COMMISSION DECISION

of 17 July 1996

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

(Case No IV/35.617 — Phoenix/GlobalOne)

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

(Text with EEA relevance)

(96/547/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

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

Having regard to the application for negative clearance and the notification for exemption submitted, pursuant to Articles 2 and 4 of Regulation 17, on 29 June 1995,

Having regard to the summary of the application and notification published pursuant to Article 19 (3) of Regulation 17 and to Article 3 of Protocol 21 of the EEA Agreement [2],

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

Whereas:

I. THE FACTS

A. INTRODUCTION

1. The Phoenix transaction was notified to the Commission on 29 June 1995. The notifying parties announced a new name, GlobalOne, at the signature of the agreements on 5 March 1996. This transaction is linked to a separate transaction creating a joint venture, Atlas, owned as to 50 % by France Télécom (FT) and as to 50 % by Deutsche Telekom (DT), given that Atlas is a parent to the joint venture entities created pursuant to the Phoenix agreements. A separate Decision in Case IV/35.337 ('the Atlas Decision') [3] exempts the Atlas agreements, notified on 16 December 1994, from the application of Articles 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement.

2. The Phoenix agreements consist of two main transactions involving two Community telecommunications organizations (TOs) and one United States telecommunications operator:

   (i) FT and DT each acquired an equity stake of approximately 10 % in Sprint, worth United States $3,7 billion. Both FT and DT obtained proportionate board representation and investor protection as minority shareholders in Sprint; as detailed below, provisions have been included in the investment agreement to prevent DT and/or FT, either separately or jointly, from controlling or influencing Sprint; and

   (ii) Atlas and Sprint created a joint venture, Phoenix, for the provision of non-reserved global telecommunications services and other telecommunications services to corporate users, carriers and consumers. The Phoenix joint venture is structured into groups of operational entities under the strategic supervision of a Global Venture Board (collectively referred to as the 'Phoenix entities'). One group of entities provides Phoenix services worldwide except in Europe and the United States (the 'Rest Of World (ROW) entities'), a second group of entities provides Phoenix services in Europe except in France and Germany (the 'Rest of Europe (ROE) entities'). The ROW and ROE entities also manage Phoenix's global backbone network until the parties reach agreement on management by an already created third entity (the 'Global Backbone Network (GBN) entity'). The Global Venture Board shall take decisions on matters of policy only and not engage in the

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No C 337, 15. 12. 1995, p. 13.
[3] See p. 23 of this Official Journal.

management of individual operational entities created pursuant to the Phoenix agreements.

B. THE PARTIES

3. Deutsche Telekom AG (DT) and France Télécom (FT) are respectively the German and French public TOs. Details of both undertakings are provided in the Decision on the Atlas venture published in this issue of the Official Journal.

4. Sprint Corporation (Sprint) is a holding company in the United States. The Sprint group of companies is a diversified telecommunications group providing global voice, data and video-conferencing services and related products. Sprint's main subsidiaries provide local (United States) exchange, cellular wireless as well as domestic (United States) and international long-distance telecommunications services. Other Sprint subsidiaries engage in wholesale distribution of telecommunications products and the publishing and marketing of white and yellow page telephone directories. Worldwide turnover for Sprint in 1994 was ECU 10,9 billion; Sprint is the world's 11th largest telecommunications carrier in terms of revenues.

C. THE RELEVANT MARKET

1. *Creation of the Phoenix entities*

5. The Phoenix entities address several product and geographic markets, namely: (i) the markets for non-reserved corporate telecommunications services both globally and regionally, (ii) the market for traveller services and (iii) the market for so-called carrier services.

(1) *Product markets*

The markets for non-reserved corporate telecommunications services

6. The Phoenix entities target the same markets for both customized packages of corporate telecommunications services and packet-switched data communications services (jointly referred to as 'non-reserved corporate telecommunications services') described in the separate Atlas Decision. Pursuant to the joint venture agreement, the offerings of Phoenix include the following services:

— corporate voice services: global virtual private network (VPN), international toll free, selected card and simple resale services and switched digital,

— data communications services using *inter alia* the X.25, Frame Relay and IP protocols,

— dedicated transmission for voice and data services: managed bandwidth and VSAT,

— custom network solutions: systems/equipment procurement, tailored and managed services and outsourcing,

— platform-based enhanced services: messaging including access to telex, local area network (LAN) interconnection, electronic document interchange (EDI), video-conferencing and audio-conferencing.

7. Phoenix provides voice simple resale services under Sprint's licence in the United Kingdom and under FT's licence in Sweden. This Decision relates only to Phoenix's range of products and business scope as notified. Any substantial change of products or business scope, notably (i) the contribution to Phoenix of broadband transmission capacity (such as Asynchronous Transfer Mode (ATM) networks) in France and Germany and (ii) the offering by Phoenix of public basic telecommunications services (such as voice telephony services[4]) requires a new notification.

The market for traveller services

8. The market for traveller telecommunications services comprises offerings that meet the demand of individuals who are away from their normal location, either at home or at work. Among the most relevant of these offerings are those offered by the Phoenix entities, namely (i) calling card services (prepaid cards with or without a code and postpaid cards), including those in combination with credit cards and other branded service cards ('affinity cards'), (ii) specialized voice services (such as equal access and code-based authorization services), and (iii) selected data and enhanced platform (that is to say, communications system software) services.

9. Customers for traveller services include both business travellers and other travellers. In the card business targeted by Phoenix, the former are by far the largest group of buyers. Business travellers are generally intensive card users, the main incentive for card usage being the ability to avoid paying hotel telephone surcharges.

The market for carrier services

10. The market for carrier services comprises the lease of transmission capacity and the provision of related

[4] Defined in the seventh indent of Article 1 of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, OJ No L 192, 24. 7. 1990, p. 10.

services to third-party telecommunications traffic carriers and service providers. Along with liberalization and globalization of telecommunications markets, demand for efficient, high-quality traffic transportation capacity has risen among old and new carriers. In this connection, the traditional model of separate arrangements with other individual carriers is increasingly challenged by players with global network infrastructure that offer an array of services. The most relevant of such services are:

(a) switched transit, meaning transport of traffic over bilateral facilities between the originating carrier, the transit carrier and the terminating carrier; neither the originating carrier nor the terminating carrier need bilateral facilities between themselves, but only with the transit carrier;

(b) dedicated transit, meaning leased line offerings for the transport of traffic through the domestic network of the transit carrier; leased line facilities used for this purpose may include discrete voice circuits or a high-bandwidth digital circuit that can be used for both voice and data services;

(c) traffic hubbing offerings, where the provider takes care of all or part of international connections; these offerings are typically designed for emerging carriers, who are interconnected with the provider over bilateral facilities and whose international traffic is merged with other traffic on the provider's global network; and

(d) reseller services for service providers without international telecommunications facilities of their own.

As international telecommunications markets are deregulated, demand for carrier services is increasingly driven by alternative carriers concerned with assigning to the incumbent TO their international traffic, for reasons such as technical dependency and commercial sensitivity of customer information.

11. Purchasers of carrier services include established and emerging carriers. Both groups of clients are sophisticated purchasers. Among the emerging carriers, one may distinguish facilities-based carriers that provide telecommunications services over alternative infrastructure or cable television networks seeking greater efficiency in the transport of international client traffic, while non facilities-based carriers and service providers seek to preserve a competitive advantage by avoiding dependence on a local TO for international client traffic.

(2) *Geographic markets*

12. Along the lines of the Commission's findings in its Decision 94/579/EC([5]) (BT-MCI), the geographic scope of certain markets targeted by the Phoenix entities, as well as the market that must be considered in respect of the investment of DT and FT in Sprint, is international and even global. Although national borders subsist for many services, strategic alliances like Phoenix are built not only in anticipation of a market unaffected by national boundaries but even with the express purpose of offering large global telecommunications users seamless end-to-end services anywhere by overcoming the difficulties inherent in the current market structure split along national borders. However, the service offerings of the Phoenix entities attain different existing geographic markets.

