COMMISSION DECISION

of 29 October 1997

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

(Case No IV/35.738 — Uniworld)

(Only the Dutch and French texts are authentic)

(Text with EEA relevance)

(97/781/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 29 September 1995,

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) On 29 September 1995 the Commission received a notification of a joint venture pursuant to Article 4 of Regulation No 17 formed by Unisource Pan-European Services BV, a subsidiary of Unisource NV, and AT&T Pan-European Services, Inc. [3], a subsidiary of AT&T Corp., under the name 'Uniworld'.

(2) This transaction is linked to the creation of Unisource. Decision 97/780/EC [4] in Case IV/35.830 — Unisource (the 'Unisource Decision') exempts the creation of Unisource from the application of Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement.

(3) As further described below, Unisource (now AT&T — Unisource Communication Services) has been created to provide pan-European telecommunications services with global connectivity to the European business market.

(4) On 2 July 1997 the Commission was informed of the strategic alliance to be developed between AT&T, Unisource and the Italian company STET concerning activities in South America and Europe. As one element of that strategic alliance, STET will fully join Uniworld in the near future. The present Decision does not take any position regarding STET's entry into Uniworld. Furthermore, if it does finally take place, the Commission will evaluate the impact of such entry on the existing Uniworld and may reassess the present Decision in the light of Article 8 of Regulation No 17.

B. The parent companies

(5) Unisource NV (Unisource), as further described in the Unisource Decision, is a joint venture company the shareholders of which are Telia AB, PTT Telecom BV and Swiss Telecom. 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 results were losses of Fl 41,072 million (ECU 20 million).

(6) AT&T is a telecommunications operator in the United States providing a broad range of US and

[1] OJ 13, 21. 2. 1962, p. 204/62.
[2] OJ C 44, 12. 2. 1997, p. 4.
[3] Unisource Pan-European Services and AT&T Pan-European Services have been created as special subsidiaries to hold the respective interests of the parent companies in Uniworld VOF.
[4] See p. 1 of this Official Journal.

international telecommunications services and infrastructures to and from the US. Its turnover in 1996 was US $ 50,5 billion.

On 9 May 1996, the US Federal Communications Commission (FCC) adopted an Order declaring AT&T a non-dominant carrier for international voice services [5].

Direct revenues of AT&T in the EEA and Switzerland (excluding bilateral services and calling cards) in 1995 were as follows: AT&T Easylink (messaging) [US $ ... (ECU ...)]; AT&T Istel (corporate services) [£ ... (ECU ...)] and Business Communications Europe (hereinafter 'BCS-E') [£ ... (ECU ...)] [5a].

C. **The joint venture: Uniworld**

1. *Structure of Uniworld*

(7) Uniworld consists of two companies: Uniworld VOF and Uniworld NV.

(8) Uniworld VOF is a general partnership under Dutch law. Unisource, through Unisource Pan-European Services, has a 59,94 % shareholder interest, AT&T, through AT&T Pan-European Services, a 39,96 % holding, and Uniworld NV the remaining 0,1 %. Uniworld VOF is not a separate legal person distinct from its owners. In addition, it is tax transparent so that the income flows through directly to the parent companies. Uniworld VOF will actually provide the telecommunications services within the business scope of Uniworld.

Uniworld NV's Supervisory Board and Chief Executive Officer (CEO) will be directly responsible for the partnership.

(9) Uniworld NV has been created to supervise and act as general partner of Uniworld VOF. It is the only partner that governs and can bind the partnership and has legal title to all tangible and intangible assets which it will hold for the benefit of Uniworld VOF. It also has the authority to manage the day-to-day operation and affairs of the partnership and has all the resources necessary to manage and operate the business activities of Uniworld VOF. Unisource, through Unisource Pan-European Services, has a 60 % shareholding interest in Uniworld NV, and AT&T, through AT&T Pan-European Services, owns the other 40 %. Uniworld NV will earn an annual management fee for its activities as general partner of the partnership.

Uniworld NV is governed by a Management Board of one Chief Executive Officer nominated by Unisource (AT&T nominates the Chief Operating Officer), responsible for managing the company, and a Supervisory Board of five directors, three nominated by Unisource and two by AT&T. The Supervisory Board approves the budget and business plan by supermajority (that is, unanimity of directors present or represented). AT&T has been granted veto rights in respect of all significant matters.

(10) In what follows, all references to 'Uniworld' cover both Uniworld VOF and Uniworld NV.

2. *Contributions by parent companies to Uniworld*

(11) Unisource will contribute to Uniworld the following companies or the relevant international assets thereof: certain of the Unisource Business Networks (UBN) companies, Unisource Voice Services (UVS), Unisource France SA, Unisource USA Inc., Unisource Business Services Inc. and Unisource World Partners Company Inc.

In addition, Unisource will transfer to Uniworld its rights in the WorldPartners Company and WorldPartners Association [6] and AT&T will do the same with its rights in the WorldPartners Association. As a result Uniworld will become the exclusive distributor in the EEA plus Switzerland of the telecommunication services bearing the WorldSource trademark [7].

[5] By order released on 23 October 1995, the FCC reclassified AT&T as a non-dominant carrier in the market for interstate (US domestic) telecommunications services.

[5a] Deleted, business secrets.

[6] WorldPartners is a limited partnership promoted by AT&T basically to set performance standards, agreed and respected by the members of the partnership, in respect of given telecommunications services. Such standards are a way to extend connectivity for those services outside the borders of each of its members. Members of the WorldPartners Company have invested in it and participate, among other things, in the definition of the standards. Members of the WorldPartners Association are distributors of the services in given territories. The agreements regarding Unisource and AT&T UK's entry into WorldPartners have been separately notified to the Commission (Case No IV/35.490 — WorldPartners).

