COMMISSION DECISION

of 17 July 1996

relating to a proceeding under Article 85 of the EC Treaty and Article 53 of the EEA Agreement

(Case No IV/35.337 — Atlas)

(Only the English, French and German texts are authentic)

(Text with EEA relevance)

(96/546/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular Articles 2, 6, and 8 thereof,

Having regard to the application for negative clearance and the notification for exemption submitted, pursuant to Articles 2 and 4 of Regulation No 17, on 16 December 1994,

Having regard to the summary of the application and notification published pursuant to Article 19 (3) of Regulation No 17 and to Article 3 of Protocol 21 of the EEA Agreement [2],

After consultation with the Advisory Committee for Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

A. INTRODUCTION

(1) The Atlas venture was notified to the Commission on 16 December 1994. This transaction brings about a joint venture owned as to 50 % by France Télécom (FT) and as to 50 % by Deutsche Telekom AG (DT). The notification of Atlas replaces the notification on 3 June 1993 [3] of a joint venture formed by FT and DT (at the time Deutsche Bundespost Telekom) under the name of Eunetcom to which this Decision extends. Atlas is also the instrument of DT and FT's participation in a second transaction, notified under the name of Phoenix, with Sprint Corporation (Sprint) [4]. Phoenix, since renamed as GlobalOne, is the object of a separate Decision pursuant to Article 85 (3) of the EC Treaty [5].

(2) Atlas is structured at two levels. A holding company established in Brussels, Atlas SA, incorporated as a *société anonyme* under the laws of Belgium, has three operating subsidiaries, namely Atlas Télécommunications SA (Atlas France) in France, Telekom Internationale Telekommunikationsdienste GmbH (Atlas Germany) in Germany, and one for the rest of Europe. Atlas France and Atlas Germany will initially provide technical and sales support to FT and DT, being the French and German distributors of Atlas and GlobalOne products. After full and effective liberalization of the telecommunications infrastructure and services markets in France and Germany, scheduled to occur by 1 January 1998, DT's subsidiary for the provision of X.25 packet-switched data communications, T-Data Gesellschaft für Datenkommunikation mbH (T-Data) [6], will be merged with Atlas Germany while FT's subsidiary for the provision of X.25 packet-switched data communications, Transpac France, will be merged with Atlas France.

B. THE PARTIES

(3) Deutsche Telekom AG (DT) and France Télécom (FT) are the public telecommunications organizations (TOs) in Germany and France. Both

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No C 337, 15. 12. 1995, p. 2.
[3] OJ No C 175, 26. 6. 1993, p. 11.
[4] OJ No C 184, 18. 7. 1995, p. 11.
[5] See p. 57 of this Official Journal.
[6] The parties have submitted that T-Data is the new name of DT's former Datex-P division for the provision of X.25 packet-switched data communications services, incorporated after publication of the Commission notice pursuant to Article 19 (3) of Council Regulation No 17 and Article 3 of Protocol 21 of the European Economic Area Agreement in this case; OJ No C 337, 15. 12. 1995, p. 2 (hereinafter the 'Article 19 (3) notice').

supply telephone exchange lines to homes and businesses; local, trunk and international communications to and from their respective home country. Worldwide turnover in 1994 was ECU 31,8 billion, a 4,3 % increase over 1993, for DT and ECU 21,7 billion, a 1,8 % increase over 1993, for the FT group.

C. THE RELEVANT MARKET

1. Product markets

(4) Atlas will address the markets for the provision of non-reserved telecommunications services to corporate users both Europe-wide and nationally. Atlas will target two separate product markets for non-reserved services, namely:

(5) *The market for customized packages of corporate telecommunications services*

This market comprises mostly customized combinations of a range of existing telecommunications services, mainly liberalized voice services including voice communication between members of a closed group of users (virtual private network (VPN) services), high-speed data services and outsourced telecommunications solutions specially designed for individual customer requirements. The market for customized packages of corporate telecommunications services, enhanced by features such as tailored capacity allocation, billing, a 24-hour technical service, etc., is currently changing and evolving rapidly. Customers demand such packages of sophisticated telecommunications and information services offered by one single provider. That provider is expected to take full responsibility for all services contained in the package from 'end to end'. Accordingly, DT and FT intend to offer such customers through Atlas whatever services existing technology allows them to offer from time to time within the applicable regulatory framework. In this regard, the parties have indicated that Atlas will eventually extend to international voice traffic and other basic services, regulations permitting.

These services are provided over high-speed, large-capacity leased lines linking sophisticated equipment on customer premises to the service provider's nodes. Alternatively, other means of transmission, such as satellite or mobile radio capacity, can be used to ensure the geographic coverage demanded from time to time. Such services employ advanced state-of-the-art protocols, data compression techniques, equipment and software. In this market, Atlas is expected to offer a portfolio of services including the following (the 'Atlas services'):

— data services: high- and low-speed packet-switched, Frame Relay, Internet Protocol (IP) services,

— value-added application services: value-added messaging, video-conferencing and electronic document interchange (EDI) services,

— voice VPN services,

— value-added leased lines offerings: pre-provisioned, managed and circuit-switched bandwidth,

— very small aperture satellite (VSAT) network services, and

— outsourcing: customers are invited to transfer responsibility and ownership of their networks to Atlas. If they agree, Atlas may integrate into its own offerings any third-party products already owned by customers who wish to keep such offerings, as the case may be.

Of the above, some services will remain with DT and FT and therefore not be Atlas services. These services are: (i) those national receive-only VSAT services in France which provide a single channel per carrier ('receive-only SCPC'); (ii) national messaging and EDI services in Germany; (iii) data network services using Asynchronous Transfer Mode (ATM) technology in France, Germany and any third country; and (iv) national VPN services in France and Germany. The integration into Atlas of any such service and/or its underlying network as well as of any broadband transmission capacity operated by DT and/or FT necessitates separate notification to the Commission.

(6) Due to the high cost of building and operating the networks needed to provide customized packages of corporate telecommunications services, such services can be commercially viable only if provided to multinational corporations, extended enterprises, and other intensive users of telecommunications and in particular the largest among those customers generating continuous high traffic volumes [7]. Many of those potential customers have complex and specific needs and have often acquired expertise in managing own internal networks. Whether each of the services listed above constitutes a separate product market can be left open for present purposes, since a separate analysis would not affect the Commission's conclusions.

[7] See Commission Decision 94/579/EC of 27 July 1994 in Case No IV/34.857 — BT-MCI; OJ No L 223, 27. 8. 1994, p. 36.

(7) However, this Decision relates only to Atlas' range of products and its business scope as notified. Any substantial change of products or business scope, and in particular (i) the integration into Atlas of broadband transmission capacity (such as Asynchronous Transfer Mode (ATM) networks) in France and Germany and (ii) the offering by Atlas of public basic telecommunications services (such as voice telephony services([8])) will require a new notification.

(8) *The market for packet-switched data communications services*

Atlas will also be active on a separate market for packet-switched data communications services. The Commission considers data communications services to be a distinct telecommunications product market, without prejudice to the existence of narrower markets([9]). One narrower market is that for packet-switched data communications services([10]). Packet switching is a means to improve network capacity utilization and consists of splitting data sequences into 'packets', feeding these and other packets into the network optimizing utilization of available capacity, switching the packets to the desired destination and rearranging the packets to obtain the original data sequences. One standard used for the provision of packet-switched data communications services is the X.25 protocol. Packet-switched data services using this protocol (the 'X.25 data services') are slower than packet-switched data communications services using protocols such as Frame Relay, Asynchronous Transfer Mode (ATM) or Internet Protocol (IP), given that X.25 data services rely on smaller packets and require switches which allow charging per packet.

(9) Packet-switched data communications services can be divided into different customer segments within the same product market.

1. On the one hand, some customers generate mostly erratic and geographically widespread demand for low-speed, low-volume applications. These features are due either to the specific type of use (such as banks operating cash machines nationwide, networks of points-of-sale in shops) or to the size of such customers, as with small and medium-sized enterprises (SMEs). Such services are billed by volume sent, according to published tariffs. All incumbent Member State TOs including DT and FT operate dense public networks with nationwide coverage providing X.25 data services to this customer segment (the 'public packet-switched data networks'). There is only one public packet-switched network in each Member State, built by the incumbent TO under a public service obligation before market liberalization.

2. On the other hand, larger corporate customers and other extended users generate more substantial and regular traffic. Often the requirements of these users make it worthwhile for either third-party service providers or the potential customer itself to assume the high cost of creating customized leased lines circuits (for example, to set up VPNs) to meet individual service demand. This demand is therefore increasingly met either by packet-switched services using protocols other than X.25, notably Frame Relay and ATM (for VPN applications) and IP (for both public and VPN applications) or by switched services (PSTN or ISDN services). Packet-switched data communications services to such users are billed according to negotiated rates that take account of the individual demand features of a particular customer.

(10) Virtually all companies active in each individual Member State of the European Community are potential if not actual customers for national packet-switched data communications services. Such services are also required by SMEs, albeit in smaller volumes and possibly less regularly than by larger users. Seldom will such volumes make it worthwhile for service providers to invest in leased lines with the specific purpose of reaching these SMEs, which are therefore in a weak negotiating position and hardly capable to date of switching from the current provider, typically the incumbent TO, to a competitor.

(11) Packet-switched data communications may also be offered as one service in a customized package of corporate services. However, even as part of such an arrangement, packet-switched data communications services are based on mature internationally standardized technology and provided over standard terrestrial infrastructure. At the national level, choice from a wider range of packet-switched data communications offerings

([8]) Defined in the seventh indent of Article 1 of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services; OJ No L 192, 24. 7. 1990, p. 10, hereinafter 'Services Directive', as last amended by Directive 96/19/EC; OJ No L 74, 22. 3. 1996, p. 13.

([9]) Commission's Guidelines on the application of Community competition rules in the telecommunications sector, OJ No C 233, 6. 9. 1991, p. 2, at paragraph 27.

([10]) Defined as 'packet- and circuit-switched services' in the ninth indent of Article 1 (1) of the Services Directive — see footnote 8.

than merely X.25 data services is available to larger customers that are not served over the TO's public packet-switched data networks but over customized leased-line circuits. However, most existing customers for packet-switched data communications currently generate annual turnover of far below ECU 10 000 each and are not therefore potential users of customized packages of corporate telecommunications services. Therefore, packet-switched data communications services offered by Atlas constitute a product market separate from the market for customized packages of corporate telecommunications services equally targeted by Atlas.

2. **Geographic markets**

The markets for customized packages of corporate telecommunications services

(12) Given that cost and price differences are quite substantial, demand for customized packages of corporate telecommunications services exists in at least three distinct geographic markets, namely at a global, at a cross-border regional and at a national level. Atlas will provide such packages to large users Europe-wide and nationally. Through GlobalOne, customized packages of corporate telecommunications services offered by Atlas will also have global 'connectivity' — the technical option of extending a given service offering beyond Europe by linking a customer's premises worldwide over Phoenix 'Global Backbone Network'([11]). Given the considerable costs involved, customized packages of corporate telecommunications services are today mainly demanded by large multinational corporations, extended enterprises, as well as major national and other intensive users of telecommunications. The Commission has discussed the requirements of such users in its Decision 94/579/EC (BT-MCI)([12]).

(13) Due to the cost structure of providing customized packages of corporate telecommunications services, notably the cost of leasing the required infrastructure, prices of such services are related to geographic coverage, as is the cost of additional features (for example, one-stop-billing, help-desk and technical assistance around the clock, customized billing). There is evidence that increasing availability of trans-European networks will ultimately blur the distinction between national and cross-border or ultimately Europe-wide provision of non-reserved telecommunications services. However, certain sophisticated national non-reserved services currently available from DT and FT in Germany and France respectively will not be Atlas services, including DT and FT's national data network services based on ATM or equivalent packet-switching technology (Datex-M and Transrel respectively) and the national services mentioned at recital 5. This demonstrates that a distinction between national and cross-border provision of customized packages of corporate telecommunications services remains valid to date.

The markets for packet-switched data communications services

(14) Price differences for these services may be less than for customized packages of corporate telecommunications services. However, a national, cross-border regional and global geographic level can be distinguished for packet-switched data communications services. In terms of traffic volumes, supply and demand of packet-switched data communications services are mostly national. For instance, in Germany DT's existing T-Data packet-switched data communications services division hardly ever provides such services across the border while FT's German subsidiary Info AG, in spite of appertaining to FT's seamless cross-border Transpac network, only provides one fifth of its packet-switched data communications services across the border. This assessment was confirmed by interested third parties further to the Commission's notice on the Atlas notification([13]).

(15) At a global and Europe-wide level, X.25 data services and customized packages of corporate telecommunications services may be partly converging to the extent that large customers of the latter do not require separate provision of X.25 data services once such services are available as part of service combinations offered over advanced networks. Accordingly, large European telecommunications users demand services with global 'connectivity', meaning that they may be extended beyond Europe if so required. DT and FT have moved to meet this demand in entering the GlobalOne agreements with Sprint. Along with increased availability of advanced, cross-border network infrastructure, the market is generally expected to overcome distinctions along national borders in the medium term. However, separate national geographic markets subsist to date for packet-switched data communications services and for the provision of customized packages of corporate telecommunications services respectively.

([11]) See Phoenix Decision in Case No IV/35.617, at recital 27.
([12]) See footnote 7.
([13]) Notification of a joint venture (Case No IV/35.337 — Atlas), OJ No C 377, 31. 12. 1994, p. 9 and the Article 19 (3) notice (see footnote 6 and recitals *et seq.*).

