II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 29 October 1997

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

(Case No IV/35.830 — Unisource)

(Only the Dutch, English and Swedish texts are authentic)

(Text with EEA relevance)

(97/780/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 6 and 8 thereof,

Having regard to the notification for exemption submitted pursuant to Article 4 of Regulation No 17 on 4 March 1996,

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

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

Whereas:

I. THE FACTS

A. Introduction

(1) Unisource NV (hereinafter 'Unisource') was established on 24 April 1992 as a 50-50 joint venture between PTT Telecom BV, the Dutch telecommunications operator, and Swedish Telecom International, a subsidiary of Televerket, the predecessor of Telia AB, a Swedish telecommunications operator, for the purpose of concentrating the international value added networks of the two parties. The parties actually transferred the corresponding networks as from 1 January 1993.

The joint venture was first expanded on 4 November 1992 by the entry of Schweizerische PTT-Betriebe (Swiss PTT) into a subsidiary of Unisource, Unisource Satellite Services BV, and later, on 1 July 1993, by the entry of Swiss PTT into Unisource. During 1994, Unisource and Telefónica started negotiations aimed at the entry of Telefónica into Unisource. The result of those negotiations was the original agreements notified to the Commission pursuant to Council Regulation (EEC) No 4064/89[3] (the Merger Control Regulation) on 29 September 1995, which provided for the creation of Unisource International NV, a joint venture between Unisource and Telefónica.

[1] OJ 13, 21. 2. 1962, p. 204/62.
[2] OJ C 44, 12. 2. 1997, p. 15.
[3] OJ L 395, 30. 12. 1989, p. 1; corrigendum OJ L 257, 21. 9. 1990, p. 13.

(2) On 6 November 1995, the Commission concluded that the notified operation did not constitute a concentration within the meaning of Article 3 (2) of the Merger Regulation and adopted a Decision to that effect in application of Article 6 (1) (a) of the Merger Control Regulation [4]. Following the Commission's decision and at the request of the parties the notification was converted into a notification under Regulation No 17.

(3) However, as a result of further negotiations between the parties carried out in parallel to the assessment by the Commission of Unisource International NV, the structure of the transaction was modified. Under the modified structure, Telefónica was to contribute to Unisource its subsidiaries Telefónica Transmisión de Datos SA and Telefónica VSAT SA in exchange for a 25 % participation in the capital of Unisource. The modified transaction was finally notified on 4 March 1996.

On 18 April 1997, Telefónica and BT announced that they had entered into a strategic alliance. That alliance will at first cover joint activities of the new partners in the Americas but it foresees, as subsequent steps, further commitments in respect of Spain, the rest of Europe and the rest of the world.

Following that public announcement, the Commission requested information from Unisource and Telefónica in respect of the consequences of that new alliance on the participation of Telefónica in Unisource. The answers from both confirmed that Unisource, its shareholders and Telefónica were in discussions about the withdrawal of Telefónica from Unisource. The withdrawal will be formalized as soon as both parties agree on a number of relevant issues. According to Unisource, Telefónica has not physically participated in any decision-making body of Unisource since 18 April 1997.

Therefore, the position to be taken on the notification must be based on the following assumptions:

— only the contribution agreement with Telefónica will not stay in force,

— there will be changes regarding activities in Spain and South America; it is for that reason that all references to the participation of Telefónica and/or to Spain have been removed,

— Telefónica will recover the full ownership of the assets originally contributed to Unisource, namely the Spanish public switched data network and Telefónica's satellite unit. In addition, it will sell its current shares in Unisource to the remaining shareholders,

— finally, pending the conclusion of the ongoing negotiations with Unisource, Telefónica will continue to be responsible for the distribution of Unisource products in Spain to existing customers of such services.

Should any of these assumptions prove to be wrong, the Commission might have to reassess the present Decision in the light of Article 8 of Regulation No 17.

B. The shareholders of Unisource

(4) PTT Telecom BV (PTT Telecom) is the incumbent telecommunications operator in the Netherlands, where it provides national and international telecommunications services and infrastructure.

Royal PTT Netherlands NV (KPN), a public company, owns 100 % of the shares in PTT Telecom. Currently, the Dutch State holds approximately 44 % of the outstanding ordinary shares of KPN (it is also the owner of PTT Post).

KPN's turnover in 1994 was Fl 18 592 million (ECU 8 769 million), of which Fl 12 686 million (some ECU 6 000 million) was accounted for by PTT Telecom.

(5) Schweizerische PTT-Betriebe (Swiss PTT) is an incorporated public-law institution which is part of the Swiss federal administration. It encompasses post and telecommunications. Total turnover of Swiss PTT in 1994 was Sfrs 13 838 million (ECU 8 989 million) of which telecommunications (services and infrastructures accounted for Sfrs 9 256 million (ECU 6 010 million).

(6) Telia AB is a telecommunications operator providing domestic and international telecommunications services and infrastructure in Sweden. It is a limited liability company incorporated under Swedish law. All shares are owned by the Swedish State.

Telia's turnover in 1995 was Skr 41,066 million (ECU 4,729 million).

C. The joint venture: Unisource

(7) Unisource is a holding company active in the telecommunications sector that incorporates seven operating subsidiaries. Total turnover of the group in 1994 was Fl 933 million (ECU 443 million). Net result was losses of Fl 41,072 million (ECU 20 million).

[4] For a reference to the Decision, see OJ C 13, 18. 1. 1996, p. 3.

1. *Structure of Unisource*

(8) Unisource is governed by a Management Board and a Supervisory Board.

— The Management Board, which is entrusted with the day-to-day business of Unisource, is composed of three members appointed by the general meeting of shareholders acting unanimously. The three members are the President and Chief Executive Officer, the Executive vice-president and Chief Financial Officer and the Executive vice-president and Director of Business Services. All decisions by the Management Board are adopted by a majority of the votes [5].

— The Supervisory Board exercises supervision over the Management Board's conduct of affairs and over the general course of business in Unisource and the operating companies. The Supervisory Board is composed of three members appointed by the general meeting of shareholders. Each shareholder nominates one of them. There is a chairman. The position of chairman rotates every two years.

Most resolutions of the Supervisory Board (including the annual budget and business plan) are to be adopted by unanimity of the votes cast [6].

Every operational subsidiary has its own Board of Directors or management team responsible for the day-to-day business of the subsidiary.

— The Supervisory Board is to report to the general meeting of shareholders.

2. *Scope of activities of Unisource*

(9) According to Unisource, the activities of the group can be split into three main areas: business services, personal services and network services. The following subsidiaries operate in each of those areas:

(a) ***Business services***

(10) Unisource Business Networks (UBN) is responsible for the provision of pan-European, seamless, end-to-end data network services, managed bandwidth services, messaging and outsourcing. UBN has subsidiaries in Sweden, the Netherlands, Switzerland, Spain, Germany, the United Kingdom, Belgium, Luxembourg, Norway, Denmark, Finland and Italy.

(11) In addition, the respective domestic packet switched data networks (PSDN) of the Unisource initial parent companies were contributed in 1993 to the respective domestic UBN subsidiaries.

The UBN subsidiaries own and operate the data nodes, the associated databases and the network control centres. Basic services (leased circuits) are provided to the UBN domestic subsidiary by the relevant Unisource shareholder. The latter resells the Unisource services to its local customer base. The networks are used to support the offering of pan-European services and purely domestic services. The country-specific domestic services are branded Unisource.

Each national network is based on the same technology. They are interfaced through a common backbone network owned by Unisource (Unidata). Furthermore, the respective PSDN services available in each country are being aligned with Unisource' Unidata PSDN service to create a basic PSDN service with a wider reach.

Finally, the three packet switched data networks (PSDN) and Unidata share their international X. 75 gateways.

(12) Unisource Voice Services (UVS) is in fact a business unit of Unisource offering pan-European voice international virtual private network (IVPN) services and other closed user group services.

(13) Unisource Satellite Services (USS) offers international value-added, voice, video, text and data communications using fixed and very small aperture terminal (VSAT) satellite terminals. It allows UBN services to be extended to remote areas outside terrestrial coverage.

(b) ***Personal services***

(14) Unisource Card Services (UC) offers personal and corporate post-paid calling cards.