[7] The WorldPartners portfolio of WorldSource services is limited to the offering of virtual network services (VNS), Frame Relay and private lines. For each of these, a common denominator of features is defined. That common denominator is to be provided by each WorldPartner's member or associate. Services complying with the common denominator can bear the WorldSource trademark.

(12) AT&T will contribute the relevant assets of the following entities: AT&T Europe SA, most of AT&T Istel Ltd, BCS-E and the AT&T companies in the Member States.

After the Uniworld transaction, AT&T will still provide in the EEA and Switzerland, under its own name, the following services: new high value-added applications (such as AT&T network notes), consumer cards and calling cards services, outsourcing (AT&T solutions) and in the UK the full range of voice telephony services to business and consumer customers by means of AT&T Communications UK's operating licence, which permits also international simple resale to the United States.

3. *Business scope*

(13) The scope of Uniworld's business will be the provision of seamless([8]) multilateral([9]) pan-European telecommunications services with global connectivity to the European business market. Global connectivity outside the EEA and Switzerland will be mainly achieved through Uniworld's participation in the WorldPartners Company and the WorldPartners Association. In areas outside Europe or the WorldPartners Association, the bilateral agreements of the Unisource shareholders, of Unisource and/or AT&T will be used to extend global connectivity. In the future, Uniworld could have its own bilateral arrangements.

(14) Uniworld's services are based on end-to-end control by Uniworld of the services to customers including the national extensions of such services. The services will initially include international virtual private network (IVPN) voice services, packet-switched, frame relay and other data networks and services, messaging and network related outsourcing. The home countries([10]), France, Germany, the United Kingdom, Belgium and Italy represent primary target countries. However, Uniworld will not offer purely domestic services([11]).

(15) Uniworld will own and/or manage all frame relay, messaging, X.25 international backbone, X.25 domestic switches with exclusive or predominantly international usage, non-home country X.25 networks and managed bandwidth assets. Asset selection will be made according to a set of rules agreed upon by the parties in accordance with the given principles for asset selection.

In addition, the existing backbone data network — Unidata — that links together the domestic data networks of the shareholders of Unisource will also be assigned to Uniworld.

4. *Uniworld's operating functions: sales, marketing and services*

(a) ***Sales***

(16) Uniworld will be responsible for negotiating distribution agreements and third-party commercial sales agreements. In addition, it will work closely with distributors to ensure that offers to customers respond to their expressed needs and will provide sales training for Uniworld employees and distributors. Uniworld will also support the development of a single integrated sales process incorporating technical support, bid management, contract support and service ordering.

In respect of complex bids, Uniworld will assist in or assume direct leadership responsibility.

(b) ***Marketing***

(17) Uniworld will be responsible for developing the service portfolio marketing strategy including the overall pricing strategy (retail pricing will however be the responsibility of distributors). It will also conduct competitive assessment and customer analysis and assist product managers in developing individual service strategies. Uniworld will develop

([8]) Seamlessness is defined as a cohesive and homogenous approach to the service from a user's perspective. The customer thus does not see the underlying complexities of providing the service.

([9]) The term 'multilateral' encompasses both foreign-to-foreign and home-to/from-foreign telecommunications traffic. By contrast, 'bilateral' services are not able to encompass directly foreign-to-foreign telecommunications traffic. In addition, in a IVPN service offered on the basis of bilateral agreements concluded with foreign telecommunication operators, the features of calls terminating in the territory of the provider of the service are controlled by whatever features are available on the other country. So, it is possible that not all the features provided within the territory of the provider are available in respect of traffic to the outside.

([10]) The Netherlands, Sweden and Switzerland.

([11]) In this respect, according to the parties, a customer receiving international and national services from a distributor of Uniworld will clearly perceive that he is receiving two different kinds of services.

marketing communications products including advertising. It will also support bid management to non-standard requests for proposals requiring the integration of multiple services.

(c) *Services*

(18) Uniworld will define, control and own service-definition and will also define and control service platforms (that is the software installed in the equipment that controls the voice and data traffic over the backbone network) and customer-care elements. It will also be responsible for the life-cycle management of all services in its portfolio. In addition, it will determine the overall architecture/technology/platform evolution that enables the services to be competitive and efficient in terms of features, functionality, customer service attributes and cost. In so doing, it will seek to accommodate the reasonable needs of its affiliated suppliers and other key non-affiliated suppliers. The resulting plans will be approved by the Supervisory Board by supermajority.

D. **Strategic Advisory Boards**

(19) Upon its incorporation, Uniworld will create three Strategic Advisory Boards to deal with the following matters:

— service-portfolio development and offerings,

— marketing and sales (the international sales board responsible for the global account-management plan), and

— architecture and technology.

All parties to the Uniworld transaction, including representatives of the Unisource shareholders, will be represented in the boards.

The boards are resources for achieving consistency in approach to an issue, as well as working committees to help make decision-making processes efficient. They are also a forum to solve disputes between the parent companies that might have an impact on Uniworld. Uniworld can use them to forge a consensus for Uniworld's initiatives in advance of Supervisory Board consideration.

E. **The notified agreements**

1. *Agreements*

(20) The original notification comprised the Joint Venture and Shareholders Agreement and the following agreements and other documents annexed to it:

— the articles of association of Uniworld NV,

— the limited partnership agreement of Uniworld CV (now Uniworld VOF),

— the by-laws of Uniworld NV and Uniworld CV (now Uniworld VOF),

— the parent company support agreement,

— principles for asset selection,

— the supply agreement between Uniworld and Unisource Carrier Services (UCS),

— the master distribution agreement,

— principles for intellectual property rights (IPR) negotiations, and

— the network evolution plan.