D. MARKET SHARES OF ATLAS

The market for customized packages of corporate telecommunications services

(16) The parties estimate the European markets for non-reserved corporate telecommunications services (exclusive of data communications services) to be worth approximately ECU 505 million (1993 figures). Of this total, end-to-end services accounted for approximately ECU 15,1 million, VPN services for approximately ECU 220,6 million, VSAT services for approximately ECU 173,2 million and outsourcing services for approximately ECU 96,4 million. According to the notification DT and FT's aggregate market shares (1993 figures) in the European Community were 25 % in the end-to-end services market, 27 % in the VPN services market and 2,3 % in the outsourcing services market. Market shares for VSAT services are difficult to calculate given that TOs mostly use VSAT terminals either as back-up facilities for other services or to extend the geographic scope of services despite terrestrial infrastructure shortcomings; however, DT and FT taken together operated 10 907 VSAT terminals by June 1994, equivalent to 29 % of the total installed base of interactive, data one-way or business television VSAT terminals in the European Economic Area.

As to the national market for customized packages of corporate telecommunications services in France and Germany respectively, DT and FT's aggregate market shares for individual non-reserved corporate telecommunications services are 93 % in the French VPN market (where DT has no presence) against 0 % in the German VPN market, and 60 % in the French market for end-to-end services against 35 % in the equivalent German market. DT and FT's outsourcing joint venture, Eunetcom B.V., achieved 36 % of total outsourcing turnover generated in France and 29 % of total outsourcing turnover generated in Germany. As for VSAT services, DT has installed approximately 25 % of all VSAT terminals in Germany; this Member State accounts for 18 % of the total installed base of such terminals in the EEA.

In third-country national markets, including all EEA member countries, DT and FT's presence is to date negligible or non-existent.

The market for packet-switched data communications services

(17) DT and FT estimate the European market for data communications services to be worth approximately ECU 2,8 billion (1993 figures). According to the notification DT and FT's aggregate shares (1993 figures) of this market were 35 %. Among national markets, Atlas will have a particularly strong position in France and Germany. DT and FT's aggregate market share for all data communications services is 79 % in Germany and 77 % in France, of which approximately half relates to services provided by DT's X.25 data services subsidiary (now incorporated as T-Data) and FT's Transpac France subsidiary. Both subsidiaries will remain outside the scope of Atlas until the French and German telecommunications infrastructure and services markets are fully and effectively liberalized, as is scheduled for 1 January 1998 (see recital 24).

E. MAIN COMPETITORS OF ATLAS

The markets for customized packages of corporate telecommunications services

(18) Since the BT-MCI Decision several players, acting alone or jointly with partners, have entered or are entering the international markets providing non-reserved corporate telecommunications services. The most important of these players, albeit with disparate geographic scope and target customers, include: AT&T WorldPartners, Concert, IBM-Stet, International Private Satellite Partners([14]), Unisource([15]) or Uniworld([16]). Some of these strategic alliances are merely projects while others are awaiting regulatory approval. However, all of the above share the aim of positioning the respective partners in anticipation of the full liberalization.

The market for packet-switched data communications services

(19) The market for packet-switched data communications services features a substantially larger number of players than that for customized packages of corporate telecommunications services. Among the global players in this market are the alliances mentioned at recital 18 competing with providers such as EDS, FNA, Infonet, SITA or Swift and operating subsidiaries of large global companies such as AT&T Istel, Cable & Wireless Business Networks, DEC's Easynet, or GEIS. In addition, a large number of smaller players competes at a cross-border regional or national

([14]) See Commission Decision 94/895/EC of 15 December 1994 (Case No IV/34.768 — International Private Satellite Partners); OJ No L 354, 31. 12. 1994, p. 75.

([15]) Notification of a joint venture (Case No IV/35.830 — Unisource/Telefónica); OJ No C 94, 30. 3. 1996, p. 5.

([16]) Notification of a joint venture (Case No IV/35.738 — Uniworld); OJ No C 276, 21. 10. 1995, p. 9.

level in the EEA. For instance, FT's indirect German subsidiary Info AG, which provides most of its data communications services within Germany, is DT's second-largest competitor in the German national market for packet-switched data communications services. None of these smaller players can compare to large alliances in terms of reach, access to transmission capacity and financial backing.

F. THE TRANSACTION

(20) The Atlas transaction notified to the Commission comprises a set of agreements whose main features are described below.

1. Agreements as originally notified

(a) The Atlas Joint Venture Agreement (JV Agreement) is the main agreement providing for the establishment of the Atlas joint venture.

(b) The Intellectual and Industrial Property Transfer and Licence Agreements were concluded by FT and DT respectively, with Atlas SA; under these agreements FT and DT make available to Atlas SA the intellectual property rights (the IPRs) needed to operate the Atlas business.

(c) The Framework Services Agreements are framework agreements setting forth the basic terms and conditions with respect to the supply by DT and FT of certain services to Atlas SA and the supply by Atlas SA of certain services to FT and DT.

(d) The Distribution Agreements are two substantially similar distribution agreements between Atlas SA and FT and DT respectively, regarding the marketing and sale of Atlas products in France and Germany respectively.

(e) The Agency Agreements under which each parent appoints Atlas SA as non-exclusive worldwide agent for the sale of DT and FT's international leased lines (half-circuits), with the territorial exception of Germany as regards DT's half-circuits.

2. Contractual Provisions

(21) In particular, the above agreements provide for the following:

1. *Structure of the Atlas venture*

Atlas SA is created as a joint venture between FT and DT, each owning half the share capital. The management structure of Atlas SA is as follows:

(a) Shareholders' meeting: Prior approval by the shareholders' meeting is necessary for matters such as the amendment of the articles of association, changes of capital, issuance of shares, mergers, sale of all or a substantial part of the assets, and liquidation.

(b) The board of directors: Atlas SA's board of directors has eleven members, five apiece being elected by DT and FT and one by Sprint. Prior approval by the board of directors is required for a number of important decisions such as the approval of business plans and annual budgets and changes in the scope of Atlas, the conclusion of important contracts, etc. Decisions on changes in the Atlas business, management appointments, and the approval of the business plan, the annual operating plan, and the budget require that at least two directors nominated by each party vote with the majority ([17]).

(c) Chief executive officers (CEOs): It is envisaged that Atlas SA will have two CEOs, one nominated by FT from among its representatives in the board of directors, the other by DT from among its representatives in the board of directors. The CEOs shall be jointly responsible for day-to-day operations and the management of the business and affairs of Atlas. Approval of both co-CEOs is required for all important decisions including the hiring or dismissal of key employees.

The parties will contribute to Atlas their existing European assets outside France and Germany (as well as some assets in France and Germany) used for the provision of services coming within the scope of Atlas.

2. *Purpose and activities of Atlas*

The Atlas venture is to provide seamless national and international non-reserved services to corporate customers (that is, to multinational companies (MNCs) and SMEs alike). The portfolio of Atlas services comprises data network services, international end-to-end services (managed links), voice VPN services, customer-defined networks, outsourcing and VSAT services. These services are fully liberalized in the European Community and are widely liberalized worldwide. Atlas will have the responsibility for the services portfolio mentioned above, outside France and Germany.

([17]) The originally envisaged Strategic Board of Atlas SA, described in the Article 19 (3) notice (footnote 6) at paragraph 20 (b), was deleted from the final Atlas Agreements.

In France and Germany, Atlas will provide sales support to FT and DT's sales forces as regards all services mentioned in the Atlas portfolio, with the exception of public packet-switched data network services within France and Germany, which will be provided by FT's Transpac France subsidiary and DT's T-Data subsidiary respectively until the telecommunications infrastructure and services markets are fully and effectively liberalized in France and Germany, as scheduled for 1 January 1998.

Each acting as an exclusive distributor, DT will sell Atlas services in Germany, while FT will sell Atlas services in France. Atlas products will be sold in France and Germany under the common globally used Atlas/GlobalOne brands. Passive sales of Atlas services by DT in France, by FT in Germany and by any Atlas operating entity in both Member States will be allowed. Outside France and Germany, Atlas products will be sold by the Atlas operating entity for the rest of Europe.

Pursuant to the JV Agreement, a balancing payment was made by DT at closing to equalize the respective contribution values of the two parties. DT or FT will make a further balancing payment upon contribution of T-Data and Transpac to Atlas to offset any difference in the valuation of T-Data and Transpac respectively.

3. *Provisions concerning dealings with/by Atlas*

Mutual service provision between Atlas and FT/DT is the subject of two Framework Services Agreements pursuant to which dealings between FT/DT and Atlas must be transparent, non-discriminatory and at arm's length.

As for services generally offered by DT or FT, the prices and other terms which DT or FT generally apply from time to time to their customers are to apply equally for Atlas. As for services not generally offered by FT or DT, market prices and terms apply and are negotiated between the Parties in good faith and at arm's length. Consequently, Atlas will purchase such services from DT or FT at similar prices and on similar conditions to those that any third party generally offering such services under equivalent circumstances would allow. If information on relevant market prices is not available, the prices applicable for Atlas are to be determined on the basis of a calculation model that is used, within FT, to make offers to customers with special requests and, within DT, to calculate intra-group transfer prices. Prices resulting from such calculation will cover, for the relevant period, all costs as well as a reasonable profit margin.

4. *Anti-competition provisions*

Pursuant to Article XIII of the Atlas JV Agreement, FT and DT will not engage anywhere in the production of services that are substantially the same or compete directly with the Atlas services, and will not engage outside France and Germany in the marketing, sale or distribution of services that are substantially the same or compete directly with the Atlas services. Furthermore, FT will not market or distribute Atlas services in Germany and DT will not market and distribute Atlas services in France; passive sales are, however, permitted by FT outside France, by DT outside Germany and by Atlas in both France and Germany.

5. *Provisions relating to intellectual and industrial property*

The parents each concluded an Intellectual and Industrial Property Transfer and Licence Agreement with Atlas SA under which DT, FT, T-Data and Transpac France (the 'IPR holders') are to make available to Atlas SA the IPRs which are needed to operate the Atlas business in accordance with the following principles:

(a) IPRs owned by, or licensed to, the IPR holders that are used exclusively for the Atlas business will be transferred to Atlas SA;

(b) IPRs owned by, or licensed to, the IPR holders that are used predominantly for the Atlas business shall be transferred to Atlas SA, and a sub-licence will be granted to the Parties (Grant-Back Licence sub-licence); and

(c) IPRs owned by, or licensed to, the IPR holders that are used predominantly for the IPR holders' business are (sub-)licensed to Atlas SA.

G. CHANGES MADE FURTHER TO THE COMMISSION'S INTERVENTION AND CONDITIONS ATTACHED TO THIS DECISION

(22) Certain features of the Atlas transaction as notified appeared to be incompatible with Community competition rules. Consequently, the Commission by letter of 23 May 1995 informed the Parties of its concerns. In the course of the notification

procedure the Parties have amended the original Agreements and given undertakings to the Commission.

1. **Contractual changes**

(23) Non-appointment of Atlas SA as an agent for international half-circuits

Further to the Commission's letter of 23 May 1995, DT and FT abolished the Agency Agreements and amended the original Service Agreements to take account of the non-appointment of Atlas SA as a non-exclusive agent for DT and FT's half-circuits.

(24) Non-integration of French and German public packet-switched data networks before full and effective liberalization of the telecommunications infrastructure and services markets

Atlas SA will not acquire legal ownership or control within the meaning of Article 3 of Council Regulation (EEC) No 4064/89 [18] of the French and German public packet-switched data networks, Transpac France and T-Data respectively, before the telecommunications infrastructure and services markets are fully and effectively liberalized in France and Germany, as is scheduled to occur by 1 January 1998. Meanwhile:

1. FT has split Transpac SA into Transpac France and Transpac Europe;

2. FT has yielded Transpac Europe to Atlas;

3. FT will keep Transpac France as a wholly owned subsidiary;

4. DT has incorporated DT's X.25 data services division as a separate company under German law and a wholly owned subsidiary of DT;

5. DT and FT have fully contributed their outsourcing joint venture, Eunetcom B.V., to Atlas SA; and

6. Atlas SA has created a subsidiary in France and Germany (Atlas France and Atlas Germany respectively) to provide the following services:

   (i) sales support regarding Atlas products to distributors in France and Germany; and

   (ii) services within the scope of Atlas other than packet-switched data network services including:

   — VSAT services,

   — international end-to-end services,

   — voice VPN services,

   — customer-defined solutions (excluding national X.25 data services in France and Germany), and

   — outsourcing services,

   and excluding the services described in the last paragraph of recital 5.

Once the telecommunications infrastructure and services markets are fully and effectively liberalized in France and Germany, Transpac France and T-Data will be contributed to Atlas in such a way that Atlas France and Atlas Germany will be merged with Transpac France and T-Data respectively. For the purposes of such contribution, Transpac France and T-Data shall be read as comprising only the public packet-switched data networks for the provision of packet-switched data communications services based on the X.25, IP, SNA and Frame Relay protocols respectively.

(25) Technical cooperation

Ahead of full and effective liberalization of the telecommunications infrastructure and services markets in France and Germany, DT and FT will cooperate in the development of common technical network elements. This Decision is subject to the condition that DT and FT's cooperation in this field will, until the date set in Article 2, comprise the following areas only:

1. FT and DT will cooperate in the development of common products and common technical network elements (namely such products and elements as share the same features, whilst being separately built and owned); such cooperation will extend to the French and German public packet-switched data networks. Only the following functions will be managed by Atlas SA for Transpac France and T-Data respectively:

   (a) product management and development, namely: (i) product definition (definition of *inter alia* speed, terms and availability of interconnection and other technical and commercial features), (ii) product marketing, (iii) product life cycle management, (iv) specification of product requirements, (v) technical specifications and developments of the products and (vi) technical development of the products (hardware and software), provided that product branding and pricing as well as product implementation in the network is managed by Transpac France and T-Data respectively;

[18] OJ No L 395, 30. 12. 1989, p. 1 (corrected version in OJ No L 257, 21. 9. 1990, p. 13); as amended by the Act of Accession of Austria, Finland and Sweden.