(15) Unisource Mobile (UM) is a provider of pan-European GSM mobile services. It also applies for licences for mobile networks operators in Europe, outside the home countries.

UM has three subsidiaries. GEAB AB in Sweden, GEAB Norge AS in Norway and TMG GmbH in Germany which act as distributors and retail outlets for the national mobile services in these countries. For example, in Norway GEAB acts as distributor of Telenor Mobile and Netcom and in Germany TMG is a service provider for the German D1, D2 and E Plus networks.

[5] Some decisions will nevertheless require the approval of the Supervisory Board, including among others, acquisitions, entering into agreements and investments.

[6] An absolute majority will be required for resolution of disputes arising out of transactions between Unisource and any of the shareholders.

(16) UM is currently developing a Virtual Mobile Network to provide seamless pan-European mobile telephony services based on GSM technology at a significant discount to standard roaming tariffs.

(c) *Network services*

(17) Unisource Carrier Services (UCS) is currently responsible for managing the international networks [7] of the shareholders of Unisource. It is organized as a management company given that the Unisource shareholders are not permitted to assign their international networks and licences to it.

At present, UCS only offers services to the shareholders of Unisource and Uniworld. However, in 1997 it is starting to provide network services to third parties in its own name on the basis of network services purchased from the Unisource shareholders (and other operators) and resold in an integrated manner to service providers. The terms and conditions for the provision of network services will be laid down in supply agreements between each Unisource shareholder and UCS [8].

(18) UCS is a crucial element for Unisource. In the future it will provide carrier's carrier services to other services providers. For that purpose, it is building a pan-European network (PEN) with global connectivity based on SDH [9] technology in those countries where regulation allows.

The PEN will be an integrated, centrally managed network that will provide seamless telecommunications services in Europe. It will take advantage of its presence in many European countries to offer an improvement on the current system of bilateral settlements.

The PEN will be deployed in two phases. The first phase, due to be completed in the third quarter of 1996, consists of a managed high-capacity network between the three home countries with centralized management and customer support. The second phase is due to be completed by 1 January 1998. By then it will be extended to non-shareholder countries and enhanced in order to provide signalling and intelligent network services to customers.

The services provided on the PEN will include switched transit services, switched hubbing services, managed bandwidth services, delivery of PSTN and ISDN traffic and signalling services.

(19) Outside that structure there is another subsidiary, Itema (to be renamed Unisource Information Services) active in the information technology field. It provides information services (IS) and information technology (IT) services to the Unisource group and to identified common projects in the Unisource alliance. It also plays a leading role in the harmonization process between the IS/IT services of the Unisource shareholders.

A management agreement has been signed to subcontract the management, coordination and supervision of certain projects and programmes to Itema. It receives a general management fee for its activities.

3. *The Unisource alliance: the one telecom country*

(20) According to the Unisource 'Organization and Governance' document, one of the aims of the alliance is 'to improve time to market and cost-effectiveness by merging or coordinating activities of the parent companies and creating service transparency between mother countries'. This is the definition of what the parties call 'the one telecom country'. That concept translates into a structure which is separate and independent from the structure of Unisource and comprises the following alliance boards.

Network Board (NB)

Its mission will be the adoption of strategic decisions concerning network questions to establish one transparent network and to use all opportunities to reduce costs, and the harmonization and integration of national networks and architectures, both as between the shareholders and with Unisource Carrier Services (see below). Its members will include the presidents of the companies involved.

[7] The international networks include the international switching centres in the three countries, the international transmission maintenance centres, the international network management centres, satellite earth stations, sea cables and other international transit capacity, the ATM- and SDH-cross connects, the international signalling transfer points and any other cross-border facilities of the Unisource shareholders in those countries.

[8] One of these agreements has been concluded between UCS and Uniworld (see Commission Decision in Case No IV/35.738 — Uniworld).

[9] Acronym for synchronous digital hierarchy; an international standardized transmission technique which offers greater capacity in existing fibre-optics networks, better remote control and automatic re-routing in the case of faults.

Service and Distribution Board (S&DB)

Its missions will be the adoption of strategic decisions concerning the joint service portfolio and its coordination, the harmonization and integration of national services of the parent companies between themselves and with the relevant Unisource services.

R&D Board

Responsible for the adoption of strategic decisions regarding annual joint research and development of portfolios and regarding R&D optimization. It will also support the NB and S&DB.

Purchasing Board (PB)

Mainly responsible for creating common opinions and making decisions about areas suitable for common purchasing and for harmonizing the process of purchasing and logistics both in support systems and in approach to the supplier market.

IT Board

Responsible for the adoption of strategic decisions concerning planning, provisioning and implementation of IT across the alliance members, the harmonization and integration of national IT systems between the parent companies and with the IT systems of Unisource.

D. The notified agreements

1. *Agreements*

(21) The parties have notified the following agreements regarding Unisource:

— the joint venture and shareholders' agreement and its appendices,

— the contribution agreement,

— the articles of association,

— the by-laws,

— the share issuance deed, and

— the non-competition agreements for UBN, USS, UC and UM.

2. *Contractual provisions*

(a) *The non-competition provisions*

(22) In accordance with Article 19 of the joint venture and shareholders agreements, the parties are free to conduct, outside Unisource and independently of each other, all activities whether or not within the areas of cooperation. Nevertheless, at such time as they agree to develop or acquire or participate in an operating company, they must negotiate and conclude a non-competition agreement specifically geared to the business activities to be conducted by that operating company.

So far, four such non-competition agreements have been concluded in respect of the activities of UBN, USS, UC and UM.

— Under the non-competition agreement for UBN's activities, the parties decide to concentrate their international value-added data network services in UBN. Thus, and except with regard to Infonet services, none of the three will offer comparable services in parallel to the UBN portfolio. Each of them will offer to their respective national markets the UBN product portfolio as an agent or distributor of UBN.

— Under the non-competition agreement for USS, none of the parties will offer comparable VSAT services in parallel to the USS portfolio. Each of them will distribute the USS product portfolio to their respective national markets as an agent or distributor of USS.

— Under the non-competition provision for UC, the parties have decided to concentrate on UC the ownership and operation of the technical platform for non-payphone calling card services and product development. Consequently, none of them will offer comparable services in parallel to the UC pan-European product portfolio. Nonetheless, each of them will continue to market their own non-payphone calling cards within their respective national markets, and UC will market and distribute its cards on a real pan-European scale.

— Finally, the non-competition provision for Unisource Mobile (GSM and DCS 1800) services requires the Unisource shareholders not to act as pan-European mobile service providers outside their territories in parallel to the UM product portfolio. However, each of them will continue offering their GSM services at home and abroad through the relevant roaming agreements concluded under the framework of the GSM Memorandum of Understanding (MoU).

(b) *Distribution of services*

(23) The services of UBN([10]), UVS and USS will be distributed through exclusive distributors. Each of the Unisource shareholders is the exclusive

([10]) After the Uniworld transaction, the UBN distribution agreement will relate to national data services and to international data services (bilateral) outside the scope of Uniworld.

distributor for its own country (Telia is also the exclusive distributor for Norway and Denmark). Exclusive distributors must not actively seek customers outside their territories and are bound by non-competition provisions([11]).

E. Relevant markets

(24) The relevant markets involved are the following([12]):

1. *Product markets*

(a) *The markets for non-reserved corporate telecommunications services*

(25) Unisource, through UBN, UVS and USS, targets the markets for both customized packages of corporate telecommunications services and packet-switched data communications services, jointly referred to as 'non-reserved corporate telecommunications services'. The services to be offered fall within the following categories:

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

— data communications services using in particular the X.25, Frame Relay and Internet protocols (IP),

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

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

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

(b) *The market for traveller services*

(26) The market for traveller telecommunications services comprises offerings that meet the demand of individuals who are away from their normal location, either at home or at work. Among the most relevant of these offerings are calling card services (that is, prepaid cards with or without a code and post-paid cards), including those in combination with credit cards and other branded service cards ('affinity cards').

(27) The pan-European GSM mobile services being developed by UM, are also mainly intended to serve the needs of traveller services and for that reason are included here as well. However, they are also seen as a GSM mobile extension to corporate customers' fixed private or virtual private networks; the possibility cannot be excluded now that in the future they will have to be included in the market for non-reserved corporate telecommunications services.