2. *Contractual provisions*

(a) ***Supply agreement with Unisource Carrier Services (UCS)***

(21) Uniworld will be a service provider and thus will not develop or operate its own basic switching and transmission systems, but will purchase these capabilities from suppliers. Under the supply agreement, the preferred([12]) supplier will be UCS, a subsidiary of Unisource responsible for managing the international networks of the Unisource shareholders.

UCS will provide to Uniworld interconnection and transmission capacity that will include international, national and local leased lines and international and national public switch telephone network (PSTN) terminations.

UCS will have a contractual requirement to provide the capacity necessary to meet Uniworld's traffic forecasts at agreed performance levels. The price for UCS's services is guaranteed for five years. The average minute/price charged by UCS will be reduced provided that Uniworld delivers the agreed total volume of international traffic and uses the agreed capacity of international bandwith. Should that not be the case, prices charged by UCS will be adjusted accordingly.

([12]) 'Preferred' means that Uniworld will be free to contract with other suppliers if the demanded services are outside the scope of UCS or if UCS does not or cannot compete with the terms and conditions of other suppliers.

The intention of the parties is to use UCS's pan-European network for all internodal bandwidth needs of the Uniworld services.

Uniworld will collect customer-care information for billing, account inquiry, and so forth. In addition, Uniworld will also own the service-control points that maintain the real-time definition and realization of the Uniworld services. Those points will be connected to the UCS network.

Uniworld's CEO will attend UCS's board meetings — without the right to cast any vote — concerning network planning and other matters concerning the supply agreement.

(b) *Commercial relationship between Uniworld and its parent companies*

(22) The commercial relationship between Uniworld and its parent companies will be governed by the terms set out in Article 10 of the Joint Venture Agreement. Thus, Uniworld,

— will purchase supplies on a 'best available' basis. 'Best available' refers to price, quality, features and functions, capacity and geographical coverage purchased from affiliated parties offered (or not) by them to third parties. In any event, such purchases will be in accordance with rules, regulations and guidelines of the European Commission and the relevant national regulatory agencies,

— will be provided access to networks and underlying facilities of any company involved directly or indirectly in Uniworld at non-discriminatory competitive prices. Such prices charged to Uniworld will be competitive in view of prices charged for similar services by competitors of the affiliated companies and consistent with applicable national and European law, including obligations of non-discrimination and prohibitions of cross-subsidizations. They must not be more advantageous than the prices charged for similar services in similar circumstances to other customers of such affiliated companies,

— will have 'privileged subsidiary' status, with regards to terms and conditions for transactions between parties for resources and services from these companies. In this respect, it will be treated as though it was a subsidiary of Unisource, its shareholders or AT&T in respect of services, to the extent that there are no contractual restrictions with third parties prohibiting it,

— will have 'most favoured customer status' from Unisource, its shareholders and its affiliated companies and AT&T for the provision of other related commercial services, such as the purchase of capacity. Uniworld will be offered 'best customer' prices for services which are in principle available both to Uniworld and to non-related customers in the marketplace.

(c) *Non-competition provision*

(23) Under Article 12 of the Joint Venture Agreement, the parent companies agree with Uniworld VOF that they will not incorporate a business or engage in exclusive[13] Uniworld services (as described above) or participate in any joint venture or other cooperative arrangement engaged in the provision of exclusive Uniworld services.

(24) The following activities are excluded from the non-competitive provisions:

— the development and offering to customers of a parent company's national services and international services based on bilateral arrangements,

— services that compete with non-exclusive Uniworld services, and

— competing offers of third parties (basically Infonet's services, but also those of Concert or Atlas) which have decided to market their services through the Unisource shareholders.

The non-competition obligation is not to affect the access by third parties to any reserved and basic network of the parties and their affiliated companies, nor affect any parent company's obligation to make available reserved and basic services.

(25) All non-competition obligations of the parent companies and their affiliated companies are to be valid until the termination of the Joint Venture Agreement. After termination no participant may, during the original duration of a customer contract,

[13] The following are examples of exclusive services: virtual network services — VNS/IVPN/closed user group voice services — X.25 bearer service, frame relay service, managed bandwidth service and X.400 bearer service. Examples of non-exclusive services are: call centre services, LAN interconnect services, messaging services, VSAT satellite services, network related outsourcing, network facilities management, private network provisioning, Internet access services and data VPN services.

solicit those existing customers with respect to which the other party has been assigned under the termination rules the right to provide Uniworld services (Article 16.3.1.F of the Joint Venture Agreement). Finally, Article 16.3.2.B (ii) of the Joint Venture Agreement provides that a company exiting (from Uniworld) will, under the non-permitted exit[14] provision, as from the date of the non-permitted exit and for a period of 12 months, continue to be subject to Article 12 of the Joint Venture Agreement.

(d) *Distribution of services*

(26) Uniworld will distribute its services through local distributors. In most cases, Uniworld will own or control them. Distributors are responsible for managing (and can own) local/national networks. However, Uniworld will approve the delivery platforms to be used by distributors in delivering Uniworld services, the overall architecture of the combined distributor/Uniworld network and the location and capacity of the gateways to be used to interface the distributor's and Uniworld's networks.

In the home countries, the respective Unisource shareholder will be the exclusive distributor. AT&T UK will be the exclusive distributor in the United Kingdom and AT&T will act as the exclusive distributor in the United States of Uniworld's services to br delivered in Europe. In addition, AT&T could sell Uniworld services to a European-headquartered firm which vested its European and/or world-wide telecommunications decisions in its US subsidiaries or locations.

In other countries where Unisource, AT&T, the Unisource shareholders or any of their affiliated companies have selected a national partner, the latter will be the preferred distributor.

(27) Distributors will pay to Uniworld the established transfer price for any given service. Uniworld will provide distributors with lists of recommended retail prices. Distributors are, however, free to set their own retail prices. Distributors can communicate such information to Uniworld to the extent that they would like to benefit fully from Uniworld's central billing system.

