonica's [illegible]% shareholding in Telettra SpA upon the acquisition of

control in Telettra Spa, and that Alcatel informs the Commission when this takes place;

(b) That Alcatel exercises its call option to acquire the 10% shareholding of Telefonica in Telettra Espanola S.A. as soon as this is possible, and at the latest within 12 months from the acquisition of control in Telettra, and that Alcatel informs the Commission when this takes place;

(c) That Alcatel enters immediately into good faith negotiations with Telefonica so as to acquire at a fair price Telefonica's 21.14% shareholding in Alcatel Standard Electrica SA, within one week of the closing of the agreement with Fiat to acquire Telettra, and that Alcatel informs the Commission when it has done so;

- That Alcatel informs the Commission as soon as there is a successful outcome;
- Where there is no successful outcome within 3 months, that Alcatel informs the Commission of the progress of the negotiations that are taking place, and updates this information subsequently every 3 months,
- That Alcatel, in the event of no successful outcome, or no successful outcome after 12 months have elapsed, provides the Commission with full details of the offer being made (including price and conditions) so as to enable the Commission to verify that the negotiations as defined above have been conducted in good faith;

(d) So as to ensure that the effect of the commitments is not neutralised, that Alcatel shall not sell to Telefonica shares in any company of the Alcatel group which has activities in the EC without prior approval from the Commission until such time as the Commission waives this obligation. This obligation ceases to have effect at the latest the date of full implementation in Spain of Directive 90/531/EEC, which must take place by 1 January 1996.

Article 3

This Decision is addressed to:

Alcatel N V
Paris Headquarters S.A.
33 rue Emeriau
F-75015 Paris

Telettra S p A
19 Via E Cornalia
I-20124 Milano

Done at Brussels, 12 4 1991

For the Commission
Sir Leon Brittan
Vice President

PUBLIC VERSION

MERGER PROCEDURE -
ARTICLE 6(1)b DECISION

Registered with advice of delivery

To the notifying parties

Dear Sirs,

Re : Case No IV/M.133 Ericsson / Kolbe
Your notification pursuant to Article 4 of Council Regulation No 4064/89 (Merger Regulation)

1. The proposed operation, notified on the 12th December 1991, concerns a joint venture (JVC) between a Swedish company, Telefonaktiebolaget LM Ericsson AB (Ericsson), and a German company, Hans Kolbe & Co. (HK).

2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of the Merger Regulation, and that it does not raise serious doubts as to its compatibility with the common market.

I/197

The Parties and the Operation

3. Ericsson and HK propose to form a joint venture (JVC), Ericsson Fuba Telekom GmbH. Ericsson is a major manufacturer of telecommunications equipment, producing mainly systems and products for wired and mobile communications in private and public networks. HK produces mainly radio and television broadcast equipment and is also a wholesaler of related electronic products. The JVC will mainly be engaged in the field of public digital transmission, especially digital cross-connect (DXC) technology, in the Federal Republic of Germany.

4. HK will transfer to the new company all of its fixed assets and inventory relating to its digital transmission systems and equipment business. Additionally, all of its intangible assets associated with that business, such as trademarks, trade names, patents, human resources and know-how, will be transferred to the JVC.

5. Ericsson will not transfer any assets to the JVC. Ericsson will acquire a 51 % stake in the new company and the balance will be held by HK.

I. COMMUNITY DIMENSION

6. The operation has a Community dimension. The worldwide turnover of the two undertakings concerned, Ericsson and HK, amounts in their respective last financial year, to Ecu 6,145 million and to Ecu 294 million.

The aggregate Community-wide turnover of Ericsson and HK is Ecu 2,541 million and Ecu 264 million respectively. They do not achieve more than two-thirds of their Community turnover in one and the same Member State.

II. CONCENTRATION

Joint control

7 The joint venture agreement between the parties provides for joint control in the sense that the agreement of both parents is required in respect of fundamental decisions, regarding the structure and the management of the JVC.

8 The JVC agreement provides that unanimity is required in the shareholder's meeting for the adoption of decisions, inter alia, relating to any budget (including investment and financial plans and cashflow forecasting), conclusion of licence agreements with major third competitors, and guidelines for the General Manager(s).

Full function JV

9. The JVC will continue HK's activities in the area of public digital transmission equipment. In addition, it will be engaged in the adaptation of Ericsson transmission equipment for the German market, and in R&D on assignment from Ericsson

HK will withdraw permanently from the production of digital transmission equipment and will in essence retain a financial interest in the JVC Ericsson will remain active in digital transmission technology as part of its worldwide telecommunication activities.

10. The newly formed company is a joint venture that will perform on a lasting basis all the functions of an autonomous economic entity

This follows already from the fact that the JVC will carry on HK's former activities in the field of digital transmission equipment. The assets transferred to the JV enable it to carry on a viable economic activity in a maner functionally distinct from its parents

The eventual licensing of the JVC's industrial property rights to Ericsson, for use for any purpose

including manufacturing outside of Germany, demonstrates the capability of the JVC in generating its own technologies and know-how. The presence of HK as shareholder in the JVC guarantees the transparency of the pricing of the JVC's products sold either to Ericsson or via Ericsson to third parties, which contributes to the financial independence of the JVC.

Absence of risk of coordination

11. HK will not retain any activities in the field of digital transmission equipment systems after the transfer of this business to the JVC. HK's divestiture of its know-how and experience relating to digital transmission will preclude it from re-entering this market. Given the significant financial resources necessary to undertake the relevant research and development to be an effective competitor in this area, it would be commercially unreasonable for HK to abandon the technological advantages that it now holds and to re-enter the market later when the technology is further developed. HK's primary area of expertise is broadcasting and receiving equipment and not digital transmission or telecommunications.

12. Ericsson will remain a competitor of the JVC as Ericsson will not withdraw from the transmission markets and will continue to take part in the Flexnode-project, having overall responsibility for the consortium (see paragraphs 17 and 18 where DXC systems and the Flexnode-project are explained). Ericsson and the JVC have developed digital cross-connect systems which differ in technology and performance. Since Ericsson will supply the German Bundespost with "the DXC 4/1 Crossconnect System", whilst the JVC will supply the same customer with its "DXC 4/4 System", the competitive relationship between Ericsson and the JVC is likely to remain unchanged.

13. Furthermore, it appears that Ericsson will assume the overall industrial responsibility for the JVC, since HK's interest in the JVC will in fact become financial rather than commercial in nature over time.

In such cirsumstances it would appear that there is no room for the coordination of the competitive behaviour of undertakings which remain independent in the sense of Art. 3 (2) of the Regulation.

14 The other activities of Ericsson and HK do not overlap except for cellular telephones. Ericsson manufactures and distributes analog cellular telephone and terminal equipment, whereas HK only distributes these products. Their respective turnover is (*) and (**). HK, however, markets its products in Germany where Ericsson is not present. Since national standards for that kind of equipment still exist, it can be said that Ericsson and HK do not compete in the same geographic area as a result.

It is unlikely that the creation of this JVC will have any effect on Ericsson's decision whether or not to enter the German market in the future.

15 In view of the above, there are no grounds to believe that the establishment and operation of the JVC will result in a coordination of competitive behaviour.

Thus, the notified operation constitutes a concentration within the meaning of Article 3 of the Merger Regulation.

III COMPATIBILITY WITH THE COMMON MARKET

Relevant Product Market

16. The JVC will develop and produce digital cross-connect (DXC) systems which are a new product in the area of telecommunications, more specifically in the line transmission sector.

17. Digital cross-connect transmisison is an emerging technology, still in a development stage, which enables network operators to optimize the use of the existing telecommunications infrastructure by looking for unused or under-used lines. DXC technology permits, from a remote central location, the engagement of those unused or underused lines in the transmission of telecommunication signals.

Optimization is especially important for the transmisison of significant amounts of data signals which occurs, for example, when data is transmitted for the remote printing of newspapers.

DXC technology also allows the automatic re-routing of signals if a communication is cut off due to failure. The current technology permits only re-routing via manual intervention by a network operator.

18. The Flexnode Consortium is one of the three consortia commissioned by the Deutsche Bundespost Telekom, through its project "Netzknoten 2000", to develop and supply digital cross-connect technology in Germany. It consists of Ericsson, HK and Deutsche Telefon Werke (DeTeWe).

The other two consortia are :

- Siemens and PKI (Philips Kommunikations-Industrie)
- Alcatel/SEL and ANT

(*) Business secrets - greater than Ecu 10 million
(**) Business secrets - below Ecu 10 million

Ericsson has the overall responsibility for the Flexnode contract under which the JVC will supply (replacing HK) the DXC 4/4 System, Ericsson the DXC 4/1 System and DeTeWe the DXC 1/0 System. These systems undertake eventually the same function but with different speeds : the HK's system has the highest transmission rate, DeTeWe's the lowest.

19 The notifying parties state that DXC transmission technology falls into the product market of line transmission technology systems and equipment as defined in the Alcatel/Telettra case.[1] They say that the line transmission sector may be further split up into multiplexing/demultiplexing equipment, digital cross-connect systems, fiber-optic transmission product, SDH/SONET broadband transmission products.

20 It can be left open whether the suggestion of the parties is correct, because even on the basis of a narrower product market definition, ie. DXC systems, the operation does not raise serious doubts.

Geographic Reference Market

21. Up to now, telecommunication markets in the EC have been largely fragmented into national markets. A process of liberalisation and deregulation of the telecommunications sector has been initiated in the framework of the achievement of the single market. The Commission's Directives on liberalisation of telecommunication services, on public procurement and on mutual recognition of terminal equipment, are examples of measures to open up national markets.

Although it is anticipated that in the medium term technical barriers will become less significant, the actual pace of change of the commercial policy of the network operators varies substantially from one Member State to another.[2]

22 The JVC has a significant impact on competition in the transmission markets in Germany, taking into account that the German Bundespost is the first telecommunications operator in Europe to equip its telecommunications network with DXC systems.

It can be left open whether Germany is the relevant geographic market, or whether the relevant geographic market is larger, because the proposed operation does not raise serious doubts on the basis of even a narrower geographic market definition.

Dominance

23. THe JVC will not create or strengthen a dominant position on the DXC market in Germany.

---

(1) Commission Decision of 12 April 1991, OJ L 122/48

(2) See Alcatel/Telettra above

According to the figures supplied by the notifying parties the market for DXC in Germany is estimated at DM 2-3 billion over a five to six year period.

At present, market shares in the business of digital cross-connect transmission technology can only be based on the first contract awarded by the German Bundespost. The Flexnode Consortium received 1/3 of that amount which was split more or less evenly among the three participants.

Thus, even the combination of the market shares of Ericsson and the JVC would not lead to a market share that would indicate a dominant position in the DXC market in Germany.

24. In addition, the companies present in the other two consortia are strong players with the know-how and the necessary resources to guarantee an effective competitive environment in the DXC market in Germany. Potential competition from telecommunication equipment manufacturers such as AT&T, Northern Telecom/STC, Fujitsu and NEC is also very likely (the entry costs are estimated at between DM 200 and 300 million).

IV. ANCILLARY RESTRAINTS

25. The joint venture agreement contains a non-competition clause under which HK is prohibited from conducting, directly or indirectly, operations in competition with the business of the JVC, as long as HK is bound by the joint venture agreement, but in any event during a period of at least five years.

This non-competition clause is seen as a restriction directly related and necessary to the implementation of the concentration and therefore covered by this decision.

V. FINAL ASSESSMENT

26. Based on the above findings, the Commission has come to the conclusion that the proposed operation does not raise serious doubts as to its compatibility with the common market.

For the above reasons, the Commission has decided not to oppose the notified concentration and to declare it compatible with the common market. This decision is adopted in application of Article 6(1)(b) of the Council Regulation No 4064/89.

For the Commission,

MERGER PROCEDURE
ARTICLE 6(1)b DECISION

PUBLIC VERSION

Registered with advice of delivery

1. To the notifyng parties

Dear Sirs,

Subject: Case No. IV/M249 - Northern Telecom/Matra Telecommunication
Notification of 9.7.1992 pursuant to Article 4 of
Council Regulation No. 4064/89

1. The notification concerns principally the proposed acquisition by Northern Telecom Limited (NT) of joint control of Matra Communication S.A. (MC), which is currently under the sole control of Matra S.A. (Matra).

2. After examination of the notification the Commission has concluded that the proposed operation falls within the scope of Council Regulation No. 4064/89 and does not raise serious doubts as to its compatibility with the common market.

I. THE TRANSACTION AND THE PARTIES

3. NT and Matra intend to establish a long-term partnership in the field of telecommunications equipment. To that effect NT will acquire joint control of MC, which conducts Matra's telecommunication activities. In addition, NT will set up with MC two joint ventures with regard to mobile telephony worldwide and public networks in France. Furthermore, NT intends to acquire a minority interest in the parent company of Matra, MMB S.A. The proposed transaction will provide NT with the opportunity to enter new geographical markets in the Community, while MC will obtain access to the resources of a global telecommunications equipment supplier.

4. NT is a Canadian manufacturer of telecommunications equipment which ranks amongst the top ten telecommunications suppliers worldwide The Canadian BCE Inc. holds a majority interest in NT and in the Canadian telecommunications operator Bell Canada

5. Matra is a diversified French holding company with activities including defence, transport systems, aerospace and, through MC, telecommunications Matra is ultimately controlled by the Lagardère family.

II. CONCENTRATION

6 NT will acquire a multitude of corporate and financial links with the Matra group. Most significant are equity participations in MC and the two joint ventures to be set up with MC. The equity participation in MC will be 20% initially. This will be increased by another 20% approximately at the latest by 1997 through shares exchanged in return for a loan given by NT. NT may even further increase its stake in

MC bringing its participation to [ ][1] if it wishes to do so. The equity participation in the two joint ventures will be 50%. All three companies will be governed mainly through two limited partnerships, the principal partners of which are NT and Matra.

Joint control

7. NT and Matra will control MC and the newly created companies jointly, since both, NT and Matra, will have to approve unanimously fundamental business decisions of all three as well as their business plans and budgets. In addition, NT and MC have to agree on the chairmen of the two joint ventures, which NT has the right to designate.

Full-function joint venture

8. MC is engaged in the manufacture and supply of telecommunications equipment, including public and private switching systems, telephone sets, mobile telephony and cellular telephones. The company will continue its activities as a full-function entity as before. In addition, it will take over NT's French private switching business (BCS business), which will be transferred to MC.

The parties intend to allocate special responsibilities to MC and the two separate legal entities to be set up. MC will be attributed global responsibility for product line planning and R&D for terminals. One of the proposed joint ventures (The GSM Company) will become responsible for the development and supply of mobile telephony worldwide for both, NT and MC. The other joint venture (The Networks Company) will become responsible for the marketing, sales and customer service of packet switching, transmission and public switching products in France.

It can be left open whether these two proposed joint ventures will become full-function entities. Their creation is part of the acquisition of joint-control by NT of Matra's telecommunication business, MC, which is a full-function entity. It should not make any difference whether the activities taken over by these joint ventures are carried out within special divisions of MC itself, or are carried out through separate legal entities.

Absence of coordination of competitive behaviour

9 The parties' intention is that in the long run MC will be integrated into NT's European and in some respects worldwide business. Thus, MC will become the group's "center of excellence" in the field of telecomunications terminals and will have global responsibility for product line planning and R&D. They also intend to converge product lines in private switching, to consolidate their sales, marketing and service organisations in France and to study the potential for consolidation in Belgium, Germany and Spain and eventually in all Member States. The GSM Company will be responsible for both parties' mobile telephony business worldwide, combining MC's cellular telephones and radio base stations with NT's switching equipment.

10. In principle Matra (and in fact the Lagardère group) will no longer be involved in the telecommunications business as an independent player. The only exception to this is a joint venture between Matra and Ericsson, namely, MET, which operates in the field of public digital switching in France, with a turnover of around [ ][2] (that is [ ][3] of MC's total turnover). MET is France Telecom's second supplier of public digital switching equipment, with a limited share of the market compared to the major supplier Alcatel. Since it began operations in 1986 MET's activities have been confined essentially to France and to certain public switching products, produced under licence from Ericsson. There is no scope for coordination of competitive behaviour between Matra/MET and the Networks

---

[1] [ ] deleted - business secret.

[2] [ ] deleted - business secret.

[3] [ ] deleted - business secret - read "a small proportion".

Company (of MC and NT) because the Networks Company realistically can only seek to enter the French market through product lines other than those currently produced by Matra/MET, [ ][4]. France Telecom's demand for public digital switching products will have been almost entirely realised through the operation of the current supply agreement. Under these circumstances coordination of competitive behaviour is unlikely to occur.

For the same reasons no coordination of competitive behaviour is likely between Matra/MET and the GSM Company (NT and MC) with regard to digital equipment for digital cellular radio systems. As in the case of public switching MET is a supplier to France Telecom under a contract which will expire in 1995.

11. Matra owns a US manufacturer of private switching systems, Intecom, which is mainly active in the North American market where structures of competition are different from Community markets. Its annual European sales of around 4 million ECU can be regarded as insignificant in competition terms.

12. In conclusion the proposed acquisition of joint control by NT in MC can be considered as a concentrative joint venture within the meaning of Article 3 of the Merger Regulation.

III. COMMUNITY DIMENSION

13. The aggregate worldwide turnover of the BCE group and the Lagardere family group of companies exceeded 5 billion ECU in 1991 (BCE 16,048 M ECU, Lagardere 7,703,M ECU). Both have a Community-wide turnover of more than 250 million ECU (BCE around 900 M ECU, Lagardere 2,587 M ECU), and they did not achieve more than two-thirds of their Community-wide turnover in one and the same Member State. Thus the proposed operation meets the thresholds of Article 1(2) of the Regulation.

IV COMPATIBILITY WITH THE COMMON MARKET

14 NT and MC are both manufacturers of telecommunications equipment. There are significant overlaps between their activities in four areas, namely, public switching, private switching, telephone sets and mobile telephony.

Geographic Reference Market

15 It is not necessary to decide in the present case whether the geographic reference market is national or Community-wide since even on the narrower market definition no dominant position is created or reinforced.

Assessment

16 The principal activities of NT and MC are carried out in different geographic areas - more than 70% of NT's EC turnover is generated in the UK (through STC) while almost 90% of MC's operations are confined to France with virtually all the rest in Germany (through AEG's former telecommunications subsidiaries). As a result of the minimal overlap between the parties, the proposed operation will not lead to the creation or reinforcement of a dominant position in the four identified affected markets in the Community or within a substantial part of it

Public switching

17. Matra/MET is only active in France where it holds a market share of less than 25% [ ][5]. NT has a

---

[4] [ ] deleted - business secret

[5] deleted - business secret.

market share of less than 10% [ ][6] in the UK, the only EEC country where it is currently supplies public switching systems. The combined market share of both parties on a Community-wide basis is significantly less than 10% (actually 2%).

Private switching

18. In the private switching systems business both parties are in principle active in most or all of the Community but their combined market share does not exceed 25% in any Member State, with the exception of Ireland, where MC is not active and thus there is no overlap. On a Community level their combined market share is also below 25% [ ][7].

Telephone sets

19 An overlap between the parties' activities exists only in Belgium and Portugal, where their combined market shares will remain significantly below 10%. There is no overlap in the UK, NT's most important market in the EEC, or in France and Germany, MC's most important EEC markets.

20 At the Community level the parties' combined market share remains below 25% [ ][8].

Mobile Telephony

21 MC produces the full range of mobile telephone equipment, with switching produced through MET, whereas NT only recently introduced switching equipment into the EEC, in the UK. NT's market position in the EEC is therefore currently insignificant while MC has a stronger position in France [ ][9] where it is France Telecom's second supplier for this equipment. The parties' combined EEC market share is well below 10%.

22. On the basis of the above, it can be concluded that the proposed acquisition will not lead to the creation or reinforcement of a dominant position in the common market or a substantial part thereof.

V ANCILLARY RESTRAINTS

23 The non-competition obligations and the cross-licensing agreement entered into between the parties can be regarded as directly related to and necessary to the implementation of the concentration and are therefore ancillary within the meaning of the Regulation

v. FINAL ASSESSMENT

24 Based on the above findings, the Commission has come to the conclusion that the proposed concentration does not raise serious doubts as to its compatibility with the common market.

* * *

For the above reasons, the Commission has decided not to oppose the notified concentration and to declare it compatible with the common market. This decision is adopted in application of Article 6(1)b of the Council Regulation No. 4064/89

For the Commission,

---

[6] deleted - business secret

[7] deleted - business secret

[8] deleted - business secret

[9] deleted - business secret

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)b DECISION

To the notifying parties

Dear Sirs,

Re : Case No IV/M.346 - JCSAT/SAJAC
Notification of 1.6.1993 pursuant to Article 4 of Council Regulation No. 4064/89 (Merger Regulation)

1. On 1.6.1993, Itochu Corporation (Itochu), Mitsui and Co, Ltd (Mitsui), Sumitomo Corporation (Sumitomo) and Nissho Iwai Corporation (Nissho Iwai) will merge their domestic satellite communication business and acquire joint control of the newly created company Kabushiki Kaisha Nihon Satellite Systems (Newco).

2 After examination of the notification, the Commission has concluded that the notified operation falls within the scope of the Merger Regulation and does not raise serious doubts as to its compatibility with the common market.

I THE PARTIES

3. Each notifying party is a large Japanese trading company dealing with a wide range of commodities, industrial goods and consumer goods. Besides trade and manufacture of goods, each offers a wide range of services and invests in various activities. Japan Communications Satellite Company Inc (JCSAT) concentrates Itochu and Mitsui's satellite operation business. JCSAT operates two communications satellites which provide domestic telecommunications services within Japan. Satellite Japan Corporation (SAJAC) concentrate Sumitomo and Nissho Iwai's satellite operations business. SAJAC is licensed to operate domestic communications satellites in Japan, but does not own or operate a satellite.

II THE OPERATION

4. Following the acquisition by Itochu and Mitsui of 50 % of the shares of SAJAC and by Sumitomo, Nissho Iwai and possibly other minority SAJAC's shareholders of 50 % of the shares of JCSAT, SAJAC and JCSAT will merge The shares of the new created entity Newco will be held in the following percentages : Itochu 27 % ; Mitsui 23 % , Nissho Iwai 22 % ; Sumitomo 22 % ; other SAJAC shareholders 6 %[1].

---

[1] In case that other SAJAC shareholders do not invest in JCSAT, and consequently in Newco, the notifying parties will adjust the above percentages with the condition i.a. that the order of the ownership is maintained.

III. JOINT VENTURE

5. According to the terms of a Shareholders Agreement, entered into by the notifying parties, Newco will have a board of ten directors, four of whom will be representative directors. Itochu, Mitsui, Sumitomo and Nissho Iwai will each nominate two directors among which one representative director. The remaining two directors will be appointed by agreement of Itochu, Mitsui, Sumitomo and Nissho Iwai. Newco will also have four statutory auditors with each party appointing one of them. The full-time auditor will rotate among the four parties. Finally, a number of matters will require the approval of Itochu, Mitsui, Sumitomo and Nissho Iwai, including the annual settlement of accounts, the establishment of subsidiary or other major investment or withdrawal, any provision of satellite communication service by Newco, determination of medium- and long-term management plans and all important matters relating to the management of the company.

6. As a result of the above mentioned elements, it can be concluded that Newco will be jointly controlled by Itochu, Mitsui, Sumitomo and Nissho Iwai.

IV. CONCENTRATION

7. Newco will perform on a lasting basis all the functions of an autonomous economic entity. It has been created for an indefinite period of time. It will have its own assets and its own personnel. It will use the trademark JCSAT and will have its own logo. Marketing, accounting, finance and management support provided by the parties to Newco will be regulated by specific contracts in order to guarantee the independence of Newco.

8. As regards possible coordination between the various undertakings concerned, the notifying parties will not retain any activity related to the satellite communication business. Furthermore, there are no identifiable spill-over effects arising from linkages or means by which the enlarged group of undertakings could exploit the increase in the total range of products.

9. The present operation therefore constitutes a concentration in the sense of Article 3 of the Merger Regulation.

V. COMMUNITY DIMENSION

10. The combined aggregate turnover of the undertakings concerned in their last financial year exceeds 5.000 million ECU (Itochu 127.135 million ECU , Mitsui 109,795 million ECU ; Sumitomo 122.838 million ECU , Nissho Iwai 69,734 million ECU) Their Community-wide turnover is more than 250 million ECU [1]
The undertakings concerned do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State Therefore, the proposed concentration has a Community dimension.

VI COMPATIBILITY WITH THE COMMON MARKET

11. Neither JCSAT nor SAJAC is licensed to provide telecommunications service outside Japan or between Japan and another location Therefore, the concentration has presently no effect in the Community.

12. This situation is not likely to change for the following reasons

- the current equipment of JCSAT is unsuited to transmission between Japan and the EC
- the Japan Minister for Post and Telecommunications has always insisted on separate licenses for domestic and international carriers Up to now, it has also never allowed a company to obtain both a domestic and an international[2] common carrier license.

Finally, it can be added that European and international satellite operators providing

---

[1] deleted business secret

[2] This applies for Type 1 common carriers

telecommunications service within Europe or between Europe and Japan already exist and that the operation of a new satellite communications service between Japan and the Community would also require European regulatory approvals.

VII. CONCLUSION

13. Based upon the above considerations, the Commission has come to the conclusion that the proposed concentration does not create or strenghten a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it.

For the above reasons, the Commission has decided not to oppose the notified concentration and to declare it compatible with the common market. This decision is adopted in application of Article 6(1)(b) of Council Regulation No 4064/89.

For the Commission,

ÖFFENTLICHE VERSION

FUSIONSVERFAHREN -
ARTIKEL 6(1)b ENTSCHEIDUNG

Einschreiben mit Empfangsbestätigung

An die Parteien

Betr.: Fall Nr. IV/M.394 - MANNESMANN/RWE/DEUTSCHE BANK
Ihre Anmeldung gemäß Artikel 4 der Ratsverordnung (EWG) Nr. 4064/89 (Fusionsverordnung)

Sehr geehrte Damen und Herren,

1. Am 19.11.1993 hat die Kommission eine gemeinsame Anmeldung der Deutsche Bank AG, Frankfurt am Main, der Mannesmann AG, Düsseldorf, und der RWE-Energie AG, Essen, erhalten, nach der die drei Unternehmen Vermögenswerte in ein Gemeinschaftsunternehmen im Bereich von Telekommunikationsnetzen ("corporate networks") und Mehrwertdiensten ("value-added services") für Firmenkunden einbringen

2. Nach Prüfung der Anmeldung hat die Kommission festgestellt, daß das angemeldete Vorhaben in den Anwendungsbereich der Fusionsverordnung fällt und daß keine ernsthaften Bedenken hinsichtlich seiner Vereinbarkeit mit dem Gemeinsamen Markt bestehen.

I. DIE PARTEIEN

3. Die Deutsche Bank AG (nachfolgend "Deutsche Bank") betreibt als Universalbank Bankgeschäfte aller Art und ist außerdem in den Bereichen Unternehmensberatung, Versicherungen und sonstige Finanzdienstleistungen tätig. Ihre Tochtergesellschaft Deutsche Gesellschaft für Netzwerkbetriebe mbH (DGN) unterhält die Telekommunikationsinfrastruktur für die Deutsche Bank und ist in geringem Umfang auch für Dritte tätig.

4. Die Mannesmann AG (nachfolgend "Mannesmann") ist ein diversifiziertes deutsches Unternehmen mit Produktions- und Vertriebsaktivitäten in der ganzen Welt. Mannesmann ist vor allem in der Erzeugung und Verarbeitung von Eisen und Stahl, in der Herstellung von Erzeugnissen des Maschinenbaus, der Elektrotechnik und der Elektronik sowie im Anlagenbau tätig. Im Bereich Telekommunikation hat das Unternehmen in Deutschland eine Beteiligung von 51 % an der Mannesmann Mobilfunk GmbH, die das Funktelefonnetz D 2 unterhält (ein zweites Funktelefonnetz wird von der Deutsche Bundespost Telekom betrieben) sowie eine 100 %-Beteiligung an der Mannesmann Datenverarbeitung GmbH und eine indirekte Mehrheitsbeteiligung an der im Bündelfunkbereich tätigen Quickfunk GmbH. In Frankreich und Spanien hält Mannesmann Minderheitsbeteiligungen an zwei Unternehmen für Mobildatenkommunikation bzw. Paging-Netze.

5. RWE-Energie AG (RWE-E), ein Tochterunternehmen der RWE-AG, ist ein im wesentlichen in den westlichen Bundesländern von Deutschland operierendes Energieversorgungsunternehmen. RWE-E bzw. RWE-AG halten Minderheitsbeteiligungen an einem Bündelfunkunternehmen bzw.

Serviceunternehmen für Mobilfunknetze sowie eine 70 %-Beteiligung an der Lahmeyer Informationstechnik GmbH, die Ingenieurleistungen im Mobilfunkbereich erbringt. Weitere 10 % an Lahmeyer werden von der Deutschen Bank gehalten.

II. DER ZUSAMMENSCHLUSS

6. Deutsche Bank, Mannesmann and RWE-E werden ihre gesamten Telekommunikationsanlagen mit Ausnahme der von RWE-E für Energieversorgungszwecke benötigten Anlagen auf DGN übertragen. Gleichzeitig wird Deutsche Bank 50 % der DGN-Anteile an Mannesmann und weitere 25 % an RWE-E veräußern.

7. Das Gemeinschaftsunternehmen (GU) wird - unter neuem Namen - im Bereich Corporate Networks für die Muttergesellschaften und für sonstige Firmenkunden in Deutschland sowie später europaweit tätig sein. Das Dienstleistungsangebot wird Sprach-, Daten- und Bildkommunikation, Basisdienste wie z.B. elektronische Post ("Electronic Mail") sowie branchenspezzifische Mehrwertdienste umfassen.

Gemeinsame Kontrolle

8. Wie bereits festgestellt, werden Mannesmann 50 %, Deutsche Bank und RWE jeweils 25 % der Anteile an dem GU halten. Gemäß dem "Partnervertrag" zwischen den Beteiligten bedürfen wichtige Geschäftsentscheidungen des GU einer einstimmigen Beschlußfassung der Gesellschafter im Gesellschafterausschuß. Dazu gehören Entscheidungen über Ausbau und Betrieb des Corporate Network, Umsatz-, Investitions- und Finanzplanung, Anschaffung und Veräußerung von Anlagevermögen, Erwerb und Veräußerung von Beteiligungen u.a. . Darüber hinaus ist jeder Geschäftsführer des GU einstimmig zu bestellen. Die Beteiligten üben somit die gemeinsame Kontrolle über das GU aus.

Selbständige wirtschaftliche Einheit

9. Zu Beginn seiner Geschäftstätigkeit wird das GU ausschließlich Telekommunikationsdienstleistungen für die Muttergesellschaften erbringen. Es ist jedoch die erklärte Absicht der Beteiligten, daß das GU längerfristig vor allem für Dritte tätig werden soll. Der gegenwärtigen Planung zufolge sollen nach 4 - 5 Jahren 50 % und nach 6 Jahren 60 - 80 % des Umsatzes mit Drittkunden erzielt werden. Ein gewinnträchtiger Betrieb des in dem GU zusammengeführten Telekommunikationsanlagen als Corporate Network ist auch nur bei Erreichung einer "kritischen Masse" von Sprachverkehrsaufkommen möglich, die bei einem Mehrfachem des Bedarfs der Muttergesellschaften liegt.

10. Da das GU selbst nur Corporate Networks und einige Basisdienste wie E-Mail oder EDI ("Electronic-Data-Interchange") entwickeln und anbieten kann, ist es für branchenspezifische Anwendungen und Mehrwertdienste auf Dritte und auf die Muttergesellschaften angewiesen. Im Bereich von Finanzdienstleistungen und von energieversorgungsspezifischen Anwendungen haben Deutsche Bank bzw. RWE-E bereits entsprechende Mehrwertdienste entwickelt. Diese werden von dem GU als Händler oder Vertreter von Deutsche Bank bzw. RWE-E vertrieben in Kopplung mit eigenen Dienstleistungen. Das GU wird nichtsdestotrotz alle Funktionen einer selbständigen wirtschaftlichen Einheit erfüllen, da es in seinem Dienstleistungsangebot frei und kundenorientiert ist und die jeweils erforderliche branchenspezifische Software für alle übrigen Bereiche bei Dritten bezieht. Die Softwareangebote der Muttergesellschaften Deutsche Bank und RWE werden insoweit nur einen kleinen Ausschnitt der Geschäftstätigkeit des GU bilden.

Koordinierung des Wettbewerbsverhaltens

11. Deutsche Bank, Mannesmann und, mit Einschränkungen, RWE bringen ihre gesamten Festnetzanlagen für Daten- und Sprachübertragung in das GU ein. RWE ist aufgrund deutscher energierechtlicher Bestimmungen gehalten, bestimmte für die Aufrechterhaltung der Energieversorgung erforderliche Telekommunikationsanlagen wie z.B. Betriebsfunk und Systeme zur Steuerung des Energieverbrauchs zu betreiben. Mit der für 1998 vorgesehenen Liberalisierung der Sprachvermittlung für die Öffentlichkeit würde RWE die Möglichkeit erhalten, seine verbleibenden Leitungen Dritten anzubieten. Nach dem "Partnervertrag" über das GU ist RWE jedoch verpflichtet, freie Kapazitäten in seinem Netz zunächst dem GU anzubieten. Außerdem ist es RWE aufgrund eines Wettbewerbsverbotes verwehrt, außerhalb des GU selbst Corporate Networks anzubieten.

12. Da Mannesmann bereits im Bereich der mobilen Sprachübertragung tätig ist, erscheint es weiterhin nicht ausgeschlossen, daß Mannesmann versuchen könnte, den Absatz in diesem Bereich mit dem Absatz des GU zu koppeln. Dies entspricht jedoch nicht den Interessen der übrigen Muttergesellschaften des GU und birgt auch die Gefahr in sich, Kunden an andere Dienstleistungsanbieter auf dem Markt des GU zu verlieren. Schließlich wäre eine solche Koordinierung zwischen GU und D 2 - Mobilfunknetz nur für das sich überschneidende Kundensegment denkbar.

Das GU wird demnach eine selbständige wirtschaftliche Einheit bilden und keine Koordinierung des Wettbewerbsverhaltens voneinander unabhängig bleibender Unternehmen bewirken.

III. GEMEINSCHAFTSWEITE BEDEUTUNG

13. Der Zusammenschluß hat gemeinschaftsweite Bedeutung im Sinne des Art. 1 Abs. 2. Die weltweiten Gesamtumsätze von Mannesmann (13,66 Mrd. ECU) und RWE (25,21 Mrd. ECU) sowie die nach Art. 5 (3) a zu berücksichtigenden Umsätze der Deutschen Bank (49,66 Mrd. ECU) betrugen 1992 mehr als 5 Mrd. ECU. Alle Unternehmen erzielten im gleichen Geschäftsjahr mehr als 250 Mio ECU in der EG, wovon nur RWE und Deutsche Bank mehr als zwei Drittel in Deutschland umsetzten.

IV. VEREINBARKEIT MIT DEM GEMEINSAMEN MARKT

A. Die relevanten Produktmärkte

Corporate networks

14. Mit der Umsetzung der Richtlinie der Kommission vom 28.6.1990 über den Wettbewerb auf dem Markt für Telekommunikationsdienste (90/388/EWG) ist es in Deutschland seit Anfang 1993 möglich, Corporate Networks, d.h. Festnetze zur Übertragung von Daten und Sprache innerhalb geschlossener Benutzergruppen, anzubieten ("Genehmigungskonzept Corporate Networks" des Bundesministeriums für Post und Telekommunikation = BMPT). Vor 1993 war allein die Telekommunikation innerhalb eines Unternehmensstandortes vom Sprach- und Datenübertragungsmonopol der DB Telekom ausgenommen. In einem ersten Liberalisierungsschritt wurde 1989 die Datenkommunikation zwischen verschiedenen Standorten freigegeben.

15. Corporate Networks können Unternehmen und Institutionen, die geschlossene Benutzergruppen darstellen, frei angeboten und mit dem öffentlichen Telefonnetz der DB Telekom verbunden werden. Vom öffentlichen Telefondienst unterscheiden sich die Netze der privaten Anbieter vor allem durch den anwendungsbezogenen Zuschnitt (z.B. ein Corporate Network für einen Automobilhersteller samt Zulieferern und Händlern). Betreibt ein Anbieter mehrere Corporate Networks, so dürfen diese nicht unmittelbar, sondern nur über das öffentliche Netz miteinander verbunden werden. Andernfalls bestünde die Gefahr einer Umgehung der noch bestehenden Beschränkung auf geschlossene Benutzergruppen. Die für ein Corporate Network erforderlichen Leitungen müssen von der DB Telekom angemietet werden. Außerdem bedarf der Betreiber einer Einzelgenehmigung durch das BMPT.

16 Das GU wird sich neben dem Corporate Network-Betrieb für seine Muttergesellschaften zunächst auf einen Kundenkreis von Unternehmen [...]1 im In- und Ausland [...](1) beschränken unter Ausschluß [...](1) der [...](1) Unternehmen, die nach Einschätzung der Beteiligten eigene Corporate Networks aufbauen werden.

17. Die Frage, ob Corporate Networks in der von dem GU angebotenen Form einen eigenen sachlichen Markt darstellen, der von der allgemeinen und öffentlich zugänglichen Sprach- und Datenübertragung durch DB Telekom und andere nationale Telekombetreiber zu trennen ist, bedarf ebenso wie die Frage nach der Unterscheidung separater Märkte für Netze zur Sprachübertragung und Netze zur Datenübertragung keiner Entscheidung, da selbst bei Annahme engerer Märkte nicht von der Entstehung oder Verstärkung einer marktbeherrschenden Stellung infolge des Zusammenschlusses auszugehen ist

18 Mit Blick auf die sonstigen Aktivitäten der Beteiligten im Bündelfunk und Mobilfunk sind Corporate Networks allerdings als eigenständige Telekommunikationsdienstleistung anzusehen. Bündelfunk erlaubt Sprachkommunikation innerhalb geschlossener Benutzergruppen nur in einer Richtung, d.h. nicht in Dialogform, und ist gegenwärtig nur regional begrenzt möglich. Diese Übertragungsform ist daher nur für wenige Zielgruppen einsetzbar (Betriebe mit Fahrzeugflotten oder Außendienstmitarbeitern) Mobilfunk ist lizenzgebundene, mobile Sprachübermittlung für die Öffentlichkeit, d.h jedermann zugänglich Zudem ist die Kommunikation über Mobilfunk wesentlich teurer als über ein rein terrestrisches Netz. Für mobile Datenübertragungsnetze sind bislang vom BMPT keine Lizenzen vergeben worden

---

1 Das GU konzentriert sich auf einen Kundenkreis von größeren Unternehmen; genauere Angaben werden aus Gründen der Wahrung von Geschäftsgeheimnissen nicht veröffentlicht.

Mehrwertdienste

19. Das Betreiben eines Corporate Network schließt, wie bereits festgestellt, eine Reihe von Basisdiensten wie E-mail, Videokonferenzen und EDI ein. Daneben soll das GU branchenspezifische Anwendungen, sog. Mehrwertdienste ("value-added services"), anbieten. Die Entwicklung solcher Dienste befindet sich gegenwärtig erst im Anfangsstadium, eine exakte Definition von Mehrwertdiensten ist deshalb noch nicht möglich. Beispiele für derartige Dienstleistungen sind die von RWE-E und Deutsche Bank angebotenen speziellen Anwendungen für den Energie- bzw. Finanzsektor oder auch die elektronische Verfolgbarkeit von Lieferungen und die entsprechende Lieferbestätigung. Allgemein kann festgestellt werden, daß erst die speziellen, auf die Bedürfnisse des Kunden zugeschnittenen Mehrwertdienste dem Corporate Network Funktionalität verleihen.

20. Im vorliegenden Fall ist es nicht erforderlich zu entscheiden, ob es einen eigenen Markt für einzelne, für einfache und fortgeschrittene oder für die Gesamtheit von Mehrwertdiensten gibt, da die wettbewerbliche Beurteilung insoweit nicht unterschiedlich ausfällt.

B Die relevanten geographischen Märkte

21 Wenn auch das GU mit Aufbau und Entwicklung eines Corporate Network zunächst nur in Deutschland und für dort ansässige Unternehmen tätig sein wird, beabsichtigt es auf längere Sicht, im europäischen Ausland und unter Umständen darüber hinaus tätig zu werden, um den internationalen Anforderungen seiner Kunden Rechnung tragen zu können. Letzteres entspricht bereits jetzt den Planungen und Aktivitäten von öffentlich-rechtlichen und privaten Anbietern: Es ist eine wachsende Zahl von transnationalen Allianzen im Telekommunikationssektor zu verzeichnen, die auf das Angebot von Corporate Networks für multinationale Unternehmen abzielen und eine globale Ausrichtung haben (DB Telekom/France Telecom; Telefonica/Unisource N.V.; British Telecom/MCI etc.). Die geographische Ausdehnung eines Corporate Network hängt demnach von der Lage der Unternehmensstandorte auf der Kundenseite ab und kann lokal, national, europäisch oder global sein. Die zunehmende Internationalisierung der Märkte spricht dafür, auch die Kommunikationsmärkte europäisch oder sogar global zu betrachten.

22 Auch diese Frage bedarf jedoch keiner abschließenden Klärung, da das geplante GU auch bei Zugrundelegung eines deutschen Marktes keine marktbeherrschende Stellung erlangen würde.

C Wettbewerbliche Beurteilung

Corporate networks

23 Bei Annahme eines Marktes für Corporate Networks zur Sprach- und Datenübertragung ist in erster Linie zu berücksichtigen, daß es sich um einen sehr jungen, in Deutschland erst seit Anfang 1993 existierenden Markt handelt. In diesem Bereich ist gegenwärtig und für die absehbare Zukunft DB Telekom der führende Anbieter in Deutschland. Das von den Beteiligten geplant GU gehört zu den ersten privaten Anbietern, die die bisherige Monopolstellung der DB Telekom angreifen. DB Telekom hat angekündigt, auf dem entstehenden Markt ab Anfang 1994 ein eigenes "Virtual Private Network" (VPN) anzubieten. Die Tatsache, daß das Unternehmen dabei auf sein bestehendes öffentliches Leitungsnetz zurückgreifen kann und daß VPN nach Aussagen von Wettbewerbern letztlich nur eine neue Abrechnungsmodalität für Großkunden unter Einschluß besonderer Rabatte darstellt, offenbart die überragende Marktstellung von DB Telekom.

24 Nach Schätzungen der Beteiligten beläuft sich das Gesamtvolumen der für Dritte mit Corporate Network-Diensten in der Daten- und Sprachkommunikation erbrachten Leistungen im Jahr 1993 auf ca. 3,5 Mrd. ECU. Davon entfallen über 3 Mrd. ECU auf DB Telekom, die auch in den kommenden Jahren der mit Abstand führende Anbieter sein wird. Das GU erwartet für 1994 einen

Umsatz von ca. [...]2.

25. Aktueller Wettbewerb geht für Datenübertragungsdienste und teilweise für Corporate Networks von spezialisierten Unternehmen wie z.B. MEGANET, GEIS (General Electric Co.), INFAS, einem Gemeinschaftsunternehmen zwischen Stinnes AG (VEBA-Konzern) und Bank für Gemeinwirtschaft, und DEBIS, einer Tochtergesellschaft der Daimler Benz AG, aus. Daneben wird das GU dem Wettbewerb der oben genannten transnationalen "outsourcing"-Unternehmen der großen Telekomanbieter ausgesetzt sein. Als potentielle Wettbewerber kommen andere Energieversorgungsunternehmen (Bayernwerk, Preussen Elektra), die über die erforderlichen Telekommunikationsanlagen verfügen, die Deutsche Bundesbahn als Inhaberin des größten terrestrischen Kommunikationsnetzes in Deutschland sowie Großunternehmen mit bislang ausschließlich konzerninternen Networks sowie Computer- und Netzequipmenthersteller in Betracht.

26. Wenn auch für einen Markteintritt Anfangsinvestitionen in beträchtlicher Höhe erforderlich sind, die entgegen der Ansicht der Parteien gewisse Marktzutrittsschranken bilden und nur großen Anbietern ein Tätigwerden ermöglichen, handelt es sich insgesamt um einen Markt mit großen Wachstumschancen, auf dem bereits vor der für 1998 erwarteten Liberalisierung der öffentlichen Sprachvermittlung ein kontinuierlicher Anstieg des Sprachverkehrsaufkommen erwartet wird. Die Wettbewerbsstruktur dieses Marktes ist bislang nur insoweit abzusehen, als die DB Telekom noch auf mehrere Jahre dominierender Anbieter sein wird. Die Gründung des GU kann zur Entstehung eines bedeutenden Konkurrenten führen und hat insoweit einen wettbewerbsbelebenden Effekt.

Value-added services

27. Der gemeinschaftsweite Bedarf an Mehrwertdiensten wurde von der Kommission für das Jahr 1992 auf etwa 5 Mrd. ECU geschätzt (vgl. die Entscheidung "Eucom/Digital" vom 18.5.1992 - IV/M.218). Insgesamt handelt es sich ebenfalls um einen in der Entwicklungs- und Experimentierphase befindlicher Markt mit großen Wachstumschancen. Umsatz- oder Marktanteilsangaben für das GU oder für die Muttergesellschaften sind nicht verfügbar, da diese bislang Mehrwertdienste nicht vermarktet haben.

28 Wettbewerber des GU werden andere Anbieter von Corporate Network-Diensten sein. Als potentielle Anbieter kommen die großen Telekomanbieter, Hersteller von Telekommunikationsausrüstungen und Softwarehersteller in Betracht. DB Telekom wird auch in diesem Sektor der führende Anbieter auf mittelfristige Sicht sein. Mit der Entstehung einer marktbeherrschenden Stellung infolge des Zusammenschlusses ist deshalb nicht zu rechnen.

V. GESAMTBEURTEILUNG

29. Aufgrund der oben getroffenen Feststellungen ist die Kommission zu dem Ergebnis gelangt, daß das Zusammenschlußvorhaben keinen Anlaß zu ernsthaften Bedenken hinsichtlich seiner Vereinbarkeit mit dem Gemeinsamen Markt gibt.

30. Aus diesen Gründen hat die Kommission entschieden, dem angemeldeten Zusammenschluß nicht entgegenzutreten, sondern ihn für vereinbar mit dem Gemeinsamen Markt zu erklären. Diese Entscheidung beruht auf Artikel 6 (1) b der Fusionsverordnung.

Für die Kommission

---

2 Unter 100 Millionen ECU, die genaue Angabe ist Geschäftsgeheimnis und wird deshalb nicht veröffentlicht.

ÖFFENTLICHE VERSION

FUSIONSVERFAHREN
ARTIKEL 6(1)(b) ENTSCHEIDUNG

An die Parteien

Betrifft : Fall Nr. IV/M.408 - RWE/Mannesmann
Ihre Anmeldung gemäß Art. 4 der Ratsverordnung (EG) Nr. 4064/89
(Fusionsverordnung)

1. Am 25.01.1994 hat die Kommission eine gemeinsame Anmeldung der RWE-Energie AG, Essen, und der Mannesmann Eurokom GmbH, Düsseldorf, erhalten, nach der die Unternehmen beabsichtigen, ein Gemeinschaftsunternehmen im Bereich der mobilen Datenübertragung, begrenzt auf das Gebiet der Bundesrepublik Deutschland, zu gründen.

2. Nach Prüfung der Anmeldung hat die Kommission festgestellt, daß das angemeldete Vorhaben in den Anwendungsbereich der Ratsverordnung (EG) Nr. 4064/89 fällt und daß keine ernsthaften Bedenken hinsichtlich seiner Vereinbarkeit mit dem Gemeinsamen Markt bestehen.

I. DIE PARTEIEN

3. Die RWE-Energie AG (RWE), ein Tochterunternehmen der RWE AG, ist vornehmlich im Bereich der Energieversorgung in Deutschland tätig. Sie ist zudem bei Telekommunikationsdienstleistungen an einem Gemeinschaftsunternehmen beteiligt, das in Deutschland corporate networks und Mehrwertdienste für Firmenkunden anbietet (vgl. Entscheidung der Kommission vom 22.12.1993, Fall Nr. IV/M. 394 - Mannesmann/ RWE/Deutsche Bank).

4. Die Mannesmann Eurokom GmbH (Mannesmann), ein Unternehmen der Mannesmann AG, hält Anteile an Gesellschaften, die Bündelfunk in Deutschland, Mobildaten-kommunikation in Frankreich und Paging in Spanien anbieten. Die Mannesmann AG ist im Bereich der Telekommunikation mehrheitlich an der Mannesmann Mobilfunk AG, die in Deutschland das Funktelefonnetz D 2 betreibt, sowie an dem unter Ziff. 3. genannten Gemeinschaftsunternehmen zum Betrieb von CORPORATE NETWORKS beteiligt.

II. DER ZUSAMMENSCHLUß

5. Die anmeldenden Parteien werden eine gemeinsame Gesellschaft in der Rechtsform einer GmbH errichten, an deren Stammkapital RWE mit 43% und Mannesmann mit 21% beteiligt sein werden. Weitere Anteilseigner sind die Deutsche Bank, die Energieversorgung Schwaben AG und die Compagnie Financière pour le Radiotéléphone S A (COFIRA) mit jeweils 10% und die RAM Mobile Data Network GmbH (RAM), ein Tochterunternehmen der US-amerikanischen BellSouth Corporation, mit 6% der Geschäftsanteile.

6. Gegenstand des Gemeinschaftsunternehmens ist zunächst die Bewerbung um die Erteilung einer vom Bundesminister für Post und Telekommunikation ausgeschriebenen Datenfunklizenz und, im Falle der Lizenzerteilung, das Errichten und Betreiben eines Datenfunknetzes im Gebiet der Bundesrepublik Deutschland zwecks Erbringung von mobilen Datenfunkdiensten. Soweit die Gesellschaft die Datenfunklizenz nicht erhält, wird sie aufgelöst. Die Erteilung einer sogenannten "wettbewerblichen Unbedenklichkeitserklärung" der zuständigen Wettbewerbsbehörde ist Voraussetzung für die Vergabe der Lizenz.

GEMEINSAME KONTROLLE

7. RWE und Mannesmann werden das Gemeinschaftsunternehmen gemeinsam kontrollieren. Zwar wird RWE nach Errichtung der Gesellschaft über 43% der Stimmrechte, Mannesmann über 21% der Stimmrechte verfügen. Die Anteileigner haben jedoch einen Konsortialvertrag geschlossen, nach dessen Inhalt eine Reihe von für die Geschäftspolitik des Unternehmens wesentlichen Entscheidungen einer Mehrheit von 83% der Stimmen der Gesellschafterversammlung bedürfen. Hierzu gehören insbesondere die Festellung des Jahresabschlusses, die Bestellung und Abberufung der Geschäftsführung sowie Änderungen und Ergänzungen des Gesellschaftsvertrages. Die Gesellschaft wird darüberhinaus einen Gesellschafterausschuß haben, der mit einer Mehrheit von 83% der Stimmanteile über Maßnahmen wie die Umsatz- und Ergebnisplanung, Investitions- und Finanzplanung, Personalplanung sowie Erwerb und Veräußerungen von Beteiligungen etc. beschließt. Aufgrund des Zustimmungserfordernisses von 83% können deshalb die genannten, für die Geschäftspolitik der Gesellschaft strategisch wesentlichen Maßnahmen sowohl in der Gesellschafterversammlung wie im Gesellschafterausschuß nur unter Mitwirkung von RWE und Mannesmann getroffen werden. Die Regelungen gewähren beiden Unternehmen daher die gemeinsame Kontrolle über das Gemeinschaftsunternehmen.

SELBSTANDIGE WIRTSCHAFTLICHE EINHEIT, KEINE KOORDINIERUNG DES WETTBEWERBSVERHALTENS

8 Die Gesellschafter werden gemäß den Verpflichtungen aus dem Konsortialvertrag die notwendigen finanziellen und sachlichen Mittel in das GU einbringen, damit dieses als selbständiger Teilnehmer am Markt operieren kann. Es soll jedenfalls bis zum Jahre 2011 seine Tätigkeit ausüben.

9. Gegenstand der Geschäftstätigkeit des GU wird die Bereitstellung eines Netzes zur mobilen paketvermittelnden Datenübertragung sowie das Angebot von entsprechenden Datenfunkdiensten sein. Mannesmann als auch RWE sind in Deutschland bereits auf benachbarten Märkten tätig. Mannesmann bietet in Deutschland über das D 2 Netz Dienstleistungen der mobilen Sprachübertragung an. Eine Koordinierung des Wettbewerbsverhaltens zwischen dem Gemeinschaftsunternehmen und der Mannesmann Mobilfunk erscheint jedoch unwahrscheinlich, da dies zum einen nicht den Interessen der RWE, des großten Gesellschafters, entsprechen würde, und zum anderen sich der Kundenkreis beider Unternehmen, wie unter Ziff. 12, 13 ausgeführt, aufgrund der nur geringen Austauschbarkeit der Angebote des Sprachmobilfunkes und des speziellen Datenmobilfunkes nur geringfügig überschneiden wird. Gleiches gilt für die Aktivitäten von Mannesmann und RWE als Anbieter von Dienstleistungen für CORPORATE NETWORKS, da diese Dienstleistungen nicht mobil, sondern auf den Festleitungsbereich und auf gesetzlich definierte Benutzergruppen beschränkt sind, sodaß im Hinblick auf eine nur geringe Überschneidung im Kundensegment eine Koordinierung als unwahrscheinlich angesehen werden kann.

III GEMEINSCHAFTSWEITE BEDEUTUNG

10 Der weltweite Gesamtumsatz der RWE AG (29,5 Mrd ECU) und der Mannesmann AG (13,6 Mrd. ECU) betrug 1992 mehr als 5 Mrd. ECU. Beide Unternehmen erreichten im gleichen Geschäftsjahr mehr als 250 Mio ECU in der Gemeinschaft, wobei nur RWE mehr als zwei Drittel dieses Umsatzes allein in Deutschland erzielte.

IV VEREINBARKEIT MIT DEM GEMEINSAMEN MARKT

MOBILER PAKETVERMITTELNDER DATENFUNK

11 Das Gemeinschaftsunternehmen soll im Rahmen der vom Bundesminister für Post und Telekommunikation vergebenen Lizenz ein Datenfunknetz zur mobilen paket-vermittelnden Datenübertragung bereitstellen und betreiben. Die Lizenz berechtigt nicht zum Sprach-Telefondienst für die Öffentlichkeit und ist auf das Gebiet der Bundesrepublik Deutschland beschränkt.

12 Im mobilen Datenfunk werden "Pakete" von Dateninformationen vom Absender zum Empfänger übermittelt, ohne daß eine spezielle Verbindung aufgebaut werden und ohne daß der Empfänger zum Zeitpunkt der Übertragung erreichbar sein muß. Die Vermittlung erfolgt auf einem Übertragungskanal, der gleichzeitig für mehrere Verbindungen genutzt werden kann. Hieraus ergibt sich eine hohe Frequenzökonomie, die es erlaubt, bis zu 1000 Datenfunkgeräte pro Funkkanalpaar zu nutzen. Der mobile

paketvermittelnde Datenfunk dient insoweit insbesondere zur Übertragung geringerer, speicherbarer und damit jederzeit abrufbarer Datenmengen. Einsetzbar ist mobile Datenfunktechnik beispielsweise für die Steuerung von Kraftfahrzeugflotten, für die Unterstützung von Außendienstmitarbeitern mit notwendigem Datenmaterial (Preise, Lagerbestände, u.a.) oder für die Telemetrie, d.h. die systematische Erfassung der Zustandsdaten von Maschinen wie Verbrauchszähler, Automaten oder Umweltmeßstationen.

13. Aus Kundensicht unterscheidet sich der mobile Sprachfunk von der paketvermittelnden Kommunikation vor allem in der Art des Angebotes, der Kundengruppen sowie in den Preisen. Sprachmobilfunk ist vornehmlich auf Vermittlung von Sprachkommunikation ausgerichtet. Zwar ist grundsätzlich auch eine Übertragung von Daten im Sprachmobilfunknetz (wie dem GSM oder dem E-Plus-Netz) technisch möglich. Diese ist jedoch wesentlich zeit- und kostenintensiver, da die Übertragung speicherbarer Daten im leitungsvermittelnden Netz nur über den Aufbau einer individuellen Verbindung zwischen den Endteilnehmern erfolgen kann. Dies führt zu einer geringeren Frequenzökonomie (~25 Mobilfunkgeräte/Funkkanalpaar) und zu zeitlichen Verzögerungen, da bei jeder Störung die Leitung erneut aufgebaut werden muß. Mobiler Datenfunk wird zudem insbesondere von spezifischen Firmenkundengruppen wie Transportunternehmen, Versicherungen usw. genutzt werden, die über die reine Nutzung der Leitung hinaus eines auf ihre Bedürfnisse zugeschnittenen Anwendungskonzeptes bedürfen. Es ist deshalb davon auszugehen, daß aus der Sicht der Kunden Datenkommunikation im mobilen Sprachfunknetz jedenfalls mittelfristig nur als Ergänzung zur Sprachkommunikation (etwa im Rahmen von nicht speicherbaren Short Message Services, die auf dem Display des Telefongerätes erscheinen), nicht jedoch als Alternative zur reinen Datenübertragung angesehen werden kann.

14. Gleichermaßen ist die mobile Datenübertragung auch im Verhältnis zu den in einem Corporate Network angebotenen Diensten als eigenständige Telekommunikations-dienstleistung anzusehen. Serviceleistungen in einem Corporate Network sind auf den Festleitungsbereich beschränkt und sind nur einer gesetzlich festgelegten Benutzergruppe zugänglich.

RELEVANTER GEOGRAPHISCHER MARKT

15. Das Gemeinschaftsunternehmen wird mobilen Datenfunk aufgrund der Lizenzbeschränkungen zunächst nur in Deutschland aufbauen und betreiben. Es kann hier dahinstehen, ob aus diesem Grunde von einem nationalen oder unter dynamischer Betrachtungsweise von einem europäischen Markt auszugehen ist. Denn auch bei Zugrundelegung des deutschen Marktes kann die Entstehung einer marktbeherrschenden Stellung des Gemeinschaftsunternehmens ausgeschlossen werden.

WETTBEWERBLICHE BEURTEILUNG

16. In Deutschland wird mobiler Datenfunk für die Öffentlichkeit bisher lediglich von der DBP Telekom über ihre Tochter DeTe-Mobil angeboten. Die Erteilung einer Datenfunklizenz an einen privaten Anbieter ist damit ein erster Schritt zur Liberalisierung des Marktes. Sie führt zum Eintritt eines zweiten Netzbetreibers, der sein Serviceangebot nach Zulassung in Konkurrenz zu dem bisherigen Monopolanbieter entwickeln muß. Der Zutritt des Gemeinschaftsunternehmens führt daher zu einem zweiten Anbieter auf dem Markt für mobile Datenfunkkommunikation und ist wettbewerblich positiv zu beurteilen.

V GESAMTBEURTEILUNG

17. Aufgrund der oben getroffenen Feststellungen ist die Kommission zu dem Ergebnis gelangt, daß das Zusammenschlußvorhaben keinen Anlaß zu ernsthaften Bedenken mit dem Gemeinsamen Markt gibt.

18. Aus diesen Gründen hat die Kommission entschieden, den Zusammenschluß für vereinbar mit dem Gemeinsamen Markt zu erklären. Diese Entscheidung beruht auf Art. 6(1)(b) der Fusionsverordnung.

Für die Kommission

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(a) DECISION

Registered with advice of delivery

To the notifying parties

Dear Sirs,

Subject : Case No IV/M.425 - BS/BT
Notification of 25.02.1994 pursuant to Article 4 of Council Regulation No 4064/89

1 The above mentioned operation concerns an agreement between Banco Santander (BS) and British Telecommunications (BT) to form a company to offer managed data network services (MDNS) in Spain.

2 After examination of the notification, the Commission has concluded that the notified operation involves the acquisition of sole control by BT of a new joint venture company which incorporates MegaRed, a wholly owned Banco Santander subsidiary. The operation does not fall within the scope of application of Council Regulation 4064/89.

I THE PARTIES

3 BS is a leading company in the Spanish banking and financial services sector and has developed a private domestic network to support its financial services business. This network is operated through its subsidiary MegaRed S.A (MegaRed)

4 BT's principal activity is the supply of telecommunications and equipment principally in the United Kingdom. Its services in the UK market include the provision of managed network services to its corporate customers.

II THE OPERATION

5 The operation consists of the purchase by BT of a 50% interest in MegaRed which will be renamed BT Telecomunicaciones SA (BTSA) BS will transfer the existing assets (ie the network) of MegaRed into BTSA. BTSA will be the only vehicle by which the shareholders (BS and BT) will market, sell and service domestic and international managed network services (MNS) to customers in Spain. BTSA will use an upgraded version of MegaRed's existing network to provide domestic MDNS services in Spain. BTSA's network will be connected to both BT's and other international networks. BTSA will also offer a limited range of BT products for those customers who wish to source all their telecoms needs from a single supplier.