(c) *The market for carrier services*

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

— switched transit, that is 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,

— dedicated transit, that is 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,

([11]) The non-competition provision regarding UBN nevertheless permits exclusive distributors to distribute in their territory Infonet's (global) data services. Infonet is a provider of global value-added telecommunications services incorporated in the United States of America and owned by a number of telecommunications operators (TO) including the members of Unisource. Actual distribution of its services in all European countries is handled by a business unit of the country's telecom operator. As regards the shareholders of Unisource, that business unit is not transferred to Unisource. However, Infonet states that its market share in any of those countries is less than 1 %.

([12]) This market definition is consistent with that adopted in the BT-MCI case (Commission Decision 94/579/EC (OJ L 223, 27. 8. 1994, p. 36, recital 5) as well as in the Atlas and Global One cases (Commission Decisions 96/546/EC and 96/547/EC (OJ L 239, 19. 9. 1996, p. 23, recitals 4 to 15, and p. 57, recitals 5 to 16, respectively).

— 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

— reseller services for service providers without international telecommunications facilities of their own.

Demand for carrier services is increasingly driven by alternative carriers concerned at entrusting their international traffic to the incumbent TO for reasons such as technical dependency and commercial sensitivity of customer information.

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

2. *Geographic markets*

(29) With the exceptions described below regarding national markets, the geographic scope of services marketed by Unisource through its different affiliates, is cross-border regional, pan-European in this case. It is possible, however, that some services may be offered with a global reach, depending on the needs of particular customers.

(a) ***The markets for non-reserved corporate telecommunications services***

(30) There is a direct relationship between cost and price of services within the category of non-reserved corporate telecommunications services and the geographical coverage requested by customers. Differences are quite substantial and are mainly based on the cost of either leasing lines or establishing an *ad hoc* infrastructure in other parts of the world and guaranteeing service levels even in respect of very remote locations. In that respect, demand by large users for non-reserved corporate telecommunications services exists on at least three distinct geographic levels; namely at a global level, a cross-border regional level (pan-European in the present case) and a national level.

Packet-switched data communications services within this category are offered by Unisource, through UBN (and the domestic subsidiaries thereof) at a cross-border regional and national level in the different Member States involved.

(b) ***The market for traveller services***

(31) The market for traveller services appears to be increasingly global: travellers demand services which include a single bill and which integrate functions such as voice messaging, voice response and information systems everywhere. Geographic limitations of current traveller service offerings are generally due to technical shortcomings which are set to be overcome in the near future, such as the incompatibility of mobile communications systems or differences in prepaid cards without an individual user code. However, the geographic scope of the services offered by Unisource can be left open for the purposes of this case, since the finding of narrow geographic markets would not affect the assessment of the parties' competitive position.

(c) ***The market for carrier services***

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

3. *Market shares of the parties*

(a) ***Cross-border regional markets***

(33) Unisource's estimates of its own market shares for 1994 were slightly above 5 % in the EEA plus Switzerland in respect of value added services to corporations (encompassing most of the services within the three markets above) and slightly over 15 % for Very Small Aperture Terminal (VSAT) services.

(b) ***National markets***

(34) As regards domestic packet switched data communication services, in 1995, Telia had 78 % in Sweden([13]), PTT Telecom over 95 % in Netherlands and Swiss PTT nearly 100 % in Switzerland. Market figures for the same year in respect of the overall domestic telecommunications services were 91 % for Telia, nearly 100 % for PTT Telecom and nearly 100 % for Swiss PTT.

4. *Competition in the markets*

(a) ***Cross-border regional or global markets***

(35) Many players, acting alone or jointly with partners, have entered or are entering the cross-border regional or global markets defined above:

— *the market for non-reserved corporate telecommunications services:* BT-MCI's([14]) Concert and Atlas/Global One are expected to become major players on a global basis; to those it is necessary to add some other important players like Sita or IPSP (International Private Satellite Partners),

— *the market for traveller services:* many companies are actively marketing calling cards, such as US firms like AT&T, MCI and Spring and alliances like Global One; in addition, most European telecommunications operators and some new entrants are launching direct-to-home or collect-call services in order to follow their customers abroad,

— *the market for carrier services:* all telecommunications operators compete with each other in the provision of transit and hubbing services; a few companies are entering the market on a cross-border regional or global basis; Global One and Hermes are, in principle, the most important ones.

(b) ***National markets***

(36) Each of the shareholders of Unisource faces a number of competitors in its respective domestic markets for packet switched data communication services. Such services are completely liberalized in Sweden, several licences were granted in the Netherlands on 1 July 1996 with full liberalization implemented on 1 July 1997, and several licences have been granted in Switzerland. Some of the companies concerned (such as Telenordia of Sweden) are also the domestic extensions of the global alliances.

F. Changes made and undertakings given further to the Commission's intervention

(37) Certain features of the notified transaction appeared to be incompatible with Community competition rules. Consequently, the Commission, by letter of 7 May 1996, informed the parties of its concerns. In the course of the notification procedure, the parties have amended the original agreements and given undertakings to the Commission.

(38) In addition, the Commission wrote to the Governments involved enquiring about the existing framework and the intended evolution thereof. It also sent letters, where required, requesting changes to that framework which in its view were necessary in order to create a level playing field. The results of such action are summarized in paragraphs 68 to 71.

1. *Contractual changes*

(39) The following undertakings reflect changes in the notified agreements:

([13]) In all cases through the respective UBN domestic subsidiary.

([14]) The market position of this alliance will be reinforced after the development to its full potential of the alliance with Telefónica.

(a) *Agency arrangements*

(40) Unisource undertakes that neither it nor any of its subsidiaries will act as an exclusive agent for PTT Telecom or Telia in respect of basic services and will not be involved with the provision of leased lines on behalf of its shareholders until full liberalization in all the countries of the shareholders of Unisource has taken place, except as purchaser of leased lines from shareholders for its own use. It will terminate as from the date of the granting of an exemption pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement the exclusive agency agreement with PTT Telecom as far as it is concerned with leased lines.

(41) Unisource undertakes that neither it nor any of its subsidiaries will act as an exclusive agent for the provision of leased lines on behalf of Swiss PTT until full liberalization in all the countries of the shareholders of Unisource has taken place. However, Unisource is allowed to purchase leased lines from each of them for its own use.

(b) *Transit negotiations*

(42) Unisource undertakes that neither it nor any of its subsidiaries, in particular UCS will act as the exclusive representative in any capacity for any of the Unisource shareholders in respect of the negotiation of transit tariffs in/through the Unisource shareholders' countries on behalf of the shareholders with licensed operators and that it will not be involved in these negotiations on behalf of the shareholders until full liberalization has taken place in all the countries of the shareholders of Unisource.

2. *Undertakings given by the parties: conditions attached to the present Decision*

(43) The parties have also entered into certain additional undertakings. Compliance with each of them will be a condition for the validity of this Decision within the meaning of Article 8 (1) of Regulation No 17.

(a) *Non-discrimination*

(44) Each of the parent companies of Unisource is in a dominant position in its respective domestic market at least for the provision of leased lines required by competitors of Unisource in those domestic markets. In addition, as owner of the PSDN networks in each of the three domestic markets of its shareholders, Unisource is in a dominant position in respect of the provision of such infrastructure and services provided over that infrastructure in those three markets. Accordingly, to ensure the absence of discrimination, which would constitute an abuse of a dominant position contrary to Article 86, and without prejudice to the compliance by the parties with the relevant Community and national legislation, the Commission intends to ask Unisource and/or its parent companies to comply with the following conditions:

(45) All shareholders undertake that all dealings with (i) any other shareholder and (ii) any entity organized under the Unisource agreements will be on an arm's length basis, that is on terms and conditions similar to those offered to third parties, in connection with reserved facilities and services and with such facilities and services in respect of which they retain a dominant position within the meaning of Article 86 of the EC Treaty after full and effective liberalization of telecommunications infrastructure and services in each of their respective countries.

(1) Leased lines[15]

(46) All shareholders undertake that, to the extent that this is not yet the case, the provision of leased lines will be a separate service for which separate accounts will be kept pursuant to the principles, rules and practices currently applying under national or Community law.