(28) An initial distribution of potential customers has been made based on the location of the decision-making units of the top target customers. However, the final assignment of a customer to a distributor depends on the choice of the customer[15]. In any event, it is expected that most sales will involve a lead distributor, one or several support distributors and Uniworld.

(29) In addition, Uniworld plans to create a 'Uniworld Association' after the model of the WorldPartners Association. It will have a light structure consisting of a permanent secretariat and an executive forum chaired by the CEO of Uniworld. The Uniworld Association will serve as a platform for discussion between Uniworld and its distributors, so that the latter will be given an opportunity to influence Uniworld's services development, processes and technology (that is the growth of the network). The Association will act as a central coordinator between distributors for ensuring that the European requirements of customers are met in the most efficient manner.

(30) The distribution licences extend to the Uniworld and WorldSource services in the territory granted.

(31) The exclusivity provisions oblige Uniworld and the distributor not to actively seek customers for Uniworld's exclusive services and the distributor's territory, as regards Uniworld, and outside it, as regards the distributor, respectively.

(32) Uniworld will also organize an international support organization which will support a global account management programme created to enhance business relationships with multinational customers. It will focus on prospective customers which, because of size and/or strategic importance, will be selected by Uniworld's international sales board. Instead of being attributed to a given distributor in accordance with the normal procedures, a global account team will be formed for each of these customers comprising a global account team leader and at least one regional or national account manager.

[14] Under Article 16.3.1 neither parent company of Uniworld may terminate the agreement before 1 January 2000. Most terminations before that date, in particular in case of material breach of the agreement, non-permitted transfers of shares or withdrawal, bankruptcy or suspension of payments by a party, are deemed to be non-permitted exits.

[15] The same rule will be applied in respect of the attribution of existing customer contracts.

The global account team will coordinate and involve the world-wide resources of Uniworld, AT&T Business solutions, WorldPartners, Unisource and its shareholders as required in order better to serve the global needs of that category of top customers on a one-stop-shop basis. In this respect, the global account group will request support from any affiliated or related company through a defined World-wide Sales Support Process that will allow for a simple, low-cost sales support coordination process.

F. **Relevant market**

1. *The market for non-reserved corporate telecommunications services* ([16])

(a) ***Supply***

(33) Uniworld will offer the following categories of services within that market:

— Voice IVPN services

(34) An IVPN service (Uniworld VNS), made up of different packages with different features, will be offered to customers to cover their intra-European needs ([17]). The backbone network (basic transmission capacity) to be used will be that of UCS and, in some cases, that of third-party suppliers. The Uniworld VNS ([18]) service is defined as multilateral ([19]), as opposed to the existing virtual private network services (VPN ([20])) marketed by the Unisource shareholders to their national customer bases. VPN services can include foreign locations of a customer. However, the availability (and features) of the thus extended VPN depend on bilateral agreements concluded by the national provider with telecommunications operators (TO) in other countries.

— Data services and networks

(35) Uniworld's data services will initially be based on the current pan-European offerings of Unisource and AT&T's BCS-E, but they will offer a better geographical coverage than those existing offerings, given the different points of presence (POPs) of the existing data networks of the parent companies.

In addition, Uniworld will roll-out new data services like high-speed LAN ([21]) interconnect, high-speed bandwidth services, interworking and Internet access to big business users (offering improved quality and security).

Alongside those services, other services to be launched are integrated (voice and data) services ([22]) like videoconferencing, fixed-mobile integration, teleworking, bandwidth on demand and call centres including automatic re-routing on real time ([23]), and remote network management for customer's data networks.

Uniworld will integrate the existing international data networks assigned by the parent companies. Since those networks are not currently interworkable, an important part of the integration will involve the standardization of delivery platforms for each service. The integrated network will be expanded by the setting up of additional POPs, in particular in key markets like Germany and Italy, where current coverage is very poor. Integrated traffic will make it feasible to install POPs in countries where it would not be economical to do so for a single type of traffic.

(36) The domestic data services and networks in the home countries and the United Kingdom will not be contributed to Uniworld but will remain in Unisource and AT&T UK respectively. The respective Unisource shareholder will act as distributor of Unisource for those domestic products in each home country.

([16]) This market definition is consistent with that adopted by the Commission in the BT-MCI case (Commission Decision 94/579/EC, OJ L 223, 27. 8. 1994, p. 36, at point 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, at points 4 to 15, and p. 57, at points 5 to 16 respectively).

([17]) That service is basically the same Phase II service jointly developed by Unisource and AT&T in the framework of the European Virtual Private Network Users Association (EVUA) bid.

([18]) It also offers more features (than the minimum common denominator) but less geographical coverage (limited to Europe), than the WorldSource VNS service that Unisource and AT&T UK are beginning to distribute in continental Europe and the United Kingdom respectively.

([19]) See footnote 9 above for a definition of the term.

([20]) Virtual Private Networks were developed so that telecommunications operators could offer the corporate user the functionality of a physical private network without having to invest in leased lines. A portion of a public network is reserved for the customer who uses it as if it were a separate one.

([21]) Local Area Network.

([22]) The EVUA has issued in 1996 a new tender for integrated voice/data services.

([23]) Service applications will include reservation centres, customers service support centres and maintenance and warranty support centres. These services require European-wide free phone numbers (0800).

— Messaging

(37) Messaging covers electronic mail and EDI (electronic data interchange). Current plans foresee the use by Uniworld of AT&T's messaging platform (Easylink), instead of Unisource's existing one (400Net).

(b) *Demand*

(38) Services within that market are mainly demanded by large multinational corporations, extended enterprises, as well as other intensive users of telecommunications, often as an alternative to self-provision. In this respect, the parties have identified a number of global and European multinationals with very substantial international telecommunications expenditure as the initial target customers for Uniworld. However, such focus does not preclude the offering of Uniworld services to any other customer with similar needs.