6 The operation will be achieved through a complex set of agreements. The main agreement is the joint venture agreement between BS and BT which sets out the formation, capitalisation, funding operation and management of BTSA; the manner in which BS and BT act as shareholders; and the framework for the supporting agreements. There are six supporting agreements: the supply agreement which commits BS to source all its current MNS requirements from BTSA for a period of at least 6 years; the marketing agreement which commits BT to appoint BTSA as its marketing representative for its international MNS operations in Spain; the distribution agreement which appoints BTSA as a distributor for a limited set of BT's telecommunications products; the support agreement which provides for BTSA to act as a maintenance, technical support and customer service contractor for BT's MNS customers in Spain; and a transport agreement which facilitates the interconnection between the BT international network and the BTSA network.

7 The joint venture agreement sets out the rights and obligations of both parties within BTSA. The principal rights and obligations are:

BS and BT each have 50% of the share capital of BTSA, but voting rights are split [ ][1] in BT's favour except for certain areas covered by consent rights which require both shareholders agreement;

II/219

[1] Business secret.

BS and BT will each have three directors on the board but the BT appointed chairman will have a casting vote except for certain key strategic issues for the first three years of the operation of the agreement where special protections for BS apply.

The General Manager (GM) and Deputy General Manager (DGM) will be responsible for the day to day management of BTSA. The GM will be initially appointed by both BS and BT and after that by the board by simple majority (including the BT casting vote if required). The DGM will be appointed by the board on BS's proposal.

8 The consent rights contained in Clause 20 of the joint venture agreement provide that the consent of both shareholders is required to take decisions on the following aspects of BTSA's business:

changes in scope (ie exploiting new markets other than MNS);
mergers, acquisitions and asset sales;
charges over assets (ie using assets as security for loans);
admission of new shareholders;
guarantees;
changes in dividend policy;
delegated authority of the GM;
increases in the Funding and Development commitments; and
shareholder related contracts.

9 These consent rights will remain in force until the joint venture agreement is dissolved or the shareholding of either BS or BT falls below 20%.

10 At board level, the BS special protections set out in Clause 18 of the joint venture agreement cover areas where the Chairman (appointed by BT) will not be able to exercise the casting vote provided for in the joint venture agreement. These areas are:

human resource policies;
organisational structure;
compulsory redundancies;
distribution and agency agreements;
changes in network investments;
major customer bids or advertising campaigns; and
substantial domestic tariff restructuring.

These special protections only operate for the first three years of the joint venture agreement.

11 After three years has elapsed, BS has an annual right for six successive years to require BT to purchase its shareholding in BTSA (the Put Option). The amount which BT would be obliged to pay is set out in a [ ][2] formula [ ][3].

12 Both BS and BT have agreed an initial amount of money which will be invested in BTSA over the first 5 years of its operation (the Funding Commitment). A proportion of the Funding Commitment (the Development Commitment) is designated for the funds required during the first 3 years of the operation of BTSA.

13 During the first 3 years, funding will be by way of equity contributions only and any increase in the Development Commitment (or any modification to the business plan which would lead to an increase in the Development Commitment) would require the agreement of *both* shareholders.

14 In Years 4 & 5 increases in the Funding Commitment would be able to be approved by simple majority of the shareholders but should BS be outvoted, they would not be obliged to participate in any such additional capital injection. If BS chose not to participate, then its shareholding would be diluted. However, any change in the funding mix (eg through debt capital or operational leasing) would require the consent of *both* shareholders. From Year 6 onwards, the Funding Commitment will cease to exist. Increases in equity participation would continue to be decided by simple majority and decisions on changes to the funding mix would continue to require consensus.

---

(2) Business secret.
(3) Business secret.

15 An initial business plan will be agreed between the two shareholders. The business plan will be for ten years and will be updated annually (jointly in the first three years if this requires an increase in the Development Commitment and solely by BT otherwise). For the first three years, the approval of BS is required where changes to the business plan impinge on areas which fall under the consent rights or the special protections.

III SOLE CONTROL

16 For the first three years of the joint venture agreement, the special protections will cover a wide range of management issues and, combined with the shareholder consent rights, will provide veto rights to BS in the running of BTSA. In addition, the Development Commitment and the requirement for the agreement of both shareholders to any change in the amount of equity participation will preclude either shareholder from increasing its shareholding at the expense of the other.

17 From Year 4 onwards, however, the balance of the joint venture agreement changes as the special protections no longer apply and the Development Commitment will be exhausted. The opportunity for BS to influence the conduct of BTSA is contained in the consent rights and the possibility of BS exercising the Put Option.

18 The consent rights, set out in paragraph 8, cover a range of major issues on which the approval of both shareholders is required. Protections for such major issues are necessary to protect minority rights but are not sufficient in themselves to provide the possibility of exercising a decisive influence on BTSA. In particular, according to clause 13.3(b) of the joint venture agreement, after the first three years of the operation of the agreement:

" ..any business case or update to the business plan may be approved by a simple majority of Shareholders but should it require funding in excess of the Funding Commitment the Shareholders shall be free to decide whether or nor to participate in the provision of the additional funding...".

The effect of this clause is to give BT the possibility of increasing its equity participation in BTSA without the agreement of BS and, should BS decide not to increase its equity stake then its shareholding would be diluted and BT would have a permanent majority at shareholder level. Should BS's shareholding fall below 45% then they would lose one of their nominees on the BTSA board.

19 The other major protection for BS within the joint venture agreement is the opportunity of exercising its Put Option between Year 4 and Year 10. The Put Option could be seen to provide a financial disincentive to BT to seek to control BTSA without reference to BS by requiring BT to purchase the whole of BS's stake at a price based on [a formula][4]. The minimum value for the stake in Year 4 is [ ][5].. This [ ][6] value does not represent a large amount for BT whose worldwide turnover in 1993 was approximately 18 billion ECU. If the value is higher, then the prospects for BTSA are better which BT, as a major telecommunications operator, would be well placed to exploit. The Put Option does not, therefore, provide a sufficient incentive for BT to allow BS to exercise a decisive influence over BTSA.

20 In the light of the above, it does not appear that BS will have the opportunity to exercise a decisive influence over BTSA after three years of the joint venture agreement.

21 At most BS will be able to exercise a decisive influence over BTSA for only the first three years of the joint venture agreement. The business plan covers a ten year period and [ ][7]. Given the long term nature of the investment, the three year period is insufficient to bring about a lasting change in the structure of the undertakings concerned. BT will therefore have sole control over BTSA. Consequently, the operation is the acquisition of control by BT of a new joint venture company which incorporates MegaRed. Therefore, for the purposes of calculating turnover, Article 5(2) is applicable.

IV ABSENCE OF COMMUNITY DIMENSION

22 BT and MegaRed have a combined worldwide turnover of over 5000 million ECU. BT has a Community wide turnover of over 250 million ECU. MegaRed does not have a Community wide turnover of over 250 million ECU. Therefore, the operation does not have a Community dimension.

---

(4) Business secret.
(5) Business secret.
(6) Business secret.
(7) Business secret.

V CONCLUSION

Based on the above, the Commission has concluded that the notified operation does not have a Community dimension within the meaning of Article 1 of the Merger Regulation and therefore does not fall within the scope of the Merger Regulation. This decision is adopted in application of Article 6(1)(a) of Council Regulation No 4064/89.

For the Commission,

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 9 November 1994

relating to a proceeding pursuant to Council Regulation (EEC) No 4064/89

(IV/M.469 — MSG Media Service)

(Only the German text is authentic)

(94/922/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations berween undertaking [1], and in particular Article 8 (3) thereof,

Having regard to the EEA Agreement, and in particular Article 57 (1) thereof,

Having regard to the Commission Decision of 18 July 1994 to initiate proceedings in this case,

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

Having regard to the opinion of the Advisory Committee on Concentrations [2],

Whereas:

(1) The procedure under consideration concerns the proposed setting up, by Bertelsmann AG (Bertelsmann), Deutsche Bundespost Telekom (Telekom) and Taurus Beteiligungs GmbH (Taurus), of a joint venture under the name of MSG Media Service Gesellschaft für Abwicklung von Pay-TV und verbundenen Diensten mbH (MSG).

(2) By decision dated 28 June 1994, the Commission ordered the suspension of the concentration as a whole, pursuant to Article 7 (2) and Article 18 (2) of Regulation (EEC) No 4064/89 (hereinafter the 'Merger Regulation'), until it takes a final decision.

(3) By decision of 18 July 1994, the Commission found that the notified concentration raises serious doubts as to its compatibility with the common market. The Commission accordingly initiated proceedings in this case, pursuant to Article 6 (1) (c) of the Merger Regulation.

(4) By letter dated 29 June 1994, Germany informed the Commission, pursuant to Article 9 (2) of the Merger Regulation, that the concentration threatened to create or to strengthen a dominant position as a result of which effective competition would be significantly impeded on three markets within Germany, each of which was a separate geographic market within the meaning of Article 9

[1] OJ No L 395, 30. 12. 1989, p. 1. Corrigendum: OJ No L 257, 21. 9. 1990, p. 13.

I/225

(7). A referral of the case pursuant to Article 9 (3) of the Merger Regulation has not taken place.

I. THE PARTIES

(5) Bertelsmann is the common parent company of the leading German media group. The Bertelsmann group has activities primarily in book and magazine publishing, book clubs, printing, music publishing and sound recording, and has holdings in commercial television. Although Germany is the most important market for Bertelsmann, the group also has widespread international activities (some 6 % of its turnover is earned outside Germany).

(6) Taurus is a holding company belonging to the Kirch group (Kirch). Kirch is the leading German supplier of feature films and television programming and is also active in commercial television. The group operates mainly in Germany. Kirch also — and to an increasing extent — has holdings in pay-TV suppliers outside Germany.

(7) Telekom is the public telecommunications operator in Germany. Telekom is active, either directly or through subsidiaries, in all areas of telecommunications services. It has a monopoly of the German telephone network and is the owner and operator of nearly all the German cable-television networks.

II. THE PROPOSED OPERATION

(8) Bertelsmann, Kirch and Telekom propose to set up a joint venture, MSG, which will have a share capital of DM 60 million. Each of the parents will hold one-third of the share capital and voting rights in MSG. The object of MSG is the technical, business and administrative handling of mainly payment-financed television and other communication services, including conditional access and subscriber customer management, as well as the provision of the necessary technical infrastructure for the supply of such services and all related business.

III. THE CONCENTRATION

1. *Joint control*

(9) MSG will be jointly controlled by its three parent companies. According to MSG's articles of association, each of the parents has the right to appoint two members of the six-member supervisory board. A number of strategic decisions require the approval of the supervisory board by a 75 % majority vote. Such decisions include the appointment of the management, the annual budget, entering into new or giving up existing activities, basic questions as to the organization of legal and economic relations with the authorities, network operators and service suppliers and basic decisions on the technology and systems to be applied. The agreement of all three parents is, therefore, required in basic decisions concerning the management, commercial policy and the competitive strategy of the joint venture.

2. *Concentrative joint venture*

(10) (a) MSG will perform on a permanent basis all the functions of an autonomous economic entity. There is at present only one pay-TV channel in Germany, Premiere, which is operated by a joint venture (Premiere Medien GmbH & Co. KG), owned by Bertelsmann, Kirch and Canal Plus. Premiere at present supplies the services required for the operation of pay-TV itself. There is therefore currently no market in Germany for the services which are the object of MSG. However, as outlined below, it is to be expected that, as a consequence of the introduction of digital television over the next few years, the joint venture's downstream market for pay-TV and other payment-financed television services will grow rapidly and new suppliers will enter the market. It may therefore be assumed that a market will develop for the services offered by MSG which will reach a substantial size in the foreseeable future. The MSG joint venture is intended to play an active role in this growth market and participate in the value chain. MSG will therefore be a full-function enterprise on the market and not merely take on auxiliary functions, whether in whole or in part, for its parent companies Bertelsmann and Kirch.

(11) With regard to the investment required for its business activity, the parent companies are prepared to provide the joint venture with the necessary financial resources to enable it to undertake the investment itself. According to the MSG business plan submitted by Telekom,

II/226

MSG's total capital requirement will be DM [...] (1) million up to the year 2004, provided that the decoders which are to be installed are rented. DM [...] million of this capital requirement is to be financed from the joint venture's own capital. Although, according to the business plan, the break-even point is to be expected only after [...] years (which means that the cumulative operating result will be positive in [...]), a positive operating result is expected in [...] if the cumulative initial losses are disregarded. Such results are not to be regarded as exceptional in the case of a long-term project in a future-oriented market with a high investment requirement. Neither the equity-capital base described nor the earnings pattern aimed at point to the conclusion that MSG would be inadequately endowed with financial resources and could not therefore be regarded as a full-function enterprise.

(12) Nor is this assumption precluded by the fact that MSG will possibly take over services relating to Premiere's current analog pay-TV business. Premiere already has the technical infrastructure for analog pay-TV, on the basis of which the company itself administers its subscriber system. MSG's business plan indicates the company itself administers its subscriber system. MSG's business plan indicates for 1995 to 1997 a subscriber list for MSG which is far smaller than Premiere's current subscriber list (Premiere subscriber list: 800 000; MSG subscriber 1995: [...]; 1966: [...]; 1997: [...]. This suggests that MSG's services are not aimed at Premiere's current analog pay-TV, but at future digital pay-TV services. If over the next few years MSG develops a digital pay-TV infrastructure, it may be assumed that Premiere will use that infrastructure if it wishes to supply digital pay-TV. Digitalization will, however, open up the possibility of further pay-TV suppliers entering the market and making use of MSG's services.

(13) MSG will, as outlined below, supply a package of services that constitute an autonomous market. One of MSG's essential tasks will be to create the necessary technical infrastructure for digital pay-TV, by establishing a decoder base and a system of conditional access. This is an essential prerequisite for pay-TV that calls for a quite substantial level of investment. In so far as the use of the technical infrastructure by the services supplied by MSG requires cooperation on the part of MSG with the parent companies, who are themselves pay-TV suppliers, the same need arises for cooperation with other pay-TV suppliers who avail themselves of infrastructure and services.

(14) (b) The setting-up of MSG has neither the object nor the effect of coordinating the competitive behaviour of undertakings, which remain independent of one another. A risk of coordination between Bertelsmann and Kirch is in particular not to be expected in the introduction of new pay-TV services or the conversion of present advertising-financed programmes into pay-TV programmes. The pay-TV activities of Bertelsmann and Kirch are currently combined in the joint venture Premiere. Premiere's three parent companies have undertaken 'as a specific measure embodying their company-law obligations in the joint venture' not to participate in any other German-language pay-TV service for the duration of the joint pay-TV service without the agreement of the other partners. If therefore in future Bertelsmann and Kirch were to supply pay-TV programmes independently of each other, any coordination of such independent activities would be the result of cooperation in Premiere. It is not apparent that any additional coordination through MSG is necessary in that connection and that such additional coordination might be relevant to the concentrative or cooperative nature of MSG.

(15) Nor can a risk of coordination within the meaning of Article 3 of the Merger Regulation between the parent companies be assumed in the installation of a digital infrastructure and in the use of such systems. The installation of an appropriate digital infrastructure for pay-TV and its use is precisely the business object of the joint venture. Cooperation within a joint venture within the framework of the business object is a characteristic of every joint venture and cannot be used as evidence of its cooperative nature. The Commission finally has no evidence that Telekom or Kirch or Bertelsmann intend to supply the abovementioned services beyond MSG. After the establishment of MSG, Telekom, in particular, can No longer be regarded as a

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

II/227

potential competitor of the joint venture, since the development of an additional alternative infrastructure by Telekom would be economically unjustifiable in view of its investment in MSG and would run completely counter to the strategy pursued by Telekom in helping to set up MSG.

(16) Lastly, it appears improbable that there will be any coordination between Kirch and Bertelsmann via MSG on the market for advertising-financed television. Although Bertelsmann and Kirch each have holdings in advertising-financed television channels, it is not apparent why cooperation in the pay-TV area and in services for pay-TV should, for example, lead to a restriction of competition between RTL and SAT 1. The same applies to the relationship between Telekom and the joint venture as regards future non-media-related communications services provided by Telekom.

(17) It must accordingly be assumed that the setting-up of MSG represents a concentration within the meaning of Article 3 of the Merger Regulation in the form of a concentrative joint venture.

IV. COMMUNITY DIMENSION

(18) The aggregate worldwide turnover of Bertelsmann, Kirch and Telekom is more than ECU 5 billion. In the financial year 1992/93, Bertelsmann earned ECU 9 billion, the Kirch group ECU [...] million and Telekom ECU 29,3 billion. Each of the three undertakings achieves an aggregate Community-wide turnover of more than ECU 250 million. The undertakings concerned do not all realize more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The concentration therefore has a Community dimension within the meaning of Article 1 of the Merger Regulation.

V. ASSESSMENT UNDER ARTICLE 2 OF THE MERGER REGULATION

A. *Relevant product markets*

(19) The proposed concentration affects the market for administrative and technical services for suppliers of pay-TV and other television services financed through subscription or payment by viewers, the market for pay-TV and other television services financed through subscription or payment by viewers (pay-TV) and the market for cable-television networks.

1. Administrative and technical services for pay-TV

(20) The operation of pay-TV requires a special technical infrastructure consisting essentially of an adaptor for decryption (decoder), conditional-access technology and a subscriber management system. A series of services required for the operation of pay-TV are provided on the basis of this infrastructure.

(21) (a) Pay-TV programmes are generally broadcast by cable or satellite. Unlike free commercial television, they require a specific system to ensure that only authorized viewers, that is, subscribers to the particular pay-TV supplier, can receive the programmes. This requires the installation of a decoder in the home of every pay-TV viewer in order to unscramble the television picture, which is scrambled when the television signal is broadcast. Decoders may be either bought or rented from shops or leased out to viewers. Since, at least in the initial phase, the price of the digital decoders which will in future be installed will amount to between DM 1 000 and DM 1 500 and as a result the cost to the individual viewer is relatively high, it may be assumed that, at least in the first five years, digital pay-TV decoders will normally be rented. This means that the installation of a decoder base requires a major investment by the operator of a pay-TV infrastructure.

(22) Since most households will, following the introduction of digital television, continue for a number of years to be equipped with an analog television set, there will also be a need for a digital-analog convertor that will allow the digital signals to be received in analog form. The convertor and decoder will in all probability be available in a single device ('set-top box') and in the longer term be incorporated in satellite receivers or directly into television sets.

(23) (b) In addition to the decoder base, pay-TV requires a system of conditional access. This system comprises the transmission of encrypted data, which contain information on the programmes or packages of programmes subscribed to and on the entitlement of the pay-TV subscribers to receive the programmes, together with the television signal, and possibly

smart cards which are made available to the viewer and are able to decipher the encrypted authorization data and transfer them to the decoder. Control of conditional access takes place either within the decoder or by means of one or more smart cards inserted in the decoder.

(24) In Western Europe, there are at present — for analog pay-TV — at least five encryption systems which operate on a proprietary basis: Videocrypt (used by BSkyB and Adult Channel in the United Kingdom and by Filmnet in the Benelux countries), Syster /Nagravision (Canal Plus in France and Spain, Premiere in Germany and Austria and Teleclub in Switzerland), Eurocrypt (Filmnet and TV 1000 in Scandinavia), Irdeto (Telepiù in Italy) and Luxcrypt (RTL 4 and RTL 5 in the Netherlands). Harmonization throughout Europe has been achieved for scrambling/descrambling, for the digital signal broadcasting standard (MPEG II) and for the licensing of proprietary conditional access technologies within the framework of the European Project for Digital Video Broadcasting (DVB), which consists of approximately 150 companies with interests in the field of digital TV in Europe. As far as encryption technology is concerned, the intentions of the individual enterprises vary. In particular, pay-TV suppliers such as BSkyB, Canal Plus and Filmnet are convinced of the need for proprietary encryption technology and see the SimulCrypt concept as the appropriate approach to conditional access in digital television. On the other hand, potential pay-TV suppliers and network operators prefer a common-interface solution. With Simulcrypt, pay-TV broadcasters can have simultaneously access to bases of consumer decoders which use different conditional access systems, on the basis of agreements and of technical arrangements defined in the DVB. On the other hand, in a 'common interface' solution, the decoders can be already technically designed so that they can 'understand' very different access control systems thanks to modules and/or smart cards. In the framework of DVB, an agreement was recently reached on the provision of both concepts 'Simulcrypt' and 'Common Interface'. A code of conduct is added to Simulcrypt for governing commercial relations between parties in the market. Some of the DVB members have signed the code, others have not.

(25) (c) In addition to the decoder base and encrypted conditional access, there is also a subscriber datafile in which all the relevant information on pay-TV subscribers is stored, including invoicing and in payments (subscriber management system).

(26) The infrastructure described forms the basis for the services relating to the operation of pay-TV. These involve primarily the following administrative and technical services:

— the making available of decoders,

— the handling of conditional access,

— subscriber management in respect of pay-TV customers,

— settlement of accounts with programme suppliers.

(27) (d) The technical and administrative services for pay-TV can be provided by a pay-TV supplier itself. This is currently the case with Premiere. The pay-TV supplier can also make its infrastructure available to other pay-TV suppliers. This is, for example, the case with Canal Plus in France and — for satellite pay-TV — with BSkyB in the United Kingdom. Premiere, too, intends to offer its services to other enterprises. The infrastructure may, however, also be operated by undertakings which are not programme suppliers. This is the case in particular with cable network operators. The provision of the relevant services by cable network operators is commonplace in the United States.

(28) MSG will make the decoders available (at least in the short and medium-term), and will also carry out access control and subscriber management for pay-TV providers. In so doing, MSG will have direct contractual relations mainly with the programme suppliers. The pay-TV subscription agreement will be concluded between the programme supplier and the final consumer. In addition, MSG will lease the decoders to the end user - in any case for quite a few years. Finally, the programme supplier must conclude user agreements with Telekom and other network or satellite operators.

(29) Under the subscriber management system, MSG will also monitor in-payments and pass

II/229

on information on this to any pay-TV supplier cutting off the conditional access signal for subscribers who are late with payments. MSG will, according to the parties themselves, neither offer programmes or interactive services nor undertake packaging (the putting together of programme packages). The packaging and marketing of the programmes transmitted through MSG will be carried out by the programme organizers themselves. MSG intends to offer its services as from 1995 to programme suppliers irrespective of whether they broadcast their programmes using digital or analog technology. Since, as described below, the introduction of digital technology is imminent and since Kirch and Bertelsmann, as co-partners in the only analog pay-TV broadcaster so far in Germany, do not intend to put together any further pay-TV programmes on an analog basis (apart from a children's channel which Premiere intends to introduce), it is not to be expected that MSG will to any significant extent be further involved in analog programmes.

(30) (e) Even if there is at present no market in Germany for the services provided by MSG, such a market is expected to develop, in particular following the introduction of digital television (see paragraph 2). Since it is unlikely that all suppliers of television communications services will have their own infrastructure, the relevant demand should develop quickly, leading to the supply-side development of the services offered by MSG.

(31) (f) According to the conception underlying MSG, it must be assumed that there will be a single market for services relating to digital pay-TV and other digital interactive television communications services. MSG will offer decoder, conditional access and subscriber management from one and the same body. The same package of services is provided on an analog basis by Premiere and Selco. Selco also markets the pay-TV programmes which it handles. After the agreement within DVB on the parallel existence of several access control solutions, the services, in particular the subscriber management system, could also be supplied separately. A number of the undertakings surveyed by the Commission accordingly consider it possible that a separate market for subscriber management by specialized firms may develop. In connection with subscriber management or separately from it, a special market might possibly also develop for programme packaging, which means the putting-together of packages of programmes from different programme suppliers.

2. Pay-TV

(32) Pay-TV constitutes a relevant product market that is separate from commercial advertising-financed television and from public television financed through fees and partly through advertising. While in the case of advertising-financed television, there is a trade relationship only between the programme supplier and the advertising industry, in the case of pay-TV there is a trade relationship only between the programme supplier and the viewer as subscriber. The conditions of competition are accordingly different for the two types of commercial television. Whereas in the case of advertising-financed television the audience share and the advertising rates are the key parameters, in the case of pay-TV the key factors are the shaping of programmes to meet the interests of the target groups and the level of subscriber prices (see also the Commission Decision of 5 August 1994-IV/M.410 Kirch/Richmont/Telepiù). There is, however, some relationship between pay-TV and free-access TV in that the growth of the pay-TV market is slower where the programmes provided by free-access TV broadcasters are relatively varied. Thus, the development of the figures of Premiere subscribers was different in Germany as compared to the development of subscribers in France or the United Kingdom (see point 48). But this does not change anything about the original character of the pay-TV market. The distinction between the two markets could, however, become blurred in the case of pay-TV programmes that are financed from a mixture of sources. Such programmes can be expected in various countries in future. On the German market, however, there is as yet no evidence of pay-TV having such mixed-financing sources, particularly since Premiere is financed solely from subscriptions and payments by viewers. According to various market participants, the absence of programme breaks for advertising will, on the contrary, be an important argument in winning customers over to digital pay-TV.

(33) Pay-TV programmes and free-access, advertising-financed programmes also differ in terms of content. Digitalization allows the signals being transmitted to be highly compressed and will therefore lead to a considerable increase in transmission capacities. At present, some 14 million households on cable and some seven million households with satellite receivers can receive about 30 television programmes in analog form. In the digital age, 200 or more television programmes are considered possible. The new programmes would probably be mainly pay-TV

II/230

programmes, since there are limits to the further growth in the volume of television advertising and since the market for advertising-financed television therefore appears essentially to be a mature one. Against this background, a variety of new, payment-financed special-interest programmes may be expected, meeting the demand of specific target groups (e.g. sport, music, news, feature films or children's programmes). Although a similar trend towards special-interest channels may be observed in the case of advertising-financed television too, this is not comparable with the specialization to be expected in digital pay-TV. In addition, digitalization in conjunction with the use of the telephone or cable network as the return channel allows the introduction of inter-active television services such as pay-per-view, near-video-on-demand, video-on-demand, home banking, home shopping and teleteaching.

(34) According to the information provided by the parties, digitalization of Telekom's cable network will take place in 1995. By early 1995, digital reception should be available to 80 % of households on cable (assuming, that they have a decoder). This is expected to rise to 96 % during the course of the year. Satellite transmission can already be carried out in either analog or digital form; only the terrestrial broadcasting and reception facilities require adjustment. In Telekom's broadband cable network, there will in future, in the hyperband range of 300 — 450 MHz, be 15 channels available for the transmission of digital programme signals. A total of four to 10 digital programmes is to be available on each channel. In a first stage, Telekom intends to provide three channels for digital pay-TV by the end of 1995.

(35) Whereas in the United States a directly receivable digital satellite programme package comprising an initial range of 75 programmes (DirectTV) was started early in 1994, Europe is at present at the stage of pilot projects. In the United Kingdom BSkyB is offering pay-per-channel and pay-per-view via satellite while BT is going to try out video-on-demand using partly digital technology. In France, France Télécom has just issued an invitation to tender for an order for the supply of 300 000 decoders. Canal Plus similarly intends to introduce digital decoders in 1995. Bertelsmann has embarked on cooperation with Canal Plus in the pay-TV area, involving investment of more than ECU [...] (1) million over the next three years.

(36) In Germany, several pilot projects for digital and in some cases interactive television are getting under way this year, for example in Nuremberg, Hamburg und Berlin. Projects involving interactive services, including near-video-on-demand and home-shopping, will start at the end of 1994 in 4 000 households in Baden-Württemberg (Multi Media Services Pilot) and in Hamburg (DTTB Gesellschaft für digitales interaktives Fernsehen mbH). In the home-shopping area, the mail order firm Quelle Schickedanz AG is planning to introduce home-shopping as from 1995 and wants to develop this into its own satellite channel with an 'electronic catalogue' and a range of available services and entertainment. Most of the undertakings surveyed by the Commission in this proceeding accordingly expect there to be an increase in digital pay-TV and digital interactive services between 1995 and 1998. Premiere, the pay-TV channel operated by Bertelsmann, Kirch and Canal Plus has announced that it hopes to be able to offer near-video-on-demand and pay-per-view as from 1995/96.

(37) According to a survey reported in the specialist press, at least 20 % of television viewers over 14 years of age in Germany would be prepared to spend money for pay-TV in addition to the television licence fees and the fees for the broadband cable network. This would give a market potential of over 10 million viewers for pay-TV. Telekom itself, as part of its planning for MSG, anticipates 3,4 million connected households by 2005.

(38) It is doubtful whether all forms of payment-financed communications services for picture-receiving appliances are to be included in one and the same market. Interactive services such as home shopping or home banking in particular might have to be regarded as separate. However, according to what is known at present, pay-TV in the form of pay-per-channel, pay-per-view and near-video-on-demand constitutes a single market, since, in such forms of viewing, the broadcaster alone determines the programme sequence and timing and the viewer has only limited choice available (in the case of near-video-on-demand, for example, a specific number of feature films is available for selection, with each being repeated at specific times of the day). Things might be different

(1) Business secret; according to press articles approximately ECU 300 million.

in the case of video-on-demand proper, with the customer selecting a programme of his choice from an electronic video library. However, since this form of broadcasting will, according to the information provided by various potential market participants, probably not be achievable for technical reasons over the next few years, if need not be assigned specifically to any particular market.

3. Cable television networks

(39) In the Commission's view, a separate market can be considered to exist for cable television networks.

(40) The parties have submitted that, following the introduction of digitalization, there will no longer be a separate relevant market for cable television networks. They argue that there would then no longer be any shortage of transmission capacity. They also consider that cable, satellite and terrestrial frequencies are now regarded by the consumer as interchangeable and entail comparable financial charges for viewers and for programme suppliers.

(41) This view cannot be accepted for a number of reasons. Regardless of whether the form of transmission is analog or digital, television can be broadcast via terrestrial frequencies, satellite or cable networks. There are considerable differences between the three means of transmission, as far as the technical conditions and financing are concerned. While terrestrial transmission and satellite television only require the viewer to install an aerial or a satellite dish at his own expense, cable television presupposes the maintenance of a cable network financed by the viewer through cable fees. It makes a difference to the final consumer whether he has to incur a large amount of expenditure on a one-off basis for one form of transmission (for example, for the satellite receiver) or whether he prefers to incur low-level, regular payments in the form of cable fees. Although in Germany market penetration through cable connections (some 14 million) is particularly high compared with other Member States, the choice between different means of transmission is not a straightforward matter for a large number of households, even in Germany. Of the total of around 33 million households with television, some 8 million are not yet on cable, and there are at present no plans at all to link a further 9 million households up to cable. The fact that some 8 million of households could still have a choice and that the differences in financing referred to above could be reduced by similar payment terms (instalments) may result in a certain degree of substitutability. This does not, however, have any particular importance in Germany because of the very advanced degree of cable link-up as compared to other Member States and because of various other circumstances set out below. Households with television are quite frequently faced with the difficulty that the acquisition of satellite dishes is prohibited on aesthetic grounds by the landlord or by the owners' association in the case of multiple dwellings. Lastly, a household already on cable or having a satellite receiver is normally not ready to make a further investment in the other form of transmission (lock-in effect). Multiple dwellings may increasingly be switching from cable to satellite in order to receive foreign broadcasters, as the parties report, but this does not mean that the two means of reception are interchangeable, since the programmes supplied differ.

(42) From the programme suppliers' point of view as well, contrary to the view put forward by the parties, cable and satellite are not interchangeable in terms of costs. Taking the cost comparison put forward by the parties, it is true that a programme supplier broadcasting via satellite and also feeding the satellite programme into the cable network has comparable costs to a supplier broadcasting only via the cable network. However, if a programme supplier broadcasts solely via satellite (direct-to-home), this entails significantly higher costs per household and per year.

(43) Lastly, it is not the case, as the parties argue, that there is no longer a separate relevant market for cable networks because digitalization has removed the shortage in the means of transmission of television signals. Whether an economic item is available to customers in limited or sufficient numbers does not determine the existence of a relevant market for such an item. The decisive factor is whether trade relationships based on payment exist in respect of a good or a service. This is at present and will in future be the case with the transmission capacity for television signals, whether in analog or digital form.

(44) For the reasons, the Commission considers that there is a separate relevant market for cable television networks.

B. *Relevant geographic market.*

(45) On the basis of the results of the Commission's investigations, the relevant geographic market for

II/232

all of the three product markets defined is restricted to Germany. However, as far as the market for services is concerned, it cannot be ruled out that MSG will over time — possibly with local partners — extend its service activities to other countries as well.

(46) 1. In the case of *pay-TV*, this is due in particular to the fact that the programmes offered in Germany are to a large extent not interchangeable with programmes offered in other countries. The conditions of competition for pay-TV suppliers are, at present and for the foreseeable future even after digitalization of the means of transmission, considerably different in the individual Member States for the following reasons:

— TV programmes are very largely nationally restricted and broadcast only in the relevant national language. Broadcasting rights are granted for one or more specified countries or language regions. Such granting of broadcasting rights and the timing of so-called 'windows' for feature films, video and pay-TV are subject to various statutory provisions and provisions agreed between the suppliers respectively. Furthermore, foreign language films or other programmes are almost never broadcast in the original language. Whereas, for example, English language films are frequently broadcast in the Benelux countries and in Scandinavia with subtitles in the relevant national language, dubbing is the usual practice in Germany, France, Italy and Spain. This entails differing costs for the broadcasters.

— It is true that, in certain niche markets, there are already programmes broadcast beyond linguistic borders, such as for example the Franco-German channel Arte or the music channel MTV. Generally, however, the range of programmes available and the programme mix are clearly determined by cultural differences and specific preferences on the part of the relevant audience.

(47) The language barriers and regulatory differences in particular will continue to exist even in the digital pay-TV age. It is to be assumed that pay-TV programmes in Germany will continue in future to be predominantly German language programmes. This factor alone means that the conditions of competition will be different from other non-German speaking countries.

(48) However, the market for pay-TV demonstrates further differences in the conditions of competition between Member States. The supplier structure in analog pay-TV is characterized by the fact that, in virtually every Member State, one particular supplier has a dominant market position or indeed a monopoly. This is the case with BSkyB in the United Kingdom, Canal Plus in France and Spain, Filmnet in the Benelux countries, Telepiù in Italy and Premiere in Germany. Only in Scandinavia are several suppliers operating (Filmnet, TV 1000, Tele TV). Similarly, prices, the number of programmes and combination possibilities differ. Even the encryption systems described above can be differentiated, albeit more at regional level, as between the large suppliers. Premiere is at present the only supplier with only one programme. The German market accordingly has a conspicuously lower level of penetration by pay-TV. Only around 800 000 German households having television — 2 % of the total — subscribe to Premiere. In France and the United Kingdom, the corresponding rates are 16 % and 15 % respectively. A difference in market penetration may not as such indicate a market access barrier. However, according to a number of television market competitors of the enterprises involved in the concentration, the discrepancy for example between Germany and France is due to differences in how attractive is the range of feature films shown on free-access advertising-financed television. The broad range of feature films in German television will probably make market access more difficult for third parties in the future as well.

(49) From a technical point of view, finally, account must be taken of the fact that in the case of pay-TV the viewer can receive programmes only via a decoder. This in principle opens up the technical possibility of operating price differentiation for identical programmes as between different Member States.

(50) Although following the introduction of digitalization it is to be expected that there will be an increase in supply and the development of various interactive services, the structural imbalances on the supply side will not be evened out in the short-term. It is already foreseeable that today's leading pay-TV suppliers will also play a leading role in digital television. The Commission's investigations have shown that Germany is regarded as the

largest potential market in Europe for pay-TV services.

(51) This would also be true for German suppliers wishing to operate in Austria. Here, bearing in mind the lack of any language barrier, a market could be assumed to exist for German language pay-TV. Currently, the pay-TV channel Premiere, which is operated by Kirch, Bertelsmann and Canal Plus, has the great majority of its subscribers in Germany; it has less than [...] % of its subscribers in Austria. There are currently no other pay-TV suppliers in these two countries. For this reason and because of the conditions of competition at the beginning of the digital pay-TV era set out below, the competition assessment of the concentration would be the same even on the assumption of a geographic market encompassing both countries.

(52) 2. Since the *services* being offered by MSG are closely connected with the supply of pay-TV, it must be assumed that the market for these services too will in the foreseeable future remain confined to Germany. Although MSG is, according to the parties, geared to Europe-wide activity and there are no obstacles to the supply of decoders and smart cards and the acquisition of subscribers abroad and the linguistic and regulatory differences, which are of some relevance in the pay-TV sector, have no direct effect on the service sector, the pay-TV suppliers handled by MSG would, as already noted, have to have transmission capacities with the respective national network owners. This may be of little relevance in countries where television programmes are received mainly by satellite, but it is of crucial importance to the German market where over 14 million households are on cable. MSG will accordingly initially operate only in Germany Even Premiere, which provides the necessary services itself and, according to its own statement, could also provide them for other pay-TV suppliers, has, as stated above, the great majority of its subscribers in Germany. To the extent that German providers of pay-TV also acquire subscribers in other German-speaking regions, MSG's service market will probably also spread to such areas.

(53) Even though it may be true that supply by foreign programme suppliers does not necessarily require them to have their own technical infrastructure in Germany, such an infrastructure appears to be an advantage. Hitherto the relevant services have always been provided by the national pay-TV supplier. The recent establishment of the German marketing and services undertaking Selco for BSkyB pay-TV programmes and other English language programmes further illustrates this. MSG's market chances also rest to a not insignificant extent on the existence of a well-developed cable network in Germany. This network will in itself and in conjunction with the telephone network also be of particular importance for future interactive services. This applies particularly in view of the imminent introduction of ISDN technology on the basis of the glass fibre broadband cable network, allowing the development of a two-way data transmission network with almost unlimited capacity. Against the background of the significantly smaller degree of connection to cable in most of the other Member States, particularly in France and the United Kingdom, there will for the foreseeable future not be any homogeneous conditions of competition between Germany and the other Member States. With regard to Austria and its cable networks, developments could, for the reasons set out above (point 52), result in the emergence of a German language market for services.

(54) 3. As regards *the operation of cable television networks*, there is already a national German market resulting from Telekom's statutory monopoly on laying and operating cable networks in public roads. This means that the conditions of competition in Germany are substantially different from those in other countries in which the network monopoly has already been abolished and in some cases a large number of private network operators exist.

C. *Effects of the concentration*

1. Technical and administrative services

(55) MSG will be the first supplier of technical and administrative services for pay-TV and other payment-financed communication services in Germany. Apart from Selco, an undertaking established in a special market segment, MSG will probably be the only supplier of such services on the German market in the near future and will thus have a monopoly. Although a monopoly in a future market that is only just beginning to develop should not necessarily be regarded as a dominant position within the meaning of Article 2 (3) of the Merger Regulation, the assumption that no market dominance exists presupposes in such a case that the future market in question remains

II/234

open to future competition and that the monopoly is consequently only temporary. However, this condition is not met in the present case. One can expect that the market for the services offered by MSG is being sealed off already in the development phase by the establishment of the joint venture and that MSG will acquire a long-term monopoly.

(a) *Elimination of potential competition*

(56) As already stated, experience in other countries shows that pay-TV suppliers or cable network operators are the most likely suppliers of technical and administrative services for pay-TV. In Germany, the only pay-TV supplier at present is Premiere, which is jointly controlled by its three shareholders, Bertelsmann, Kirch and Canal Plus. Premiere at present provides the necessary technical and administrative services for its pay-TV operation itself. On the other side there is Telekom, which holds a monopoly under public law on the broadband cable network, and which is virtually the sole cable network operator in Germany. Over 90 % of cable networks in Germany are operated by Telekom. With the setting up of MSG there is therefore a concentration of those enterprises which would each otherwise have had to install an infrastructure for digital pay-TV and provide the corresponding services. The most likely potential competition is thus excluded already in the development phase of the market.

(57) The parties argue in response to this that none of the undertakings setting up MSG would, in view of the substantial investment required, be prepared on its own to open up the market for the services being offered by MSG. According to the submission of the parties, none of the shareholders in MSG would accept the risk associated with the investment on its own and without the combined know-how required for the project. It must be granted to the parties that the investment required, which according to the documents available is estimated at DM [...] million over the next 10 years, is of a considerable order of magnitude However, Bertelsmann/Kirch on the one hand and Telekom on the other have the resources to carry out a project such as MSG on their own as well. Each also has a strong interest in setting up a technical infrastructure for digital pay-TV. In the case of Bertelsmann/Kirch, this is because of the additional programme possibilities that digital television makes available precisely for pay-TV In the case of Telekom, it is of considerable importance that in introducing digital television the preconditions be created for digital pay-TV. Since the additional programmes made possible by digitalization would probably, as already described, mostly be payment-financed, the success of digital television and hence better use of Telekom's cable network depends on the necessary infrastructure for pay-TV being ensured.

(58) The argument put forward by the parties that they could assume the risk of investing in digital infrastructure only jointly also appears rather unconvincing if one bears in mind experience with the introduction of the mobile telephone system GSM in Germany. Here too, an infrastructure covering as much of the country as possible had to be set up for a new communications system. Yet it proved possible for two competing mobile telephony operators to undertake the task. It was thus ensured that mobile telephony users can choose between two competing systems, system D1 operated by Telekom and system D2 operated by a private consortium. Whereas MSG's investment is to amount to some DM (..) million over 10 years, each of the D1 and D2 operators invested DM 2,5 to 3 billion over a period of five years.

(59) It is apparent from Telekom's documentation on the MSG project that Telekom has a strategic interest, through the development of a service undertaking, in entering the pay-TV market and the future market for interactive higher-value services. With the promotion of the spread of pay-TV as an entry into interactive services, the possibility opens up for Telekom to pursue a more strongly use-oriented policy in the broadband cable service area rather than a purely connection-related payments and charges policy. Against this background, it appears likely that, if it were not involved in MSG, Telekom would independently enter the market for technical and administrative services and would hence operate a pay-TV infrastructure that would not be controlled by Bertelsmann/Kirch. If necessary, Telekom could also undertake this task together with other partners not active in the field of pay-TV.

(b) *Partitioning of the market*

(60) It appears scarcely conceivable that competing suppliers in Germany could enter the market for technical and administrative services for pay-TV once MSG had established itself on that market. The installation of an alternative infrastructure would require a large amount of investment that would be undertaken by other suppliers or groups of suppliers only if there was a chance of market penetration. However,

such a chance would scarcely exist if MSG had already occupied the market. An alternative supply of services would have to impose itself against the combined competitive advantages and specific strengths of Telekom on the one hand and Bertelsmann/Kirch on the other. This appears hardly possible.

(aa) Strengths of Telekom

(61) The following specific strengths of Telekom are particularly relevant to the joint venture MSG and the market for the services offered by MSG:

— Telekom has a broadband cable network with at present over 13 million connected households, which represents more than 90 % of all cabled households in Germany (a total of 14 million cable connections). Of the two basic means of transmitting pay-TV, the cable network plays a far greater role in Germany than satellite TV, which at present can be received by seven million households. In addition, regional or local markets can be reached most cheaply via direct, locally limited inputs into the cable network. Because of the importance of the cable network in Germany, it makes sense for services relating to pay-TV to be provided only if they relate to pay-TV programmes that are also transmitted by cable. Restricting services to satellite programmes is conceivable only in special market segments, such as the area of activity covered by Selco, described below. Apart from such segments, any pay-TV provider is therefore dependent on the use of the cable network of Telekom.

— As the owner of the cable network, Telekom will be in charge of digitalization in the hyperband area. It will determine the gradual expansion of the transmission channels for digital television and can thus control the development of the transmission capacity for digital television.

— With its recently acquired 16,6 % holding in SES, Telekom has become the second largest shareholder, after the Grand Duchy of Luxembourg, in the main European satellite operator, which reaches 6 million households in Germany via the Astra satellites. Telekom is represented on the board of directors of SES and collaborates with SES in order to ensure compatibilitiy between the satellite network and the cable network in the digital television area. Even if Telekom does not control SES, it can, through its stake in SES, influence the allocation of satellite channels using the Astra satellites, which play a dominant role in the Community.

— As the owner of the broadband cable network and at the same time the holder of the monopoly for the fixed telephone network, Telekom controls the two main means of transmission that can provide the return channel required for interactive digital television. The use of the mobile phone system as a return channel, though technically possible, does not appear to be an appropriate alternative in economic terms at least for private households. According to the Commission's information, the broadband cable network in Germany cannot for technical reasons be used at present as a return channel. This would require further investment. This makes Telekom's telephone network or its glass fibre network all the more important as the only channel currently available for interactive television.

— With the cable network, Telekom has a customer base that may be of considerable importance for the operation of pay-TV. Telekom has direct access to about four million individual customers. It is in addition indirectly involved in the cable service companies, which look after a further 900 000 cable users in the network level 4 area (house distribution equipment). Furthermore, with its Telekom shops represented throughout the country, Telekom also has a national distribution base.

— As a cable and telephone network operator, Telekom has experience in network management and the technological know-how for communications services.

The specific strengths of Telekom outlined above confer substantial competitive advantages on MSG as compared with potential competitors.

(bb) Strengths of Bertelsmann/Kirch

(62) As the only supplier of pay-TV so far, Bertelsmann/Kirch already have, through Premiere, a subscriber base which they can also use in future digital pay-TV. The parties object in this respect that Premiere's subscriber base would not be sufficient to ensure a pay-back on the investment in MSG. This may be true. However, the risk of investment in a digital infrastructure is significantly reduced if the service provider can build on a subscriber base of analog pay-TV customers. Each competitor of MSG would have to build on a subscriber base which the pay-TV suppliers handled by them would have to first acquire.

II/236

Competitors of Bertelsmann/Kirch on the market for pay-TV would, in contrast to the parent companies of Premiere, have to start from scratch. The same applies to potential competitors of MSG in the area of technical and administrative services.

(63) As explained in detail below, Bertelsmann and in particular Kirch have preferential access to programme software. Bertelsmann/Kirch have to a far greater extent than their potential competitors in the pay-TV market the possibility, after the introduction of digital television, of offering additional attractive pay-TV programmes. Any potential competitor of MSG would consequently have to create a customer base without having the programmes of the future leading pay-TV supplier available for its technical infrastructure. This increases substantially the economic risk for an alternative service supplier.

(64) Lastly, Bertelsmann, which has experience in the customer management of 22 million book club members worldwide and is the leading book club operator in Germany, with six million book club members, has an important potential distribution channel for pay-TV. This too strengthens the chances of market success for future Bertelsmann/Kirch digital pay-TV programmes, which at the same time means for MSG that its customer base is secured. In this respect, Bertelsmann argues that a substantial part of the book club customer base is only leased to Bertelsmann by [...] independent selling agents, and that Bertelsmann is not interested in steering the buying power of book club clients from the current club products towards other products. However, on the one hand, it is unlikely that a selling method, which consists of recruiting clients through independent selling agents, would seriously prevent the extension of the club's product range. On the other hand, the argument of a transfer of club clients from books and discs to pay-TV products is not very convincing. Any successful pay-TV product presents a risk of transfer within the culture budget of consumers, whatever way is used for selling, and the successful introduction of digital pay-TV is precisely the declared objective of MSG and its parents.

(cc) Other service suppliers

(65) The only currently known company wishing to offer in Germany similar services to those to be provided by MSG is Selco Servicegesellschaft fur elektronische Kommunikation mbH (Selco). Selco is a joint venture between the private television broadcaster PRO 7 (50,1 %) and News Corporation Ltd (49,9 %), which belongs to the Murdoch group. According to the information available to the Commission, Selco's business object is confined to the marketing of foreign-language programmes in Germany. This probably involves primarily programmes from the pay-TV supplier BSkyB, which belongs to the Murdoch group. Selco will therefore operate in a niche market with a limited subscriber base. It should further be noted that 47,7 % of the shares in PRO 7 are held by Mr Thomas Kirch, the son of the owner of the Kirch group. It appears furthermore that PRO 7 to a large extent purchases Kirch-group programme software for use in its programmes. PRO 7 therefore should probably be included at least in the sphere of influence of the Kirch group. Against this background it is hardly to be expected that Selco will enter into active competition against MSG.

(66) The Luxembourg company Europa Online SA, which is mentioned by the parties and which is in the process of being set up, is, according to press reports, confined to interactive information services that are computer-supported. The share capital reported in the press of an equivalent of DM 1,25 million suggests that it is improbable that Europa Online will establish an infrastructure for digital pay-TV.

(67) Contrary to the submission of the parties, it cannot realistically be expected that other competitors will enter MSG's market in view of its competitive advantages as described above. In this connection, a contradiction in the parties'submission should be pointed out. On the one hand, MSG's investment risk is said to be so high that Bertelsmann/Kirch and Telekom would each be unable to take on the risk on their own. On the other, according to the parties, other competitors will enter the market once MSG has successfully established itself on it.

(68) The assumption that in the long term MSG is to be expected to have a monopoly position is confirmed both by the results of the oral hearing, in which a number of third parties took part, and by a large number of responses from other firms surveyed by the Commission, firms which operate in the television area or other areas of relevance to MSG's activity. It is accordingly not to be expected that an alternative service provider could establish itself as a competitor of MSG.

(69) A dominant position on the part of MSG is also to be expected even if MSG with its present shareholder structure were to decide to install a decoder base using a so-called 'common interface'. 'Common interface' means here an encryption technology design that allows any other

pay-TV or service provider to operate conditional access and subscriber management using an available decoder base without requiring a licence for the use of the conditional access system of the firm that installed the decoder base. This can be achieved because modules of different programme or service providers can be plugged into a decoder equipped with a common interface, and each module contains the proprietary encryption elements. It is true that, under such a system, potential competitors would no longer require investment in their own decoder base. However, it cannot be excluded that, where decoders are leased to viewers, MSG might impose on them in the lease contracts the requirement that they should not use the decoder with modules of other pay-TV or service providers without the consent of MSG. Such a contractual restriction would be possible at the present stage of understanding within the DVB project. As a consequence of the restriction, competitors of Bertelsmann/Kirch or of MSG would not have free and uncontrolled access to the installed decoder base in spite of the common interface, as long as decoders are mainly or at least to a substantial extent leased by MSG and not bought by pay-TV subscribers. According to the business plan of MSG, this will be the case during the first five years, during which the proportion of leasing of new equipment should fall progressively from approximately 70 % to approximately 20 %. This means that free access will not be possible during a fairly lengthy period in which digital television is being introduced. But this period is decisive in determining market conditions on MSG's market. Moreover, even after this period, free access will be possible only for decoders sold to subscribers and not for lease decoders already installed.

(70) Even if MSG does not limit the access of other service providers in the leasing contracts on decoders, it can be expected that MSG would have a dominant position on the separate conditional-access and subscriber-management market that could then in theory exist. Thanks to the business potential of Bertelsmann/Kirch in the pay-TV area, MSG will on its market probably benefit from economies of scale (subscriber base, number of programmes handled) that would make competition from other service providers much more difficult. On the other hand, Telekom's participation in the joint venture allows MSG to provide pay-TV suppliers with the necessary user contracts for Telekom's broad band cable network, even if these contracts are legally made between Telekom and the users. MSG can therefore, in contrast to other potential service suppliers, offer programme suppliers a comprehensive service covering all the technical prerequisites for pay-TV.

(71) Furthermore, if MSG occupies the market with its present shareholder structure, any new pay-TV suppliers will probably be largely dependent on MSG's supply of services, even if, with a common interface and unlimited access to decoders, conditional access and subscriber management can be provided by other service suppliers using the decoder base installed by MSG. It is not to be expected that the average pay-TV subscriber would wish to have dealings with several subscriber management operators. It is in the viewer's interest to have as far as possible a single body dealing on his behalf with all questions relating to the taking of pay-TV (e. g. extension of the subscription to additional programmes, reduction of programmes subscribed to, settlement of the subscription). Whichever service supplier can provide the largest number of programmes and the most attractive programmes will thus occupy a favoured position against which the other service suppliers will have difficulty in asserting themselves. It is to be expected that MSG will acquire such a favoured position since, in view of their programme resources, Bertelsmann and Kirch will be able most rapidly and most extensively to provide the digital pay-TV market with attractive programmes. Any new pay-TV suppliers would therefore substantially reduce their sales prospects if they did not make use of MSG's services and offered the customer their own subscriber management or that of another service supplier.

(72) The 'suction effect' of a service undertaking controlled by Bertelsmann and Kirch could be countered most easily by a cable network operator that took over pay-TV subscriber management itself and possibly offered cable customers programme packages which it had itself put together. Because of the structural conditions in Germany, such a function could be performed only by Telekom, which dominates the market for cable networks. The cable islands of the private cable network operators are mostly too small to justify the expenditure involved in the investment that would be required for them to have their own conditional access and their own subscriber management for pay-TV. In contrast to Telekom's broad band cable network, the private operators' cable networks are moreover not such an essential means of transmission for pay-TV that Bertelsmann/Kirch's programmes would be obliged to use them. As a result of Telekom's involvement in MSG, therefore, a market structure is created

II/238

which suggests that MSG will have a dominant position even where a common interface is used.

(c) *Summary*

(73) For the reasons set out above it is to be expected that the proposed concentration will give MSG a durable dominant position on the market for technical and administrative services in Germany.

2. Pay-TV

(74) If MSG held a dominant position on the market for technical and administrative services, this would considerably strengthen the position of Bertelsmann/Kirch on the downstream market for pay-TV. It would have to be expected that the setting-up of MSG would give Bertelsmann and Kirch a durable dominant position on the market for pay-TV.

(a) *Present position of Bertelsmann/Kirch on the market for pay-TV*

(75) At present, Premiere, which is jointly controlled by Bertelsmann, Kirch and Canal Plus, is the only pay-TV supplier in Germany. Even if, as a result of increased capacity following the digitalization of television, a large number of new pay-TV programmes are possible and hence competitors may be expected to enter the pay-TV market, there is significant evidence that Bertelsmann/Kirch, irrespective of the establishment of MSG, will retain a leading position on that market.

(76) Bertelsmann and Kirch have preferential access to the software that is attractive for pay-TV. Kirch is the leading German supplier of feature films and entertainment programmes for television. Kirch has at its disposal a stock of about 15 000 movies of all types and 50 000 hours of television programmes and also has extensive production activities in the area of movies and television. Together with Axel-Springer-Verlag, Kirch also controls ISPR. ISPR has become the leading agency for sports broadcast rights and, for example, markets the Bundesliga football games centrally. Bertelsmann also has access to attractive sports rights and film production activities through Ufa.

(77) Both undertakings have widespread activities in free-access commercial television. The commercial television broadcasters in which Bertelsmann and Kirch have holdings or which have to be included within the sphere of influence of the Kirch group achieve a share of some 80 % of television advertising revenue in Germany (RTL, SAT 1, PRO 7, RTL 2, VOX, Deutsches Sportfernsehen and Kabelkanal). Kirch in particular, with its associated companies or the companies to be included in its sphere of influence (SAT 1, DSF, PRO 7 and Kabelkanal), has the possibility of making multiple use of film rights or sporting rights. This enables the Kirch group to pay higher prices than other competitors in acquiring such rights. Their preferential access to software means that Bertelsmann/Kirch can, following the digitalization of television, offer additional attractive pay-TV programmes and programme packages more easily than potential competitors.

(78) In this connection, it is of particular importance that Bertelsmann/Kirch's programme resources allow different programme packages to be put together that are tailored to the requirements of specific target groups and can be offered at an attractive subscription price. Experience in countries where pay-TV is already at a more advanced stage of development shows that the bringing together of individual programmes to form programme packages is a key factor in achieving success on the pay-TV market. Pay-TV suppliers occupying a less important position on the market may moreover be forced to include their programmes in the leading pay-TV supplier's packages, thus giving it control over its competitors.

(79) Account must also be taken of the fact that, as already noted, Bertelsmann is the leading book club operator in Germany and thus has at its disposal an important potential distribution channel for pay-TV programmes. In the case of Kirch, a further competitive advantage derives from its 35 % holding in Axel-Springer-Verlag, which for its part has a 20 % stake in SAT 1. Axel-Springer-Verlag is the largest newspaper publisher in Germany and at the same time also the leading publisher of television programme magazines. Obviously, the media association of Kirch and Axel-Springer-Verlag is likely to promote the acceptance of pay-TV programmes in which Kirch is involved.

(80) With regard to the position which Bertelsmann and Kirch hold on the pay-TV market, another important point is the fact that the competition ban imposed on Premiere's shareholders, as described above, removes any chance of competition between both undertakings on the pay-TV market. This fact is perhaps less important in the case of analog television, since, given the shortage of available transmission channels, the possibility of new pay-TV programmes is in any

event limited. However, with the increase in transmission capacities following digitalization, both Bertelsmann and Kirch will have the possibility of supplying a much larger range of programmes on the market. Against this background, the competition ban acts as a restriction of competition to a much greater extent than previously.

(81) Thus, Bertelsmann/Kirch already at present has an extraordinarily strong position on the pay-TV market.

(b) *Strengthening of the position of Bertelsmann/Kirch through MSG*

(82) If, for the reasons set out above, MSG achieves on a lasting basis a monopoly position as an operator of a digital infrastructure for pay-TV, all pay-TV suppliers that may enter the pay-TV market following digitalization will be forced to take the services underlying pay-TV from an enterprise controlled by the pay-TV suppliers that are already in a leading position. Future pay-TV competitors of Bertelsmann/Kirch would have the choice of either accepting MSG' conditions or staying out of the market. This assessment is supported by the results of the hearing and by a large number of responses from enterprises surveyed.

(83) The parties argue in response to this that each pay-TV programme supplier has the alternative of providing this service themselves, as is currently generally usual. This is incorrect. A look at the present situation shows that any new programme supplier entering the market is obliged to make use of the services of that pay-TV supplier which is already established on the market with technical infrastructure. This follows from the fact that the economic risk is normally too great for a programme supplier to install its own new infrastructure for a new programme. Experience has shown that, for example, a new programme supplier in the United Kingdom is dependent on BskyB's infrastructure and a new supplier in France on that of Canal Plus. With the setting up of MSG under its current shareholder structure, a comparable situation would also arise for digital pay-TV in Germany.

(84) Via MSG, therefore, Bertelsmann/Kirch could significantly influence competition from future pay-TV suppliers and to a large extent shape it as they wished. Through their controlling influence in MSG, they can ensure that MSG's terms and conditions and in particular the price structure are arranged in a way that is advantageous to their own programmes and disadvantageous to those of their competitors. Bertelsmann/Kirch could also derive benefit from artificially high prices, since unlike their competitors they have a share in MSG's earnings.

(85) There would furthermore be the possibility, citing technical constraints that could be verified only with difficulty, of supplying MSG's services in such a way that the market access of programmes that ran counter to the interests of Bertelsmann/Kirch was at least delayed. The same also applies to Telekom's input of programmes into the cable network. It cannot be ruled out that, if it is concentrated with Bertelsmann/Kirch in MSG, Telekom will also take its partners' interests into account. The difficulties previously encountered in feeding programmes broadcast via Astra into Telekom's cable network suggest that, citing technical constraints, it can influence access to the cable network without in any provable way infringing the neutrality requirement.

(86) As already stated, Telekom has it in its power to control the digital development of the hyperband in its broadband cable network. Telekom intends to make three channels available for digital television by the end of 1995, with each channel being able to broadcast digitally between four and 10 television programmes. This means that initially an additional transmission capacity will be available for only 30 new programmes at the most. A large proportion of this capacity can easily be taken up by Bertelsmann/Kirch, particularly since Premiere will be able to introduce near-video-on-demand, which would use up a considerable proportion of the transmission capacity. Telekom has stated that the digitalization of the other 12 channels available will take place in the light of general economic conditions in accordance with the principle of development that will achieve optimum coverage tailored to suit the needs of the market. Having set itself these relatively vague criteria, Telekom has it in its power to base the further development of the hyperband on the pay-TV interests of its partners in MSG. Account should also be taken of the fact that development can in any case take place only gradually, since digitalization of a new channel takes about six months and involves investment of around DM 50 million.

(87) Bertelsmann/Kirch also have the possibility of influencing via MSG the location of their competitors' programmes. The large number of possible programmes in digital television makes it

necessary to establish a system of user guidance to help the viewer locate individual programmes in the 'programme jungle'. Since the necessary on-screen modulator is contained in the decoder box, such user guidance will probably be operated by whoever installs the decoder base. The control of user guidance enables the operator to place programmes of competing pay-TV suppliers on positions in the programme menu which make them less attractive. In this context, it is important, for example, how many operating steps are required to get access to a certain programme.

(88) Bertelsmann/Kirch similarly have the possibility via MSG of influencing the marketing of competing programmes as regards the placing of such programmes on the smart cards issued by MSG. MSG, as the operator of conditional access, places on the smart cards the pay-TV programmes and programme packages offered, which are then released by the authorization signals transmitted with the television signal. It is to be expected that the average pay-TV subscriber will not wish to have to use a variety of different smart cards. MSG can therefore impede any competitors of Bertelsmann/Kirch by placing them not on the first smart card with the attractive programmes, but on additional new smart cards.