The markets for non-reserved corporate telecommunications services

13. As described in the Atlas Decision, demand from large users for customized packages of corporate telecommunications services exists in at least three distinct geographic markets, namely at a global, a cross-border regional and a national level. Phoenix services have global reach given that DT, FT, Sprint and the ROE and ROW entities each interconnect over the Phoenix global backbone network. In the global market for customized packages of corporate telecommunications services the Phoenix venture therefore creates competition, for instance for BT and MCI's existing Concert venture. In the Community, the ROE entities will cooperate with DT, FT and Atlas to provide customized packages of corporate telecommunications services at the cross-border regional level; these services will have global 'connectivity' — that is, they will allow for an extension beyond the Community and ultimately worldwide if a customer so requires.

14. Packet-switched data communications services in each geographic market mentioned in the previous recital are a part of the Phoenix offerings portfolio. However, the regional Phoenix operating entity decides whether to provide such services at the

([5]) Commission Decision of 27 July 1994 in Case No IV/34.857 — BT-MCI, OJ No L 223, 27. 8. 1994, p. 36.

national level. Therefore, the ROE entities provide Europe-wide packet-switched data communications services initially based on the network that results from merging the existing Transpac and Sprint networks. The extent to which the ROE entities will provide such services in national markets within the European Economic Area (EEA) will depend on the coordination between Atlas and the ROE entities as the competent Phoenix entities in the EEA.

The market for traveller services

15. Along with the globalization of the economy the market for traveller services appears to be increasingly global; travellers demand offerings which include a single bill and integrated functions such as voice messaging, voice response and information systems everywhere. Geographic limitations of current traveller service offerings are generally due to technical shortcomings due to be overcome in the near future, such as the incompatibility of mobile communications systems or differences in prepaid cards without an individual user code. As illustrated at recital 8 above, none of the services targeted by the Phoenix entities is affected by these shortcomings; however, the geographic scope of the traveller services offered by Phoenix can be left open for the purposes of this case, as the finding of narrow geographic markets would not affect the assessment of the parties' competitive position.

The market for carrier services

16. Both supply of and demand for carrier services are by nature international. Geographic proximity between purchaser and supplier of switched transit capacity is hardly relevant for switched transit which carriers use either as a substitute for operating own international lines or to deal with peak traffic on such lines. Likewise, dedicated transit services offer cable- or satellite-based routing capacity across third countries. Finally, using hubbing services is an alternative to entering into an undetermined number of bilateral agreements with individual carriers.

2. *DT and FT's investment in Sprint*

17. The acquisition by DT and FT of new equity amounting to an approximate 20 % stake in Sprint aims at consolidating a strategic alliance to enter the global telecommunications markets and extending service into new market segments. As the BT-MCI alliance showed, investment in a United States carrier offers one efficient way of addressing multinational companies, being the largest target customer group for global non-reserved corporate telecommunications services.

D. MARKET SHARES OF PHOENIX

The markets for customized packages of corporate telecommunications services

18. *Global market*

The parents estimate the global market for customized packages of corporate telecommunications services market addressed by Phoenix (exclusive of data communications services) to be worth approximately ECU 4,8 billion (1993). Of this total, end-to-end services accounted for approximately ECU 37,6 million, VPN services for approximately ECU 2,8 billion, VSAT services for approximately ECU 1,4 billion and outsourcing services for approximately ECU 527 million. In 1993, the aggregate turnover of DT, FT and Sprint in the different market segments amounted to approximately ECU 3,8 million for end-to-end services, approximately ECU 576 million for VPN services and approximately ECU 6 million for outsourcing services, giving Phoenix a theoretical market share of 12,2 % in the global market for customized packages of corporate telecommunications services.

19. *Cross-border regional market*

Services in the Community (exclusive of data communications services) accounted for approximately ECU 505 million in 1993. According to the notification the Phoenix parents' aggregate market shares in the Community in 1993 were [. . .] % [6] in the end-to-end services market, [. . .] % [7] in the VPN services market, [. . .] % [8] in the outsourcing services market and [. . .] % [9] in the VSAT market. However, market shares for VSAT services are difficult to calculate given that TOs mostly use VSAT terminals as back-up facilities for other services or to extend the geographic scope of services despite terrestrial infrastructure shortcomings.

20. *National markets*

National markets for customized packages of corporate telecommunications services within the EEA are discussed in the Atlas Decision. In this regard, Sprint has a significant share of total outsourcing turnover generated in Member States

[6] Business secret (less than 30 %).
[7] Business secret (less than 30 %).
[8] Business secret (less than 5 %).
[9] Business secret (less than 30 %).

such as the Netherlands ([. . .] % ([10])) and the United Kingdom ([. . . % ([11])), where DT and FT's outsourcing joint venture, Eunetcom BV, has a lesser presence (5 % of total turnover in both Member States). As for France and Germany, adding Sprint to DT and FT brings Phoenix's aggregate share of total turnover generated by outsourcing services to [. . . % ([12]) in France and to [. . . % ([13]) in Germany, compared with 31 % in France and 33 % in Germany for the second-largest provider there, Concert's Syncordia.

The market for packet-switched data communications services

21. The global market for packet-switched data services was worth approximately ECU 5,3 billion in 1993, while DT, FT and Sprint's aggregate sales were [. . .] ([14]) or [. . .] % ([15]) worldwide. The European market for data communications services is discussed in the Atlas Decision. Sprint's turnover for packet-switched data services was [. . .] ([16]) in 1993, bringing DT, FT and Sprint's aggregate shares of that market to [. . .] % ([17]). As for national markets, Sprint achieved its highest turnover in France, Germany, Italy and the United Kingdom. Neither DT nor FT have a significant market presence in the latter two Member States, where Sprint has a [. . .] % ([18]) and [. . .] % ([19]) market share respectively. In turn, Sprint's turnover in France (ECU [. . .] ([20])) and Germany (ECU [. . .] ([21])) equals market shares in these Member States of only [. . .] % and [. . .] % respectively ([22]).

The market for traveller services

22. Total calling card revenue in the Community was approximately ECU 120,5 million in 1994, most of which was generated by national dialling. In 1993, DT had issued 200 000 cards (all of them in Germany), equivalent to 2,1 % of the total card subscriber base in the Community; FT had issued 1,5 million cards (all of them in France), equivalent to 15,7 % of the card subscriber base in the Community; and Sprint had issued 12 million cards worldwide, of which 500 000 (equivalent to a 5,2 % market share) were issued in the Community. The aggregate market shares of the parents would therefore make Phoenix the largest calling card services provider in the Community (23 % market share) in terms of subscriber numbers, ahead of AT&T and BT with a 21 % and 17,8 % market share respectively. In terms of calling card traffic within the Community, the aggregate market shares of FT (21 %) and DT (3 %) are equal to BT's market share of 24 %.

The market for carrier services

23. The market for global switched transit services is estimated to be worth approximately ECU 301,1 million and generates 1 500 million minutes of international traffic or approximately 3 % of the world's international telephony traffic. Of this total, approximately ECU 165,6 million are services provided by European carriers, of which in turn approximately ECU 30,1 million goes to other European carriers. Within the global switched transit market (1994), which grows at an annual rate of 5 to 6 %, DT had a turnover of ECU [. . .] ([23]), FT of ECU [. . .] ([24]) and Sprint of ECU [. . .] ([25]). The aggregate market shares of DT, FT and Sprint make Phoenix the third largest global switched transit provider behind AT&T and BT (20,2 % each).

E. MAIN COMPETITORS OF THE PHOENIX ENTITIES

The markets for non-reserved corporate telecommunications services

24. The situation in these relevant markets is discussed in the Atlas Decision. The parties include the following players among their competitors: AT&T/Worldpartners, Cable and Wireless plc, Concert, IBM, Kokusai Denshin Denwa Company Ltd. (KDD), Nippon Telegraph and Telephone Corporation (NTT), Unisource and the United States regional Bell operating companies (RBOCs).

The market for traveller services

25. More than one-third of calling cards in Europe are issued by United States operators. AT&T is estimated to have 2 million postpaid card customers in Europe — 21 % of all cards issued there. These customers generate 59 % of calling card traffic from Europe to the United States. MCI has an estimated 1 million postpaid card customers in Europe (10,5 %), which generate 27 % of calling card traffic from

([10]) Business secret (less than 10 %).
([11]) Business secret (less than 10 %).
([12]) Business secret (less than 45 %).
([13]) Business secret (less than 40 %).
([14]) Business secret.
([15]) Business secret (less than 25 %).
([16]) Business secret.
([17]) Business secret (less than 40 %).
([18]) Business secret (less than 5 %).
([19]) Business secret (less than 10 %).
([20]) Business secret.
([21]) Business secret.
([22]) Business secret (less than 5 % respectively).
([23]) Business secrets (market share less than 10 %).
([24]) Business secrets (market share less than 15 %).
([25]) Business secrets (market share less than 5 %).