Very large companies with a presence in many different countries demand that all their locations which are geographically dispersed across different territories be linked. The services required in this connection must respond to a very particular set of features which represent specific requirements by users. Such requirements include, in particular, the provision of services across multiple borders at consistent service levels overcoming the possible inadequacies of local infrastructures, the availability of delivery schedules, the irrelevance of time-zones, languages and currencies.

In addition, customers expect providers of such services to take full responsibility for all services provided from 'end to end' and to establish a single point of contact for all kinds of eventuality related to the provision of the services.

Much has been done by providers in respect of all these requirements. However, the provision of real seamless services is now only at a very rudimentary stage in particular as regards customer care and global billing features, and the establishment of infrastructure abroad, the latter as a result of differences in regulatory regimes between countries.

2. *Geographic market*

(39) Uniworld services are intended to cover the pan-European needs of customers. Uniworld will not be active in the provision of purely domestic services (other than the national extensions of its pan-European services). In addition, as referred to in recital 13, coverage outside Europe will be possible only by relying on the bilateral agreements of any of its parent companies. In this respect, the geographic market to be considered is the EEA plus Switzerland [24].

As indicated above, Uniworld is not involved in the provision of purely domestic services. However, given the links between Uniworld, Unisource and its shareholders, Uniworld has an impact on the respective domestic markets of the shareholders of Unisource, where each of them enjoys a dominant position.

3. *Market shares of the parties*

The market for non-reserved corporate telecommunications services on a pan-European scale

(40) The current combined market share of the parties in the EEA and Switzerland is around 10 % for data services and 10 % for messaging. No data are available for IVPN voice services and network related outsourcing.

4. *Competition in the markets*

The market for non-reserved corporate telecommunications services on a pan-European scale

(41) According to the parties, the addressable size of the European market will grow from US $ 1,9 billion in 1995 to US $ 4,2 billion in 2005 for IVPN and from US $ 2,9 billion in 1995 to US $ 4 billion in 2005 for data services.

BT-MCT's Concert and Atlas/Global One are expected to become major players on that market. To those it is necessary to add some other significant players like Sita or International Private Satellite Partners (IPSP).

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

(42) Certain features of the notified transaction appeared to be incompatible with Community competition rules. Consequently, by letter of 7 May 1996, the

[24] That definition is consistent with the cross-border regional market defined in the Atlas Decision (at point 12) (see footnote 16) and in the Unisource Decision (at point 30).

Commission informed the parties of its concerns. In the course of the notification procedure, the parties have amended the original agreements and given undertakings to the Commission.

1. *Contractual changes in respect of the communication of retail prices to Uniworld*

(43) The parties will amend the notified agreements to remove the stipulation that distributors are obligated to communicate price information to Uniworld regarding specific customers. However, where a distributor chooses not to communicate its retail prices to Uniworld, that distributor's customers would not be able to benefit fully from Uniworld's centralized billing capacity.

2. *Undertakings given by the parties*

(44) In addition, the parties have provided the undertakings set out below. 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***

(45) Every shareholder of Unisource and Unisource itself undertakes that neither it nor any of its subsidiaries will offer terms and conditions to Uniworld in respect of interconnection to the PSTN, ISDN and PSDN networks as well as leased lines in the home countries of the Unisource shareholders which are discriminatory in favour of Uniworld.

(46) Every shareholder of Unisource undertakes that all dealings with (i) AT&T and (ii) any other shareholder in respect of correspondent bilateral traffic will be 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 still have 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.

(b) ***No misuse of confidential information***

(47) Unisource and every one of its shareholders undertakes not to misuse confidential information obtained from third parties to the benefit of Uniworld and will in relation to Uniworld ensure and facilitate the respect of the undertakings related to misuse of confidential information given in the context of the Unisource Decision.

(c) ***Prevention of cross-subsidization***

(48) Every shareholder of Unisource undertakes not to grant any cross-subsidies to any entity created pursuant to the Uniworld 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.

(d) ***Prevention of tying***

(49) Every shareholder of Unisource undertakes that it will not tie-in the sale of any service provided by Uniworld with any service provided by each of them. Each 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 Uniworld 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. *Position of AT&T*

(50) During the assessment of the case, the Commission raised with AT&T its concerns regarding access by European telecommunications operators not involved in the present transaction to the United States via AT&T's infrastructure, which is still the most widely available one in that country. In the framework of the ensuing discussions, AT&T made a detailed description of its obligations under US regulations in respect of its international facilities and services, in particular regarding interconnection to its networks. AT&T further confirmed its intention to abide by all relevant US legislation and FCC rules to which it is subject from time to time in respect of its international facilities and services.

(51) In addition, in order to further guarantee the access of those European telecommunications operators not involved in the present transaction and to guarantee that there will be no negative effect on those other European telecommunications operators resulting from the transaction, AT&T offered the following undertakings to the European Commission, which accepted them:

(1) AT&T undertakes to advise the European Commission promptly of any complaint filed with the FCC regarding access to or interconnection with AT&T's international facilities, including any complaint filed with the

FCC regarding bilateral correspondent arrangements, by telecommunications operators or service providers from the EEA or Switzerland. AT&T further undertakes to inform the European Commission of any final decision taken by the FCC in regard to any such complaint.

(2) With respect to operators with international facilities licences in the EEA and Switzerland with whom AT&T today has an accounting rate agreement, and for traffic sent in the context of the bilateral correspondent regime, AT&T undertakes to offer cost-based accounting rates that, in all cases, would be no higher than the lowest accounting rate established between AT&T and any Unisource shareholder.

(3) With respect to operators with international facilities licences in the EEA and Switzerland with whom AT&T may in the future establish an accounting rate agreement, AT&T undertakes to offer cost-based accounting rates that, in all cases, would be no higher than the lowest accounting rate then in effect between AT&T and any Unisource shareholder.