(89) Lastly, Bertelsmann/Kirch could acquire substantial informational advantages through MSG. This applies in respect of planned new programmes, but in particular also in relation to the customer structure and viewer behaviour of the subscribers handled by its subscriber management system. Bertelsmann/Kirch do not even have to acquire access to individual customer data. It is sufficient for them to obtain access to non-personal data giving, for example, information on the age structure of the viewers of the relevant programmes. In the case of interactive pay-TV services such as pay-per-view, moreover, it can be ascertained from non-individualized data which specific group prefers what specific programme contents and to what extent. Such information confers substantial competitive advantages since it makes it much easier to develop target-group-oriented programmes or programme packages.

(90) The parties counter this by arguing that it could not be in the interest of MSG's shareholders to act to the prejudice of other pay-TV suppliers as this would endanger the economic success of MSG. This argument appears questionable, since MSG is, as was stated above, expected to achieve a monopoly position. Other pay-TV suppliers will be dependent on the services supplied by MSG even if the conditions are unfavourable and there are possibilities of prejudice. Furthermore, Bertelsmann and Kirch have a particular interest in controlling the pay-TV market and in influencing the chances of their competitors notwithstanding a possible negative impact of such behaviour on MSG's profits. Any counter-argument by the parties that the participation of Telekom ensures that MSG's activity will be non-discriminatory and supplier-neutral is not convincing. Bertelsmann and Kirch hold two-thirds of the shares in the joint venture. Even if Telekom exercises joint control with Bertelsmann and Kirch over the joint venture, it cannot be expected that MSG will behave in a neutral manner where the interests of both Bertelsmann and Kirch coincide. This is of particular relevance, since Kirch and Bertelsmann possess know-how for pay-TV technology, and in addition will be the most important customers of MSG's services, so that they will be able to restrict Telekom's scope for decision-making in MSG.

(c) *Summary*

(91) In view of the considerable competitive advantages that are involved for Bertelsmann and Kirch in MSG and the possible adverse effect on future competitors, it is to be expected that the proposed concentration will create a durable dominant position for Bertelsmann and Kirch on the pay-TV market in Germany.

3. Cable networks

(92) It can be expected that the proposed concentration will in the long-term also adversely affect to a considerable extent effective competition on the market for cable networks in Germany. In the immediate future, the Telekom monopoly under public law in the broadband cable network will continue. It is however to be expected that, following the liberalization of basic telephone services in 1998, the cable network market will also be deregulated and opened up to competition. There is a danger that, by jointly operating the pay-TV structure together with the leading pay-TV suppliers, Telekom will strengthen its position as a cable network operator in such a way that, following liberalization, competition in the cable network market will be substantially impeded and thus Telekom's dominant position safeguarded. In the same way as Bertelsmann/Kirch remove

II/241

Telekom as a potential competitor in the market for technical and administrative pay-TV services, Telekom, through the proposed joint venture, prevents Bertelsmann and Kirch from being available as potential partners for other future cable network operators.

(93) For the time being, cable operators operating at network level 4, i.e. in the area of private home-distribution facilities, can only to a very limited extent install cable networks which are independent of Telekom's broadband cable network. Establishing the required satellite reception equipment (head ends) is subject to the Federal monopoly on radio plants and needs an authorization from the Ministry for Post and Telecommunications (BMPT). According to the administrative practice of the BMPT, a general authorization is given only for head ends of cable networks which do not go beyond the frontiers of a piece of land or which cover linked pieces of land with not more than 25 supplied households. Otherwise, a special authorization is required. As to cable networks between pieces of land which are not linked, the BMPT does not in principle give authorization for head ends. The only exception from this prohibition is made for private operators outside existing or projected areas of Telekom. This administrative practice largely protects Telekom from competition by private cable network operators. Should this practice be abandoned in liberalizing the market for cable networks, cable companies operating at network level 4 will have the opportunity to link their cable islands which at present are limited to single estates and thus to enter into competition with Telekom. This competition can, however, be rendered much more difficult for the private network operators if Telekom together with Bertelsmann and Kirch controls MSG as the dominant service company. There would in particular be the risk that private operators could not obtain the programmes of the leading pay-TV suppliers Bertelsmann and Kirch, which are required for attractive programme packages, or could obtain them only on unfavourable conditions. The creation of MSG with the current shareholding structure is therefore liable to strengthen the dominant position of Telekom as a cable network operator.

VI. UNDERTAKINGS WHICH THE PARTIES PROPOSE TO GIVE

(94) By letter of 20 October 1994 the parties proposed giving various undertakings so as to remove the doubts against the proposed concentration. The proposed undertakings comprise the following points:

— MSG will choose a decoder base that works on the basis of a common interface provided that a common interface is developed in accordance with the standards defined by DVB and minimizes the risk of piracy, so that this technology can be accepted by pay-TV providers.

— MSG will promote the free sale of decoders in the market and, in the case of renting, it will not impose any clause forbidding the use of the decoder for receiving programmes not handled by MSG.

— MSG undertakes not to disclose to its parent companies any information on programmes or subscriber data of other pay-TV suppliers (even in non-individualized form).

— MSG will choose a neutral and non-discriminatory style of presentation within the framework governing the technical features for the presentation of an Electronic Programming Guide (EPG) and will, as far as technically possible, provide information on programmes not handled by MSG.

— MSG will establish an advisory body that will control the non-discriminatory manner of display within EPG. On the board, the customers (service providers) of MSG will be represented, and proposals made by the advisory body will be taken into account by MSG in its decisions.

— MSG will charge reasonable market prices and will operate a transparent price policy, in particular with regard to equivalent prices for equivalent services.

— Telekom undertakes that, in addition to the currently installed 30 channels, it will open up its networks for further digital transmission of programmes in order to have sufficient reserves of technically usable transmission capacity and to avoid any shortage of channels.

(95) These proposed undertakings must be deemed insufficient to avoid the abovementioned creation or strengthening of dominant positions. It is true that they relate to certain aspects which, generally, can be of particular importance for the competitive structure of future digital pay-TV. In particular, the introduction of a common interface appears from a competition point of view to be a solution to the problem of conditional access that would have a positive effect on the development of free and unfettered competition. This is true at least if

there are no contractual restraints on access to the decoder base for other pay-TV suppliers. Equally, a transparent price policy with respect to administrative and technical services is a positive factor for the competitive development of digital pay-TV. Given the current structure of shareholders of MSG, however, the proposed undertakings do not suffice to remove the competition problems in the present case. Moreover, they are partly subject to conditions and reservations which put their enforceability into question. Furthermore, apart from the undertakings concerning the introduction of a common interface and the creation of sufficient digital channel reserves by Telekom, they basically comprise only the commitment not to abuse in certain respects a dominant position held by MSG on the market for administrative and technical services to the detriment of competitors in the market for pay-TV.

(96) The undertaking concerning the introduction of a common interface is subject to the condition that it minimize the risk of piracy and that the technology can be accepted by pay-TV providers. It is thus merely a declaration of intent which leaves scope for MSG to choose a decoder infrastructure on the basis of a proprietary system, claiming that the common interface is not sufficiently secure or that there is a lack of acceptance by potential customers. In this context, it should be borne in mind that the most important potential customer of MSG is Premiere, which is jointly controlled by Bertelsmann, Kirch and Canal Plus. It is well known that Canal Plus is resolutely opposed to a common interface and vigorously supports proprietary encryption systems in digital television as well as elsewhere. Besides, Bertelsmann recently entered a strategic alliance with Canal Plus. One practical project to come out of this strategic alliance is the agreement to set up a joint venture to develop a digital encryption system.

(97) Even if the undertaking were given in a form which ensured the introduction of a common interface, the incompatibility of the concentration with the common market would not be removed. As set out above (points 70 to 72), MSG in its current structure of shareholders would achieve a dominant position in the market for technical and administrative services even on the basis of a common interface with unlimited access. Against this background, a common interface is not capable to remove the serious harm to competition resulting from the combination of the leading cable network operator and the leading pay-TV suppliers in the MSG joint venture.

(98) The proposed undertakings relating to the behaviour of MSG towards its customers and the further digitalization of the cable network by Telekom are not such as to avoid the creation or strengthening of a pre-existing dominant position held by Bertelsmann and Kirch in the market for pay-TV. As to MSG's assurance of non-discriminatory treatment of customers, this merely complies with the legal obligations incumbent on undertakings in a position of market dominance. In view of the various possibilities of hidden discrimination that exist in practice, it would furthermore be difficult to prove that MSG was not behaving neutrally *vis-à-vis* programme providers. The proposed advisory board would not alter this assessment since it would have only advisory functions and its proposals would not be binding on MSG. In addition, the undertaking not to pass programme information or subscriber data to the parent companies of MSG could not prevent the parent companies from obtaining informational advantages in non-verifiable ways because of the particular relationship and information links between them and MSG. Nor does the undertaking by Telekom that it will provide sufficient digital channel reserves afford any guarantee that further digitalization will not, citing technical and economic needs, be tailored to suit the interests of Bertelsmann and Kirch. In any case, it is rather a general declaration of intent and not a firmly defined undertaking.

(99) All in all, it can be said that only the undertaking on the introduction of a common interface contains a structural aspect. The undertaking, however, is not sufficient to prevent market dominance by MSG, and it is moreover subject to reservations which make it amount to a non-binding declaration of intent. The other proposed undertakings have to be described as mere pledges of conduct which have no structural dimension and whose fulfilment cannot in any case be checked. They are as a matter of principle inappropriate to solving the structural problem, namely that the creation of MSG creates or strengthens dominant positions on the markets for administrative and technical services, pay-TV and cable networks.

VII. DEVELOPMENT OF TECHNICAL AND ECONOMIC PROGRESS

(100) The parties point out that the rapid acceptance of digital television will be promoted by the services

offered by MSG. It is true that the successful spread of digital television presupposes a digital infrastructure and hence that an enterprise with the business object of MSG can contribute to technical and economic progress. However, the reference to this criterion in Article 2 (1) (b) of the Merger Regulation is subject to the reservation that no obstacle is formed to competition. As outlined above, however, the foreseeable effects of the proposed concentration suggest that it will lead to a sealing-off of and early creation of a dominant position on the future market for technical and administrative services and to a substantial hindering of effective competition on the future market for pay-TV.

(101) This hindering of effective competition does in fact make even the achievement of technical and economic progress questionable. It is extremely doubtful whether, under the conditions given, the establishment of a digital infrastructure for pay-TV by MSG will actually contribute in a positive manner to the development of technical and economic progress. It is to be feared that, in view of the effects of the concentration described above, potential suppliers of digital pay-TV will not decide to enter the market to the same extent as would be the case with a service supplier whose shareholder structure would ensure strict neutrality. The successful spread of digital television would, in such a situation, be hindered rather than promoted. This assumption is underpinned by a series of opinions from the enterprises surveyed, which have stated that, in the event of the concentration being carried out, they would have to review and possibly abandon existing plans or thoughts on future pay-TV supply in the digital television area.

VIII. SUMMARY

(102) For the reasons outlined above, it is to be expected that the proposed concentration would lead to the development or strengthening of dominant positions and that effective competition in a substantial part of the Community would as a result be significantly hindered. The concentration must therefore be declared incompatible with the common market, in accordance with Article 2 (3) of the Merger Regulation, and with the functioning of the EEA Agreement, in accordance with Article 57 of that Agreement.

HAS ADOPTED THIS DECISION:

Article 2

The concentration by way of the creation of a joint venture as notified by Bertelsmann AG, Deutsche Bundespost Telekom and Taurus Beteiligungs GmbH & Co. KG is hereby declared incompatible with the common market and the functioning of the EEA Agreement.

Article 2

This Decision is adressed to:

1. Bertelsmann AG,
   Carl-Bertelsmann-Straße 270,
   D-33311 Gütersloh.

2. Deutsche Bundespost Telekom,
   Godesberger Allee 87-93,
   D-40474 Dusseldorf.

3. Taurus Beteiligungs GmbH & Co. KG,
   Robert-Burkle-Straße 2,
   D-85737 Ismaning.

Done at Brussels, 9 November 1994.

For the Commission

Karel VAN MIERT

Member of the Commission

II/244

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(a) DECISION

Dear Sirs,

Subject: **Case No. IV/M.561 - SECURICOR DATATRAK**
Your notification of 17.2.1995 pursuant to Article 4 of Council Regulation No 4064/89.

1. On 17 February 1995 two British undertakings Securicor International Limited and Securicor Datatrak Limited and the Dutch undertakings, Centraal Beheer Pensioenverzekering NV (Centraal Beheer) and Parcom Services BV notified to the Commission the creation of a joint venture which will provide vehicle tracking services within the territory of the Netherlands.

2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of application of Council Regulation No 4064/89 and does not raise serious doubts as to its compatibility with the common market and with the functioning of the EEA Agreement.

I. THE PARTIES

3. Securicor International Limited and Securicor Datatrak Limited are both subsidiaries of the British undertaking Securicor Group plc whose main activities, carried out in the UK and internationally, include express parcels, freight haulage, document delivery and mail services; the transportation and care of cash and valuables; security guards and patrol, custodial services; the manufacture, sale, installation and maintenance of communication products, electronic surveillance and alarm systems.

4. Central Beheer is part of the Achmea Group created as a result of a recent merger between two Dutch insurance undertakings the AVCB Group and the Zilveren Kruis Group. The Achmea Group is active in both life and non-life insurance.

5. Parcom Services BV is an investment company belonging to the Banking and Insurance Dutch Group ING.

II. THE AGREEMENTS

6. Securicor International, Central Beheer and Parcom Services will first create a holding company Security Datatrak Europe BV (SDE) which will hold all the share capital of an operating subsidiary to be created, Security Datatrak Netherland BV (SDN) SDN will carry out in the Netherlands a new telecommunication service, namely, a vehicle tracking system which will provide fleet operators with real time information on the position and status of all vehicles under their control.

7. SDN and Securicor Datatrak Limited will enter into an exclusive supply and licence agreement for the Netherlands by which Securicor Datatrak Limited will supply the infrastructure equipment (the base stations), the vehicle equipment (the locators) and will license the know how, including the software, necessary to run the system.

III. CONCENTRATION

8. SDN will be jointly controlled, through SDE, by Securicor International, Central Beheer and Parcom Services as each of the parent companies will hold 33.33% of the share capital of SDE and major decisions concerning the activity of SDN such as the approval of the business plan, the appointment of senior staff will require the consent of all parents.

9. SDN will be an autonomous full function undertaking which will provide specific telecom services, namely a vehicle tracking services within a national geographic market (the Netherlands). To perform these services SDN has to build a terrestrial infrastructure of LF and VHF radio stations and to benefit from the service the customers must have the appropriate vehicle equipment. These infrastructure and vehicle equipments are manufactured in the UK by another subsidiary of the Securicor Group, Securicor Datatrak Limited, which will supply them on an exclusive basis for the Netherlands. SDN will then sell and install the vehicle equipment to the customers either directly or through a network of agreed service providers established by SDN throughout the Netherlands. The primary objective of SDN is not to be a sales agency to distribute Securicor Datatrak equipment but to provide a specific service requiring a specific technology and equipment which is currently only marketed by Securicor Datatrak Limited.

10. SDN will therefore be an autonomous full function undertaking with its own assets and personnel and it will not give rise to the coordination of the competitive behaviour of its parents since only one parent, the Securicor Group, will be active in the JV services market although in a different geographic market.

11. Thus the notified operation constitutes a concentration within the meaning of the Merger Regulation.

IV. COMMUNITY DIMENSION

12. The operation has a Community dimension. The worldwide turnover of all undertakings concerned amounts to more than 5,000 million ECU. The Community wide turnover of each parent exceeds 250 million ECU and the undertakings concerned do not achieve more than two thirds of their aggregate Community-wide turnover within one and the same Member State.

V COMPATIBILITY

13. The vehicle tracking services which will be provided by the JV in the Netherlands will use the automatic vehicle location (AVL) technology developed by Securicor Datatrak Limited. The Datatrak system consists of a new technology which combines the accurate position determination of the vehicles with the reliable transmission of the position information

14. The infrastructure of the Datatrak system in the Netherlands will comprise three main integrated elements: a network of 5 low frequency (LF) transmitters allowing position determination, a two way data transmission network which will comprise 21 UHF base stations connected to a central computer by means of land lines and a network control centre which will inter alia monitor and control the LF stations and operate a customer service desk for answering customer queries.

In order to operate the base stations a licence attributing the radio frequencies has to be obtained from the Dutch Authorities

15. The service will be marketed to fleet operators Potential customers include inter alia distribution companies, emergency services (police, ambulance, fire brigades), national courier services, public transport and taxi services The standard customer vehicle equipment includes the locator, an electronic device combining the positioning and the data communications equipment in a single compact unit and a single whip antenna In addition to the basic standard equipment, customers will be offered additional equipment to perform more specific functions Customers will also need a display system located at their premises to present the vehicle location and status data in a form understandable to the user.

16. According to the parties, this is a new service and there are currently no competitive systems in the market. However the parties indicated that other systems developed by competitors, which will combine both elements, may be offered in the future in the Netherlands subject to prior authorization for the use of radio frequencies by the Dutch authorities Both positioning systems and mobile data transmission

systems are available but there is at present no other system which offers the integration of both

17. The service to be provided will be quite a new one in the Dutch market and therefore there are no affected markets in the sense of the Merger Regulation. Besides, both the Achmea Group and the ING Group are not active at all neither in the operation of vehicle tracking services nor in the up stream market of development, manufacture and sale of vehicle tracking systems and equipment. Therefore, there is neither any addition of market shares outside the jv geographic market nor any risk of foreclosure of the up-stream market for systems and equipment since there will be any pooling of technological know-how or manufacturing capacities.

VI. ANCILLARY RESTRAINTS

18 Securicor Datatrak Limited, a company belonging to the Securicor Group will enter in an exclusive supply and licence agreement for the Netherlands to supply SDN with all the infrastructure equipment and the vehicle equipment. However, SDN may purchase equipment from a third party if better conditions are offered providing that such equipment meets the technical criteria of Security Datatrak and no know-how of Securicor Datatrak is used on the manufacture of such equipment.

19. The supply and licence agreement also deals with the exclusive licence for SDN to use, within the geographic area covered by the agreement, the trade names, trade marks, know-how, software and other rights owned by Securicor Datatrak in connection with the vehicle tracking system.

20 The supply and licence agreement is directly related to the concentration. However, the exclusive nature of these agreements goes beyond what is strictly necessary for the implementation of the concentration and therefore the supply and licence agreement cannot be considered as ancillary to the proposed concentration and should be assessed under the provisions of Article 85 of the Treaty.

VII. CONCLUSION

21. Based on the above, the proposed concentration does not raise serious doubts as to its compatibility with the common market and the functioning of the EEA Agreement.

For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the functioning of the EEA Agreement. This decision is adopted in application of Article 6(1)b of Council Regulation No 4064/89

For the Commission

II/247

II/248

DOCUMENTS ON THE APPLICATION OF THE COMPETITION RULES TO THE TELECOMMUNICATIONS SECTOR

III Judgments of the Court of Justice relating to Telecommunications

A Judgments relating to Articles 85 and 86 EC

Case 41/83

Italian Republic

v

Commission of the European Communities

'Abuse of a dominant position (Article 86) — Public undertakings (Article 90) — International agreements (Article 234) — Article 222 — Article 190 of the Treaty'

Summary

1. *Competition — Dominant position — Activities of a national telecommunications undertaking — Exercise by that undertaking of rule-making powers — Application of Article 86 of the Treaty*
   (EEC Treaty, Art. 86)

2. *Competition — Dominant position — Abuse — Prohibition by an undertaking holding a statutory monopoly on telecommunications of certain activities of private message-forwarding agencies — Criteria for appraisal*
   (EEC Treaty, Art. 86)

3. *Application for annulment — Submissions — Infringement of Article 90 (2) of the Treaty pleaded by a Member State other than the Member State which controls the undertaking in question — Whether admissible*
   (EEC Treaty, Art. 90 (2) and first paragraph of Art. 173)

4. *Measures adopted by institutions — Statement of reasons — Duty — Scope*
   (EEC Treaty, Art. 190)

1. The management, by an undertaking having the status of a nationalized industry, of public telecommunication equipment and its placing of such equipment at the disposal of users on payment of a fee amounts to a business activity which as such is subject to the obligations imposed by Article 86 of the Treaty. Comprised within that activity, and therefore subject to review in the light of Article 86 of the Treaty, is the autonomous exercise of rule-making powers strictly limited to the fixing of tariffs and the conditions under which services are provided for users.

2. An undertaking holding a statutory monopoly on the management of

telecommunications networks infringes Article 86 of the Treaty when it prohibits the activities of private message-forwarding agencies handling international telecommunication traffic, unless it is shown that such agencies are abusing the public networks. The employment of new technology constituting technical progress in conformity with the public interest cannot be regarded as an abuse.

3. Pursuant to the first paragraph of Article 173 of the Treaty, Member States may, by means of an application for annulment, challenge any measure adopted by the Commission in the form of a regulation or an individual decision and may, in so doing, plead the infringement of any stipulation in the Treaty in support of their claims. It follows that a Member State may, in support of such an application, plead an infringement by the Commission of Article 90 (2) of the Treaty, the observance of which the Commission is required to ensure, even if the undertaking affected by the application of that provision comes under the authority of another Member State.

4. The statement of the reasons on which a decision having adverse effect is based must enable the Court to review the legality of the decision and to provide the party concerned with details sufficient to allow that party to ascertain whether or not the decision is well-founded. The requirement of a statement of reasons must be viewed in the context of the circumstances of the case, and in particular the content of the measure in question, the nature of the reasons relied on and the interest which addressees, or other persons to whom the measure is of direct and individual concern, within the meaning of the second paragraph of Article 173 of the Treaty, may have in obtaining explanations.

OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 16 January 1985 *

Mr President,
Members of the Court,

The case which this Court has before it is unusual on more than one count. It is, as has been observed, the first of its kind.

The Italian Government, acting on the basis of Article 173 of the EEC Treaty, has asked the Court to declare void a decision of 10 December 1982, [1] in which the Commission declared certain provisions, adopted successively by the United Kingdom Post Office and by British Telecommunications (hereinafter jointly referred to as 'BT') and designed to curtail the activities of message-forwarding agencies, to be contrary to Article 86 of the Treaty.

Thus the applicant State is not the one in which the undertaking in question has its seat. On the contrary, the Government of the United Kingdom intervened in the proceedings in support of the Commission. Furthermore, BT, which had not implemented the provisions complained of, did not incur any fine, and indeed refrained from seeking the Court's censure of a

* Translated from the French.

1 — Commission Decision No 82/861/EEC (Official Journal 1982, L 360, p. 36)

JUDGMENT OF THE COURT
20 March 1985 *

In Case 41/83 ...

Italian Republic, represented by Arnaldo Squillante, Head of the Department of Diplomatic Legal Affairs, acting as Agent, assisted by Giorgio Azzariti, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, Giuliano Marenco, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

supported in its submissions by

the United Kingdom, represented by G. Dagtoglou, of the Treasury Solicitor's Department, Queen Anne's Gate Chambers, London, with an address for service in Luxembourg at the office of J.D. Howes, acting as Agent for the Government of the United Kingdom, c/o British Embassy, 28 Boulevard Royal,

intervener,

APPLICATION for a declaration that Commission Decision No 82/861/EEC of 10 December 1982 (Official Journal L 360, p. 36), relating to a proceeding against British Telecommunications under Article 86 of the EEC Treaty, is void,

* Language of the Case: Italian

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco, O. Due and C. Kakouris (Presidents of Chambers), T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot and R. Joliet, Judges,

Advocate General: M. Darmon
Registrar: H. A. Rühl, Principal Administrator

*

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By application lodged at the Court Registry on 15 March 1983, the Italian Republic brought an action under the first paragraph of Article 173 of the EEC Treaty for a declaration that Commission Decision No 82/861/EEC of 10 December 1982 (Official Journal, L 360, p. 36), relating to a proceeding against British Telecommunications under Article 86 of the EEC Treaty, was void.

2 On 1 October 1981 British Telecommunications, a statutory corporation established under the British Telecommunications Act 1981, took over the functions of the United Kingdom Post Office, set up under the Post Office Act 1969. Both of these nationalized undertakings are hereinafter referred to as 'BT'. As holder of the statutory monopoly on the running of telecommunications systems in the United Kingdom, BT has a duty to provide *inter alia* telex and telephone services. Pursuant to both the Post Office Act and the British Telecommunications Act, BT exercises rule-making powers in respect of telecommunications services in the United Kingdom for which it lays down charges and conditions by means of schemes; these are published in the London, Edinburgh and Belfast Gazettes.

* after hearing the Opinion of the Advocate General delivered at the sitting on 16 January 1985,

111/6

Furthermore, BT has the international status of a recognized private operating agency having a seat on one of the permanent bodies of the ITU (International Telecommunications Union), set up by the ITC (International Telecommunications Convention, United Nations Treaty Series, No 2616, p. 188), which was signed on 2 October 1947 at Atlantic City and last revised on 25 October 1973 at Malaga-Torremolinos. All the Member States of the EEC are parties to the ITC. As a private operating agency recognized as such by the United Kingdom, BT participates in the work of the CCITT (International Telegraph and Telephone Consultative Committee), together with the national administrations of all the signatories to the ITU which are entitled to a seat there.

The CCITT issues recommendations on operating and tariff questions regarding telegraphy and telephony, such recommendations being adopted by virtue of the provisions of the ITC itself and the Telegraph and Telephone Regulations (the Final Acts of the World Administrative Telegraph and Telephone Conference held by the ITU in Geneva in 1973). Those regulations supplement the provisions of the ITC pursuant to Article 82 thereof, and govern the use of telecommunications.

5 Under Article 6 (3) of the Telegraph Regulations of 11 April 1973,

'Administrations [or recognized private operating agency(ies)] shall undertake to stop, at their respective offices, the acceptance, transmission and delivery of telegrams addressed to telegraphic re-forwarding agencies and other organizations set up to forward telegrams on behalf of third parties so as to evade full payment of the charges due for the complete route. ...'

6 On the basis of and pursuant to that provision, the CCITT adopted in October 1976 Recommendation F 60, Section 3.5.2. of which provides as follows:

'Administrations and recognized private operating agencies shall refuse to make the telex service available to a telegraph forwarding agency which is known to be organized for the purpose of sending or receiving telegraphs for retransmission by telegraphy with a view to evading the full charges due for the complete route.'

7 In reliance on those provisions BT started a campaign against the development, on United Kingdom territory, of private message-forwarding agencies. Those agencies

III/7

offered the general public a new service whereby a large volume of messages could be received and forwarded on behalf of third parties at prices which were appreciably lower than those charged under the tariffs for the conventional use of telecommunication lines and systems.

8 Availing itself of the rule-making powers conferred on it by statute, BT adopted, in the first instance, Schemes T7/1975 and T1/1976. Those schemes, whilst leaving subscribers free to use their installations for forwarding or receiving messages on behalf of third parties, nevertheless provided, in Paragraphs 43 (2) (b) (iii) and 70 (2) (b) (iii), that whenever a subscriber relayed a telex message which both originated from, and was intended for delivery in, a foreign country he could not apply a scale of charges which would have the result of enabling the originator of the message to send it more cheaply than if he had forwarded it directly. It is common ground between the parties, however, that BT never actually enforced those provisions.

9 BT subsequently supplemented those schemes by adopting Scheme T1/1978, which came into operation on 21 January 1978. Paragraphs 44 (2) (a) and 70 (2) (b) thereof prohibited forwarding agencies from providing international services for their customers whereby:

(a) messages in data form were sent or received internationally by telephone and then converted into telecommunication messages for reception in telex, facsimile, written or other visual form; or

(b) telex messages were forwarded in transit between places outside the United Kingdom and the Isle of Man; or

(c) telex messages were sent or received via other message-forwarding agencies.

The above provisions of Scheme T1/1978 were incorporated in their entirety into a new 1981 scheme, which revoked and replaced all previous schemes.

10 By Decision No 82/861/EEC of 10 December 1982 the Commission held that the aforesaid schemes constituted infringements of Article 86 of the Treaty, and required BT to bring them to an end — in so far as it had not already done so — within two months of notification of the decision.

In its statement of the reasons on which the decision is based, the Commission claims that the restrictions imposed by BT and the sanctions which may be incurred by their infringement, namely the cutting-off or disconnection of the apparatus provided, (a) prevent message-forwarding agencies from offering certain services, to the detriment of their customers operating in other Member States, (b) subject the use of telephone and telex equipment to obligations unrelated to the provision of telephone or telex services, and (c) place the agencies at a competitive disadvantage *vis-à-vis* the national telecommunications authorities and agencies in other Member States not bound by such rules.

Notwithstanding the infringements recorded, the Commission considered that, in view of the special circumstances of the case, in particular the duty to observe international commitments and the fact that BT had not penalized infringements of the restrictions by disconnecting the facilities of the message-forwarding agencies, no fine should be imposed on it.

3 In support of its claim that the Commission decision should be declared void, the Italian Republic denies, in the first place, that the disputed schemes were in law open to appraisal in relation to Article 86 of the EEC Treaty. In that connection it argues, first, that the rule-making activities of a body governed by public law may not be regarded as the activities of an undertaking for the purposes of Article 86. Secondly, it argues that, since BT holds a statutory monopoly, it is exempted by Article 222 of the Treaty from the application of the Community rules on competition.

4 In the second place, the Italian Republic maintains that the schemes at issue may not in law be regarded as contrary to Article 86 inasmuch as, first, they are intended to counter unfair practices on the part of private forwarding agencies, secondly, the Community rules on competition cannot apply, except within certain limits, to BT as a public undertaking for the purposes of Article 90 (2) of the Treaty, and lastly, the ICT provisions mentioned above required BT to adopt the measures complained of.

5 The Italian Republic concludes by maintaining that the contested decision does not contain an adequate statement of reasons.

III/9

I — Submissions to the effect that BT's schemes are not open to appraisal for their compatibility with Article 86 of the Treaty

1. *The applicability of the Community rules on competition in the light of the activities covered by the decision at issue*

16 The Italian Republic argues that Article 86 of the Treaty applies solely to the activities of business concerns carried out under private law, and not to rule-making activities carried out pursuant to a statute by a public body functioning in conformity with conditions laid down by central government. Inasmuch as the contested decision is directed, not to BT's conduct in its capacity as a body responsible for the operation of certain equipment or as a supplier of telecommunications services to users, but rather to its rule-making activities under the Post Office Act 1969 and the British Telecommunications Act 1981, the applicant takes the view that the Commission has misapplied Article 86. The rule-making activities complained of can, at most, provide the basis for an action against the United Kingdom under Articles 90 or 169 of the Treaty.

17 The Commission, supported in its conclusions and arguments by the United Kingdom, contends that the provision of telecommunications services is a business activity. Although United Kingdom statute law empowered BT to have recourse to schemes, it did so solely for the purpose of establishing the charges and conditions subject to which such services are offered. The schemes at issue therefore perform the same function as contractual terms, and were freely adopted by BT pursuant to the powers vested in it and without any intervention on the part of the United Kingdom authorities. Even if the United Kingdom could be held responsible in these circumstances, that would have the effect, at most, of diminishing the undertaking's responsibility for the purposes of calculating the fine, but would not prevent the Community rules on competition from being applied to it.

18 It should be noted in the first place that the applicant does not dispute that, despite BT's status as a nationalized industry, its management of public telecommunications equipment and its placing of such equipment at the disposal of users on payment of a fee do indeed amount to a business activity which as such is subject to the obligations imposed by Article 86 of the Treaty.

19 In the second place it should be observed that, by virtue of Section 28 of the Post Office Act 1969 and then of Section 21 of the British Telecommunications Act 1981, the power conferred on BT to introduce schemes has been strictly limited to laying down provisions relating to the scale of charges and other terms and conditions under which it provides services for users. In the light of the wording of those provisions it must further be acknowledged that the United Kingdom legislature in no way predetermined the content of the schemes, which is freely determined by BT.

In those circumstances, the schemes referred to by the contested decision must be regarded as an integral part of BT's business activity. The submission to the effect that it was not in law open to the Commission to appraise them for their compatibility with Article 86 of the Treaty must therefore be rejected.

2. *The question whether the Community rules on competition are applicable in view of the monopoly held by BT*

21 The applicant argues that, by virtue of Article 222 of the Treaty, which provides that the Treaty 'shall in no way prejudice the rules in Member States governing the system of property ownership', Member States are free to determine, in their internal systems, the activities which are reserved to the public sector and to create national monopolies. Thus BT is entitled to preserve its monopoly by preventing the operation of private agencies wishing to provide services covered by that monopoly. By condemning the schemes adopted by BT in that regard as being incompatible with Article 86, the Commission therefore infringed Article 222 of the Treaty.

22 It is apparent from the documents before the Court that, whilst BT has a statutory monopoly, subject to certain exceptions with regard to the management of telecommunication networks and to making them available to users, it holds no monopoly over the provision of ancillary services such as the retransmission of messages on behalf of third parties. At all events, it must be observed that the schemes adopted by BT are not designed to suppress any private agencies which may be created in contravention of its monopoly but seek solely to alter the conditions in which such agencies operate. Accordingly, Article 222 of the Treaty did not prevent the Commission from appraising the schemes in question for their compatibility with Article 86 thereof.

23 The submission based on infringement of Article 222 of the Treaty must therefore be rejected.

II — Submissions to the effect that BT's schemes are not contrary to Article 86 of the Treaty

1. *The claim that BT's schemes were consistent with the need to prevent the improper use of telecommunications equipment by private forwarding agencies*

24 The Italian Republic has submitted, both in its pleadings and in its oral argument before the Court, that the private message-forwarding agencies established on United Kingdom territory abuse the public telecommunication network. It maintains that such abuse resides, in the first place, in the abnormal utilization of

III/11

point-to-point circuits, that is to say, public circuits hired out to individuals for their exclusive use, at a fixed tariff determined by the number of messages normally transmitted by that category of user. By transmitting messages on behalf of third parties via such circuits, the agencies evade the normal tariff terms. The agencies further abuse the public network, according to the Italian Government, by using special equipment which, with the aid of computer techniques, enable a large number of messages to be forwarded in a very short time. Those practices are especially harmful to the proper running of the international telecommunications system because they use the lines carrying the heaviest traffic. BT could therefore, without infringing Article 86 of the Treaty, adopt the measures needed to put an end to such unlawful activities.

25 The Commission and the United Kingdom deny that the forwarding agencies make use of point-to-point circuits. The fact that such agencies employ new techniques and introduce a modicum of competition into international telecommunications traffic cannot, in itself, constitute an abuse.

26 In that connection, it is sufficient to note that neither the documents before the Court nor the oral argument presented to it have provided any confirmation that the message-forwarding agencies established in the United Kingdom abuse the public telecommunication networks. In the first place it has not been shown that such agencies use point-to-point circuits for the purpose of retransmitting messages on behalf of third parties. In the second place the employment of new technology which accelerates the transmission of messages constitutes technical progress in conformity with the public interest and cannot be regarded *per se* as an abuse. The Italian Republic has not, moreover, claimed that the forwarding agencies are attempting to evade payment of the charges covering the periods during which they actually use the public network.

27 In those circumstances, the submission to the effect that the schemes at issue are justified by abuses on the part of the private forwarding agencies must be rejected.

2. *The claim that the measures adopted by BT are covered by the provisions of Article 90 (2) of the Treaty derogating from the rules on competition and applying for the benefit of undertakings entrusted with the operation of services of general economic interest*

28 According to the applicant, the Commission disregarded the terms of the Treaty in so far as it took the view that Article 90 (2) was inapplicable to the present case.

Before considering the merits of that submission it must be observed that the Commission states that it has doubts as to whether the applicant is entitled to rely on it. Article 90 (2) of the Treaty, whose purpose is to safeguard the tasks which a Member State sees fit to entrust to a specified body, presupposes, according to the Commission, a situation in which conflicting interests are delicately poised and which involves facts and appraisals which are peculiar to the Member State in question and extraneous to other Member States which bear no responsibility for them and therefore have no interest in defending a position in regard to them.

It should be borne in mind in this regard that, pursuant to the first paragraph of Article 173 of the Treaty, Member States may bring actions against any measure adopted by the Commission in the form of a regulation or an individual decision, and may, in support of their claims, plead *inter alia* the infringement of any stipulation in the Treaty. It must further be observed that the application of Article 90 (2) of the Treaty is not left to the discretion of the Member State, which has entrusted an undertaking with the operation of a service of general economic interest. Article 90 (3) assigns to the Commission the task of monitoring such matters, under the supervision of the Court. It follows that Article 90 (2) of the Treaty ranks among those provisions whose infringement may be pleaded by any Member State in support of an action to have a measure declared void.

The Italian Republic contends that, by declaring that the schemes which BT adopted are contrary to Community law, the Commission is placing in jeopardy the performance by BT of the tasks entrusted to it.

The first argument adduced by the applicant is that the activities of private message-forwarding agencies cause economic damage to the public telecommunications service in the United Kindom.

It should be observed that, whilst the speed of message-transmission made possible by technological advances undoubtedly leads to some decrease in revenue for BT, the presence in the United Kingdom of private forwarding agencies attracts to the British public network, as the applicant itself observes, a certain volume of international messages and the revenue which goes with it. The Italian Republic has totally failed to demonstrate that the results of the activities of those agencies in the United Kingdom were, taken as a whole, unfavourable to BT, or that the Commission's censure of the schemes at issue put the performance of the particular tasks entrusted to BT in jeopardy from the economic point of view.

The Italian Republic puts forward a second argument based on the need for a system of world-wide cooperation as instituted by the ITU, in order to ensure the

III/13

proper running of international telecommunications services, and on the legitimate expectation of other national administrations that the international rules for the time being in force which are designed to prevent the activities of private message-forwarding agencies will be complied with. By preventing BT from honouring to the full the obligations of such international cooperation, the contested decision again threatens to jeopardize the performance of the particular tasks entrusted to it as a nationalized industry.

35 In reality, the question raised by that argument is whether or not the ITC or the law derived from it required BT to adopt the measures at issue. It is precisely that question which is covered by the third submission made by the Italian Republic which is designed to show that BT was not, in the circumstances, obliged to comply with the Community rules on competition. It must therefore be considered below.

3. *The claim that the ITC and the law derived from it required BT to prevent — as it did — the activities of private forwarding agencies operating in the United Kingdom*

36 The Italian Republic maintains that the Commission disregarded the terms of Article 234 of the Treaty. Article 234 resolves any conflict between Community law and the pre-existing rules of international law, by giving the latter precedence over the former. The applicant claims that the provisions of the ITC and its administrative regulations have always forbidden national administrations to allow the re-routing of the international traffic in telegraph or telephone messages when such re-routing is caused by the attempt of private forwarding agencies to evade the full charges due for the complete route. By virtue of Article 6.3 of the Telegraph Regulations of 1973, on the one hand, and CCITT Recommendation F 60, on the other, BT was obliged to adopt the schemes to which the Commission objects.

37 The Commission and the United Kingdom state that the provisions at issue are designed solely to put an end to a practice whereby communications evade payment of the full charges due for the complete route, and not to prevent a message from passing via an intermediate country merely on the ground that it thereby incurs a lower charge. The schemes adopted by BT can therefore find no justification in those provisions.

38 The Commission further argues that Article 234 of the Treaty is not applicable because the ITC was revised at Malaga-Torremolinos on 25 October 1973, that is, on a date subsequent to the United Kingdom's accession to the Communities. The arguments put forward by the applicant on the similarity of the provisions in force prior to that date are, the Commission alleges, irrelevant, because members of the ITU recover their freedom of action and enter into a fresh commitment whenever a revision occurs. Even on the supposition that there are international rules predating the EEC Treaty which demand the course of action for which BT was

criticized, Article 234 does not, however, override the prohibition under Article 86 except in so far as compliance therewith would prevent a Member State from fulfilling its obligations towards non-member countries.

The United Kingdom states that it does not share the view of the Commission on the revision, subsequent to the accession of a Member State to the Communities, of an international treaty concluded before the EEC Treaty. It contends for its part that, as is clear from the judgment of the Court of 27 February 1962 (Case 10/61 *Commission* v *Italy* [1962] ECR 1), by virtue of Article 234 of the Treaty, Member States waive all rights accruing under an earlier treaty which are contrary to Community rules. Inasmuch as BT drew no distinction between the international and the Community obligations of the United Kingdom and consequently failed to confine the effects of its schemes to those activities of forwarding agencies which adversely affect comparable activities in non-member countries, those schemes do indeed infringe Article 86 of the Treaty.

Without there being any need to rule on the point whether the aforesaid provisions of Article 6.3 of the Telegraph Regulations of 1973 or of CCITT Recommendation F 60 were or were not binding on BT, it is sufficient to note that they differ in their purpose and content from the BT schemes to which the Commission objected.

It follows from the very wording of Article 6.3 of the Telegraph Regulations and of CCITT Recommendation F 60 that their sole purpose is to prevent the activities of message-forwarding agencies which are 'set up' or 'known to be organized' with a view to evading the full charges due for the complete route. The measures envisaged by those provisions can therefore affect only those agencies which, by the use of improper means, attempt to avoid payment of the full charges due in respect of certain messages.

Whenever a Member State, or a recognized private operating agency to which a Member State has entrusted the operation of telecommunications services, permits transmissions which are not improper in the sense described above and are therefore not prohibited by the aforesaid provisions, there can be no question of a breach by the State concerned of commitments undertaken at international level.

It follows from the foregoing that the schemes adopted by BT had a different purpose from the one pursued by the aforesaid provisions of the Telegraph Regulations and by the CCITT recommendation and were concerned with private message-forwarding agencies whose activities were in no way improper.

III/15

44 In those circumstances, the submission to the effect that the ICT and the law derived from it placed BT under an obligation to adopt the schemes at issue must in any event be rejected.

III — The submission that the statement of reasons given for the decision at issue is inadequate

45 The Italian Republic argues that the obligation under Article 190 of the Treaty to state the reasons on which decisions are based was infringed, as the Commission failed to give the reasons for which it had taken the view that:

(a) BT's statutory monopoly was contrary to Community law;

(b) the exercise of rule-making powers could be equated with a business activity;

(c) Community rules on competition took precedence over pre-existing international rules.

46 First, it should be borne in mind that, according to a consistent line of decisions of the Court, the statement of the reasons on which a decision having adverse effect is based must enable the Court to review the legality of the decision and to provide the party concerned with details sufficient to allow that party to ascertain whether or not the decision is well-founded. The requirement of a statement of reasons must be viewed in the context of the circumstances of the case, and in particular the content of the measure in question, the nature of the reasons relied on and the interest which addressees, or other persons to whom the measure is of direct and individual concern, within the meaning of the second paragraph of Article 173 of the Treaty, may have in obtaining explanations.

47 Secondly, it should be observed that the contested decision in no way disputes the compatibility of BT's statutory monopoly with Community law. No reasons had therefore to be given by the Commission on that point.

48 Lastly, with regard to the other two points disputed by the Italian Republic, the recitals in the preamble to the contested decision show that the Commission noted that BT, as a statutory corporation, was an economic entity carrying on activities of an economic nature and was, as such, an undertaking within the meaning of Article 86 of the Treaty. The Commission further noted that, whilst it accepted BT's argument that international cooperation and compliance with international

commitments were essential to the efficient provision of international communication services, such cooperation could not go so far as to authorize an infringement of the competition rules under the Treaty.

49 The statement of reasons satisfies the requirements of Article 190 of the Treaty, inasmuch as it enables the Court to exercise its power of review and makes it possible for the parties concerned effectively to convey their point of view on the correctness and the relevance of the facts and circumstances alleged.

50 In the circumstances, the submission that the statement of reasons is inadequate must be rejected.

51 It follows from all the foregoing considerations that the application of the Italian Republic must be dismissed.

Costs

52 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the Italian Republic has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Dismisses the application;

(2) Orders the Italian Republic to pay the costs.

Mackenzie Stuart Bosco Due Kakouris

Koopmans Everling Bahlmann Galmot Joliet

Delivered in open court in Luxembourg on 20 March 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President

III/17

Case 311/84

Centre belge d'études de marché — Télémarketing (CBEM) SA
v
Compagnie luxembourgeoise de télédiffusion SA and Information publicité Benelux SA

(reference for a preliminary ruling
from the Tribunal de commerce, Brussels)

'Dominant position — Telemarketing'

Summary

1. *Competition — Dominant position — Position resulting from provisions laid down by law — Application of Article 86 of the Treaty*
(EEC Treaty, Art. 86)

2. *Competition — Dominant position — Abuse — Case where an undertaking holding a dominant position reserves to itself an activity which might be carried out by another undertaking*
(EEC Treaty, Art. 86)

1. Article 86 of the EEC Treaty applies to an undertaking holding a dominant position on a particular market, even where that position is due not to the activity of the undertaking itself but to the fact that by reason of provisions laid down by law there can be no competition or only very limited competition on that market.

2. An abuse within the meaning of Article 86 is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking.

III/19

JUDGMENT OF THE COURT (Fifth Chamber)
3 October 1985 *

In Case 311/84

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal de commerce [Commercial Court], Brussels, for a preliminary ruling in the proceedings pending before that court between

Centre belge d'études de marché — Télémarketing (CBEM) SA

and

Compagnie luxembourgeoise de télédiffusion SA,

Information publicité Benelux SA

on the interpretation of Article 86 of the EEC Treaty

THE COURT (Fifth Chamber)

composed of: Lord Mackenzie Stuart, President, O. Due, C. Kakouris, U. Everling and Y. Galmot, Judges,

Advocate General: C. O. Lenz
Registrar: P. Heim

after considering the observations submitted on behalf of:

Centre belge d'études de marché — Télémarketing SA, the plaintiff in the main proceedings, by W. Pissoort of the Brussels Bar,

Compagnie luxembourgeoise de télédiffusion SA, the first defendant, by Mr Kirschen and Mr Huisman of the Brussels Bar,

Information publicité Benelux SA, the second defendant, by Mr Colinet of the Brussels Bar,

* Language of the Case: French.

III/20

the Commission of the European Communities, by its Legal Adviser, N. Coutrelis,

after hearing the Opinion of the Advocate General delivered at the sitting on 11 July 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an order of 21 December 1984, which was received at the Court on 27 December 1984, the Vice-President of the Tribunal de commerce, Brussels, sitting on behalf of the President of the Tribunal in proceedings for an interim injunction, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Article 86 of the Treaty.

2 Those questions were raised in proceedings brought by the Centre belge d'études de marché — Télémarketing SA (hereinafter referred to as 'Centre belge') against the Compagnie luxembourgeoise de télédiffusion SA (hereinafter referred to as 'Compagnie luxembourgeoise'), which runs the RTL television station, and against Information publicité Benelux SA (hereinafter referred to as 'Information publicité'), which is RTL's exclusive agent for television advertising aimed at the Benelux countries. In its action Centre belge is claiming an injunction restraining the Compagnie luxembourgeoise and Information publicité from refusing to sell it television time on the RTL station for telephone marketing operations using a telephone number other than that of Information publicité.

3 It appears from the documents before the Court that Centre belge is a trading company which, since 1978, has been studying the technique known as 'tele-sales' or 'telemarketing', whereby an advertiser places in one of the media, in the present case television, an advertisement carrying a telephone number which those at whom the advertisement is aimed may call either to obtain information on the product offered or to respond to the advertising campaign in some other way.

III/21

4 Centre belge organized its first telemarketing operation on the RTL television station in 1982. In 1983 it concluded an agreement with Information publicité for a period of 12 months which gave it the exclusive right to conduct telemarketing operations on the RTL station aimed at the Benelux market. The telephone number shown to television viewers was that of Centre belge, which made its telephone lines and team of telephonists available to advertisers and to the television station.

5 On the expiry of that agreement Information publicité notified advertisers that from April 1984 RTL would no longer accept advertising 'spots' involving an invitation to make a telephone call unless the telephone number used in Belgium was that of Information publicité. It was against that notice that Centre belge brought an action for an injunction before the Tribunal de commerce, claiming *inter alia* that it constituted an abuse of a dominant position within the meaning of Article 86 of the EEC Treaty.

6 In its order for reference the Vice-President of the Tribunal de commerce states that Compagnie luxembourgeoise and its subsidiary, Information publicité, dominate the market in television advertising aimed at viewers in French-speaking Belgium by reason of the fact that in Belgium itself there is as yet no commercial advertising on national television stations and the advertising of other French-language stations which can be received in Belgium is aimed only rarely or not at all at the Belgian public. However, the Vice-President of the Tribunal de commerce raises the question whether the two undertakings occupy a dominant position within the meaning of Article 86 of the Treaty, since under the relevant treaties and laws Compagnie luxembourgeoise has a legal monopoly in the market and there is no real freedom of establishment.

7 As regards telemarketing activities, the Vice-President comes, after considering the forms of agreement which Centre belge entered into and the conduct of the parties in the main action, to the conclusion that, if Centre belge is engaged in an activity ancillary to advertising, it must be regarded as operating on behalf of advertisers rather than on behalf of the broadcaster. Telemarketing constitutes a separate market from that of television advertising and one which is extremely open and in which extensive competition is possible. If Compagnie luxembourgeoise and Information publicité do occupy a dominant position in the television advertising market for the purposes of Article 86, the question then arises whether their conduct amounts to an abuse of that position.

8 In those circumstances the Vice-President of the Tribunal de commerce stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) The interpretation of the concept of a dominant position

Is there a dominant position within the meaning of Article 86 of the EEC Treaty where an undertaking enjoys a legal monopoly for the supply of certain goods or services and where, as a result, competition in the supply of those goods or services is excluded? Does the concept of a dominant position imply a real possibility of competition suppressed or extinguished by the action of the party which occupies the dominant position or may it apply in a context in which such competition cannot exist or is, in any event, extremely limited?

(2) Interpretation of the concept of abuse of a dominant position

Where, in the situation envisaged in the first question, it is accepted that the undertaking in question occupies a dominant position within the meaning of Article 86 of the Treaty, must the conduct of such an undertaking be interpreted as constituting an abuse of a dominant position, where that conduct consists in reserving for itself or for a subsidiary under its control, to the exclusion of any other undertaking, an ancillary activity which could be carried out by a third undertaking as part of its activities?'

9 It must be observed at the outset that several of the arguments put to the Court by the parties to the main proceedings and by the Commission relate to problems which are not covered by the above questions. They include arguments relating to the financial and commercial relations between Compagnie luxembourgeoise and Information publicité, the nature and geographical extent of the market or markets in issue, the position in law and in fact of Compagnie luxembourgeoise and Information publicité on those markets, the question whether the conduct of the companies has any effect on trade between Member States and the reasons for requiring that the telephone number of Information publicité be used in any telemarketing transactions involving the RTL station.

10 In that regard it must be emphasized that, by virtue of the division of jurisdiction provided for by Article 177 in preliminary-ruling proceedings, it is for the national

III/23

court alone to assess the relevance of such arguments and to make a fresh request to the Court if it considers that it is necessary to obtain a further ruling on the interpretation of Community law for the purpose of giving its judgment. The Court need not therefore consider those arguments.

First question

11 In substance the first question asks whether Article 86 of the Treaty applies to an undertaking holding a dominant position on a particular market where that position is due not to the activities of the undertaking itself but to the fact that by reason of provisions laid down by law there can be no competition or only very limited competition on the market.

12 The Centre belge proposes that the Court should answer that question in the affirmative. It maintains that, according to the case-law of the Court, an undertaking holding a monopoly in a particular service has a dominant position on the market in that service within the meaning of Article 86 and that that article applies to the conduct of broadcasting organizations. Compagnie luxembourgeoise cannot rely on the proviso in Article 90 (2), since it is not an undertaking 'entrusted with the operation of services of general economic interest' for the purposes thereof.

13 Compagnie luxembourgeoise states that the Court held, in its judgment of 30 April 1974 in Case 155/73 (*Sacchi* [1974] ECR 409), that a State may, for reasons of public interest of a non-economic nature, remove radio and television broadcasting from competition by conferring a monopoly on an undertaking. Extending the scope of the question put to the Court, Compagnie luxembourgeoise proposes, therefore, that the Court should reply that it is not as such incompatible with Article 86 of the Treaty for an undertaking to which a State has granted exclusive rights within the meaning of Article 90 to enjoy a monopoly.

14 Information publicité does not agree with the abstract definition of a dominant position which in its opinion is suggested by the question. It maintains that it is not possible to disregard the product or service at issue or the extent of the relevant market. Further, to fall within the provisions of Article 86 the dominant position must affect trade between Member States and exist within a substantial part of the common market. Information publicité therefore proposes that the Court should

reply that the existence of a legal monopoly does not in itself entail a dominant position within the meaning of Article 86.

15 In the Commission's view, the notion of a dominant position, as defined by the Court, refers to a factual situation independent of the reasons giving rise to that situation. The question must therefore be answered in the affirmative.

16 With regard to the first question, it must first of all be remembered that, according to the established case-law of the Court, most recently confirmed by the judgment of 9 November 1983 in Case 322/81 (*Michelin* v *Commission* [1983] ECR 3461), an undertaking occupies a dominant position for the purposes of Article 86 where it enjoys a position of economic strength which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers. The fact that the absence of competition or its restriction on the relevant market is brought about or encouraged by provisions laid down by law in no way precludes the application of Article 86, as the Court has held, *inter alia*, in its judgments of 13 November 1975 in Case 26/75 (*General Motors* v *Commission* [1975] ECR 1367), 16 November 1977 in Case 13/77 (*Inno* v *ATAB* [1977] ECR 2115) and most recently in its judgment of 20 March 1985 in Case 41/83 (*Italy* v *Commission* [1985] ECR 880).

17 Although it is true, as Compagnie luxembourgeoise has pointed out, that it is not incompatible with Article 86 for an undertaking to which a Member State has granted exclusive rights within the meaning of Article 90 of the Treaty to enjoy a monopoly, it is none the less apparent from the same article that such undertakings remain subject to the Treaty rules on competition and in particular those contained in Article 86. In its aforesaid judgment of 30 April 1974 in the *Sacchi* case, the Court also stressed that, if certain Member States treat undertakings entrusted with the operation of television, even as regards their commercial activities and in particular advertising, as undertakings entrusted with the operation of services of general economic interest, the prohibitions of Article 86 apply, as regards their behaviour within the market, by reason of Article 90 (2), so long as it is not shown that the said prohibitions are incompatible with the performance of their tasks.

18 The reply to the first question must therefore be that Article 86 of the EEC Treaty must be interpreted as applying to an undertaking holding a dominant position on a particular market, even where that position is due not to the activities of the undertaking itself but to the fact that by reason of provisions laid down by law there can be no competition or only very limited competition on that market.

Second question

19 The second question asks whether an undertaking holding a dominant position on a particular market, by reserving to itself or to an undertaking belonging to the same group, to the exclusion of any other undertaking, an ancillary activity which could be carried out by another undertaking as part of its activities on a neighbouring but separate market, abuses its dominant position within the meaning of Article 86.

20 Centre belge considers that such conduct constitutes an abuse under several provisions of Article 86. Where a television station subjects the sale of broadcasting time for any telemarketing operation to the use of the telephone number of an exclusive advertising agent belonging to the same group, such conduct amounts to a refusal of sale to other telemarketing undertakings. As regards advertisers, such conduct amounts to the imposition of an associated service and the limitation of markets prohibited by Article 86 (d) and (b). Ultimately it enables the agent to impose on advertisers unfair prices contrary to Article 86 (a).

21 Compagnie luxembourgeoise and Information publicité maintain that, where an undertaking to which a State has granted exclusive rights and which thus occupies a dominant position reserves to itself or to a company with which it has common interests ancillary activities which could be carried out by another undertaking, this does not in itself amount to an abuse of a dominant position. The undertaking which occupies the dominant position must in addition use it to obtain advantages which it could not obtain if there were effective competition and its conduct must be likely to harm consumers, for example, by the imposition of unfair prices or conditions.

2 Compagnie luxembourgeoise maintains that the decision no longer to use the services of Centre belge and its telephonists cannot be regarded as an abuse when it is due to the laws of trade; nor can the requirement that advertisers, in any 'tele-answer' operation conducted by RTL, should use only the telephone number of RTL's exclusive agent amount to an abuse when it is inspired by the close links between the two services supplied and is necessary in practice to preserve the television station's image.

3 The Commission infers from the judgment of the Court of 6 March 1974 in Joined Cases 6 and 7/73 (*Commercial Solvents and Others* v *Commission* [1974] ECR 223) that there is an abuse of a dominant position for the purposes of Article 86 where an undertaking which occupies a dominant position on a market and which is thus able to control the activities of other undertakings on a neighbouring market decides to establish itself on the second market and for no good reason refuses to supply the product or service in question on the market where it already occupies a dominant position to the undertakings whose activities are centred on the market which it is penetrating.

4 Even if the conduct in issue in the main proceedings were to be regarded not as a refusal to supply but as the imposition of a contractual condition, it would, in the Commission's view, be contrary to Article 86. First, Information publicité, as a seller of television time, imposes on all other undertakings for telemarketing operations a condition which it does not impose on itself for the same operations, namely the condition that it must not use its own telephone number; that is an unfair trading condition within the meaning of Article 86 (a). Secondly, Information publicité subjects the conclusion of contracts to the acceptance of supplementary obligations which have no connection with the subject of the contracts, and that is contrary to Article 86 (d).

5 In order to answer the national court's second question, reference must first be made to the aforesaid judgment of 6 March 1974 (*Commercial Solvents*), in which the Court held that an undertaking which holds a dominant position on a market in raw materials and which, with the object of reserving those materials for its own production of derivatives, refuses to supply a customer who also produces those

III/27

derivatives, with the possibility of eliminating all competition from that customer, is abusing its dominant position within the meaning of Article 86.

26 That ruling also applies to the case of an undertaking holding a dominant position on the market in a service which is indispensable for the activities of another undertaking on another market. If, as the national court has already held in its order for reference, telemarketing activities constitute a separate market from that of the chosen advertising medium, although closely associated with it, and if those activities mainly consist in making available to advertisers the telephone lines and team of telephonists of the telemarketing undertaking, to subject the sale of broadcasting time to the condition that the telephone lines of an advertising agent belonging to the same group as the television station should be used amounts in practice to a refusal to supply the services of that station to any other telemarketing undertaking. If, further, that refusal is not justified by technical or commercial requirements relating to the nature of the television, but is intended to reserve to the agent any telemarketing operation broadcast by the said station, with the possibility of eliminating all competition from another undertaking, such conduct amounts to an abuse prohibited by Article 86, provided that the other conditions of that article are satisfied.

27 It must therefore be held in answer to the second question that an abuse within the meaning of Article 86 is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking.

Costs

28 The costs incurred by the Government of the Federal Republic of Germany and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Vice-President of the Tribunal de commerce, Brussels, by order of 21 December 1984, hereby rules:

(1) Article 86 of the EEC Treaty must be interpreted as applying to an undertaking holding a dominant position on a particular market, even where that position is due not to the activity of the undertaking itself but to the fact that by reason of provisions laid down by law there can be no competition or only very limited competition on that market.

(2) An abuse within the meaning of Article 86 is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking.

Mackenzie Stuart Due

Kakouris Everling Galmot

Delivered in open court in Luxembourg on 3 October 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President

III/29

Case 247/86

Société alsacienne et lorraine de telecommunications et d'électronique (Alsatel)

v

SA Novasam

(reference for a preliminary ruling
from the tribunal de grande instance, Strasbourg)

(Payment of compensation for the termination
of a contract for the rental of telephone
installations — Abuse of a dominant position)

Summary of the Judgment

1. *Preliminary questions — Jurisdiction of the Court — Extension of the subject-matter of the question submitted for a preliminary ruling in disregard of the jurisdiction of the national court — Not permissible*
(EEC Treaty, Art. 177)

2. *Competition — Agreements, decisions and concerted practices — Dominant position — Effect on trade between Member States — Condition for the application of Community rules*
(EEC Treaty, Arts 85 and 86)

3. *Competition — Dominant position — Concept*
(EEC Treaty, Art. 86)

4. *Competition — Dominant position — Relevant market — Determination — Supply of telephone installations by authorized undertakings under a State monopoly — Domestic market*
(EEC Treaty, Art. 86)

///31

5. Competition — Dominant position — Existence — Large market share — Insufficient evidence

(EEC Treaty, Art. 86)

1. The Court cannot, whether it be at the request of a party to the main proceedings or at the request of an institution which has exercised its right to submit observations, extend the subject-matter of a question referred to it for a preliminary ruling where it appears that that extension was expressly sought by a party before the national court and was refused.

2. The interpretation of the condition that trade between Member States must be affected, which is set out in Articles 85 and 86 of the Treaty, must be based on its purpose, which is to determine the scope of application of Community competition law. Community law applies to any agreement, decision or concerted practice which may influence, directly or indirectly, actually or potentially, patterns of trade between the Member States and thereby hinder the economic interpenetration intended by the Treaty by partitioning the market.

3. The dominant position referred to in Article 86 is a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers.

4. Contractual practices, even abusive ones, on the part of an undertaking supplying telephone installations which has a large share of a regional market in a Member State do not fall within the prohibition in Article 86 of the EEC Treaty where that undertaking does not occupy a dominant position on the domestic market in telephone installations. Only that market may be taken into consideration in that sector since it is only at that level that the conditions of competition are sufficiently homogeneous, in view of the existence of a telecommunications monopoly which means that telephone installations can be supplied only by the postal and telecommunications authorities or by private installers to whom those authorities delegate in part the exercise of the monopoly, by means of authorizations valid throughout the country.