(47) All shareholders undertake to publish the standard terms and conditions for the leasing of lines (national and international). The terms will refer to the technical specifications of the lines, the provisioning time, repair time, tariffs and discounts.

(48) All shareholders undertake that all types of lines made available to any subsidiaries or to Unisource will also be available under the same terms and conditions to third parties.

(49) PTT Telecom undertakes to delete any clause from its general conditions containing references to the use of leased lines (i.e. clause 11.10) and

[15] Conditions regarding the provision of leased lines are consistent with Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines (OJ L 165, 19. 6. 1992, p. 27).

international half circuits in any way which would not be justified by technical considerations or mandatory provisions and undertakes not to introduce such clause or interference [16].

(2) Interconnection

(50) Unisource and its affiliates, in particular UBN, undertake to establish and maintain third-party access to public data networks (X.75 or any standard that might replace it) of domestic UBN's on non-discriminatory cost-based terms including price, availability of volume and other discounts and the quality of interconnection provided to its own affiliates as from the grant of exemption pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement. These terms will be publicly available. The price will be based on costs defined and attributed using an analytical accounting system.

(51) PTT Telecom will make public no later than on the date of adoption of the present Decision a standard interconnection agreement in respect of the PSTN and ISDN networks, which will provide for timely and transparent interconnection and will include terms and conditions (including technical standards and specifications) which are non-discriminatory and cost based on a service-by-service basis. Costs will be defined and attributed using an analytical accounting system. A copy of the interconnection agreement will be also provided to the Commission.

Interconnection will be available at a reasonable range of termination points in accordance with international technical standards to ensure adequate and efficient interconnections to the extent necessary to ensure interoperability of services. There will be a number of regional points of interconnection where international standardized interfaces and signalling systems are available and where it is economically feasible. In any event, all reasonable requests for interconnection, including special network access, will be met on terms which are non-discriminatory and cost based on a service-by-service basis.

(52) PTT Telecom undertakes that it will continue to grant access on a non-discriminatory basis to customer databases necessary for the provision of directory services at cost-oriented pricing.

(53) Swiss PTT will make public no later than on the date of adoption of the present Decision a standard interconnection agreement in respect of the PSTN and ISDN networks which will be in accordance with relevant Swiss regulations and be equivalent to similar requirements under Community regulations. This agreement will provide for timely and transparent interconnection and will include terms and conditions (including technical standards and specifications) which are non-discriminatory and cost based on a service-by-service basis. Costs will be defined and attributed using an analytical accounting system. A copy of the interconnection agreement will be also provided to the Commission.

Interconnection will be available at a reasonable range of termination points in accordance with international technical standards to ensure adequate and efficient interconnections to the extent necessary to ensure interoperability of services. There will be a number of regional points of interconnection where international standardized interfaces and signalling systems are available and where it is economically feasible. In any event, all reasonable requests for interconnection, including special network access, will be met on terms which are non-discriminatory and cost based on a service-by-service basis.

(54) Swiss PTT undertakes that it will continue to grant, in accordance with the relevant Swiss regulations, access on a non-discriminatory basis to customer databases necessary for the provision of directory services at cost-oriented pricing.

(55) Telia undertakes that its interconnection service will be provided on a timely and transparent basis and will include terms and conditions (including technical standards and specifications) which are non-discriminatory and cost based on a service-by-service basis. Costs will be defined and attributed using an analytical accounting system.

All reasonable requests for interconnection, including special network access, will be met on

[16] PTT Telecom has also indicated that it has no clause on its general conditions containing any obligation on customers to reveal the use they intend to make of leased lines and does not request such information from (potential) customers before or after entering into contracts for leased lines.

terms which are non-discriminatory and cost based on a service-by-service basis.

(b) *No misuse of confidential information*

(56) Unisource and its affiliates, UCS in particular, will not make available to any other of its subsidiaries or shareholders confidential customer information received in its capacity as agent of the Unisource shareholders.

(57) All shareholders undertake that they will not misuse confidential information in respect of customer contract related data, such as prices, received in their capacity as shareholders in Unisource, because of their representation on any board or committee in any entity established pursuant to the Unisource agreements, or as distributors for any Unisource services.

(58) All shareholders undertake that they will not misuse confidential customer information obtained from any other shareholder, because of their representation on any board or committee in any entity established pursuant to the Unisource agreements.

(59) All shareholders will furthermore ensure that Unisource or its subsidiaries will not have access to confidential information in respect of customer contract related data, such as prices, acquired as a result of the provision of services by them to competitors of Unisource.

(c) *Prevention of cross-subsidization*

(60) The parties will not engage in cross-subsidization within the meaning of the Commission's competition guidelines for the telecommunications sector ([17]).

(61) All shareholders undertake not to grant any cross-subsidies to any entity created pursuant to the Unisource agreements funded out of income generated by any business which they operate pursuant to any exclusive right or in respect of which they hold a dominant position within the meaning of Article 86 of the EC Treaty.

([17]) OJ C 233, 6. 9. 1991, p. 2, point 102 *et seq.*

(62) All shareholders will in particular ensure that any entity created pursuant to the Unisource agreements: (i) obtains its own debt financing; (ii) does not allocate operating expenses, costs depreciation or other expenses to any business unit of the shareholders; (iii) charges the shareholders the same price as they charge third parties for the provision of services sold to third parties in commercial quantities; and (iv) charges the shareholders 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.

(63) All shareholders will ensure transparency by ensuring compliance with the accounting rules, principles and practices currently in use under national or Community law. Such rules, principles and practices include the cost standard used, the accounting conventions used for the treatment of costs and the attribution method chosen. Payments and transfers to Unisource and Unisource companies can be identified on the basis of accounting reports that are periodically available.

(d) *Prevention of tying*

(64) PTT Telecom undertakes that it will not tie-in the sale of any service provided by Unisource with any service provided by PTT Telecom. It will moreover, for as long as it has a dominant position within the meaning of Article 86 of the EC Treaty in respect of the provision of telecommunications services and/or infrastructures, only make combined offerings of Unisource services and its own services in such a way that the customer can identify in the contract forms the price charged as well as the other terms and conditions for these services and it will ensure that each of these components is separately available at equivalent conditions.

(65) Swiss PTT undertakes that it will not tie-in the sale of any service provided by Unisource with any service provided by Swiss PTT. It will moreover, for as long as it has a dominant position in respect of the provision of telecommunication services and/or infrastructures, only make combined offerings of Unisource services and its own services in such a way that the customer can identify in the contract forms the price charged as well as the other terms and conditions for these services and it will ensure that each of these components is separately available at equivalent conditions.

(66) Telia undertakes that it will not tie-in the sale of any service provided by Unisource with any service

provided by Telia. It will moreover, for as long as it has a dominant position within the meaning of Article 86 of the EC Treaty in respect of the provision of telecommunication services and/or infrastructures, only make combined offerings of Unisource services and its own services in such a way that the customer can identify in the contract forms the price charged as well as the other terms and conditions for these services and it will ensure that each of these components is separately available at equivalent conditions.

(67) All the above conditions will apply as from the date of the exemption for the period of validity of the exemption.

3. *Changes to the regulatory framework in the countries of the Unisource shareholders*

(68) Discussions with the governments concerned have been conducted on the degree of liberalization of each national market directly involved and the existence of regulatory mechanisms to ensure a level playing field in these telecommunications markets. The discussions involved several letters exchanged with each government as from 10 April 1996.

— *Sweden*

(69) There is already full liberalization in Sweden.

By letter of 25 April 1996, the Swedish Minister for Telecommunications added that the current Telecommunications Act of 1 July 1993 will be reformed in 1997. The reform has been adopted. The most important changes concern the powers of the regulator (the National Post and Telecom Agency), which have been extended as a consequence of Directive 97/33/EC of the European Parliament and of the Council (the Interconnection Directive) ([18]).

— *The Netherlands*

(70) The Netherlands Government confirmed its acceptance of the dates for the liberalization of alternative infrastructures and for the introduction of full competition. Confirmation was also given that an independent regulatory agency was in place.