H. Comments from third parties

(52) Following the publication of a notice pursuant to Article 19 (3) of Regulation No 17 and to Article 3 to Protocol 21 to the EEA Agreement([25]), three interested third parties submitted specific comments to the Commission regarding Uniworld. These 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 commentators pointed out, however, the need to introduce an additional condition regarding the absence of discrimination by the Unisource shareholders *vis-à-vis* AT&T and each other in respect of bilateral correspondent traffic. A general remark was also made regarding the need to impose auditing, recording and reporting obligations in respect of the activities of Uniworld as a way to ensure compliance with conditions. Finally, some comments insisted on the need for the Commission to treat all alliances on an equivalent footing and to create a level playing field between them.

(53) 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 have not therefore affected the Commission's substantive position outlined in the Article 19 (3) notice as regards the notified agreements. However, in the interest of legal certainty the Commission introduces an additional condition regarding the absence of discrimination by the shareholders of Unisource *vis-à-vis* AT&T and each other and extends the auditing, recording and reporting obligations imposed on the Unisource-Decision to cover the activities of Uniworld.

II. LEGAL ASSESSMENT

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

1. *Structural cooperative joint venture*

(54) Uniworld combines activities of its parent companies in a range of Europe-wide and third-country markets for liberalized telecommunications services and is set to develop in these markets. This venture entails major changes in the structures of the parent companies as it represents a major step for them towards providing services of a real pan-European nature. To that end, through Uniworld the parent companies are pooling a significant number of assets in connection with the provision and marketing of telecommunications services.

(a) *Joint control*

(55) The structure of Uniworld implies that no single parent company is in a position to exercise separately a decisive influence on the decision making of Uniworld. The fact that most decisions have to be adopted by supermajority and the veto rights granted to AT&T show that both parent companies jointly control Uniworld.

(b) *Coordination of competitive behaviour*

(56) Prior to the Uniworld transaction, its parent companies were actual competitors for the provision of data services and at least potential competitors in respect of the provision of IVPN/voice services. After the transaction, the parent companies will remain at least potential competitors in respect of

([25]) See footnote 2.

all services within the relevant market defined as 'non-exclusive services'([26]). This is so because, as described above, those services are excluded from the non-competition provision. Furthermore it will not conduct its own basic research and development activities. It will have access to research capabilities and proprietary technologies of AT&T, Unisource and the Unisource shareholders by means of intellectual property arrangements.

(57) In conclusion, the Commission considers that Uniworld constitutes a cooperative joint venture.

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

(58) The agreements between Unisource and AT&T fall within Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement since they restrict competition between the parent companies in respect of some categories of services included in the market for non-reserved corporate telecommunications services. Such restriction of competition affects trade between Member States.

(a) ***Data services networks***

(59) AT&T and Unisource are actual competitors in respect of the provision of data services and networks. They each currently have their own international European data network and services. They themselves estimate their combined market share (based on an independent study) at around 10 % of the pan-European corporate data market (Unisource will have around 6,5 % and AT&T less than 5 %). However, in that estimate the parties have not included figures for the provision of public data network services (X.25 and frame relay) in which Unisource is active now and will be active after the transaction both for its own account (domestic-only services in the home countries and presumably other countries within the territory) and as Uniworld distributor in the home countries([27]) and in which AT&T is and will remain active. Market shares in the home countries and in the United Kingdom are far more important.

In addition, both parent companies had already signed contracts for the provision of services with a significant number of customers in different countries within the EEA.

([26]) See footnote 13.
([27]) In both cases through its shareholders.

(60) Coverage and features of both networks are very similar, although the individual points of presence networks sometimes cover different locations within basically the same countries. Unisource offers large coverage in the home countries of its shareholders, and AT&T has a substantial network in the United Kingdom. Coverage in other major markets (like France, Germany or Italy) offered by them is similar and limited to a few nodes in some of the major cities.

(61) As regards data services, Uniworld will market initially the existing data services of the parent companies. In this respect, at least for an initial period, Uniworld services will not be totally new from a technical point of view but will only offer a better geographical coverage in Europe.

(b) ***IVPN/voice***

(62) For the following reasons, AT&T, Unisource and the shareholders of Unisource have to be considered at least potential competitors in the provision of such services.

Before the current transaction, AT&T and Unisource had separate plans to field IVPN services.

— Unisource had even started to market a limited IVPN offering based on technology available through PTT Telecom and on the networks and platforms of the individual Unisource shareholders (the so-called Phase I network,)

— AT&T has since 1985 offered a VPN service branded SDN (Software Defined Network) to its US customers. One feature of the service, the Global Software Defined Network (GSDN), offers US customers the ability to add non-US locations to their SDN network environment. GSDN allows calls from the US to be subject to the same originating features as any other intra-US call. However, calls terminating in the United States are controlled by whatever features are available on the non-US service. GSDN is offered on the basis of bilateral agreements concluded by AT&T and foreign telecommunication operators,

— in addition, Unisource, in the framework of its participation in the WorldPartners Company and WorldPartners Association, and AT&T UK launched the WorldPartners VNS service towards the end of 1995 in 14 European countries. They are marketing it first to a limited set of customers. The IVPN service to be marketed by Uniworld (Uniworld VNS) and the WorldSource VNS are substitutable for (i) any European potential customer for Uniworld's VNS, and (ii) any customer having

intra-European needs (that is, with locations to connect in at least two European countries). In addition, both will be provided over the same backbone network.

(c) *Messaging*

(63) Unisource and AT&T are each active in the European messaging market where they claim to have a market share of 10 % in the whole of the Community (Unisource[28] 5 % with its 400NET platform and service, AT&T 5 % with the Easylink Messaging Network).