5. While the fact that an undertaking holds a very large market share may be important evidence of the existence of a dominant position, that factor, taken separately, is not necessarily decisive but must be taken into consideration together with other factors.

JUDGMENT OF THE COURT (Sixth Chamber)
5 October 1988 *

In Case 247/86

REFERENCE to the Court under Article 177 of the EEC Treaty by the tribunal de grande instance (Regional Court), Strasbourg, for a preliminary ruling in the proceedings pending before that court between

Société alsacienne et lorraine de télécommunications et d'électronique (Alsatel)

and

SA Novasam,

on the interpretation of Article 86 of the EEC Treaty,

THE COURT (Sixth Chamber)

composed of: O. Due, President of Chamber, G. C. Rodríguez Iglesias, T. Koopmans, K. Bahlmann and C. N. Kakouris, Judges,

Advocate General: G. F. Mancini
Registrar: B. Pastor, Administrator

after considering the observations submitted on behalf of

Alsatel, the plaintiff in the main proceedings, by M. Meyer,

SA Novasam, the defendant in the main proceedings, by L. Anstett-Gardea,

the Commission of the European Communities, by its Legal Adviser C. Durand and by N. Coutrelis,

* — Language of the Case: French

having regard to the Report for the Hearing and further to the hearing on 17 November 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 31 May 1988,

gives the following:

Judgment

1 By a judgment of 17 September 1986, as explained and supplemented by a decision of 10 December 1986, which were received at the Court on 2 October and 29 December respectively, the tribunal de grande instance, Strasbourg, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 86 of the EEC Treaty.

2 That question arose in a dispute between Alsatel, the plaintiff in the main proceedings, and Novasam, a temporary employment agency, the defendant in the main proceedings, concerning Alsatel's claim for compensation amounting to three-quarters of the annual payments outstanding under three contracts for the rental and maintenance of telephone installations that were terminated by the defendant. The installations in question, each of which comprises several telephones, are 'complex' installations.

3 It is apparent from the order for reference that the contracts for the rental and maintenance of telephone equipment which the plaintiff offers to subscribers are concluded for an initial duration of 15 years, but are to be renewed for a further term of 15 years if, as a result of one or more modifications to the installation, the initial rental is increased by 25% or more.

4 According to the national court, the contract binds the customer to deal exclusively with Alsatel for any changes, moves, extensions, putting lines into service

and, in general, any modifications of the installation. That obligation in practice prohibits customers from dealing with another supplier of equipment throughout the duration of the contract. Any modifications to the installation entail supplements to the contract, for which the price is not determined and may, in view of the exclusive-dealing clause imposed on customers, be fixed unilaterally by the plaintiff.

5 The defendant contended that the contracts which had been terminated were contrary to the competition rules of the EEC Treaty, whereupon the national court decided to stay the proceedings and referred to the Court the following question for a preliminary ruling:

'In view of Alsatel's major share of the regional market, are the contracts drawn up by it evidence of its abuse of a dominant position within the meaning of Article 86 of the EEC Treaty?'

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

7 In view of the fact that the Commission and the defendant have asked the Court to consider the problems raised not only from the point of view of Article 86 of the Treaty, which is the only article referred to in the national court's question, but also from the point of view of Article 85 of the Treaty, it must be pointed out at once that this course of action is not open to the Court.

8 It is apparent from the documents before the Court that in this case the national court, which alone is competent under the system established by Article 177 to assess the relevance of questions concerning the interpretation of Community law in order to resolve the dispute before it, has refused by implication, inasmuch as it has referred only to Article 86 in its question, to seek from the Court a ruling on the interpretation of Article 85 of the Treaty, notwithstanding an express request to that effect made by the defendant during the main proceedings.

9 In order to answer the question submitted, it must be borne in mind in the first place that Article 86 of the Treaty prohibits any abuse of a dominant position within the common market or in a substantial part of it in so far as it may affect trade between Member States. According to the defendant and the Commission, the clauses concerning duration and rental imposed by the plaintiff in the contracts which it concludes constitute an abuse of a dominant position.

10 Although the obligation imposed on customers to deal exclusively with the installer as regards any modification of the installation may be justified by the fact that the equipment remains the property of the installer, the fact that the price of the supplements to the contract entailed by those modifications is not determined but is unilaterally fixed by the installer and the automatic renewal of the contract for a 15-year term if as a result of those modifications the rental is increased by more than 25% may constitute unfair trading conditions prohibited as abusive practices by Article 86 of the Treaty if all the conditions for the application of that provision are met.

11 The first condition for the application of that provision is that trade between Member States must be affected. The interpretation of that condition, which is set out in Articles 85 and 86 of the Treaty, must be based on its purpose, which is to determine the scope of application of Community competition law. Community law applies to any agreement, decision or concerted practice which may influence, directly or indirectly, actually or potentially, patterns of trade between the Member States and thereby hinder the economic interpenetration intended by the Treaty. That condition would be satisfied, in particular, if the contractual clauses referred to above had the effect of restricting imports of telephone equipment from other Member States, thereby partitioning the market. There is nothing in the documents before the Court which suggests that such is the case. However, it is for the national court to make the necessary findings of fact in that regard.

12 The second condition laid down by Article 86 is that there must be a dominant position within the common market or in a substantial part of it. The Court has defined such a dominant position (see the judgment of 9 November 1983 in Case 322/81 *Michelin* v *Commission* [1983] ECR 3461) as a position of economic

III/36

strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers.

13 In order to ascertain whether a dominant position of that kind exists in a case such as this, it is necessary to assess the economic strength of the undertaking in question on the relevant market, that market to be defined from the point of view of both the activities concerned and its geographical extent.

14 For those purposes, it is necessary to take account of the following facts to be found in the documents before the Court: the contracts which have given rise to the main proceedings are concerned with the rental and maintenance of telephone installations; because of the telecommunications monopoly in France, telephone installations may be provided only by the postal and telecommunications authorities or by private installers such as Alsatel to whom the exercise of the monopoly is in part delegated; those private installers must be approved by the authorities; finally, the authorizations granted are valid throughout the country.

15 It follows that the framework within which the conditions of competition are sufficiently homogeneous to enable the economic strength of the undertaking in question to be assessed is the market in telephone installations throughout France.

16 The Commission has none the less argued that within the market in telephone installations as a whole it is possible to identify, from the point of view of the activities concerned, a market in the rental and maintenance of telephone equipment, and that on that market competition between installers operates primarily at the local and regional level, particularly in view of the importance of the maintenance factor. It is therefore on that geographical sub-market that the position of installers should be assessed in order to ascertain whether or not they occupy a dominant position on the market for the rental and maintenance of telephone installations.

17 In ascertaining whether the economic strength of an undertaking is sufficient t enable it to hinder the maintenance of effective competition it is impossible t isolate the rental and maintenance market as the relevant market when it i apparent that users have a choice between a rental and maintenance contract an the purchase of the same equipment. The Commission's argument that those tw possibilities are not interchangeable, which is based on the point of view solely o users who have already opted for a rental and maintenance contract, cannot b accepted.

18 There is nothing in the documents before the Court which suggests that the plaintiff enjoys a dominant position throughout France. The only fact which is referred to in the order for reference with regard to the plaintiff's economic strength is the large share it holds of the regional market.

19 A finding of that kind is insufficient to establish that the undertaking in question occupies a dominant position. In the first place, the Court has consistently held that while the fact that an undertaking holds a very large market share may indeed be important evidence of the existence of a dominant position, that factor, taken separately, is not necessarily decisive but must be taken into consideration together with other factors (see the judgment of 13 February 1979 in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461). Secondly, it is apparent from the foregoing that in circumstances such as those of the present case the economic strength of an undertaking can be assessed only in the geographical context of the national territory as a whole.

20 If the large share of the regional market held by the plaintiff was the result of an agreement between authorized installers to share out regional markets between them, such an agreement ought to be caught by Article 85 of the Treaty. It is only if such an allocation of markets were carried out by a number of undertakings belonging to the same group that Article 86 could be applicable, as the Court has consistently held (see the judgments of 8 June 1971 in Case 78/70 *Deutsche Grammophon* v *Metro* [1971] ECR 487, and of 16 December 1975 in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie* v *Commission* [1975] ECR 1663).

21 However, the Commission has suggested that the Court should consider whether parallel behaviour on the part of several independent undertakings, in particular with regard to prices and trading conditions, which does not leave their customers any possibility of negotiating the terms of the contracts to be concluded may place those undertakings collectively in a dominant position coming within the scope of Article 86 of the Treaty.

22 The Court cannot consider that possibility when it is unconnected with the facts before the national court and is based solely on information in the Commission's possession which, on its own admission, is not sufficiently precise. If the Commission considers that there is evidence of the existence of practices that are contrary to the competition rules in the Treaty, it must exercise the powers of investigation which it has in order to ensure the application of those rules.

23 The answer to the question submitted by the national court must therefore be that contractual practices, even if abusive ones, on the part of an undertaking supplying telephone installations which has a large share of a regional market in a Member State do not fall within the prohibition in Article 86 of the EEC Treaty where that undertaking does not occupy a dominant position on the relevant market, in this case the domestic market in telephone installations.

Costs

24 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the tribunal de grande instance, Strasbourg, by judgment of 17 September 1986, as explained and supplemented by the decision of 10 December 1986, hereby rules:

Article 86 of the EEC Treaty must be interpreted as meaning that contractual practices, even if abusive ones, on the part of an undertaking supplying telephone installations which has a large share of a regional market in a Member State do not fall within the prohibition in that article where that undertaking does not occupy a dominant position on the relevant market, in this case the domestic market in telephone installations.

Due Rodríguez Iglesias

Koopmans Bahlmann Kakouris

Delivered in open court in Luxembourg on 5 October 1988.

J.-G. Giraud
Registrar

O. Due
President of the Sixth Chamber

///40

Case C-18/88

Régie des télégraphes et des téléphones
v
GB-Inno-BM SA

(Reference for a preliminary ruling
from the Tribunal de Commerce de Bruxelles)

(Free movement of goods — Competition —
Type-approval of telephone equipment)

Summary of the Judgment

1. Competition — Public undertakings and undertakings to which Member States grant special or exclusive rights — Undertaking having a monopoly over operating the public telecommunications network — Sale, on a competitive basis, of telephone equipment — Power to lay down technical standards applicable to telephone equipment and to check that competing undertakings have complied with those standards — Not permissible
(EEC Treaty, Arts 3(f), 86 and 90))

III/41

2. *Free movement of goods — Quantitative restrictions — Measures having equivalent effect — Type-approval by a public undertaking of telephone equipment not supplied by it and intended to be connected to the public network — Absence of any right of appeal to the courts — Not permissible*

(EEC Treaty, Art. 30)

1. Articles 3(f), 86 and 90 of the EEC Treaty preclude a Member State from granting to the undertaking which operates the public telecommunications network the power to lay down standards for telephone equipment and to check that the economic operators meet those standards when it is itself competing with those companies on the market for that equipment.

   To entrust to an undertaking which markets telephone equipment the task of drawing up specifications for such equipment, of monitoring their application and granting type-approval in respect thereof is tantamount to conferring on it the power to determine at will which equipment can be connected to the public network and thus gives it an obvious advantage over its competitors which is inimical to the equality of chances of traders, without which the existence of an undistorted system of competition cannot be guaranteed. Such a restriction on competition cannot be regarded as justified by a public service of general economic interest within the meaning of Article 90(2) of the Treaty.

2. Article 30 of the Treaty precludes a public undertaking from being given the power to approve telephone equipment which is intended to be connected to the public network and which it has not supplied if the decisions of that undertaking cannot be challenged before the courts.

   Although overriding requirements concerning the protection of users as consumers of services and the protection of the public network and its proper functioning justify the existence of a procedure for type-approval of the said equipment, the absence of any possibility of challenge before the courts could enable the authority granting type-approval to adopt an attitude which was arbitrary or systematically unfavourable to imported equipment.

111/42

JUDGMENT OF THE COURT (Fifth Chamber)
13 December 1991 *

In Case C-18/88,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Vice-President of the Tribunal de Commerce (Commercial Court), Brussels, for a preliminary ruling in the proceedings pending before that court between:

Régie des Télégraphes et des Téléphones (RTT)

and

GB-Inno-BM SA,

on the interpretation of Articles 30 and 86 of the EEC Treaty,.

THE COURT (Fifth Chamber),

composed of: R. Joliet, President of the Chamber, Sir Gordon Slynn, J. C. Moitinho de Almeida, G. C. Rodriguez Iglesias and M. Zuleeg, Judges,

Advocate General: M. Darmon,
Registrar: B. Pastor, Administrator,

after considering the written observations submitted on behalf of:

— Régie des Télégraphes et Téléphones, by Eduard Marissens, of the Brussels Bar,

* Language of the case: French.

III/43

— GB-Inno-BM SA, by Louis van Bunnen, of the Brussels Bar,

— the Commission of the European Communities, by Eric L. White and Edith Buissart, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Régie des Télégraphes et Téléphones, GB-Inno-BM SA and the Commission, at the hearing on 25 January 1989,

after hearing the Opinion of the Advocate General at the sitting on 15 March 1989,

gives the following

Judgment

1 By order of 11 January 1988, which was received at the Court on 18 January 1988, the Vice-President of the Commercial Court, Brussels, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Articles 30 and 86 of the Treaty for the purpose of assessing the compatibility with those provisions of national rules giving the public undertaking which is responsible, subject to the authority of the Minister, for the establishment and operation of the public telephone network and which sells telephone equipment the power to grant type-approval to telephone equipment which it did not supply itself with a view to the connection of that equipment to the network.

2 Those questions were raised in a dispute between the Régie des Télégraphes et des Téléphones (hereinafter referred to as 'RTT') and the company GB-Inno-BM (hereinafter referred to as 'GB'), which sells in its shops non-approved telephones for use as second telephones to be connected to an existing installation at prices far lower than those charged by the RTT for such equipment.

111/44

On the basis of Articles 54 and 55 of the Law on Commercial Practices of 14 July 1971 (*Moniteur Belge* of 30 July 1971), which prohibits all acts contrary to fair trading and which enables the President of the Commercial Court to order that such an act shall cease, the RTT has brought proceedings for an order that GB cease selling telephones, largely of Far Eastern origin, without informing purchasers, by appropriate advertising or any other effective means, that the telephones are not approved. The RTT claims that, by selling the telephones in question without informing the purchasers that they are not approved, GB is encouraging the purchasers to connect — or have connected — the non-approved telephones to the network, which, it says, impairs the functioning of the network.

In its defence in those proceedings, GB argued that since Articles 13, 91 and 93 of the Ministerial Order of 20 September 1978 laying down, in particular, the conditions governing the connection of telephones (*Moniteur Belge* of 29 September 1978, p. 11166), as last amended on 24 September 1986, which contain provisions governing the type-approval procedure, are illegal, it would be improper to impose on a trader the duty of pointing out that the telephones sold are not approved, and to prohibit him from selling them without providing that information. Furthermore GB has lodged a counterclaim for a declaration that the RTT has infringed Article 86 of the Treaty. GB contends that, by bringing the aforementioned action, the result of which would be to set up an obstacle to competition from retailers of non-approved telephone equipment so as to favour the sale of its own equipment or of equipment approved by itself, the RTT has abused its monopoly situation.

It is apparent from the file that Article 1 of the Belgian Law of 13 October 1930, which consolidates the various legislative provisions governing telegraph and telephone communications, gives the RTT a monopoly over the establishment and operation of telegraph and telephone lines and offices for use by the public.

Under the first paragraph of Article 13 of the Ministerial Order of 20 September 1978, 'unless authorized by the RTT in writing, a subscriber shall not connect any wire, apparatus or object to the equipment which he is permitted to use, nor open or dismantle the equipment, or alter in any way the position or use of the equipment or wires'.

7 Article 91 of the said Ministerial Order provides that equipment connected to the circuits made available to the public upon their becoming subscribers must be supplied or approved by the RTT. Under that same provision, it is for the RTT to determine the disposition of subscriber's circuits and their technical characteristics. The technical specifications adopted by the RTT under Article 91 are set out in a document entitled 'Specifications No RN/SP 208', the edition currently in force being that of 21 April 1987. A copy of the said specifications, which are applicable to the second or third telephones connected up in addition to the first standard RTT telephone, is provided to any applicant for type-approval.

8 It is also apparent from the file that as regards the equipment sold by the RTT, the technical specifications to be complied with are laid down in the General Conditions that it imposes on its suppliers. Accordingly, that equipment does not have to be subject to a specific type-approval procedure in order to be connected up to the public network.

9 The file also shows that as regards telephones the RTT has reserved to itself the right to supply the first telephone but has abandoned, during recent years, the exclusive position that it formerly held in respect of additional telephones. However, Article 93 of the aforementioned Ministerial Order of 20 September 1978 also provides that the RTT may, at any time, reassert the right to supply equipment which is left to the private sector and may thereupon require that equipment in use be withdrawn from service.

10 In those circumstances the Vice-President of the Commercial Court, Brussels, has stayed the proceedings pending a preliminary ruling on the following questions:

'(1) Interpretation of Article 30 of the Treaty:

In so far as the Régie des Télégraphes et Téléphones (RTT), in addition to operating the public network in Belgium, also sells equipment intended to be

connected to the network, to what extent is Article 13 of the Ministerial Order of 20 September 1978 compatible with Article 30 of the Treaty where:

A. it empowers the RTT to decide whether equipment not supplied and sold by it is to be approved for connection to the public network, and therefore leaves to the discretion of the RTT the establishing of the technical and administrative criteria that such equipment must meet in order for the RTT to grant its approval?

B. although the RTT is a competitor on the Belgian market with private sector suppliers and importers in Belgium, no procedure involving the hearing of both parties would appear to exist as regards the setting of the standards and as regards ascertaining whether the equipment meets those standards, and no opportunity is given to the subscriber or to the importer of the equipment in question to establish that during the procedure for the granting of the approval no arbitrary or discriminatory action was taken, and no appeal lies against a decision taken by the RTT?

(2) To what extent does the fact that the subscriber is made liable for the costs incurred by the RTT by reason of an infringement of the first paragraph of Article 13 of the Ministerial Order in question, including the costs of seeking out and eliminating any interference caused by a non-authorized piece of equipment constitute a measure equivalent to a quantitative restriction where no procedure exists for both parties to be heard by an independent body to assess whether and to what extent a causal link exists and, therefore, a user or subscriber desiring to connect a piece of equipment in such a manner will be inclined, so as to avoid any risk, to buy from the RTT itself?

(3) Interpretation of Article 86 of the Treaty

To what extent does the monopoly given to the RTT to grant authorizations for connection to the public network and to lay down the detailed rules governing the connection of equipment not supplied or sold by it, with the related power for the RTT arbitrarily to determine the standards which the

equipment must meet, constitute a practice prohibited by Article 86(b) and (c) of the Treaty?'

11 Reference is made to the Report for the Hearing for a fuller account of the relevant Belgian legislation, the facts and the background to the case, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

12 In its order for reference, the Commercial Court, Brussels, noted at the outset that neither the RTT's legal monopoly over the public network, nor the fact that telephone installations must meet certain technical requirements in order to be connected to the public network was in question. It pointed out that Belgian legislation leaves it to the RTT to determine the technical requirements that equipment must satisfy in order to be connected to the network and also to assess whether those requirements have been met. It observed that that situation became highly debateable where the RTT, which itself sells equipment intended to be connected to the network, is competing with the company against which it has brought an action on the ground that that company has sold telephones without informing the consumers that those telephones were not approved. The Commercial Court considered that it needed to submit to the Court questions as to the conformity with the Treaty of provisions that place the RTT in a situation where it is both judge and party, on the grounds that if those provisions were to be found to be illegal, 'any prohibition and any measure demanded on the basis of them would constitute an unacceptable distortion of competition and an abuse of economic power by means of the RTT's uncontested monopoly over the operation of the network'.

13 Although the national court considered the question of the compatibility of the national legislation with the Treaty rules on the free movement of goods and on competition, it is apparent, in view of the grounds of the order making the reference mentioned above, that the questions raised by the national court should be examined by interpreting the rules on competition.

The competition rules

The national court asks whether Articles 3(f), 90 and 86 of the EEC Treaty preclude a Member State from granting to the company operating the public telecommunications network the power to lay down the standards for telephone equipment and to check that economic operators meet those standards when it is competing with those operators on the market for terminals.

Under Belgian law, the RTT holds a monopoly for the establishment and operation of the public telecommunications network. Moreover, only equipment supplied by the RTT or approved by it can be connected to the network. The RTT thus has the power to grant or withhold authorization to connect telephone equipment to the network, the power to lay down the technical standards to be met by that equipment, and the power to check whether the equipment not produced by it is in conformity with the specifications that it has laid down.

At the present stage of development of the Community, that monopoly, which is intended to make a public telephone network available to users, constitutes a service of general economic interest within the meaning of Article 90(2) of the Treaty.

The Court has consistently held that an undertaking vested with a legal monopoly may be regarded as occupying a dominant position within the meaning of Article 86 of the Treaty and that the territory of a Member State to which that monopoly extends may constitute a substantial part of the common market (judgments in Case C-41/90 *Höfner* [1991] ECR I-1979, paragraph 28, and in Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 31).

The Court has also held that an abuse within the meaning of Article 86 is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself an ancillary activity

which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking (judgment in Case 311/84 *CBEM* [1985] ECR 3261).

19 Therefore the fact that an undertaking holding a monopoly in the market for the establishment and operation of the network, without any objective necessity, reserves to itself a neighbouring but separate market, in this case the market for the importation, marketing, connection, commissioning and maintenance of equipment for connection to the said network, thereby eliminating all competition from other undertakings, constitutes an infringement of Article 86 of the Treaty.

20 However, Article 86 applies only to anti-competitive conduct engaged in by undertakings on their own initiative (see judgment in Case C-202/88 *France* v *Commission* 'Telecommunications terminals', [1991] ECR I-1223), not to measures adopted by States. As regards measures adopted by States, it is Article 90(1) that applies. Under that provision, Member States must not, by laws, regulations or administrative measures, put public undertakings and undertakings to which they grant special or exclusive rights in a position which the said undertakings could not themselves attain by their own conduct without infringing Article 86.

21 Accordingly, where the extension of the dominant position of a public undertaking or undertaking to which the State has granted special or exclusive rights results from a State measure, such a measure constitutes an infringement of Article 90 in conjunction with Article 86 of the Treaty.

22 The exclusion or the restriction of competition on the market in telephone equipment cannot be regarded as justified by a task of a public service of general economic interest within the meaning of Article 90(2) of the Treaty. The production and sale of terminals, and in particular of telephones, is an activity that

should be open to any undertaking. In order to ensure that the equipment meets the essential requirements of, in particular, the safety of users, the safety of those operating the network and the protection of public telecommunications networks against damage of any kind, it is sufficient to lay down specifications which the said equipment must meet and to establish a procedure for type-approval to check whether those specifications are met.

According to the RTT, there could be a finding of an infringement of Article 90(1) of the Treaty only if the Member State had favoured an abuse that the RTT itself had in fact committed, for example by applying the provisions on type-approval in a discriminatory manner. It emphasizes, however, that the order for reference does not state that any abuse has actually taken place, and that the mere possibility of discriminatory application of those provisions by reason of the fact that the RTT is designated as the authority for granting approval and is competing with the undertakings that apply for approval cannot in itself amount to an abuse within the meaning of Article 86 of the EEC Treaty.

That argument cannot be accepted. It is sufficient to point out in this regard that it is the extension of the monopoly in the establishment and operation of the telephone network to the market in telephone equipment, without any objective justification, which is prohibited as such by Article 86, or by Article 90(1) in conjunction with Article 86, where that extension results from a measure adopted by a State. As competition may not be eliminated in that manner, it may not be distorted either.

A system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators. To entrust an undertaking which markets terminal equipment with the task of drawing up the specifications for such equipment, monitoring their application and granting type-approval in respect thereof is tantamount to conferring upon it the power to determine at will which terminal equipment may be connected to the public network, and thereby placing that undertaking at an obvious advantage over its competitors (judgment in Case C-202/88, paragraph 51).

26 In those circumstances, the maintenance of effective competition and the guaranteeing of transparency require that the drawing up of technical specifications, the monitoring of their application, and the granting of type-approval must be carried out by a body which is independent of public or private undertakings offering competing goods or services in the telecommunications sector (judgment in Case C-202/88, paragraph 52).

27 Moreover, the provisions of the national regulations at issue in the main action may influence the imports of telephone equipment from other Member States, and hence may affect trade between Member States within the meaning of Article 86 of the Treaty.

28 Accordingly, it must first be stated, in reply to the national court's questions, that Articles 3(f), 90 and 86 of the EEC Treaty preclude a Member State from granting to the undertaking which operates the public telecommunications network the power to lay down standards for telephone equipment and to check that economic operators meet those standards when it is itself competing with those operators on the market for that equipment.

The free movement of goods

29 The national court asks secondly whether Article 30 prevents a public undertaking from being given the power to approve telephone equipment which is intended to be connected to the public network and which it has not supplied if the decisions of that undertaking cannot be challenged before the courts.

30 As the Court has consistently held (see in particular the judgment in Case 120/78 *REWE-Zentral* [1979] ECR 649, 'Cassis de Dijon'), in the absence of common rules applying to the products concerned, the obstacles to free movement within the Community resulting from disparities between national provisions must be

accepted in so far as those national provisions, which are applicable without distinction to national products and to imported products, can be justified as being necessary in order to satisfy imperative requirements of Community law. The Court has, however, held that such rules must be proportionate to the object to be achieved and that, where a Member State has a choice between a number of measures suited to achieving the same purpose, it must choose the means that least hinders the free movement of goods.

31 In the absence of Community rules on the establishment of public telecommunications networks, and in view of the technical diversity of the networks in the Member States, the Member States retain, on the one hand, the power to lay down technical specifications which telephone equipment must meet to be capable of being connected to the public network and, on the other, the power to examine whether the said equipment is fit to be connected to the network in order to satisfy the imperative requirements regarding the protection of users as consumers of services and the protection of the public network and its proper functioning.

32 It is true that the requirement that telephone equipment must be granted type-approval to be capable of being connected to the network does not absolutely exclude the importation into the Member State concerned of products from other Member States. But that requirement does nonetheless render the sale of such equipment more difficult or more onerous. Such a requirement means that a manufacturer in the Member State of exportation has to take into account, when manufacturing the products concerned, the criteria for type-approval laid down in the Member State of importation. Moreover, the procedure for obtaining type-approval necessarily entails delay and expense, even where the imported products meet the criteria for approval.

33 An exception to the principle of the free movement of goods based on an imperative requirement is justified only if the national rules are proportionate to the object to be achieved.

34 It is apparent from the judgment in Case 178/84 *Commission* v *Germany* [1987] ECR 1227, paragraph 46, that it must be open to traders to challenge before the courts an unjustified failure to grant authorization for imports. The same possibility must exist with regard to decisions refusing to grant type-approval since they can lead in practice to denial of access to the market of a Member State to telephone equipment imported from another Member State and hence to a barrier to the free movement of goods.

35 If there were no possibility of any challenge before the courts, the authority granting type-approval could adopt an attitude which was arbitrary or systematically unfavourable to imported equipment. Moreover, the likelihood of the authority granting type-approval adopting such an attitude is increased by the fact that the procedures for obtaining type-approval and for laying down the technical specifications do not involve the hearing of any interested parties.

36 The second answer to be given to the national court is, therefore, that Article 30 of the Treaty precludes a public undertaking from being given the power to approve telephone equipment which is intended to be connected to the public network and which it has not supplied if the decisions of that undertaking cannot be challenged before the courts.

Costs

37 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Vice-President of the Commercial Court, Brussels, by order of 11 January 1988, hereby rules:

1. Articles 3(f), 90 and 86 of the EEC Treaty preclude a Member State from granting to the undertaking which operates the public telecommunications network the power to lay down standards for telephone equipment and to check that economic operators meet those standards when it is itself competing with those operators on the market for that equipment;

2. Article 30 of the Treaty precludes a public undertaking from being given the power to approve telephone equipment which is intended to be connected to the public network and which it has not supplied if the decisions of that undertaking cannot be challenged before the courts.

Joliet Slynn

Moitinho de Almeida Rodríguez Iglesias Zuleeg

Delivered in open court in Luxembourg on 13 December 1991.

J.-G. Giraud
Registrar

R. Joliet
President of the Fifth Chamber

DOCUMENTS ON THE APPLICATION OF THE COMPETITION RULES TO THE TELECOMMUNICATIONS SECTOR

III Judgments of the Court of Justice relating to Telecommunications

B Article 90

Case C-202/88

French Republic

v

Commission of the European Communities

(Competition in the markets in telecommunications terminals equipment)

Summary of the Judgment

1. *Competition — Public undertakings and undertakings to which the Member States have granted special or exclusive rights -- Powers of the Commission — Adoption of directives specifying in general terms the obligations of the Member States*
   (EEC Treaty, Art. 90(1) and (3))

2. *Competition — Undertakings to which the Member States have granted special or exclusive rights — Compatibility with the Treaty of the rights conferred — No presumption to that effect*
   (EEC Treaty, Art. 90(1))

3. *Competition — Public undertakings and undertakings to which the Member States have granted special or exclusive rights — Powers of the Commission by virtue of its duty of supervision and legislative powers of the Council*
   (EEC Treaty, Arts 87, 90(3) and 100a)

III/60

4. *Free movement of goods — Quantitative restrictions — Measures having equivalent effect — Interpretation of Article 30 of the Treaty in the light of Articles 2 and 3 — Telecommunications terminals — Exclusive importation and marketing rights granted by the Member States — Not permissible — Corollary — Exclusive rights regarding the connection, bringing into service and maintenance of terminal equipment not permissible — Withdrawal legally required by Directive 88/301 — Obligation, in order to ensure equal opportunities between economic agents, to entrust the drawing up of technical specifications and type-approval of equipment to an independent body*

(EEC Treaty, Arts 2, 3(f) and 30; Commission Directive 88/301, Arts 2, 3 and 6)

5. *Competition — Undertakings to which the Member States have granted special or exclusive rights — Recourse to Article 90 of the Treaty in order to deal with anti-competitive conduct engaged in by undertakings on their own initiative — Illegality — Appropriate legal basis — Articles 85 and 86 of the Treaty*

(EEC Treaty, Arts 85, 86 and 90; Commission Directive 88/301, Art. 7)

1. Article 90(3) of the Treaty empowers the Commission to specify in general terms, by adopting directives, the obligations imposed on the Member States by Article 90(1) as regards public undertakings and undertakings to which they have granted special or exclusive rights. That power, which is exercised without taking into consideration the situation prevailing in any particular Member State, differs by its very nature from that exercised by the Commission when seeking a declaration that a Member State has failed to fulfil a particular obligation under the Treaty.

2. The fact that Article 90(1) of the Treaty presupposes the existence of undertakings which have special or exclusive rights cannot be construed as meaning that such rights are necessarily compatible with the Treaty. They must be assessed in the light of different rules of the Treaty, to which Article 90(1) refers.

3. The subject-matter of the power conferred on the Commission by Article 90(3) of the Treaty, namely supervision of measures adopted by the Member States in relation to undertakings with which they have certain specific links, is different from, and more specific than, that of the powers conferred on the Council by either Article 100a or Article 87. Furthermore, the possibility that rules containing provisions which impinge upon the specific sphere of Article 90 might be laid down by the Council by virtue of its general power under certain articles of the Treaty does not preclude the exercise of the power which Article 90 confers on the Commission.

4. The grant by a Member State of exclusive importation and marketing rights in the telecommunications terminals sector is capable of restricting intra-Community trade and therefore

111/61

constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty. In the first place, the existence of such rights deprives traders without such rights of the opportunity of having their products purchased by consumers, and secondly the diversity and technical nature of the products in that sector are such that there is no certainty that the holder of exclusive rights can offer the entire range of models available on the market, inform customers about the state and operation of all the terminals and guarantee their quality. Accordingly, Article 2 of Directive 88/301 rightly requires such rights to be withdrawn, whilst Article 3 sets limits thereto which are imposed by the requirements of safety, protection of networks and inter-working of equipment.

Furthermore, Article 30 et seq. of the Treaty has to be interpreted in the light of Articles 2 and 3. Those articles set out to establish a market characterized by the free movement of goods where the terms of competition are not distorted, which means that the competition aspect of Article 3(f) has to be taken into account. In addition, if exclusive rights regarding the connection, bringing into service and maintenance of terminal equipment were retained, traders engaged in the marketing of such equipment might not be able to carry on business in conditions of competition which are not distorted, since there would be no certainty that the holder of those exclusive rights would be able to guarantee the reliability of those services for every type of terminal available on the market and the utilization of all those terminals, nor would he have any incentive to do so. Consequently the directive rightly requires those rights to be withdrawn also.

That same need to ensure that competition is not distorted and to secure equality of opportunity as between the various economic operators justifies the requirement laid down in Article 6 of the directive to the effect that Member States must entrust responsibility for drawing up technical specifications, monitoring their application and granting type-approval to a body independent of public or private undertakings offering competing goods and/or services in the telecommunications sector.

5. Where undertakings to which Member States have granted special or exclusive rights engage in anti-competitive conduct on their own initiative, Article 90 of the Treaty, which confers powers on the Commission only in relation to State measures, does not constitute an appropriate legal basis for requiring such conduct to be brought to an end. Such conduct can be called in question only by individual decisions adopted under Articles 85 and 86 of the Treaty.

Consequently, it is necessary to annul Article 7 of Directive 88/301, by which the Commission sought to require Member States to make it possible to terminate, with maximum notice of one year, leasing or maintenance contracts which concern terminal equipment subject to exclusive or special rights granted to certain undertakings at the time of the conclusion of the contracts, since it has not been established that the conclusion of long-term contracts, which are regarded as anti-competitive, was the result of encouragement or coercion on the part of the national authorities.

JUDGMENT OF THE COURT
19 March 1991 *

In Case C-202/88,

French Republic, represented by Jean-Pierre Puissochet, Director of Legal Affairs in the Ministry for Foreign Affairs, acting as Agent, and by Géraud de Bergues, Assistant Secretary for Foreign Affairs in the same Ministry, acting as deputy Agent, with an address for service in Luxembourg at the French Embassy, 9 Boulevard Prince-Henri,

applicant,

supported by

Italian Republic, represented by Luigi Ferrari Bravo, Head of the Legal Affairs Department, and by Ivo M. Braguglia, Avvocato dello Stato, acting as Agents, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

Kingdom of Belgium, represented by Eduard Marissens, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Lucy Dupong, 14A Rue des Bains,

Federal Republic of Germany, represented by Martin Seidel, Ministerialrat in the Federal Ministry for Economic Affairs, acting as Agent, with an address for service in Luxembourg at the Embassy of the Federal Republic of Germany, 20-22 Avenue Émile-Reuter,

and

Hellenic Republic, represented by Nikos Frangakis, Legal Adviser in the office of the Greek Permanent Representative to the European Communities, by Stamatina Vodina, Advocate, a member of the Legal Department of the office of the Greek Permanent Representative to the European Communities, and by Galateia Alexaki, Advocate, Legal Assistant in the Ministry for Economic Affairs, acting as Agents,

* Language of the case: French.

with an address for service in Luxembourg at the Greek Embassy, 117 Val Sainte-Croix,

interveners,

v

Commission of the European Communities, represented by Jean-Louis Dewost, Director General of the Legal Department, Götz zur Hausen, Legal Adviser, and Luís Antunes, a member of the Commission's Legal Department, acting as Agents, with an address for service in Luxembourg at the office of Guido Berardis, a member of the Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the partial annulment of Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment,

THE COURT,

composed of: O. Due, President, G. F. Mancini, T. F. O'Higgins, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias (Presidents of Chambers), C. N. Kakouris, R. Joliet, F. A. Schockweiler and M. Zuleeg, Judges,

Advocate General: G. Tesauro,
Registrar: J.-G. Giraud,

having regard to the Report for the Hearing,

after hearing oral arguments by the parties at the hearing on 26 October 1989,

after hearing the Opinion of the Advocate General at the sitting on 13 February 1990,

gives the following

111/64

Judgment

1 By application lodged at the Court Registry on 22 July 1988, the French Republic brought an action before the Court under the first paragraph of Article 173 of the EEC Treaty for the annulment of Articles 2, 6, 7 and, in so far as necessary, Article 9 of Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment (Official Journal 1988 L 131, p. 73). The Italian Republic, the Kingdom of Belgium, the Federal Republic of Germany and the Hellenic Republic have intervened in the proceedings in support of the form of order sought by the French Republic.

2 Directive 88/301 was adopted on the basis of Article 90(3) of the Treaty. According to Article 2 of that directive, Member States which have granted special or exclusive rights to undertakings for the importation, marketing, connection, bringing into service of telecommunications terminal equipment and/or maintenance of such equipment are to ensure that those rights are withdrawn and are to inform the Commission of the measures taken or draft legislation introduced to that end.

3 According to Article 3, Member States are to ensure that economic operators have the right to import, market, connect, bring into service and maintain terminal equipment. However, Member States may:

in the absence of technical specifications, refuse to allow terminal equipment to be connected and brought into service where such equipment does not, according to a reasoned opinion of the body referred to in Article 6, satisfy the essential requirements laid down in Article 2(17) of Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment (Official Journal 1986 L 217, p. 21);

require economic operators to possess the technical qualifications needed to connect, bring into service and maintain terminal equipment on the basis of objective, non-discriminatory and publicly available criteria.

4 According to Article 6 of the directive, Member States are to ensure that, from 1 July 1989, responsibility for drawing up specifications, monitoring their application and granting type-approval is entrusted to a body independent of public or private undertakings offering goods and/or services in the telecommunications sector.

5 Article 7 requires Member States to take the necessary steps to make it possible for customers to terminate, with maximum notice of one year, leasing or maintenance contracts relating to terminal equipment which at the time when the contracts were concluded were subject to exclusive or special rights granted to certain undertakings.

6 Finally, according to Article 9, Member States are to provide the Commission at the end of each year with a report allowing it to monitor compliance with the provisions of Articles 2, 3, 4, 6 and 7.

7 For a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, reference is made to the Report for the Hearing, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

8 The French Government relies on four pleas in law, alleging misuse of procedure, lack of powers of the Commission, breach of the principle of proportionality and infringement of essential procedural requirements. As part of its plea in law alleging lack of powers, the French Government also claims that the Commission has misapplied the rules of the Treaty. Since that allegation in fact constitutes a separate plea, it will be considered on its own.

I — Legal background to the dispute

9 The pleas in law and arguments put forward in this case relate essentially to the interpretation of Article 90 of the Treaty. According to paragraph (3) of that

article, on the basis of which the contested regulation was adopted, 'the Commission shall ensure the application of the provisions of this article and shall, where necessary, address appropriate directives or decisions to Member States'.

10 In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Article 90(1) prohibits the Member States generally from enacting or maintaining in force any measure contrary to the rules contained in the Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94.

11 Article 90(2) provides that undertakings entrusted with the operation of services of general economic interest are to be subject to those rules, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them, on condition, however, that the development of trade is not affected to such an extent as would be contrary to the interests of the Community.

12 In allowing derogations to be made from the general rules of the Treaty on certain conditions, that provision seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community's interest in ensuring compliance with the rules on competition and the preservation of the unity of the Common Market.

13 In paragraph 11 of the preamble to the contested directive, the Commission states that the conditions for applying the exception in Article 90(2) of the Treaty are not fulfilled. Neither the French Government nor the interveners have challenged that. It follows that this dispute falls within the scope of paragraphs (1) and (3) of Article 90 of the Treaty.

14 Inasmuch as it makes it possible for the Commission to adopt directives, Article 90(3) of the Treaty empowers it to lay down general rules specifying the obligations arising from the Treaty which are binding on the Member States as regards the undertakings referred to in Article 90(1) and (2).

15 Accordingly, the parties' pleas in law and arguments must be considered in the light of the question whether in this case the Commission has remained within the bounds of the legislative power thus conferred upon it by the Treaty.

II — Misuse of procedure

16 In its first plea in law the French Government claims that the Commission adopted the contested directive pursuant to Article 90(3) of the Treaty instead of initiating the procedure provided for in Article 169. In its view, Article 90(3) is intended to enable the Commission to inform the Member States, in cases where it is unclear how compliance with the Treaty is to be achieved, of the means which must be used in order to ensure such compliance. In contrast, recourse must be made to Article 169 where it is clear that a measure is wholly contrary to the Treaty and must be brought to an end forthwith.

17 It must be held in that regard that Article 90(3) of the Treaty empowers the Commission to specify in general terms the obligations arising under Article 90(1) by adopting directives. The Commission exercises that power where, without taking into consideration the particular situation existing in the various Member States, it defines in concrete terms the obligations imposed on them under the Treaty. In view of its very nature, such a power cannot be used to make a finding that a Member State has failed to fulfil a particular obligation under the Treaty.

18 However, it appears from the content of the directive at issue in this case that the Commission merely determined in general terms obligations which are binding on the Member States under the Treaty. The directive therefore cannot be interpreted as making specific findings that particular Member States failed to fulfil their obligations under the Treaty, with the result that the plea in law relied upon by the French Government must be rejected as unfounded.

III — Competence of the Commission

19 In its second plea in law the French Government, supported by the interveners, argues that by adopting a directive providing simply for the withdrawal of special

111/63

and exclusive rights for the importation, marketing, connection, bringing into service and/or maintenance of telecommunications terminal equipment, the Commission exceeded the supervisory powers conferred upon it by Article 90(3) of the Treaty. In the French Government's view, that provision presupposes the existence of special and exclusive rights. Accordingly, to take the view that the maintenance of those rights constitutes in itself a measure within the meaning of Article 90 disregards the scope of that article.

20 The Belgian and French Governments further consider that a policy on the restructuring of the telecommunications sector, as envisaged by the Directive, fell within the sole competence of the Council, acting under Article 100a. The Belgian and Italian Governments maintain in addition that the directive is contrary to Article 87 of the Treaty inasmuch as only the Council is empowered to lay down rules for the application of Articles 85 and 86 of the Treaty in specific sectors.

21 As far as the first argument is concerned, it must be held in the first place that the supervisory power conferred on the Commission includes the possibility of specifying, pursuant to Article 90(3), obligations arising under the Treaty. The extent of that power therefore depends on the scope of the rules with which compliance is to be ensured.

22 Next, it should be noted that even though that article presupposes the existence of undertakings which have certain special or exclusive rights, it does not follow that all the special or exclusive rights are necessarily compatible with the Treaty. That depends on different rules, to which Article 90(1) refers.

23 As regards the allegation that the Commission has encroached on the powers conferred on the Council by Articles 87 and 100a of the Treaty, those provisions have to be compared with Article 90, taking into account their respective subject-matter and purpose.

24 Article 100a is concerned with the adoption of measures for the approximation of the provisions laid down by law, regulation or administrative action in Member

111/69

States which have as their object the establishment and functioning of the internal market. Article 87 is concerned with the adoption of any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86, that is to say the competition rules applicable to all undertakings. As for Article 90, it is concerned with measures adopted by the Member States in relation to undertakings with which they have specific links referred to in the provisions of that article. It is only with regard to such measures that Article 90 imposes on the Commission a duty of supervision which may, where necessary, be exercised through the adoption of directives and decisions addressed to the Member States.

25 It must therefore be held that the subject-matter of the power conferred on the Commission by Article 90(3) is different from, and more specific than, that of the powers conferred on the Council by either Article 100a or Article 87.

26 It should also be noted that, as the Court held in Joined Cases 188 to 190/80 (*France, Italy and United Kingdom* v *Commission* [1982] ECR 2545, at paragraph 14), the possibility that rules containing provisions which impinge upon the specific sphere of Article 90 might be laid down by the Council by virtue of its general power under other articles of the Treaty does not preclude the exercise of the power which Article 90 confers on the Commission.

27 The plea in law alleging lack of powers on the part of the Commission must therefore be rejected.

IV — The principle of proportionality

28 In claiming that there has been a breach of the principle of proportionality the French Government alleges that the Commission failed to use appropriate means to bring to an end any abuse by telecommunications undertakings of their special or exclusive rights. As a result, that plea in law merges with the pleas in law alleging a misuse of procedure and lack of powers which have been dismissed; it therefore does not have to be considered separately.

III/70

V — Application of the rules of the Treaty

29 The French Government and the interveners allege that Articles 2, 6, 7 and 9 of the directive are unlawful, on the ground that those provisions are wrongly based on an infringement by the Member States of Articles 30, 37, 59 and 86 of the Treaty.

30 On the basis of the observations set out above, that complaint must be construed as being directed against the misapplication by the Commission of the aforesaid provisions of the Treaty. Articles 2, 6, 7 and 9 of Directive 88/301 must therefore be considered in the light of the grounds on which they are based.

1. *Legality of Article 2 of Directive 88/301 (withdrawal of special and exclusive rights)*

31 Article 2 of the contested directive requires Member States which have granted undertakings special or exclusive rights regarding the importation, marketing, connection, bringing into service of telecommunications terminal equipment and/or maintenance of such equipment to withdraw those rights and to inform the Commission of the measures taken or draft legislation introduced to that end.

32 It follows that the directive is concerned with exclusive rights, on the one hand, and special rights, on the other. It is appropriate to follow that classification in considering this complaint.

33 With regard to exclusive importation and marketing rights, it should be borne in mind that, as the Court has consistently held (see, in particular, the judgment in Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837, at paragraph 5), the prohibition of measures having an effect equivalent to quantitative restrictions laid down in Article 30 of the Treaty applies to all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.

34 In that regard it should be noted first that the existence of exclusive importing and marketing rights deprives traders of the opportunity of having their products purchased by consumers.

35 It should be pointed out, secondly, that the terminals sector is characterized by the diversity and technical nature of the products concerned and by the ensuing constraints. In those circumstances there is no certainty that the holder of the monopoly can offer the entire range of models available on the market, inform customers about the state and operation of all the terminals and guarantee their quality.

36 Accordingly, exclusive importation and marketing rights in the telecommunications terminal sector are capable of restricting intra-Community trade.

37 With regard to the question whether such rights can be justified, it should be noted that in Article 3 of the contested directive the Commission specified the extent and the limits of the withdrawal of special and exclusive rights so as to take into account certain requirements such as those listed in Article 2(17) of Council Directive 86/361, namely user safety, safety of employees of public telecommunications network operators, protection of public telecommunications networks from harm and interworking of terminal equipment in justified cases.

38 For its part, the French Government has not challenged Article 3 of the contested directive, nor has it argued that there are other essential requirements which the Commission should have complied with in this case.

39 In those circumstances, the Commission was right to consider exclusive importation and marketing rights in the telecommunications terminal sector incompatible with Article 30 of the Treaty.

40 So far as concerns exclusive rights regarding the connection, bringing into service and maintenance of telecommunications terminal equipment, paragraph 6 of the preamble to the directive states that:

'. . . The retention of exclusive rights in this field would be tantamount to retention of exclusive marketing rights . . . '.

41 In that regard it should be borne in mind, in the first place, that, as the Court has consistently held, Articles 2 and 3 of the Treaty set out to establish a market characterized by the free movement of goods where the terms of competition are not distorted (see, in particular, the judgment in Case 229/83 *Leclerc* v *Au Blé Vert* [1985] ECR 1, at paragraph 9). Article 30 et seq. must therefore be interpreted in the light of that principle, which means that the competition aspect of Article 3(f) of the Treaty has to be taken into account.

42 Next, it should be noted that in a market which exhibits the characteristics described above (see paragraph 35), there is no certainty that a holder of exclusive rights regarding the connection, bringing into service and maintenance of terminal equipment can guarantee the reliability of those services for every type of terminal available on the market and thereby enable them all to be used, nor that he will have any incentive to do so. Accordingly, when the exclusive marketing right has been withdrawn, an economic agent must himself be able to connect, bring into service and maintain equipment in order to be able to carry on his marketing activity in conditions of competition which are not distorted.

43 Accordingly, the Commission rightly regarded exclusive rights regarding the connection, bringing into service and maintenance of telecommunications terminal equipment as incompatible with Article 30.

44 It follows from the foregoing that the Commission was justified in requiring the withdrawal of exclusive rights regarding the importation, marketing, connection, bringing into service of telecommunications terminal equipment and/or maintenance of such equipment.

45 As far as special rights are concerned, it should be noted that neither the provisions of the directive nor the preamble thereto specify the type of rights which are actually involved and in what respect the existence of such rights is contrary to the various provisions of the Treaty.

46 It follows that the Commission has failed to justify the obligation to withdraw special rights regarding the importation, marketing, connection, bringing into service and/or maintenance of telecommunications terminal equipment.

47 Accordingly, Article 2 must be declared void in so far as it concerns the withdrawal of those rights.

2. *Legality of Article 6 of Directive 88/301 (drawing up specifications, monitoring their application and granting type-approval for terminal equipment)*

48 According to Article 6 of the contested directive, Member States are to ensure that from 1 July 1989 responsibility for drawing up the specifications referred to in Article 5 of the directive, monitoring their application and granting type-approval is entrusted to a body independent of public or private undertakings offering goods and/or services in the telecommunications sector.

49 Paragraph 9 of the preamble to the directive states that:

'... To ensure that [technical specifications and type-approval procedures] are applied transparently, objectively and without discrimination, the drawing-up and application of such rules should be entrusted to bodies independent of competitors in the market in question ...'.

50 Paragraph 17 of the preamble to the directive states that:

111/74

'Monitoring of type-approval specifications and rules cannot be entrusted to a competitor in the terminal equipment market in view of the obvious conflict of interest. Member States should therefore ensure that the responsibility for drawing up type-approval specifications and rules is assigned to a body independent of the operator of the network and of any other competitor in the market for terminals.'

51 It should be observed that a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators. To entrust an undertaking which markets terminal equipment with the task of drawing up the specifications for such equipment, monitoring their application and granting type-approval in respect thereof is tantamount to conferring upon it the power to determine at will which terminal equipment may be connected to the public network, and thereby placing that undertaking at an obvious advantage over its competitors.

52 Consequently, the Commission was justified in seeking to entrust responsibility for drawing up technical specifications, monitoring their application and granting type-approval to a body independent of public or private undertakings offering competing goods and/or services in the telecommunications sector.

3. *Legality of Article 7 of Directive 88/301 (termination of leasing or maintenance contracts)*

53 Article 7 of the contested directive requires Member States to take the necessary steps to make it possible to terminate, with maximum notice of one year, leasing or maintenance contracts which concern terminal equipment subject to exclusive or special rights granted to certain undertakings at the time of the conclusion of the contracts.

54 Paragraph 18 in the preamble to the directive states that:

'The holders of special or exclusive rights in the terminal equipment in question have been able to impose on their customers long-term contracts preventing the introduction of free competition from having a practical effect within a reasonable period. Users must therefore be given the right to obtain a revision of the duration of their contracts.'

55 In that regard, it should be noted that Article 90 of the Treaty confers powers on the Commission only in relation to State measures (see paragraph 24) and that anti-competitive conduct engaged in by undertakings on their own initiative can be called in question only by individual decisions adopted under Articles 85 and 86 of the Treaty.

56 It does not appear either from the provisions of the directive or from the preamble thereto that the holders of special or exclusive rights were compelled or encouraged by State regulations to conclude long-term contracts.

57 Article 90 cannot therefore be regarded as an appropriate basis for dealing with the obstacles to competition which are purportedly created by the long-term contracts referred to in the directive. It follows that Article 7 must be declared void.

4. *Legality of Article 9 of Directive 88/301 (annual report)*

58 Article 9, which requires Member States to provide the Commission at the end of each year with a report allowing it to monitor compliance with certain provisions of the directive, must also be declared void in so far as it refers to the provisions of Article 2 which are concerned with special rights and to Article 7 of the contested directive.

VI — Infringement of essential procedural requirements

59 The French Government further claims that the contested directive does not contain an adequate statement of reasons.

60 It should be pointed out *in limine* that that plea in law must be considered only in so far as it relates to aspects of the contested directive which have not already been declared invalid.

III/76

61 In that regard, it should be noted that the reasons which led the Commission to require the withdrawal of exclusive rights regarding the importation, marketing, connection, bringing into service and maintenance of terminal equipment are sufficiently clear from the preamble to the directive. The same is true as regards the obligations imposed on the Member States by Article 6 of the contested directive.

62 The plea in law alleging infringement of essential procedural requirements therefore cannot be upheld.

VII — Costs

63 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, the first subparagraph of Article 69(3) provides that the Court may order the parties to bear their own costs in whole or in part; each party succeeds on some and fails on other heads. As the French Republic has only been partially successful, each of the parties, including the interveners, is to bear its own costs.

On those grounds,

THE COURT

hereby:

(1) Declares Article 2 of Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment void in so far as it requires Member States which grant undertakings special rights regarding the importation, marketing, connection or bringing into service of terminal equipment and/or maintenance of such equipment to withdraw such rights and to inform the Commission of the measures taken or draft legislation introduced to that end;

(2) Declares void Article 7 of the directive;

(3) Declares Article 9 of the directive void in so far as it refers to the provisions of Article 2 which are concerned with special rights and to Article 7 of the directive;

(4) Dismisses the remainder of the application;

(5) Orders the parties to bear their own costs.

Due Mancini O'Higgins Moitinho de Almeida

Rodríguez Iglesias Kakouris Joliet Schockweiler Zuleeg

Delivered in open court in Luxembourg on 19 March 1991.

J.-G. Giraud
Registrar

O. Due
President

ARRÊT DE LA COUR
27 octobre 1993

«Agrément national de terminaux de radiocommunication -- Autorisation pour l'utilisation de tels terminaux -- Articles 30 à 37 et 86 du traité CEE -- Directive 88/301/CEE de la Commission»

Dans les affaires jointes C-46/90 et C-93/91,

ayant pour objet des demandes adressées à la Cour, en application de l'article 177 du traité CEE, par le tribunal de première instance (57e et 55e chambres) de Bruxelles et tendant à obtenir, dans les litiges pendants devant cette juridiction entre

M. le Procureur du Roi

et, d'une part,

Jean-Marie Lagauche,
Constant De Munck,
Jacques Paulissen,
Alain Delerue,
Jean-Claude Lambert,
Willy Cleynen,
Serge Hoffman,
Pierre Lemoine,

et, d'autre part,

Pierre Evrard,

Langue de procédure : le français.

une décision à titre préjudiciel sur l'interprétation des articles 30 à 37 et 86 du traité CEE, ainsi que de la directive 88/301/CEE de la Commission, du 16 mai 1988, relative à la concurrence sur les marchés de terminaux de télécommunication (JO L 131, p. 73),

LA COUR,

composée de MM. O. Due, président, G. F. Mancini, J. C. Moitinho de Almeida, M. Díez de Velasco, D. A. O. Edward, présidents de chambre, C. N. Kakouris, R. Joliet, F. A. Schockweiler, G. C. Rodríguez Iglesias, F. Grévisse, M. Zuleeg, P. J. G. Kapteyn et J. L. Murray, juges,

avocat général: M. C. O. Lenz,
greffier: M. H. A. Rühl, administrateur principal,

considérant les observations écrites présentées:

- pour le gouvernement belge, par M. Jan Devadder, conseiller au ministère des Affaires étrangères, en qualité d'agent, et Me Eduard Marissens, avocat au barreau de Bruxelles,

- pour le gouvernement britannique, par Mme Rosemary Cawdwell, du Treasury Solicitor's Department, en qualité d'agent,

- pour la Commission des Communautés européennes, par MM. Richard Wainwright, conseiller juridique, et Bernhard Jansen, membre du service juridique, en qualité d'agents, assistés de Me Hervé Lehman, avocat au barreau de Paris,

vu les rapports d'audience,

ayant entendu les observations orales du gouvernement belge et de la Commission, représentée par M. Richard Wainwright, Me Hervé Lehman et Mme Virginia Melgar, fonctionnaire national mise à la disposition de la Commission, en qualité d'agents, à l'audience du 9 juin 1992,

ayant entendu l'avocat général en ses conclusions à l'audience du 2 décembre 1992,

III/80

rend le présent

Arrêt

1 Par jugements du 19 avril 1989 et du 11 mars 1991, parvenus à la Cour respectivement le 28 février 1990 et le 15 mars 1991, le tribunal de première instance (57e et 55e chambres) de Bruxelles a posé, en application de l'article 177 du traité CEE, deux questions préjudicielles sur l'interprétation des articles 30 à 37 et 86 du traité CEE, ainsi que de la directive 88/301/CEE de la Commission, du 16 mai 1988, relative à la concurrence sur les marchés de terminaux de télécommunication (JO L 131, p. 73), en vue d'apprécier la compatibilité avec ces dispositions d'un régime national qui, d'une part, subordonne la détention d'appareils émetteurs ou récepteurs de radiocommunication à une autorisation ministérielle et, d'autre part, interdit la mise en vente ou en location d'appareils émetteurs ou récepteurs dont un exemplaire n'aurait pas été préalablement agréé par un organisme public, placé sous l'autorité hiérarchique du ministre compétent, comme satisfaisant aux prescriptions techniques fixées par ce ministre.

2 Ces questions ont été soulevées dans le cadre de deux procédures pénales.

3 La première procédure, qui a donné lieu à l'affaire C-46/90, a été introduite contre M. Jean-Marie Lagauche et sept autres personnes, prévenus notamment d'avoir détenu des téléphones sans fil et une paire de walkie-talkie, sans avoir obtenu l'autorisation ministérielle requise, et d'avoir mis en vente ou en location des téléphones sans fil dont aucun exemplaire n'avait préalablement été agréé par la Régie des télégraphes et téléphones (ci-après «RTT»).

4 La deuxième procédure, qui a donné lieu à l'affaire C-93/91, a été introduite contre M. Pierre Evrard, prévenu d'avoir détenu et mis en vente, entre le 1er janvier 1989 et le 2 février 1989, un téléphone sans fil non agréé par la RTT, et d'avoir, le 23 janvier 1990, détenu et mis en vente onze appareils de radiocommunication, également non agréés, sans avoir obtenu l'autorisation ministérielle exigée.

5 Pour sa défense, M. Evrard a fait valoir que l'un de ces appareils portait la marque de la Deutsche Bundespost qui l'avait homologué. Il a produit par ailleurs une attestation d'un laboratoire agréé par British Telecom, selon laquelle certains de ces appareils produisent une puissance inférieure à dix milliwatts. Il estime que dans ces conditions, et comme l'admet d'ailleurs le ministère public, la détention de ces appareils n'était soumise à aucune autorisation ministérielle. Il conteste cependant la position de ce dernier, selon laquelle l'ensemble des appareils en cause devaient néanmoins répondre aux normes techniques belges et être agréés

comme tels par la RTT, et invoque les dispositions de la directive 88/301, précitée, au soutien de son argumentation.

6 Il ressort du dossier que l'article 3, paragraphe 1, de la loi du 30 juillet 1979, relative aux radiocommunications (Moniteur belge du 30 août 1979), prévoit que «nul ne peut dans le royaume (...) détenir un appareil émetteur ou récepteur de radiocommunication (...) sans avoir obtenu l'autorisation écrite du Ministre (ayant les télégraphes et les téléphones dans ses attributions)». Cette même disposition précise que l'autorisation ministérielle est personnelle et révocable.

7 Habilité en vertu de l'article 3, paragraphe 2, de la même loi à déterminer les cas dans lesquels les autorisations ne sont pas requises, le Roi a, par l'article 5, paragraphe 3, de l'arrêté royal du 15 octobre 1979, relatif aux radiocommunications privées (Moniteur belge du 30 octobre 1979), accordé une dispense d'autorisation pour «les dispositifs radioélectriques agréés par la Régie dont la puissance d'émission ne dépasse pas 10 milliwatts», ce qui inclut les téléphones sans fil.

8 En vertu d'une loi du 13 octobre 1930, la RTT détient en Belgique le monopole de l'établissement et de l'exploitation, pour la correspondance du public, des lignes et des bureaux télégraphiques et téléphoniques (y compris la téléphonie sans fil). En outre, selon l'article 2 de la loi relative aux radiocommunications, précitée, elle est autorisée «à entreprendre et à exploiter tout service de radiocommunication».

9 Il résulte par ailleurs de l'article 17 de l'arrêté royal du 15 octobre 1979, précité, que la RTT est chargée «de la gestion du spectre des fréquences radioélectriques et du contrôle de leur utilisation dans le royaume». Il lui appartient à cette fin d'assigner les fréquences nécessaires au fonctionnement des stations et réseaux de radiocommunications autorisés et de procéder à leur coordination, tant sur le plan national qu'international. La RTT est chargée également d'instruire les demandes introduites auprès du ministre en vue de l'obtention de l'autorisation de détenir un appareil émetteur ou récepteur de radiocommunication.

10 Il ressort enfin de l'article 7 de la loi belge relative aux radiocommunications, précitée, qu'«aucun appareil émetteur ou récepteur de radiocommunication ne peut être mis en vente ou en location si un exemplaire n'a pas été agréé par la Régie comme satisfaisant aux prescriptions techniques fixées par le Ministre» et que «les modalités de l'agrément sont arrêtées par le Ministre».