Europe to the United States. Executive Telecard International (ETI) markets calling cards in Europe through agreements with local operators or credit card companies; ETI's market position is similar to that of MCI.

The market for carrier services

26. Major players in the market for carrier services and notably global switched transit services competing in the EEA include AT&T, BT (each holding approximately one fifth of the market), Cable & Wireless, MCI and Teleglobe Canada. Along with the growing numbers of new carriers that seek to be independent of the incumbent TO for their international traffic, new suppliers of such services, some with substantial infrastructure resources, are emerging or active in the market, an example being Hermes Europe Railtel ([26]).

F. THE TRANSACTION

27. The transaction notified to the Commission comprises a set of agreements the main features of which are described below.

1. *Agreements as originally notified*

(1) *Agreements regarding the Phoenix joint venture*

The parties have submitted the following agreements:

(a) the Phoenix joint venture agreement (the 'JV agreement') sets out the parties' essential commitments and business objectives;

(b) the transfer agreements provide for the transfer by Sprint, FT, DT, and Atlas (collectively referred to as the 'parents') of certain basic and related businesses to the relevant ROE, ROW entities;

(c) the intellectual property and trademark licence agreements concern the grant by the parents and certain affiliates to the Phoenix entities of non-exclusive, non-transferable licences to use certain of the parents' technical information, trademarks and intellectual property rights (IPRs);

(d) the services agreements specify terms and conditions of trading relationships among Sprint, Atlas, and the ROE and ROW entities, including the supply and support services needed to provide Phoenix services world-wide.

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

(a) The investment agreement provides for the purchase by each of FT and DT of approximately 10 % of the common stock of Sprint.

(b) The standstill agreement binds FT and DT for a period of 15 years not to acquire additional shares in Sprint which would increase their combined aggregate voting rights to more than 20 %.

(c) The registration rights agreement is required in order for each party to consummate the transactions contemplated by the investment agreement.

(d) The investor confidentiality agreements between Sprint and DT, and Sprint and FT, respectively, provide for the maintenance of the confidentiality of all Sprint proprietary information received by DT and FT as a result of the investment agreement and in particular by the DT and FT representatives on the Sprint board of directors, which may be used by DT and FT only for the purposes of exercising their rights under such agreement.

2. *Main contractual provisions*

(1) *Concerning the Phoenix entities*

(a) **Structure of the Phoenix venture**

The JV agreement provides for the creation of two groups of operating entities, namely Phoenix Rest of Europe (ROE) and Phoenix Rest of the World (ROW). Each group consists of the following entities: a sales entity, a clearing-house entity and a holding entity, which is in turn held by an entity able to be bound for the purposes of the Consent Decree entered by the United States Department of Justice. Each of the above entities within the ROE group (the 'ROE parent entities') has a board of six members, with Atlas having the right to nominate four members and Sprint two. Each of the above entities within the ROW group (the 'ROW parent entities') has a board of four members, with each of Atlas and Sprint having the right to nominate two members.

([26]) Commission Decision in Case No IV/M.683; OJ No 157, 1. 6. 1996, p. 13.

The ROE parent entities conduct the Phoenix business within the 'rest of Europe' region (that is, outside France and Germany), while the ROW parent entities conduct the Phoenix business within the 'rest of the world' region (outside Europe and the United States). The ROE entities and the ROW entities will initially own and operate a global transmission network over which Phoenix services and other traffic will be routed: Phoenix's global backbone network. The parties have, however, created a Global Backbone Network (GBN) entity, a limited liability holding company, which is due eventually to take over the relevant global backbone network assets and functions.

Pursuant to section 2.1 of the operating entities services agreement, FT, DT and their respective subsidiaries each are exclusive distributors of Phoenix services in France and Germany respectively, while Sprint is pursuant to section 2.2 (b) the exclusive distributor of Phoenix services in the United States. However, any parent, Phoenix and their respective affiliates will meet unsolicited customer requests for Phoenix services regardless of the customer's location. Moreover, the French and German subsidiaries of Atlas provide FT, DT and their respective subsidiaries with (i) sales support services regarding Phoenix products to the distributors in France and Germany; and (ii) services within the scope of Phoenix other than X.25 packet-switched data network services in France and Germany.

A new, wholly-owned subsidiary of Sprint (the 'Sprint subsidiary') and Atlas each initially owns 50 % of the outstanding voting equity of each of the parent entities of the ROW entity and the GBN entity. The Sprint subsidiary and Atlas initially owns 33⅓ % and 66⅔ %, respectively, of the voting equity of the parent entity of the ROE entity.

A Global Venture Board was established to set global policies and monitor compliance of the operating groups with their business plans. Any initiative of the Global Venture Board generally requires a unanimous vote.

Day-to-day operations are the responsibility of the chief executive officers of the operating entities, who are under the supervision of the governing board of the relevant parent entity of either the ROE, ROW, or eventually GBN entity. Most decisions of each governing board are adopted by simple majority vote of the members present. Unanimous consent is however required for a number of important decisions including final approval of business plans, certain changes in structure and capitalization, and certain decisions on technology and investments.

(b) **Purposes and activities of Phoenix entities**

The business of the joint venture initially is provision of (i) global international data, voice, and video business services for multinational companies and business customers; (ii) international services for consumers, initially based on card services for travellers; and (iii) carrier services providing certain transport services for the parents and other carriers. The Phoenix entities may also offer telecommunications equipment and invest in national operations.

To market these services Phoenix is responsible for the planning and management functions of operations, as well as marketing and customer support, including the following:

(i) central coordination of product development and management to ensure seamless global services; the Phoenix entities notably defines functionality, technical standards, and service level requirements for Phoenix services;

(ii) implementation of a common global network and information systems platform rationalizing and integrating the international data, voice, and overlay networks of the parents which are currently separate; the GBN will link overlay and backbone networks in each operating area (i.e. ROE and ROW) while proprietary interfaces will allow provision of seamless services; within its first few years of operation, Phoenix will begin to deploy the next generation of ATM packet-switching technology, comprising any and all of transmission, switching, signalling, network intelligence, and service management elements;

(iii) integration and development of information systems for coordinated billing, customer support, and other back-office functions, supporting national distributors; and

(iv) development of a sales presence in the ROE and ROW territories either directly or through distribution arrangements using a common 'masterbrand'; in particular, national service operations will be established or consolidated in each major country to distribute Phoenix services

there; in addition, regional sales offices will be established to provide technical and sales support, including identification of potential customers and assisting in preparation of customer proposals.

(c) **Provisions concerning dealings with/by Phoenix entities**

Pursuant to the JV agreement, transactions among the Phoenix entities, on the one hand, and FT, DT, and Atlas, on the other, shall generally be conducted on the most favourable terms and conditions that are offered to third parties. If products, services, or facilities relevant to these transactions are not commercially available, such transactions shall be conducted in accordance with an arm's length pricing method, using full-cost reimbursement or such other arm's length pricing method as may be agreed on by the parties. The parents have the first right to offer to supply certain products, services, and facilities to the Phoenix entities. Notwithstanding, each Phoenix entity may purchase from a third party which, on otherwise comparable terms and conditions, offers lower prices, either once the parties have been given the opportunity to match such terms and conditions or if a customer so requires.

Each of the Phoenix entities and their parents have the first right to offer to perform in their respective territory any facilities or services required by another party to the Phoenix agreements. Such services may be obtained from a third party at a lower price under comparable terms and conditions, or where a customer so requires. In accordance with this principle, the ROE and ROW entities will be required to purchase telecommunications network transmission capacity from the GBN entity, to the extent available, once that entity becomes operational.

(d) **Anti-competition provisions; distribution**

Pursuant to the JV agreement as originally notified, albeit subject to various exceptions, no party or affiliate of a party may distribute any international telecommunications services which are either provided by the Phoenix entities or substitutable for such services. Likewise, no party or affiliate of a party may invest in any entity that offers such services. Moreover, no party or any of its affiliates may offer national long-distance services in competition with either a national operation of Phoenix or a public telephone operator affiliated to Phoenix (such as a national distributor of Phoenix). Nor may any party or any of its affiliates make investments in any entity offering such competing national long-distance services or in any national operation allied with a major competitor of Phoenix.