In her answer of 25 June 1996, the competent Minister indicated that, since 1 January 1996, it has been possible to use cable television networks for liberalized telecommunications services and as leased lines. Furthermore, under new legislation adopted by the Parliament, the market was fully liberated on 1 July 1997. Two additional licences to install, maintain and operate fixed infrastructure without territorial limitation were granted on 1 July 1996. Furthermore a large number of regional licences with territorial limitations will be granted. All these new infrastructure licences will have the right and (after an interim period) the obligation to supply leased lines. All of them will have rights of way.

Further fixed networks can be installed by any person without a licence. Such networks will be used to provide leased lines or telecommunication services (except voice telephony). However, they will not have rights of way.

Finally, an independent regulator was established by 1 August 1997.

— *Switzerland*

(71) The Swiss Government has confirmed its acceptance of the 1 July 1996 and 1 January 1998 dates for the liberalization of alternative infrastructures and for the introduction of full competition, respectively, and given confirmation that an independent regulatory agency is in place.

By letters of 2 July and 13 September 1996, the Swiss Minister for Transport, Communications and Energy, stated that telecommunications in Switzerland will be fully liberalized by 1 January 1998 in parallel to the Community. A new law will be enacted shortly eliminating remaining restrictions.

As regards alternative infrastructure liberalization, the Minister indicated that from 1 May 1995, 15 pilot licences had been granted (the majority to cable TV operators). Such pilot licences allow the provison of some telecommunications services to subscribers (Internet access, data transmission, multimedia and telephony within closed user groups). The contents of such licences were extended by the end of 1996 to offer the possibility to owners of alternative infrastructures in Switzerland to carry out commercial activities, in particular for the provision over them of corporate telecommunications services. Competitors of Swiss PTT for the provision of such corporate telecommunications services will be allowed to use such alternative infrastructures.

As regards the regulator, the existing regulator (Ofcom) will be supplemented by a

([18]) OJ L 199, 26. 7. 1997, p. 32.

Communications Commission independent from the Swiss federal administration. That Commission will be particularly responsible for decisions in respect of which a conflict of interests could exist between Ofcom as regulator and the Confederation as owner of Swiss PTT.

G. Comments from third parties

(72) Following the publication of a notice pursuant to Article 19 (3) of Regulation No 17 and to Article 3 of Protocol 21 to the EEA Agreement([19]), seven interested third parties submitted comments to the Commission. The comments focused, in particular, on the changes and undertakings submitted by the parties. Generally speaking, comments were supportive of the changes and undertakings submitted. Some third parties argued, however, that they were insufficient to redress the competitive situation in the countries involved and made suggestions to specify and extend some of the undertakings. Many comments referred to the desirability of imposing auditing, recording and reporting obligations on the shareholders and the entities created under the Unisource agreements as a way of ensuring compliance with the conditions. Finally, some comments also referred to the need for the Commission to treat all alliances on an equivalent footing and to create a level playing field between them.

(73) Some other comments made reference to the regulatory situation in the countries involved and outlined very precise difficulties experienced in facing such regulatory situations.

(74) The Commission carefully reviewed all comments received and concluded that most concerns expressed therein had already been raised by the Commission and discussed in detail with the parties, who had provided adequate answers and safeguards. Those comments do not therefore affect the Commission's substantive position outlined in the Article 19 (3) notice as regards the notified agreements. However, in the interest of legal certainty it appears appropriate to specify in more detail in this Decision the scope and duration of some conditions, to extend some conditions to cover Telia and to impose auditing, recording and reporting obligations on Unisource and its shareholders.

([19]) See page 1, footnote 2. It should be noted that when the Article 19 (3) notice was published, Telefónica was still a full member of Unisource.

II. LEGAL ASSESSMENT

A. Application of Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement

1. *Structural cooperative joint venture*

(75) Unisource combines the activities of its parent companies in a range of Europe-wide and third-country markets for liberalized telecommunications services and is set to develop and take over new services in those markets. This venture entails major changes in the structures of the parent companies as it represents a decisive step for them towards providing services of a nature and on a scale far greater than their current national activities. To that end, through Unisource, the parent companies are pooling a significant number of assets in connection with the provision and marketing of telecommunications services.

(a) *Joint control*

(76) The governing structure of Unisource, as described in recital 8 above, implies that no single parent company is in a position to separately exercise a decisive influence on the decision making of Unisource.

(b) *Coordination of the competitive behaviour of the parent companies*

(77) Prior to the Unisource transaction, its members were at least potential competitors for the provision of all services which have been transferred to Unisource.

After the transaction, the Unisource shareholders remain actual competitors of each other in the cross-border regional markets for (i) non-reserved corporate telecommunications services, in particular in the provision of international and/or national Virtual Private Network services ((I)VPN); and (ii) traveller services, in particular for post-paid cards and mobile GSM telephony.

— As regards the market for non-reserved corporate telecommunications services, the Unisource shareholders can continue marketing to their customers their existing (I)VPN services([20]) based on bilateral agreements concluded with other telecommunications operators.

([20]) PTT Telecom: WVPN; Telia: Telia Intercall; Swiss Telecom: FlexNet.

Furthermore, they are also actual or potential competitors in respect of the distribution of the Infonet services. In accordance with existing plans, each Unisource shareholder will continue distributing Infonet services to its national territory outside the framework of Unisource.

— As regards the market for traveller services, it is possible for a national customer holding a card of one of the shareholders to use it within its national territory and in the territory of the other parties in competiton with the Unisource card and with the cards of the other parties.

— As regards GSM, each Unisource shareholder will remain a GSM network operator within its own territory. In addition, none of the clauses of the notified agreements prevents the partners from establishing roaming agreements with other GSM operators. So, any GSM user who is a subscriber with any of the partners may use her/his terminal in the territory of the other partners, in the same way as in the territory of any other operator with whom a roaming agreement exists.

(78) In conclusion, the Commission considers that Unisource still qualifies as a structural cooperative joint venture even considering all changes to its structure which have taken place since the Commission adopted its Decision in application of Article 6 (1) (a) of the Merger Control Regulation in respect of Unisource International NV([21]).

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

(79) The agreements between the parent companies of Unisource fall within Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement as they restrict competition and affect trade between Member States.

(80) Unisource restricts actual and potential competition between its parent companies at European level and in respect of their respective domestic markets.

— Unisource is owned by three telecommunications operators which are active outside their respective national markets. In addition, all of them have a web of bilateral agreements with other telecommunications operators, which allow services to be provided beyond the national borders of the participating operators. In this respect, the creation of an alliance like Unisource is not the only objective means for the parent companies to enter those markets.

— As for services provided on national markets, the large number of providers of liberalized services in all European countries, including the three national markets directly involved, where Unisource will have activities, shows that the parent companies have the financial and technological capabilities required to address national markets across Europe on their own.

That restriction of competition is particularly serious with regard to the national markets directly involved, where each of the parent companies has a dominant position for the provision of national services and leased lines. While in Sweden full liberalization has been in place for several years already, the situation in the Netherlands was until 1 July 1997 that of a monopoly for the provision of basic infrastructures and services. Such a monopoly will virtually exist in Switzerland until 1 January 1998.

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

(81) The following provisions may further restrict competition:

1. the 'one telecom country' structure, as described in recital 20;

2. the general principle of non-competition under Article 19 of the joint venture and shareholders agreement and the non-competition agreements in respect of UBN, USS and UC and UM; and

3. the exclusive distribution arrangements for the activities of UBN, UVS and USS.

(82) Of these, the 'one telecom country' structure and the general principle of non-competition under Article 19 of the joint venture and shareholders agreement and the non-competition agreements in respect of UBN, USS and UC and UM are regarded as ancillary restrictions. Therefore, those restrictions are not the subject of an assessment under Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement separate from that of Unisource itself. Its parent companies created Unisource as a way to strengthen their presence in the relevant cross-border and ultimately Europe-wide markets.

([21]) See recital 2.

— Although the 'one telecom country' structure could increase the degree of coordination of the competitive behaviour of the parent companies in respect of areas of decision-making which are not directly within the current scope of Unisource's activities, it is inseparable from Unisource because decisions adopted within the latter regarding, for instance, network architecture, technologies employed or R&D coordination will have an implication not only on the specific networks that have been transferred to Unisource, but also on other networks not transferred to it but which are (or will be) used for the provision or distribution of Unisource's services. That is so because the successful provision of services to international customers has to be made, as customers require, on a 'one-stop-shop' and seamless basis.