11 A cet égard, l'article 1er de l'arrêté ministériel du 19 octobre 1979, relatif aux radiocommunications privées (Moniteur belge du 30 octobre 1979), qui fixe les modalités de l'agrément, précise que ce régime vise tous les appareils construits ou importés en Belgique en vue de la vente ou de la location ainsi que tout appareil construit par un particulier pour son propre usage. La RTT peut toutefois agréer, sans essai préalable, des appareils émetteurs ou récepteurs de radiocommunication importés, qui ont déjà été homologués dans l'un des États membres de la Conférence européenne des administrations des Postes et Télécommunications,

comme satisfaisant à des spécifications techniques équivalentes à celles définies à l'article 6 de cet arrêté ministériel.

12 Le non-respect des exigences d'autorisation et d'agrément est sanctionné pénalement. A cet égard, les agents de la RTT, agissant en qualité d'officiers de police judiciaire, veillent au respect par les usagers des dispositions applicables et constatent les infractions à la loi du 30 juillet 1979 et aux arrêtés d'exécution.

13 La directive 88/301, précitée, concerne les marchés de terminaux de télécommunication, entendant par l'expression «appareil terminal», selon son article 1er, tout appareil qui est connecté directement ou indirectement à la terminaison d'un réseau public de télécommunication pour transmettre, traiter ou recevoir des informations.

14 L'article 5 de la directive prévoit la publication, par les États membres, de toutes les spécifications et procédures d'agrément pour les appareils terminaux.

15 L'article 6 de la directive dispose:

> «les États membres assurent qu'à partir du 1er juillet 1989 la formalisation des spécifications mentionnées à l'article 5 de la directive et le contrôle de leur application ainsi que l'agrément sont effectués par une entité indépendante des entreprises publiques ou privées offrant des biens et/ou des services dans le domaine des télécommunications.»

16 Ayant des doutes quant à la conformité avec le droit communautaire de la législation invoquée par le ministère public pour demander la condamnation des prévenus au principal, le tribunal de première instance de Bruxelles a sursis à statuer et a posé, dans l'affaire C-46/90, Lagauche e.a., les questions préjudicielles suivantes:

> «Les articles 37 et 86 du traité instituant la Communauté économique européenne doivent-ils être interprétés comme interdisant dans le secteur des radiocommunications et radiocommunications privées, des dispositions légales du type de la loi du 30/7/1979 et de l'AR du 15/10/1979, lesquelles sanctionnent par des peines de prison et/ou d'amende ceux qui auront:
>
> 1. mis en vente ou en location un appareil émetteur ou récepteur en l'espèce des TSF sans qu'ils aient été agréés par la RTT
>
> ou
>
> 2. détenu, établi ou fait fonctionner un appareil émetteur, en l'espèce des TSF et une paire de walkie-talkie sans avoir obtenu l'autorisation écrite, personnelle et révocable du ministre compétent?»

III/83

et, dans l'affaire C-93/91, Evrard, les questions suivantes:

> «Les articles 30 à 37 et 86 du traité instituant la Communauté économique européenne, ainsi que la directive de la Commission européenne du 16 mai 1988 relative à la concurrence sur les marchés des terminaux de télécommunication, doivent-ils être interprétés comme interdisant dans le secteur des radiocommunications des dispositions légales du type de la loi du 30 juillet 1979 et de l'arrêté royal du 15 octobre 1979, lesquels sanctionnent par des peines d'emprisonnement et/ou d'amende ceux qui auront:
>
> 1) dans le Royaume de Belgique ou à bord d'un navire, d'un bateau, d'un aéronef ou de tout autre support soumis au droit belge, détenu un appareil émetteur ou récepteur de radiocommunication, ou établi et fait fonctionner une station ou un réseau de radiocommunication sans avoir obtenu l'autorisation écrite, personnelle et révocable du Ministre ou du Secrétaire d'État ayant les télégraphes et les téléphones dans ses attributions;
>
> 2) mis en vente ou en location un appareil émetteur ou récepteur de radiocommunication sans qu'un exemplaire ait été agréé par la Régie des Télégraphes et des Téléphones comme satisfaisant aux prescriptions techniques fixées par le Ministre compétent,
>
> et ce malgré, le cas échéant, l'existence d'une agréation obtenue dans le cadre d'une procédure établie par un autre État membre de la Communauté européenne?»

17 L'affaire C-46/90, ayant été renvoyée devant la cinquième chambre, a fait l'objet d'une audience publique le 2 mai 1991 et de conclusions de l'avocat général le 11 juillet 1991. Par la suite, en application de l'article 95, paragraphe 3, du règlement de procédure, cette affaire a été renvoyée devant la Cour plénière. A la suite des conclusions de l'avocat général, il a été décidé, par ordonnance du 14 juillet 1993, de joindre les deux affaires aux fins de l'arrêt.

18 Pour un plus ample exposé des faits des litiges au principal, de la législation belge applicable, du déroulement de la procédure ainsi que des observations écrites déposées devant la Cour, il est renvoyé aux rapports d'audience. Ces éléments du dossier ne sont repris ci-dessous que dans la mesure nécessaire au raisonnement de la Cour.

19 Par ses questions, la juridiction nationale cherche à savoir en substance si les articles 30 à 37 et 86 du traité, d'une part, et les dispositions de la directive 88/301, d'autre part, s'opposent à l'application de dispositions nationales, telles que celles décrites ci-dessus (points 6 à 12).

20 A cet égard, il y a lieu de préciser tout d'abord que, pour ce qui concerne les dispositions du traité relatives à la libre circulation des marchandises, il suffit d'examiner ces questions successivement sous l'angle de l'article 30 et de l'article 37 du traité.

21 Il convient de relever ensuite que l'article 86 du traité ne visant que les comportements anticoncurrentiels qui ont été adoptés par les entreprises de leur propre initiative (voir notamment arrêt du 19 mars 1991, France/Commission, C-202/88, Rec. p. I-1223, point 55), alors que les questions posées concernent des mesures étatiques, c'est au regard de l'article 90, paragraphe 1, du traité, en liaison avec l'article 86, que ces questions doivent être examinées.

22 Il y a lieu de relever encore que, dans l'affaire C-46/90, les faits du litige au principal sont antérieurs au 1er juillet 1989, date d'entrée en vigueur de l'article 6 de la directive 88/301, alors que, dans l'affaire C-93/91, ils sont pour partie antérieurs et pour partie postérieurs à cette date.

23 Il y a lieu de souligner enfin que le champ d'application matériel de la directive 88/301 est limité aux appareils connectés directement ou indirectement à la terminaison d'un réseau public de télécommunication, de sorte que seulement certains des appareils dont il est question dans les affaires au principal relèvent du champ d'application de celle-ci.

24 Il s'ensuit que, indépendamment de l'interprétation des articles 30 et 37 du traité, les questions posées doivent être examinées au regard des articles 86 et 90, paragraphe 1, du traité pour ce qui concerne les faits antérieurs au 1er juillet 1989 et au regard des dispositions de la directive pour ce qui concerne les faits postérieurs à cette date, tout en opérant la distinction entre les appareils relevant du champ d'application de la directive et ceux qui n'en relèvent pas.

Sur l'article 30 du traité

25 Dans l'arrêt du 13 décembre 1991, GB-Inno-BM (C-18/88, Rec. p. I-5941), la Cour a dit pour droit que l'article 30 du traité s'oppose à ce qu'une entreprise publique se voie accorder le pouvoir d'agréer les appareils téléphoniques destinés à être raccordés au réseau public et non fournis par elle, si les décisions de cette entreprise ne sont pas susceptibles de faire l'objet d'un recours juridictionnel.

26 Cette interprétation doit être étendue au cas où une entreprise publique agrée les appareils émetteurs ou récepteurs de radiocommunication, que ceux-ci soient destinés ou non à fonctionner par le biais du réseau public.

III/85

27 Le gouvernement belge a affirmé dans ses observations qu'un refus par la RTT d'accorder l'agrément en question est susceptible de faire l'objet d'un recours devant le Conseil d'État belge.

28 Dès lors, et dans la mesure où la procédure d'agrément en question respecte les critères énoncés dans l'arrêt GB-Inno-BM, précité, elle ne saurait être considérée comme contraire à l'article 30 du traité.

29 Il en résulte que l'article 30 du traité ne s'oppose pas à ce qu'une entreprise publique se voie accorder le pouvoir d'agréer les appareils émetteurs ou récepteurs de radiocommunication non fournis par elle, dès lors que les décisions de cette entreprise sont susceptibles de faire l'objet d'un recours juridictionnel.

Sur l'article 37 du traité

30 Il y a lieu de rappeler à titre liminaire que l'article 37 qui prévoit l'aménagement des monopoles nationaux présentant un caractère commercial s'applique «à tout organisme par lequel un État membre, de jure ou de facto, contrôle, dirige ou influence sensiblement, directement ou indirectement, les importations ou les exportations entre les États membres. Ces dispositions s'appliquent également aux monopoles d'État délégués».

31 Il y a lieu, en outre, de souligner qu'une interdiction de détenir certains appareils sans autorisation ministérielle n'entre pas dans le champ d'application de l'article 37.

32 Les prérogatives dont est investi un organisme public tel que la RTT portent sur l'instruction des demandes introduites auprès du ministre en vue de l'obtention d'une autorisation de détention d'un appareil émetteur ou récepteur de radiocommunication, sur l'assignation et la coordination des fréquences hertziennes ainsi que sur la délivrance des agréments après vérification de la conformité des appareils commercialisés avec les normes techniques fixées par le ministre. Elles sont destinées à éviter la perturbation des radiocommunications.

33 L'exercice de ces prérogatives répond donc à des préoccupations de nature régalienne, à savoir la police du domaine public hertzien, et ne constitue pas une prestation de services. Une telle activité est, en tout état de cause, étrangère au champ d'application de l'article 37 du traité qui, ainsi que l'a jugé la Cour (voir notamment arrêt du 28 juin 1983, Mialocq, 271/81, Rec. p. 2057), vise les échanges de marchandises et ne concerne les prestations de services que dans la mesure où le monopole de telles prestations contreviendrait au principe de libre circulation des marchandises en discriminant les produits importés au profit de produits d'origine nationale.

34 Il convient donc de constater que l'article 37 du traité ne s'oppose pas à l'application de dispositions législatives ou réglementaires nationales qui comportent l'interdiction de vendre ou de donner en location des appareils émetteurs ou récepteurs de radiocommunication, dont un exemplaire n'aurait pas été préalablement agréé par l'organisme public compétent, comme satisfaisant aux prescriptions techniques fixées par le ministre.

Sur la directive 88/301/CEE

35 Il convient, à ce stade, d'examiner la portée de la directive 88/301 pour ce qui concerne les appareils relevant de son champ d'application.

36 Cette directive a été arrêtée par la Commission dans l'exercice de son pouvoir normatif, qui lui est conféré par l'article 90, paragraphe 3, du traité, d'édicter des règles générales précisant les obligations résultant du traité, qui s'imposent aux États membres en ce qui concerne les entreprises visées aux deux paragraphes précédents du même article (arrêt France/Commission, précité, points 14 et 15).

37 L'article 6 de ladite directive opère une distinction entre les activités ou fonctions tenant, d'une part, à la formalisation des spécifications des appareils terminaux, au contrôle de leur application et à l'agrément de tels appareils et, d'autre part, à l'offre par une entreprise publique ou privée des biens et/ou des services dans le domaine des télécommunications.

38 L'article 6 précise l'obligation pour les États membres d'assurer qu'à partir du 1er juillet 1989 les activités de la première catégorie soient effectuées par une entité indépendante des entreprises qui s'engagent dans les activités de la deuxième catégorie.

39 Or, il est constant, ainsi que le gouvernement belge l'a admis au cours de l'audience, qu'au cours de la période postérieure au 1er juillet 1989, visée en l'espèce au principal, cette division des activités n'avait pas été opérée en Belgique.

40 Il s'ensuit que, pour autant que les appareils en cause relèvent du champ d'application matériel de la directive 88/301, et dans la mesure où il s'agit de la période postérieure au 1er juillet 1989, l'article 6 de cette directive s'oppose à une réglementation nationale qui interdit, sous peine de sanctions, la mise en vente ou en location d'appareils sans qu'un exemplaire ait été agréé par une entreprise publique offrant des biens et/ou des services dans le domaine des télécommunications. Il appartient au juge national d'en tirer les conséquences.

41 Pour ce qui concerne la période antérieure au 1er juillet 1989, et pour ce qui concerne les appareils qui ne relevaient ni avant ni après cette date du champ

d'application matériel de la directive, il y a lieu d'examiner le problème sous l'angle de l'article 90, paragraphe 1, en liaison avec l'article 86 du traité.

Sur l'article 90, paragraphe 1, en liaison avec l'article 86 du traité

42 Il convient de relever à titre liminaire que les articles 86 et 90 font partie d'un ensemble de règles qui, aux termes de l'article 3, sous f), du traité, visent à assurer que la concurrence n'est pas faussée dans le marché commun.

43 Comme il a été précisé ci-avant, le contrôle du domaine public hertzien est nécessaire au bon fonctionnement des radiocommunications, tant dans le domaine des services publics que dans celui des activités commerciales et privées. Un tel contrôle est également nécessaire à la réalisation d'une concurrence non faussée entre les opérateurs économiques qui se servent des radiocommunications, ainsi qu'entre les producteurs et entre les vendeurs des appareils, ces opérateurs ayant tout intérêt à ce que leurs appareils puissent être utilisés sans perturbation.

44 Il y a lieu cependant de signaler, dans le même temps, qu'un système de concurrence non faussée, tel que celui prévu par le traité, ne peut être garanti que si l'égalité des chances entre les différents opérateurs économiques est assurée. Tel ne serait pas le cas si une entreprise qui commercialise des appareils terminaux se voyait confier la tâche de formaliser les spécifications auxquelles devront répondre les appareils terminaux, de contrôler leur application et d'agréer ces appareils (arrêts France/Commission, précité, point 51, et GB-Inno-BM, précité, point 25).

45 C'est à la lumière de ces considérations que doit être appréciée la compatibilité d'une législation nationale, telle que la loi belge du 30 juillet 1979, avec les exigences du traité.

46 Quant à l'exigence, pour la détention d'un appareil émetteur ou récepteur, d'une autorisation écrite du Ministre ayant les télégraphes et les téléphones dans ses attributions, telle que prévue par l'article 3, paragraphe 1, de la loi belge, il convient de relever que seules entrent dans le champ d'application de l'article 90, paragraphe 1, les mesures prises par les États membres à l'égard des entreprises publiques et des entreprises auxquelles ils accordent des droits spéciaux et/ou exclusifs. Cette disposition du traité ne saurait dès lors être invoquée à l'encontre d'un pouvoir d'autorisation conféré à un ministre dans le cadre normal de ses attributions.

47 La même constatation s'impose en ce qui concerne la simple fonction, telle que celle qui a été confiée à la RTT, d'instruire les demandes d'autorisation introduites auprès du ministre, cette fonction n'étant qu'accessoire à l'exercice du pouvoir ministériel.

48 Quant au pouvoir d'agrément, il y a lieu de constater que la loi belge s'applique indistinctement à tout appareil émetteur ou récepteur de radiocommunication, y compris les appareils destinés, comme les téléphones sans fil, à être connectés indirectement à un réseau public de télécommunication.

49 Or, il ressort des termes de l'article 7 de la loi belge, précité, que, à la différence de la situation visée par l'affaire GB-Inno-BM, précitée, c'est le ministre qui fixe les prescriptions techniques nécessaires pour l'agrément de tels appareils, ainsi que les modalités de l'agrément, et ceci dans le cadre de ses attributions de contrôle de la radiocommunication sur le territoire belge. S'il est vrai que la RTT est autorisée par l'article 2 de cette même loi à entreprendre et à exploiter tout service de radiocommunication, il ressort des termes dudit article 7 que, en ce qui concerne l'agrément d'appareils émetteurs ou récepteurs, la seule mission de la RTT consiste en la vérification de la conformité de tels appareils aux prescriptions fixées par le Ministre.

50 Pour ce qui concerne les appareils agréés par l'organisme compétent d'un autre État membre, il y a lieu de relever qu'aussi longtemps que les systèmes de télécommunications et de radiocommunications des États membres n'ont pas été harmonisés, l'homologation accordée par un État membre ne garantit pas que l'appareil en question ne perturbe pas le bon fonctionnement de ces systèmes sur le territoire d'un autre État dont les prescriptions techniques peuvent encore être différentes.

51 Il s'ensuit que l'article 90, paragraphe 1, en liaison avec l'article 86 du traité, ne s'oppose pas à l'application de dispositions nationales qui comportent l'interdiction, en premier lieu, de détenir des appareils émetteurs ou récepteurs de radiocommunication sans autorisation ministérielle, et, en deuxième lieu, de vendre ou de donner en location de tels appareils dont un exemplaire n'aurait pas été agréé comme satisfaisant aux prescriptions techniques fixées par le ministre compétent, même si l'appareil a été agréé dans un autre État membre.

Sur les dépens

52 Les frais exposés par le gouvernement belge, par le gouvernement du Royaume-Uni et par la Commission des Communautés européennes, qui ont soumis des observations à la Cour, ne peuvent faire l'objet d'un remboursement. La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction nationale, il appartient à celle-ci de statuer sur les dépens.

III/89

Par ces motifs,

LA COUR,

statuant sur les questions à elle soumises par le tribunal de première instance de Bruxelles, par jugements du 19 avril 1989 et du 11 mars 1991, dit pour droit:

1) L'article 30 du traité CEE ne s'oppose pas à ce qu'une entreprise publique se voie accorder le pouvoir d'agréer les appareils émetteurs ou récepteurs de radiocommunication non fournis par elle, dès lors que les décisions de cette entreprise sont susceptibles de faire l'objet d'un recours juridictionnel.

2) L'article 37 du traité CEE ne s'oppose pas à l'application de dispositions législatives ou réglementaires nationales qui comportent l'interdiction de vendre ou de donner en location des appareils émetteurs ou récepteurs de radiocommunication, dont un exemplaire n'aurait pas été préalablement agréé par l'organisme public compétent, comme satisfaisant aux prescriptions techniques fixées par le ministre.

3) Pour autant que les appareils en cause relèvent du champ d'application matériel de la directive 88/301/CEE de la Commission, du 16 mai 1988, relative à la concurrence sur les marchés de terminaux de télécommunication, et dans la mesure où il s'agit de la période postérieure au 1er juillet 1989, l'article 6 de cette directive s'oppose à une réglementation nationale qui interdit, sous peine de sanctions, la mise en vente ou en location d'appareils sans qu'un exemplaire ait été agréé par une entreprise publique offrant des biens et/ou des services dans le domaine des télécommunications. Il appartient au juge national d'en tirer les conséquences.

4) L'article 90, paragraphe 1, en liaison avec l'article 86 du traité CEE, ne s'oppose pas à l'application de dispositions nationales qui comportent l'interdiction, en premier lieu, de détenir des appareils émetteurs ou récepteurs de radiocommunication sans autorisation ministérielle, et, en deuxième lieu, de vendre ou de donner en location de tels appareils dont un exemplaire n'aurait pas été agréé comme satisfaisant aux prescriptions

techniques fixées par le ministre compétent, même si l'appareil bénéficie d'un agrément accordé par un autre État membre.

Due Mancini Moitinho de Almeida Díez de Velasco

Edward Kakouris Joliet

Schockweiler Rodríguez Iglesias Grévisse

Zuleeg Kapteyn Murray

Ainsi prononcé en audience publique à Luxembourg, le 27 octobre 1993.

Le greffier Le président

J.-G. Giraud O. Due

III/ 91

TRIBUNAL DE JUSTICIA
DE LAS
COMUNIDADES EUROPEAS

DE EUROPÆISKE FÆLLESSKABERS
DOMSTOL

GERICHTSHOF
DER
EUROPAISCHEN GEMEINSCHAFTEN

ΔΙΚΑΣΤΗΡΙΟ
ΤΩΝ
ΕΥΡΩΠΑΪΚΩΝ ΚΟΙΝΟΤΗΤΩΝ

COURT OF JUSTICE
OF THE
EUROPEAN COMMUNITIES

COUR DE JUSTICE
DES
COMMUNAUTÉS EUROPÉENNES

CÚIRT
BHREITHIÚNAIS NA
gCOMHPHOBAL EORPACH

CORTE DI GIUSTIZIA
DELLE
COMUNITÀ EUROPEE

HOF VAN JUSTITIE
VAN DE
EUROPESE GEMEENSCHAPPEN

TRIBUNAL DE JUSTIÇA
DAS
COMUNIDADES EUROPEIAS

CVRIA
LUXEMBOURG

ARRET DE LA COUR

du 17 novembre 1992

"Concurrence dans les marchés
des services de télécommunications"

Dans les affaires jointes

C-271/90,

Royaume d'Espagne, représenté initialement par M. Carlos Bastarreche Sagües, puis par M. Alberto José Navarro González, directeur général de la coordination juridique et institutionnelle communautaire, et Mme Rosario Silva de Lapuerta, abogado del Estado, chef du service du contentieux communautaire, en qualité d'agents, ayant élu domicile à Luxembourg au siège de l'ambassade d'Espagne, 4-6, boulevard E. Servais,

partie requérante,

soutenu par

République française, représentée par M. Jean-Pierre Puissochet, directeur des affaires juridiques au ministère des Affaires étrangères, et par M. Géraud de Bergues, secrétaire-adjoint principal à ce même ministère, en qualité d'agents, ayant élu domicile à Luxembourg au siège de l'ambassade de France, 9, boulevard Prince Henri,

partie intervenante,

C-281/90,

Royaume de Belgique, représenté par Me Eduard Marissens, avocat au barreau de Bruxelles, ayant élu domicile à Luxembourg en l'étude de Me Lucy Dupong, 14a, rue des Bains,

partie requérante,

et C-289/90,

République italienne, représentée par M. le professeur Luigi Ferrari Bravo, chef du service du contentieux diplomatique du ministère des Affaires étrangères, en qualité d'agent, assisté de M. Ivo M. Braguglia, avvocato dello Stato, ayant élu domicile à Luxembourg au siège de l'ambassade d'Italie, 5, rue Marie-Adelaïde,

partie requérante,

contre

Commission des Communautés européennes, représentée, dans les affaires C-271/90 et C-281/90, par M. Bernhard Jansen, conseiller juridique, ainsi que, respectivement, par Mme Blanca Rodriguez Galindo et M. Xavier Lewis, membres du service juridique en qualité d'agents, et, dans l'affaire C-289/90, par M. Enrico Traversa, membre du service juridique, en qualité d'agent, ayant élu domicile à Luxembourg auprès de M. Roberto Hayder, représentant du service juridique, Centre Wagner, Kirchberg,

partie défenderesse,

ayant pour objet l'annulation de la directive 90/388/CEE de la Commission, du 28 juin 1990, relative à la concurrence dans les marchés des services de télécommunications (JO L 192, p. 10),

LA COUR,

composé de MM. G.C. Rodríguez Iglesias, président de chambre, faisant fonction de président, M. Zuleeg et J.L. Murray, présidents de chambre, G.F. Mancini, R. Joliet, F.A. Schockweiler, J.C. Moitinho de Almeida, F. Grévisse et D.A.O. Edward, juges,

avocat général : M. F.G. Jacobs,
greffier : M. D.Triantafyllou, administrateur,

vu le rapport d'audience,

ayant entendu les parties en leur plaidoirie à l'audience du 31 mars 1992, au cours de laquelle, dans l'affaire C-271/90, le Royaume d'Espagne a été représenté par M. Antonio Hierro Hernández-Mora, abogado del Estado, et la Commission des Communautés européennes, par M. Francisco Enrique González Díaz et M. Enrico Traversa, membres du service juridique, en qualité d'agents,

ayant entendu l'avocat général en ses conclusions à l'audience du 20 mai 1992,

rend le présent

Arrêt

1 Par requêtes déposées au greffe de la Cour respectivement les 7, 14 et 20 septembre 1990, le Royaume d'Espagne, le Royaume de Belgique et la République italienne ont, en vertu de l'article 173, premier alinéa, du traité CEE, demandé l'annulation de la directive 90/388/CEE de la Commission, du 28 juin 1990, relative à la concurrence dans les marchés des services de télécommunications (JO L 192, p. 10). La République française est intervenue à la procédure C-271/90 au soutien des conclusions du Royaume d'Espagne.

2 La directive 90/388 a été adoptée sur la base de l'article 90, paragraphe 3, du traité. L'article 1er contient une définition de différents termes utilisés dans la directive, tels que, notamment, "organismes de télécommunications", "droits spéciaux ou exclusifs", "réseau public de télécommunications", "services de télécommunications", "point de terminaison du réseau", "exigences essentielles". Il précise en outre que la directive ne s'applique pas au service télex, à la radiotéléphonie mobile, à la radiomessagerie et aux communications par satellite.

3 En vertu de l'article 2 de la directive, les Etats membres assurent l'abolition des droits exclusifs ou spéciaux pour la fourniture de services de télécommunications autres que le service de téléphonie vocale et prennent les mesures nécessaires afin de garantir le droit de tout opérateur économique de fournir lesdits services de télécommunications.

4 L'article 4 impose aux Etats membres de prendre les mesures nécessaires pour assurer la publicité, l'objectivité et

l'égalité des conditions d'accès aux réseaux et de communiquer, lors de chaque augmentation des tarifs applicables aux circuits loués, les éléments permettant à la Commission d'apprécier le bien-fondé de ces augmentations.

5 L'article 6 prévoit, entre autres, l'abrogation, par les Etats membres, des restrictions existantes en ce qui concerne le traitement des signaux avant leur transmission sur le réseau public ou après leur réception, ainsi que l'obligation de communiquer à la Commission les mesures adoptées à cet égard.

6 L'article 7 prévoit que les Etats membres attribuent, à partir du 1er juillet 1991, certaines fonctions administratives, techniques, de contrôle et de surveillance à une entité indépendante des organismes de télécommunications.

7 L'article 8 reconnaît aux utilisateurs liés par un contrat de fourniture de services de télécommunications qui, lors de sa conclusion, faisait l'objet de droits exclusifs ou spéciaux, le droit de résilier ledit contrat avec un certain préavis.

8 Enfin, selon l'article 9, les Etats membres communiquent à la Commission les informations nécessaires pour lui permettre d'établir pendant une période de trois ans, à la fin de chaque année, un rapport d'ensemble sur l'application de la directive.

9 Pour un plus ample exposé des faits du litige, des dispositions de la directive en cause, du déroulement de la procédure ainsi que des moyens et arguments des parties, il est renvoyé un rapport d'audience. Ces éléments du dossier ne sont repris ci-dessous que dans la mesure nécessaire au raisonnement de la Cour.

10 A l'appui de leur recours, les Etats membres invoquent différents moyens tirés en substance de l'incompétence de la Commission, du défaut de motivation et de la violation du principe de proportionnalité.

Sur la compétence de la Commission

11 Dans ses observations écrites, le gouvernement belge fait valoir, en premier lieu, que les dispositions de l'article 90, paragraphe 3, du traité ne confèrent pas à la Commission un pouvoir normatif mais se bornent à lui attribuer une mission de surveillance des règles communautaires déjà existantes. Selon lui, la Commission ne pouvait pas édicter de règles nouvelles sur le fondement de l'article 90, paragraphe 3, du traité, comme elle l'a fait aux articles 1, 2, 4 et 6 de la directive litigieuse.

12 Cet argument doit être écarté. Ainsi que l'a jugé la Cour dans l'arrêt du 19 mars 1991, France/Commission (C-202/88, Rec. p. I-1223, point 14), en permettant à la Commission d'adopter des directives, l'article 90, paragraphe 3, du traité, lui confère le pouvoir d'édicter des règles générales précisant les obligations résultant du traité, qui s'imposent aux Etats membres en ce qui concerne les entreprises visées aux deux paragraphes précédents du même article. Le pouvoir de la Commission ne se limite donc pas à la simple surveillance de l'application des règles communautaires déjà existantes.

13 Le gouvernement belge fait valoir, en deuxième lieu, qu'en prescrivant l'abolition des droits spéciaux et exclusifs, la Commission empiété sur les compétences conférées au Conseil par les articles 100 A et 87 du traité.

14 A cet égard, il suffit de rappeler que l'objet de la compétence conférée à la Commission par l'article 90, paragraphe 3, est différent et plus spécifique que celui des compétences attribuées au Conseil par l'article 100 A, d'une part, et par l'article 87, d'autre part, et que l'éventualité d'une réglementation édictée par le Conseil en application d'un pouvoir général qu'il détient en vertu d'autres articles du traité et comportant des dispositions qui toucheraient au domaine spécifique de l'article 90 ne fait pas obstacle à l'exercice de la compétence que ce dernier article confère à la Commission (arrêt du 19 mars 1991, France/Commission, précité, points 25 et 26).

15 A l'audience, le gouvernement belge a, en outre, fait valoir les arguments suivants.

16 Il a soutenu, d'une part, que, si la Commission avait pu valablement définir, dans la directive 88/301/CEE, du 16 mai 1988, relative à la concurrence dans les marchés de terminaux de télécommunication (JO L 131, p. 73), dite directive "Terminaux", les obligations découlant de l'article 30 du traité, puisque cet article avait été suffisamment précisé, au préalable, par les règles du droit dérivé, elle n'avait pas pu valablement définir, dans la directive litigieuse, les obligations découlant de l'article 59 du traité, dont l'application soulève des problèmes complexes dans le secteur des télécommunications, sans que soit intervenue, au préalable, une directive du Conseil précisant la portée de cet article.

17 Il a soutenu, d'autre part, que, dans la mesure où il est possible d'envisager plusieurs manières, pour les Etats membres, de s'acquitter des obligations qui leur incombent en vertu de

l'article 86 du traité dans le secteur des services de télécommunication, la Commission n'était pas en droit de leur imposer un moyen particulier de parvenir à un résultat.

18 Il y a lieu de rappeler que, dans l'arrêt du 19 mars 1991, France/Commission (C-202/88, précité, point 21), la Cour a jugé que le pouvoir de surveillance confié à la Commission comporte la possibilité, fondée sur l'article 90, paragraphe 3, de préciser les obligations découlant du traité, et que, par conséquent, l'étendue de ce pouvoir dépend de la portée des règles dont il s'agit d'assurer le respect.

19 En vertu de l'article 59 du traité, les restrictions à la libre prestation des services à l'intérieur de la Communauté devaient être supprimées à l'expiration de la période de transition à l'égard des ressortissants des Etats membres établis dans un pays de la Communauté autre que celui du destinataire de la prestation. Les impératifs de cette disposition comportent notamment l'élimination de toute discrimination à l'encontre d'un prestataire établi dans un Etat membre autre que celui où la prestation est fournie.

20 Il est de jurisprudence constante (voir notamment arrêt du 17 décembre 1981, Webb, 279/80, Rec. p. 3305, point 13) que l'article 59 prescrit une obligation de résultat précise, dont l'exécution devait être facilitée, mais non conditionnée, par la mise en oeuvre d'un programme de mesures progressives. Partant, les dispositions de l'article 59 du traité sont devenues inconditionnelles à l'expiration de la période de transition (arrêt du 3 décembre 1974, Binsbergen, 33/74, Rec. p. 1299, point 24).

21 L'article 59 étant donc, comme l'article 30, une disposition directement applicable, la Commission pouvait, en vue de favoriser l'exercice effectif du droit à la libre prestation des services, préciser les obligations découlant de cet article sans qu'une action législative du Conseil ait été nécessaire au préalable. Dans ces conditions, une restriction du pouvoir de la Commission du type de celle envisagée par le gouvernement belge conduirait à priver l'article 90, paragraphe 3, de son effet utile. Le premier argument du gouvernement belge doit, par conséquent, être rejeté.

22 En ce qui concerne l'article 86 du traité, il suffit de constater que, contrairement à ce que prétend le gouvernement belge, la directive 90/388 ne détermine pas, de manière exhaustive, les moyens dont disposent les Etats membres pour s'acquitter des obligations qui leur incombent en vertu de cette disposition. Ainsi, l'article 7 de la directive 90/388, qu'au cours de l'audience le gouvernement belge a pris comme exemple des contraintes imposées aux Etats membres se borne à prescrire, conformément à ce qu'exige le régime de concurrence non faussée, prévu à l'article 3, sous f), du traité (voir, notamment, arrêt France/Commission, précité, points 51 et 52), que le titulaire des pouvoirs d'autorisation, de contrôle et de surveillance des services de télécommunications doit être indépendant des organismes de télécommunications. Cette disposition énonce une règle de droit et laisse aux instances nationales un large choix des moyens pour la mettre en oeuvre. L'argument selon lequel la Commission a excédé les pouvoirs qu'elle détient au titre de l'article 90, paragraphe 3, en fixant un cadre trop rigide à l'élimination des infractions à l'article 86, doit donc également être rejeté.

23 Les gouvernements espagnol et italien relèvent pour leur part que l'article 90, paragraphe 3, du traité n'attribue pas à la Commission le pouvoir d'obliger les Etats membres à imposer la modification des contrats qui ont été librement conclus entre gestionnaires et utilisateurs de services de télécommunications, comme le prévoit l'article 8 de la directive.

24 Dans l'arrêt France/Commission, précité (point 55), la Cour a rappelé que l'article 90 du traité ne conférait de pouvoir à la Commission qu'à l'égard des mesures étatiques et que les comportements anticoncurrentiels qui avaient été adoptés par les entreprises de leur propre initiative ne pouvaient être mis en cause que par des décisions individuelles prises en application des articles 85 et 86 du traité.

25 Tout comme la directive "Terminaux", précitée, la directive visée par les présents recours ne fait aucunement apparaître que les détenteurs des droits spéciaux ou exclusifs aient été contraints ou incités, par des réglementations étatiques, à conclure des contrats de longue durée.

26 L'article 90 ne saurait dès lors être regardé comme une base appropriée pour supprimer les obstacles à la concurrence qui résulteraient de contrats de longue durée, visés par la directive.

27 Il s'ensuit que l'article 8 de la directive doit être annulé.

Sur le défaut de motivation

28 Le gouvernement espagnol soutient que la directive litigieuse, en ce qu'elle concerne les droits spéciaux, est insuffisamment motivée.

29 Dans l'arrêt du 19 mars 1991, France/Commission, précité (point 45), la Cour a jugé, à propos de la directive "Terminaux", précitée, que doit être regardée comme insuffisamment motivée une directive qui, alors qu'elle vise la suppression de droits spéciaux dans un secteur déterminé, ne précise, dans ses dispositions ou ses considérants, ni le type de droits spéciaux qui est concrètement visé ni en quoi l'existence de ces droits serait contraire aux différentes dispositions du traité.

30 Or, la directive litigieuse ne comporte pas de telles précisions.

31 En particulier, la définition figurant à son article 1er, selon laquelle on entend par "droits spéciaux et exclusifs" "les droits octroyés par un Etat membre ou une autorité publique à un ou plusieurs organismes publics ou privés au moyen de tout instrument législatif, réglementaire ou administratif, leur réservant la fourniture d'un service ou l'exploitation d'une activité déterminée", ne permet pas de déterminer le type de droits spéciaux visé par la directive litigieuse ni en quoi l'existence de ces droits serait contraire aux différentes dispositions du traité.

32 Par suite, il y a lieu d'annuler les dispositions de la directive litigieuse en tant qu'elles visent à régler les droits spéciaux.

Sur la justification de l'interdiction générale des droits exclusifs

33 Le gouvernement italien estime que, dans la mesure où la concession de droits spéciaux ou exclusifs n'est pas, en tant que telle, contraire au traité, la Commission n'aurait pas dû formuler l'obligation générale d'abolir ces droits, dans le domaine considéré, sans avoir, au préalable, procédé à une enquête circonstanciée sur les différents comportements adoptés dans l'exercice de ces droits. De l'avis de ce gouvernement, une interdiction générale ne pouvait être justifiée que si une enquête avait relevé que l'octroi de droits spéciaux ou exclusifs excluait toute possibilité de concurrence dans le secteur en cause. Il estime toutefois qu'une enquête n'aurait fait apparaître que des restrictions ponctuelles à l'accès au marché, dues, par exemple, à des charges pécuniaires excessives. Dans ces conditions, il appartenait à la Commission de prendre des mesures tendant exclusivement à éliminer les cas concrets d'abus, conformément au principe de proportionnalité.

34 Il convient de relever, à titre liminaire, que ce moyen n'est examiné que dans la mesure où il porte sur les droits exclusifs, la directive devant être annulée pour autant qu'elle vise à régler les droits spéciaux (voir point 32 du présent arrêt).

35 Il résulte de la jurisprudence de la Cour que le simple fait de créer une position dominante par l'octroi de droits exclusifs, au sens de l'article 90, paragraphe 1, du traité, n'est pas, en tant que tel, incompatible avec l'article 86 (voir, notamment, arrêt du 10 décembre 1991, Merci, C-179/90, Rec. p. I-5889, point 16).

36 Toutefois, la Cour a également jugé que l'extension du monopole de l'établissement et de l'exploitation du réseau téléphonique au marché des appareils téléphoniques, sans justification objective, était prohibée comme telle par l'article 86 ou par l'article 90, paragraphe 1, en relation avec l'article 86, lorsque cette extension est le fait d'une mesure étatique, conduisant ainsi à éliminer la concurrence (arrêt du 13 décembre 1991, RTT/GB-Inno-BM, 18/88, Rec. p. I-5941, point 24). La même conclusion s'impose lorsque le monopole de l'établissement et de l'exploitation s'étend au marché des services de télécommunications.

37 A cet égard, il résulte du seizième considérant de la directive litigieuse dont le gouvernement italien n'a aucunement contesté les termes, que l'octroi de droits exclusifs aux organismes de télécommunications conduit ces derniers à exclure les concurrents du marché des services de télécommunications ou, à tout le moins, à restreindre leur accès à ce marché. Or, selon ce même considérant, tous les services en question peuvent, en principe, être offerts par des fournisseurs établis dans d'autres Etats membres.

38 La Commission était donc fondée à exiger l'abolition des droits exclusifs, pour ce qui concerne la fourniture de certains services de télécommunications. Le moyen invoqué à cet égard doit, dès lors, être rejeté.

Sur les dépens

39 Aux termes de l'article 69, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens. Toutefois, selon le paragraphe 3, premier alinéa, du même

article, la Cour peut répartir les dépens ou décider que chaque partie supporte ses propres dépens si les parties succombent respectivement sur un ou plusieurs chefs. Les parties requérantes n'ayant obtenu que partiellement gain en cause, il y a lieu de condamner chacune des parties, y compris la partie intervenante, à supporter ses propres dépens.

Par ces motifs,

LA COUR

déclare et arrête:

1. La directive 90/388/CEE de la Commission, du 28 juin 1990, relative à la concurrence dans les marchés des services de télécommunications, est annulée pour autant qu'elle vise à régler les droits spéciaux.

2. L'article 8 de la directive est annulé.

3. Le recours est rejeté pour le surplus.

4. Chacune des parties supportera ses propres dépens.

Rodriguez Iglesias | Zuleeg | Murray

Mancini | Joliet | Schockweiler

Moitinho de Almeida | Grevisse | Edward

Ainsi prononcé en audience publique à Luxembourg, le 17 novembre 1992.

Le président faisant fonction

G.C. Rodriguez Iglesias
Président de chambre

Le greffier

J.-G. Giraud

TRIBUNAL DE JUSTICIA
DE LAS
COMUNIDADES EUROPEAS

DE EUROPÆISKE FÆLLESSKABERS
DOMSTOL

GERICHTSHOF
DER
EUROPÄISCHEN GEMEINSCHAFTEN

ΔΙΚΑΣΤΗΡΙΟ
ΤΩΝ
ΕΥΡΩΠΑΪΚΩΝ ΚΟΙΝΟΤΗΤΩΝ

COURT OF JUSTICE
OF THE
EUROPEAN COMMUNITIES

COUR DE JUSTICE
DES
COMMUNAUTÉS EUROPÉENNES

CUIRT
BHREITHIUNAIS NA
gCOMHPHOBAL EORPACH

CORTE DI GIUSTIZIA
DELLE
COMUNITÀ EUROPEE

HOF VAN JUSTITIE
VAN DE
EUROPESE GEMEENSCHAPPEN

TRIBUNAL DE JUSTIÇA
DAS
COMUNIDADES EUROPEIAS

CVRIA

LUXEMBOURG

ARRÊT DE LA COUR
27 octobre 1993

«Directives 83/189/CEE du Conseil et 88/301/CEE de la Commission - Notification des spécifications en matière de télécommunications - Indépendance de l'entité chargée de la réglementation - Sanctions pénales»

Dans l'affaire C-69/91,

ayant pour objet une demande adressée à la Cour, en application de l'article 177 du traité CEE, par la cour d'appel de Douai (France) et tendant à obtenir, dans la procédure pénale poursuivie devant cette juridiction contre

Francine Decoster, épouse Gillon,

une décision à titre préjudiciel sur l'interprétation de la directive 83/189/CEE du Conseil, du 28 mars 1983, prévoyant une procédure d'information dans le domaine des normes et réglementations techniques (JO L 109, p. 8) et de la directive 88/301/CEE de la Commission, du 16 mai 1988, relative à la concurrence dans les marchés de terminaux de télécommunication (JO L 131, p. 73),

LA COUR,

composée de MM. O. Due, président, G.C. Rodríguez Iglesias, M. Zuleeg et J.L. Murray, présidents de chambre, G.F. Mancini, R. Joliet, F.A. Schockweiler, J.C. Moitinho de Almeida et F. Grévisse, juges,

Langue de procédure: le français

CORRIGENDUM DANS L'ARRET

C - 69/91

Decoster

Veuillez lire dans l'arrêt sus-mentionné :

page 1 :

au lieu de :

composée de MM. O. Due, président, G.C. Rodríguez Iglesias, M. Zuleeg et J.L. Murray, présidents de chambre, G.F. Mancini, R. Joliet, F.A.Schockweiler, J.C. Moitinho de Almeida et F. Grévisse, juges,

veuillez lire:

composée de MM. O. Due, président, G.F. Mancini, J.C. Moitinho de Almeida, M. Díez de Velasco et D.A.O. Edward, présidents de chambre, C.N.Kakouris, R. Joliet, F.A. Schockweiler, G.C. Rodríguez Iglesias, F. Grévisse, M. Zuleeg, P.J.G. Kapteyn et J.L. Murray, juges,

page 11:

au lieu de:

Due	Rodríguez Iglesias	Zuleeg
Murray	Mancini	Joliet
Schockweiler	Moitinho de Almeida	Grévisse

veuillez lire:

Due	Mancini	Moitinho de Almeida
Díez de Velasco	Edward	Kakouris
Joliet	Schockweiler	Rodríguez Iglesias
Grévisse	Zuleeg	Kapteyn

Murray

III/108

avocat général: M. G. Tesauro,
greffier: M. J.-G. Giraud,

considérant les observations écrites présentées:

- pour l'appelante au principal, par Mes S. Bailleul, avocat au barreau de Lille, et L. Misson, avocat au barreau de Liège,

- pour le gouvernement de la République française, par MM. P. Pouzoulet, sous-directeur à la direction des affaires juridiques au ministère des Affaires étrangères, en qualité d'agent, et G. de Bergues, secrétaire adjoint principal au même ministère, en qualité d'agent suppléant,

- pour le gouvernement de la République fédérale d'Allemagne, par MM. E. Röder, Ministerialrat au ministère fédéral de l'Economie, et J. Karl, Regierungsdirektor au même ministère, en qualité d'agents,

- pour le gouvernement du Royaume-Uni, par Mlle R. Caudwell, du Treasury Solicitor's Department, assistée de Me E. Sharpston, barrister, en qualité d'agents,

- pour la Commission des Communautés européennes, par M. R. Wainwright, conseiller juridique, en qualité d'agent, assisté de Me H. Lehman, avocat au barreau de Paris,

vu le rapport d'audience,

ayant entendu les observations orales de l'appelante au principal, du gouvernement français, du gouvernement allemand, du gouvernement du Royaume-Uni et de la Commission à l'audience du 22 janvier 1992,

ayant entendu l'avocat général en ses conclusions à l'audience du 3 juin 1992,

rend le présent

Arrêt

1 Par arrêt du 6 février 1991, parvenu à la Cour le 18 février suivant, la cour d'appel de Douai (France) a posé, en application de l'article 177 du traité CEE, trois questions préjudicielles sur l'interprétation de la directive 83/189/CEE du Conseil, du 28 mars 1983, prévoyant une procédure d'information dans le domaine des

normes et réglementations techniques (JO L 109, p. 8), modifiée par la directive 88/182/CEE du Conseil du 22 mars 1988 (JO L 81, p. 75, ci-après "directive normes techniques"), et de la directive 88/301/CEE de la Commission, du 16 mai 1988, relative à la concurrence dans les marchés de terminaux de télécommunication (JO L 131, p. 73, ci-après "directive terminaux"), en vue d'apprécier la compatibilité avec celles-ci du régime mis en place par le décret français n° 85-712, du 11 juillet 1985, portant application de la loi du 1er août 1905 et relatif aux matériels susceptibles d'être raccordés au réseau des télécommunications de l'Etat.

2 Ces questions ont été soulevées dans le cadre d'une procédure pénale dirigée contre Mme Decoster, prévenue d'avoir vendu, entre mai et octobre 1989, des terminaux de télécommunications (télécopieurs) sans avoir sollicité ni obtenu au préalable le certificat d'homologation exigé par l'article L 48 du code des Postes et Télécommunications et les articles 1er à 7 du décret n° 85-712, susmentionné. Estimant que la commercialisation de terminaux non homologués constituait un délit de fraude commerciale, au sens de l'article 1er de la loi du 1er août 1905, le tribunal correctionnel de Lille a condamné Mme Decoster en première instance à une amende de 50 000 FF.

3 Il ressort du dossier qu'en vertu du décret susmentionné, les matériels susceptibles d'être raccordés au réseau public ne peuvent être fabriqués pour le marché intérieur, importés pour la mise à la consommation, détenus en vue de la vente, mis en vente ou distribués à titre gratuit ou onéreux que s'ils sont conformes à ses dispositions et s'ils satisfont à un certain nombre de prescriptions qui visent à préserver le bon fonctionnement du réseau et la sécurité des utilisateurs (articles 3 et 4). Pour justifier de la conformité des appareils à ces exigences, les opérateurs concernés doivent présenter soit un rapport établi par un organisme agréé par le ministère chargé de l'Industrie, soit un agrément délivré en application du code des P et T, soit un certificat de qualification délivré en application de la loi sur la protection et l'information des consommateurs ou un autre document justificatif reconnu comme équivalent par arrêté du ministre chargé de l'Industrie (article 6).

III/110

L'article 7 du décret précise la pénalité encourue par ceux qui contreviennent à l'obligation de justifier de la conformité des appareils en question.

4 Pour l'application du décret n° 85-712, le ministre du Redéploiement industriel et du Commerce extérieur a émis, le 1er novembre 1985, un avis relatif aux terminaux susceptibles d'être raccordés au réseau des télécommunications de l'Etat. L'avis précise, entre autres, de quelle façon les intéressés peuvent justifier de la conformité des terminaux. A cet égard, il dispose que le Centre national d'études des télécommunications (CNET) a été agréé par le ministre chargé de l'Industrie pour la délivrance du rapport visé à l'article 6 du décret précité, que l'agrément est délivré par la direction générale des télécommunications, en application du code des P et T, pour les matériels conformes aux spécifications figurant sur la liste annexée à l'avis, et que la mise en place des autres modes de justification prévus à l'article 6 se fera ultérieurement. Les débats devant la Cour n'ont pas fait apparaître si, postérieurement à l'avis de novembre 1985, le système de délivrance des documents autres que l'agrément et du rapport du CNET avait été mis en place.

5 Devant la cour d'appel de Douai, Mme Decoster a fait valoir qu'à l'époque des faits du litige au principal, et ce en violation de l'obligation pour les Etats membres, prévue à l'article 6 de la directive 88/301, précitée, l'autorité chargée en France de formaliser les spécifications techniques et de vérifier la conformité des appareils aux conditions requises ne présentait aucune indépendance par rapport à l'organisme qui gère le réseau public des télécommunications et qui, par ailleurs, commercialise lui-même des appareils terminaux. Elle a affirmé en second lieu que les spécifications techniques permettant de justifier de la conformité des appareils au decret susmentionné n'avaient pas fait l'objet de la notification prévue par les directives 83/189 et 88/301, précitées, et que celles-ci lui étaient dès lors inopposables.

6 Compte tenu des allégations de la prévenue, la cour d'appel de Douai a décidé de poser à la Cour les trois questions préjudicielles suivantes:

«1) La directive 83/189/CEE du 28 mars 1983 qui n'a pas été suivie d'un texte national d'application dans le délai de 12 mois est-elle d'effet direct en droit français?

2) La directive 88/301/CEE du 16 mai 1988 qui n'a pas été suivie d'un texte national d'application dans le délai expirant le 1er juillet 1989 est-elle d'effet direct en droit français?

3) Dès lors les effets combinés de ces deux directives commandent-ils d'écarter l'application du décret de 1985?»

7 Pour un plus ample exposé des faits et du cadre réglementaire du litige au principal, du déroulement de la procédure ainsi que des observations écrites déposées devant la Cour, il est renvoyé au rapport d'audience. Ces éléments du dossier ne sont repris ci-après que dans la mesure nécessaire au raisonnement de la Cour.

Sur la directive 88/301/CEE

8 Par la deuxième question, qu'il convient d'examiner en premier lieu, en liaison avec la troisième question, la juridiction nationale cherche en substance à savoir si l'article 6 de la directive 88/301 s'oppose à l'application d'une réglementation nationale, telle que celle visée en l'espèce au principal, qui interdit, sous peine de sanctions, aux opérateurs économiques de fabriquer, d'importer, de détenir en vue de la vente, de vendre ou distribuer des appareils terminaux sans justifier, par la présentation d'un agrément ou de tout autre document considéré comme équivalent, de la conformité de ces appareils à certaines exigences essentielles tenant notamment à la sécurité des usagers et au bon fonctionnement du réseau, alors que n'est pas assurée l'indépendance, par rapport à tout opérateur offrant des biens et/ou des services dans le domaine des télécommunications, de l'organisme

qui délivre l'agrément ou tout autre document équivalent et formalise les spécifications techniques auxquelles ces appareils doivent répondre.

9 L'article 6 de la directive 88/301 dispose: "les Etats membres assurent qu'à partir du 1er juillet 1989 la formalisation des spécifications, le contrôle de leur application ainsi que l'agrément sont effectués par une entité indépendante des entreprises publiques ou privées offrant des biens et/ou des services dans le domaine des télécommunications."

10 Il ressort des pièces du dossier qu'en vertu des dispositions du décret n° 86-129 du 28 janvier 1986 (articles 13 à 15) la direction générale des télécommunications du ministère des P et T était chargée de l'exploitation du réseau public, de la mise en oeuvre de la politique commerciale des télécommunications, de la formalisation des spécifications techniques, du contrôle de leur application et de l'agrément des appareils terminaux. Devant la Cour, le gouvernement français a précisé que le Centre national d'études des télécommunications (CNET), dont le rapport était considéré comme équivalent à l'agrément, faisait partie de la direction générale des télécommunications en tant que centre de recherche.

11 Par décret n° 89-327, du 19 mai 1989, modifiant le décret n° 86-129, la formalisation des spécifications techniques, le contrôle de leur application et l'agrément des appareils terminaux ont été transférés à la nouvelle direction de la réglementation générale du même ministère.

12 Il résulte donc de la réglementation en cause que, durant la période visée en l'espèce au principal, différentes directions du ministère français des P et T étaient chargées tout à la fois de l'exploitation du reseau public, de la mise en oeuvre de la politique commerciale des télécommunications, de la formalisation des spécifications techniques, du contrôle de leur application et de l'agrément des appareils terminaux.

III/113

13 Dans ces circonstances, il y a lieu de vérifier, à la lumière des dispositions de l'article 6 de la directive, d'une part, si l'administration française des P et T peut être considérée comme une entreprise publique au sens du droit communautaire et, d'autre part, si le critère de l'indépendance de l'entité chargée de la formalisation des spécifications, des contrôles et de l'agrément est respecté.

14 S'agissant de la notion d'entreprise, l'article 1er, deuxième tiret, de la directive précise que celle-ci vise "les organismes publics ou privés auxquels l'Etat octroie des droits spéciaux ou exclusifs d'importation, de commercialisation, de raccordement, de mise en service d'appareils terminaux de télécommunications et/ou d'entretien de tels appareils".

15 Il y a lieu d'observer, à cet égard, que le fait que, comme en l'espèce au principal, l'exploitation du réseau public et de la commercialisation des appareils terminaux est confiée à des entités intégrées dans l'administration publique ne saurait soustraire ces dernières à la qualification d'entreprise publique. En effet, comme la Cour l'a constaté dans le contexte de la directive 80/723/CEE de la Commission, du 25 juin 1980, relative à la transparence des relations financières entre les Etats membres et les entreprises publiques (JO L 195, p. 35), un organe exerçant des activités économiques de caractère industriel ou commercial ne doit pas nécessairement posséder une personnalité juridique distincte de l'Etat pour être considérée comme une entreprise publique. S'il n'en était pas ainsi, il serait porté atteinte à l'efficacité des dispositions de la directive en cause ainsi qu'à l'uniformité de son application dans tous les Etats membres (voir arrêt du 16 juin 1987, Commission/Italie, 118/85, Rec. p. 2599, point 13).

16 En ce qui concerne l'exigence de l'indépendance de l'entité chargée de la formalisation des spécifications, du contrôle de leur application ainsi que de l'agrément, il suffit de constater que des directions différentes d'une même administration ne sauraient être considérées comme indépendantes l'une de l'autre, au sens de l'article 6 de la directive.

III/994

17 Il y a lieu de relever enfin que les faits de la présente affaire se sont déroulés entre mai et octobre 1989, c'est-à-dire pendant la période au cours de laquelle le délai prévu à l'article 6 de la directive 88/301 est venu à échéance. Pour la période antérieure au 1er juillet 1989, la question posée doit être considérée comme visant également les articles 3 (f), 86 et 90 du traité (voir arrêt du 13 décembre 1991, GB-Inno-BM, C-18/88, Rec. p. I-5941, point 14).

18 Mme Decoster estime que la combinaison de la fonction de commercialisation des appareils terminaux avec celle d'homologation des appareils commercialisés par ses concurrents est susceptible de créer, au sein du ministère des P et T, un conflit d'intérêts, puisque le ministère sera en mesure de mettre en oeuvre une politique anti-concurrentielle au détriment de ses concurrents.

19 Dans l'arrêt du 19 mars 1991, dit "Terminaux", France/Commission (C-202/88, Rec. p. I-1223, point 51), la Cour a reconnu qu'un système de concurrence non faussée tel que celui prévu par le traité ne peut être garanti que si l'égalité des chances entre les différents opérateurs économiques est assurée. La Cour en a conclu que le maintien d'une concurrence effective et la garantie de transparence exigent que la formalisation des spécifications techniques, le contrôle de leur application et l'agrément soient effectués par une entité indépendante des entreprises publiques ou privées offrant des biens ou des services concurrents dans le domaine des télécommunications.

20 Dans l'arrêt GB-Inno-BM (précité, point 28), la Cour a jugé que les articles 3 (f), 90 et 86 du traité s'opposent à ce qu'un Etat membre confère à la société exploitant le réseau public de télécommunications le pouvoir d'édicter des normes relatives aux appareils téléphoniques et de vérifier leur respect par les opérateurs économiques, alors qu'elle est la concurrente de ces opérateurs sur le marché de ces appareils.

21 A la différence de la situation qui a donné lieu à l'arrêt GB-Inno-BM, précité, et dans laquelle les fonctions susmentionnées étaient exercées par la RTT, organisme belge d'intérêt public, ces mêmes fonctions ont été exercées, dans la présente affaire, par le ministère français des P et T. Toutefois, ainsi qu'il résulte des points 14 et 15 de cet arrêt, il est indifférent de savoir si le cumul de ces fonctions existe au niveau d'un organisme juridiquement distinct de l'Etat ou d'un ministère.

22 Dans ces conditions, il convient de répondre à la juridiction nationale que les articles 3 (f), 86 et 90 du traité et l'article 6 de la directive 88/301 s'opposent à une réglementation nationale qui interdit, sous peine de sanctions, aux opérateurs économiques de fabriquer, d'importer, de détenir en vue de la vente, de vendre ou distribuer des appareils terminaux sans justifier, par la présentation d'un agrément ou de tout autre document considéré comme équivalent, de la conformité de ces appareils à certaines exigences essentielles tenant notamment à la sécurité des usagers et au bon fonctionnement du réseau, alors que n'est pas assurée l'indépendance, par rapport à tout opérateur offrant des biens et/ou des services dans le domaine des télécommunications, de l'organisme qui délivre l'agrément ou tout autre document équivalent et formalise les spécifications techniques auxquelles ces appareils doivent répondre.

Sur la directive 83/189/CEE

23 Compte tenu de la réponse donnée ci-dessus, il n'y a pas lieu de statuer sur les questions relatives à la directive 83/189.

Sur les dépens

24 Les frais exposés par les gouvernements de la République française, de la république fédérale d'Allemagne et du Royaume-Uni et par la Commission des Communautés européennes, qui ont soumis des observations à la Cour, ne peuvent

III/116

faire l'objet d'un remboursement. La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction nationale, il appartient à celle-ci de statuer sur les dépens.

Par ces motifs,

LA COUR,

statuant sur les questions à elle soumises par la cour d'appel de Douai, par arrêt du 6 février 1992, dit pour droit:

Les articles 3 (f), 86 et 90 du traité et l'article 6 de la directive 88/301 (CEE) de la Commission, du 16 mai 1988, relative à la concurrence dans les marchés de terminaux de télécommunication, s'opposent à une réglementation nationale qui interdit, sous peine de sanctions, aux opérateurs économiques de fabriquer, d'importer, de détenir en vue de la vente, de vendre ou distribuer des appareils terminaux sans justifier, par la présentation d'un agrément ou de tout autre document considéré comme équivalent, de la conformité de ces appareils à certaines exigences essentielles tenant notamment à la sécurité des usagers et au bon fonctionnement du réseau, alors que n'est pas assurée l'indépendance, par rapport à tout opérateur offrant des biens et/ou des services dans le domaine des télécommunications, de l'organisme qui délivre

l'agrément ou tout autre document équivalent et formalise les spécifications techniques auxquelles ces appareils doivent répondre.

Due Rodriguez Iglesias Zuleeg

Murray Mancini Joliet

Schockweiler Moitinho de Almeida Grévisse

Ainsi prononcé en audience publique à Luxembourg, le 27 octobre 1993.

Le greffier Le président

J.-G. Giraud O. Due

III/118

TRIBUNAL DE JUSTICIA
DE LAS
COMUNIDADES EUROPEAS

DE EUROPÆISKE FÆLLESSKABERS
DOMSTOL

GERICHTSHOF
DER
EUROPÄISCHEN GEMEINSCHAFTEN

ΔΙΚΑΣΤΗΡΙΟ
ΤΩΝ
ΕΥΡΩΠΑΪΚΩΝ ΚΟΙΝΟΤΗΤΩΝ

COURT OF JUSTICE
OF THE
EUROPEAN COMMUNITIES

LUXEMBOURG

COUR DE JUSTICE
DES
COMMUNAUTÉS EUROPÉENNES

CÚIRT
BHREITHIÚNAIS NA
gCOMHPHOBAL EORPACH

CORTE DI GIUSTIZIA
DELLE
COMUNITÀ EUROPEE

HOF VAN JUSTITIE
VAN DE
EUROPESE GEMEENSCHAPPEN

TRIBUNAL DE JUSTIÇA
DAS
COMUNIDADES EUROPEIAS

ORDONNANCE DE LA COUR
22 novembre 1993

« Rectification d'arrêt »

Dans l'affaire C-69/91,

ayant pour objet une demande adressée à la Cour, en application de l'article 177 du traité CEE, par la cour d'appel de Douai (France) et tendant à obtenir, dans la procédure pénale poursuivie devant cette juridiction contre

Francine Decoster, épouse Gillon,

une décision à titre préjudiciel sur l'interprétation de la directive 83/189/CEE du Conseil, du 28 mars 1983, prévoyant une procédure d'information dans le domaine des normes et réglementations techniques (JO L 109, p. 8) et de la directive 88/301/CEE de la Commission, du 16 mai 1988, relative à la concurrence dans les marchés de terminaux de télécommunication (JO L 131, p. 73),

LA COUR,

composée de MM. O. Due, président, J.C. Moitinho de Almeida, M. Diez de Velasco, D.A.O. Edward, présidents de chambre, C.N. Kakouris, R. Joliet, F.A. Schockweiler, G.C. Rodriguez Iglesias, F. Grevisse, M. Zuleeg et P.J.G. Kapteyn, juges,

avocat général: M. G. Tesauro,
greffier: M. J.-G. Giraud,

Langue de procédure: le français

l'avocat général entendu,

rend la présente

ORDONNANCE

Le 27 octobre 1993, la Cour a rendu son arrêt dans l'affaire C-69/91.