Sprint is under an obligation to cease competing actively in Germany and France by selling its data and card business to DT's subsidiary T-Data Gesellschaft für Datenkommunikation mbH ('T-Data') and to FT's subsidiary Transpac France respectively. Outside the parents' home countries exclusivity will be granted to distributors on a case-by-case basis. Passive sales by any one distributor to customers in the respective sales territory of any other distributor are allowed in the EEA.

(e) **Licences to be granted to Phoenix entities**

Under the technical information licence and access master agreement and agreements implementing the framework applicable to IPRs (the 'IPR agreements'), each parent grants each of the Phoenix entities non-exclusive, non-transferable licences to use certain technical information of that parent in the respective territories of such entities to conduct the Phoenix business. Each Phoenix entity has the right to sub-license the rights granted to any other Phoenix entity or any affiliated national operation or local partner, wherever such a sub-licence is necessary to conduct the Phoenix business. Likewise, each Phoenix entity must on request also sub-license such rights to any parent or affiliate of such parent, to the extent that such a sub-licence is necessary to conduct the Phoenix business.

Royalties are payable as customary in the market and negotiated by the parties on an arm's-length basis. Licence rights granted to a party under the IPR agreements will continue in the event of either termination of the Phoenix venture or transfer of such party's interest in the Phoenix venture.

Similarly, pursuant to the trademark licence master agreement and implementing agreements each parent grants each of the Phoenix entities non-exclusive, non-transferable rights to use certain trademarks owned by or licensed to

such parent in connection with the marketing or sale of certain authorized products and services in the respective territories of such entity.

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

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

Pursuant to the investment agreement, neither FT or DT may dispose of its shares in Sprint for five years after the closing date. Thereafter restrictions apply to large transfers, which would in most circumstances give Sprint the right of first refusal.

Pursuant to the standstill agreement, FT and DT each have the right to acquire additional Sprint shares to reach and maintain a 10 % shareholding, but shall not for 15 years after the closing date acquire additional shares that would increase their aggregate voting rights to more than 20 %. Once this initial 'standstill' period has expired, FT and DT may acquire additional shares, but may not increase their aggregate voting rights above 30 % nor conduct certain activities intended at taking control of Sprint.

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

FT and DT have the right to elect directors to the Sprint board in proportion to their shareholding, provided that each has the right to elect at least one director. Neither FT nor DT have access to confidential, competitive information on Sprint's activities in the EEA through their representation on Sprint's board. Nor may these representatives provide Sprint with confidential information that FT or DT may have obtained from United States competitors through correspondent relationships.

As the sole holders of Sprint's class A common stock, FT and DT have been granted substantial consensual rights with respect to certain corporate actions of Sprint, which nevertheless fall considerably short of control. These actions include major equity issuances, disapproval of investments in Sprint by major competitors, participation rights in transactions involving change of control, and other bilateral corporate transactions. FT and DT have a right of first offer with respect to long-distance assets of Sprint for a fixed period of time.

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

28. Some features of the agreements as notified appeared to be incompatible with the Community competition rules. In the course of the notification procedure the parties have amended certain clauses in their agreements and given undertakings to the Commission.

1. *Contractual changes*

29. Non-appointment of Phoenix as an agent for international half-circuits.

Following an announcement made in the Phoenix notification, which did not yet reflect the parties commitments regarding Atlas further to the Commission's intervention, DT, FT, Atlas and Sprint have deleted FT and DT's 'international private lines', meaning FT and DT's international half-circuits, from the list of products that Phoenix would distribute as agent.

30. Anti-competition provisions

Phoenix will provide international simple resale (ISR) services and call termination PSTN services under Sprint's existing licences in Sweden and the United Kingdom. However, the parties have not sought an exemption pursuant to Articles 85 (3) of the EC Treaty and 53 (3) of the EEA Agreement for any specific agreements regarding national long-distance services, which these services would require (see recital 7). The anti-competition clause in the original JV agreement has therefore been amended: the parties are now obliged to refrain only from either (i) competing with or (ii) investing in a competitor of entities providing long-distance services provided such entities are controlled by Phoenix.

2. *Non-discrimination*

31. Just as DT and FT are prohibited from discriminating in favour of their Atlas venture, so the Commission prohibits DT and FT from discriminating in favour of any entity created pursuant to the Phoenix agreements. This condition includes all specific elements described at recital 28 of the Atlas Decision, in relation to access and use of (i) the French and German PSTN, (ii) the French and German ISDN, (iii) reserved facilities and/or services until the French and German

telecommunications services and infrastructure markets are fully and effectively liberalized, as is scheduled to occur by 1 January 1998, and (iv) thereafter facilities and/or services for which FT and DT respectively are dominant and which are essential for the provision of a competitive service.

32. Specific services

The Commission attaches as a condition to this Decision that DT and FT shall not discriminate in favour of any entity created pursuant to the Phoenix agreements with regard to the facilities-related telecommunications services detailed at recital 28 of the Atlas Decision. The non-discrimination condition extends to all aspects of access to and use of such facilities and services, namely the terms and conditions, scope of services available, technical information and commercial information.

33. Correspondent services

The Commission imposes a specific condition not to discriminate with regard to correspondent services, for which (i) DT and FT shall not unduly prefer Sprint over other United States correspondents; (ii) DT and FT shall not unduly prefer each other over other German or French correspondents once telecommunications services markets are fully liberalized, as is foreseen by 1 January 1998; and (iii) Sprint shall not unduly prefer DT and FT over other European and eventually over other German and French correspondents. The condition on Sprint relates to traffic to final destinations outside Germany and France respectively until the German and French telecommunications services and infrastructure are fully and effectively liberalized, as is scheduled to occur by 1 January 1998, and to any traffic thereafter. A correspondent is a telecommunications services provider in one country party to a bilaterally negotiated agreement with a provider of telecommunications services in another country by which each party undertakes to terminate in its country traffic originated by the other party, for provision of an international telecommunications service.

3. *Other Conditions and obligations attached to this Decision*

34. Non-reserved corporate telecommunications services

The exemption of Phoenix's customized packages of corporate telecommunications services and packet-switched data communications services from the application of Articles 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement is conditional on DT and FT's compliance with the conditions attached to the separate Atlas Decision and described at recital 29 of that Decision.

35. Carrier services

Neither Atlas, Phoenix, DT, FT, Sprint or any affiliate of these entities shall make a particular telecommunications operator's ability to use Phoenix international carrier services conditional upon use or distribution by that telecommunication's operator of services provided by Atlas, Phoenix, FT, DT or Sprint. Neither shall Atlas, Phoenix, DT, FT, Sprint or any affiliate of these entities condition its commercial dealings (i.e. terms, conditions, price, discounts) with any telecommunications operator upon use or distribution by that telecommunication's operator of services provided by Atlas, Phoenix, FT, DT or Sprint.

36. DT and FT shall also comply with conditions that mirror those attached to the Atlas Decision concerning (i) use of DT and FT's public X.25 packet-switched data networks, (ii) cross-subsidization, (iii) bundling, and accounting in respect of the entities created pursuant to the Phoenix agreements operating in the EEA, and with recording and reporting obligations matching those imposed on DT and FT in the Atlas Decision. Likewise, all entities created pursuant to the Phoenix agreements which operate in the EEA shall keep separating accounting records using international accounting standards for each service they provide in any country.

37. To the extent related to existing obligations under national or Community law, these obligations and conditions are intended to ensure the parties' firm commitment to comply with the applicable legal framework.

H. THE REGULATORY SITUATION

38. The regulatory situation in France and Germany is described under recital 31 of the Atlas Decision. As for the United States, pursuant to the 1934 Communications Act, Sprint is required to publish tariff schedules and contracts describing its network arrangements and services. Furthermore, the 1934 Communications Act, enforced by the Federal Communications Commission (FCC), prohibits Sprint from providing services that unjustly or unreasonably discriminate against Sprint's competitors or foreign correspondents, which may lodge a formal complaint before the FCC if Sprint

does not comply with these obligations. The Telecommunications Act of 1996 gives the FCC the authority to refrain from regulating 'charges, practices or classifications' of telecommunications carriers, albeit only where the FCC finds that regulation is not necessary to ensure that these elements are just and reasonable or not unjustly and unreasonably discriminatory.