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

(64) The agreements contain provisions that further restrict competition between AT&T, Unisource and the Unisource shareholders:

(1) the commercial relationship between Uniworld and its parent companies concerning purchasing by Uniworld or supply to it, under Article 10 of the Joint Venture Agreement;

(2) the non-competition provision under Article 12 of the Joint Venture Agreement;

(3) the exclusive distributorship agreements regarding the countries of the Unisource shareholders as included in the Master Distribution Agreements.

(65) Of these, the relationship between Uniworld and its parent companies concerning purchasing by Uniworld or supply to it, under Article 10 of the Joint Venture Agreement, and the non-competition provision, under Article 12 of the Joint Venture Agreement, are to be seen as ancillary restrictions. Therefore, these restrictions are not assessed under Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA separately from Uniworld as such:

— the commercial relationship between Uniworld and its parent companies as set out in the agreements ensures that Uniworld will get continued access to the services and infrastructures of the parent companies which it requires at the best conditions available. Such access and conditions are required for a successful entry of Uniworld in the market,

— the non-competition provision is a reflection of the firm commitment of every parent company to the joint venture. It expresses the reality of the lasting withdrawal of the parent companies at least in respect of those services defined as exclusive within the relevant market.

(66) On the other hand, the exclusive distributorship arrangements regarding the countries of the Unisource shareholders are caught by Article 85 (1) of the EC Treaty and Article 53 (1) of the EAA Agreement because they have the object or effect of isolating each national market concerned, where the respective Unisource shareholders enjoy dominant positions for the provision of most telecommunications networks and services, against imports of those services from other EEA Member States. That may adversely affect the conditions of competition within the EEA. 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*

(67) By the very nature of the services within its business scope, Uniworld has a substantial effect on trade between Member States because it will provide non-reserved services between any two Member States and within any Member State to customers having a need for pan-European telecommunications 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[29].

The exclusive distribution provision in respect of the countries of the Unisource shareholders caught by Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement protect the parent companies within their respective home market and contribute to dividing the single market along national borders. Therefore, this non-ancillary provision affects trade among Member States and between Member States and the EFTA countries.

[28] Unisource has 45 % market share in the Netherlands, 25 % in Sweden, 20 % in Switzerland and markets shares below 5 % in Portugal, Finland and Denmark. Market presence in the other countries of the EEA is below 1 %. As for AT&T, it has 10 % in the United Kingdom and below 1 % in the rest of the EEA.

[29] At paragraph 39 of the Guidelines.

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

1. *Technical and economic progress*

(68) Uniworld will make possible the provision of improved services with regard to the existing offerings of the parent companies. It will thus become a more viable alternative than Unisource and AT&T separately with regard to large customers.

(69) The combination of Unisource's and AT&T's forces in Uniworld will allow cheaper and earlier deployment of pan-European services which are more advanced, in terms of quality, coverage and seamlessness, than the two could provide separately. Uniworld facilitates the structure necessary for the uniform provision of the pan-European seamless services within its scope by defining the elements of those services and by ensuring that the quality of service is at the same high level throughout the structure. In addition, Uniworld organizes distribution of the voice IVPN and other services beyond the customers belonging to the EVUA and improves the coverage offered to the US branches of European companies.

New providers, including existing alliances like Unisource, are not yet able to offer the range of services, the geographic breadth or the service quality that multinational corporations need to operate their increasingly complex and interrelated businesses. Moreover, according to the parties, real seamlessness does not yet exist in the provision of international (pan-European) services to corporate customers. Current offerings available from service providers still involve low reliability, in view of the cost and difficulties of establishing the necessary infrastructure abroad, and rudimentary customer care systems and global billing platforms, which are crucial to fulfil the requirements of big corporations in order for them to manage their increasingly international business.

(70) The provision of IVPN services constitutes an improvement over the existing situation. IVPN services are being developed at the request of the biggest customers that want to obtain on a transfrontier basis the features offered at home by national VPN offerings of telecommunications operators. It was not previously possible to arrange a multilateral international VPN solution through a single operator. In that connection, the EVUA launched a request for information to potential vendors of such services because it was not possible to buy IVPN services in Europe. IVPN offerings were made on the basis of bilateral arrangements with other telecommunications operators, which affected the seamless nature of the provision of such services and the availability of features abroad.

Unisource and AT&T plan to offer a multilateral IVPN service based on their own network. That service will be really seamless and on a one-stop-shop basis.

AT&T is making very important contributions to that service and network in terms of know-how, IPR and expertise, including in particular its proprietary customer care and global billing platforms that are not commercially available and that are not licensed by AT&T to any other company, including the other members of the WorldPartners Company and WorldPartners Association. For instance, the material and non-material contributions of AT&T serve to reduce the time to market of the Phase II service by nearly 12 months.

(71) As regards data networks and services, Uniworld will first integrate and rationalize the networks and homogenize the different platforms for the different services and then enhance it by the introduction of new transmission techniques.

In addition, the assignment to Uniworld of international data assets improves the geographical coverage (POPs) of the individual networks currently existing, that is in the home countries in respect of AT&T and in the United Kingdom in respect of Unisource. More POPs will be installed in the short to medium term to improve coverage in key markets, such as Italy or Germany, where combined coverage is very poor. The combination will produce cost savings because the more POPs are installed the more it is possible to reduce the cost of access in foreign countries. Access still accounts for the major part of the direct costs of alternative providers of telecommunications services.

(72) As regards services([30]), new data services, based to a large extent on AT&T's technologies and know-how, will be rolled out. Further categories of new services, in particular integrated (voice and data) services, will be launched to meet the requirements of big customers (or associations thereof, like the EVUA). Such services are not currently available in Europe from a single vendor as is shown by the new tender that the EVUA is to issue.