(b) certain network planning functions, namely: (i) central network engineering and optimization of the common transmission network so as to avoid an unreasonable duplication of resources, (ii) engineering and optimization of the networks for the various service platforms so as to ensure seamless services and (iii) central planning regarding the implementation of new network nodes (such as timing); and

(c) information systems, namely: (i) definition of the information system architecture (for example, development of common technical features for future information systems), (ii) specification of information system requirements and applications, (iii) technical development of hardware and software for information systems and (iv) central implementation planning of hardware and software, provided that central information system functions (for example, billing information and statistics) will be operated by Transpac France and T-Data respectively.

The above areas of cooperation are on no account to be tantamount to a *de facto* integration of the French and German public packet-switched data networks, which will be controlled by two separate network management centres. The restriction of DT and FT's technical cooperation to the elements set out above is attached to this Decision as a condition within the meaning of Article 8 (1) of Regulation No 17.

2. Atlas may subcontract certain operational functions to Transpac France and T-Data respectively.

(26) Non-integration of assets of FT's indirect German subsidiary

The assets of FT's German corporate telecommunications services provider Info AG shall not be integrated into Atlas save as indicated in the following undertaking:

'To meet the requirement of the European Commission that competition is not eliminated on the German telecommunications services market, France Télécom (FT) undertakes that it will irrevocably make available for sale, as a going business, Transpac's German subsidiary Info AG, or execute alternative remedies if such sale should not occur.

Scope of the divestiture

FT will divest of all assets as well as contracts of Info AG. Multinational clients whose headquarters are outside Germany to whom Info AG to date provides advanced network services as part of the Transpac network may be transferred to Atlas, to the extent to which the Commission is satisfied that such services are separable from the German activities of Info AG ("Info AG's business") without significantly lessening the value of those activities.

The two parts of Info AG's business (i.e. Disaster Recovery Services (DRS) and Network Services (NWS)) will be sold separately if no purchaser can be found for Info AG's business as a whole. For the purposes of this undertaking, the sale of Info AG will be considered as the sale of both the DRS and the NWS parts of Info AG's business.

Obligations of France Télécom

1. With regard to Info AG's present operations in respect of customers whose headquarters are located outside Germany, FT will, before the sale of Transpac's shares in Info AG to the party purchasing such shares (the 'purchaser'), try to bring about a service agreement between Info AG and Transpac. Pursuant to such agreement, Transpac will continue providing for Info AG such services as Transpac is currently providing to Info AG.

2. The services covered by the agreement referred to in the preceding paragraph shall be provided so as not to impair Info AG's remaining business as presently conducted. Conclusion of such agreement with the purchaser is not a condition and cannot be required by FT for the purposes of complying with this undertaking.

3. FT also agrees to provide the purchaser with any assistance (e.g. licences and know-how) relating to the provision of Info AG's services to the extent possible under existing contractual obligations, as the case may be. FT may charge the purchaser a market-based fee for any such licence and know-how. The market-based fee shall be that normally obtainable on the market at the time that any licence or know-how is provided.

4. FT recognizes the Commission's objectives to (i) maintain the viability, marketability and competitiveness of Info AG's current business and (ii) to provide sufficient management and other resources for this purpose. To achieve these objectives, FT undertakes the following:

(a) to ensure that (i) Info AG's business is legally kept separate from both

Transpac and T-Data and maintained as a distinct and saleable business; (ii) the value of Info AG's assets and of its business in every respect is maintained, pursuant to good business practice, at their current level, unless a change in the assets is necessary, in which case FT shall not make any significant change without prior consultation with and approval of the European Commission; and (iii) all agreements necessary to maintain Info AG's business are entered into or continued according to their terms, consistent with past practice and the ordinary course of business; this notably includes all agreements and arrangements related to leased line capacity and interconnection with T-Data and/or Deutsche Telekom;

(b) to keep all administrative and management functions relating to Info AG which have been carried out at all levels within FT and/or Transpac to maintain the viability, marketability and competitiveness of Info AG until divestiture is completed or until the trustee advises FT that such functions are no longer necessary, whichever occurs earlier;

(c) as soon as is practical and in any event no later than by 10 July 1996, to appoint a trustee (the 'trustee'), such as an investment bank, subject to approval by the Commission (such approval shall not be withheld without good cause), provided that, subject to approval by the Commission (such approval shall not be withheld without good cause), FT may (i) terminate the trustee agreement should FT decide at any time after the appointment that the trustee does not perform its duties properly, and (ii) replace the previously appointed trustee by another trustee also approved by the Commission;

(d) to give such trustee an irrevocable mandate to sell Info AG, on best possible terms and conditions, to an available purchaser making an offer before [. . .] [19]; and

(e) to establish and facilitate the management structure agreed with the trustee in the framework of the divestiture negotiations.

5. When the trustee is appointed to sell Info AG, FT shall comply with the requirements of the trustee to maintain the value of Info AG's assets, to the extent legally permissible, unless a change in the assets is necessary, in which case FT shall not make any significant change without prior consultation with and approval of the European Commission. FT shall in particular ensure that all services provided by FT or any of FT's subsidiaries to Info AG continue to be provided efficiently and satisfactorily and that no increase is made in the charge (if any) made to Info AG for any service. FT shall not, except with the consent of the trustee, employ or offer employment to any employee or officer of Info AG until after the sale of Info AG.

Obligations of the trustee

6. Pursuant to the agreement between FT and the trustee appointed with the Commission's consent, the trustee shall:

(a) advise FT and Transpac on the best management structure to ensure the continued viability, marketability and competitiveness of Info AG's business. The trustee shall notably give advice on how to undertake any restructuring of Info AG in a way that guarantees Info AG's viability, marketability and competitiveness;

(b) advise FT and Transpac with regard to the satisfactory operation and management of Info AG to ensure the continued viability, marketability and competitiveness of Info AG's business as well as supervise, monitor and control the implementation of the advice by Info AG. For the purposes of and to the extent necessary for such monitoring, the trustee shall have complete access to Info AG's personnel and facilities as well as to documents, books and records of both FT and Transpac, including such personnel, facilities, books and records which, even if not directly related to Info AG,

[19] Business secret.

may have an impact on the conduct of Info AG's operations;

(c) act as FT's investment banker in conducting good faith negotiations with interested third parties with a view to selling Info AG within [. . .](20) of the first closing date of the Atlas transaction as defined therein, i.e. before [. . .](21) (the 'target date'). In the event that the trustee at any time prior to the target date but at least two months before that date determines together with the Commission that it is not possible to identify an acceptable purchaser for Info AG exclusive of the customers whose headquarters are located outside of Germany, the trustee, FT and the Commission will discuss appropriate alternatives to the proposed divestiture of Info AG, notably an extended divestiture;

(d) provide a written report before a binding contract is signed and in any event every month on all developments in its negotiations with third parties interested in purchasing Info AG; such reports, with supporting documentation, shall be furnished to the Commission with copy to FT;

(e) provide the Commission, with copy to FT, with a written report every two months concerning the monitoring of the operations and management of Info AG;

(f) at any other time upon the Commission's request provide the Commission with a written or oral report on any aspect of the duties and activities of the trustee in relation to Info AG and its possible purchasers. FT shall receive a copy of such written reports and shall be informed of the content of oral reports; and

(g) cease to perform its duties as trustee for the purpose of this undertaking when the sale of Info AG or any alternative remedy within the meaning of paragraph 6 (c) above becomes effective.

7. The trustee shall be remunerated by FT. The trustee's remuneration shall provide incentives for a prompt divestiture, so that the trustee uses its best efforts in arranging a prompt and value-maximizing sale of Info AG.

8. FT undertakes to give all reasonable assistance requested by the trustee to sell Info AG by the target date. FT shall be deemed to have complied with its divestiture undertaking if by such date it has entered into a binding letter of intent or a binding contract for the sale of Info AG to a purchaser agreed by the Commission, provided that such sale is completed within a reasonable time limit, after the signing of such binding letter of intent or binding contract, agreed by the Commission.

9. The Commission may, upon FT's request and good cause provided, extend the period granted to FT for divestiture of Info AG by an additional six months after the target date (the 'extended target date').

10. The reports referred to in subparagraphs (6) (d) and (f) above shall indicate whether a proposed purchaser would be able to ensure that Info AG remains a competitive participant in the German telecommunications market and whether negotiations with such proposed purchaser should continue. If within 10 working days of the receipt of such indications from the trustee the Commission does not formally disagree with the trustee's favourable assessment of a proposed purchaser, negotiations with such proposed purchaser may proceed. The Commission may disagree with the trustee's assessment of a proposed purchaser if the proposed purchaser were in the Commission's view unlikely to compete effectively with T-Data, Atlas Germany and GlobalOne respectively.

11. The [. . .](22) period up to the target date and the six-month period up to the extended target date, as the case may be, are suspended in cases where the sale of Info AG is suspended due to a notification to a competition authority until such authority adopts its final decision with regard to the sale of Info AG.

12. Any dispute between FT and the purchaser(s) of Info AG with respect to FT's undertaking to divest of the Info AG business will be subject to arbitration by an independent third party. During such arbitration, the [. . .](23) period up to the target date will be suspended.

13. If the sale of Info AG's business does not seem likely to occur by the date stated in paragraph (4) (d), FT shall, at least two

(20) Business secret.
(21) Business secret.
(22) Business secret.
(23) Business secret.

months before that date, submit alternative remedies sufficiently satisfactory to safeguard actual competition in the German market. These alternative remedies must be executed by the date stated in paragraph (4) (d).'

The Commission makes this Decision conditional on FT's compliance with the terms of the above undertaking. Where they are separable from the product divisions of Info AG that are to be divested, multinational clients to whom Info AG now provides network services as part of the Transpac network and whose headquarters are located outside Germany may be transferred to Atlas.

(27) FT, DT, Atlas and GlobalOne have given separate undertakings not to compete, for one year after the closing date of the sale of Info AG, with the purchaser for the provision of telecommunications services to customers of Info AG whose headquarters are located within Germany (the 'transferred customers') at the specific locations which Info AG served, except where such transferred customers decline in good faith to deal with the purchaser of Info AG. The Commission makes this Decision conditional on compliance by FT, DT, Atlas and GlobalOne comply with the requirements of this undertaking.

2. **Non-discrimination condition**

(28) In order to provide the services described under recital 5, Atlas or any other service provider is dependent on access to the public switched telecommunications network (PSTN), the integrated services digital network (ISDN) and to other essential facilities, and also on reserved services [24]. Until there is full and effective liberalization of infrastructure and services in France and Germany, as is scheduled to occur by 1 January 1998, only FT and DT provide access to the PSTN and the ISDN as well as reserved services. However, even when all telecommunications facilities and services are non-reserved, FT and DT will at least for a number of years remain indispensable suppliers of building blocks for the relevant services in France and Germany. Given that FT and DT are shareholders of Atlas it is essential for the safeguarding of fair competition between Atlas and other existing or future telecommunications services providers to eliminate the risk that the former might be granted more favourable treatment regarding the following facilities-related telecommunications services provided by FT and DT to Atlas in France and Germany respectively, pursuant to the Framework Services Agreements: (i) leased lines services, in particular international leased lines (half-circuits) and domestic leased lines, including any discounts, as the case may be; and (ii) PSTN/ISDN services including both access to such networks (namely analogue access; basic ISDN access; ISDN access to the public packet-switched data networks; special access from the public packet-switched data networks to ISDN (X.75 interface); and national and international voice VPN and VPN interconnection services) and traffic over such networks. Likewise, Atlas is not to be granted more favourable treatment than third parties in connection with other reserved facilities and services and with such facilities and services which remain an essential facility after full and effective liberalization of telecommunications infrastructure and services in France and Germany. Thus:

1. Terms and conditions

The terms and conditions applied by DT and FT to Atlas for the abovementioned services covered by the Framework Services Agreements and for the provision of other reserved and/or essential services (for example, provision of leased lines, allocation of numbers, addresses and names) in connection with the services described under recital 5 shall be similar to the terms and conditions applied to other providers of similar services. This requirement covers *inter alia* availability, price, quality of service, functionality, usage conditions, timetable for installation of requested facilities, connection of apparatus, or repair and maintenance services.

2. Scope of services available

Atlas is not to be granted terms and conditions, or to be exempted from any usage restrictions regarding the abovementioned services covered by the Framework Services Agreements and other reserved and/or essential services, which would enable it to offer services which competing providers are prevented from offering.

3. Technical information

DT and FT is not to discriminate between Atlas and any other service provider competing with Atlas in connection with either a decision to substantially modify technical interfaces for the access to reserved and/or essential facilities or services or the disclosure of any other technical

[24] Reserved services are services which are provided pursuant to special or exclusive rights granted by the EU Member States to their respective TOs.

information relating to the operation of the PSTN/ISDN. Competitors will, in particular, have access to technical information to which they can adapt lest their quality of services be reduced, such as signalling software information for the provision of voice services.

4. Commercial information

DT and FT is not to discriminate between Atlas and other providers of services as described under recital 5 as regards the disclosure of certain commercial information (for example, systemized and organized customer information derived exclusively from the operation the PSTN/ISDN or the provision of reserved and/or essential services) if such information would confer a substantial competitive advantage and is not readily and equally available elsewhere by service providers competing with Atlas.