— The general non-competition obligation and the subsequent non-competition agreements concluded in respect of some of the activities of Unisource are expressions of the firm commitment of the shareholders towards Unisource.

(83) On the other hand, the exclusive distributorship agreements in respect of UBN, UVS and USS are caught by Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement because they have the object or effect of isolating each national market involved from imports of those services from other EEA Member States. This may adversely affect the conditions of competition within the EEA and Switzerland. Unlike the other restrictive provisions, the Commission cannot consider such exclusive distributorship agreements to be ancillary to the creation of the joint venture, since non-exclusive forms of distribution are possible which would not impair the performance or marketing of the services.

4. *Effect on trade between Member States*

(84) By the very nature of its business scope and of the services provided by its affiliates, the creation of Unisource, which covers the joint development and provision of services throughout the European Economic Area and Switzerland, has a substantial effect on trade between Member States in that it will provide non-reserved services between any two Member States and within any Member State to customers having a need for pan-European or even global services.

Furthermore, that view is consistent with that expressed in the Commission's telecommunications guidelines that agreements concerning non-reserved services, equipment and space segment infrastructure potentially affect trade between Member States [22].

In addition, the exclusive distribution provision, by protecting the parent companies within their respective home markets, contributes to dividing the single market along national borders. Therefore, this non-ancillary provision affects trade between Member States and between Member States and the EFTA countries and is caught by Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement.

B. Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement

1. *Technical and economic progress*

(85) Unisource is in the process of developing truly pan-European services based on the purely domestic networks and services received from its shareholders. In addition, Unisource will be able to satisfy earlier than its parent companies acting separately the expressed demand for such services from big users. The provision of those services requires at least a substantial presence abroad.

(86) The Unisource transaction will also facilitate the building of a trans-European network and will result in a structure that enables Unisource to provide better services to customers throughout Europe. This is particularly the case of UCS, which, as indicated in recital 18, will become one of the most important pillars of the alliance in the near future.

(87) In addition, Unisource will lead to substantial cost savings. Cost savings will be realized in operational aspects like integration and rationalization of networks, cost of operation, technical development and maintenance, sharing of overhead costs, sharing of financial systems, customer care and billing systems, rationalization of spare capacities or the pooling of know-how and intellectual property rights. Cost reductions will amount to 1 % of total costs in 1996 and up to 15 % in 2000.

[22] Paragraph 39 of the guidelines.

(88) Finally, under the conditions attached to this Decision, the harmonized UBN networks will also improve the level of services provided by competitors of Unisource since they will be able either: (i) to interconnect with the public packet-switched data networks operated by Unisource or its shareholders; or (ii) to access those public packet-switched data networks from other networks, notably the public switched telephone network (PSTN) and the integrated services digital network (ISDN); or (iii) to interconnect with the parent companies' other networks, notably the PSTN. The last possibility is indispensable for the viability of competitive voice services offerings. The conditions relating to leased lines will further improve the competitive position of competitors.

(89) The exclusive distributorship arrangements will improve distribution by ensuring that distributors will concentrate their marketing efforts on their respective territories. In any event, the parties have confirmed that the exclusivity does not preclude passive sales in the sense that customers will always be in the position of choosing who they wish the lead distributor to be. Furthermore, the provision and distribution to customers of pan-European services will nearly always physically involve the activities of more than one distributor in order to be able to cover all the countries where the customer will have facilities.

2. *Benefits for consumers*

(90) Unisource will shorten the time required by the parent companies individually for developing and marketing new telecommunications services in a rapidly changing technological and commercial market environment. Business customers will benefit, more rapidly than if they acted separately, from both the provision of a larger product portfolio of newly developed services and lower pricing. Increased choice of telecommunications services and related cost benefits will spill over to other segments of the telecommunications market and economic sectors and will help to improve the competitive position of European companies *vis-à-vis* other competitors in markets that are globalizing.

In addition, the consolidation of Unisource as a viable alternative will increase the choice of customers for pan-European services.

(91) The exclusive distribution mechanism will ensure that there is a single person to contact in respect of any contract. This will substantially benefit customers, in particular those with transnational or global telecommunications needs, who up to now had to deal with several counterparts in the different countries or regions.

3. *Indispensability*

(92) Medium-sized telecommunications operators appear to feel the need to enter into structural strategic alliances covering as much of Europe as possible if they wish to serve an increasingly globalized customer base. It also appears that there is a requirement for an integrated management of any alliance in order for it to gain credibility with customers. That is the case for Unisource and its three current parent companies.

In addition, it is only by joining forces that the parties will be able to field an array of pan-European services on a reduced cost and time basis as Unisource is doing.

(93) As for exclusive distribution, participants in alliances reserve the right to distribute in their respective home countries in exchange for the investment made in the alliance. In this respect, the distribution of Unisource's pan-European services is indispensable. In addition, as indicated above, passive sales are possible. Indeed it is not uncommon for customers to opt for another distributor within an alliance for particular reasons. Account must also be taken of the fact that contracts will normally involve more than one distributor, which will reduce any negative effects stemming from the exclusive distribution agreements.

In addition, in other similar alliances the Commission has recognized that exclusive distribution protects the intellectual property rights of the parent companies better than other arrangements [23]. In that context, the exclusivity constitutes an incentive to share with the joint venture not only existing intellectual property rights but new developments made in other markets outside the scope of Unisource.

4. *Non-elimination of competition*

(94) The competitive situation in the three markets concerned from the regulatory point of view is such that in each of them at least two licences for alternative infrastructures were granted by 1 July

[23] See Decision 95/546/EC (Atlas), cited in footnote 12, at recital 58.

1996, the date on which such licences were granted in the Netherlands. In that respect, other providers of telecommunications services are in a position to compete with Unisource without depending completely on Unisource's parent companies ([24]).

(95) That fact reduced the concerns of the Commission in respect of this criterion under Article 85 (3). However, in view of the fact that it will take some time before the increased choice will produce its beneficial effects, the Commission further assessed the fulfilment of this condition at the cross-border regional and domestic levels of the relevant markets as described above. Its conclusions are the following:

(a) *National markets*

(96) The changes and conditions imposed on the parties and on Unisource with respect to the originally notified transaction will ensure that it will not reinforce the dominant position of each of the shareholders or of Unisource (as owner — through the respective UBN subsidiary — of the national PSTN in Sweden, the Netherlands and Switzerland) in their respective countries. In addition, as competition in national markets is coming in many cases from local branches of other alliances of cross-border regional or even global scope, the effect of these conditions will help to improve the position of those other alliances as they will be in a better position to serve customers in the national markets of the parent companies of Unisource.

— Conditions are basically aimed at ensuring that third-party competitors of Unisource in any of the countries of its parent companies (where they have dominant positions) are not discriminated against in any manner whatsoever by the parent companies. Particular emphasis has, therefore, been put on access to infrastructure and lease of lines of the parent companies. It is clear that even if alternative infrastructure is being made available, in order to serve customers, third-party competitors still have to rely to a large extent on the infrastructure of the incumbent, the only one with the necessary coverage.

— As regards interconnection, the Commission has taken account of the fact that, with the exception of Telia, the parent companies were not even offering interconnection services to third parties and asking the parties to introduce interconnection services was thus a necessary condition for allowing third parties to enter the market. In addition, in order for the interconnection conditions to have a real impact, the Commission imposed additional conditions regarding publication of standard interconnection agreements and terms, on the one hand, and tariffs and terms of leased lines, on the other hand. Finally, the ability of third parties to offer competing services depends also on the possibility for them to gain the access to customer databases necessary for new entrants to provide directory services.

— Moreover, additional conditions on absence of cross-subsidies, separation of accounts and use of analytical accounting systems are aimed at ensuring that the use of any of the PSTN or the data networks in the countries will be possible for Unisource and its competitors under equivalent conditions.