39. While the Commission was assessing the Phoenix notification under Community law, Phoenix was authorized under United States anti-trust law by a judicial consent decree filed by the United States Department of Justice and signed on 16 February 1996. This consent decree imposes conditions on the parties that largely resemble those attached to this Decision.

I. THIRD-PARTY OBSERVATIONS

40. Following the publication of a notice pursuant to Article 19 (3) of Regulation No 17 and to Article 3 of Protocol 21 of the EEA Agreement([27]), six interested third parties submitted observations to the Commission. Concerns expressed in these observations included the risk that Phoenix might (i) increase the dangers of DT and FT's cooperation in the framework of Atlas for Europe-wide markets given the elimination of another competitor there, Sprint, (ii) further facilitate abuses of dominant position by DT and FT in their respective home markets and (iii) distort competition in all relevant markets through an extension of the notified cooperation to reserved services, notably correspondent services. As for the latter allegation, third parties feared most that DT and FT might link favourable conditions for reserved services to the purchase of Phoenix services.

41. The Commission carefully reviewed all third-party observations and concludes that concerns expressed therein have been addressed during the notification procedure. Most conditions as to conduct and obligations attached to the Atlas Decision take sufficient account of anti-competitive concerns if extended to all entities created pursuant to the Phoenix agreements and to Sprint where appropriate. Third-party observations have not therefore affected the Commission's substantive position described in the Article 19 (3) notice in respect of the transaction named Phoenix at the time. However, in the interest of legal certainty the Commission has spelled out in greater detail in this Decision the scope and duration of certain conditions and obligations imposed on the parties.

42. Subsequent to third-party observations the Commission attaches an additional condition to this Decision requiring that DT and FT unbundle own services for which they are dominant and Phoenix services, which restricts the contractual rights of DT, FT and their affiliates under Section 2.1.1 of the operating entities services agreement dated 31 January 1996. As the Commission explained at recital 60 of the Atlas Decision, dominant providers are prohibited from bundling, widespread as it might be in the telecommunications market, under the regulatory framework of most countries where that market is fully competitive. The same condition already applies to DT and FT in respect of Atlas services, as described at recital 29 (5) of the Atlas Decision.

II. LEGAL ASSESSMENT

A. THE RÔLE OF ATLAS IN PHOENIX

43. The European parent company of Phoenix is Atlas. Within the framework of this transaction Atlas is merely a vehicle to coordinate DT and FT, including their respective European networks, as European providers which obtain global 'connectivity' — that is, worldwide reach of a service with constant technical performance and features. Phoenix's distribution agreements make a distinction between DT, FT and Sprint's home respective countries on the one hand and 'rest of Europe' and 'rest of world' areas on the other hand. Under these agreements, DT and FT jointly exercise decisive influence on Phoenix' European business.

44. Phoenix ROE entity results from adding Sprint's European business and network to that of Atlas outside France and Germany. Indicative of the integration of Atlas' Europe-wide services into Phoenix is that Info AG's current customers with headquarters outside Germany are transferred directly to Phoenix and not to Atlas. Moreover, the technical aspects of network cooperation between DT and FT which are exempted from the application of Articles 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement pursuant to Article 3 of the Atlas Decision are under the responsibility of the same entity that provides network management services to the ROE entity. Given that the relevance of Atlas as a separate entity from DT and FT for Phoenix is limited, the following legal assessment refers to DT, FT and Atlas without distinction.

([27]) See footnote 2 (hereinafter referred to as Article 19 (3) notice).

B. ARTICLES 85 (1) OF THE EC TREATY AND 53 (1) OF THE EEA AGREEMENT

1. *Structural cooperative joint venture*

The Phoenix joint venture is cooperative in nature, since Atlas, which takes over FT's Europe-wide Transpac network, and Sprint (jointly referred to as the 'parents') are potential competitors for the provision of Europe-wide services and certain global offerings within Phoenix's envisaged offerings portfolio (hereinafter referred to as the 'Phoenix products'), namely customized packages of corporate telecommunications services. Prior to this transaction, Sprint was an actual competitor of DT in Germany and of FT in France.

45. Potential competition in markets for Europe-wide services.

DT and FT remain potential competitors of Sprint as a provider of services over an own leased-line network in Europe and worldwide in spite of withdrawing from the markets addressed by Phoenix. While licensing some technology to Phoenix the parents retain their respective IPRs, know-how and R & D capabilities and receive grant-back licences for IPRs transferred to Phoenix. Phoenix will also award DT, FT and Sprint R & D contracts and license them to use any own developments or services other than Phoenix products. The parents will thus keep and increase proficiency and know-how in respect of such technologies as the market requires from time to time.

46. DT, FT and Sprint will maintain their commercial presence, reputation and, as exclusive distributors of Phoenix in their respective home countries, keep their knowledge of the market up to date. In this connection, Phoenix's global backbone network linking the ROW and ROE entities will initially be a mere cross-Atlantic line concentrating traffic between Germany or France and the United States which implies that DT, FT or Sprint's own offering could be competing directly with Phoenix's where a customer prefers favourable terms of an agreement on domestic telecommunications services to the international scope of Phoenix. The above implies that market (re-)entry by DT, FT and Sprint is possible. Moreover, all three undertakings directly develop own activities outside their home markets through subsidiaries or as members of international organizations, while Sprint is providing private line services to and from the United States under a United Kingdom licence.

47. Structural joint venture.

Phoenix combines Sprint's as well as DT and FT's joint activities in a range of Europe-wide and global markets for non-reserved telecommunications services and is set to develop and take over new services in these markets. This venture entails major changes in the structures of DT and FT, undertakings with very limited presence outside their respective home countries, and of Sprint whose international presence was limited for lack of strong regional partners. Through Phoenix these three undertakings pool a significant number of assets in connection with the provision and marketing of non-reserved corporate telecommunications services.

2. *Application of Articles 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement to the creation of Phoenix*

The Phoenix agreements creating a joint venture as a means of cooperation between DT and FT, and Sprint eliminate competition in the relevant markets and affect trade between Member States. The Commission cannot therefore give negative clearance to the creation of the joint venture as requested in the parties' application.

48. On the grounds set out under recital 38 of the Atlas Decision, Atlas and Sprint were competitors for the provision of outsourcing services. DT, FT and Sprint were also competitors for the obtention of large customers' telecommunications 'hubs'. Sprint's Sprintnet division also competed with FT's Transpac for the provision of non-correspondent services, notably Europe-wide and national packet-switched data communications services with limited global connectivity, under licences in several European countries. This competition is eliminated by the creation of Phoenix.

49. Creating Phoenix each of DT, FT and Sprint refrain from developing similar offerings to compete individually, reducing R & D competition and choice for customers in the relevant markets. In a way similar to Atlas' effects [28] eliminating

[28] Recital 41 of the Atlas Decision.

competition between DT and FT, the anti-competition provisions, intellectual property agreements, geographical scope of the licences and grant-back licences agreed, and the terms of the exclusive distribution agreements turn Phoenix into an instrument for pooling and cross-licensing DT, FT and Sprint's respective IPRs.

50. DT, FT and Sprint each have the financial and technological capabilities required to enter the relevant markets on their own. DT, FT and Sprint are among the world's largest telecommunications companies in terms of traffic. While DT and FT are dominant for most non-reserved corporate telecommunications services in their respective home countries, Sprint is the third-largest long-distance carrier in the United States. Creating Phoenix is therefore not DT, FT and Sprint's only objective means to enter the market for international non-reserved corporate telecommunications services. The same applies to carrier services, which at least initially will mainly serve the purpose of increasing efficiencies by selling unused network capacity. Atlas and Sprint, which is already one of the largest Internet carriers in the United States, could provide such services in competition with each other by investing in an own global or intercontinental extension to its network. Individual market entry would notably raise the same issues, for example in terms of regulatory hurdles, that Phoenix must address.

3. *Applicability of Articles 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement to DT and FT's investment in Sprint*

51. The Commission and the Court of Justice do not consider Article 85 (1) of the EC Treaty applicable to agreements for the sale or purchase of shares unless these agreements affect the competitive behaviour of the parties to the transaction [29]. The Commission analysed whether the appointment of DT and FT representatives to Sprint's board and subsequent access to confidential business data could give rise to coordination of the competitive behaviour of all three undertakings. The Commission found that (i) the investment agreement signed on 31 July 1995 does not afford DT and FT the possibility of exercising a controlling influence over Sprint and (ii) United States corporate and antitrust laws are designed to prevent access to and misuse of Sprint's confidential information by DT and FT. Sprint and DT, and Sprint and FT, respectively, set out an additional prohibition to misuse such information in two investor confidentiality agreements signed on 31 January 1996.