To ensure the absence of third-party discrimination, this Decision in application of Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement is to be valid only on condition that DT, FT and Atlas comply with the following additional conditions.

3. **Other conditions attached to this Decision**

(29) DT and FT have also entered into certain additional commitments. Where these commitments are too general or insufficient, the Commission has specified and supplemented the behavioural constraints imposed on the parents. Compliance with the constraints described below will be a condition for the validity of this Decision within the meaning of Article 8 (1) of Regulation No 17.

1. Access to DT and FT's public packet-switched data networks

DT and FT have given the following undertaking:

'Each of FT and DT will as of 1 January 1996 establish and thereafter maintain third-party access to their public switched data networks in France and Germany respectively. Non-discriminatory, open and transparent access will be granted to all data services providers that offer X.25 packet-switched data communications services. To ensure non-discriminatory access to their national public X.25 packet-switched data networks, FT and DT shall:

(a) establish and maintain standardized X.75 interfaces to access their national public X.25 packet-switched data networks; this interconnection is suitable for the provision of end-to-end services based on X.25 specifications for end-user access speeds up to 64 kbps; and

(b) offer such access on non-discriminatory terms, including price, availability of volume or other discounts and the quality of interconnection provided.

FT and DT shall further ensure non-discriminatory access by making publicly available the standard terms and conditions for such X.75 interface standards, including, if any, volume and other discounts, as of 1 January 1996. FT and DT will make available for inspection by the Commission any agreements relating to such X.75 interfaces, including all specifically agreed terms. Until such time as Transpac France and T-Data are integrated into Atlas, neither Transpac France nor T-Data shall disclose to Atlas any such specifically agreed terms that are identified and maintained as confidential by the party obtaining interconnection through such X.75 interfaces. Finally, the above obligations shall likewise apply to any generally used CCITT-standardized interconnection protocol that may modify, replace or co-exist as a standard related to the X.75 standard and is used by FT and DT.

Proprietary interfaces may be retained or established among Transpac France, T-Data and Atlas; such interfaces are defined by the particular type of technology, hardware and software that a network operator uses to provide advanced or customized services. Atlas will be allowed to access the Transpac France and T-Data public packet-switched data networks through these proprietary interfaces, also for the provision of packet-switched data communications services, provided access granted to Atlas through such interfaces is economically equivalent to third-party access to the Transpac France and T-Data networks.'

The Commission makes this Decision subject to the condition that Transpac France, T-Data and eventually Atlas grant third-party access to the French and German public packet-switched

data networks on non-discriminatory transparent terms and conditions which must be economically equivalent to the terms and conditions of Atlas' access to such networks.

2. Access to DT and FT's other networks and facilities

This Decision is conditional on DT's and FT's granting to any third party that operates a telecommunications facility ('telecommunications operator') and applies for the interconnection of such facility or systems facilities with DT or FT's networks, such as PSTN, ISDN or ATM networks and related broadband capacity, as the case may be, such interconnection on non-discriminatory terms vis-à-vis Atlas. Such terms must enable the telecommunications operator to provide telecommunications services or provide its telecommunications facilities without limitation in any respect within the reasonable capabilities of the telecommunications operator concerned.

3. Cross-subsidization

DT and FT have undertaken not to engage in cross-subsidization in connection with the Atlas venture. To prevent Atlas from benefiting from cross-subsidies stemming from the operation of public telecommunications infrastructure and of reserved services by either DT or FT, all entities formed pursuant to the Atlas venture will be established as distinct entities separate from DT and FT.

Atlas SA, T-Data and Transpac France shall obtain their own debt financing on their own credit, provided that FT and DT:

(a) may make capital contributions or commercially reasonable loans to such entities as are required to enable Atlas SA, T-Data and Transpac France to conduct their respective businesses;

(b) may pledge their venture interests in such entities, in connection with non-recourse financing for such entities, and

(c) may guarantee any indebtedness of such entities, provided that FT and DT may only make payments pursuant to any such guarantee following a default by such entities in respect of such indebtedness.

Compliance with the above undertaking is a condition for the validity of this Decision under Article 8 (1) of Regulation No 17. The Commission extends the following conditions as to conduct to cover all entities created pursuant to the Atlas agreement, T-Data and Transpac France. Such entities are not to allocate directly or indirectly any part of their operating expenses, costs, depreciation, or other expenses of their business to any parts of FT or DT's business units (including without limitation the proportionate costs based on work actually performed that are attributable to shared employees or sales or marketing of Atlas products and services by DT or FT employees); however, nothing is to prevent Atlas SA, T-Data and Transpac France from billing DT or FT for products and services provided to DT or FT by such entities on the basis of the same price charged third parties (in the case of products or services sold to third parties in commercial quantities) or full cost reimbursement or other arm's length pricing method (in the case of products and services not sold to third parties in commercial quantities).

4. Accounting

The Commission imposes a condition on T-Data, Transpac France (including all subsidiaries) and all entities created pursuant to the Atlas agreements which operate in the EEA to keep separate accounting records (including profit and loss account and balance sheet or statement of capital employed) using international accounting standards for each service they provide in any country.

These accounting records will notably identify all services provided to such entities by DT and FT and payments or transfers to or from DT and FT; moreover, no entity created pursuant to the Atlas Agreement, nor T-Data or Transpac France will receive any material subsidy (including forgiveness of debt) directly or indirectly from DT or FT, or any investment or payment from DT or FT that is not recorded in the books of such entities as an investment in debt or equity.

The Commission also imposes a condition on DT and FT (including all subsidiaries) to keep separate accounting records of all services provided to any entity created pursuant to the Atlas Agreements operating in the EEA. To that end, DT and FT are to implement within one year from the date of the exemption pursuant to Article 1 of this Decision an accounting system which identifies detailed cost accounting data for any such service.

The records mentioned in the previous two subparagraphs will detail the following:

(a) the cost standard used;

(b) the accounting conventions used for the treatment of costs;

(c) the full allocation and attribution of expenses or costs, revenues, assets and liabilities shared between such entities and their parents; and

(d) the attribution method chosen.

5. Bundling.

The Commission imposes a condition on DT and FT to sell DT and FT services respectively under contracts separate from the contracts for the sale of Atlas services concluded as distributors of Atlas in Germany and France respectively. Each separate contract will set out the terms and conditions of each individual service sold thereunder and notably attribute any quantity or other discounts to a particular service, as the case may be.

4. Obligations attached to this Decision

(30) The Commission attaches the following obligations within the meaning of Article 8 (1) of Regulation No 17 to this Decision, pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement. These obligations will remain in force for the duration of the exemption. In so far as related to existing obligations under national or Community law, the obligations described below are intended to ensure the Parties' firm commitment to comply with the applicable legal framework. Pursuant to Article 8 (3) (b) of Regulation No 17, the Commission may revoke this Decision where the parties breach any such obligation.

1. Auditing

Atlas SA (which includes its consolidated subsidiaries), Transpac France and T-Data are to be audited every year; such audit will confirm from an accounting viewpoint that:

(a) the transactions between these entities, on the one hand, and FT and DT, on the other hand, have been conducted at arm's length;

(b) these entities have adhered to the accounting procedures chosen within the framework set out under recital 29 (4); and

(c) the calculation numbers are accurate.

The first auditing reports, covering the 12-month period starting on the date on which this Decision comes into force, will be submitted to the Commission within 15 months of that date. This obligation will remain in force for the duration of this Decision.

2. Recording obligations

DT, FT and all entities created pursuant to the Atlas Agreements will each keep records and documents suitable to prove compliance with the terms of the above conditions ready for inspection by the Commission.

3. Inspection of records

For the purpose of ascertaining and ensuring compliance by DT, FT or Atlas with the above conditions, DT, FT and all entities created pursuant to the Atlas Agreements will, on reasonable notice, during office hours, and without a need for the Commission to invoke the powers of inspection pursuant to Regulation No 17, give the Commission access to DT, FT or Atlas's business premises to inspect records and documents covered by the above recording obligations and to receive oral explanations relating to such documents.

4. Reporting obligations

T-Data, Transpac France, DT, FT and all entities created pursuant to the Atlas Agreements will provide the Commission, for the purpose of ascertaining whether DT, FT and Atlas comply with the above obligations, with:

(a) any records and documents in the possession or control of DT, FT or an entity created pursuant to the Atlas agreements necessary for that determination; in particular, every six months, starting one year after the date of the exemption pursuant to Article 1 of this Decision with unaudited accounting data as specified in recital 29 (4); and

(b) oral or written complementary explanations.

H. THE REGULATORY SITUATION

(31) In letters sent to the Commission, the French and German Governments have undertaken to take the necessary steps to effectively allow the use of alternative infrastructure for the provision of liberalized telecommunications services by 1 July 1996 and to liberalize the voice telephony service and all telecommunications infrastructure fully and effectively by 1 January 1998. The availability of alternative telecommunications infrastructure in Germany and France renders competitors of Atlas

independent of DT and FT's infrastructure for the purposes of creating trunk network infrastructure to provide liberalized services.

Early alternative infrastructure liberalization in France and Germany adds to a regulatory framework in the home countries of the Atlas partners that is designed to ensure a level playing field in the telecommunications markets.

1. **France**

1. *Separation of regulatory and operative functions*

Pursuant to French Law, the Minister of Telecommunications shall ensure that regulation of the telecommunications markets is undertaken separately of service provision in these markets. A specific national regulatory authority (NRA), the Direction Générale des Postes et Télécommunications (DGPT), is competent for licensing providers of telecommunications networks and services in France based on objective and transparent criteria. The DGPT shall survey FT's market behaviour and approve FT's tariffs for (i) reserved services and leased lines and (ii) such liberalized services that are not in fact provided by a third party active in the French market.

2. *Non-discriminatory access*

Further to the adoption of the Commission Services Directive and Council Directive 90/387/EEC ('ONP Framework Directive')([25]), Article L 32-1-4° of the French Law of 29 December 1990 grants all users equal access to the public networks on objective, transparent and non-discriminatory conditions. FT is under an obligation to effectively grant such access and must publish information on the network (such as technical features, tariffs and usage conditions) and on leased line offerings. The DGPT may verify FT's compliance with these obligations and investigate complaints filed against FT for non-compliance with these obligations. The DGPT is, further, to ensure compliance with FT's obligation to share available transmission capacity for liberalized services with competitors and shall publish annual statistical reports on FT's compliance with these obligations.

([25]) Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision; OJ No L 192, 24. 7. 1990, p. 1.

3. *Prevention of cross-subsidies*

To allow the DGPT to supervise FT's market behaviour, FT is under the legal obligation to keep an analytical accounting system that relates costs to each individual FT service. Where an offering comprises the provision of both reserved and liberalized services, FT must separate each kind of service in the contract and in the invoice. In this connection, FT's data communications services are already provided by a separate legal entity.

2. **Germany**

1. *Separation of regulatory and operative functions*

Pursuant to the German 1989 Poststrukturgesetz, the 1994 Postneuordnungsgesetz and the 1994 Post- und Telekommunikation-Regulierungsgesetz, regulatory competencies are assigned to a Federal agency created under the Federal Ministry of Post and Telecommunications (BMPT) while telecommunications operations are undertaken by DT, a fully State-owned joint stock corporation. Regulatory obligations of DT are policed by independent bodies, so-called regulatory chambers.

2. *Non-discriminatory access*

Under the current and future German regulatory framework, DT is to provide third parties with both access to monopoly infrastructure and reserved or mandatory services on a non-discriminatory and transparent basis according to objective criteria. Upon application, DT will supply state-of-the-art leased lines over service-neutral access points without delay. With the only restriction of voice telephony service provision, leased lines may be freely interconnected and used for any service. Leased lines must meet market demand and DT must publish data concerning availability and quality of such lines.

3. *Prevention of cross-subsidies*

The BMPT (i) will approve both tariffs and other price-sensitive contractual terms for DT's reserved services and (ii) may object to DT's tariffs for mandatory services. The BMPT may also seize DT's profits stemming from tariffs in excess of the approved amount and take any measure necessary to reestablish an effectively competitive environment jeopardized by unlawful cross-subsidization. Moreover, DT's subsidiaries and affiliates are to use reserved

services for the provision of competitive services under equivalent terms as DT's customers and must use such terms to account internal services transfer.

I. THIRD-PARTY OBSERVATIONS

(32) Following the publication of a notice pursuant to Article 19 (3) of Regulation No 17 and to Article 3 of Protocol 21 of the EEA Agreement[26], 10 interested third parties submitted comments to the Commission. These comments approved of the structural changes made by DT and FT to the original project, whilst suggesting that a swift divestiture of FT's indirect German subsidiary Info AG was crucial. Third parties also contributed to the Commission's definition of the relevant markets emphasizing the indispensability of (i) an effective liberalization of alternative infrastructure in France and Germany, namely actual access to alternative sources of infrastructure in these countries, before Atlas is exempted from Articles 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement and (ii) surveillance of technical cooperation between DT and FT lest it extend to sales, marketing and pricing.

(33) As for proposed behavioural restraints to be imposed on DT and FT, third parties submitted that obligations and conditions should remain in place until there was effective competition in France and Germany. Finally, third-party observations also pointed to the relevance of appropriate accounting systems and interconnection terms, including technically equivalent interfaces for the joint-venture companies and third parties, to ensure that Atlas's competitors are not harmed by cross-subsidies or discriminatory practices.