— Third-party competitors are still very vulnerable given their dependence on the parent companies. That is why the Commission requested conditions precluding misuse of confidential information. Customer information is extremely valuable and unless it is particularly protected, the position of third-party competitors will be extremely difficult. The parent companies have also deleted from the Unisource agreements those clauses originally notified that appointed Unisource or any of its subsidiaries as a parent company's agent for half-circuits. Given that such international leased lines are demanded either by service providers competing with Unisource or by MNCs and other private network operators, the agency agreement would have given Unisource a competitive information advantage over competitors.

— The conditions requiring each parent company not to tie-in the sale of any of Unisource's services and its own services will ensure that possible differences in calculation are verifiable and thus that the non-discrimination conditions work in practice. The sale of packages of different services under one single contract is common commercial practice in the telecommunications sector. In liberalized telecommunications markets, dominant providers are usually prohibited both from tying sales of different services and from granting discounts on packages of services

([24]) The validity of the Atlas Decision was made dependent on the grant of two licences for alternative infrastructures both in France and Germany (see Decision 95/546/EC (Atlas), at recital 76 (a)).

without specifying (i) the terms and conditions of each individual service; and (ii) the individual service(s) subject to discounts. In addition, dominant providers are under an obligation to publish all tariffs and must prove that discounts on packages of services are justified by savings specifically due to the offering of a package of services. The condition reflects such obligations.

(b) *Cross-border regional markets*

(97) As described in recital 35, Unisource faces significant competition in the cross-border regional markets for non-reserved corporate telecommunications services, traveller services and carrier services. Almost all alliances in the telecommunications sector are trying to enter those markets.

In addition, the first customers targeted will be sophisticated corporations with an extensive knowledge of the market (many have until now self-provided their telecommunications) and considerable bargaining power.

Such customers are able to put pressure on alliances to better address their needs (and to reduce prices). The European Virtual Private Network Users Association (EVUA) is a clear example of this trend by big customers. The total expenditure of the EVUA members for their voice telecommunications needs is US $ 2 billion a year.

(98) Finally, the obligations to keep and supply detailed accounting information set out in recital 105 ensure that the entities created pursuant to the Unisource agreements and the shareholders gather sufficient information to allow the Commission to monitor their competitive behaviour. Such obligations will also make it possible for national courts to order discovery of evidence of breaches of the substantive conditions attached to this Decision and of any alleged anti-competitive behaviour where third parties seek remedies against such behaviour before the national courts.

(99) However, in its letter of 7 May 1996, the Commission made a reservation concerning the activities of UCS. The involvement of UCS in transit tariffs negotiations with other telecommunications operators resulted in a reduced choice in respect of those services for other telecommunications operators, since before the establishment of UCS they could get separate proposals from the three parent companies. As a result, the activities of UCS restrict competition between the parent companies in an area where they are actual competitors. In addition, that kind of traffic — basically international voice traffic — will not be included within the scope of Unisource at least until after full liberalization in all the countries involved.

Following the position taken by the Commission, the parties offered the undertaking referred to in recital 42.

(100) As regards exclusive distribution, the Commission concluded that the possibility of passive sales, and more importantly, the growing availability of alternative infrastructure together with the non-discriminatory terms of interconnection with the national PSTNs, will reduce any restrictive effects resulting from the exclusive distribution agreement.

(101) In the light of the above considerations, and taking into account the changes to the national regulatory situation in the respective countries as necessary and the conditions imposed by the Commission on the parties, it can be concluded that the condition regarding the non-elimination of competition pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement is fulfilled.

5. *Conclusion*

(102) It is the Commission's conclusion that all conditions for an individual exemption pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement are met in respect of the creation of Unisource and in respect of the individual restrictions discussed above.

C. Duration of the exemption, conditions and obligations

(103) Pursuant to Article 8 of Regulation No 17 and to Protocol 21 to the EEA Agreement respectively, a Decision in application of Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement must be issued for a specified period and conditions and obligations may be attached

thereto. Pursuant to Article 6 of Regulation No 17, the date from which such a decision takes effect cannot be earlier than the date of notification. In the present case, in so far as the Decision grants exemption, it should take effect:

1. as regards the creation of Unisource and related agreements as described above, for five years from 1 July 1996 ([25]);

2. as regards the activities of Unisource or any of its subsidiaries, in particular UCS, as the entity with exclusive responsibility in respect of the negotiation of transit tariffs in/through the countries of the Unisource shareholders, from the date of full liberalization in the last of the three countries of the shareholders of Unisource to the expiry of the five-year period specified in point 1;

3. as regards the exclusive provision of leased lines by Unisource or any of its subsidiaries on behalf of its shareholders, from the date of full liberalization in the last of the three countries of the shareholders of Unisource to the expiry of the five-year period specified in point 1.

(104) This Decision must be subject to the conditions referred to in recitals 44 to 67. Furthermore, this Decision must be subject to a certain number of obligations. These conditions and obligations are indispensable to prevent an elimination of competition in the relevant markets in the EEA. The Commission will, upon the parties request, review the need for any particular condition or obligation attached to this Decision if circumstances change substantially before the period of exemption expires.

(105) In so far as they relate to existing obligations under national or Community law, the obligations described below are intended to ensure the parties' firm commitment to comply with the applicable legal framework. These obligations will remain in force for the duration of the exemption. Pursuant to Article 8 (3) (b) of Regulation No 17, the Commission may revoke this Decision if the parties breach any of these obligations.

1. *Auditing*

Unisource and all its subsidiaries must be audited every year. The audit should confirm from an accounting viewpoint that:

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

(b) the companies have adhered to the accounting procedures;

(c) the figures are accurate.

The first auditing reports, covering the calendar year, shall be submitted to the Commission within six months after the end of 1997.

2. *Recording obligations*

All shareholders and all entities created pursuant to the Unisource agreements must keep records and documents serving to prove compliance with the terms of the above conditions ready for inspection by the Commission.

3. *Inspection of records*

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

4. *Reporting obligations*

All shareholders and all entities created pursuant to the Unisource agreements must provide to the Commission, for the purpose of determining whether they comply with the above obligations:

(a) any records and documents in the possession or control of the shareholders or any entity created pursuant to the Unisource agreements necessary for that determination every six months, starting one year after the date of the exemption pursuant to Article 1 of this Decision; and

(b) oral or written complementary explanations.

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

([25]) See recital 94.

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement, the provisions of Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement are hereby declared inapplicable for a period of five years from 1 July 1996 to:

1. the joint venture Unisource as notified to the Commission, including the ancillary obligations regarding (i) the 'one telecom country' structure imposed on the parent companies, and (ii) the general principle of non-competition under Article 19 of the joint venture and shareholders agreement and the non-competition agreements in respect of the activities of Unisource Business Networks, Unisource Voice Services, Unisource Cards and Unisource Mobile;

2. the exclusive distribution arrangements for the activities of Unisource Business Networks, Unisource Voice Services and Unisource Satellite Services.

Article 2

Pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement, the provisions of Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement are hereby declared inapplicable to the activities of Unisource or any of its subsidiaries, in particular UCS, as the entity with exclusive responsibility in respect of the negotiation of transit tariffs in/through the countries of the Unisource shareholders, from the date of full liberalization in the last of the countries of the shareholders of Unisource until the date on which the five-year period specified in Article 1 expires.

Article 3

Pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement, the provisions of Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement are hereby declared inapplicable to the exclusive provision of leased lines by Unisource or any of its subsidiaries on behalf of its shareholders from the date of full liberalization in the last of the countries of the shareholders of Unisource until the date on which the five-year period specified in Article 1 expires.

Article 4

The exemption from the application of Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement set out in Articles 1, 2 and 3 of this Decision shall be subject to the following conditions:

I. **Non-discrimination**

1. All shareholders shall undertake that all dealings with (i) any other shareholder, and (ii) any entity organized under the Unisource agreements will be on an arm's length basis, that is on terms and conditions similar to those offered to third parties, in connection with reserved facilities and services and with such facilities and services in respect of which they will maintain a dominant position after full and effective liberalization of telecommunications infrastructures and services in each of their respective countries.

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

(a) *Leased lines*

1. All shareholders shall undertake that, to the extent that this is not yet the case, the provision of leased lines will be a separate service for which separate accounts will be kept pursuant to the principles, rules and practices currently applying under national or Community law.