The Commission therefore concludes that DT and FT's investment in Sprint falls outside the scope of Articles 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement.

4. *Application of Articles 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement to contractual provisions*

52. The following provisions restrict competition:

(a) the anti-competition obligation on the parents as regards the activities of Phoenix (sections 10.2 and 10.3 of the JV agreement as amended by Amendment 1 to the JV agreement);

(b) the obligation on the parents to obtain from Phoenix all requirements for global services (section 2.1.1 of the operating entities services agreement) in Germany and France respectively; and

(c) the appointment of DT and FT respectively as exclusive distributors of Phoenix (section 2.2 (b) of the JV agreement as amended) in Germany and France respectively.

Of the above restrictions, the anti-competition provision and the obligation to purchase all requirements for global services from Phoenix are ancillary to the creation and successful initial operation of Phoenix, and are therefore assessed under Articles 85 of the EC Treaty and 53 of the EEA Agreement together with the joint venture.

53. Both restrictions reflect the parties' commitment, towards one another and towards Phoenix. Both are also required if Phoenix is to enter the market successfully, given considerable uncertainty and commercial risks, substantial investment requirements and strong competition in the relevant markets. Thus:

(1) the anti-competition clause expresses DT and FT and Sprint's commitment to withdraw from the relevant markets targeted by Phoenix and to concentrate their efforts in the relevant services markets on Phoenix lest other initiatives, alone or in cooperation with third parties, impair Phoenix's establishment in the market; and

[29] See BT-MCI Decision (footnote 4) at recital 44 and footnote 1 of that Decision for references.

(2) the obligation on DT, FT and Sprint as exclusive distributors of Phoenix products in their respective home countries to buy all requirements for global services from Phoenix, aims at ensuring Phoenix steady funding, credibility and market reputation, which would be seriously jeopardized if the very founding partners of Phoenix used other global services providers.

Ancillary provisions are usually acceptable only for a limited period of time. In the light of the BT-MCI Decision, where similar volumes of investment and risks were at issue ([30]), the Commission will however accept the above ancillary restrictions for the entire duration of the exemption granted by this Decision.

54. Exclusive distribution.

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

5. *Effect on trade between Member States and between Member States and EFTA countries*

55. As discussed under recital 44 of the Atlas Decision, a joint venture designed to provide cross-border non-reserved corporate telecommunications services in the EEA has an effect on trade between Member States which is set to increase over the coming years. The same applies to the appointment of DT and FT as exclusive distributors in the two largest single national telecommunications markets in the Union, namely in Germany and France. This effect is especially substantial given that the purpose of Phoenix in Europe is the provision of services between Member States.

56. The Commission concludes that the creation of Phoenix falls under Articles 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement. The same conclusion is drawn as regards the non-ancillary appointment of DT and FT as exclusive distributors in Germany and France respectively. The Commission considers the restrictive effect on competition and on trade between Member States to be substantial in both cases.

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

1. *Technical and economic progress*

57. The creation of Phoenix

The combination of Atlas and Sprint's technology will allow Phoenix to offer new services with global 'connectivity' at lower cost and better than either Atlas or Sprint are capable of providing alone given their current business. Combining different platforms and product features will still require a considerable investment of time and money. Like BT and MCI's Concert and like Atlas at the European and national level ([31]), Phoenix will add value to leased line capacity by implementing own homogeneous network elements such as switches, software platforms and signalling systems to provide seamless international telecommunications services. Phoenix will also allow cost savings, given that the operation of a single network architecture generates economies of scale and scope at a technological and commercial level, and may contribute to downward pressure on infrastructure prices across the Community, for example through lowest cost routing.

58. Seamlessness substantially improves international services as currently provided over different interconnected national networks. If successful, Phoenix will increase choice in the relevant markets and offer businesses across the Community state-of-the-art telecommunications services which their competitors overseas can already use. Although Sprint already operated a network in some European countries which allowed seamless connectivity with certain foreign locations, Sprint's market shares reveal that it would have taken much longer for Sprint to become a globally competing supplier for the ever increasing number of multinational companies that need a comprehensive range of customized global non-reserved corporate telecommunications services.

([30]) Footnote at recital 46 *in fine*.

([31]) Recital 48 of the Atlas Decision.

59. Exclusive distributorship in Germany and France

The exclusive distribution arrangements in respect of DT, FT and their respective subsidiaries aim at ensuring that DT and FT concentrate their respective marketing efforts through Atlas, such as customer prospecting or investments in regional and/or national networks and other facilities in their home countries on making Phoenix successful, rather than considering alternative options. Only if DT and FT are seen as fully committed to Phoenix will the joint venture benefit from the reputation and presence of its parents in the marketplace.

2. ***Benefits to consumers***

60. The benefits of seamless network implementation across national borders is discussed under recital 54 of the Atlas Decision. Phoenix makes it possible that consumers benefit from a considerably wider range of new services that DT, FT and Sprint would not be capable of providing separately within the same period of time. The Commission stated before the notification of Phoenix that only a truly global dimension would make the cooperation between DT and FT in the framework of Atlas sufficiently important to consider an exemption from the prohibition of Articles 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement. The volume of investment required to ensure a worldwide presence, which is a requirement for global services provision, is beyond the capabilities of most potential users of such services, including MNCs active in sectors other than telecommunications. The creation of a global venture committed to undertaking the investment needed to be present worldwide is therefore crucial for the choice and quality of communications available to MNCs and eventually SMEs.

Adding global 'connectivity' to Europe-wide services, Phoenix is a substantial step forward in relation to Atlas. Accordingly, the Commission concludes that both the creation of Phoenix and the exclusive distributorship of DT, FT and their respective subsidiaries are beneficial to consumers.

3. ***Indispensability***

61. The creation of Phoenix

Phoenix is indispensable for the parents to successfully enter the relevant global and regional markets. Phoenix will allow the time required for the relevant services to be marketed in competition with longer existing competitors to be substantially shortened. As further companies enter the relevant markets, Phoenix enables DT, FT and Sprint substantially to reduce costs and risks inherent to an organization set to offer telecommunications services worldwide to multinationals and other large users. While cost savings are important, an alliance such as Phoenix is also a decisive means to overcome the technical and logistic difficulties of providing the services and features (*inter alia* one-stop shopping, end-to-end delivery, seamlessness) required by such users, which cannot be addressed satisfactorily under the existing framework of TO correspondent relationships.

62. Exclusive distribution

DT and FT are exclusive distributors of Phoenix products in their respective home countries. Article 4 (2) of the 'technical information licence and access master agreement' of 31 January 1996 provides that the territory to which DT, FT and Sprint are granted licence rights shall generally be worldwide and not restricted to the respective party's own exclusive distribution territory. Under the terms of this Decision, DT and FT are prohibited from selling Phoenix products as distributors under the same contracts covering own reserved services.

63. Exclusivity is a guarantee for DT and FT to protect IPRs contributed to the joint venture against third parties and thus an incentive to contribute more valuable IPRs than would otherwise seem reasonable. On the other hand, the combination of (i) competitive alternatives in the market, (ii) bargaining power of customers in the market for customized packages of corporate telecommunications services to corporate users and (iii) the opening for DT and FT's passive sales into each other's home market ensure that the aim of protecting DT and FT's IPRs does not lead to an elimination of competition.

64. DT and FT are constrained under both national legislation and the terms of this Decision not to disclose information derived from operating the PSTN or providing reserved services to the entities whose services DT and FT are distributing. This ensures that exclusive distribution by DT in Germany and FT in France will not give Phoenix an unfair advantage over competitors in these countries. The Commission concludes from the above that the exclusive distributorship of DT and FT is indispensable within the meaning of Articles 85 (3) of the EC Treaty and 53 (3) of the EEA Agreement.

4. *Elimination of competition*

65. The creation of Phoenix will not in itself afford the parties the possibility of eliminating competition in the relevant services markets. The Commission has addressed related concerns raised by the integration of DT and FT's public X.25 packet-switched data networks into Atlas. The combination of (i) competitive alternatives in the market, (ii) bargaining power of customers in the market for customized packages of corporate telecommunications services to corporate users and (iii) the opening for DT and FT's passive sales into each other's home market ensure that the creation of Phoenix does not eliminate competition in the relevant markets.