(34) The Commission carefully reviewed all comments received and concluded that most concerns expressed therein had already been raised by the Commission and discussed in detail with DT and FT, who had provided adequate answers and safeguards. Those comments have not therefore affected the Commission's substantive position outlined in the Article 19 (3) notice as regards the notified agreements. However, in the interests of legal certainty the Commission has spelled out in more detail in this Decision the scope and duration of some conditions and obligations imposed on DT and FT.

(35) Subsequent to third-party observations the Commission also requested that FT, DT, Atlas and GlobalOne give the undertakings reproduced under recitals *et seq.* and decided to attach as an additional condition to this Decision that DT and FT sell own products unbundled from Atlas products (see recital 29 (5)).

II. LEGAL ASSESSMENT

A. ARTICLE 85 (1) OF THE EC TREATY AND ARTICLE 53 (1) OF THE EEA AGREEMENT

1. Structural cooperative joint venture

The Atlas joint venture is structural and cooperative in nature.

(36) Potential competition in markets for Europe-wide and national telecommunications services

Atlas will initially combine and develop products largely based on DT and FT's existing products, in respect of which DT and FT will act as exclusive distributors within their respective domestic markets. Although certain services transferred to Atlas in third-country national markets and Europe-wide remain with DT and FT in their respective home markets (see recital 5), interconnection allows the extension of any such service from the national home market into another geographic market. FT for instance provides an international extension to its domestic and international VPN services offerings. For both offerings this extension may include Germany where DT's national VPN services remain outside the scope of Atlas. Moreover, DT and FT will keep a residual staff presence at all their current foreign locations and continue to provide international leased lines, which are the 'building blocks' of self-provided private networks.

In this connection, Atlas will undertake own R+D activities but also award important R+D contracts to DT and FT. The parents will therefore keep and increase their proficiency and know-how in respect of the technologies required to stay in (or to re-enter) the relevant markets while keeping control of the necessary infrastructure in the single largest Member State telecommunications markets. Moreover, although Atlas may own new

[26] See footnote 2.

developments (see recital 21 (5)) it is on the whole more likely that such ownership will revert to the developing parent. In any event, Atlas will license back to the respective parent most technology developed from IPRs contributed by DT or FT.

The Commission concludes that DT and FT remain potential competitors for Atlas services and other services in neighbouring and upstream (transmission capacity) markets.

(37) Structural joint venture

Atlas combines DT and FT's activities in a range of Europe-wide and third-country markets for liberalized telecommunications services and is set to develop and take over new services in these markets. This venture entails major changes in the structures of DT and FT as two undertakings with very limited presence outside their respective home countries. Through Atlas the parents pool a significant number of assets in connection with the provision and marketing of telecommunications services. Atlas will employ 2 500 people across Europe.

2. **Applicability of Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement to the creation of Atlas**

The agreements between DT and FT fall within Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement as they restrict competition and affect trade between Member States. The Commission cannot therefore give negative clearance to the Agreements as the Parties requested in their application.

(38) The Atlas venture eliminates actual and potential competition between DT and FT both in Germany and France and Europe-wide. DT and FT were already competing in some segments of the market for Europe-wide if not global provision of customized packages of corporate telecommunications services to corporate users described at recitals 12 *et seq.*: prior to the implementation of their Eunetcom joint venture DT and FT tendered individually for outsourcing contracts, offering similar corporate services. As any European TO, DT and FT also competed on features and prices for the location of telecommunication hubs of international users [27]. While currently targeting only large businesses, this competition was set to intensify along with further liberalization and ultimately extend to private households. With the exception of outsourcing services and in spite of substantial market shares in their respective home markets, the parents were actual competitors for Europe-wide services only in Germany (see below).

(39) In creating Atlas, DT and FT each abandon their own developments and activities in the relevant markets for cross-border and ultimately Europe-wide telecommunications services. In the case of FT, such activities were substantial to the point that FT's existing Transpac network is the starting base for Atlas' envisaged European backbone network. As for national services, the large numbers of providers of liberalized services, including FT's Transpac, in all European countries targeted by Atlas shows that the parents have the financial and technological capabilities required to address national markets across Europe on their own.

(40) The elimination of competition between the parents is substantial as the Atlas venture is created by two internationally active TOs and covers the joint development and provision of services throughout the European Economic Area. DT and FT's respective dominant positions in the two single largest Member State telecommunications markets is reinforced by a legal infrastructure monopoly until such markets are fully and effectively liberalized, as is scheduled to occur by 1 January 1998, and will continue to rely on a dominant position for terrestrial transmission capacity for years thereafter. Current prices for infrastructure access — leased lines tariffs or interconnection rates — together with DT and FT's strengthened joint market position impair competitors' ability to create a competitive network of similar scope and density to DT and FT's in these countries [28].

[27] BT-MCI Decision (footnote 7), at recital 41.

[28] See Commission Decision 93/49/EEC of 23 December 1992 — Ford/Volkswagen, OJ No L 20, 28. 1. 1993, p. 14, at recitals 18 to 21; Decision 94/322/EC of 18 May 1994 — Exxon/Shell, OJ No L 144, 9. 6. 1994, p. 20, at recitals 42 *et seq.*; and Decision 94/896/EC of 16 December 1994 — Asahi/Saint Gobain, OJ No L 354, 31. 12. 1994, p. 87, at recitals 16 to 22.

3. Application of Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement to contractual provisions

(41) The following individual provisions are restrictive of competition:

1. the anti-competition provision as regards the activities of Atlas (Article XII JV Agreement as amended and Article VII of both Distribution Agreements);

2. the obligation on DT and FT acting as distributors to obtain from Atlas all requirements for Europe-wide products (Article VII of both Distribution Agreements); and

3. the appointment of DT and FT as exclusive distributors of Atlas products in the respective parent's home market (Article IV of both Distribution Agreements).

(42) The Commission considers the anti-competition provision and DT and FT's obligation to obtain all requirements for global products from Atlas to be ancillary to the creation and operation of Atlas. Therefore, these restrictions are not assessed under Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement separately from the joint venture as such. DT and FT chose creating Atlas as a way to strengthen their presence in the relevant cross-border and ultimately Europe-wide markets and as a first step towards entering the global markets for customized packages of corporate telecommunications services. In this respect, both the anti-competition provision and the exclusive purchasing obligation are different expressions of DT and FT's same commitment to the other parent and to their joint venture. Atlas requires both restraints to successfully establish itself in the emerging market for customized packages of global corporate telecommunications services given the uncertainty and risks associated with such market entry, the level of investment required, and competition from similar ventures.

1. Anti-competition obligation

Given DT and FT's substantial investment in Atlas, this clause ensures that DT and FT concentrate their efforts in the relevant markets on Atlas lest parallel activities, perhaps in cooperation with other TOs, jeopardize Atlas' successful establishment in the market.

2. Exclusive purchasing obligation

This restraint on DT and FT as exclusive distributors of Atlas services aims at ensuring Atlas a steady stream of funds and at increasing its credibility and market reputation. Were the parents free to obtain such products from other suppliers, notably in cases where Atlas is in a position to meet a particular demand requirement, this would affect Atlas' credibility and financial position alike. Inversely, Atlas is not under an obligation to obtain all its requirements for telecommunications and other products and services from the parents.

The Commission usually accepts ancillary provisions for a limited period of time only. In this case, however, given the particular features of the market in which Atlas will operate, notably the substantial investment required and the risks associated to such investment, the Commission accepts both the anti-competition clause and DT and FT's obligation to obtain all provisions for Europe-wide services from Atlas as ancillary restraints for the entire duration of this exemption Decision.

(43) Exclusive distribution

DT and FT's exclusive distributorship in their respective home countries is caught by Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement because it has the object or effect of isolating Germany and France against imports of Atlas services from other EEA Member States. This may adversely affect the conditions of competition within the EEA. Unlike the other restrictive provisions, the Commission cannot consider DT and FT's exclusive distributorship to be ancillary to the creation of the joint venture, as non-exclusive forms of distribution are possible which would not impair the performance or marketing of Atlas services. Given that Germany and France taken together account for more than 40 % of all telecommunications revenues in the European Community, the restriction is appreciable.

4. Effect on trade between Member States

(44) Pursuant to the Commission's telecommunications guidelines, agreements concerning non-reserved services, equipment and space segment

infrastructure potentially affect trade between Member States [29]. The creation of Atlas has an effect on inter-Member State trade in that Atlas will provide non-reserved services between any two Member States and within any Member State. The exclusive distribution provision caught by Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement protect the parents within their respective home market and contribute to dividing the single market along national borders. Therefore, this non-ancillary provision affects trade among Member States and between Member States and the EFTA countries. The Commission concludes that the loss of two powerful independent and potentially competing service providers in the relevant markets generally and in France and Germany in particular has a considerable impact on trade.

B. ARTICLES 85 (3) OF THE EC TREATY AND ARTICLE 53 (3) OF THE EEA AGREEMENT

(45) DT and FT pursue different aims in entering this set of transactions. DT was for a long time restricted to domestic investments and additionally burdened with a programme of infrastructure modernization in the former German Democratic Republic territories. DT has little presence elsewhere in Europe and aims at becoming an international telecommunications services provider worldwide, albeit seeing European markets as a priority. Cooperating with a major European player present in all of DT's target markets is particularly important for DT to achieve its objectives, notably a sufficiently broad European base to justify an extension of its business into the United States market, where 40 % of multinational companies are located.

(46) FT's main interest is to maintain its competitive position as a cross-border provider of business telecommunications services in Europe while addressing increasing customer demand for global services. The increasing presence of BT and MCI's Concert venture in Europe convinced FT of the need for wide coverage in Europe before adding a global dimension to its services; given that the scope of business of Infonet, in which FT held a stake, was limited compared to the range of envisaged Atlas services, FT opted for an alliance with another TO. DT and FT's joint aim now is to become leading providers of non-reserved telecommunications services in Europe. This requires a substantial investment in creating seamless networks in Europe, where DT and FT face strong competition from Concert and possibly from Uniworld [30].

(47) The notified agreements, to the extent caught by Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement, satisfy the conditions for an exemption set out in Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement, for the following reasons:

1. Technical progress

(48) DT and FT will in the framework of Atlas implement a seamless Europe-wide network by adding value to basic transmission capacity purchased from local TOs. To that end, Atlas will not preserve the features of each national network involved but will instead implement harmonized technical features, own switching systems, call processing/routing, signalling and databases as well as software applications, notably fully compatible interfaces. This approach has substantial advantages over most existing international services that are provided by interconnecting national networks which are usually incompatible in terms of structure, software, hardware and management systems. Consequently, the number and features of services available is determined by the least sophisticated national network involved. The creation of a seamless trans-European network will allow the technical performance already requested by large business customers across Europe, which competitors such as Concert are also aiming at through distribution agreements and ventures.

(49) Under the conditions attached to this Decision, the harmonized joint DT and FT network will also improve the level of services provided by competitors of Atlas which may: (i) interconnect with the public packet-switched data networks operated by Transpac France and T-Data and eventually by Atlas in France and Germany over X.75 interfaces; (ii) access these public packet-switched data networks from other networks, notably the public switched telecommunications network (PSTN) and the integrated services digital network (ISDN); and (iii) interconnect with DT and FT's other networks, notably the PSTN. The latter

[29] Footnote 9, at paragraph 39.

[30] See notice published in OJ No C 276, 21. 10. 1995, p. 9.

is indispensable for the viability of competitive voice services offerings. Third parties shall be offered access to the public packet-switched data networks, the PSTN and the ISDN on terms technically and commercially non-discriminatory with regard to Atlas. Any service provider who wishes to make applications for interconnection to DT and FT will be able to rely on a substantive non-discrimination duty attached to this Decision as a separate condition.

(50) The combination of FT and DT's technology will enable Atlas from the outset to offer new services, albeit initially based largely on parents' existing services. By joining their R+D in the framework of the joint venture DT and FT will enable Atlas to provide more advanced features than either parent would be capable of providing independently within the same time frame. Jointly, DT and FT will also be able to make the substantial investment required to create a large seamless state-of-the-art trans-European network. This is a major improvement over the current situation in Europe, where many modern networks exist, but can only be interconnected at the price of a loss of features. At present, the most relevant example of shortcomings of interconnection is data transmission over state-of-the-art networks. Most advanced features of packet-switched data communications services, for example reverse charging, closed user group definition or end-to-end management, are lost as soon as several data communications networks are interconnected unless the respective technical specifications and interfaces are harmonized. As the Commission acknowledged in its BT-MCI Decision, successful implementation of trans-European networks will allow Europe's major undertakings to chose from international telecommunications services improved to levels of quality which are currently available only nationally or even locally. Availability of international state-of-the-art telecommunications services is critical to face increasingly global competition stemming from parts of the world where advanced telecommunications technology and services are already widely available.

2. **Economic progress**

(51) DT and FT jointly intend to undertake the investment necessary to bring about a qualitative improvement of European telecommunications which Atlas will also make available to SMEs. As the Commission acknowledged in its BT-MCI Decision, this requires a costly and time consuming effort. DT and FT will implement investment plans amounting to a total of ECU 5 billion linked to the creation or enhancement of services. Further to the Commission's preliminary position on the proposed alliance as expressed on 23 May 1995 the parties have: (i) changed their agreements in respect of Atlas' rôle outside France and Germany; and (ii) entered into a global alliance with a United States operator. A sizeable presence across the EEA is one requirement for the provision of such non-reserved services as targeted by Atlas. DT and FT have submitted data showing their commitment to substantial investment in Europe. Moreover, DT and FT have changed the original balance between Atlas' own services and services outsourced to the parents in Atlas' favour. Another requirement if service offerings are to progress beyond what is already available in the European market is the global extension of services as needed by multinational companies, so-called global connectivity of services. Atlas meets this requirement as a parent of the Phoenix alliance.