L'arrêt contient des erreurs de plume qu'il convient de rectifier d'office en vertu de l'article 66 du règlement de procédure.

Par ces motifs,

LA COUR

ordonne que l'arrêt précité soit rectifié comme suit :

1) A la page 1, il y a lieu de rectifier la composition de la Cour comme suit : La Cour composée de MM. O. Due, président, G.F. Mancini, J.C. Moitinho de Almeida, présidents de chambre, R. Joliet, F.A. Schockweiler, G.C. Rodriguez Iglesias, F. Grévisse, M. Zuleeg et J.L. Murray, juges,

2) A la page 5, point 8, 3ème ligne, il y a lieu de lire "s'oppose à une réglementation nationale".

3) A la page 7, point 15, 2ème ligne, il y a lieu de lire "l'exploitation du réseau public et la commercialisation des appareils terminaux".

4) A la page 11, il y a lieu de rectifier la composition de la Cour comme suit : Due, Mancini, Moitinho de Almeida, Joliet, Schockweiler, Rodriguez Iglesias, Grévisse, Zuleeg, Murray.

5) La minute de la présente ordonnance est annexée à la minute de l'arrêt rectifié. Mention de cette ordonnance est faite en marge de la minute de l'arrêt.

III/120

Fait à Luxembourg, le 22 novembre 1993

Le greffier

J.-G. Giraud

Le président

O. Due

III/ 121

Fait à Luxembourg, le 22 novembre 1993

Le greffier

J.-G. Giraud

Le président

O. Due

III/123

COURT OF JUSTICE
OF THE
EUROPEAN COMMUNITIES

CVRIA

LUXEMBOURG

COURT
OF JUSTICE
OF THE
EUROPEAN COMMUNITIES

ARRÊT DE LA COUR
27 octobre 1993

«Directive 88/301/CEE de la Commission - Indépendance de l'entité chargée de la réglementation - Sanctions pénales»

Dans l'affaire C-92/91,

ayant pour objet une demande adressée à la Cour, en application de l'article 177 du traité CEE, par le tribunal de police de Vichy (France) et tendant à obtenir, dans la procédure pénale poursuivie devant cette juridiction contre

Annick Taillandier, épouse Neny,

et

une décision à titre préjudiciel sur l'interprétation de la directive 88/301/CEE de la Commission, du 16 mai 1988, relative à la concurrence dans les marchés de terminaux de télécommunication (JO L 131, p. 73),

LA COUR,

composée de MM. O. Due, président, G.C. Rodríguez Iglesias, M. Zuleeg et J.L. Murray, présidents de chambre, G.F. Mancini, R. Joliet, F.A. Schockweiler, J.C. Moitinho de Almeida et F. Grévisse, juges,

avocat général: M. G. Tesauro,

Langue de procédure: le français.

greffier: M. J.-G. Giraud,

considérant les observations écrites présentées:

- pour le gouvernement de la République française, par MM. P. Pouzoulet, sous-directeur à la direction des affaires juridiques au ministère des Affaires étrangères, en qualité d'agent, et G. de Bergues, secrétaire adjoint principal au même ministère, en qualité d'agent suppléant,

- pour le gouvernement du Royaume-Uni, par Mlle R. Caudwell, du Treasury Solicitor's Department, assistée de Me E. Sharpston, barrister, en qualité d'agents,

- pour la Commission des Communautés européennes, par M. R. Wainwright, conseiller juridique, en qualité d'agent, assisté de Me H. Lehman, avocat au barreau de Paris,

vu le rapport d'audience,

ayant entendu les observations orales du gouvernement français, du gouvernement du Royaume-Uni et de la Commission à l'audience du 22 janvier 1992,

ayant entendu l'avocat général en ses conclusions à l'audience du 3 juin 1992,

rend le présent

Arrêt

1 Par jugement du 5 mars 1991, parvenu à la Cour le 13 mars suivant, le tribunal de police de Vichy (France) a posé, en application de l'article 177 du traité CEE, une question préjudicielle sur l'interprétation de la directive 88/301/CEE de la Commission, du 16 mai 1988, relative à la concurrence dans les marchés de terminaux de télécommunication (JO L 131, p. 73) en vue d'apprécier la compatibilité avec celle-ci du régime mis en place par le décret français n° 85-712, du 11 juillet 1985, portant application de la loi du 1er août 1905 et relatif aux matériels susceptibles d'être raccordés au réseau des télécommunications de l'Etat.

III/126

CORRIGENDUM DANS L'ARRET

C - 92/91

Taillandier

Veuillez lire dans l'arrêt sus-mentionné :

page 1

au lieu de :

composée de MM. O. Due, président, G.C. Rodríguez Iglesias, M. Zuleeg et J.L. Murray, présidents de chambre, G.F. Mancini, R. Joliet, F.A. Schockweiler, J.C.Moitinho de Almeida et F. Grévisse, juges

veuillez lire:

composée de MM. O. Due, président, G.F. Mancini, J.C. Moitinho de Almeida, M. Díez de Velasco et D.A.O. Edward, présidents de chambre, C.N.Kakouris, R. Joliet, F.A. Schockweiler, G.C. Rodríguez Iglesias, F. Grévisse, M. Zuleeg, P.J.G. Kapteyn et J.L. Murray, juges,

page 9:

au lieu de :

Due	Rodriguez Iglesias	Zuleeg
Murray	Mancini	Joliet
Schockweiler	Moitinho de Almeida	Grévisse

Veuillez lire :

Due	Mancini	Moitinho de Almeida
Díez de Velasco	Edward	Kakouris
Joliet	Schockweiler	Rodríguez Iglesias
Grévisse	Zuleeg	Kapteyn
	Murray	

2 Cette question a été soulevée dans le cadre d'une procédure pénale dirigée contre Mme Taillandier, prévenue d'avoir vendu, le 5 avril 1990, des terminaux de télécommunications (appareils téléphoniques) sans avoir obtenu l'agrément prévu par les articles 1er à 7 du décret susmentionné. Celle-ci a cependant excipé de l'illégalité de ce décret par rapport à la directive 88/301, précitée.

3 Il ressort du dossier qu'en vertu du décret susmentionné, les matériels susceptibles d'être raccordés au réseau public ne peuvent être fabriqués pour le marché intérieur, importés pour la mise à la consommation, détenus en vue de la vente, mis en vente ou distribués à titre gratuit ou onéreux que s'ils sont conformes à ses dispositions et s'ils satisfont à un certain nombre de prescriptions qui visent à préserver le bon fonctionnement du réseau et la sécurité des utilisateurs (articles 3 et 4). Pour justifier de la conformité des appareils à ces exigences, les opérateurs concernés doivent présenter soit un rapport établi par un organisme agréé par le ministère chargé de l'Industrie, soit un agrément délivré en application du code des P et T, soit un certificat de qualification délivré en application de la loi sur la protection et l'information des consommateurs ou un autre document justificatif reconnu comme équivalent par arrêté du ministre chargé de l'Industrie (article 6). L'article 7 du décret précise la pénalité encourue par ceux qui contreviennent à l'obligation de justifier de la conformité des appareils en question.

4 Pour l'application du décret n° 85-712, le ministre du Redéploiement industriel et du Commerce extérieur a émis, le 1er novembre 1985, un avis relatif aux terminaux susceptibles d'être raccordés au réseau des télécommunications de l'Etat. L'avis précise, entre autres, de quelle façon les intéressés peuvent justifier de la conformité des terminaux. A cet égard, il dispose que le Centre national d'études des télécommunications (CNET) a été agréé par le ministre chargé de l'Industrie pour la délivrance du rapport visé à l'article 6 du décret précité, que l'agrément est délivré par la direction générale des télécommunications, en application du code des P et T, pour les matériels conformes aux spécifications figurant sur la liste

annexée à l'avis, et que la mise en place des autres modes de justification prévus à l'article 6 se fera ultérieurement. Les débats devant la Cour n'ont pas fait apparaître si, postérieurement à l'avis de novembre 1985, le système de délivrance des documents autres que l'agrément et du rapport du CNET avait été mis en place.

5 Estimant que le litige posait un problème d'interprétation de la réglementation communautaire en cause, le tribunal de police de Vichy a saisi la Cour de la question préjudicielle suivante:

> «La directive de la Commission du 16 mai 1988 relative à la concurrence dans les marchés de terminaux de télécommunication prohibe-t-elle la procédure consistant à soumettre à l'homologation de la société nationale des télécommunications les appareils téléphoniques proposés à la vente aux consommateurs, et prévoyant que le défaut de référence de cette homologation sur lesdits appareils sera puni d'une amende de mille trois cents francs à deux mille cinq cents francs, réglementation telle qu'instituée par le décret numéro 85-712 du 11 juillet 1985».

6 Pour un plus ample exposé des faits et du cadre réglementaire du litige au principal, du déroulement de la procédure ainsi que des observations écrites déposées devant la Cour, il est renvoyé au rapport d'audience. Ces éléments du dossier ne sont repris ci-après que dans la mesure nécessaire au raisonnement de la Cour.

7 Par sa question, la juridiction nationale cherche en substance à savoir si l'article 6 de la directive 88/301 s'oppose à l'application d'une réglementation nationale, telle que celle visée en l'espèce au principal, qui interdit, sous peine de sanctions, aux opérateurs économiques de fabriquer, d'importer, de détenir en vue de la vente, de vendre ou distribuer des appareils terminaux sans justifier, par la présentation d'un agrément ou de tout autre document considéré comme équivalent, de la conformité de ces appareils à certaines exigences essentielles tenant notamment à la sécurité des usagers et au bon fonctionnement du réseau, alors que n'est pas

assurée l'indépendance, par rapport à tout opérateur offrant des biens et/ou des services dans le domaine des télécommunications, de l'organisme qui délivre l'agrément ou tout autre document équivalent et formalise les spécifications techniques auxquelles ces appareils doivent répondre.

8 L'article 6 de la directive 88/301 dispose: «les Etats membres assurent qu'à partir du 1er juillet 1989 la formalisation des spécifications, le contrôle de leur application ainsi que l'agrément sont effectués par une entité indépendante des entreprises publiques ou privées offrant des biens et/ou des services dans le domaine des télécommunications.»

9 Il ressort des pièces du dossier qu'en vertu des dispositions du décret n° 86-129 du 28 janvier 1986 (articles 13 à 15) la direction générale des télécommunications du ministère des P et T était chargée de l'exploitation du réseau public, de la mise en oeuvre de la politique commerciale des télécommunications, de la formalisation des spécifications techniques, du contrôle de leur application et de l'agrément des appareils terminaux. Devant la Cour, le gouvernement français a précisé que le Centre national d'études des télécommunications (CNET), dont le rapport était considéré comme équivalent à l'agrément, faisait partie de la direction générale des télécommunications en tant que centre de recherche.

10 Par décret n° 89-327, du 19 mai 1989, modifiant le décret n° 86-129, la formalisation des spécifications techniques, le contrôle de leur application et l'agrément des appareils terminaux ont été transférés à la nouvelle direction de la réglementation générale du même ministère.

11 Il résulte donc de la réglementation en cause que, durant la période visée en l'espèce au principal, différentes directions du ministère français des P et T étaient chargées tout à la fois de l'exploitation du réseau public, de la mise en oeuvre de la politique commerciale des télécommunications, de la formalisation des

spécifications techniques, du contrôle de leur application et de l'agrément des appareils terminaux.

12 Dans ces circonstances, il y a lieu de vérifier, à la lumière des dispositions de l'article 6 de la directive, d'une part, si l'administration française des P et T peut être considérée comme une entreprise publique au sens du droit communautaire et, d'autre part, si le critère de l'indépendance de l'entité chargée de la formalisation des spécifications, des contrôles et de l'agrément est respecté.

13 S'agissant de la notion d'entreprise, l'article 1er, deuxième tiret, de la directive précise que celle-ci vise «les organismes publics ou privés auxquels l'Etat octroie des droits spéciaux ou exclusifs d'importation, de commercialisation, de raccordement, de mise en service d'appareils terminaux de télécommunications et/ou d'entretien de tels appareils».

14 Il y a lieu d'observer, à cet égard, que le fait que, comme en l'espèce au principal, l'exploitation du réseau public et de la commercialisation des appareils terminaux est confiée à des entités intégrées dans l'administration publique ne saurait soustraire ces dernières à la qualification d'entreprise publique. En effet, comme la Cour l'a constaté dans le contexte de la directive 80/723/CEE, de la Commission, du 25 juin 1980, relative à la transparence des relations financières entre Etats membres et entreprises publiques (JO L 195, p. 35), un organe exerçant des activités économiques de caractère industriel ou commercial ne doit pas nécessairement posséder une personnalité juridique distincte de l'Etat pour être considérée comme une entreprise publique. S'il n'en était pas ainsi, il serait porté atteinte à l'efficacité des dispositions de la directive en cause ainsi qu'à l'uniformité de son application dans tous les Etats membres (voir arrêt du 16 juin 1987, Commission/Italie, 118/85, Rec. p. 2599, point 13).

15 En ce qui concerne l'exigence de l'indépendance de l'entité chargée de la formalisation des spécifications, du contrôle de leur application ainsi que de

l'agrément, il suffit de constater que des directions différentes d'une même administration ne sauraient être considérées comme indépendantes l'une de l'autre, au sens de l'article 6 de la directive.

16 Dans ces conditions, il convient de répondre à la juridiction nationale que l'article 6 de la directive 88/301 s'oppose à une réglementation nationale qui interdit, sous peine de sanctions, aux opérateurs économiques de fabriquer, d'importer, de détenir en vue de la vente, de vendre ou distribuer des appareils terminaux sans justifier, par la présentation d'un agrément ou de tout autre document considéré comme équivalent, de la conformité de ces appareils à certaines exigences essentielles tenant notamment à la sécurité des usagers et au bon fonctionnement du réseau, alors que n'est pas assurée l'indépendance, par rapport à tout opérateur offrant des biens et/ou des services dans le domaine des télécommunications, de l'organisme qui délivre l'agrément ou tout autre document équivalent et formalise les spécifications techniques auxquelles ces appareils doivent répondre.

Sur les dépens

17 Les frais exposés par les gouvernements de la République française et du Royaume-Uni et par la Commission des Communautés européennes, qui ont soumis des observations à la Cour, ne peuvent faire l'objet d'un remboursement. La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction nationale, il appartient à celle-ci de statuer sur les dépens.

Par ces motifs,

LA COUR,

statuant sur la question à elle soumise par le tribunal de police de Vichy, par jugement du 5 mars 1991, dit pour droit:

L'article 6 de la directive 88/301 (CEE) de la Commission, du 16 mai 1988, relative à la concurrence dans les marchés de terminaux de télécommunications s'oppose à l'application d'une réglementation nationale qui interdit, sous peine de sanctions, aux opérateurs économiques de fabriquer, d'importer, de détenir en vue de la vente, de vendre ou distribuer des appareils terminaux sans justifier, par la présentation d'un agrément ou de tout autre document considéré comme équivalent, de la conformité de ces appareils à certaines exigences essentielles tenant notamment à la sécurité des usagers et au bon fonctionnement du réseau, alors que n'est pas assurée l'indépendance, par rapport à tout opérateur offrant des biens et/ou des services dans le domaine des télécommunications, de l'organisme

qui délivre l'agrément ou tout autre document équivalent et formalise les spécifications techniques auxquelles ces appareils doivent répondre.

Due	Rodriguez Iglesias	Zuleeg
Murray	Mancini	Joliet
Schockweiler	Moitinho de Almeida	Grévisse

Ainsi prononcé en audience publique à Luxembourg, le 27 octobre 1993.

Le greffier

J.-G. Giraud

Le président

O. Due

III/134

Costs

12 The costs incurred by the French Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Tribunal de Grande Instance, Reims, by judgment of 18 March 1993, hereby rules:

Neither Article 30 of the EEC Treaty nor Directive 88/301/EEC precludes national rules which prohibit traders, with penalties for infringement, from importing terminal equipment which has not been approved for release for consumption, possessing it with a view to sale, selling, distributing or advertising it, even if the importer, holder or vendor has clearly stated that such equipment is intended solely for re-export, where there is no certainty that it will actually be re-exported, and is therefore not suitable for connection to the public network.

Due	Mancini	Edward
Joliet	Schockweiler	Rodríguez Iglesias
Grévisse	Zuleeg	Murray

Delivered in open court in Luxembourg on 12 July 1994.

R. Grass	O. Due
Registrar	President

III/136

Case C-314/93

Criminal proceedings against François Rouffeteau and Robert Badia

(Reference for a preliminary ruling from the Tribunal de Grande Instance, Reims (France))

(Article 30 of the EEC Treaty — Directive 88/301/EEC — Telecommunications terminals — Prohibition on telephones which have not been approved — Re-export)

Summary of the Judgment

Free movement of goods — Quantitative restrictions — Measures having equivalent effect — National rules prohibiting the marketing of telecommunications terminals which have not been approved, even where those are stated to be intended for re-export — Whether permissible — Corollary of the power conferred on the Member States by Directive 88/301

(EEC Treaty, Art. 30; Commission Directive 88/301/EEC, Art. 3)

Neither Article 30 of the EEC Treaty nor Directive 88/301 on competition in the markets in telecommunications terminal equipment, certain provisions of which implement Article 30, precludes national rules which prohibit traders, with penalties for infringement, from importing terminal equipment which has not been approved for release for consumption, possessing it with a view to sale, selling, distributing or advertising it, even if the importer, holder or vendor has clearly stated that such equipment is intended solely for re-export, where there is no certainty that it will actually be re-exported, and is therefore not suitable for connection to the public network, but where on the contrary the findings of the national court indicate that most of it is not re-exported.

While Article 3 confers on traders the right to import and market terminal equipment, it permits the Member States to check the equipment in order to establish whether it satisfies certain essential requirements, that is to say in particular, user safety, safety of employees of public telecommunications network operators, protection of public telecommunications networks from harm and interworking of terminal equipment in justified cases. The power so conferred on the Member States would be rendered ineffective if it were possible to undertake the abovementioned activities without any guarantee that the equipment in question will actually be re-exported.

JUDGMENT OF THE COURT
12 July 1994 *

In Case C-314/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal de Grande Instance, Reims (France), for a preliminary ruling in the criminal proceedings pending before that court against

François Rouffeteau,

Robert Badia,

on the interpretation of Article 30 of the EEC Treaty and Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment (OJ 1988 L 131, p. 73),

THE COURT,

composed of: O Due, President, G. F. Mancini and D. A. O. Edward (Presidents of Chambers), R. Joliet, F. A. Schockweiler, G. C. Rodríguez Iglesias, F. Grévisse, M. Zuleeg (Rapporteur) and J. L. Murray, Judges,

Advocate General: G. Tesauro,
Registrar: R. Grass,

* Language of the case: French.

III/139

after considering the written observations submitted on behalf of:

— the French Government, by J.-M. Belorgey, Chargé de mission in the Legal Department of the Ministry of Foreign Affairs, and C. de Salins, Adviser on foreign affairs in the same department, acting as Agents,

— the Commission of the European Communities, by A. C. Jessen, of the Legal Service, and V. Melgar, a national civil servant seconded to the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the French Government and the Commission, represented by V. Melgar, acting as Agent, assisted by A. Jaume, technical expert, at the hearing on 2 March 1994,

after hearing the Opinion of the Advocate General at the sitting on 19 April 1994,

gives the following

Judgment

1 By judgment of 18 May 1993, received at the Court on 14 June 1993, the Tribunal de Grande Instance (Regional Court), Reims (France), referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 30 of the Treaty and of Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment, with a view to ascertaining the compatibility therewith of the system

///1:0

established in France by Decree No 85-712 of 11 July 1985 implementing the Law of 1 August 1905 and relating to equipment capable of being connected to the State telecommunications network (*Official Journal of the French Republic* of 14 July 1985, p. 7976) and by Law No 89-1008 of 31 December 1989 on the development of commercial and craft undertakings and the improvement of their economic, legal and social environment (*Official Journal of the French Republic* of 2 January 1990, p. 9).

2 That question was raised in criminal proceedings against Mr Rouffeteau and Mr Badia, the former charged with advertising, possessing and offering for sale, and the latter with possessing and offering for sale telephone equipment in September 1991 without obtaining type approval or any other document certifying compliance with the specifications required in respect of equipment capable of being connected to the public network, being offences contrary to Decree No 85-712 and Law No 89-1008. Mr Rouffeteau and Mr Badia have objected that the legislation is unlawful in relation to Article 30 of the Treaty and Directive 88/301.

3 Under Decree No 85-712, equipment capable of being connected to the public network may be manufactured for the domestic market, imported for release for consumption, held with a view to sale, offered for sale or distributed only if it complies with a number of requirements intended to ensure the proper functioning of the network and user safety (Articles 2, 3 and 4). As evidence that the equipment complies with those requirements, the traders concerned must produce a report drawn up by a body approved by the Minister for Industry, type approval granted pursuant to the Postal and Telecommunications Code, an evaluation certificate issued pursuant to the law on consumer protection and information or other documentary evidence recognized as equivalent by order of the Minister for Industry (Article 6). Article 7 of the decree lays down the penalty for breach of that obligation to provide evidence.

III / 141

4 Article 8 of Law No 89-1008 provides that it is prohibited, and punishable by a fine, to advertise in any way equipment which is capable of being connected to the State telecommunications network but which cannot be shown to comply with the regulations concerning such equipment.

5 Taking the view that the case involved the interpretation of the Community legislation at issue, the Reims criminal court referred the following question to the Court for a preliminary ruling:

'Must Article 30 of the Treaty and Directive 88/301/EEC be interpreted as precluding national legislation, such as the French legislation, which prohibits the import, possession with a view to sale and offering for sale of all telephone equipment which has not been granted type approval, even where it is clearly stated by the importer, holder or seller of that equipment, in this case cordless telephones and answering machines, that the equipment is intended solely for re-export and is not, therefore, suitable for connection to the public network?'

6 The first sentence of Article 3 of Directive 88/301 confers on traders the right to import and market terminal equipment. In accordance with the second sentence of that provision, however, Member States may check terminal equipment in order to establish whether it satisfies certain essential requirements such as those listed in Article 2(17) of Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment (OJ 1986 L 217, p. 21), that is to say in particular user safety, safety of employees of public telecommunications network operators, protection of public telecommunications networks from harm and interworking of terminal equipment in justified cases.

7 It should be borne in mind that Directive 88/301 was adopted by the Commission in the exercise of the legislative power conferred on it by Article 90(3) of the Treaty to lay down general rules specifying the obligations arising from the Treaty, which are binding on the Member States as regards the undertakings referred to in Article 90(1) and (2) (judgment in Case C-202/88 *France* v *Commission* ('Terminals') [1991] ECR I-1223, paragraph 14). Article 3 of the directive forms part of the provisions implementing Article 30 of the Treaty (see to that effect the same judgment, paragraphs 37 to 39).

8 The power so conferred on the Member States would be rendered ineffective if it were possible to import equipment which has not been approved for release for consumption, to possess it with a view to sale, to sell or distribute it or to advertise it without any guarantee that it will actually be re-exported.

9 According to the French Government, most of the equipment which has not been approved and is marketed in a Member State is in fact subsequently connected to the public network, despite the written or oral information which is sometimes provided at the time of sale, to the effect that the equipment is intended for re-export and is not suitable for connection to the public network.

10 It is for the national court to establish whether that statement is true.

11 In those circumstances, the answer to the question from the national court must be that neither Article 30 of the Treaty nor Directive 88/301 precludes national rules which prohibit traders, with penalties for infringement, from importing terminal equipment which has not been approved for release for consumption, possessing it with a view to sale, selling, distributing or advertising it, even if the importer, holder or vendor has clearly stated that such equipment is intended solely for re-export, where there is no certainty that it will actually be re-exported and is therefore not suitable for connection to the public network.

III/ 1 L 3

Costs

12 The costs incurred by the French Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Tribunal de Grande Instance, Reims, by judgment of 18 March 1993, hereby rules:

Neither Article 30 of the EEC Treaty nor Directive 88/301/EEC precludes national rules which prohibit traders, with penalties for infringement, from importing terminal equipment which has not been approved for release for consumption, possessing it with a view to sale, selling, distributing or advertising it, even if the importer, holder or vendor has clearly stated that such equipment is intended solely for re-export, where there is no certainty that it will actually be re-exported, and is therefore not suitable for connection to the public network.

Due Mancini Edward

Joliet Schockweiler Rodríguez Iglesias

Grévisse Zuleeg Murray

Delivered in open court in Luxembourg on 12 July 1994.

R. Grass O. Due

Registrar President

III/145

DOCUMENTS ON THE APPLICATION OF THE COMPETITION RULES TO THE TELECOMMUNICATIONS SECTOR

ANNEX I

EC Commission Press Releases

Bulletin of the European Communities

EC Commission Press Release - Ref: IP/86/379

COMMISSION ENFORCES COMPETITION RULES IN TERMINALS MARKET IN GERMANY

After intervention by the Commission under Article 90(1) in conjunction with Articles 37 and 86 of the EEC Treaty, the Federal Republic of Germany has agreed to allow modems - both separate and built into other equipment such as personal computers - to be supplied direct by suppliers other than the national posts and telecommunications authority, the Bundespost. Previously the situation in the Federal Republic was that the Bundespost had a monopoly for supplying any modem to be connected to the public telephone network. This meant that users of the public telephone network could not always obtain the type of modem best suited to their needs and that only the market for modems to be used in private networks was open to suppliers of devices imported from other Member States. The Commission considered that the German rules giving the Bundespost a monopoly to supply modems were in breach of Article 90(1) in conjunction with Article 37 of the EEC Treaty because they denied users a choice between equipment available from different suppliers and closed a very large part of the market to direct access by such suppliers. The tying of the sale or leasing of modems to the provision of network services was furthermore an abuse of a dominant position under Article 86 of the Treaty. After the Commission had made these objections clear to the German Government, the Government agreed to amend its rules and to publish technical specifications for modems applicable to domestic and imported products alike. Suppliers other than the Bundespost will now be able to supply modems (both separate and built-in devices) for connection to the public telephone network. The Commission is continuing its examination of the legality or otherwise under the Treaty of monopolies held by Member States' posts and telecommunications authorities for supplying terminal equipment to be connected to the telephone network. Its general position is that the claiming of a monopoly for the supply of terminal equipment breaches Article 37(2) of the Treaty as its restricts imports from other Member States.

EC Commission Press Release - Ref: IP/88/99

SUMMARY OF ADDRESS BY MR SUTHERLAND AT THE EUROSTRATEGIES TELECOMMUNICATIONS FORUM - BRUSSELS, FEBRUARY 25.1988 : THE APPLICATION OF COMPETITION POLICY IN THE TELECOMMUNICATIONS SECTOR

The weight and complexity of national telecom regulations is inhibiting the development of an efficient telecommunications industry in Europe and placing an intolerable burden on the European economy. Private and professional users are still faced with an entirely uncompetitive, monopoly situation in the field of telecommunications. Most public telecommunication operators remain the sole purchasers of transmission, switching and receiving equipment and the sole providers of network facilities, telecommunications services and of user equipment. Telecommunications are at the cross roads of future high technology and service economies. The changes that are taking place will affect the very basis future economic development in Europe. The strengthening of European telecommunications has become one of the major conditions for achieving the internal mrket, improving the competitivity of the European economy and strengthening European cohesion. The difference of interest between the competitive industry and the telecommunications monopolies is at the heart of the technological push for institutional change at European and national level. It is within this context that the Commission, at the end of June last year, issued its Green Paper on telecommunications which aims at advancing an open, competitive Community wide market in this area and diminishing restrictive policies which hamper the ability of European firms to compete on a world wide basis. Following the consultations on its Green Paper, the Commission is now embarking on its ambitious programme of opening the telecommunications sector progressively by 1992. With regard to two essential parts of this programme, the Commission has decided to use the legal instruments available under the competition rules of the Treaty. Under Article 90, the Commission is required to control the behaviour of public or privately-owned enterprises, to which Member States give exclusive or special rights. Member States must ensure that there are no measures in existence in regard to such enterprises which would lead to inffringements of the Treaty. Accordingly, the Commission has decided to issue, within the next few months, a directive on the liberalization of the terminal equipment market and before the end of the year, a second directive on the liberalization of telecommunication services, based on Article 90(3) of the Treaty. In regard to the liberalization of the terminal equipment, the Commission will establish rules requiring Member States to abolish the exclusive import and distribution rights which most Member States have delegated to their national telecommunications administrations. Users in future will be free to choose the equipment they want and not be bound to one supplier. Consumers will be free to have the equipment installed by the supplier and have the maintenance done by a firm of their choice. On the important question of the liberalization of telecommunication services, the Commission's directive will define the scope of the activities which can be maintained under monopoly of the state and of services which will have to be liberalized and may thus be provided by private operators The Commission will seek to ensure that there is a separation between regulatory powers and commercial activities and the directive will establish the conditions of access to the network by independent, private operators Procedures will be established to ensure that the Commission is kept informed of all new legislation the Member States intend to implement, as well as financial arrangements between the State and public enterprises, in order to verify that no cross subsidization takes place to the detriment of users or competitors. The Commission welcomes the enthousiastic support by the industry for the ideas which have been set out in the Green Paper Support for the common objective of ensuring that Europe will have a healthy and competitive telecommunications industry Europe cannot afford to maintain the monolithic and inefficient structures of the past. Only through market oriented enterprises with the flexibility to adapt rapidly to the swift technological changes of this industry can we hope not only to prosper but indeed to survive as a modern economic power.

EC Commission Press Release - Ref: IP/88/251

COMMISSION PRESENTS A DIRECTIVE TO INTRODUCE COMPETITION INTO TELECOMMUNICATIONS TERMINAL MARKETS

The Commissioner for Competition, Mr. Peter Sutherland, today presented a new Commission Directive based on Article 90 of the EEC Treaty which requires Member States to develop competition in the Community market for telecommunications terminal equipment. At the informal meeting Mr. Sutherland informed the Ministers of the Commission's decision to adopt the Directive, outlined its principal provisions and underlined the significance of the Directive as the first major concrete step to implement the programme set out in the Commission's Green Paper on Telecommunications. Article 90 of the EEC Treaty requires in the case of public undertakings and undertakings to which Member States grant special or exclusive rights that Member States neither enact nor maintain in force any measure contrary to the rules of the EEC Treaty, including applicable rules on competition, free movement of goods and right of establishment. Where necessary, the Commission is required to address appropriate directives or decisions to Member States. Such directives or decisions may include measures taken in pursuit of the Commisison's role of surveillance in regard to Community law and specifying the particular obligations that flow from the directly applicable rules of the Treaty in situations where otherwise infringement of the Treaty rules would be liable to occur. The liberalization of telecommunications terminal markets is the first major step in implementing the Green Paper. Hitherto the market for such equipment, which includes, inter alia, telephone sets, modems and telex terminals, were often maintained as separate controlled national markets because national telecommunications administrations have had a monopoly of importing and supplying terminals. The last few years have seen major improvements in the performance of terminal equipment. A more open market-oriented environment is considered necessary to develop swiftly the commercial opportunities in Europe afforded by rapid technological innovation in terminal equipment. A sharp rise in sales, which are now worth about 9.5 billion ECU, can be expected with growth around 6-7% a year provided the restrictive national barriers challenged by the directive are removed. - 2 - It is therefore vital that EC telecommunications equipment manufacturers should be able to sell terminals throughout the Community and that users be able to choose the equipment that best meets their needs at the lowest cost so that they can benefit fully from the technological advances made in the sector The situation that has existed until now in most Member States has caused their markets to be tightly segregated. Only the telecommunications authority had the right to supply terminal equipment to users and not infrequently it ordered all its equipment from domestic suppliers. Abolition of the monopolies held by PTTs will make it possible for suppliers to deal directly with users. The restrictive barriers separating the markets will thus be removed and a common market for terminal equipment created by 1992. In addition, Member States will be required to publish the technical specifications they lay down for equipment to meet so that manufacturers from other Member States can adapt their equipment to the characteristics of each national network. As the technical characteristics of networks vary considerably in the 12 Member States, so too do the technical specifications that terminal equipment has to meet in order to enable connection without damaging the network. Another requirement in the Commission's Directive is for Member States to separate the regulatory functions of their telecommunications administrations from their commercial interests as network operator. At present the regulatory functions held by the telecommunications administrations alongside their business interests enable them to keep products supplied by competitors off the market The Directive also requires users to be given the right to connect terminal equipment they have obtained in the free market to the network without having to rely on the national telecommunications administration. For this purpose the Member States will have to ensure that users have access to the points where terminals are connected to the network and to publish their technical characteristics. Liberalization of the market would not be effective if network termination points were not accessible and if their technical characteristics were not published because then only the PTT (which may still be the monopoly network operator) would be able to connect up equipment Another barrier to competition addressed by the Directive are the long-term contracts which subscribers have often been obliged to make with the national telecommunications administration in order to be supplied with terminal equipment Subscribers had no choice but to enter into such contracts because frequently the PTT as network operator was the only body allowed to supply them with - 3 - terminals. In the past telecommunications administrations often would not sell terminal equipment to users but insisted on their renting it, sometimes at inflated prices compared with the equipment's purchase price. The Directive requires Member States to oblige their telecommunications administrations to release subscribers from contracts entered into during the time the administration had a monopoly so that if they wish they can obtain the equipment from another supplier. The Commission Directive thus provides a legal framework for all the areas that are essential

for a genuine liberalization of telecommunications terminal markets in the Community, so that not only can users fully benefit from the technological advances in the sector but the EC telecommunciations equipment industry can develop its competitiveness vis-a-vis non-EC producers.

EC Commission Press Release - Ref: IP/89/49

FIRST STRATEGIC PLAN FOR ADVANCED COMMUNICATIONS FOR EUROPE IN THE 1990s

Vice-President Pandolfi, responsible for research and telecommunications, yesterday stressed that effective, advanced communications will be essential for European business competitivity, employment and prosperity in the 1990s and beyond. Advanced communications will also open up new possibilities in such areas as education, health care, cultural and leisure activities. Mr. Pandolfi was speaking at the presentation of the first report of a series of Strategic Audits of the situation in Europe for the development of advanced communications, carried out in the framework of the European Commission's RACE programme. Practically all EC and EFTA Telecommunication Administrations and telematic equipment manufacturers have joined together in the framework of the Community's RACE programme (Research in advanced Communications technologies in Europe), aimed at providing Europe rapidly and efficiently with advanced telecommunications services. The work in RACE will help to clarify techno-economic oprions but needs to be complemented by strategic analyses. Therefore when RACE was officially launched on December 14 1987, it was decided to carry out annual Strategic Audits of developments in advanced communications and their implications. The first such Strategic Audit has now been completed. It has concentrated on global objectives and priorities, taking into account political, social, economic, technical and industrial developments and the evolution of demand for advanced telecomunnications(1). (1) The Strategic Audit has been carried out by seven experienced advisors acting in an independent, personal capacity: John Alvey, a senior UK telecommunications advisor Jose Viana Baptista, President of the Portuguese Telecommunication Administration John Barret, Director of the RACE industrial consortium responsible for RACE consensus management Basilio Catania, General Manager of CSELT in Italy Jozef Comu, Executive Vice-President, Alcatel Jacques Dondoux, President of IREST, formerly Director of the DGT in France Dietrich Elias, former State Secretary and President of DETECON in the FRG - 2 - The audit has identified key issues in the establishment of advance communications in Europe and formulated a set of recommendations for action by Governments, the European Commission, Telecommunication Administrations, European industries, telecommunications service providers and standardization organisations. The set of recommendations constitutes the first comprehensive strategic plan for the establishment of advanced communications in Europe and will provide the basis for debate on the very important and wide-ranging issues related to regulatory frameworks, investment strategies and technical options. Summary of recommendations for action The introduction of advanced broadband communications will provide potentially enormous benefits to Europe. However, these can only be realised through innovative services relying on a new generation of terminal facilities and infrastructures. This large-scale deployment of new technologies and services will involve a major investment programme by telecommunications administrations, businesses and individuals of about 500 billions ECU over a decade. While R&D cooperation has been successfully established in the framework of RACE, it is considered that further action is now needed both in the industrial and regulatory areas to exploit the results for the benefit of Europe's telecommunications users. The following further actions are recommended for consideration: A) National governments should collaborate to define by 1992 the conditions and regulatory provisions which should be applied to the introduction of pan-European advanced communications services. B) Telecommunications, broadcasting and cable TV administrations should propose, by mid-1989, a concerted approach to, and a timetable for, development and use of IBC infrastructures for both telecommunications and entertainment service's including HDTV (high definition television), teking full advantage of private sector investment initiatives when appropriate C) Telecommunications administrations should prepare an initial memorandum of understanding by 1990 on closer collaboration in their intra-European long-distance links and operations. D) Service providers should specify, by the end of 1990, a first set of service requirements, commercial conditions and regulatory provisions which would favour an early and widespread use of IBC services. - 3 - E) Telecommunications, broadcasting and cable TV administrations, service providers and the telematics industry should agree a memorandum of understanding by mid 1989 to complement the collaborative R&D in RACE by pilot implementation of some IBC services on a European scale for a business-led introduction of IBC by 1992. F) Collaborative R&D should be extended to include integrated service engineering, fixed and mobile applications and techniques for verification and testing of communications equipment and service functions by the end of 1989 G) European standardization bodies should reinforce and coordinate their efforts towards international standardization for IBC and advanced services. A standardization schedule should be established by mid-1989, particularly for ATM (asynchronous transfer mode)(2) H) Member State should address the problem of frequency allocation in Europe over the whole range of frequencies and applications They should permit, by 1992, a rationalization of frequency allocations reflecting evolving needs and priorities For further information: Willy HELIN . 235.75.22 / 235.00.86

ANNEX I - 7

Mrs. SANGLIER: 235.61.88 (2) ATM is a switching and transmission technique that allows flexible use of transmission capacity

EC Commission Press Release - Ref: IP/89/256

"COMPETITION IN TELECOMMUNICATIONS" : EXTRACTS FROM THE SPEECH BY SIR LEON BRITTAN AT THE SECOND INTERNATIONAL CONFERENCE ON TELECOMMUNICATIONS - AMSTERDAM, 18 APRIL 1989

"Competition has traditionally been turned away at the door of the telecoms market as an undesirable influence. But times change; ever since the presentation of the Commission's Green Paper on Telecommunications in 1987 major developments have occurred. Now it is a question of opening the door: means, motive and opportunity are all to hand. We have two reasons to introduce fair competition into this sector. The need for an efficient service and choice; and the need to bring some order to the path towards deregulation which is already being trod. We also have a unique opportunity: the creation of the European single market in 1992.The breaking down of barriers to trade between Member States will bring a new dimension to this process of change and provide the opportunity to take up the full challenge of technological development. Given these reasons and such an opportunity, the Commission's philosophy is to prevent Member States or particular undertakings from erecting or maintaining artificial barriers to the single market, in the interests of the whole economy. At the same time, we will encourage all forms of cooperation which foster innovation and economic progress, as Article 85(3) of the Treaty envisages. Now, what are the means at our disposal to progressively liberalise the telecoms market? It has sometimes been argued that liberalisation should be based on harmonisation directives by the Council of Ministers of Member States rather than on directives by the Commission. Such arguments are based on the assumption that the Commission has a choice between the different procedures available. This is not so. The liberalisation of telecommunications markets implies in the first place the application of existing Community rules. Article 90 of the Treaty of Rome obliges the Commission to monitor enterprises under state ownership or those in a privileged position because they have been granted special or exclusive rights. Member States may not enact or maintain, in respect of such enterprises, measures contrary to the rules of the Treaty. After careful examination of the situation in the telecommunications sector, the Commission identified several infringements of the rules on competition, free circulation of goods and free provision of services It could have started individual actions against several Member States. But that would have resulted in much duplication and delay. The fact was that we were facing a general problem and a global approach was obviously necessary. That is why it was appropriate to use Commission directives to open up the telecommunications markets to competition. A first directive liberalising the markets for terminals was adopted in May of last year and a second directive liberalising services should be adopted shortly. I think it is important to stress again that these two directives do not introduce a new policy they implement the principles laid down by the Treaty. Directives are necessary because the Treaty is drafted in broad language which requires interpretation according to changing circumstances. We are implementing a legal provision, but it is of a constitutional character and therefore it has to be given fresh meaning as circumstances change Economic and technological changes make it necessary to adopt these rules now." For further information please contact. Michael Berendt : 235 8562 Elisabeth Kaiser : 235 2210

EC Commission Press Release - Ref: IP/89/274

COMMISSION CLOSES PROCEDURE FOR ITALIAN MODEM SUPPLY

The Commission has decided to close a procedure against the Italian government concerning restrictions on the supply of telecommunication modems, following changes in Italian legislation. The action followed a complaint made in 1986 concerning the monopoly for supplying modems which was enjoyed by S.I.P., the concessionaire for internal telephone traffic in Italy. Under this monopoly arrangement users were often unable to instal the modem best suited to their needs, while alternative suppliers were unable to market their products. Now they are free to do so subject to type approval conditions. The Commission's action was taken under Community competition rules and the Commission's Article 90 directive of May 1988 on terminals. for further information please contact : Michael Berendt : 235 8562 Elisabeth Kaiser : 235 2210

EC Commission Press Release - Ref: IP/89/948

COMMISSION OUTLINES CONDITIONS FOR EXEMPTING TELECOMS COOPERATION PLAN UNDER COMPETITION RULES

The Commission has been informed that the project of 22 European Telecommunications Administrations and Recognized Private Operators Agencies (RPOAs) to form a joint venture company in the Netherlands offering international managed data network services (MDNS) has been abandoned at a meeting in Copenhagen on 13 October 1989 because the commercial and regulatory environment was no longer favourable. The project would have offered standard enhanced data communications services on a pan-European basis. The services would have included features such as one-stop shopping and network management. The project had been discussed with the Commission in the context of the competition rules of the Treaty and the Commission's general policy in the telecommunications sector. The Commission's Services considered that the MDNS project presented certain risks of restriction of competition not only between the operators themselves by limiting their commercial autonomy, but also from private service suppliers because the Telecommunications Administrations concerned have an effective monopoly in the network infrastructure. Nevertheless, the Commission accepted that the project also offered economic benefits to telecommunications users such as access to European-wide services through a single operator. Such cooperation could also have accelerated European standardization, reduced costs and increased the quality of the services. To ensure that these benefits took full effect, in conformity with the EC rules on competition, the services of the Commission had informed the participants that approval of the project would have to be subject to guarantees designed to prevent undue restriction of competition in the telecommunications services markets, such as discrimination against private services suppliers and cross-subsidization. Such guarantees would be essential conditions for the granting of an exemption under the competition rules to cooperation agreements involving Telecommunications Administrations. For further information contact: Mr. Michael Berendt 235.85.62

EC Commission Press Release - Ref: IP/90/67

MODIFICATION OF THE CONDITIONS UNDER WHICH TELECOMMUNICATIONS CIRCUITS ARE LEASED IN BELGIUM FOLLOWING INVESTIGATIONS BY THE COMMISSION

The Commission has taken action in respect of the Belgian Regie des telegraphes et telephones after receiving a complaint concerning an alleged abuse of dominant position from a private supplier of value-added telecommunications services relating to the conditions under which telecommunications circuits are being leased. Following discussions with the Commission, the RTT has authorised the private supplier concerned to use the leased telecommunications circuits subject to no restrictions other than that they should not be used for the simple transport of data. After the complaint was withdrawn, the Commission and the RTT commenced discussions with a view to ensuring that all clients of the Regie in a comparable situation received the same treatment. The outcome of these negotiations was that the RTT decided that from now on they would not apply the standard conditions concerning the access of third parties to international data transmission circuits which contained restrictions likely to infringe the competition rules. Pending the possible adoption of new rules in Belgium, and without prejudice to any such rules, the RTT has undertaken that all its existing and potential clients for leased telecommunications circuits to which third parties may have access shall be governed by the same conditions as those which have been agreed with the private sector supplier mentioned above, that is to say that they will not be subjected to any restrictions apart from the requirement that the circuit shall not be used for the simple transport of data. The context of this case provides an opportunity for the Commission to reiterate that, under the competition rules, an undertaking in a dominant position on a market for telecommunications services may not impose any restrictions on the use of such services unless they are necessary to the task of providing the service of general economic interest with which it has been entrusted. • • •

EC Commission Press Release - Ref: IP/90/188

TELECOMS OPERATORS ABOLISH TARIFF RECOMMENDATIONS FOLLOWING COMMISSION ACTION

Following the intervention of the European Commission, the European Conference of Postal and Telecommunications Administrations (CEPT) has decided to abolish a Recommendation to its member organisations which fixed the terms for leasing out international telecommunications circuits. The Commission had found that the Recommendation amounted to a price agreement under Article 85 of the Treaty which substantially restricted competition within the European Community. This is a landmark case in the application of Community competition law to telecommunications: - it re-establishes competition between telecoms operators for the supply of international leased cicuits, to the benefit of users and notably suppliers of value-added services; - it applies the competition rules for the first time to the activities undertaken by the CEPT. The CEPT represents the telecoms administrations of 26 European countries, including the 12 Community member states. From time to time the Conference adopts recommendations on the technical, supply and usage conditions as well as tariffs of international services. In April 1989 it revised its Recommendation on the General Principles for the Lease of International Telecommunications Circuits and the Establishment of Private International Networks. This revision provided, inter alia, for the imposition of a 30% surcharge or an access charge where third-party traffic was carried on an international telecommunications leased circuit, or if such a circuit was interconnected to the public telecommunications network. The Recommendation also provided for the application of uniform tariff coefficients for the determination of the price of international telecommunications leased circuits. The Commission investigated the matter on its own initiative and also received two complaints alleging violation of the competition rules by the CEPT and claiming that the Recommendation would substantially increase telecommunications costs and limit the growth of value-added services. - 2 - After investigating the matter, the Commission informed the CEPT that the Recommendation could be deemed as a decision by an association of undertakings (i.e. Telecommunications Administrations and Recognized Private Operating Agencies) having the object and effect of restricting price competition for international leased circuits, and therefore, contrary to Article 85(1) of the Treaty. In these circumstances, the CEPT decided at its meeting of 20-21 February 1990 to abolish the Recommendation, since it had no real significance if it was deprived of the provisions the Commission identified as anti- competitive and not qualifying for an exemption. However, the Commission indicated that it was prepared to examine the possibility of an exemption under Article 85(3) of the Treaty upon notification of a Recommendation which would harmonize tariff principles without any price-fixing agreement insofar as this would bring economic advantages, for example by making tariffs more cost-related, and transparent and so benefiting users. This case provides an opportunity for the Commission to reiterate that Telecommunications Administrations are undertakings in the meaning of the competition rules of the Treaty, and any agreement or decision by association between them which is restrictive of competition is prohibited under Article 85(1) of the Treaty, unless it is exempted under Article 85(3) thereof For further information contact Mr. Michael Berendt

EC Commission Press Release - Ref: IP/90/375

COMMISSION ENQUIRY INTO INTERNATIONAL TELEPHONE CHARGES

The European Commission has confirmed that it is examining the arrangements governing international telephone charges, to see whether they are compatible with the competition rules of the Treaty of Rome. This examination is being undertaken because of the significance of international communications for the Community's economy. Vice-President of the Commission Sir Leon Brittan, who is responsible for competition policy, stressed the importance of the enquiry. "We have to ensure that consumers benefit from an international telephone charging system which allows genuine competition between the telecommunications operators. This is essential for European business and also for individuals."

EC Commission Press Release - Ref: IP/90/589

DAWN OF A NEW ERA IN EUROPEAN TELECOMMUNICATIONS MEMBER STATES NOTIFIED OF TWO NEW DIRECTIVES

The Community member states have now received formal notification of two directives in the telecommunications sector which mark the beginning of a new era in European telecoms and the creation of a single market in this sector. The two measures relate together. Liberalisation will for the first time open up unlimited opportunities for the telecommunications industry, for business users and for the individual consumer as the range of services expands, made possible on a Community basis by the harmonisation of use and access conditions. The directives are: - the open network provision (ONP) framework directive, which facilitates access of private companies to the public networks and certain public telecommunications services; - the Article 90 telecoms services directive, which establishes the right for independent undertakings to offer new services on the telecommunications network. The ONP directive was adopted by the Council of Ministers at its meeting on June 28. The Article 90 directive was a modification of the text agreed by the Commission in June 1989. The two should be seen in parallel. Until now, the provision of pan-European services has often been made impossible by the absence of harmonised technical interfaces, by divergent conditions of use or discriminatory tariff principles. The ONP directive lays down the principles for creating a European market by harmonising technical interfaces, it outlines conditions for supply and usage and proposes the harmonisation of tariff principles. Technical harmonisation will be achieved in close collaboration with the European Telecommunications Standards Institute (ETSI) The telecommunications industry has often found it difficult to provide new or alternative services on the existing national networks due to the existing monopoly rights which vary from country to country. The Article 90 directive limits the exclusive rights which can be given to the telecommunications monopolies, confining them to control of the basic network and voice telephony. This means that in future independent suppliers will have a guaranteed right of access to the national networks for new and developing services. This provision takes immediate effect for all value-added services. The resale of leased line capacity may be restricted until the end of 1992. - 2 - The major features of the ONP directive 1) Technical interfaces and service features will become the subject of European standards to be adopted by ETSI. These standards will in principle be of a voluntary nature. However, there is a presumption in favour of those who comply with the standard, i e. service providers complying with that standard will be able to offer their services throughout the whole European Community. This is an important incentive, but no obligation to apply the standard. 2) If the working of this presumption in practice does not suffice to guarantee the ineroperability of trans-frontier services within the Community, the Commission can make the reference to the standard in question mandatory to the extent strictly necessary to ensure such interoperability and to improve freedom of choice for users. There will most probably not be any mandatory standards for value- added services since the procedure mentioned above was conceived for application to basic services such as packet-switched data transmission and the ISDN. 3) Since the Commission will have to improve the freedom of choice for users when making the reference to a European standard mandatory, this will not prevent a company that offers services related to mandatory standards also to offer other services. 4) The ONP Directive is a "framework" directive, to be followed by directives on specific issues. In this context the Council decided on the work programme in the field of ONP for the next years. In particular, this programme provides that : there will be specific ONP Directives for leased lines and voice telephony; by 1 January 1991, technical interfaces and services features concerning packet-switched data transmission and the ISDN will be established and could be made mandatory according to the procedure mentioned above, ONP conditions will be adopted in the form of recommendations by 1 July 1991 and 1 January 1992 for packet-switched data transmission and the ISDN respectively; the Council will examine Commisson proposals in 1992 and thereafter by which the recommendations mentioned above would be transposed into directives The Services Directive On 28 June 1989, the Commission had adopted a first draft of the Services Directive on the basis of Article 90(3) of the Treaty. However, the Commission postponed its entry into force so that the Council of Ministers would have sufficient time to adopt the Directive on Open Network Provision (the ONP Directive) Thus, the Commission wished to see the Services Directive entering into force on the same day as the ONP Directive - 3 - The basic concept of the Services Directive is as follows : The exclusive or special rights of the PTTs in the field of telecommunications services have to be abolished, with the exception of voice telephony and the network infrastructure The Directive does not apply to the telex service and allows the Member States to prohibit the simple resale of capacity of leased lines for a transitional period ending, in principle, on 31 December 1992. As soon as this Directive enters into force, private service providers will be able to offer value-added telecommunications services in competition with the PTTs throughout the European Community.

From 1 January 1993, they will also be able to offer basic services by way of the simple resale of capacity of leased lines. The basic thrust of the liberalization of basic data transmission services from 1 January 1993 will be maintained. In addition, all valued- added services will be liberalized immediately upon the Directive's entering into force. At the meeting of the Council of Ministers of 7 December 1989, the Commission accepted, as part of a global compromise, to modify certain aspects of the Services Directive as follows : 1) The Commission may consider to prolong the transitory period during which the simple resale of capacity may be prohibited beyond 31 December 1992 up to 1 January 1996 for individual Member States whose network for packet-switched data transmission services is not yet sufficiently developed. 2) The second change which the Commission accepted concerns the so-called "cahier de charges" (set of obligations) that may, under certain conditions, be imposed by a Member State on private service providers to the extent that this is necessary to safeguard the operation of services of general economic interest which have been entrusted to a public undertaking in the sense of Article 90(2) of the Treaty. Such a set of obligations can only be used in the field of basic packet- or circuit -switched data transmission and only if the activity of competing service providers risks to obstruct the performance of the particular tasks asigned to the national PTT in question. In all other instances, the provision of basic data transmission services will be free from 1 january 1993. It is provided that the Commission will scrutinize any set of obligations which a Member State may want to propose. The Member States will therefore have to notify their proposed sets of obligations at the planning stage by 30 June 1992 so that the Commission can check on their compatibility with Community law before they will be implemented. 3) The revised version of the Services Directive contains a review clause according to which the Commission will examine, in the course of the year 1994, the working of the provisions concerning the set of obligations with a view to determine whether they have to be changed. This permits the Commission to take account of the technological change on the one hand and possible distortions of trade between Member States on the other hand.

EC Commission Press Release - Ref: IP/90/670

COMMISSION SUPPORTS COOPERATION IN THE DEVELOPMENT OF A PAN-EUROPEAN MOBILE TELEPHONE SYSTEM

The European Commission has formally reassured three major European electronics and telecommunications companies - the German AEG Aktiengeselischaft, the French/Dutch Alcatel NV and the Finnish Oy Nokia - that the consortium they have formed to develop a pan-European mobile telephone system does not contravene the Community's competition rules. In 1987, European telecommunications administrations signed a memorandum of understanding in the context of the CEPT (Conference europeenne des administrations des postes et des telecommunications) to introduce a pan- European public digital cellular telecommunications system in their respective countries by 1991. This planned system, called the GSM (for "Group special mobile") system, is a new communications sytem which does not yet exist. The only potential buyers with respect to the GSM system are at present the national network operators in the CEPT countries, or the companies acting on behalf of those operators. In order to participate in this new project, Alcatel and Nokia set up a consortium known as ECR 900, which will jointly develop, manufacture and sell the pan-European digital cellular mobile telecommunications system, and parts thereof. Most other communications have likewise grouped together in order to bid effectively for the calls for tenders which have emanated from the network operators (PTTs). More than half a dozen consortia are thus participating in the development of the pan-European system which is presently under way. AEG, Alcatel and Nokia were the first consortium to notify their cooperation agreement to the Commission, seeking assurances that it did not entail any competition problems. The Commission has now confirmed by way of a formal decision that in the very special circumstances surrounding the development of the GSM system the cooperation does not fall within the scope of Article 85(1): the companies acting individually could not, in view of the very heavy investment involved and the tight time-schedule imposed in the calls for tenders, have been effective competitors for the purpose of this project. Other consortia will be dealt with where appropriate along similar lines.

EC Commission Press Release - Ref: IP/90/896

THE COMMISSION TERMINATES INFRINGEMENT PROCEEDINGS AGAINST IRELAND CONCERNING THE TELEPHONE SET MONOPOLY

The Commission has decided to terminate the infringement proceedings it initiated in February in respect of Ireland's failure to fulfil its obligation to apply Commission Directive of 16 May 1988 on competition in the markets in telecommunications terminal equipment. Under that Directive, member states had to withdraw the exclusive rights enjoyed by their telecommunications administrations in relation to the marketing of terminal equipment and inform the Commission of the measures taken to that effect. The Irish Government complied only partially with that obligation, maintaining the monopoly held by the public enterprise TELECOM EIRANN in respect of the marketing of the first telephone set. Following a number of discussions between the Commission and the Irish Government, the latter finally agreed to abolish the monopoly as from 1 July 1990. TELECOM EIRANN's private-sector competitors can now market such equipment on an equal footing. The Commission is also monitoring the implementation of the Directive by the other member states. Further infringement proceedings have been initiated against Belgium and Denmark. The Commission has decided, however, to terminate the proceedings against the latter country as it has since complied with the Directive by abolishing the exclusive rights granted in connection with PABXs.

EC Commission Press Release - Ref: IP/91/48

EUROPEAN COMMISSION CLEARS THE AT&T/NCR CONTESTED TAKEOVER BID

The American Telephone and Telegraph Company (AT&T) has made a takeover bid for all the shares of NCR Corporation (NCR). The bid is resisted by the Board of NCR, and AT&T is now trying to collect proxy votes in order to gain control at a forthcoming general meeting of the shareholders of NCR. AT&T is the worldwide leader in the telecommunications business. It manufactures and distributes the whole range of telecommunications equipment, computers, and data networking products. NCR is the world's 12th largest information service company. Its main business is the manufacture, installation and servicing of business information processing systems and automatic retail and financial workstations. The Commission's appraisal, under the Community Merger Regulation, has concentrated mainly on the vertical and the conglomerate aspects of the concentration: - NCR, although not one of the major overall manufacturers of hardware in the Community, has a strong position on the financial and retail workstations markets (Automatic Teller Machines, Electronic Points of Sale, Electronic Cash Registers), while AT&T has a wide range of activities in markets which are linked, mainly upstream, to the workstations business. One of the most important of these is the control of the source of the UNIX operating system software, which AT&T licenses very widely; - The conglomerate aspect is mainly concerned with the possible technical complementarity of AT&T's telecommunication and computer networking and NCR's workstation business. The Commission found that the proposed concentration does not create or strengthen a dominant position on these Community markets. Therefore, it has decided not to oppose the operation and to declare it compatible with the common market under the Merger Regulation. The ready availability of the UNIX operating system to competitors of AT&T and NCR is an important aspect of the overall market picture, and the Commission will pay particular attention to the maintenance of this aspect of current competitive conditions.