66. As to the impact of DT and FT's dominant positions in Germany and France respectively, the Commission concludes that the terms of this Decision are sufficient to prevent an elimination of competition in the relevant markets. DT, FT and their respective subsidiaries are prohibited from selling Phoenix products as distributors under the same contracts covering own reserved services. DT and FT are also constrained under both national legislation and the terms of this Decision not to disclose information derived from operating the PSTN or providing reserved services to the Phoenix entities whose services DT and FT are distributing. This ensures that distribution of Phoenix services by DT in Germany and FT in France will not lead to market foreclosure or constitute a barrier to entry.

In the context of Phoenix, the following considerations are relevant:

Markets for non-reserved corporate telecommunications services

67. Global markets

Two years after the Commission's BT-MCI Decision global markets are still only emerging. Corporate users with global telecommunications needs still have an open demand for seamless services with customized features such as 24-hour technical assistance and maintenance service, one-stop billing across language barriers and currency zones and seamless links between premises spread over wide geographic areas. BT and MCI's Concert was the first player to enter that emerging market, with a head-start over its competitors. Phoenix is set to become a competitive player once the substantial required investment is made and a reliable seamless backbone network created. At this point in time the Commission regards entry of a competitor to Concert into this immature market as being dependant on the participation of an established United States provider with wide geographic coverage ([32]). Recent legislative changes in the United States have allowed regional Bell operating companies (RBOCs) to enter the long-distance market there. However, before such changes are felt in the market and while AT&T and MCI are engaged in alliances of their own, large existing players such as Sprint or LDDS are DT and FT's natural choice among United States long-distance carriers. The Commission therefore sees no elimination of competition in the emerging global market.

68. Cross-border regional market

This relevant market is discussed in detail under recitals 62 *et seq.* of the Atlas Decision. As was noted above, Phoenix essentially adds a global dimension to DT and FT's cooperation in the framework of Atlas and adds Sprint's existing European business in these markets. The elimination of Sprint as an independent supplier does not lead to an elimination of competition in the light of significant third-party competition stemming from existing alliances, such as AT&T WorldPartners, Concert and IPSP, and from future alliances between TOs that are not yet positioned, such as the RBOCs, NTT and European TOs such as Mercury. Moreover, at least partial competition for certain components of global customized packages of corporate telecommunications services and notably for packet-switched data communications services stems from niche players ([33]).

69. National markets

Phoenix adds to the restriction of competition brought about by Atlas in France and Germany in that one competitor to FT or DT there disappears. Adding DT's and FT's market shares to those of Sprint in France and Germany makes Phoenix the market leader for certain non-reserved corporate telecommunications services offered in customized packages, notably for outsourcing services. Outsourcing is relevant only until the market for cross-border and global services has evolved sufficiently to give current self-providers a choice of services that suits their needs. The Commission has ensured in the context of the related Atlas

([32]) See BT-MCI Decision (footnote 4) at recital 51.
([33]) Cf. BT-MCI Decision (footnote 4) at recital 56, first indent.

notification and in its 'Full Competition' Directive [34] the essential prerequisite of increased choice, namely infrastructure liberalization. The Commission is persuaded that competition will not be eliminated given the conditions imposed on DT and FT to (i) provide all reserved services required for the provision of non-reserved corporate telecommunications services, such as PSTN interconnection with all relevant information on *inter alia* implementation of protocols such as the Signalling System 7 (SS7) [35] on non-discriminatory terms to Phoenix and third parties, (ii) sell Phoenix products in contracts separate from those for own reserved services and (iii) gather, submit and have available the information required to verify compliance with those commitments.

70. The sale of Sprint's data and card business to T-Data in Germany and to Transpac France in France respectively is a concentration that does not attain a Community dimension. This does not affect the Commission's assessment of the Phoenix transaction under Articles 85 (3) of the EC Treaty and 53 (3) of the EEA Agreement. As was shown under recital, Sprint has small market shares in absolute figures for packet-switched data communications services in the French and German markets, but is an important player given that all competitors of FT and DT respectively taken together add up to less than a 20 % market share. The Commission considers that this will not be tantamount to an elimination of competition. A large number of data services providers is active in Germany and in France, where six service providers have been licensed to provide public data services under conditions similar to Sprint, in addition to a number of players that provide services under class licences or in areas where no licence is required.

71. DT and FT's public X.25 packet-switched data networks shall not be contributed to Atlas until there is full and effective liberalization of the French and German telecommunications markets. Moreover, the Commission considers that the conditions attached to this Decision for its entire duration, such as non-discriminatory interconnection of Phoenix and third parties to DT and FT's public X.25 packet-switched data networks over X.75 interfaces or equal technical and commercial treatment of Phoenix and competitors in respect of interconnection to the PSTN and other services relevant to call termination and services distribution, will ensure a level playing field more efficiently than in the past. Nevertheless, the existing regulatory framework in the respective home countries of DT, FT and Sprint already prohibits cross-subsidization and/or discrimination. These regulatory constraints, together with the additional conditions attached to this Decision, lead the Commission to conclude that Phoenix does not afford the parties the possibility of eliminating competition by either discrimination or cross-subsidization.

Markets for traveller services and carrier services

72. The Commission sees no elimination of competition attributable to the creation of Phoenix, in the relevant markets. Phoenix's aggregate market share in the Community is far from giving it a dominant position; it includes both postpaid and prepaid cards, although in the latter category most of the cards issued by DT and FT are usable in national public telephones only and are thus possibly not directly comparable to Sprint's cards. As for carrier services, Phoenix will be active in selling excess capacity on its backbone network in a market which is only emerging. Phoenix's position as third-largest global switched transit provider is due to the fact that only two other companies meet the most valuable requirement in this market, namely worldwide reach and ultimately coverage.

5. *Conclusion*

73. The Commission concludes that the Phoenix transactions meet all four conditions for an individual exemption pursuant to Articles 85 (3) of the EC Treaty and 53 (3) of the EEA Agreement, as regards both the creation of Phoenix and the indispensable restriction of DT and FT's exclusive distributorship in Germany and France respectively.

D. DURATION OF THE EXEMPTION, CONDITIONS AND OBLIGATIONS

74. Pursuant to Article 8 of Regulation No 17 and to Protocol 21 of the EEA Agreement respectively, the

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

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

Commission shall issue a Decision pursuant to Articles 85 (3) of the EC Treaty and 53 (3) of the EEA Agreement for a specified period, and may attach conditions and obligations. Pursuant to Article 6 of Regulation No 17, such a Decision cannot take effect from an earlier date than the date of notification. Accordingly, this Decision shall, in so far as it grants an exemption from Articles 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement, take effect for seven years from the date on which the second new infrastructure licence comes into force in both Germany and France authorizing the licensee to operate infrastructure for the provision of liberalized services in competition with DT and FT, and the respective first licensee as regards the Phoenix agreements as described above. Unlike Atlas, Phoenix is not focused on the German and French national markets, where the restrictive effects of a cooperation between DT and FT are felt strongest. These restrictive effects in a fast-changing market that is not yet fully liberalized meant that Atlas had to be granted an exemption only for a relatively short period of time. By contrast, Phoenix targets mainly cross-border and ultimately global markets, and only to a certain extent third-country national markets. Given that in this regard Phoenix resembles BT and MCI's Concert venture, the Commission considers that the same duration of the exemption is justified.

75. Until the date defined in Article 2 of the Atlas Decision, no entity created pursuant to the Phoenix agreements should receive more favourable treatment than any third-party in respect of access to DT and FT's public X.25 packet-switched data networks, provided that Phoenix may access such networks over proprietary interfaces on condition that such interconnection is economically equivalent to third-party access over interfaces using the X.75 protocol or any other generally used CCITT-standardized interconnection protocol that may modify, replace or co-exist as a standard related to the X.75 standard and is used by DT and FT, T-Data and Transpac France and eventually Atlas Germany and Atlas France.