(52) Given the current cost of leased line infrastructure, Atlas' investment will initially be driven by the large multi-national companies (MNCs) with most complex requirements in countries other than France and Germany. However, as a result of operating a single high-speed network architecture Atlas will allow economies of scale at both the technological and operational level, i.e. reduce the cost per channel. Atlas is further likely to reduce infrastructure costs in respect of interconnection agreements with other TOs by generating larger traffic volumes which allow lowest-cost routing. The effects of economies of scale along with increased availability of infrastructure further to the implementation of recent Community legislation [31] will eventually allow service offerings with sophisticated technical features to develop and become widely available.

3. **Benefits to consumers**

(53) Atlas will shorten the time required by the parents individually for marketing new telecommunications

[31] Commission Directive 96/19/EC of 13. 3. 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in the telecommunications markets; OJ No L 74, 22. 3. 1996, p. 13.

services in a rapidly changing technological and commercial market environment. Business customers will benefit, more rapidly than if DT and FT acted separately, from both the provision of a larger product portfolio of newly developed services and lower pricing. Increased choice of telecommunications services and related cost benefits will spill over to other segments of the telecommunications market and economic sectors. Atlas will also provide an alternative option for the supply of customized offerings which cover the complete range of liberalized business telecommunications services.

(54) Through its global alliance with Sprint, Phoenix, Atlas will also offer European customers an expanded geographic reach of its customized packages of corporate telecommunications services. The possibility for European customers to reach remote locations worldwide either ad hoc or permanently without a loss of quality or technical features and without changing supplier is a major advantage for such customers, for example European companies endeavouring to establish a worldwide presence in an increasingly global economy. Customers have the advantages of seamless cross-border services through Atlas in Europe and through Phoenix worldwide at their convenience. Only global alliances can offer global connectivity of services. While the scope of Atlas is not in itself global, DT and FT's investment plans through Atlas ensure that a substantial number of European business customers will have the option of global scope.

(55) The exclusive distributorship in Germany and France combined with the agreements concerning IPR licensing and grant-back licensing will provide an incentive for DT and FT to share with the joint venture any technical progress made in markets related to the relevant markets. This is an additional benefit for large non-reserved telecommunications services users in DT and FT's home countries, i.e. two of the Member States with a substantial number of potential customers for Atlas services.

4. **Indispensability**

(56) The creation of Atlas

Creating Atlas is indispensable for the parents to bring about the benefits within the meaning of Article 85 (3) of the EC Treaty and 53 (3) of the EEA Agreement discussed above. Compared to individual market entry or other forms of cooperation with a lesser level of integration, the degree of cooperation between DT and FT in the framework of Atlas is necessary to provide the relevant services. Atlas will shorten the time DT and FT would have required to compete with other providers of cross-border and Europe-wide services and substantially reduce the costs and risks borne by each parent. In rapidly changing markets FT is forced to update its Transpac network and DT to establish itself as a European player. Last, Atlas is a means to quickly overcome the inadequacies of most services and features currently available by creating a major trans-European network which offers what multinationals and other large international users need.

(57) Exclusive distribution

Pursuant to the Distribution Agreements, each parent is the exclusive distributor for Atlas products in its own home market. The exclusive distribution provisions are indispensable in that:

1. exclusivity together with the grant-back licensing provisions in the Intellectual and Industrial Property and Licence Agreements in respect of technology Atlas receives from each parent protects DT and FT's technology against third parties and against the other parent respectively; and

2. using one such network instead of several is technically easier and therefore allows more efficient distribution. Atlas as a provider of Europe-wide services relies on national distribution networks with broad geographic coverage. The alternative to using the TO's distribution networks is either distribution by several smaller distributors or the construction of an own nationwide network in the parents' home countries. Both would deprive European telecommunications markets of the benefits of a technical harmonization of Europe's two largest existing public packet-switched data networks.

(58) Atlas will use Transpac-France and T-Data as national distribution networks in France and Germany. Thus, DT or FT will provide the national services required and use Atlas to provide all cross-border and third-country connections needed. In the light of this, other distribution arrangements would be less protective of the parents intellectual property rights and less adequate to the importance

of services DT and FT will initially provide to Atlas. The Commission therefore concludes that the exclusive distribution arrangement is indispensable within the meaning of Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement.

5. Non-elimination of competition

(59) The conditions imposed on DT and FT and the general regulatory framework in the European Community will improve the environment for competition in FT and DT's home countries. This applies notably to the conditions regarding: (i) interconnection to the public packet-switched data networks on terms non-discriminatory and economically equivalent to those available to Atlas in France and Germany; (ii) non-discriminatory interconnection to the PSTN and the ISDN in France and Germany; and (iii) the prohibition on DT and FT to take advantage of their market position in distributing Atlas' services and own services through joint contracts.

(60) The condition described in recital 29 (5) requiring DT and FT to sell Atlas products under separate contracts from the sale of own products will ensure that possible differences in calculation are verifiable and thus that non-discriminatory interconnection works in practice. The outsourcing and value-added ('managed') leased lines services provided by Atlas are open to competition and returns on these services are relatively low. Given the legal monopoly and eventually the dominant position for infrastructure provision enjoyed by DT and FT for the duration of this Decision, DT and FT could eliminate competition by using discounts on reserved services (such as leased lines) to attract their clients to use Atlas' non-reserved services.

The sale of packages of different services under one single contract is common commercial practice in the telecommunications sector known as 'bundling.' In liberalized telecommunications markets, dominant providers are usually prohibited both from tying sales of different services and from granting discounts on packages of services without specifying: (i) the terms and conditions of each individual 'unbundled' service; and (ii) the individual service(s) subject to a discount. Also, dominant providers are under an obligation to publish all tariffs and must prove that discounts on packages of services are justified by savings specifically due to the offering of a package of services. However, given: (i) the imbalance between DT and FT's ubiquitous monopoly networks on the one side and the small presence and reliance on interconnection of new market entrants on the other; and (ii) the lack of sufficient regulatory transparency requirements for the relevant services, allowing DT and FT to negotiate single contracts for both liberalized and reserved services would at this stage effectively impair market entry by competitors in Germany and France. DT and FT could *inter alia* grant quantity discounts or more favourable conditions in respect of combined packages of such services in a way which would make individual pricing and notably justification of any discounts non-transparent. The requirement to sell such services under separate contracts would in itself be insufficient unless terms and conditions are set out for each particular service sold.

(61) Moreover, the conditions and obligations imposed on DT and FT to keep and supply detailed accounting information ensures that the entities created pursuant to the Atlas Agreements and Atlas' parents gather sufficient information to allow the Commission a verification of their competitive behaviour. Accounting-related requirements attached to this Decision will also make it possible for national courts to order discovery of evidence of breaches of the substantive conditions attached to this Decisions and of any alleged anti-competitive behaviour where third parties seek remedies against such behaviour before the national courts. The Commission concludes that Atlas will not afford the parents the possibility of eliminating competition in respect of the envisaged set of services. In reaching this conclusion the Commission has taken into account the following elements.

Markets for cross-border and ultimately Europe-wide services

(62) Competitors in the marketplace

Atlas is one of several alliances between TOs and/or other undertakings in the relevant markets. Several alliances have obtained regulatory clearance and are already active in the market ([32]). DT and FT will also face competition, at least for certain non-reserved services that will integrate Atlas' Europe-wide packages of corporate telecommunications services. Competitors range from

([32]) In addition to BT-MCI's Concert (footnote 7), the Commission has granted regulatory approval in Case No IV/M.595 — BT/VIAG, OJ No C 15, 20. 1. 1996, p. 4; Case No IV/M.618 — Cable & Wireless/VEBA, OJ No 23, 5. 9. 1995, p. 3, and Case No IV/M.689 — ADSB/Belgacom (Decision of 29 February 1996; OJ No C 194, 5. 7. 1996, p. 4).

computer and data processing companies, for example IBM, DEC and EDS, to information services companies such as GEIS and Compuserve. However, most of these competitors have small market shares and are dependent on a substantive change in current competitive conditions to develop their presence in the non-reserved corporate telecommunications services markets. As for the provision of cross-border and ultimately Europe-wide services from and into Germany and France, these conditions will change as soon the two main elements of competition are available, namely: (i) alternatives to using DT and FT's infrastructure; and (ii) access to DT and FT's networks on transparent and non-discriminatory terms.

Both elements are of particular relevance to innovative offerings of non-reserved corporate telecommunications services which require state-of-the-art, high-speed lines and distribution networks whose use does not entail a loss of features. The mere presence of competing providers of cross-border and ultimately Europe-wide services has had little impact in that market yet. For both economic and geographic reasons, service provision into or across Germany and France is key to competition in the markets for Europe-wide non-reserved corporate telecommunications services. DT and FT will not eliminate competition if prevented from abusing their market positions and from preventing effective market entry. The Commission concludes that the following conditions are indispensable to that end.

(63) Availability of alternative infrastructure

Alternative infrastructure options and competitive pressure on leased-line rates will be possible in Germany and France when at least two infrastructure licences for the provision of liberalized telecommunications services are awarded, as is scheduled to occur by 1 July 1996. Given the existence of several infrastructure operators in both Member States and given the chance these operators have had to prepare for early infrastructure liberalization, the award of at least two alternative infrastructure licences in Germany and France should mean choice of infrastructure there. Only from that moment will other telecommunications services providers be in a position to compete with Atlas without depending on Atlas' parents for their leased-line requirements.

(64) Interconnection on non-discriminatory technical terms

Atlas, as any of its competitors, must: (i) create an own leased-line network to provide cross-border services; and (ii) interconnect to the public packet-switched data networks, the PSTN or the ISDN in France and Germany for final distribution of the Atlas services to customers. The use of DT and FT's networks as distribution networks will also be possible for competitors from the date of the exemption by interconnecting to such networks over X.75 interfaces. As to voice and sophisticated data services, DT and FT respectively must make available upon request adequate technical information relevant for PSTN or ISDN interconnection. This enables third-party competitors to provide services from and into DT and FT's home countries offering essential advanced features such as reverse charging, closed user group definition or end-to-end management. DT and FT's packet-switched ATM networks are not integrated into the Atlas venture; as was stated at recital 7, such integration would require a new notification. Atlas must therefore interconnect to such networks if so required for certain high-speed data communications services. The condition imposed on DT and FT not to discriminate between Atlas and third-party competitors as regards technical information on DT and FT's networks, such as full data on DT and FT's implementation of the Signalling System 7 (SS7)([33]) for voice services interconnection to the PSTN, will ensure that technical performance options for Atlas' non-reserved services involving interconnection with DT and FT's networks are similar for any competitor([34]).

([33]) Major digital protocol/signalling system for managing and transmitting control and routing information in networks.

([34]) The Commission has decided similarly in previous cases featuring similar market structures and problems, e.g. Decision 93/403/EEC of 11 June 1993 — EBU/Eurovision System, OJ No L 179, 22. 7. 1993, p. 23, at recital 82; Decision 94/594/EC of 27 July 1994 — ACI, OJ No L 224, 30. 8. 1994, p. 28, at recital 66; and Decision 94/663/EC of 21 September 1994 — Night Services, OJ No L 259, 7. 10. 1994, p. 20, at recitals 80 and 82.

(65) Interconnection on non-discriminatory economic terms

DT and FT are constrained under their respective national regulations not to discriminate against third parties and to comply with Open Network Provision (ONP) obligations such as providing a minimum set of lines at cost oriented and transparent tariffs([35]). More importantly, the exemption of the Atlas transaction is conditional upon DT and FT *inter alia* granting transparent and non-discriminatory terms of interconnection and implementing an accounting system which discloses the fully allocated costs of each service in anticipation of the ONP Interconnection Directive([36]). While the existing legal framework already provides for transparency, the Commission considers the additional conditions imposed on DT and FT as to separation and auditing of accounts, exclusion of cross subsidies and economically equivalent rates for interconnection to the German and French public packet-switched data networks are indispensable to ensure that the use of DT or FT's PSTN, Transpac-France in France and/or T-Data in Germany as distribution networks will be possible for Atlas and its competitors under equivalent conditions.

(66) No privileged information

Atlas will not have a competitive advantage over competitors as regards access to DT and FT's privileged commercial information. The parents have also deleted from the Atlas Agreements those clauses originally notified that appointed Atlas as DT and FT's agent for half-circuits. Given that such international leased lines are sought either by service providers competing with Atlas or by MNCs and other private network operators which are potential clients for Atlas' outsourcing services, the agency agreement would have given Atlas a competitive information advantage over competitors.

(67) Consumer bargaining power

MNCs or other large companies have the choice between either building their own private network solutions across national borders or purchasing them from service providers such as Atlas; they are not likely to choose the latter option unless this is cost-effective. Given their knowledge of the market these customers are in a position to request offers from different competitors. This gives MNCs considerable bargaining power, reflected in competition between the suppliers. This may equally apply to SMEs when lower infrastructure prices allow small suppliers to reach the scale necessary to enter the market.

French and German markets for packet-switched data communications services

(68) DT and FT have substantial market presence in their respective home countries, where they own the only existing nationwide, packet-switched data communications networks. Actual competition existed in Germany and will not be eliminated, thanks to the divestiture of FT's indirect German subsidiary Info AG. However, the restriction of potential competition between FT and DT in France and Germany has a substantial impact on the respective markets for packet-switched data communications services. More than 80 % of customers for this service in France and Germany are SMEs, which would not have sufficient bargaining power to counterbalance the strengthening of DT and FT's market position through the creation of a joint public packet-switched data network.