EC Commission Press Release - Ref: IP/91/303

THE COMMISSION IMPOSES STRICT OBLIGATIONS IN ITS APPROVAL TO THE ALCATEL/TELETTRA MERGER

In its first decision under the merger Regulation after a full enquiry, the Commission has approved the merger between the French group Alcatel and Fiat subsidiary Telettra, subject to strict obligations which have been imposed on Alcatel and firm assurances given by Telefonica, the Spanish telecommunications operator. Sir Leon Brittan, Vice President of the Commission in charge of competition policy, said: "This merger raised serious questions of competition policy because of its impact on the telecommunications markets in Spain, where the parties' combined market share for transmission equipment is around 80 %. Normally, this would be unacceptable. I have however: - Obtained significant commitments from Alcatel as a result of which it has agreed to buy Telefonica's shares in Alcatel and Telettra. In this way, competition will be opened up between suppliers of equipment to Telefonica. My concern was that links between a telecommunications operator and its suppliers may distort competition by giving those suppliers privileged market access. The Commission's decision therefore imposes strict legal obligations in order to ensure that these commitments are fully respected. - In addition, I have received assurances from Telefonica that it will pursue a diversified buying policy and will respond to approaches from new suppliers. It has agreed to clarify its technical approval procedures and has declared that an industrial presence in Spain will no longer be a decisive factor in awarding contracts". On this basis, the Commission is satisfied that the Spanish market for transmission equipment is open to competition and that there is no danger that this merger will lead to the creation of a dominant market position there. Suppliers other than the combined Alcatel/Telettra group, whether established in Spain or not, will be able to compete effectively for orders in Spain. Background Alcatel is the telecommunications subsidiary of the French Alcatel- Alsthom group. Telettra is the telecommunications subsidiary of the Italian Fiat group. Telefonica is the Spanish telecommunications operator. Alcatel and Telettra notified their merger to the Commission on 10 December 1990. The Commission decided on 21 January 1991 to carry out a full enquiry under the merger Regulation. With the parties' cooperation, it has been possible to complete this case a full six weeks before the expiry of the legal deadline laid down in the Regulation. • • •

EC Commission Press Release - Ref: IP/91/648

COMMISSION LAUNCHES FORMAL INVESTIGATION INTO INTERNATIONAL TELEPHONE CHARGES

A preliminary examination of international telephone charges has given the Commission reason to believe that the level of these charges both within the European Comunity and between Member States and other parts of the world might result from anti-competitive arrangements between Telecommunications Organisations in breach of EC competition rules. The Commission has therefore decided to proceed to a full and formal inquiry. The Commission has written to the Telecommunications Organisations in the 12 Member States requesting detailed information on their prices, costs and international pricing arrangements. This will enable the Commission to assess whether there is indeed a violation of the competition rules and to ensure that the level of international telephone charges is proportionate to the costs of the services provided. The investigation covers both the charges to the users (known as collection charges) and the prices paid by each Telecommunications Organisation to its counterparts in other countries for the delivery of the calls originating in those countries (known as accounting rates). The Commission will assess whether any arrangements between the organisations violate Article 85 of the Treaty, or whether they constitute the imposition of unfair selling prices in breach of Article 86. The investigation is being pursued under Council Regulation 17/62, which gives the Commission considerable powers of investigation in order to enforce the competition rules. Sir Leon Brittan, Commissioner for competition policy, said: "The decision to proceed with a formal investigation shows the Commission's determination to ensure that consumers and business users benefit from maximum price transparency and full compliance with the competition rules". Contact for journalists: Mr. P. Guilford

EC Commission Press Release - Ref: IP/91/935

COMMISSION ADOPTS FIRST EXEMPTION DECISION IN THE TELECOMMUNICATIONS SECTOR

The Commission has adopted its first formal decision applying the competition rules of the EEC Treaty to a cooperation agreement between a telecommunications organisation (TO) and a private operator for the provision of a telecommunications service. As outlined in the Commission's recently adopted "Guidelines on the application of the EEC competition rules in the telecommunications sector" (1), cooperation between TO's and other operators is increasing. The Commission recognizes that such cooperation can bring about important benefits, such as the improvement of existing services or the transfer of technology. However, such agreements can restrict competition not only between the two partners themselves but also vis-a-vis third parties where the TO gives more favourable network access to its cooperation partner than to other competing service providers. Moreover, a cooperation involving the monopolist for the network provision may have an undesirable dissuasive effect vis-a-vis potential market entrants. The benefits and adverse effects must be weighed in each case. The case at hand involves the Irish telecommunications organisation, Bord Telecom Eireann (Irish Telecom) and Motorola Ireland Ltd., a subsidiary of the US Motorola Group, who have jointly set up a company, Eirpage Ltd., to provide a nationwide radiopaging service interconnected to Irish Telecom's telecommunications network. Paging is a one-way means of communication, with the simplest form enabling the carrier of a "beep" device to call back after being paged while on the move. Following the principles set out in the Guidelines, this cooperation between two potential competitors was found to fall under Article 85(1). But it also made possible the rapid introduction of a new paging service previously unavailable to consumers and businesses in Ireland, such as nationwide coverage and direct contact with the paging service subscriber.The market for the sale of paging receive equipment may also be expected to benefit, as subscribers to the Eirpage service are free to use any brand of compatible receive units on the system, which has been so construed as to allow the broadest possible range of compatibility. Under these circumstances, the Commission concluded that the cooperation could be exempted under Article 85(3) of the EEC Treaty. This favourable attitude was subject to several conditions, including assurances by Irish Telecom as the public network provider that it will make available to independent companies who wish to provide paging services in competition with Eirpage the required facilities such as antennae and transmitters. Market entrants may also choose to buy and install such equipment themselves. It should be noted that the Eirpage company pays Irish Telecom an annual fee designed to cushion the investment in the paging infrastructure, which was partly funded under the Community's "STAR" programme aimed at developing less forward regions of the Community through improved telecommunications services. In addition, Eirpage is charged full commercial rates for all Irish Telecom's facilities such as the use of leased lines. Competing operators would be subject to the same terms. (1) OJ C 233 of 6 September 1991 • • •

EC Commission Press Release - Ref: IP/91/1192

COMMISSION CLEARS ALCATEL'S ACQUISITION OF AEG'S CABLE BUSINESS

The Commission has approved the merger between Alcatel Cable and AEG Kable. Alcatel is taking over AEG's cable business in Germany, with the exception of the motor vehicle cable activity which will be retained by AEG. The Commission examined the effect of the concentration on five different markets, namely telecommunication cables, power cables, installation power cables, and enamelled wire as well as overhead aluminium bare conductors. Cable markets in the Community are at a transitional stage, shifting from national markets to one that is Community-wide, but the transition has not yet been completed and progress varies between product markets. However, only the power cable market, among the markets examined in this case, can still be considered to be a national market. The Commission concluded that the merger will not create or strenghten a dominant position for the parties on any of these markets. During the investigation of the case, the Commission received a request from the German authorities under Article 9 of the Merger Regulation for referral of the case to the Federal Cartel Office on the basis that the merger threatened to damage competition on the German market. The German authorities were particularly concerned about the position in relation to telecommunication cables and power cables. After careful consideration, the Commission decided that it did not accept that the concentration would adversely affect competition on a national German market and therefore rejected the request for referral. * * *

EC Commission Press Release - Ref: IP/92/42

COMMISSION APPROVES JOINT VENTURE IN THE TELECOMMUNICATIONS EQUIPMENT INDUSTRY

The Swedish telecommunications group Ericsson and the German manufacturer of radio and television receiving antennas Hans Kolbe & Co (Kolbe) have agreed to form a joint venture (Ericsson Fuba Telekom GmbH) which will be involved in the field of telecommunications equipment. It will manufacture line transmission systems, especially digital cross-connect (DXC) technology. Kolbe will transfer to the new company all of its tangible and intangible assets relating to its digital transmission equipment business. Ericsson will acquire a 51% stake in the new company and 49% will be held by Kolbe. Digital cross-connect transmission is an emerging technology which enables network operators to optimize the use of the existing telecommunications infrastructure by looking for unused or under-used lines. The joint venture has been examined under the Community's Merger Regulation. The Commission has come to the conclusion that the operation does not raise serious doubts as to its compatibility with the common market, since the affected market is still in a development stage and there are strong actual as well as potential competitors.

ANNEKI-24

EC Commission Press Release - Ref: IP/92/576

COMMISSION APPROVES JOINT VENTURE IN THE TELECOMMUNICATIONS EQUIPMENT INDUSTRY

ERICSSON and ASCOM HOLDING AG (Ascom) have agreed to form a joint venture (Ascom Ericsson Transmission AG) which will be engaged in the field of public line transmission, mainly in Switzerland. Ericsson is a Swedish group which operates in the telecommunications sector and related fields. Ascom is a Swiss electronics and telecommunications group, the ultimate parent company of which is the Hasler Foundation. The joint venture has been examined under the Community's Merger Regulation. The Commission has come to the conclusion that the operation does not raise serious doubts as to its serious compatibility with the common market, since it affects competition in the Community only in the long term and not significantly. • • •

EC Commission Press Release - Ref: IP/92/585

PROPOSALS FOR ACTION IN THE TELECOMMUNICATIONS SERVICES SECTOR

On the initiative of Vice-President Pandolfi, the Commission has decided to adopt four documents concerning the telecommunications sector in preparation of the single market. In this framework the Commission has launched two proposals for Council directives which represent important steps forward in the harmonisation of telecommunications services and in particular voice telephony. The basis for the proposals is the directive adopted in 1990 on the establishment of the internal market through the application of the principles of open network provision (ONP) to telecommunications services. The first proposed directive concerns the application of ONP to voice telephony. The proposed directive aims to provide for a minimal harmonisation of the quality of telecommunications services and to define the rights of users of such services.(*) The second proposed directive supports the mutual recognition of national authorizations for telecommunications services and the establishment of a Single Community Telecommunications Licence. Both proposals are the result of long consultations with all interested parties. Furthermore, the Commission has adopted two communications examining the situation and future challenges in two other important areas. The first paper, which deals with telecommunication tariffs in the Community, points out that important intra-Community price disparities for telephone calls persist. These could affect the implementation of the Single Market and the competitivity of businesses The second paper, which has been prepared at the invitation of the Council, covers the European industry for telecommunications equipment. Equipment manufacturers in the Community have engaged in a process of re- structuring and today we need to reinforce their presence in key high growth segments and markets. The Communication discusses the strengths and weaknesses of the European industry compared to the Japanese and American and puts forward several proposals for improving its competitiveness. (*)The text of this proposal should be finalised in the next few days. - 2 - 1. Open Network Provision (ONP) for voice telephony This proposal is an important step in the harmonisation strategy of Community 's Telecommunication policy The proposed directive on the application of open network provision to voice telephony services has three basic goals - To improve the quality of telephone services for private and business users by setting minimum quality standards to be provided by member States. This would include the time it takes to have a phone installed, and the right to be compensated if quality standards are not met. - To open up access to the public telephone infrastructure for service providers and other telecom operators, including mobile phones, on an equitable and non-discriminatory basis. - To enhance Community-wide provision of voice telephony services. This would include fixing common technical specifications, for example for sockets, enabling the same equipment to be used through the EC. It would also aim to harmonise phone numbers on an EC-wide basis, as well as establishing access to telephone inquiries services covering the whole Community 2. Licences The Commission is proposing a directive - which is also part of the harmonization strategy - aiming to establish a balanced and efficient procedure for the mutual recognition of licences, across the Community including a single Community licence, and other authorisations for the provision of telecommunications services issued by the member states. A Community Telecommunications Committee would assist the Commission in carrying out this work. 3. Communication on tariffs The paper reviews progress towards achieving the 'progressive implementation of the general principle that communications tariffs should follow overall cost trends', which was given as a major goal in the Commission Green Paper on the development of the common market for telecommunications services and equipment adopted in 1988 There is still a lack of trans-European structures and major bottlenecks remain in the Community hindering telecommunications development. The Commission's Communication on telecommunications tariffs in the Community shows the continuing 'surcharge' for crossing national borders in the Community -3- - Firstly, there is a 'frontier effect' A three-minute call in peak time from one Member State to another costs, on average, between 2.5 and 3 times the price charged for the most expensive national long- distance call, over a comparable geographical distance. In off-peak periods the ratio is between 5 and 6 times as much, thus especially penalising residential users. - Secondly, the price of a call in one direction within the Community often differs significantly, up to a factor of two, from the price in the opposite direction. - Thirdly, there is a continuing lack of night-time and weekend tariff offerings for international telephony. In the vast majority of Member States, off-peak reductions on national calls in the Community range from 32% to 69% whereas the reductions for intra-Community calls are at most 33%. Three countries offer no off-peak tariffs to other Community countries. 4. Communication on the state of Europe's telecommunications equipment industry. This examines the competitive state of EC suppliers, and assesses their strengths and weaknesses affecting their ability to meet the demands of a genuine single telecommunications market, as well as their capacity to compete internationally, especially with Japan and the US The industry's strengths include a broad operational base in the

Community, a strong relationship with the TOs and a comprehensive product range, while among its weak points are market fragmentation and the duplication of R&D inherited from the past. Community action should aim at four key objectives: the creation of a genuine internal market through further liberalisation and harmonisation within the industry; supporting technological progress, above all by financing "priority technology projects"; improving the industry's position in the terminal equipment sector through regular consultation with the operators themselves; working to create a level playing field worldwide by launching multilateral (GATT, OECD), bilateral (Japan and US) and other initiatives. * * *

EC Commission Press Release - Ref: IP/92/837

COMMISSION LAUNCHES REVIEW OF THE TELECOMMUNICATIONS SERVICES SECTOR

At the initiative of Vice-Presidents Brittan and Pandolfi, the Commission has today adopted a report carrying out an overall assessment of the situation in the telecommunications services sector. To tackle the problems identified, the Commission has decided to launch a wide consultation of all interested parties on the basis of various options. This approach is fully consistent with the declaration of Birmingham where the Commission commits itself 'to consult more widely before proposing legislation which could include consultation with all the Member States and a more systematic use of consultation documents'.

This review was required by two directives. The Commission's 1990 directive on telecommunications services (90/388/EEC) provided for the opening up of services such as leased lines to competition, but granted a temporary exception allowing monopolies on voice telephony to continue, subject to a reconsideration by the Commission in 1992. The Council's 1990 directive on Open Network Provision (90/387/EEC) set out a framework for the harmonisation of access to public telecommunications networks and, where applicable, services and provided for a 1992 review of progress in this direction.

On the basis of this assessment, the Commission has found that, despite progress made since it published a Green Paper on the sector in 1987, a number of bottlenecks remain, in particular that telephone users are obliged to pay excessively high tariffs for intra-Community services. These are impeding the development of the internal market, and have a detrimental impact on cohesion as well as limiting the growth potential of the sector.

The European Community is characterised by the existence of twelve technically diverging national networks. Community-wide services cannot therefore be guaranteed solely by the full implementation of the competition rules and the freedom to provide services. There is a need for harmonisation measures to ensure interoperability. Therefore, the continuity of Community telecommunications policy and the stable framework provided by the Green Paper for Community and national reforms must be maintained. This concerns, in particular, the principle of balance between liberalisation and harmonisation which has underpinned Community telecommunications policy since 1989.

In accordance with this approach the Commission has analysed the situation envisaging the four following possible options for dealing with the problems identified

Option 1 Freezing the liberalisation process (which was started by the Green Paper and Commission Directive 90/388/EEC), effectively maintaining the status quo

Option 2 : Introducing extensive regulation of both tariffs and investments at Community level in order to remove the bottlenecks and in particular the surcharge on intra-Community tariffs.

Option 3 The liberalisation of all voice telephony, i e international (inside and outside the Community) and national calls.

Option 4 : An intermediate option of opening up voice telephony between Member States to competition.

Option 1 (maintaining status quo) would involve a steady falling back of the Community market with regard to the United States and the Japanese markets and therefore does not seem acceptable. Option 2 could resolve some of the problems identified in the Review by means of e g price-capping, but risks foregoing the efficiency gains of other options and furthermore would involve introducing extensive regulation at national and/or Community level. Option 3 and Option 4 both represent substantial opportunities for moving forward although their implications must be carefully studied.

The Commission's policy on telecommunications has always been to introduce competition gradually. Implementation of Option 3 would depart from this approach by introducing full liberalisation. The Commission

considers, at this stage, that such an option would give rise to practical problems unless questions such as tariff rebalancing, access charges, etc. have been resolved. Therefore Option 3 can only be contemplated if introduced in phases. However, Option 4 provides one of the possible intermediate steps which moreover provides a solution to one of the most serious bottlenecks identified in the Review (the 'frontier' effect). At this stage, the Commission therefore considers that Option 4 seems better suited than others to the fundamental objectives of the Community in this policy area.

In launching this consultation, the Commission seeks comments on all the options set out in this Review. In particular, comments will be sought on the actions envisaged, the appropriate timescale, the maintenance and expansion of universal access, and any specific situations which need to be taken into account. • • •

EC Commission Press Release - Ref: IP/92/932

COURT JUDGEMENT ON TELECOMMUNICATIONS SERVICES DIRECTIVE

Sir Leon Brittan, EC competition commissioner, today welcomed the judgement of the Court of Justice in the telecoms services case.

In 1988, the Commission adopted Directive 90/338/EEC under Article 90(3) of the EC Treaty. This directive had the effect of obliging the Member States to abolish any existing monopoly rights on the supply of telecommunications services other than simple voice telephony. It also obliged them to take all necessary measures to ensure that any company is able to supply these newly liberalised services.

The Court yesterday confirmed the Commission's power to issue this Directive, taking the same line as in its judgement in the terminals equipment case. The Court confirmed the Commission's jurisdiction to prohibit the grant of maintenance of monopoly rights that are contrary to the free movement and competition provisions of the EC Treaty. In annulling part of the Directive, the Court took exactly the same position that it had taken in the terminals case. This concerns specific provisions regarding the grant of special rights and the renegotiation of existing contracts between telecommunications companies and purchasers of the services which are liberalised under the Directive. The Commission will consider what measures it needs to take in this regard, but this will not effect the substance of the Directive, any more than the similar judgement of the Court did in the terminals case.

• • •

EC Commission Press Release - Ref: IP/92/1076

COMMISSION REQUESTS INFORMATION FROM TELECOMMUNICATIONS ORGANIZATIONS

The Commission has noted reports on certain practices on the part of telecommunications organizations in various Member States which could be in breach of the Community rules on competition.

On examining published data on charges, it has found that there are differences between the rental/maintenance charges for lines leased by such organizations to third parties and rental/maintenance charges for lines offering direct access to public data-switching networks.

The Commission is not at present aware of any objective factors providing justification for the differences in charges.

On the basis of the information at its disposal, the Commission considers that the differences in charges could be found to be contrary to the Community rules on competition. If confirmed, these practices on the part of telecommunications organizations enjoying inter alia exclusive rights with regard to the establishment and operation of public networks would run counter to the principles defined by the Council and the Commission in the context of the liberalization of the telecommunications sector.

For the purpose of vetting those practices, the Commission has requested additional information from the telecommunications organizations concerned.

It will also examine any other information sent to it.

• • • •

EC Commission Press Release - Ref: IP/92/1126

COMMISSION OPENS SECOND-PHASE PROCEEDINGS INTO SIEMENS/PHILIPS MERGER IN THE CABLE BUSINESS

On November 11, 1992, Siemens and Philips notified their intention to bring the optical fibre and telecommunications cable business of Philips under the control of two jointly controlled companies, one for optical fibres and one for telecommunications cables. Following this notification, the Bundeskartellamt informed the Commission that this merger threatened to create or strengthen a dominant position on the German market and requested referral of the case to the German cartel authority.

Following its own investigation, the Commission found that the proposed merge raised serious doubts as to its compatibility with the common market. It decided to initiate second-phase proceedings in order to further investigate the case, in particular in view of the narrow supply structure created by the merger both at national and Community level. A referral to the Bundeskartellamt is therefore not envisaged.

• • •

EC Commission Press Release - Ref: IP/93/189

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL ON TRANS-EUROPEAN DATA COMMUNICATIONS NETWORKS BETWEEN ADMINISTRATIONS

Following an initiative by Vice-President Bangemann, the Commission today adopted a communication from the Commission to Parliament and the Council together with two proposals for Council Decisions, one on a series of guidelines for trans-European data communications networks between administrations and the other on the adoption, in this sector, of a multiannual Community support programme (IDA - Interchange of Data between Administrations).

This initiative constitutes the first application, within the telecommunications sector, of the Community actions envisaged in the domain of trans-European networks.

It seeks to reinforce the introduction of the functions essential for the efficient management of the internal market through the use of high- performance data communications networks, while at the same time ensuring that the citizens of the Union and the economic players derive maximum advantage from the four freedoms of movement defined in the Treaty of Rome.

From the European citizen's point of view, and by way of a practical example, the data communications networks between administrations will help to ensure the rapid processing of case files on social security benefits outside the national territory, promote personal mobility through the creation of a network linking the national employment agencies and set up networks for the prevention and control of natural disasters.

The budget requested for the execution of the development work entailed under the IDA programme amounts to 180 MECU for five years, supplemented over the same period by 75 MECU in the form of a contribution to the development of the statistical information network (COMEDI project) and by 85 MECU for the development of various priority networks (taxation, veterinary and phytosanitary information, education and training, monitoring of exports).

Like the trans-European transport and energy network projects, the proposal for a programme on the development of data communications networks between

administrations comes within the scope of the implementation of the growth initiative because:

- it will facilitate, through the implementation of the master plans and following consultations with the administrations, the introduction of a network architecture which, by reason of the necessary harmonization of specifications, will result in the gradual upgrading of the physical infrastructures and their associated services in the least well endowed Member States, thus reinforcing the cohesion of the Community;

- it places at the disposal of the Community a system for the administration of Community rules to promote the functioning of the internal market for the benefit of economic operators, while at the same time offering them substantial advantages in terms of speed and efficiency. In this respect, the assurance given to the economic players guaranteeing them equitable treatment as far as Community rules and the stepping-up of anti-fraud measures are concerned will help to restore a climate of confidence (an indispensable requirement for enterprises and consumers alike). In the same spirit, the steps being taken to modernize the administrative environment in which the enterprises operate will produce an overall improvement in their competitiveness;

- the general availability within the Community, as the result of a consistent programme of investment, of high-performance hardware and software tools will provide incentives for using data communications systems for the exchange of information - an activity currently inhibited by the non-existence of consistent standards and by the incompatibility of the basic national services.

As regards the prospects held out for European industry, the nature and extent of public investment over the coming

years will have a positive impact on growth and will contribute substantially to efforts to trigger economic recovery, in keeping with the priority objectives established at the Edinburgh Economic Council held in December 1992.

Indeed, the creation of high-performance data communications services and innovatory applications which benefit both the national and the Community administrations will eventually produce:

- a spin-off effect on the market which will favour the development of similar services on a Community scale to the advantage of the commercial operators. This, in turn, should help to ensure the profitability of the investments initially authorized both by the suppliers of the equipment and by the telecommunications operators;

- positive consequences for the Community research programmes dedicated to the development of a new generation of enhanced-performance networks (ISDN, wideband).

Lastly, this initiative will devote special attention to the harmonization of the administrative rules among the Community's partners, notably within the European Economic Space and especially against the background of enlargement.

The contributions mentioned above represent only a minute proportion of the investment needed to set up and operate the data communications networks between administrations: according to initial estimates, which these studies will examine in greater detail, Member States will be required to invest a minimum of 6 000 MECU over five years. Furthermore, for the peripheral regions of the Community, the modernization and upgrading of data-processing and telecommunications equipment as a prelude to the introduction of these networks would necessitate an investment of 7 000 MECU over the next seven years. A detailed business plan and a schedule of commitments dealing specifically with these investments will need to be drawn up jointly by all the user administrations.

Apart from Community budget financing in line with the needs of projects of common interest, the master plans and the declaration of European interest will provide the basis for mobilizing the financing of the EIB and the European Investment Fund.

• • •

EC Commission Press Release - Ref: IP/93/277

TELECOMS: THE ROAD AHEAD - SPEECH BY MR VAN MIERT, TO THE POSTAL, TELEGRAPH AND TELEPHONE INTERNATIONAL - BRUSSELS, 15 APRIL 1993

Is there any need to point out why the telecommunications sector in the Community has to evolve?

. its economic importance (more than ECU 100 billion a year for telecommunications services and ECU 30 billion for equipment)

. its importance for the development of new technology and for employment

. the role it plays in guaranteeing social cohesion, through the benefits it provides for less-favoured groups and outlying regions

. regional planning

Now there are a number of factors the Community has to take into account here. It has to consider technological development (at a time when satellites are gradually replacing copper wire), the new dimension of the internal market, the sometimes very high cost of telephone communications, the poor use made of infrastructures, and international competition.

The challenge facing the Community is to strike a balance between these various aspects so as to enable businesses and society in general to reap the benefits of technological progress, the single market and competition without sacrificing any particular group in the pursuit of dogmatic objectives such as the immediate introduction of fuly fledged competition. This has to be done against the background of the already well-developed policy of harmonization, standardization and liberalization.

The present situation

The Commission's interest in this sector is nothing new It is discernible in the 1987 Green Paper on telecommunications, in research and development programmes, and in the work on standardization. All of these were necessary preliminaries to the establishment of Community-wide competition, which has been introduced gradually in the area of terminal equipment and in that of services with a high value-added component. The time has now come when we simply must tackle the field which accounts for 80% of the sector, namely voice telephony.

Liberalization must continue

Telecommunications cannot go on being a special case, a sector apart. It must be opened up within the context of the liberalized single market; but liberalization will need the assent of those involved. As was the case with Community civil aviation policy, it will have to be gradual so as to allow organizations to adapt.

That is why the publication of the Commission's telecommunications review at the end of last year was followed by a very wide-ranging consultation exercise during which the Commission sounded out more than 170 different groups.

Leaving aside differences of opinion on points where individual interests are at stake, this process of consultation has established the existence of a consensus on the main options for the future. Telephony should be liberalized gradually over a fixed period throughout the Community, without an intermediate stage in which only communications between Member States would be liberalized.

What proposals can the Commission put forward?

The objective of eliminating monopolies in voice telephony in the Community could be achieved in two stages. The first stage would see the application of the policies already decided; this would include the approval of the planned measures regarding mobile telephony by the end of 1993. In the second stage, running from 1994 to 1997, telephone services would be opened up to competition by a process of controlled liberalization (with the maintenance of a high-quality universal service, charges for access to the defined networks, mutual recognition of export licences, structural adjustments, etc.).

The Commission should also be publishing a green paper on public telecommunications infrastructures by the end of 1995.

These are some of the main options emerging from consultations between the Commission and interested parties; they have still to be discussed with my fellow member of the Commission, Mr Bangemann, after which the two of us should very shortly be recommending a detailed proposal to the whole Commission.

• • •

EC Commission Press Release - Ref: IP/93/494

COUNCIL ADOPTS COMMON POSITION ON A COUNCIL DIRECTIVE IN THE SATELLITE COMMUNICATION SECTOR

Today, 16 June 1993, the Council of Telecommumnications Ministers, acting on a proposal of Mr Martin Bangemann of the Commission of the European Communities, adopted a Common Position on a Council Directive 'On the approximation of the laws of the Member states concerning satellite earth station equipment, amending the scope of council Directive 91/263/EEC'.

The development of satellite communication has been up to now held back by the fragmentation of the Commumnity market, in contrast to the situation in the United States where this technology is more widespread. A dynamic market in the field of satellite communications equipment and services would bring substantial benefits to the European space and telecommunications industry, as well as the European economy as a whole.

This is particularly important for the proposed European Ecnonomic Area and as regards communications requirements in Central and Eastern Europe, where satellite communication systems are well suited for infrastructure requirements and the Commumnity's Trans-European Networks initiative.

With a view to allowing the Community to achieve the full potential of stallite communications, the Commission adopted, on 20 November 1990, the 'Green Paper on a Common Approach in the field of Satellite Communications in the European Community' which set out the proposals for a coherent Community policy in the sector.

The Council, in its corresponding Resolution of 19 December 1991, confirmed its agreement with the overall policy goals set out by the Commission.

The Council Directive on which a common position was adopted in the Council today, responds to the first of the four major policy goals set out in the Satellite Green Paper, namely '...harmonisation and liberalisation for appropriate satellite earth sations...'.

An advanced open Community-wide market for satellite earth station equipment requires effective and efficient harmonised procedures for certification, testing, marking, quality assurance and product surveillance. The Council Directive covers these procedures and conditions for the placing on the market of satellite earth station equipment and includes the objective laid down in the second-phase Terminals Directive (91/263/EEC), i.e. the mutual recognition of conformity.

Besides the harmonised provisions set out in the Directive, satellite earth station equipment may be subject to licensing terms.

In creating an open Community-wide market for satellite earth stations, the Directive will assist manufacturers of satellite communications equipment to achieve the economies of scale necessary to compete effectively in European and world markets.

The Council has accordingly adopted a Common Position on a fundamental measure, the first in a series of proposals in the satellite communications sector, which will now be rapidly proposed and will remove the remaining obstacles in the Community market for satellite communications equipment and services.

The Common Position on the Council Directive on Satelite Earth Station Equipment will now be forwarded to the European Parliament for a second reading.

• • •

EC Commission Press Release - Ref: IP/93/607

OPENING UP THE ITALIAN MOBILE TELEPHONE MARKET

On 19 July the Italian Minister for posts and telecommunications, Mr Pagani, and the member of the Commission responsible for competition policy, Mr Van Miert, discussed the problems raised by the opening-up of the Italian mobile telephone market.

Mr Pagani confirmed that the Italian Government intended to liberalize the market as rapidly as possible. He drew Mr Van Miert's attention to the special features of the Italian system and the legal difficulties which arose as a result. Mr Pagani had not yet decided upon the best approach to the problem in the light of experience in other Member States and the requirements of Community law. He said that whatever course was chosen he intended to act in a spirit of clarity and non-discrimination. A special committee would be set up shortly to consider the procedure to be followed.

Mr Van Miert welcomed the constructive intentions Mr Pagani had expressed; he took note of the difficulties which Mr Pagani had pointed out, but said that action was urgently needed if a situation was not to become established on the mobile telephone market which would make it very difficult to open it up to fair competition.

He said that in conducting the proceedings it had initiated, the Commission would take account of the foreseeable progress along the lines indicated by Mr Pagani.

The Commission departments would be pleased to collaborate with the Italian authorities in order to arrive at a form of liberalization which was compatible with Community law.

Mr Pagani and Mr Van Miert agreed to meet again when Mr Van Miert visited Rome in September.

• • •

EC Commission Press Release - Ref: IP/93/777

SUMMARY OF A SPEECH BY MR VAN MIERT IN ROSMALEN (NETHERLANDS): 'THE ROLE OF CABLE IN THE CONTEXT OF COMPETITION IN EUROPE'

Speaking on 'The role of cable in the context of competition in Europe', Mr Van Miert began by examining the main issues over the coming years and stressed that, alongside technological development, the decisions and choices of political authorities, including the Commission, would continue to be of vital importance.

Thus, faced with the objective of full liberalization of voice telephony services scheduled for 1998, the Community would have to take a view on all types of cooperation projects currently being developed by operators.

The question of vertical integration would have to be addressed, as would, in the context of the liberalization of services, the future status of infrastructure, a White Paper on which had been announced by the Commission for 1995.

Mr Van Miert was convinced that some degree of liberalization of infrastructures would be needed in the medium term.

It was here that alternative infrastructures, such as cable television networks, would be able to play a key role.

Mr Van Miert then referred to the projects announced recently by the Dutch Government, in particular the setting-up of a second national network to foster cooperation between the different operators of alternative networks, stressing straight away that this was a step in the right direction. In any case, these projects would generate debate and perhaps lead to similar initiatives in other Member States. At the end of a transition period, and in the context of competition in Europe, it would clearly be difficult to retain a second, purely national operator.

Mr Van Miert concluded by calling on cable operators to have the boldness and enterpreneurial spirit to seize the new opportunities open to them: development of new services and optimal use of capacity were the challenges awaiting them.

The Commission would make every effort to contribute to the development of an open and competitive telecommunications market that would serve the needs of businesses and the public.

• • •

EC Commission Press Release - Ref: IP/93/900

'THE FUTURE OF PUBLIC SERVICES': SUMMARY OF SPEECH BY MR KAREL VAN MIERT - 21 OCTOBER 1993

There is increasing concern in the Community about what is felt to be a threat to those functions which, since the second world war, have generally been performed by the welfare state.

Mr Van Miert takes the view that a number of principles do not entirely hold true. For instance:

- the equation 'public service = public enterprise' does not correspond to any tangible reality;

- on the basis of a comparison of the situation in our Member States, it would take a particularly gifted observer to establish a cause- and-effect relationship between the relative size of the public sector and the quality of performance of public services;

- another equation often put forward - the identification of public service with state monopoly - has also been severely shaken by reality.

Why is this concept of public service becoming so important at this time? Since the mid-1980s and the implementation of the measures set out in the Commission's White Paper, the common market has been extended to services.

Several service industries are dominated by public monopolies.

The success of Community integration will increasingly come to depend on the efficiency of the trans-European networks (energy, telecommunications, postal services, transport), and this is a field in which public service monopolies predominate.

If, in the years to come, the Community is to develop into a political entity (European Union), this new dimension, which will encompass social policy (social charter), cannot overlook the concept of public service.

The continued existence of national enterprise monopolies is hard to reconcile with the Community's political objective of establishing an integrated single market in which every firm can operate at will.

Can we, for example, continue to tolerate a situation where the German or French telecommunications monopolies can offer voice-telephony services to the British and, soon, the Swedish public (the United Kingdom and Sweden have both abolished their telecommunications monopolies) whereas British or Swedish enterprises may not offer the same services in Germany or France?

The Commission, supported and often even anticipated by the Court of Justice, has merely ensured the application of the decisions taken by the Member States in the treaties by beginning to open up the most cloistered markets, including those dominated by the national monopolies, to competition and free movement.

Yet, according to Mr Van Miert, the Commission is perfectly aware of the serious dangers attendant on any sudden disturbance of the balance in sectors which are both sensitive and of vital importance to the economy as a whole. We also know that the market cannot solve everything and that, without going to far as to eliminate all competition, public intervention may sometimes be needed to satisfy what are considered to be socially essential needs.

At all events, the Commission has chosen a gradual approach, so as to arrive at a balance between what is desirable and what is immediately feasible, this being an approach which gives those concerned the time to make the necessary adjustments (for example, in their scales of charges); it is also an 'educational' approach insofar as it allows those concerned to come to terms with the new circumstances.

A gradual approach therefore, but coupled with careful preparation of a new frame of rules to replace the monopolist structure of the industries concerned. Contrary to what is often said, European-style liberalization does not lead to the introduction of cut-throat competition where the weak are crushed by the strong and where the most essential social needs are sacrificed merely for the sake of short-term profitability!

In fact, we are not faced with a choice between monopoly, ensuring that every citizen everywhere can always rely on receiving public services, and a system of free competition, leading inexorably to the marginalization of the least advantaged individuals or regions.

The market can sometimes satisfy a demand which is not necessarily met by the monopolies, and experience shows that, in a competitive environment, the additional costs entailed in maintaining a reasonable level of public services can be covered.

It must be said that, contrary to a widespread notion, there has never been any dispute between the Member States and the Commission or the Court of Justice as to the definition of 'services of general economic interest', the concept used, in the Treaty (Article 90(2)) which roughly corresponds to that of public service.

For example, the Commission has not questioned the fact that the basic postal service (standard letter) corresponds to a public service obligation. The Commission has also agreed that electricity distribution companies provide 'services of general economic interest', as do postal administrations or telecommunications corporations setting up or operating a universal network.

Thus, neither the existence of public services, nor even their delimitation, particularly as regards the basic services provided by sectors organized as networks, has ever been the cause of litigation within the Community.

Up to now, the Community has therefore left it up to the Member States to determine what constitute public service obligations and has been content to ensure that the ways and means used to satisfy these obligations have not been excessively restrictive in terms of the competition rules or the four freedoms.

However, if fair and balanced competition is to become the rule, there must be a modicum of harmony in the obligations imposed on public enterprises by reason of their public service function. It is for this reason that the forthcoming Council meeting of telecommunications ministers is expected to pass a resolution concerning the concept of the universal service and the resources need to finance it. The fact remains that this will be a delicate exercise and that, at all events, the Member States will have to be allowed a certain margin of manoeuvre in order to cope with their specific constraints.

Mr Van Miert brought his speech to a close by saying: 'We are only at the beginning of a long process culminating in the opening up of the European market in sectors as essential and present in our daily lives as telecommunications, transport, energy and postal services. Throughout this process, it will be up to the Community to demonstrate that Europe is able to contribute an 'extra something' to the public in terms of the quality of public services and that there is no irreconcilable opposition between enterprise and the needs of the public or between the quest for greater economic efficiency and the drive for social and regional cohesion, which must continue to be the hallmark of the European model.'

• • •

EC Commission Press Release - Ref: IP/93/907

THE COMMISSION CLEARED A JOINT VENTURE IN THE SATELLITE NEWS GATHERING SECTOR UNDER THE COMPETITION RULES

JOINT VENTURE COOPERATIVE

The Commission has cleared an arrangement whereby PTT Telecom B.V., the public telecommunications operator (TO) in the Netherlands, and Nederlands Omroepproduktie Bedrijf N.V. (NOB), the main television facilities house in the Netherlands, have set up a joint venture company, Intrax B.V.. The object of this company is to provide 'Satellite News Gathering' services both within and outside the Netherlands. Satellite news gathering involves the use of transportable equipment allowing for the rapid audio-visual registration and transmission of television signals via satellite from remote locations not served by the terrestrial network.

This case illustrates an increasingly common phenomenon whereby Telecommunications operators (TOs) join together with companies not operating in the telecommunications area in order to venture into new, not strictly telecom-related business activities. In each case of this type, on top of the traditional analysis of cooperative joint ventures under the competition rules, the Commission must examine whether the still existing special and/or exclusive rights of the TO in question cause its participation in the joint venture company to place the latter in an unjustifiably favourable position vis-a-vis competitors.

In the case at hand, the Commission found that satellite news gathering service providers who wish to compete with Intrax on the Dutch market are not faced by any major barriers to entry.

- The uplinking of signals to satellites, traditionally an activity reserved exclusively for the TOs, was liberalized in the Netherlands in 1991 as far as satellite news gathering is concerned.

- Furthermore, as far as capacity on satellites is concerned, PTT Telecom has assured the Commission that as Signatory to international TO-run satellite-operating consortia such as Eutelsat, it will deal with Intrax on the same footing as competing companies.

- Secondly, even when uplinking in the Netherlands these companies are free to acquire capacity on Eutelsat satellites via the Signatories in at least France, Germany and the United Kingdom. As a third possibility, capacity is available on independent satellites not belonging to the TO-run consortia

- In countries other than the Netherlands, Intrax will be subject to the same operational constraints relating to uplinking and satellite capacity as its competitors.

In view of these circumstances, the Commission published its favourable attitude to the operation in the Official Journal (C 117/3 of 28/04/1993), which did not give rise to any comments. The Commission has now closed the file by means of an administrative or 'comfort' letter, after consultation of the national competition authorities.

• • •

EC Commission Press Release - Ref: IP/93/988

EC GREENLIGHT FOR TRANSNATIONAL TELECOM NETWORK F.N.A.

The Commission has cleared the creation of a Belgian cooperative company called FNA (standing for Financial Network Association). The association embraces twelve leading telecommunication organisations*, including 6 European companies.

This joint venture will develop a wide range of telecommunications services to customers active in the financial services sectors, such as banks and insurance companies.

Such companies have particular requirements regarding telecommunications, in particular the transmission of large quantities of data. The joint venture will therefore offer services especially adapted to suit the requirements of the companies combining voice, data and image services.

The joint venture will be able to offer these services world-wide through its parents' networks ('one-stop shopping') and furthermore, will be able to offer 'one-stop billing', where the customer receives a single invoice irrespective of the number of networks that it uses.

The members are individually responsible for their own tariffs, for their investments, and for the marketing and the provision of the services. The joint venture therefore acts as a vehicle for offering these independently managed services in a coordinated and efficient manner. The agreements were notified under the competition rules.

The Commission accepted that the FNA agreements offered benefits to telecommunication users and to other service providers :

- centralised management and optimization of the existing national networks and international lines will increase quality and reduce costs.

- bandwidth flexibility and improved trouble management will benefit end users and service suppliers using the FNA backbone network.

- third party billing and will facilitate one-stop shopping

* France Telecom; Belgacom, Italcable S.p.A.; Mercury Communications Ltd; Telefonica de Espana S.A.; Deutsche Bundespost Telekom; Telstra; Hong Kong Telecom International Limited; Kokusai Denshin Denwa Co., Ltd (KDD) MCI; Singapore Telecom; Stentor.

However, the Commission considered that as originally notified the agreements were incompatible with Article 85(1) of the EEC Treaty. This was because there was a risk that they would result in cross- subsidization between those services reserved to the telecommunications organizations ('reserved services') and those - such as data transmission - open to free competition ('non-reserved services'). The agreements were also considered as likely to result in the bundling of reserved and non-reserved services and discrimination against private service suppliers.

During the course of the Commission's procedure, its concerns regarding cross-subsidization, bundling and discrimination were resolved by way of undertakings given by the parties based in the EC.

As a result, the Commission has concluded that the conditions for granting an individual exemption to FNA are fulfilled and consequently has closed the case by means of a comfort letter.

In commenting on the case, Mr Van Miert, Commissioner responsible for competition policy, stated 'telecommunications markets are evolving very rapidly, with new technologies being introduced almost on a daily basis. This joint venture represents an attempt to react to this changing situation. Whilst I believe that such an

initiative is to be welcomed, it is important that we ensure that it does not result in raising barriers to entry to new competitors. The undertakings taken by the Telecommunications organizations meet this need, because they ensure that the Telecommunications organisations, which retain certain monopoly rights, will not be able to use their privileged position to limit the opportunities to other companies in the areas where competition exists. I am pleased that it is possible to give the green light to this operation which will offer new and improved services to an industry that is of great importance to the Community's overall competitiveness. This approach balances the needs of competition, efficiency and global competitiveness.

• • •

EC Commission Press Release - Ref: IP/93/998

ADJUSTMENT OF THE COMMUNITY TELECOMMUNICATIONS SECTOR FOR LIBERALISATION STARTS

The Commission adopted on 15 November 1993 a Communication to the Council and the European Parliament on developing universal service in the new competitive environment, following a proposal of Commissioners Bangemann and Van Miert.

The Communication is a first vital step in assisting Member States and Telecommunications Operators in their preparations for the full liberalisation of telecommunications services by 1 January 1998, - the date agreed at the Telecommunications Council of 16 June 19931.

The Communication identifies the current scope of universal service at a Community level and establishes general principles concerning the future approach to covering the cost of universal service.

The Scope of Universal Service

The provision and further development of a universal telecommunications service for all users at an affordable price is the cornerstone of Community telecommunications policy.

Universal service, as identified in the Communication includes, for example, the right for all customers :

- to have a phone connected,

- to obtain services meeting defined quality standards (for installation times; fault repairs, etc.),

- to benefit from clear procedures to sort out problems between the customer and the telecommunications operator, and

- progressively to have access to a range of new services (such as itemised billing, access to emergency services and for business users, for example, a minimum set of high capacity leased lines).

The benefits of liberalisation should through lower costs and the introduction of new services help the provision of universal service.

1 Council Resolution 93/C213/1, OJ C213, 6.8.93

This will be particularly true for services in the peripheral regions of the Community, where improvements in the basic phone service and the introduction of new advanced services will strengthen economic and social development.

At the same time, appropriate regulatory safeguards will ensure that universal service is provided to all customers in order to meet specific social obligations, such as the provision of services to customers with special needs or in remote areas.

This Communication will help regulators, operators and customers launch their preparations for liberalisation by focusing on what should be a key element of their evolving plans.

The Communication builds on basic elements of universal service at a Community level , some mandatory, some optional at this stage, which can already be found in the Community's existing telecoms legislation (the Open Network Provision (ONP) rules).

Ensuring the Provision of Universal Service in a Competitive Environment

The guidance provided by this Communication will also help Member States in meeting their existing obligations to ensure that call and other charges in the sector move towards cost.

Whilst tariff rebalancing resulting from liberalisation promotes greater efficiency and is leading to lower long distance and international charges, it is reducing the contribution which these profitable services can make to the cost of universal service.

Estimates suggest that as much as 16 Billion ECU each year is currently transferred from profitable international and long distance calls throughout the Community to cover losses made in providing the basic phone connection and a local service, as well as in meeting other obligations imposed by Member States, such as access to emergency services and operator assistance.

A major aim of the Communication is to show how the cost of universal service can be covered in future, in those cases where the losses which may be made in serving a particular customer would otherwise deter the provision of a full universal service.

The cost of universal service should be met from a combination of :

- greater direct contributions from subscriber revenue and from rebalanced tariffs ;

- access charges paid by new operators and service providers, and

- where appropriate, funding in the peripheral regions from the Community support framework

The Communication and the proposal for a Council Resolution should also initiate a broad discussion on the issue.

. . .

EC Commission Press Release - Ref: IP/93/1072

COMMISSION OPENS COMPETITION IN SATELLITE COMMUNICATIONS

Following a proposal of Commissioners Van Miert and Bangemann, the Commission has adopted today (by written procedure) in first reading, an amendment to its 1988 and 1990 Directives concerning telecommunications terminal equipment and telecommunications services respectively, and which addresses the Community's satellite communications industry.

The amendment aims to liberalize the satellite communications equipment and services sectors with the effect that private operators can offer satellite based services in all Member States in competition with the national operators and that equipment suppliers can offer their products directly to consumers.

The extension of the scope of the two abovementioned Directives to include satellite communications was indeed one of the proposals set out in the Commission's Green Paper on satellite communications of November 1990.

The initiative was already welcomed by the Council, first of all in its Resolution of 19 December 1991 on the development of the common market for satellite communications services and equipment and again in its Resolution of 22 July 1993.

In its Resolution of 18 January 1993 on the Hoppenstedt report, the European Parliament also expressed its support for such an extension.

Enhancing the use of satellite services in the Community The amending directive intends to abolish restrictions in

- the provision of all satellite earth station equipment such as Very Small Aperture Terminal (VSAT) equipment for business networks, mobile satellite equipment, Satellite News Gathering units, Direct-to-Home television reception equipment etc,

- the provision of satellite services over satellite business networks to allow e.g.

. corporate voice services (not connected to the public switched network),

. interactive data services from a central location to retail outlets

. videotransmissions for the training of corporate staff located on various sites,

. transmission of the content of a daily paper to remote printing locations

- the provision of mobile satellite services to allow e.g. tracking of and communications with road haulage fleets or fisheries fleets, the monitoring of dangerous transports, satellite links to aircraft, etc.

The Directive does not apply to voice telephony for the public (allowing the Member States to maintain the vocal telephony monopole until 1998) - such as the satellite links used by the telecommunications organizations for calls to other continents - neither to the provision of direct television broadcasting links.

Although the satellite communications sector is, and will remain, only a relatively small part (1-3 %) of the overall telecommunications services sector provided by cable, optical fibre or terrestrial microwave, it is a market with high growth potentials, which until now could not yet be fully realised due to a various regulatory restrictions of the Member States. The implementation of the Directive is expected to give a major boost to the Community's satellite communications sector.

The central aim of the Directive is therefore to abolish these restrictions in order to grant both current operators and new entrants new opportunities and to enhance the development of Satellite communications services in the Community, while stimulating new opportunities and employment.

The Commission is fully aware that it is necessary to avoid, for example, harmful interference between satellite telecommunications systems and other space-based or terrestrial services. The Directive therefore allows Member state to maintain transparent, objective and non-discriminatory authorization procedures to warrant these types of essential requirements.

When will the Directive enter into force ? The Commissioners Van Miert and Bangemann will now present the amending directive to the Council of Ministers of 7 December 1993 and take note of its position. They will also hear possible comments by the European Parliament and the Social and Economic Committee. Both Commissioners will then finalize the text and propose it for final adoption to the Commission.

The Commission expects a quick response from the other Community institutions which would allow for the final adoption of the Directive in February 1994. The Directive gives the Member States nine months to implement its provision. This would mean that by the end of next year, most of the remaing rstrictions on the provision of satellite services and equipment could be removed and thus bring the satellite sector fully in line with telecommunications sector in general.

Some Member States (in fact those which account for a substantial part of the Community market in this sector, i.e. France, Germany, the Netherlands and the United Kingdom) have already liberalized to a significant extent the activities covered by the Directive and thus anticipated its adoption.

Legal basis The draft Directive is, like the two Directives it is intended to amend, based on Article 90(3) of the EEC Treaty This means that it will be adopted by the Commission and not by the Council.

The text adopted by the Commission is however the result of one year of detailed consultations of Member States and of a representation of major operators concerned. The Commission's original draft has been thoroughly recast in the light of observations made in the course of this long consultation process

Further initiatives The implementation of the Satellite Green Paper is now in full progress. Last month, the Council adopted the Satellite equipment Directive concerning the harmonised procedures for equipment type-approval and the mutual recognition thereof in every Member State.

The Commission, convinced that the satellite communications sector is in urgent need of a coherent regulatory framework and a clear and focused policy initiative at Community level, can be expected to adopt further measures and develop further actions in the very near future, especially concerning the licensing of satellite services, and a Community approach to satellite based personal communications.

At the forthcoming Council of Ministers of 7 December 1993, Commissioner Bangeman is furthermore planning to outline a complete package of measures and actions for the satellite sector while some of these will be discussed in detail.

• • •

EC Commission Press Release - Ref: IP/93/1241

COMMISSION CLEARED A JOINT VENTURE BETWEEN MANNESMANN RWE- DEUTSCHE BANK IN THE TELECOMMUNICATION NETWORKS AREA

MERGER REGULATION

Deutsche Bank AG, Mannesmann AG and RWE-Energie AG, a subsidiary of RWE- AG, intend to contribute assets to a jointly owned and controlled company which will provide closed user group corporate telecommunication networks and value-added services. The services on offer will include voice telephony and data transmission, basic value-added services such as electronic mail and some more advanced value-added services, particularly sectorially-specific applications.

The parent companies will transfer their telecommunication equipment (although RWE will retain its utility network) to the joint venture. The new entity provides its services to parents and third parties. The proposed concentration does not raise serious doubts as to its compatibility with the common market. DB Telekom held a monopoly over the provision of voice telephony network for corporate clients until January 1993. It will remain the leading supplier for the foreseeable future. The joint venture will also experience competition from other specialised companies and from the new 'global outsqurcing'-companies formed by national telecommunication operators like France Telekom/DB Telekom or British Telecom/MCI. This market is developing quickly and high growth rates are expected. There are thought to be a large number of potential entrants including utilities, other telecom operators, software houses, etc.

The concentration will therefore not lead to the creation or reinforcement of a dominant position in the relevant markets and furthermore this new entrants will enhance the competition in a fast growing market. Commissioner Van Miert wellcomed this timely decision while alliances such as FT-DB telekomm or BT-MCI are currently under consideration.

• • • •

EC Commission Press Release - Ref: IP/94/66

COMMISSION DECIDES THAT STATE AID IS NOT INVOLVED IN THE FORMATION AND PRIVATIZATION OF TELEDANMARK A/S

- State aid No N 558/A/93 and NN 6/94 - Telecommunications sector - Denmark

In view of the future liberalisation of the telecommunication sector, the Danish Government considered it desirable to restructure the Danish tele- sector to make it more competitive. By a political agreement in 1990 it was decided by way of legislation to form a new public holding company, TeleDanmark A/S, which should acquire the 5 telephone companies in the Danish telecommunication sector (carrying out telephone network operations and other tele-activities :

- Copenhagen Telephone Company (KTAS) - Jutland Telephone Company (JTAS) - Funen Telephone Company - South Jutland Telephone comapny and - Telecom A/S

The political agreement moreover, stipulates that the State, after the acquisition of the 5 existing companies, shall bring down its stockholding in TD to 51 %, i.e. a semi-privatisation.

The Commission has decided that the formation of TeleDanmark A/S, in particular the acquisition of the two Danish telephone companies KTAS and JTAS, and the subsequent privatisation of TeleDanmark A/S does not involve state aid within the meaning of Article 92,1 of the EC-Treaty.

- The Commission has examined the different share-transactions involved in these two operations and has concluded that the Danish State's behaviour, in view of the fact that the State remains a majority- shareholder in TeleDanmark A/S and that TeleDanmark A/S is a company with good prospects, is equivalent to that of a private investor operating under normal market conditions.

- The Commission has, moreover, decided that the State guarantee granted to TeleDanmark A/S for existing loans in KTAS and JTAS at the time TeleDanmark A/S acquired the two companies does not involve state aid within the meaning of Article 92,1 of the EC-Treaty, as TeleDanmark A/S with effect from the date the guarantee was granted will pay a premium of 0,15% of the remaining loans the majority of which will expire in 1994/1995. In view of the high credit-worthiness of the company the premium is considered to be correct.

EC Commission Press Release - Ref: IP/94/164

COMMISSION CLEARS A JOINT VENTURE BETWEEN RWE AND MANNESMANN IN THE MOBILE DATA TRANSMISSION SECTOR

Merger regulation

The Commission has approved a proposed joint venture between Mannesmann Eurokom GmbH, belonging to Mannesmann AG, and RWE-Energie AG, a subsidiary of Germany's largest electricity utility.

The object of the newly created company is to apply for an operating licence from the German Ministry for Postal Services and Telecommunications which would subsequently enable it to install and operate a mobile data transmission network in Germany. The clearence of the proposed transaction by the competent anti-trust authority is a precondition for the granting of the licence.

At present, Deutsche Bundespost Telekom is the only supplier for mobile data transmission services in Germany. The creation of the joint venture would lead to the entry of a new competitor in the developing data transmission market and would have the pro-competitive effect of increasing the choice for the customers in this area. So, the Commission has decided to approve the proposed joint venture.

•••

EC Commission Press Release - Ref: IP/94/263

COMMISSION FINDS BANCO SANTANDER/BT TELECOMS AGREEMENT TO BE OUTSIDE THE JURISDICTION OF THE MERGER REGULATION

Merger Regulation

The European Commission has found the agreement between Banco Santander and BT to set up a telecoms company in Spain to be outside the jurisdiction of the merger control regulation. Consequently, it has not assessed the competitive impact of the operation.

Banco Santander (BS) and BT notified to the Commission an operation to set up a company to offer managed data network services (MDNS) in Spain. This company would compete against the current monopoly supplier of telecommunications in Spain, Telefonica. The new company would use the existing BS MDNS network and expand it to offer MDNS services to other companies under the BT brand name.

After assessing the operation, the Commission found that BS and BT would have joint control of the company for the first three years and after that period BT would have sole control. This three year period was judged to be insufficient to decide that the company would be jointly controlled. BT was, therefore, judged to have sole control. The operation was, therefore, an acquisition by BT of certain assets of a BS subsidiary As a result, the operation did not exceed the threshold set out in the merger control regulation which requires that at least two of the parties to an operation each have an EU wide turnover of 250 million ECU.

The Commission has declared that the operation does not fall under the merger control regulation.

• • •

EC Commission Press Release - Ref: IP/94/409

THE ROLE OF COMPETITION POLICY IN THE DEVELOPMENT OF TELECOMUNICATIONS - (SPEECH GIVEN BY MR KAREL VAN MIERT IN BRUSSELS ON 17 MAY 1994)

The telecommuncations sector is important for the European Union in a number of ways:

- economically, since it generates revenue of more than ECU 100 billion in services and ECU 30 billion in equipment, - socially, since it provides employment for more than a million people, - for the efficiency of firms, since it allows communication, - in human terms, since it brings people together.

It is one of the Union's booming secters, with a projected growth rate of 8% a year in services up to the year 2000.

At present, telecommunications are har dicapped by the fragmentation of the Community market and by monopolistic situations that penalize consumers (higher costs than in the United States, particularly for cross-frontier communications).

The only way to overcome such handicaps is to abolish national monopolies and open networks up to competition, on the basis of Community competition policy.

The Commission has gradually introduced competition policy legislation in the telecommunications sector, culminating in the adoption in July last year of a precise timetable for opening up voice telephony to competition. So long as infrastructures remain under the control of national monopolies, discriminatory access charges and overpricing may persist. The Commission has accordingly announced that it will publish a green paper on this subject in 1995.

Although cooperative arrangements are necessary between the telecommunications organizations in Europe if an optimum network and service are to be provided for consumers, the Commission must examine each strategic alliance between companies so as to ensure that it does not result in restrictions of competition. Thus, among the few instances of joint ventures so far dealt with by the Commission, the companies have had to undertake not to eliminate competition.

The new strategic alliances emerging in the sector are on a much larger scale than the previous cooperative arrangements. If such alliances result in the creation of activities that could not be engaged in by the parent companies individually, Article 85(1) should not normally apply to them. However, if they create combinations of activities in which each of the parent companies is already in a very powerful position on its own market, unacceptable situations may develop.

Mr Van Miert stressed the strategic importance of mobile communications and referred to the recently adopted green paper in this sector, where the aim is to achieve a combination of harmonization and liberalization. He said that the Commission would ensure that at least two mobile telephony operators could co-exist in each Member State. The suppliers of the final service to the consumer must have full commercial freedom and not be impeded by restrictions stemming from the granting of licences. Interconnection between mobile and fixed networks must be possible on the basis of objective, transparent and non-discriminatory criteria.

Mr Van Miert said that cable networks could be useful in the provision of non-reserved services. He did not believe that the opening-up of cable networks to activities other than television would impede the current telecom operators in their public-service activities. The access of cable networks to non-reserved services should therefore be liberalized soon.

Mr Van Miert said in conclusion that competition policy had a key role to play in a sector that was undergoing very rapid growth. Flexibility should be the watchword if we were to keep up with rapid technological developments and the globalization of markets. Community policy must therefore promote beneficial cooperative arrangements while

stamping out anti-competitive collusive practices.

***

EC Commission Press Release - Ref: IP/94/675

COMMISSION OPENS IN-DEPTH INVESTIGATION IN THE CASE MSG MEDIA SERVICE

Merger regulation

The Commission has decided to carry out an in-depth investigation into the proposed creation of the Media Service GmbH (MSG) in a second phase of proceedings. On 6 June 1994, the operation was notified to the Commission under the EC Merger Regulation. It concerns the creation of a joint venture between Bertelsmann, Deutsche Bunderpost Telekom and the Kirch-group which will be active in technical and administrative services for Pay-TV and other TV communication services.

The operation constitutes a concentration within the meaning of the Merger Regulation since MSG will perform all the functions of an autonomous entity and will be active itself on the market for technical and administrative services for Pay-TV. It is considered that this market will evolve, in particular, following the introduction of digital TV broadcasting. In Germany, this development is favoured by the extraordinarily high number of households which are able, already today, to receive TV by cable or satellite. The proposed concentration raises the question whether MSG could obtain, on a permanent basis, a dominant position on the German market for technical and administrative services for Pay-TV. Telekom is by far the leading German cable network operator. Moreover, it recently acquired a substantial stake in the European satellite operator SES-ASTRA. Bertelsmann and Kirch have widespread activities in the field of audiovisual media and, together with Canal plus Premiere, operate the only Pay-TV channel in Germany to date. It is, therefore, particularly important to examine the effects which may result from the combination of companies which probably would have a leading position in Pay-TV and cable networks in the future. In this context, the Commission also has to examine the extent to which the proposed concentration could have a negative impact on the development of the German Pay-TV market, in particular in relation to access for other programme suppliers.

The Bundeskartellamt requested referral of the case to the German cartel authority since, in its view, the proposed concentration threatened to create or strengthen a dominant position on the affected market in Germany. The Commission has decided not to refer the case to the Bundeskartellamt. After a preliminary investigation it cannot be excluded that the proposed concentration may also affect the access of Pay-TV suppliers from other Member States of the Community to the German market. Furthermore, the future competitive structure of the market for technical and administrative services in Germany could also have an impact on the development of the conditions of competition throughout the Community, given the importance of the German market. The Commission, therefore, will decide itself on the case after an in-depth investigation.

• • •

EC Commission Press Release - Ref: IP/94/767

COMMISSION CLEARS TRANSACTIONS CONCLUDED BETWEEN BT AND MCI IN THE TELECOMMUNICATIONS SECTOR UNDER THE COMPETITION RULES OF THE EC TREATY AND THE EEA AGREEMENT

At the proposal of Mr. Van Miert, Commissioner in charge of competition policy, the Commission has taken its first formal decision regarding one of the global strategic alliances which are developing in the telecommunications area. The alliance involves British Telecommunications plc. (BT) of the United Kingdom and MCI of the United States. The notified operation comprises two main transactions:

1. BT is to take a 20 % stake in MCI, worth $ 4.3 billion. By so doing, BT will become the largest single shareholder in MCI, with proportionate board representation and investor protection. Several provisions have however been included in the relevant agreements to impede BT from controlling or influencing MCI.

2. the creation of a joint venture company, Concert, formerly known as Newco, for the provision of enhanced and value-added global telecommunications services to multinational (or large regional) companies. The Parties will contribute their existing non- correspondent international network facilities and Syncordia, BT's existing outsourcing business, to Concert.

Concert is expected to offer a portfolio of global products included in 6 categories of service offerings. Those global products will originally be based on a blend of existing products of the parent companies.

The 6 categories are the following : . data services : low speed packet, high speed packet and frame relay services, pre-provisioned, managed and circuit switched bandwidth,

. value-added application services : value added messaging and video conferencing services,

traveller services : global calling card services,

intelligent network services,

other services : Integrated VSAT network services,

global outsourcing that will allow the distributor to offer its customers the ability to transfer responsibility and ownership of their global networks to either the distributor or Newco In this respect, Newco will be able to integrate within its own offering third party products already owned by customers that they want to keep.

Given the needs of big companies to link locations geographically dispersed over the world (that means also providing broad coverage of delivery capacity and in-country support), those products must be global in nature and respond to a very particular set of requirements.

In addition, in the framework of Concert, the parties will rationalise their respective holdings in other telecommunications operators (TO) and groupings in the world In this respect, MCI has already acquired most of BT's existing business in North America, and has withdrawn from the Infonet consortium.

This very complex operation was first notified as a concentration under the Merger Control Regulation. However, the Commission having concluded in September 1993 that none of the transactions notified constituted a concentration, the notification was converted into a notification for negative clearance and/or exemption under Regulation 17/62 (see IP(93) 757).

The decision is one of the first where the Commission has applied both Article 85 of the EC Treaty and Article 53 of the European Economic Area (EEA) Agreement. It contains different elements:

1. Some are not falling under article 85, the Commission finds that there are no grounds for action.

- The acquisition by BT of a 20% stake in MCI. After a careful study of the way in which the transaction has been built up and of the market context of the case, the Commission finds that there is no risk that this acquisition may result in the competitive behaviour of the parties being coordinated or influenced (the investment agreement has been drafted in such a way that BT does not have the possibility to seek to control or influence MCI)

- Those parts of the two transactions affecting only the Americas (North and South). Given the current state of development of the overall market for telecommunications, the stipulations affecting only the Americas, will not at present produce any appreciable effect in the EEA.

- Other provisions in the agreements, namely a non-compete obligation on BT and MCI as regards the activities to be undertaken by Concert and an obligation on BT and MCI, as exclusive distributors of Concert's services, to obtain from Concert all of their requirements for global telecommunications services. The Commission finds that these provisions are ancillary to the creation and successful initial

operation of Concert.

2. Some are not falling under Article 85 and are benefiting of an Exemption under both Article 85(3) of the EC Treaty and Article 53(3) of the EEA Agreement

- The creation of Concert is found to restrict competition because BT and MCI are, and for the foreseeable future will continue to be, at least potential competitors not only in the overall market for telecommunications, but also in the enhanced and value-added global telecommunications services segment of that market to be addressed by Concert.

However, the Commission has concluded that Concert satisfies the conditions for receiving an individual exemption1, which will apply until 16 November 2000.

In particular, Concert is going to more quickly develop and offer to customers a set of new global services of a more advanced nature than either BT or MCI would be capable of providing alone under their existing technologies. By creating Concert, each parent will also substantially reduce the costs and risks inherently associated with the offering of such services at the scale and with the particular features required by multinationals and other big international users. In addition, the services are going to be offered on an end- to-end and seamless basis. The Commission considers this to be a genuine advantage over existing international services that are provided by interconnecting incompatible national networks, because the result of the combined network thus created is as strong as its weakest link, so that the services provided, and their features, are those supported by the least performant network involved.