2. All shareholders shall undertake to publish the standard terms and conditions for the leasing of lines (national and international). The terms will refer to the technical specifications of the lines, the provisioning time, repair time, tariffs and discounts.

3. All shareholders shall undertake that all types of lines made available to any subsidiaries or to Unisource will also be available under the same terms and conditions for third parties.

4. PTT Telecom shall delete any clause from its general conditions containing references to the use of leased lines (i.e. clause 11.10) and international half circuits in any way which would not be justified by technical considerations or mandatory provisions and undertakes not to introduce such clause or interference.

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

(b) *Interconnection*

1. Unisource NV and its affiliates, in particular UBN, shall establish and maintain third-party access to public data networks (X.75 or any standard

that might replace it) of domestic UBNs on non-discriminatory cost-oriented terms including price, availability of volume and other discounts and the quality of interconnection provided to its own affiliates as from the grant of exemption pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement. These terms shall be publicly available. The price shall be based on costs defined and attributed using an analytical accounting system.

2. PTT Telecom shall make public no later than on the date of the present Decision a standard interconnection agreement in respect of the PSTN and ISDN networks, which will provide for timely and transparent interconnection and will include terms and conditions (including technical standards and specifications) which are non-discriminatory and cost based on a service-by-service basis. Costs shall be defined and attributed using an analytical accounting system. A copy of the interconnection agreement shall be also provided to the Commission.

3. Interconnection shall be available at a reasonable range of termination points in accordance with international technical standards to ensure adequate and efficient interconnections to the extent necessary to ensure interoperability of services. There shall be a number of regional points of interconnection where international standardized interfaces and signalling systems are available and where it is economically feasible. All reasonable requests for interconnection, including special network access, will be met on terms which are non-discriminatory and cost based on a service-by-service basis.

4. PTT Telecom shall continue to grant access on a non-discriminatory basis to customer databases necessary for the provision of directory services at cost-oriented pricing.

5. Swiss PTT shall make public no later than on the date of the present decision a standard interconnection agreement in respect of the PSTN and ISDN networks which will be in accordance with the relevant Swiss regulations and be equivalent to similar requirements under Community regulations. This agreement shall provide for timely and transparent interconnection and shall include terms and conditions (including technical standards and specifications) which are non-discriminatory and cost based on a service-by-service basis. Costs shall be defined and attributed using an analytical accounting system. A copy of the interconnection agreement shall also be provided to the Commission.

6. Interconnection shall be available at a reasonable range of termination points in accordance with international technical standards to ensure adequate and efficient interconnections to the extent necessary to ensure interoperability of services. There shall be a number of regional points of interconnection where international standardized interfaces and signalling systems are available and where it is economically feasible. All reasonable requests for interconnection, including special network access, shall be met on terms which are non-discriminatory and cost based on a service-by-service basis.

7. Swiss PTT shall continue to grant, in accordance with the relevant Swiss regulations, access on a non-discriminatory basis to customer databases necessary for the provision of directory services at cost-oriented pricing.

8. Telia shall undertake that its interconnection service will be provided on a timely and transparent basis and will include terms and conditions (including technical standards and specifications) which are non-discriminatory and cost based on a service-by-service basis. Costs shall be defined and attributed using an analytical accounting system. All reasonable requests for interconnection, including special network access, shall be met on terms which are non-discriminatory and cost based on a service-by-service basis.

9. Breaches of the requirements set out in points 1 to 8 shall not be considered to violate this condition unless such breaches have a substantial impact on the market.

II. **No misuse of confidential information**

1. Unisource NV and its affiliates, in particular UCS, shall not make available to any other of its subsidiaries or shareholders confidential customer information received in its capacity as agent of the Unisource shareholders.

2. All shareholders shall not misuse confidential information in respect of customer contract related data, such as prices, received in their capacity as shareholders in Unisource NV because of their representation on any board or committee in any entity established pursuant to the Unisource agreements, or as distributors for any Unisource services.

3. All shareholders shall not misuse confidential customer information obtained from any other

shareholder because of their representation on any board or committee in any entity established pursuant to the Unisource agreements.

4. All shareholders shall ensure that Unisource NV or its subsidiaries will not have access to confidential information in respect of customer-contract-related data, such as prices, acquired by them as a result of the provision of services to competitors of Unisource.

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

III. **Prevention of cross-subsidization**

1. All shareholders shall not grant any cross-subsidies to any entity created pursuant to the Unisource agreements funded out of income generated by any business which they operate pursuant to any exclusive right or in respect of which they hold a dominant position.

2. All shareholders shall in particular ensure that any entity created pursuant to the Unisource agreements:

   (i) obtains its own debt financing;

   (ii) does not allocate operating expenses, costs depreciation or other expenses to any business unit of the shareholders;

   (iii) charges the shareholders the same price as they charge third parties for the provision of services sold to third parties in commercial quantities; and

   (iv) charges the shareholders 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.

3. All shareholders shall ensure transparency by ensuring compliance with the accounting rules, principles and practices currently in use under national or Community law. Such rules, principles and practices include the cost standard used, the accounting conventions used for the treatment of costs and the attribution method chosen. Payments and transfers to Unisource and Unisource companies shall be identified on the basis of accounting reports that are periodically available.

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

IV. **Prevention of tying**

1. PTT Telecom shall not tie-in the sale of any service provided by Unisource with any service provided by PTT Telecom. It shall moreover, for as long as it has a dominant position in respect of the provision of telecommunication services and/or infrastructures, only make combined offerings of Unisource services and its own services in such a way that the customer can identify in the contract forms the price charged as well as the other terms and conditions for these services and it shall ensure that each of these components is separately available at equivalent conditions.

2. Swiss PTT shall not tie-in the sale of any service provided by Unisource with any service provided by Swiss PTT. It will moreover, for as long as it has a dominant position in respect of the provision of telecommunications services and/or infrastructures, only make combined offerings of Unisource services and its own services in such a way that the customer can identify in the contract forms the price charged as well as the other terms and conditions for these services and it will ensure that each of these components is separately available at equivalent conditions.

3. Telia shall not tie-in the sale of any service provided by Unisource with any service provided by Telia. It will moreover, for as long as it has a dominant position in respect of the provision of telecommunications services and/or infrastructures, only make combined offerings of Unisource services and its own services in such a way that the customer can identify in the contract forms the price charged as well as the other terms and conditions for these services and it will ensure that each of these components is separately available at equivalent conditions.

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

Article 5

This Decision shall be subject to the following obligations:

1. *Auditing.*

   Unisource and all its subsidiaries shall be audited every year. Such audit shall confirm from an accounting viewpoint that:

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

   (b) the companies have adhered to the accounting procedures; and

   (c) the figures are accurate.

The first auditing reports, covering the calendar year 1997, shall be submitted to the Commission within six months after the end of 1997.

2. *Recording obligations.*

All shareholders and all entities created pursuant to the Unisource agreements shall each keep records and documents suitable to prove compliance with the terms of the conditions set out in Article 4 ready for inspection by the Commission.

3. *Inspection of records.*

For the purpose of ascertaining and ensuring compliance by the shareholders or Unisource with the conditions set out in Article 4, each of the shareholders and all entities created pursuant to the Unisource agreements shall, on reasonable notice, during office hours, and without the need for the Commission to invoke the powers of inspection pursuant to Regulation No 17, give the Commission access to business premises to inspect records and documents covered by the recording obligations referred to in point 2 and to receive oral explanations relating to such documents.

4. *Reporting obligations.*

All shareholders and all entities created pursuant to the Unisource agreements shall provide to the Commission, for the purpose of determining whether they comply with the obligations referred to in points 1, 2 and 3:

(a) any records and documents in the possession or control of the shareholders or any entity created pursuant to the Unisource agreements necessary for that determination every six months, starting one year after the date of the exemption pursuant to Article 1; and

(b) oral or written complementary explanations.

Article 6

This Decision is addressed to:

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NL-2500 GD Den Haag

Telia AB
Mårbackagatan 11
S-123 86 Farsta

Swiss PTT
Generaldirektion PTT
Viktoriastrasse 21
CH-3030 Bern

Done at Brussels, 29 October 1997.

For the Commission
Karel VAN MIERT
Member of the Commission