(69) For the purposes of this assessment the Commission defines two different albeit partly overlapping customer segments in the market for packet-switched data communications services, namely: (i) customers demanding casual, low-speed, low-volume applications, which are provided over the public packet-switched data networks in each Member State and billed by volume sent according to published tariffs (recital 9 (1)); and (ii) customers that generate more substantial and regular demand traffic, which service providers meet increasingly by packet-switched services using protocols such as Frame Relay, ATM and IP or by switched services and bill according to individual demand features (recital 9 (2)).

The choice of alternative infrastructure is not in itself sufficient to provide competitive alternatives to X.25 data services T-Data and Transpac France offer in Germany and France respectively to the first customer segment described above. These services require dense networks with wide

([35]) Articles 7 and 10 of Council Directive 92/44/EC of 5 June 1992 on the application of open network provision to leased lines, OJ No L 165, 19. 6. 1992, p. 27.

([36]) See Articles 6 and 7 of the modified proposal for a European Parliament and Council Directive on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision (ONP), OJ No C 178, 21. 6. 1996, p. 3.

geographic coverage, which DT and FT's competitors will continue to lack for some time. This conclusion is based on two considerations. First, all alternative infrastructure currently available in Germany and France taken together amounts to only one third of total infrastructure owned by DT and FT respectively. Secondly, the market for X.25 data services is characterized by low margins. Consequently, investment in alternative infrastructure with nationwide coverage as required to serve the first customer segment described in the previous recital will not begin to narrow the gap with the incumbent TO's infrastructure until new infrastructure can carry any telecommunications service and thus provide a better return on investment. The legal and administrative framework necessary to provide such new infrastructure is scheduled to be in place in France and Germany by 1 January 1998.

(70) Competitive alternatives

No adequate competitive alternative to Atlas would exist in Germany and France for customers in the first segment described at recital 9 (1) if DT and FT were to integrate their respective nationwide, public packet-switched data networks before at least two competing nationwide carriers are licensed in each of these Member States to provide public telecommunications services. The integration of these public packet-switched data networks into Atlas would reinforce Transpac France and T-Data's existing dominant position in the French and German markets for national packet-switched data communications services (more than 70 % market share respectively). With hardly any competitive alternative yet for national services, Atlas would at this stage lock in existing Transpac France and T-Data customers with restrictive effects in the cross-border and ultimately Europe-wide geographic market as the Single Market develops. Keeping the French and German public packet-switched data networks separate from Atlas and prohibiting FT and DT from selling own services and Atlas services in the same contract, customers have the possibility to: (i) compare Transpac France and T-Data's national X.25 data services to emerging competitive alternatives such as more advanced packet-switched data communications and switched services (see below), for which FT and DT face stronger competition; and (ii) choose between Atlas and its competitors for separate provision of cross-border and ultimately Europe-wide X.25 data services if their requirements exceed the national scope.

Generally, competitive alternatives must be effectively available to have an appreciable impact on market conditions. However, as regards the French and German telecommunications markets, the Commission envisages that competitive conditions will already change substantially once telecommunications services and networks are fully and effectively liberalized and first nationwide carrier licences granted, as is scheduled to occur by 1 January 1998, and develop quickly thereafter. To reach this conclusion, the Commission has taken into consideration: (i) the decreasing relevance of public packet-switched data networks using the X.25 protocol for the provision of corporate packet-switched data communications services; (ii) the outstanding economic importance and attraction of the French and German telecommunications markets to telecommunications operators; (iii) the existence of operational expandable alternative infrastructure there and (iv) the positioning of a number of strong competing alliances ahead of full and effective liberalization of telecommunications networks and services in France and Germany by 1 January 1998 (see recital 18).

Ahead of full and effective liberalization of the French and German telecommunications markets it is possible in Germany to provide nationwide X.25 data services using the ISDN 'D' channel. Several of T-Data's competitors use this alternative to direct interconnection with DT's public packet-switched data networks (see next recital) at a total investment cost of approximately ECU 1,1 million. The ISDN 'D' channel is accessible in France using Transpac France as a transit network and direct access will be possible by the end of 1996. The Commission considers that increasing availability of the ISDN might eventually offer a competitive alternative for the provision of X.25 data services in the German customer segment described at recital 9 (1). As for France however, the Commission concludes from the density of Transpac France's public packet-switched data networks that using the ISDN is unlikely to prove a sufficiently competitive alternative.

(71) Economically equivalent interconnection terms

Any third party can obtain non-discriminatory interconnection with T-Data and Transpac-France

(before these entities are integrated into Atlas) or Atlas Germany and Atlas France (after T-Data and Transpac France have been integrated into Atlas) in Germany and France over X.75 interfaces. Services provided over two or more networks interconnected through X.75 interfaces are an alternative to using own networks in the market for packet-switched data communications services. This alternative is competitive only for service provision to customers in the second segment described at recital 9 (2), albeit demand for X.25 data services in this segment is decreasing quickly. In this segment, most value is added to services provided over customized networks, and service providers rely on interconnection merely to relay customer data communications to third parties unconnected to the customized network (call termination).

While Atlas may use proprietary interfaces to interconnect with T-Data and Transpac France, non-discriminatory third-party access to T-Data and Transpac France via X.75 interfaces is sufficient to prevent Atlas from eliminating competition in the market for packet-switched data communications services. For instance, to date T-Data interconnects to most third-party networks over interfaces which use the X.75 protocol and do not therefore support certain advanced features. DT and FT's tariffs for interconnection to their public packet-switched data communications networks must disclose the mark-up on the fully allocated costs of providing such interconnection. Third-party interconnection must be non-discriminatory compared to interconnection conditions for Atlas, *inter alia* as regards availability of ancillary services, provisioning time, repair and maintenance levels or technical information required. In the light of the above, the Commission concludes that the elimination of potential competition between T-Data and Transpac France in Germany and France respectively will not allow the parents to foreclose their home markets for the provision of standardized packet-switched data communications services.

Markets for national services in countries other than France and Germany

(72) At the third-country national level, Atlas is set to develop into a significant competitor for incumbent TOs: Atlas aims at becoming the second player on the data communications services markets of all major European markets with the exception of the UK. In respect of these services, the parents' submitted market share target for Atlas in all major national markets other than France and Germany is 20 %. Atlas is therefore set to offer an alternative to dominant incumbent TOs rather than to eliminate actual competition in third countries.

Markets outside the scope of the Atlas venture

(73) The liberalized services subject to cooperation within Atlas contribute less than 10 % to DT and FT's respective turnover. Even some liberalized services such as national VPN services and all data communications involving the use of DT and FT's ATM networks are not Atlas services and therefore subject to competition between the parents, while Atlas may purchase these services and access these networks under equivalent non-discriminatory, transparent conditions and at the same interconnection rates as third-party competitors. The condition attached to this Decision restricting the exchange of sensitive information between DT, FT and Atlas limit the potentially negative effects of the joint venture both on competition between the parents acting as Atlas distributors and on overall competition between the parents.

Exclusive distribution arrangements in France and Germany

(74) In allowing passive sales the Distribution Agreements provide an opening for customers with bargaining power to exploit margins for competition between the Atlas parent acting as exclusive distributor in its home country and the other parent that may offer the same Atlas service at a lower price. More importantly, the restrictive effects of the exclusive distribution agreements are likely to be increasingly balanced by the availability of alternative infrastructure and the non-discriminatory terms of interconnection with T-Data and Transpac-France's networks, which will induce competition for Atlas and for DT and FT acting as Atlas distributors.

6. Conclusion

(75) It is the Commission's conclusion that all conditions for an individual exemption pursuant to

Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement are met in respect of the creation of Atlas and in respect of the individual restrictions discussed above.

C. DURATION OF THE EXEMPTION, CONDITIONS AND OBLIGATIONS

(76) Pursuant to Article 8 of Regulation No 17 and to Protocol 21 of the EEA Agreement respectively, a decision in application of Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement shall be issued for a specified period and conditions and obligations may be attached thereto. Pursuant to Article 6 of Regulation No 17, the date from which such a decision takes effect cannot be earlier than the date of notification. In that respect, in the present case the Decision, in so far as it grants exemption, shall take effect:

(a) as regards the creation of Atlas and related agreements as described above, except for the integration of Transpac France and T-Data into a joint venture, for five years from the date on which the second new infrastructure licence comes into force in both Germany and France authorizing the licensee to operate infrastructure for the provision of liberalized services in competition with the respective parent and the respective first licensee; and

(b) as regards the integration of Transpac France and T-Data into a joint venture company, from the date on which licences to new applicants for the provision of nationwide infrastructure and national and international voice telephony services which provide two alternatives to DT and FT in a substantial part of Germany and France respectively come into force in both Germany and France to the expiry of the five-year period specified in the preceding recital.

(77) This exemption Decision shall be subject to the conditions described in recitals 25 to 30 (1). This exemption Decision shall further impose on DT, FT and the entities created pursuant to the Atlas agreements the obligations described in recital 30. These conditions are indispensable to prevent an elimination of competition in the relevant markets by the largest TOs in the EEA. The Commission will, upon the parties request, review the need for any particular condition or obligation attached to this Decision if circumstances change substantially before the period of exemption expires.

The most crucial behavioural requirements to safeguard competition in the EEA are attached as conditions rather than obligations to this Decision, given the need to prevent an elimination of effective competition. Strict compliance with these requirements is so important that the Commission must ensure immediate consequences in the event of a breach. Given the legal consequences of such breach of a condition, national courts can adequately and swiftly contribute to a decentralized policing of compliance and thus ensure that the competition rules will be respected for the benefit of private individuals ([37]). However, the principle of proportionality requires that far-reaching legal, financial and commercial consequences do not ensue from occasional or individual mistakes whose effects on the market are negligible. Therefore, violations of the prohibitions on cross-subsidization, discrimination and bundling cannot be considered to breach a condition attached to this Decision unless such violations have a substantial impact on market conditions, for instance if practices are committed systematically or repeatedly.

The condition relating to non-discriminatory treatment of Atlas and its competitors (recital 28) will also allow DT and FT to compete against each other at the distribution level, albeit through passive sales. Such competition is possible because the same Atlas service may be sold from either end of the requested circuits, namely from Germany or from France. To limit the potentially negative effects of the joint venture on overall competition between the parents, the Commission considers it appropriate to impose restrictions on the exchange of sensitive information between the parents and Atlas (recital 28 (4)).

(78) This Decision is without prejudice to the applicability of Article 86 of the EC Treaty and Article 54 of the EEA Agreement,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement and subject to Articles 2 to 5 of this Decision, the provisions of

([37]) See Commission notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, OJ No C 39, 13. 2. 1993, p. 6.

Articles 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement are hereby declared inapplicable, for a period of five years from the date on which two or more licences for the construction or ownership and control of alternative infrastructure for the provision of liberalized telecommunications services take effect in both Germany and France, to:

(a) the creation of the Atlas joint venture by Deutsche Telekom AG ('DT') and France Télécom ('FT'), as notified to the Commission, including the ancillary obligations imposed on DT and on FT:

  (i) to obtain from Atlas all requirements for global products under Article VII of both Distribution Agreements; and

  (ii) not to compete with the joint venture for the provision of Atlas services under Article XIII of the Joint Venture Agreement and Article VII of both Distribution Agreements; and to

(b) the appointment of DT as the exclusive distributor for Atlas in Germany and of FT as the exclusive distributor for Atlas in France under Article IV of both Distribution Agreements.

Article 2

Pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement and subject to Articles 3, 4 and 5 of this Decision, the provisions of Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement are hereby declared inapplicable to the integration into Atlas of the German and French public packet-switched data networks, provided that only networks providing packet-switched data communications services using the X.25, Frame Relay, SNA or Internet protocols shall be integrated, from the date on which both Germany and France have:

(a) removed all legal prohibitions on entities other than DT and FT and their subsidiaries to:

  (i) build, own or control both national and international telecommunications infrastructure and use such infrastructure to provide any telecommunications service, and

  (ii) provide a national and international voice telephony service; and

(b) granted and made effective at least two licences to applicants other than DT and FT for

  (i) the construction or ownership, and control, of telecommunications infrastructure and either separately or in combination,

  (ii) the provision of national and international voice telephony services, provided that such licences provide two suitable alternatives to DT and FT respectively to serve all or a substantial part of the territory of Germany and France,

until the expiry of the five-year period specified in Article 1.

Article 3

Until the date specified in Article 2 of this Decision, the exemption from Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement set out in Article 1 of this Decision is subject to the condition that cooperation between DT and FT in developing common technical network elements comprise the following areas only:

(a) the following product management and development tasks:

  (i) product definition,

  (ii) product marketing,

  (iii) product life-cycle management,

  (iv) specification of product requirements,

  (v) technical specifications and development of the products, and

  (vi) technical development of the products;

(b) the following network planning functions:

  (i) central network engineering and optimization of the common transmission network so as to avoid an unreasonable duplication of resources,

  (ii) engineering and optimization of the networks for the various service platforms so as to ensure seamless services, and

  (iii) central planning regarding the implementation of new network nodes; and

(c) the following aspects of information systems:

  (i) definition of the information system architecture,

  (ii) specification of information system requirements and applications,

  (iii) technical development of hardware and software for information systems, and

  (iv) central implementation planning of hardware and software.

Until the date specified in Article 2, all other aspects and functions of each of the French and the German public packet-switched data networks shall be controlled by two separate network management centres.