76. Given the link between Atlas and Phoenix, the Commission may withdraw this Decision if the exemption granted to the Atlas agreements is not renewed by the end of the period defined in Article 1 of the Atlas Decision. Likewise, in the light of the assessment of the Atlas agreements due at the end of the initial exemption period the Commission will lift or modify those conditions attached to this Decision which parallel the conditions and obligations described in recitals 23 to 29 of the Atlas Decision. Moreover, the Commission will, upon the parties' request, review the need for any particular condition or obligation attached to this Decision if circumstances change substantially before the period of exemption expires.

77. The Commission has decided to attach certain conditions and obligations to this Decision to exclude the risk of collusion between DT, FT and Sprint and to prevent an elimination of competition in the relevant markets. To this end, the Commission must ensure that DT and FT, where they are dominant in the provision of infrastructure and services used by Phoenix or Sprint, treat both Sprint and all entities created pursuant to the Phoenix agreements on similar terms as third-party competitors in respect of such provision. The condition imposed on DT, FT and Sprint not to discriminate in each other's favour is necessary because Phoenix will offer non-reserved services and will operate under Sprint's existing international simple resale (ISR) licence in the United Kingdom and under FT's existing ISR licence in Sweden. A distinction between reserved and non-reserved voice services does not exist in a number of geographic markets targeted by Phoenix and this distinction is due to disappear in most Member States with full liberalization of public voice telephony by 1 January 1998. Therefore, in the absence of such condition the parents' cooperation in the framework of Phoenix could easily spill over to the voice telephony markets, thus impairing effective liberalization of such markets and the development of competition in the Community.

The non-discriminatory treatment of Sprint, of Phoenix entities and of third-party competitors (recital 31) will allow the last-named category to compete against DT and FT, which in turn have room to compete over distribution: passive sales are possible because the same Phoenix service may be sold from either end of the requested circuits, for example from Germany or from France. To limit the potentially negative effects of the joint venture on overall competition between the parents, the Commission considers it appropriate to impose restrictions on the exchange of sensitive information between the parents and Phoenix (recital 64).

The most crucial requirements as to conduct, designed to safeguard competition in the EEA, are attached as conditions rather than as obligations to this Decision, given the need to prevent an

elimination of effective competition. Given the legal consequences of a breach of a condition, national courts can adequately and swiftly contribute to a decentralized policing of compliance and thus ensure that the competition rules will be adhered to the benefit of private individuals([36]). However, the principle of proportionality requires that far-reaching legal, financial and commercial consequences do not ensue from occasional or individual mistakes whose effects on the market are negligible. Therefore, infringements of the prohibitions on cross-subsidization, discrimination and bundling cannot be considered to breach a condition attached to this Decision unless such infringements have a substantial impact on market conditions, for instance if practices are pursued systematically or repeatedly.

78. This Decision is without prejudice to the application of Article 86 of the EC Treaty and Article 54 of the EEA Agreement,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Articles 85 (3) of the EC Treaty and 53 (3) of the EEA Agreement and subject to Articles 2 and 3 of this Decision, the provisions of Articles 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement are hereby declared inapplicable, for a period of seven years from the date on which two or more licences for the construction or ownership and control of alternative infrastructure for the provision of liberalized telecommunications services come into force in both Germany and France, to:

(a) the creation of the Phoenix joint venture by Deutsche Telekom AG ('DT'), France Télécom ('FT') and Sprint Communications Corporation ('Sprint'), as notified to the Commission, including the ancillary obligation imposed on Sprint, on DT and on FT to obtain from Phoenix all requirements for global products under section 2.1.1 of the operating entities services agreement and not to compete with the joint venture for the provision of Phoenix services under sections 10.2 and 10.3 of the joint venture agreement, as amended; and to

(b) the appointment of DT as the exclusive distributor of Phoenix in Germany and of FT as the exclusive distributor of Phoenix in France under section 2.2 (b) of the joint venture agreement as amended.

Article 2

The exemption set out in Article 1 is subject to the following conditions:

(a) Non-discrimination

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

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

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

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

2. DT and FT shall grant to Sprint, to any entity created pursuant to the Phoenix agreement, and to any third party operating a telecommunications facility that apply for the interconnection of such facility with DT or FT's networks, such interconnection on non-discriminatory terms as will enable it/them to provide telecommunications services or provide its telecommunications facilities without limitation in any respect within the reasonable capabilities of the operator concerned.

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

3. DT and FT shall not in any way discriminate between Sprint, any entity created pursuant to the Phoenix agreements, and any other service provider competing with Sprint or such entity in connection with:

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

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

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

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

1. FT and DT shall immediately grant to Sprint, to any entity created pursuant to the Phoenix agreements, and to any third party, access to their respective public X.25 packet-switched data networks on non-discriminatory terms, including availability of volume or other discounts and the quality of interconnection provided.

2. Transpac France and T-Data shall, until such time as Transpac France and T-Data are yielded to Atlas, not disclose either to Sprint or to any entity created pursuant to the Phoenix agreements any specifically agreed terms that are identified and maintained as confidential by the party obtaining interconnection through standardized X.75 interfaces to access the French or German national public X.25 packet-switched data networks.

3. Sprint and any entity created pursuant to the Phoenix agreements may access the French and German public X.25 packet-switched data networks through proprietary interfaces, even for the provision of X.25 data communications services, provided that the access granted to Sprint or such entity through such interfaces is economically equivalent to third-party access to these networks.

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

(c) Correspondent services

1. DT and FT shall not give more favourable treatment to:

   (i) Sprint over other United States correspondents; or

   (ii) each other over other German or French correspondents once telecommunications services markets are fully liberalized.

2. Sprint shall not give more favourable treatment to DT and FT over other German or French correspondents once telecommunications services markets are fully liberalized.

(d) Cross-subsidization

1. All entities created pursuant to the Phoenix agreements shall be established as distinct entities separate from DT and FT.

2. All entities created pursuant to the Phoenix agreements shall obtain their own debt financing on their own credit, provided that FT and DT:

   (i) may make any capital contributions or commercially normal loans to such entities that are required to enable such entities to conduct their respective businesses;

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

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

3. No entity created pursuant to the Phoenix agreements shall allocate directly or indirectly any part of its operating expenses, costs, depreciation, or other expenses of their business to any parts of FT or DT's business units (including, without limitation, the proportionate costs based on work actually performed that are attributable to shared employees or sales or marketing of Phoenix products and services by DT or FT employees), provided that any such entity may bill DT or FT for products and services supplied to DT or FT by such entity at:

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

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

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

(e) Bundling

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

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

(f) Accounting

1. Any entity created under the Phoenix agreements in France and Germany, any ROE parent entity and any entity controlled by a ROE parent entity shall keep separate accounting records using international accounting standards for each service they provide in any country. DT and FT (including all subsidiaries) shall keep separate accounting records using international accounting standards for each service they provide to any entity created pursuant to the Phoenix agreements, operating in the EEA.

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

(i) the cost standard used;

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

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

(iv) the attribution method chosen.

3. The accounting records referred to in points 1 and 2 shall identify all services provided to:

(i) any entity created pursuant to the Phoenix agreements in France and Germany;

(ii) any ROE parent entity; and

(iii) any entity controlled by a ROE parent entity by DT and FT or transfers to or from DT and FT.

4. No entity created pursuant to the Phoenix agreement, ROE parent entity or entity controlled by a ROE parent entity shall receive any material subsidy directly or indirectly from DT or FT, or any investment or payment from DT or FT that is not recorded in the books of such entities as an investment in debt or equity.

Article 3

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

(a) Auditing

1. All entities created pursuant to the Phoenix agreements in France and Germany, all ROE parent entities and any entity controlled by a ROE parent entity shall be audited by an independent external auditor every 12 months, provided that such audit shall certify from an accounting viewpoint that:

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

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

(iii) the calculation numbers are accurate.

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

(b) Other obligations

DT, FT, all entities created pursuant to the Phoenix agreements in France and Germany, all ROE parent entities and all entities controlled by a ROE parent

entity shall each, for the purpose of ascertaining and ensuring compliance by these undertakings with the conditions set out in Article 2,

1. keep all detailed records and documents necessary to prove complete compliance with the terms of the conditions set out in Article 2 ready for inspection by the Commission and to enable the Commission to verify the correctness of the audit certificate referred to in point (a) (2);

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

3. provide the Commission with:

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

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

   (iii) further oral or written explanations.

Article 4

This Decision is addressed to:

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Done at Brussels, 17 July 1996.

For the Commission
Karel VAN MIERT
Member of the Commission