- Other provisions of the agreements, namely the appointment of BT as exclusive distributor of Concert within the EEA and a provision intended to dissuade MCI from entering some sectors of the telecommunications market of the EEA not to be addressed by Concert, are also found restrict competition as both provisions tend to isolate the entire EEA from competition by companies located outside the EEA. Although a number of arguments were given by BT and MCI to justify those provisions, an exemption could only been granted by the Commission once assurances were received that, despite the appointment of BT as exclusive distributor in the EEA, any user in the EEA can obtain Concert's services through MCI instead of BT, and once the parties amended the dissuasive provision on MCI so that it only will last for 5 years in so far as the territory of the EEA is concerned.

In its assessment of this strategic alliance, as reflected in the decision, particular attention has been paid by the Commission to the evolving nature of the telecommunications market resulting from the quick convergence of

1 The provision of basic correspondent services through Concert is not covered by the decision.

telecommunications and information technology, from the gradual process of liberalization of telecommunications in the Community and from the significant third party increasing competition as well as the important bargaining power of the purchasers. In addition, the decision is a clear reflection of the stated aim of the Commission of

furthering beneficial forms of cooperation between TOs while ensuring that the competition rules of the EC are observed.

EC Commission Press Release - Ref: IP/94/815

COMMISSION APPROVES JOINT VENTURE BETWEEN GEC AND FINMECCANICA FOR CERTAIN ELECTRONIC AND COMMUNICATIONS PRODUCTS

Merger Regulation

The European Commission today approved the creation of a concentrative joint venture between GEC of the UK and Finmeccanica of Italy, for certain products in the field of civil and military radio communications, electronics and telematics. All of Finmeccanica's activities in the relevant areas will be transferred to the joint venture, as will those of a GEC subsidiary in Italy, Marconi S.p.A. ("Marconi").

The joint venture's military products will include high frequency and VHF/UHF radios, global positioning systems, communications electronic warfare and integrated radio/navigational systems. On the civilian side, it will produce private mobile radio systems, PTT network management systems, mobile cellular radio infrastructure and terminals, air traffic control equipment and a range of special data processing or telematic systems (eg automatic vehicle monitoring/road pricing, public information displays, building automation). The joint venture will also supply satellite groundstations for both military and civilian use.

In the case of the military products, the joint venture will face not only the monopsonist buyers of the defence sector, but also competition from between four and six other major European and US defence contractors with capabilities in the products concerned. In the case of the dual use and civilian products, the joint venture's market shares will only exceed 10% in two products, PTT network managements systems and private mobile radio systems, and then only on the hypothesis of national markets (21% and 23% respectively of the Italian market). In both cases the range of potential suppliers in these markets is so large and includes such powerful international groupings as the major telecommunications equipment suppliers, information technology and software houses that the Commission does not consider that these markets shares are such as to prejudice effective competition.

In the light of the above, the Commission has decided not to oppose the operation since it does not raise serious doubts as to its compatibility with the common market.

• • •

EC Commission Press Release - Ref: IP/94/864

THE COMMISSION HAS DECIDED THE JOINT VENTURE DEKRAPHONE NOT TO FALL WITHIN THE SCOPE OF THE MERGER REGULATION

Merger regulation

Dekraphone has been notified to the Commission as a concentrative joint venture on 24 August 1994. Dekraphone will provide services for mobile telephony and sell mobile phones.

The three parent undertakings are Rheinelektra AG ("Rheinelektra") controlled by RWE AG, COFIRA (Deutschland) Telekommunikations- und Vertriebsgesellschaft mbH ("COFIRA"), which belongs to the French CGEaux Group (Compagnie Generale des Eaux), and the German undertaking DEKRA e.V. ("DEKRA"). Rheinelektra is a manufacturer of electrical equipment and plants and has also interests in telecommunications. COFIRA/CGEaux have mobile telecommunication activities in several Member States of the European Union. DEKRA primarily operates technical inspections of vehicles in Germany.

The parent companies will transfer the whole of two German service providers for mobile telephony to the new joint venture. COFIRA and DEKRA will transfer their joint venture Dekratel to Dekraphone and Rheinelektra will transfer the company Unicom.

Dekraphone is a cooperative joint venture, because two of the parents undertakings have not exited the joint venture's market on a permanent basis.

COFIRA will remain active as a service provider for mobile telephony in France, Luxembourg and the UK.

Rheinelektra has transferred its participation in Unicom to Dekraphone and hence it has exited the joint venture's market on a transitory basis. However, the RWE group to which Rheinelektra belongs, plans to acquire Preussag Mobilfunk GmbH from the German Preussag group. Talkline, a competitor of Dekraphone, is a subsidiary of Preussag Mobilfunk GmbH. Hence, a re-entry of the RWE group in the market of Dekraphone is likely.

On the basis of these facts a coordination of competitive behaviour can not be excluded.

Since the Merger Regulation does not apply to cooperative joint ventures, the Commission has decided Dekraphone not to fall within the scope of the Regulation.

• • •

EC Commission Press Release - Ref: IP/94/948

COMMISSION LIBERALISES SATELLITE COMMUNICATIONS MARKETS

Following a proposal from Commissioners Van Miert and Bangemann, the Commission has today adopted a directive liberalising satellite telecommunications equipement and services throughout the European Union. Liberalisation of satellite markets has been strongly supported by the European Parliament as well as the Council which has marked introduction of competition into satellite markets as major goal for EU telecoms policy.

The directive liberalises both the establishment and operation of satellite networks, as well as associated satellite dishes across the Union. It covers in particular the establishment of the new-advanced so- called VSAT (very small aperture satellite terminals) as well as larger satellite dishes used for news gathering and other forms of satellite business and of particular relevance in the context of satellite proposal and mobile communications. The major users are expected to be in the retailing distribution and financial sectors. Many similar potential users in the EU have pan-European requirements and few suppliers can offer credible, fully supported pan-European service in the present environment. Satellite communications networks, now liberalise across the Union, are expected to be a major means of implementing Trans European Networks in these areas.

This initiates a completely new stage of development for the European Satellite market. Due to liberalisation a ten-fold incease in the volume of satellite communications before the year 2000 can be expected. Studies estimate that as much as 80 000 VSAT satellite dishes may be deployed across the Union by that time.

Regulatory restrains to date were restrictive for users and service providers alike, contrary to the situation in the United States where an "Open Skies" policy greatly stimulated the satellite market fince the early 1980s.

The state of liberalisation is the most important determinant of the size and the nature of the satellite telecoms market in Europe and rapid deployment of Trans-European Networks. As such the new directive is also a vital step on the way to the European Information Society, as defined in the Commission's response to the report established on the issue by leading industrialists under chairmanship of Commissioner Bangemann.

The benefits which the new Satellite Directive will bring to this market include :

- Reduction of costs of deploying and operating satellite networks which will be translated into lower prices for the consumer. Competition and liberalisation will mean lower charges for licensing terminal type-approvals (which will become "one stop" and space segment access

- Pan-European networks. The harmonised regulatory environment will facilitate the establishment of pan-European satellite networks which has been frequently recognised as a key requirement for market growth. This will be critical in the development of trans- European communications networks

- The rapid deployment, especially in less developed or remote areas of multimedia applications and access to the developing date superhighways of the information society

- Removal of prohibitions on service and interconnection

- Simplification of operations such as licensing equipment registration and installation

- Increased confidence of users, operators and investors in satellite solutions for Europe.

The directive is an amendment to the 1990 directive on the introduction of competition in the telecommuniations services market and has been issued by the Commission under Treaty Article 90. Article 90 provides for application of competition rules to sectors where Member States allocate exclusive or special rights. "Use of directives based on Article 90 is an efficient tool for the application of competition law to such sectors, providing investment certainty

to market agents and cutting red tape" states Commissioner Van Miert. "However, this instrument must be used with care and in clearly circumscribed circumstances".

The provisions of the directive are immediatley applicable. Member States have 9 months after publication of the directive to communicate the measures taken to comply. However, the Commission will also take into account the situation of those Member States in which the terrestrial network is not yet sufficiently developed and which could justify deferment of full application of the directive until 1 January 1996.

The satellite directive is issued by the Commission in the context of the follow-up of the Council resolution on the liberalisation of satellite services. Before issuing the directive, the Commission awaited confirmation of its approach to competition in the telecommunications services markets by the European Court of Justice in autumn 1992. Subsequent to preliminary adoption of the directive by the Commission in December 1993, the Commission has completed extensive consultations with the European Parliament and Council.

Together with an already adopted Directive on satellite equipment, and a proposal for a directive on satellite service licences currently in discussion in Council and Parliament, the new Directive completes a package of measures intended to rapidly develop the European satellite sector.

* * *

EC Commission Press Release - Ref: IP/94/951

COMMISSION OPENS IN-DEPTH INVESTIGATION IN THE CASE SIEMENS/ITALTEL

Merger regulation

The Commission has decided to carry out an in-depth investigation in a second phase of proceedings into the proposed creation of a joint venture between Siemens of Germany and STET of Italy, for certain products in the fields of public and private telecommunications equipments.

On 13 September 1994, the operation was notified to the Commission under the EC Merger Regulation. Siemens will contribute its Italian subsidiary (Siemens Telecomunicazioni) to the new joint venture and STET will transfer its manufacturing subsidiary Italtel. STET is a holding company which also controls the Italian public telecom operators, recently merged under Telecom Italia.

The joint venture between STET and Siemens raises both horizontal and vertical issues, especially in the markets of public telecommunications equipment in Italy.

With regard to horizontal aspects, the joint venture will hold a substantial share (about half of the market) of the public switching and transmission equipment market in Italy. Elsewhere the operation is not likely to have major effects, since Italtel's sales are basically restricted to Italy.

In relation to the vertical aspects, Siemens will, through the joint venture, share the pre-existing vertical link between the Italian telecom operator (Telecom Italia, previously SIP) and the telecom equipment manufacturer Italtel. In public telecommunications, vertical links are an issue given that the activities of the companies in the downstream markets are not subject to the usual competitive conditions.

It is, therefore, particularly important to examine the effects which may result from the combination of companies which will have a leading position in telecommunication services and in the manufacture of public telecommunication equipment in the future.

In this context, the Commission has also to examine the extent to which the proposed concentration would have a negative impact on the implementation of public procurement rules and the progressive opening up of national markets to Community competition.

After a preliminary investigation, the Commission has sufficient reasons to open an in-depth investigation in the case.

• • •

EC Commission Press Release - Ref: IP/94/1016

FINANCING OF COMMUNICATIONS INFRASTRUCTURE WILL NOT REQUIRE ANY PUBLIC FUNDING IF WE LIBERALIZE IMMEDIATELY

At the opening of the "Electronica" trade fair in Munich on 7 November, Martin Bangemann, the Commission member responsible for industrial policy, pointed to the major role of modern information and communications technologies in the global information society. "Electronica" is the world's largest trade fair for electronic components and for measuring and testing technology, with 2 800 exhibitors from 48 countries.

The move to a global information society has, in Mr Bangemann's view, gathered a momentum that is unstoppable. There are hardly any firms now, whether small or large, that can get by without advanced information and communications technologies. More and more private households too are using PCs, not only for games, but also for learning. "We are all moving at incredible speed into an increasingly network-linked world, which in many respects can bring us enormous advantages if we so wish," Mr Bangemann stated.

Mr Bangemann firmly believes that the information society can help to solve more effectively problems for which we have not yet found the right answers. One example was growing traffic congestion, which could be substantially reduced by means of intelligent, computer-assisted traffic control systems; such systems would also make it possible to charge more equitably to the individual the costs generated by use of the private car. To widen the scope for such future-orientated applications, services and infrastructure should, in Mr Bangemann's view, be liberalized rapidly. "Liberalization of services also requires the removal of existing network monopolies", Mr Bangemann said. This was necessary in order to create the necessary planning certainty for network investments. "The establishment of an efficient global communications infrastructure does not require any public funding, but is self-financing - provided that we liberalize now and do not wait until it is too late," Mr Bangemann stated.

"I therefore hope that the Council meeting of Ministers for Telecommunications on 17 November will accept our proposals and agree to this timetable," Mr Bangemann continued.

In Mr Bangemann's view, the main technical prerequisites for the information society are already largely established with the PC and telephone. The main obstacle to broad acceptance of the new uses to which they could be put was unduly high telephone charges. "A reduction in charges can be achieved only if there is more competition, in services as well as in networks," Mr. Bangemann said In his view, the electronics industry would also benefit considerably: "The more people use the new technologies at home and at work, the greater will be the demand for better and better equipment." This applied not only to PCs, which would have to be made easier to use, but especially to new, complex transmission systems. "In my opinion, the telephone has not as yet by any means been developed to its full potential," Mr Bangemann stated

The European Union is, in Mr Bangemann's view, fully aware of the major importance of electronics as a key strategic industry for many other branches of industry It was precisely for this reason that the Union was making a special effort to promote research and development on this enabling technology. However, this was not enough, since for many firms the main problem was the introduction of new products onto the market. "We have plenty of good ideas" Mr Bangemann said. "What we still need is to convert them rapidly into competitive products." In order to create an innovation incentive for small and medium-sized business in particular, the Commission had introduced a special innovation prize, the "Information Technology European Award 95", to be awarded in 1995. "We will be awarding three prizes of ECU 200 000 and 20 prizes of ECU 5 000 to innovative products with a high information-technology content," Mr Bangemann continued The Commission would thus also be demonstrating that it was in favour of research that was near the market in the field of information and communication technologies in particular.

Mr Bangemann thought that the future prospects for the European electronics industry were extremely promising. "European firms are once again confident in their own competitive strength. The billions invested in new chip factories show that the industry faces the future with self-assurance The European Commission at any rate will play

its part in ensuring that Europe will continue to be an attractive location for industry and commerce."

• • •

EC Commission Press Release - Ref: IP/94/1082

THE COMMISSION AUTHORIZES THE CREATION OF A JOINT-VENTURE BETWEEN ERICSSON AND RAYCHEM

Merger RegulationLM ERICSSON AG (Sweden) and RAYCHEM CORPORATION (USA) jointly notified to the Commission an agreement by which they will create a joint-venture which will incorporate substantially all the activities and assets of RAYNET CORPORATION, a wholly owned subsidiary of RAYCHEM prior to the operation.

ERICSSON is one of the major players worldwide in the manufacturing and selling of telecommunications systems and equipment. RAYCHEM develops and sells high performance industrial products used inter alia by the aerospace, automotive, electronic and telecommunications industries and RAYNET activities consist in the manufacturing and selling of fibre optic transmission systems for access telecommunications networks.

The Commission after examination of the notified operation has decided not to oppose it and to declare it compatible with the common market and with the functioning of the EEA Agreement since, on the one hand, the addition of market shares is not significant in any of the geographic markets concerned and, on the other hand, the operation is not likely to give rise of a coordination of the competitive behaviour of the parent companies neither in the joint-ventures product markets nor in any other product market within the overall telecommunications equipment markets.

• • •

EC Commission Press Release - Ref: IP/94/1236

COMMISSION CLEARS THE CREATION OF INTERNATIONAL PRIVATE SATELLITE PARTNERS, A JOINT VENTURE IN THE TELECOMMUNICATIONS AND THE SATELLITE SECTORS, UNDER THE COMPETITION RULES OF THE EC TREATY AND THE EEA AGREEMENT.

At the proposal of Mr. Van Miert, Commissioner in charge of competition policy, the Commission has given its formal green light to the creation of International Private Satellite Partners (IPSP), a limited partnership organized under US law among nine partners(1) to provide international private business telecommunications services via satellites to businesses in Europe and North America. IPSP will also offer bulk satellite transmission capacity to third parties, but only to the extent that IPSP or its partners do not use all the available capacity. IPSP will own and operate two high power telecommunications satellites to be located in geosynchronous orbit over the Atlantic ocean, the first of which was launched on 29 November last and is expected to be operational by the end of the year.

In the decision, the creation of IPSP has been concluded to fall outside the scope of both Article 85(1) of the EC Treaty and Article 53(1) of the EEA Agreement, because IPSP, which is a venture the partners of which are mostly private companies active in the telecommunications and aerospace areas, will not restrict competition but actually have a positive impact; IPSP will be a new competitor to the big strategic alliances being established, often between public operators, in the market for advanced telecommunications services. It will furthermore increase competition in the market for satellite transmission capacity, as it is a new and private alternative to the international satellite organisations (INTELSAT, EUTELSAT and INMARSAT) and national systems (generally owned by governments or public companies which, in most cases, are also the national signatories to those international satellite organisations) that currently control almost every aspect of the satellite market.

A number of provisions in the agreements, namely a non compete obligation imposed only on the general partner of IPSP (Orion Satellite Co.), several provisions intended to ensure that IPSP will offer to its partners, that will normally also be its customers, the best prices, terms and conditions that it will be offering to third customers for the provision of services or capacity (the "most favoured nation" provisions) and the preference to be given to limited partners in respect of certain calls for tenders issued by IPSP have been considered restraints ancillary to the creation and successful operation of IPSP.

Two other provisions, namely the exclusive right to promote the sale of the IPSP services in Italy once full liberalization of telecommunications is in place, and the appointment of STET as exclusive representative agent of IPSP in Austria have been concluded as non appreciable restrictions of competition given, in particular, the inherent international dimension of the IPSP services, the big size of potential customers and the small market share that IPSP is expected to achieve.

(1) The partners of IPSP are the following: Orion Satellite Co. (USA), Orion Networks Systems (USA), British Aerospace Communications (UK), COM DEV Satellite Communications Ltd (Canada), General Dynamics Commercial Launch Services (USA), Kingston Communications International Ltd. (UK), MCN Sat US (USA), STET (Italy) and Trans-Atlantic Satellite, Inc. (Japan).

• • •

EC Commission Press Release - Ref: IP/94/1262

THE COMMISSION OPENS CABLE TV NETWORKS TO LIBERALISED TELECOMS SERVICES - A FIRST STEP TO THE MULTI-MEDIA WORLD

On the initiative of Commissioners Van Miert and Bangemann, the Commission has today adopted a directive for public consultation which will lift restrictions on the use of cable TV networks for the carriage of all liberalised telecommunications services. The proposal represents a modification of the Article 90 directive liberalising those services (90/388). It aims, in particular, to allow new multi-media telecoms services to be carried on cable networks, throughout the European Union, by 1 January 1996. During 1995, the Commission will be presenting the directive to the Member States and the European Parliament and consulting with other interested parties on the draft directive before formally adopting a decision, in an open procedure ensured by Mr Van Miert at the last Telecoms Council. The precedent for such a procedure was set with consultations on the satellite amendment to the services directive which was finally adopted in October of this year.

Liberalising access to cable infrastructure should permit a lowering of costs and a significant increase in the amount of capacity available for new services. Alongside this it encourages use of state of the art technology and represents an important contribution to the development of the informations society.

The goal: multi-media services

In many of the Member States existing national regulation restricts use of cable TV networks for all but simple, one-way broadcasting services (see table 1). The regulatory restrictions which would be abolished by the directive currently prevent cable TV operators from offering carriage or provision of any of the new interactive and multimedia services. Most of these involve the digital transmission of moving pictures which the traditional telecommunictions networks are not designed to - and in many cases can not carry

The main goal of the Commission is to lift those restrictions in order to foster pilot projects and new initiatives in the multi-media field. This area was highlighted in the White Paper on Growth, Competitiveness and Employment as of fundamental importance in realising the information society.

Examples of such new services include:

* Home shopping (including catalogue browsing, live video displays, "navigation" around the "shopping mall" from home, viewing real estate),

*Home transaction packages (banking, reservations, buying, trading)

*"Edu-tainment" (interactive video games which entertain and educate)

*specialised interactive on-line databases (for example for the medical or dentistry professions, which involve detailed and/or moving images)

The lifting of current restrictions will also encourage the provision of new distributive applications, such as home alarms and telemetry (i.e distance meter reading) Cable operators can offer capacity for such services at a significantly lower cost than telecom operators.

A further important market for cable capacity concerns mobile services New entrants are looking for alternatives to using the TO's network since the latter is often a competitor in their own mobile market. Once liberalised, the fast growing market of mobile communications is expected to generate sufficient revenues to allow cable operators to upgrade and expand their infrastructure for increasingly sophisticated multi-media services.

The advantage of CATV networks

The "final drop" is that step of the network which actually runs into the home and connects the terminal (TV, telephone, computer or some hybrid combination). It is, without doubt, the most important gateway to the benefits of "the information superhighways".

The advantage of using Cable TV networks is that, as they are designed for the carriage of TV signals, they reach the end user with broad-band "co- axial" cable capable of providing up large amounts of capacity, such as is required for moving images, especially enhanced quality signals ("enhanced reality"), with a high degree of reliability. This allows provision of the new multi-media services without major adaptions of the lines running into customers' homes.

Such services cannot, in general, be efficiently carried over the local networks currently provided by the national telecoms operators in the Member States. TOs connection to households is by "copper pairs" only capable of providing reliable services of relative low capacity which is not appropiate, for example, for even standard quality TV signals, except in particular sitations1. This is because such networks were set up some years ago and designed for carying voice telephony which requires a very small fraction of the capacity.

1 That is, without involving significant trade-offs concerning lack of reliability and increased error rates and severly limiting the distance which the end user may be from a central switch.

Form and Content of the Directive

Like the satellite directive adopted in October, the cable directive involves an amendment to the 1990 telecoms services directive. The amendment allows service providers the choice of offering their services over cable TV networks. This does not effect the Member States' rights to maintain monopolies in provision voice telephony unitl 1998 as the directive concerns only the provision of non-reserved services.

The current situation in most of the member States, whereby only the telecoms organisations are allowed to lease out capacity for, or to carry, telecoms services on behalf of anyone else, severely constrains possibilities and opportunities for both service providers and users (see table). Furthermore, the tariffs for lease of high-capacity lines from the TOs in the EU is, on average, 10 times higher than in liberal environments such as Sweden and North America. Maintaining restrictions on CATV networks means that, while capacity is restrained, the cable operators are not investing in adapting their infrastructure to provide high capacity for telecoms services, since they are not allowed to respond to the demand for it.

After the adoption of the services directive 90/388, which was based on Article 90 of the Treaty, the Commission organised consultations from which it emerged that the goal of effective liberalisation of telecoms services would remain unsatisfied unless the network infrastructure overwhich they are provided was also liberalised.

The extension of the Article 90 directive must be seen in the context of the following points:

•the benefits of services liberalisation in the multi-media context will not be realised without liberalsiation of available CATV network capacity

•Many of the Member States, also the most important in terms of the EUs telecoms markets, urged the Commission at the last Telecoms Council to present proposals as soon as possible for rapid liberalisation of CATV networks.

•The Commission has underlined its intention to present its proposals in this context to both the Council and the Parliament and to proceed in close cooperation with them, with utmost respect for transparency.

•the development of new, multi-media services is increasingly rapid with the anticipation of the information society. The market expanding. The revenues of the TOs are not threatened by a transfer of customers, since they are, for the most part, not even providing these new services yet.

The directive also introduces competition safeguards aimed at preventing operators using a dominant position in one market to impose predatory prices in another. requires the Member States to adopt measures to allow the monitoring of cross subsidies between reserved and liberalised activities, when a single operator provides both. This concerns, on the one hand, TOs which also operate CATV networks, and on the other, CATV operators enjoying exclusive for their broadcasting activeity who also enter the liberalised telecoms market.

"This draft should be seen as a major step towards the early introduction of multi-media services throughout the European Union", explains Mr Van Miert. "It will also favour initiatives from small and medium sized enterprises by opening up the cable TV networks. It thus responds to specific requests we have received from them in the context of telecommunications liberalisation."

Table 1

Current provisions concerning use of cable TV networks for the provision of telecommunications services can be summarised as follows:

Use of cable TV networks for liberalised services

Belgium No Denmark No France Non-voice services only Germany No Greece ---------* Ireland No legal provision Italy ---------* Luxembourg No legal provision Netherlands Limited use Portugal No Spain No UK Yes

Source: "L'impact de l'authorisation de la fourniture de services de telecommunications liberalises par les cAblo-operateurs", IDATE, 1994, and additional analysis

* No cable TV networks available

Table 2

Minimum Capacity requirements (approximate) for services

Speech: 64 kilo-bits/second

ISDN: 140 kilo-bits/second

Standard quality moving images: 2 mega-bits/second

Enhanced quality moving images: 10 mega-bits/second

Table 3

Technical limits on network infrastructure to the home

i. Twisted Copper pairs: used by TOs to connect end users to the local switch:

up to 257 kilo-bits/second: reliable service to all customers on local network

the greater the capacity requirement above 257 mega-bits the greater the trade-offs of increased error rates, lack of reliability and limits on the distance which the end user can be from a central switch.

2 mega-bits and overOnly in particular, limited situations.

e.g Not appropriate for: users in less densely populated areas, users requiring high reliability, or users preferring high quality pictures and "enhanced realism"

ii. Broadband coaxial cable: used by cable operators to connect end users to head-end

up to 500 mega-bits/secondreliable service to all customers irrespective of distance

Table 4

Cable TV Networks in the European Union *

Number of Households Subscribers Operators passed

Belgium 38 97.4% 95.5% Denmark 6500 73.6% 57.3% Germany 1 64.6% 40.5% Greece ------ ------ ------ Spain 30 8.1% 1.1% France 16 25.8% 6% Ireland 13 >50% 40% Italy ------ ------ ------ Luxembourg 120 99.5% 81.4% Netherlands 358 90.3% 86.4% Portugal 1 1.6% 0.3% UK 23 12.6% 2.8%

* Source: IDATE, 1994

• • •

EC Commission Press Release - Ref: IP/95/61

LIBERALISING TELECOMMUNICATIONS INFRASTRUCTURE : PUBLICATION OF PART II OF THE GREEN PAPER AND CONSULTATION ON THE FUTURE REGULATORY FRAMEWORK

The Commission has today adopted as proposed by Mr Bangemann and Mr Van Miert Part II of the Green Paper on the Liberalisation of Telecommunications Infrastructure and Cable TV Networks. While Part I, adopted on the 25 October 1994, set out the general principles and proposed timetable for liberalisation, Part II examines the substantive issues involved in establishing the regulatory framework for full competition in the telecommunications sector. Part II of the Green Paper logically follows the Resolution of the Council of Telecommunications Ministers meeting of the 17 November 1994, which confirmed the principle of full liberalisation of the telecommunications sector by the 1 January 1998.(1)

The "Bangemann Group" Report earlier in 1994 on Europe and the Global Information Society had already stressed that "the key issue for the emergence of new markets is the need for a new regulatory environment allowing full competition" and urged Member States to "accelerate the on- going process of liberalisation of the telecommunications sector by opening up to competition infrastructures and services still in the monopoly area".

Infrastructure liberalisation, whereby operators will be permitted to apply for licenses to build or develop new telecommunications networks, backed up by a well functioning regulatory framework will be one of the key factors in encouraging the development of communications and the information society in the Union. In particular it will lower the price of telecommunications, encourage innovation and the exploitation of new technologies, improve the provision of telecommunications services to both industrial and residential consumers and stimulate the injection of private capital into the sector Services conveyed over telecommunications infrastructure in the European Union amounted to about 120 billion ecu during 1993 and are at the heart of the Union's information sector - see Figure 1 attached

The Major Issues

The second part of the Green Paper deals with the substantive issues involved in establishing the future regulatory framework

Universal service consists of access to a defined minimum service of specified quality to all users at an affordable price based on the principle of universality, equality and continuity With respect to universal service, three major issues are raised the definition and scope of universal service, a common approach to costing universal service and the financing of universal service in a competitive environment. Concerning scope and definition, Union wide standards for universal service have already been proposed under the auspices of the application of Open Network Provision rules to the voice telephony service. On financing, the Green Paper adopts a relatively novel approach and indicates a preference for using universal service funds rather than access charges. This is based on the view that in the future, more than one operator may be competing to provide universal service

Interconnection and inter-operability of infrastructures and services will be a major commercial issue. Interconnection will primarily be a matter for national regulatory authorities within an overall framework. All interconnection agreements are subject to the competition rules. In addition, the Green Paper outlines the scope of an Interconnection Directive, foreseen in the Commission's Action Plan on the Information Society, which will govern access to and interconnection with public infrastructure networks Some major issues of the directive will be: . set out the rights and obligations on public telecommunications infrastructure providers with regard to interconnection requests, including obligations to interconnect and provide standard interconnnect offerings; . common rules for fair competition, . dispute resolution mechanisms

On licensing, the Green Paper recognises that the licensing of telecommunications infrastructures, networks and services will remain a matter for national regulatory authorities At the same time an overall framework is required which sets the general principles and procedures for granting licences and which strikes an appropriate balance

between excessive regulation and reasonable safeguards. The Green Paper stresses the need for fair and effective competition in the new environment through the enforcement of the Treaty competition rules. The competition rules will have a key role to play in providing a predictable environment within which companies can plan and invest.

With respect to the international dimension, full account must be taken of the current WTO/GATS negotiations on basic telecommunications services, (which include infrastructure). The major objective of the European Union is to ensure comparable and effective access to global markets.

Towards the Information Society The Green Paper sets the common approach to infrastructure more broadly within the context of the overall approach to the Information Society. Although it focuses on telecommunications infrastructures, the Green Paper shows that the worlds of telecommunications, broadcasting and computing are moving together. This is because many of the new digital telecommunications services lie between traditional telecommunications and broadcasting. The Green Paper does not aim to extend telecommunications regulation to other sectors of the economy. Rather it recognises that there are different policy objectives which underlie the regulatory approach in the various sectors and that these different objectives will remain even when technologies and markets converge. A clear framework for infrastructure liberalisation is therefore complementary to the evolution of Union policy in other neighbouring fields such as intellectual property rights, audio- visual policy and media concentration - all areas which are central to the emerging Information Society.

Consultations In conjunction with Part I of the Infrastructure Green Paper, the Commission has opened a broad consultation on the future regulatory framework for infrastructure liberalisation in the European Union. The Commission is inviting comments on all the issues raised and will also organise hearings in Brussels with interested parties early in 1995. The Commission intends to complete its consultations during the French Presidency in the first half of the year, enabling it to come forward, before the end of 1995, with a proposed package of measures for widespread reform of the regulatory environment.

Figure 1 - Turnover of EU information sector in 1993.(2)

Telecom services 27% Publishing 22% Software and services 15% Computer equipment 11% Audiovisual services 10% Telecom equipment 6% Consumer electronics 5% Micro-electronics 2% Electronic publishing 2%

Total Market : 414 billion ECU

(1) subject to additional transitional periods for certain member states, i.e. up to five years for Greece, Ireland, Portugal and Spain and up to two years for Luxembourg (2) Source : Commission Studies

• • •

EC Commission Press Release - Ref: IP/95/131

LIBERALISING CORE SECTORS OF INFORMATION SOCIETY IN EUROPE: "NO FORTRESS EUROPE BUT NO BLUE-EYED APPROACH EITHER" SAYS COMMISSIONER VAN MIERT

"The global issue of the world-wide trade-off between competition and the traditional mechanisms for ensuring public service will come to a head at the G7 conference... The Commission has been asked to play a major part in this meeting, and I myself, will be participating in the debate concerning the development of information infrastructure and the provision of access to it."

"In the interests of consumers, business and the industry itself it is important that policy does not pre-empt or straight-jacket market development with unnecessary regulations and standards. On this point we are in full agreement with our friends on the other side of the Atlantic. However, this does not mean a "blue-eyed" or "one-sided" approach to EU liberalisation and this will also be made very clear to our G7 partners. ", Mr Van Miert said in a speech delivered on friday the 10th of February at the Conference on European Public Service organised by the Trans European Policy Studies Association.

"The message the EU will bring to the G7 debate is not "fortress Europe" but global progress, Mr Van Miert added

i rapid progress in liberalising the core sectors of the information society in Europe. In our own interests as well as the international credibility of the Union, we must carry through a tight programme of concrete liberalisation measures this year. This relates in particular to cable networks, alternative infrastructures and mobile communications

ii encouraging our competitors to offer the same level of market access as will be available here

iii but also protecting our cultural identity and ensuring fairness in future issues concerning content."

The key point of the discussion concerned the relationship between the objectives for the European Union of liberalisation on the one hand and development of public service on the other.

If Mr Van Miert gave particular emphasis to the significance of the G7 conference on the information society in this context, which will take place in Brussels at the end of this month, he generally drew the following conclusions :

• Competition and public service are compatible, in fact they may be mutually reinforcing, as long as it is recognised that public service does not necessarily mean (a) monopoly provision nor (b) public operator

• Rigid and over generalised dogma concerning policy in these areas is not appropriate. Overall principles must be tempered by the demands of subsidiarity, flexibility (vis avis technology and development of market structure) and the reality of significant differences between sectors (such as telecoms, post and energy). This concerns, for example, the approach to a European Public Service Charter and to use of particular Treaty articles.

• It is critical for the Union that existing Treaty rules be respected, not tampered with for short term political motives.

• Given rapid technological change and pressure from competitors in the US and Japan/SE Asia in the context of the information society, we cannot afford to let unnecessary delays block progress in liberalisation. Time is short in this area. We must run to a tight time table.

• In the course of 1995 the schedule for liberalising telecoms services and infrastructure must be written up in EC law. This involves both 1998 measures and more immediate proposals for mobile services and concerning use of available capacity for already liberalised services.

• In the international context the EU must encourage market access to third countries as well as the protection of European cultural identity and intellectual property rights.

• • •

EC Commission Press Release - Ref: IP/95/149

COMMISSION CLEARS PROPOSED JOINT VENTURE BETWEEN SIEMENS AND ITALTEL IN THE SECTOR OF TELECOMMUNCATION EQUIPMENT

- Merger regulation

The Commission adopted today a decision to authorise the merger of the activities of the Italian subsidiary of Siemens for the manufacture of telecommunication equipment (Siemens Telecomunicazioni SpA) and Italtel, the manufacturing subsidiary of the STET group in the sector of telecommunication equipment. STET is a holding company which also controls the Italian public telecom operators, recently merged under Telecom Italia.

On 13 September 1994 the operation was notified to the Commission under the EC Merger Regulation. After the initial one month assessment provided for under the Merger Regulation, the Commission considered that the proposed operation raised serious doubts as to its compatibility with the common market (IP No 94/951). The Commission stated that the joint venture between STET and Siemens raised both horizontal and vertical issues in the markets of public telecommunication equipment. With regard to horizontal aspects the joint venture will hold a substantial share of the public switching and transmission equipment market in Italy. In other countries the operation would not be likely to have major effects, since Italtel's sales are basically restricted to Italy. In relation to vertical aspects, Siemens will, through the joint venture, share the pre-existing shareholder link between the Italian telecom operator (Telecom Italia) and the telecom equipment manufacturer Italtel.

The second phase investigation, during which the Commission consulted a large number of telecommunication equipment manufacturers and telecommunication operators, has shown that in spite of the substantial market shares, the creation of the joint venture will not result in market dominance.

Firstly, the Commission has taken into consideration that, with regard to the longer term, and in particular to the introduction of new technologies, the markets for telecommunications equipment are in the process of transformation due to i) the possible development of large markets because of technological developments, ii) the fact that the effects of standardization and public procurement legislation will progressively have a larger impact in opening up national markets, iii) the further progress towards liberalization of services and, foremost, the liberalization of infrastructures which will lead more and more to the creation of a worldwide market for public telecommunications equipment. The effects of the combination of these developments have already been seen in the area of mobile communications, where the definition of a European standard (GSM), the liberalization of services and the liberalization of infrastructures have resulted today in the creation of a European, if not worldwide, market for the supply of telecommunication equipment.

Secondly, as to the shareholding link between the new joint venture and Telecom Italia, it has to be considered that the benefits of any privileged treatment to the joint venture imposed on Telecom Italia by STET would be shared with Siemens. The notified operation reduces therefore the objective interest of STET or Telecom Italia to favour the joint venture at the expense of Telecom Italia. This is more so since Siemens gains a direct influence only over the equipment supplier (Italtel) and no influence at all over the telecom operator (Telecom Italia) or over its parent (STET). Such an operation would be of a very different nature.

Thirdly the distinction between the interests of the service activities and the manufacturing activities within the STET group has been further reinforced in the framework of the reorganization of STET, through the creation of Tecnitel, a 100% owned company of STET. Tecnitel constitutes a separate organizational level in the structure of the STET group whose main function is the supervision of the manufacturing activities of STET.

Furthermore, in the course of the proceedings, STET has given assurances to the Commission with respect to the non interference of STET in the purchasing policy of Telecom Italia, more in particular with regard to the choice of suppliers and to a clear separation of the Boards of Directors, the CEO and in general the management of Telecom Italia, Tecnitel and the companies of the Italtel group.

In the other affected markets, mobile radio networks and private telecommunication equipment, the investigation confirmed that the liberalisation has already resulted in a competitive market situation and that the positions of the joint venture in these sectors do not raise competition concerns.

For the reasons outlined above, the Commission has considered that the proposed concentration does not lead to the creation or reinforcement of a dominant position in any of the markets identified in the sectors of public and private telecommunication equipment, as a result of which effective competition would be significantly impeded in the common market within the meaning of Article 2, paragraph 3 of the merger regulation. The Commission has therefore adopted a decision of compatibility with the common market pursuant to Article 8(2) of Council Regulation (EC) n. 4064/89.

• • •

EC Commission Press Release - Ref: IP/95/288

COMMISSION EXAMINES A THIRD STRATEGIC ALLIANCE IN THE TELECOMMUNICATIONS SECTOR

In July 1994, the Commission cleared the joint venture between British Telecommunications and the US long-distance carrier MCI. A second proposed alliance, between Deutsche Telekom and France Telecom - called ATLAS -is presently being examined by the Commission. Regarding a third important alliance the Commission has just sent a formal request to all the so-called "Unisource" partners asking them for informations; on the basis of the answers received, the Commission will pursue its procedure in this case.

This third important alliance developing in this sector involves the telecommunications operators of the Netherlands, Sweden, and Switzerland, which have set up a company named "Unisource"; as confirmed by press statements made by the parties, the Spanish telecommunications operator Telefonica is to join Unisource as a fourth shareholder. Unisource has also entered into several forms of cooperation with the US long-distance carrier and equipment manufacturer AT&T. Given the importance of these parties on the telecommunications market and in order to ensure a fair and balanced scrutiny under the EU competition rules of all the alliances in this sector,the Commission has at its own initiative launched an examination of the arrangements regarding Unisource as well as its links with AT&T. A formal request for information has been sent to the companies concerned.

During the last two to three years, the telecommunications market in the European Union has been characterized by two parallel developments, namely an accelerating liberalization process and at the same time the emergence of what is commonly referred to as "strategic alliances" involving the public telecommunications operators which previously enjoyed monopoly rights in their domestic markets.

These strategic alliances generally aim at providing highly-advanced, end- to-end, seamless telecommunications services over a wide geographic area, often the whole world. The very fast development of the new technologies involved in these services and the pressure to go global felt by service providers from the companies which represent the main target customers, namely powerful multinational firms, have led to the perceived need by telecommunications operators to cooperate together to offer such services, rather than enter this new market alone.

From the point of view of competition policy, it is not possible to say beforehand whether such alliances -which are in any event by no means uniform - are good or bad. As a general rule, however, given the strong position and technical skills of the telecommunications operators involved, a careful examination under the European Union competition rules will be required with respect to each alliance, to ensure that the liberalization which is painstakingly being achieved in this area is not thwarted by anticompetitive cartel-like arrangements.

Until now, the Commission has issued one formal exemption decision in this area, with respect to the "Concert" joint venture established by the UK operator British Telecommunications and the US long-distance carrier MCI (see IP/94/767). A favourable position was possible among other reasons because of the genuinely global nature of the services offered through "Concert" and the fact that the telecommunications markets of both parent companies are open to competition.

• • •

EC Commission Press Release - Ref: IP/95/312

THE COMMISSION HAS CONSIDERED THAT THE CREATION OF OMNITEL-PRONTO ITALIA IS NOT A CONCENTRATION AND HAS TO BE ASSESSED UNDER ARTICLE 85

Merger regulation

The Omnitel-Pronto Italia operation, which was notified to the Commission on 24 February 1995, consists of the creation of a joint venture which will operate the second GSM mobile telephone system in Italy.

Since, from a procedural point of view, the Merger Regulation does not apply to cooperative joint ventures, the Commission has decided that the notified operation is not a concentration and does not, therefore, fall within the scope of application of the Merger Regulation and should thus be examined under the provisions of Article 85 of the Treaty where it will benefit from the accelerated treatment applied to structural joint ventures.

Omnitel - Pronto Italia was created by two undertakings Omnitel Sistemi Radio Cellulari SpA (Omnitel) and Pronto Italia SpA which initially competed separately for the award of the second GSM licence in Italy and afterwards decided to join forces to submit a joint bid. Both parents, Omnitel and Pronto - Italia are themselves Joint Ventures created by several industrial and financial undertakings for the purpose of obtaining the GSM licence in Italy. The major shareholders of Omnitel are Olivetti, Bell Atlantic, Cellular Communications Inc., Telia and Lehman Brothers. Pronto Italia, which is a consortium of 14 undertakings, has as its main shareholders Air Touch International, Mannesmann and Banca di Roma.

On 22 December 1994, the Commission had already decided, to grant the parties a derogation in order to implement the concentration before its notification. The decision of the Commission was justified by the necessity for the parties to begin without delay the build-up of their GSM network in order to meet the strict deadlines imposed by Italian authorities and also in order to prevent the reinforcement of the current position of strength held by Telecom Italia which had already built its own GSM network and was selling this service.

After examination, the Commission has considered that the proposed operation takes place in a services market, where a rapid evolution is observed with a rising trend towards a progressive interaction of the markets. Some of the joint venture's ultimate parents, which are GSM operators in other EU countries, could be in competition in this increasingly global market, and therefore a risk of coordination of their competitive behaviour could not be excluded

• • •

EC Commission Press Release - Ref: IP/95/311

THE COMMISSION IS INITIATING A DETAILED INVESTIGATION INTO "NORDIC SATELLITE DISTRIBUTION"

The cooperation project "Nordic Satellite Distribution" (NSD), grouping Norsk Telekom AS, a wholly-owned subsidiary of the Norwegian telecommunications operator Telenor AS, TeleDanmark AS, the Danish telecommunications operator and the Swedish group Kinnevik will be the subject of a detailed investigation by the European Commission.

The project, which was notified to the Commission on 23 February last, is mainly concerned with the distribution of television channels to cable distributors, operators of multiple-user antennae and individuals with dish aerials through the leasing of satellite capacity covering the Nordic region (Denmark, Sweden, Norway and Finland).

The Commission has decided to initiate this second, four-month stage of detailed investigation in order to ascertain whether the project will give NSD a permanent dominant position in several sectors on the Nordic market.

Basically, NSD will be the only operator covering the Nordic region whose programmes can be received by small dish antennae.

Moreover, the partners in NSD hold a major share of the cable network in the region.

The vertical integration between satellite operators and television programme distributors combined with the strong position held by the parent companies in markets both upstream and downstream (satellite owners, cable operators and distributors) would give NSD a competitive advantage in all market sectors.

A major concern for the Commission will be to ascertain whether such an advantage would prevent new competitors from entering the Nordic market.

. . .

EC Commission Press Release - Ref: IP/95/426

COMMISSION APPROVES CREATION OF SWEDISH TELECOMS JOINT VENTURE

The European Commission yesterday approved the creation of a telecommunications joint venture in Sweden by British Telecom, Tele Danmark and Telenor, the Danish and Norwegian public telecom operators. The new company will provide domestic and international services for both voice and data in competition with existing Swedish operators such as Telia and Tele2.

The new joint venture - provisionally called TBT Communication AB - will combine the existing telecom service activities of the three parents in Sweden. It will offer telecom services to both residential and corporate customers. TBT will be both a network operator and service provider. It will, in principle offer communication service throughout all of Sweden. At first, however, its efforts will be concentrated on the triangle represented by Stockholm, Goteborg and Malmo which represent 50% of the business market. Initially, for reasons of necessity and economy, the TBT network will be fully based on leased lines from Telia, Tele2 or Banverket (the Swedish railway agency owning the railway infrastructure). However, as from 1998 TBT plans to undertake its own infrastructure investment.

At present, the combined market share of the three parents activities in Sweden is relatively insignificant. TBT will face strong competition with the existing operators providing telecom services in Sweden especially Telia, the former monopoly operator as well as Tele2 and AT&T Nordics, the Swedish subsidiary of AT&T.

Competitive asessment

The markets for telecommunications services are evolving very rapidly as a result of technical change and liberalisation of the regulatory environment. Sweden (along with the UK) has one of the most liberalised telecommunications regulatory regimes in Europe. This has led to a number of overseas telecommunications companies setting up operations in Sweden to take advantage of this regime. Neverthless, despite the establishment of these competitors, the state owned national telecom operator -Telia- still enjoys an overwhelming market share for the voice market (90% according to the parties) and a stron market share in data communications (70%).

In comparison, the market share acquired by new entrants has been relatively small -none has a market share exceeding 5% for either voice or data. AT&T Nordics - the Swedish subsidiary of AT&T established in 1985 - has a market share of less than 1% for voice, BT's existing Swedish subsidiary has less than 1% of voice and less than 5% of data whilst Tele2 (the only Swedish operator apart from Telia to hold a Recognised Private Operating Agency status) has secured a market share of only 2% of voice and 3% of data since its formation in 1991.

In the light of the above facts, the Commission has decided that the operation does not raise serious doubts as to its compatibilty with the common market and has therefore approved the operation.

• • •

EC Commission Press Release - Ref: IP/95/443

"GLOBAL EUROPEAN NETWORK" PROJECT FOR OPTICAL-FIBRE TRANSMISSION OF DATA: MR VAN MIERT SEEKS CLARIFICATION OF INFRASTRUCTURE PRICES

The Commission is seeking more information on the prices to be charged to users of the future "Global European Network" (GEN) for data transmission before taking a position on the project, which was submitted at the beginning of 1994 by a number of telecommunications network operators in Europe.

The GEN project involves the creation of a network of optical-fibre communications linking Frankfurt, London, Madrid, Milan and Paris. The initial partners in the project (British Telecom, Deutsche Telekom, France Telecom, STET and Telefonica, later joined by Belgacom and by the Swiss, Dutch and Portuguese telecoms administrations) intend to install and manage the computer equipment needed to set up sub-circuits through this network and to connect them to the national circuits in their countries in order to offer advanced, ultra-rapid data-transmission services.

While recognizing the strategic nature of the GEN project, which has significant value added in relation to international digital half-circuits, Mr Van Miert, Member of the Commission with special responsibility for competition policy, has asked his departments to find out more about the price levels and costs of national and international digital circuits.

The aim is to check, in particular, whether the prices currently charged are justified.

Mr Van Miert's departments will focus on the level of prices that competitors would be required to pay in order to acquire the technological resources needed to launch a system in competition with GEN:

- the competitors would undoubtedly not have the option of supplying large- scale infrastructures and of using the profits thus made to finance the supply of non-reserved services such as international network circuits;

- potential competitors, in particular suppliers of alternative infrastructures, will have to pay the official price to buy the equipment needed to launch systems in competition with GEN. On the other hand, traditional telecoms operators have always used each other's equipment at a substantially lower price, on the basis of reciprocity.

Not only should the prices charged between partners in GEN not cause discrimination, but there should be no abuses in the prices charged to the public for hiring the digital circuits needed to implement GEN, in accordance with the principles of open network provision.

The latter point is of particular interest. With regard to digital circuits, price differences are very striking throughout the world: for example, the prices charged in Europe are up to ten times higher than those in the United States.

...

EC Commission Press Release - Ref: IP/95/432

RESULTS OF THE CONSULTATIONS ON THE GREEN PAPER ON THE LIBERALISATION OF INFRASTRUCTURE FOR TELECOMMUNICATIONS AND TV WIRED NETWORKS.

The Commission has today adopted(1) , following the proposal by Mr Bangemann and Mr Van Miert, the report on the results of the consultation on the Green Paper (2) concerning the Liberalisation of Telecommunications Infrastructure and Cable TV networks.

The consultations have attracted a wide-ranging response. Several hundred organisations, companies and associations, including trade unions and user and consumer organisations have taken part in hearings in Brussels. In addition, over 100 written submissions have been received. The consultations have produced widespread support for the liberalisation proposals and programme of the Commission in the telecommunications sector.

Moreover, the consultations have demonstrated the wish for the Commission to come forward as soon as possible with its package of proposals on the regulatory framework which encourages dynamic competition and promotes interconnection and interoperability. In particular, the consultations have re-emphasised the need for effective measures in the key areas highlighted in the Green Paper : i.e. licensing, interconnection, financing universal service in a competitive environment and the full and effective implementation of competition rules.

The key role of the Telecommunications sector Modernisation, reform and a transition to effective competition are the key to continuing growth and prosperity of the European Union's telecommunications sector. The telecommunications sector in the European Union has a yearly turnover of more than 140 billions ecu, i.e. more than 3 per cent of GDP, and growing strongly. Cross-border and international telecommunications usage on the public networks has been increasing at over 10 per cent annually on average in recent years, with an even faster growth on private networks. There are over 170 million main telephone lines in the Union and nearly 15 million mobile telephone subscribers, with the latter growing rapidly in some of the more competitive markets.

Moreover, the modernisation, growth and cost effectiveness of telecommunications infrastructures underpins the whole development of telecommunications in the Union and the increasing use of communications and information services by businesses and consumers, large and small.

The Major issues and results of the consultations Above all, the consultations have shown that there is general agreement on the need for a transparent predictable and effective regulatory framework across the Union to allow effective competition, particularly on the issues of universal service, interconnection and licensing.

On licensing of infrastructure and services, transparent measures and procedures for licensing or granting authorisations need to be in place in advance of 1998 so that the liberalisation deadline that has been agreed can be respected.

Interconnection between existing and new networks, fixed and mobile has been recognised as a key ingredient in the new competitive environment. There are both technical and financial aspects to interconnection and there is widespread support for a common regulatory framework at a European level to ease and resolve difficulties in negotiating interconnection arrangements.

With respect to universal service there was recognition for the need of a common concept at a European level. Most operators, service providers and user organisations felt that the definition as the basic voice telephone service was an appropriate starting point. This concept could evolve with changes in technology and market demand but any evolution should not create disproportionate barriers to market entry.

As to the mechanisms of financing the universal service there was agreement that key characteristics should be that it does not distort market structure or delay the introduction of competition and that it places pressure on operators to improve their performance.

Although there was considerable support from the consultations for the use of universal service funds, the Commission believes on the basis of subsidiarity that, member states can choose the method in which the cost is financed, provided it is through a transparent and agreed mechanism.

With respect to the international dimension, there was also strong agreement on the need for the European Union to seek comparable and effective access to third country markets both for operators and the equipment sector.

The Next steps The Commission believes that the Consultation has established a clear consensus around the main proposals put forward in the Green Paper and in addition has provided a major input to the measures that the Commission will now table.

On the liberalisation aspects, the Commission will draft amendments to the 1990 Services Directive(3) in order to assure full liberalisation of telecommunications infrastructure and services at the beginning of 1998. In addition, the Commission will draft amendments to the Service Directive with regard to liberalising mobile and personal communications. The Commission has already proposed measures to liberalise the use of Cable TV networks to supply liberalised telecommunications services.

(1) COM(95) 158 (2) Part 1 of the Green Paper (COM(94) 440) was published on 25 October 1994 and Part II (COM(94)682 on 25 January 1995) (3) (90) 388 EEC

...

EC Commission Press Release - Ref: IP/95/549

COMMISSION LAUNCHES INVESTIGATIONS INTO GLOBAL MOBILE SATELLITE SYSTEMS

By the year 2000 millions of subscribers worldwide are expected to be offered satellite personal communications services. In this sector global consortia start are being set up involving major american and european companies. This new phenomenon which is set to become a dominant feature of the international satellite market in the second half of this decade has attracted the attention of the European Commission, among others as far as competition policy is concerned.

Hence, Mr. Karel Van Miert, the European Commissioner in charge of competition matters has recently asked his services to send out requests for information regarding two mobile satellite systems (MSS), Globalstar (led by the US companies Loral and Qualcomm) and Iridium (led by the US company Motorola). Inmarsat-P, another major MSS, has already notified its system and partnership agreements to the Commission's competition services. Since Iridium and Globalstar have not yet followed suit, the Commission has commenced investigations at its own initiative.

Although MSS systems are inherently global and the establishment of such systems, in principle procompetitive, it is important that they are screened from the outset under the EC competition rules. The aim of the investigation is to ensure level playing fields in the EU and, in particular, to assess the impact of the consortia and their partnership and related agreements on future competition in the relevant more localised markets within the European Union.

As part of its examination of these ventures, the two consortia have been asked to provide a comprehensive description of their systems from the technical, financial and commercial point of view. Moreover, the investigation also addresses the major areas of potential concern which these projects present from the point of view of the competition rules of the EC Treaty; in particular the nature, terms and conditions of the distribution policies chosen by the consortia, the nature of links with cellular terrestrial networks and the access by competing MSS to infrastructure owned by partners in one of them. Most of these areas of concern have also been identified with regard to Inmarsat-P.

Satellite-based, global mobile communications using hand-held terminals represent a market which is expected to result in revenues of 10 to 20 Billion ECU during the next decade. The indirect effects which will ripple through related markets will be much greater. Due to the scarcity of frequencies, the very heavy financial implications involved in launching and operating the large number of satellites needed for such systems, and a high level of market uncertainty, however, it is unlikely that there will be more than a few major players. Given this small number of alternatives and the potential market power of these global satellite system operators, it is particularly important that competition is maximised in the European Union for the other, "downstream", elements of the market involving local service provision, distribution and equipment supply Open, non-discriminatory and fair conditions regarding partnerships and agreements will need to be maximised.

The Mobile Satellite Systems Services Market

The general service to be offered involves the full coverage of a roaming satellite system, using LEO (low earth orbit) or MEO (medium earth orbit) satellites, which will also support full user mobility, as well as offering the user a light hand-held portable terminal and identification by a single number anywhere in the world. Entering the global age, it is clear that global service is becoming the most appropriate solution to solving an increasing number of communication needs. It is expected that mobile voice service will be the primary application for these networks, but two other significant segments will involve so-called mobile personal digital assistants, data transmission and paging.

In essence, MSS represent the ability to maximise mobility of users, by providing global roaming and coverage in remote areas where terrestrial services may be uneconomic. "Global coverage" means not only that the user can move

ANNEX 85

anywhere, but also that the communications system can "move" to serve new fixed or "stationary" users. Thus, these systems are not aimed only at the international business traveller. In fact Commission studies predict that by far the greatest potential (in terms of numbers of subscribers) in the MSS market will be for communities in less developed regions of the world as a substitute for "fixed service" where fixed networks have yet to be rolled out or are very poor. Central and Eastern Europe represent an important customer base in this context, which could be accessed from gateways within the EU. A third important use of MSS will be as a substitute for cellular mobile telephony in areas where the cellular network has failed to penetrate (i.e. rural parts of the developed world and both urban and rural parts of lower income countries).

MSS is expected to act as complement to both GSM and DECT wireless technologies as well as the public telephone network, enhancing universal service coverage since it is uniquely well suited to areas of low population density.

Iridium

Motorola, a major US telecommunications equipment manufacturer, plays the leading role in the Iridium consortium. A number of European companies are participating by way of partnership agreements and/or investment. This includes companies such as STET (the Italian state holding company, majority owner of Telecom Italia) and Vebacom (subsidiary of the major German telecom corporation VEBA AG).

Motorola Satellite Communications is in charge of spacecraft construction but Iridium itself will own and operate the system once in place. Lockheed Corp. (USA) is contracted to actually build 125 satellites for Iridium by the year 2003. Other partners/investors include Krunichev Enterprise (CIS) who will launch the satellites with Proton rockets, Scientific Atlanta Inc (USA) who will develop and manufacture the hand-held units as well as the satellite earth terminals, and Sprint, the third US long-distance telecommunication carrier. The total cost of the system is estimated at US$ 3.8 billion.

In 1990 Motorola filed its application to operate a global satellite personal communications system with the US Federal Communications Commission (FCC). Approval was given and frequencies allocated by the FCC in January 1995. Iridium plans to be operational with a limited number of satellites by 1997-98, and expects 1.5 million subscribers by the year 2000. It will offer voice, paging and data services.

GlobalStar

The Globalstar consortium is led and sponsored by the Loral Corporation, a leading US defence electronics company which acquired Ford Aerospace in 1990. Loral Qualcomm Satellite Service has bypassed many funding problems experienced by other players in the satellite industry by use of existing, in orbit, satellites. Partners/contractors include the European companies Alcatel (France), Aerospatiale (F), Alenia (I) and Deutsche Aerospace (D). The total cost of the system is estimated at US$800 million

Like Iridium, Globalstar has been approved in the US by the FCC in January 1995. It expects to be operational in the US around 1999-2000 and globally, around five years later. Globalstar will also be offering voice and data, as well as tracking services

Inmarsat-P

Inmarsat-P is a MSS system sponsored by the International Maritime Satellite Organization (Inmarsat) and a large number of its signatories, including the European companies Telefonica de Espana (E), Telecom Finland (SF), OTE (Gr), Swiss Telecom (Swt), CPRM (P), PTT Telecom (NI) and Detemobil (D). The Inmarsat-P system which will consist of 12 satellites in intermediate circular orbit, will be operational around the turn of the century.

laws of the Member States relating to turnover taxes: OJ L 280, 29.9.1989; Bull. EC 4-1989, point 2.1.42

Adopted by the Commission on 27 February. Purpose: to authorize the United Kingdom to continue applying after 1 April a derogation which is aimed at combating the tax avoidance which may occur on the transfer of certain assets to a company which is a member of a group; to modify the scope of the derogation authorized by Council Decision 89/533/EEC; to clarify the legal basis of the new derogation.

COM(90) 45 final

Trans-European networks

1.1.32. Council resolution concerning trans-European networks

- Council endorsement: Bull. EC 12-1989, point 2.1.7

Formally adopted on 22 January.

OJ C 27, 6.2.1990

Competition

Eighteenth Report on Competition Policy

1.1.33. Parliament resolution on the Commission's Eighteenth Report on Competition Policy.

- Eighteenth Report: Bull. EC 7/8-1989, point 2.1.62
- Economic and Social Committee opinion: OJ C 62, 12.3.1990; Bull. EC 12-1989, point 2.1.77

Adopted on 18 January. Parliament examined recent developments in the competition field, notably in relation to merger control, State aid, liberalization of telecommunications markets, competition in the services sectors and certain procedural matters.

OJ C 38, 19.2.1990

Application of the competition rules to businesses

RTT

1.1.34. Intervention by the Commission, without a formal decision, following a complaint by a private supplier of value-added telecommunications services alleging abuse by the Régie belge des télégraphes et téléphones of its dominant position. The complaint related to the terms on which telecommunications circuits were leased. The Régie has decided no longer to apply the standard conditions governing access by third parties to an international data transmission network, which contained restrictions prima facie incompatible with the competition rules. It has undertaken, as regards leased international telecommunication circuits to which third parties may have access, to impose no restrictions other than a ban on the mere transfer of data. On the strength of this undertaking, the Commission closed the file on the case on 19 January.

CEPT

1.1.35. Intervention by the Commission, without a formal decision, in response to a measure by the European Conference of Postal and Telecommunications Administrations (CEPT). Following this intervention, the CEPT withdrew, on 21 February, a recommendation to its member organizations concerning the terms for leasing out international telecommunications circuits. The Commission had found that the recommendation amounted to a price-fixing agreement caught by Article 85 of the EEC Treaty which substantially restricted competition within the Community.

Alcatel-ANT

1.1.36. Commission Decision 90/46/EEC based on Article 85(3) of the EEC Treaty. Exemption of an R&D agreement between

ANNEX I - 87

DOCUMENTS ON THE APPLICATION OF THE COMPETITION RULES TO THE TELECOMMUNICATIONS SECTOR

ANNEX II

Index to the DG XIII publication:
Official Documents
Community Telecommunications Policy

ANNEX II - II

Reprints of official documents

as published in the Official Journal of the European Union

Contents list:

COUNCIL RESOLUTION of 22 December 1994 on further development of the Community's satellite communications policy, especially with regard to the provision of, and access to, space segment capacity (94/C 379/04; OJ C379/5, 31.12.94) p.450

This list does not include the basic policy documents published by the Commission in this field:

Green Paper on the development of the Common Market for Telecommunications services and equipment (COM(87)290, 30.06.87)

Green Paper on a common approach in the field of satellite communications in the European Community (COM(90)490, 20 11 90)

1992 Review of the Situation in the telecommunications services sector (SEC(92) 1048) and Communication to the Council and European Parliament on the consultation on the the review of the situation in the telecommunications sector (COM(93) 159 final)

Green Paper on a common approach in the field of mobile and personal communications in the European Union (COM(94)145, 27.04.94)

Green Paper on the liberalisation of Telecommunications Infrastructure and cable television networks: Part One (COM(94)440, 25 10 94)

These documents should be ordered separately

Policy documents in neighbouring fields, such as the Green Paper on the development of the single market for postal services (COM(91)476, 11 06 92) have not been included.

Also not included are references to specific IT application programmes such as: Drive, Delta, Aim and the Insis and Caddia programmes and the implementation of the information services market (programme IMPACT) Most of the former programmes are now integated in the general programme on telematics systems 91/353/EEC

Reports on the above initiatives are also not included