Article 4

The exemption from the application of Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement set out in Articles 1 and 2 of this Decision is subject to the following conditions:

(a) Divestiture of Info AG

(1) FT shall:

(i) sell Transpac's shares in Info AG before [. . .][38]. The Commission may extend the period granted to FT for divestiture of Info AG by an additional six months after that date; FT shall be deemed to have complied with this condition by [. . .][39] if it has entered into a binding letter of intent or a binding contract for the sale of Info AG to a purchaser agreed by the Commission, provided that such sale is completed within a reasonable time limit, after the signing of such binding letter of intent or binding contract, agreed by the Commission;

(ii) appoint a trustee subject to approval by the Commission to advise on the management and to sell Info AG, provided that, subject to approval by the Commission, FT may

— terminate the trustee agreement should FT decide at any time after the appointment that the trustee is not performing its duties properly, and

— replace the previously appointed trustee by another trustee also approved by the Commission;

(iii) give the trustee an irrevocable mandate to sell Info AG, on best possible terms and conditions, to any available purchaser making an offer before [. . .][40];

(iv) remunerate the trustee providing incentives for a prompt divestiture;

(v) give all reasonable assistance requested by the trustee to sell Info AG by the target date;

(vi) establish and facilitate the management structure agreed with the trustee in the framework of the divestiture negotiations;

(vii) provide the purchaser of Info AG with any licences and know-how relating to the provision of Info AG's services to the extent possible under existing contractual obligations, if any. FT may charge the purchaser a market-based fee for any such licence and know-how;

(viii) keep all administrative and management functions relating to Info AG which have been carried out at all levels within FT and/or Transpac, so as to maintain the viability, marketability and competitiveness of Info AG until divestiture is completed or until the trustee advises FT that such functions are no longer necessary, whichever occurs earlier.

(2) FT shall at all times use its best efforts to maintain the value of Info AG and of its business in every respect and, when the trustee is appointed to sell Info AG, shall consider the advice of the trustee to maintain this value. FT shall in particular ensure that all services provided by FT or any of FT's subsidiaries to Info AG continue to be provided efficiently and satisfactorily and that no increase is made in the charge (if any) made to Info AG for any such service. FT shall not, except with the consent of the trustee, employ or offer employment to any employee or officer of Info AG until after the sale of Info AG.

(3) The trustee appointed by FT shall:

(i) advise FT and Transpac on the best management structure to ensure the continued viability, marketability and competitiveness of Info AG's business, also in the event of a restructuring of Info AG;

(ii) advise FT and Transpac with regard to the satisfactory operation and management of Info AG, so as to ensure the continued viability, marketability and competitiveness of Info AG's business, and shall supervise, monitor and control the implementation of the advice by Info AG; for these purposes the trustee shall have complete access to Info AG's personnel and facilities as well as to documents, books and records of both FT and Transpac, including such personnel, facilities, books and records which, even if not directly related to Info AG, may have an impact on the conduct of Info AG's operations;

(iii) act as FT's investment banker in conducting bona fide negotiations with interested third parties with a view to selling Info AG. In the event that the trustee at any time prior to the target date determines together with the Commission that it is not possible to identify an acceptable purchaser for the business of Info AG other than the customers whose headquarters are located outside Germany,

[38] Business secret.
[39] Business secret.
[40] Business secret.

the trustee, FT and the Commission shall discuss appropriate alternatives to the proposed divestiture of Info AG, notably an extended divestiture;

(iv) provide the Commission with a written report before a binding contract is signed and in any event every month on all developments in its negotiations with third parties interested in purchasing Info AG;

(v) provide the Commission with a written report every two months concerning the monitoring of the operations and management of Info AG;

(vi) at any other time upon the Commission's request, provide the Commission with a written or oral report on any aspect of the duties and activities of the trustee in relation to Info AG and its possible purchasers, indicating whether a proposed purchaser would be able to ensure that Info AG remains a competitive participant in the German telecommunications market and whether negotiations with such proposed purchaser should continue; and

(vii) cease to perform its duties as trustee for the purpose of this condition when the sale of Info AG or any alternative remedy within the meaning of point (iii) becomes effective.

(4) Multinational clients to whom Info AG has so far provided network services as part of the Transpac network and whose headquarters are located outside Germany may be transferred to Atlas on condition that the Commission is satisfied that these services can be separated from the German activities of Info AG without significantly lessening the value of those activities.

(5) With immediate effect from the date of notification of this Decision and until one year after the date of signature of the agreements between Transpac and the purchaser of Info AG, neither DT, FT, Atlas nor GlobalOne shall compete with Info AG for the provision of telecommunications services to customers of Info AG whose headquarters are located within Germany except where such customers decline to deal with Info AG.

(6) If the sale of Info AG's business does not seem likely to occur by the date stated in point (1) (i), FT shall, at least two months before that date, submit alternative remedies sufficiently satisfactory to safeguard actual competition in the German market. These alternative remedies must be executed by the date stated in point (1) (i).

(b) Non-discrimination

(1) DT and FT shall not grant to any entity created pursuant to the Atlas Agreements terms and conditions dissimilar to the terms and conditions applied to other providers of similar services, nor exempt such entity from any usage restrictions which would enable such entity to offer services which competing providers are prevented from offering with regard to the following facilities-related telecommunications services provided by FT and DT in France and Germany respectively:

(i) leased lines services, in particular international leased lines (half-circuits) and domestic leased lines, including any discounts, as the case may be; and

(ii) PSTN/ISDN services including both access to such networks (namely analogue access; basic ISDN access; ISDN access to the public packet-switched data networks; special access from the public packet-switched data networks to ISDN; and national and international voice VPN and VPN interconnection services) and traffic over such networks.

Atlas shall not be granted more favourable treatment than third parties in connection with reserved facilities and services and with such facilities and services which remain an essential facility after full and effective liberalization of telecommunications infrastructure and services in France and Germany.

(2) DT and FT shall grant any entity created pursuant to the Atlas Agreement and any third party operating a telecommunications facility that apply for the interconnection of such facility with DT or FT's networks such interconnection on non-discriminatory terms that enable such entity or person to provide telecommunications services or provide its telecommunications facilities without limitation in any respect within the reasonable capabilities of the operator concerned.

(3) DT and FT shall not in any way discriminate between any entity created pursuant to the Atlas Agreements and any other service provider competing with such entity in connection with:

(i) either a decision substantially to modify technical interfaces for the access to reserved services and/or essential facilities or services, or the disclosure of any other technical information relating to the operation of the PSTN/ISDN; competitors shall in particular have access to such software and interface information as is

indispensable for maintaining the technical features of voice services where such competitors interconnect to the German or French PSTN/ISDN; and

(ii) the disclosure of any commercial information that would confer a substantial competitive advantage and is not readily and equally available elsewhere by service providers competing with such entity.

(4) Breaches of the requirements set out in points 1, 2 and 3 shall not be considered to infringe this condition unless such breaches have a substantial impact on the market.

(c) Interconnection to DT and FT's public packet-switched data networks

(1) FT and DT shall immediately:

(i) establish and maintain standardized X.75 interfaces to access their national public packet-switched data networks;

(ii) offer such access on non-discriminatory terms, including price, availability of volume or other discounts and the quality of interconnection provided; and

(iii) publish the standard terms and conditions for such X.75 interface standards, including, if any, volume discounts and other discounts and make any agreements relating to such X.75 interfaces, including all specifically agreed terms, available for inspection by the Commission.

(2) Transpac France and T-Data shall, until such time as Transpac France and T-Data are integrated into Atlas, not disclose to any entity created pursuant to the Atlas Agreement any such specifically agreed terms as are identified and maintained as confidential by the party obtaining interconnection through standardized X.75 interfaces to access the French or German national public packet-switched data networks.

(3) The conditions set out in points (1) and (2) shall likewise apply to any generally used CCITT-standardized interconnection protocol that may modify, replace or co-exist as a standard related to the X.75 standard and is used by FT and DT.

(4) Any entity created pursuant to the Atlas Agreements may access the French and German public packet-switched data networks through proprietary interfaces, even for the provision of data communications services, provided that access granted to such entity through such interfaces is economically equivalent to third-party access to those networks.

(5) Breaches of the requirements set out in points 1 to 4 shall not be considered to infringe this condition unless such breaches have a substantial impact on the market.

(d) Interconnection to DT and FT's other networks and facilities

(1) DT and FT shall grant to any third party that operates a telecommunications facility ('telecommunications operator') and applies for the interconnection of such facility or systems facilities with DT or FT's networks, such interconnection on non-discriminatory terms as compared to the terms applied to Atlas. Such terms shall enable the telecommunications operator to provide telecommunications services or provide its telecommunications facilities without limitation in any respect within the reasonable capabilities of the telecommunications operator concerned.

(2) Breaches of the requirements set out in point 1 shall not be considered to infringe this condition unless such breaches have a substantial impact on the market.

(e) Cross-subsidization

(1) All entities created pursuant to the Atlas Agreements shall be established as distinct entities separate from DT and FT.

(2) Atlas SA, T-Data and Transpac France shall obtain their own debt financing on their own credit, provided that FT and DT:

(i) may make capital contributions or commercially normal loans to Atlas SA, T-Data and Transpac France, to enable them to conduct their respective businesses;

(ii) may pledge their venture interests in such entities, in connection with non-recourse financing for such entities; and

(iii) may guarantee any indebtedness of such entities, provided that FT and DT may only make payments pursuant to any such guarantee following a default by such entities in respect of such indebtedness.

(3) All entities created pursuant to the Atlas Agreement, T-Data and Transpac France shall not allocate directly or indirectly any part of their operating expenses, costs, depreciation, or other expenses of their business to any parts of FT or DT's business units (including without limitation the proportionate costs based on work actually performed that are attributable to shared employees or sales or marketing of Atlas products and services by DT or FT employees).

These undertakings may bill DT or FT for products and services supplied to DT or FT by such undertakings at:

(i) the same price charged third parties in the case of products or services sold to third parties in commercial quantities; or

(ii) on the basis of the full cost reimbursement or other arm's length pricing method in the case of products and services not sold to third parties in commercial quantities.

(4) Breaches of the requirements set out in points 1, 2 and 3 shall not be considered to infringe this condition unless such breaches have a substantial impact on the market.

(f) Bundling

(1) DT and FT shall sell their services under contracts separate from the contracts for the sale of Atlas services concluded as distributors of Atlas in Germany and France respectively. Each separate contract shall set out the terms and conditions of each individual service sold thereunder and notably attribute any quantity or other discounts to a particular service, as the case may be.

(2) Breaches of the above requirements shall not be considered to infringe this condition unless such breaches have a substantial impact on the market.

(g) Accounting

(1) T-Data, Transpac France (including all their subsidiaries) as well as all entities created pursuant to the Atlas Agreements which are operating in the EEA shall keep separate accounting records using international accounting standards for each service they provide in any country. DT and FT (including all subsidiaries) shall keep separate accounting records using international accounting standards for each service they provide to any entity created pursuant to the Atlas Agreements, operating in the EEA.

(2) DT and FT shall, within one year of the date defined in Article 1, implement an accounting system which generates sufficiently detailed records of the services covered by point (1). Those records shall detail the following:

(i) the cost standard used;

(ii) the accounting conventions used for the treatment of costs;

(iii) the allocation and attribution of expenses or costs, revenues, assets and liabilities shared between any entity created pursuant to the Atlas Agreements and DT and/or FT; and

(iv) the attribution method chosen.

(3) The accounting records referred to in points (1) and (2) shall identify all services provided to any entity created pursuant to the Atlas Agreements by DT and FT or transfers to or from DT and FT.

(4) No entity created pursuant to the Atlas Agreement, nor T-Data or Transpac France shall receive any material subsidy directly or indirectly from DT or FT, nor any investment or payment from DT or FT that is not recorded in the books of such entities as an investment in debt or equity.

Article 5

The exemption granted under this Decision is subject to the following obligations:

(a) Auditing

(1) Atlas SA and any consolidated subsidiary of Atlas SA, Transpac France and T-Data shall be audited by an independent external auditor every 12 months, provided that such audit shall certify from an accounting viewpoint that:

(i) all transactions between those undertakings, on the one hand, and FT and DT, on the other hand, have been conducted at arm's length;

(ii) the undertakings have adhered to the accounting procedures; and

(iii) the calculation numbers are accurate.

(2) The first auditing report and certificate complying with point (1), covering the 12-month period starting on the date on which this Decision takes effect, shall be submitted to the Commission within 15 months of that date.

(b) Other obligations

DT, FT, T-Data, Transpac France and all entities created pursuant to the Atlas Agreements shall each, for the purpose of ascertaining and ensuring compliance by these undertakings with the conditions set out in Article 4:

(1) keep all detailed records and documents necessary to prove complete compliance with the terms of the conditions set out in Article 4 ready for inspection by the Commission and to

enable the Commission to verify the correctness of the audit certificate referred to in point (a) (2);

(2) give the Commission access to their business premises to inspect records and documents covered by the obligations set out under heading (a) and to receive oral explanations relating to such documents on reasonable notice, during office hours, and without the need for the Commission to invoke the powers of inspection pursuant to Regulation No 17; and

(3) provide the Commission with:

(i) any records and documents in the possession or control of those undertakings necessary for that determination;

(ii) unaudited accounting data as specified in points (1) and (2) every six months, starting one year after the commencement date of the exemption pursuant to Article 1; and

(iii) further oral or written explanations.

Article 6

This Decision is addressed to:

Deutsche Telekom AG,
Friedrich-Ebert-Allee 140,
D-53105 BONN;

France Télécom,
Place d'Alleray,
F-75505 PARIS.

Done at Brussels, 17 July 1996.

For the Commission
Karel VAN MIERT
Member of the Commission