([30]) Independent sources point to the importance of creative packaging of base services (which everyone can offer) into new value added services as a source of competitive advantage.

(73) As regards messaging services, Unisource's current messaging platform (400Net) has a wide European coverage but has few locations outside Europe. In addition, it does not provide a number of features requested by customers such as cheap and easy connection to other LAN platforms, electronic data interchange (EDI), lower cost text to fax, text to telex, and so on. According to the parties, improving coverage and developing such features will be both expensive and time consuming. Current plans therefore foresee the use by Uniworld of AT&T's Easylink messaging platform, which offers those features on a global basis. AT&T would transfer the relevant platform assets in Europe. No indication has been provided of the fate of 400Net, but in view of the above it will probably be discontinued.

(74) In conclusion, the fact that Unisource and AT&T are joining forces in Uniworld will allow the consolidation of a viable competitor in the European telecommunications field with the necessary credibility to compete in the market with major competitors like Concert or Atlas/Global One.

(75) The exclusive distributorship arrangements will improve distribution by ensuring that distributors will concentrate their marketing efforts on their respective territories. In any event, the exclusivity does not preclude passive sales (customers will always decide who they wish the lead distributor to be) and is limited to the exclusive services of Uniworld. The nomination of AT&T as the US distributor of Uniworld services will help to improve the coverage and services offered by Uniworld and the US branches of European customers.

2. *Benefits for consumers*

(76) Uniworld will mean that consumers, big users of telecommunications services in the first place, will benefit more rapidly from an improved portfolio of new advanced services than its parent companies would have been capable of providing separately. It is worth noting in this respect that some of these services, like the integrated services to be requested by the EVUA, are not yet available in Europe.

In addition, the availability of the improved portfolio will allow business customers to operate more effectively on an European and global scale and to compete better with their EEA and global competitors.

Finally, the consolidation of Uniworld as a viable alternative will increase the choice of viable service providers available for customers.

(77) The exclusive distribution mechanism will ensure, as further described above, that there is a single person to contact in respect of any contract in the event of any kind of difficulties related to the provision of the services anywhere within the territory.

3. *Indispensability*

(78) Uniworld is indispensable to achieve the benefits identified above:

— AT&T's portfolio of non-reserved corporate telecommunications services in Europe was incomplete, because it lacked a voice IVPN provided on a suitable network. AT&T evaluated in 1993 the cost of a unilateral entry into the IVPN field in Europe at US $ 1 billion in ten years. AT&T's current GDSN service in the US does not allow it to provide consistent service levels in Europe, to overcome inadequacies of local infrastructure, to ensure seamlessness or uniform features/functionality across geography,

— the current service provided by Unisource, the so-called Phase I, was an interim solution that did not achieve the WorldSource minimum common denominator set of features. The Phase II service, as described above was only possible given the substantial contributions made by AT&T, in particular its proprietary customer care and global billing platform. AT&T's contributions also made it possible for the Phase II service to be operational 12 months ahead of the original schedule.

(79) In this particular case, less restrictive solutions such as the teaming agreements originally concluded by the parent companies are not enough to achieve the benefits, because they do not provide a stable framework for the relationship to develop.

(80) In addition, the participation of Unisource in WorldPartners as an alternative to the creation of Uniworld is not enough, because WorldPartners is not a service provider but a facilitator of global connectivity between its members. It merely establishes common denominators of features in respect of specific services. Again, it does not

provide a stable framework which will allow the relationship to develop.

In addition, Uniworld offers a more complete portfolio than that of WorldPartners, which is limited to IVPN, Frame Relay and private lines.

(81) As regards exclusive distribution, it is very common, in alliances like the present one, for investors to reserve distribution rights in their respective home markets in exchange for the investment made. In the present case, taking into account the fact that territories entrusted to distributors are not completely closed since it is ultimately customer preference that determines who will be the distributor and that, in any event, in respect of most customer contracts more than one distributor will be involved (either as lead or support distributors). Such distribution rights can be said to be indispensable to secure firm commitment by the distributors towards Uniworld.

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 [31].

4. *Non-elimination of competition*

(82) The Commission assessed the fulfilment of this condition at the cross-border regional and domestic levels of the relevant markets as described above.

(a) ***Pan-European market***

(83) Uniworld faces significant competition in the pan-European market for non-reserved corporate telecommunications services. Almost all alliances in the telecommunications sector are trying to enter those markets.

The first customers targeted are by definition very big and have a substantial degree of bargaining power. It appears to be of the utmost importance to gain a few, very important customers in that segment which creates a substantial source of revenue but above all means a quantum leap in terms of the track record and credibility of the alliance.

Such customers are well informed and are able to put pressure on alliances to better address their needs (and to reduce prices). The 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.

(b) ***National markets of the shareholders of Unisource***

(84) Concerns by the Commission regarding the position of the Unisource shareholders on their respective national markets have been addressed by the conditions and obligations imposed and the changes to the regulatory situation referred to in detail in the Unisource Decision [32]. However, the Commission has imposed conditions and obligations on the parties regarding non-discrimination, no misuse of confidential information, prevention of cross-subsidization and prevention of tying, the main object of which is to extend to the activities of Uniworld the scope of similar conditions and obligations imposed on the parent companies of Unisource.

(85) As regards exclusive distribution, the Commission concluded that passive sales provide an opening for customers with bargaining power to exploit margins for competition between the Uniworld parent company acting as exclusive distributor in its territory and the other parent company that may offer the same Uniworld service at a lower price. More importantly, the restrictive effects of the exclusive distribution agreements are likely to be increasingly balanced by the availability of alternative infrastructure and the non-discriminatory terms of interconnection with the national PSTN, which will encourage competition for Uniworld and for each parent company acting as Uniworld distributor.

5. *Conclusion*

(86) It is the Commission's conclusion that all the 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 Uniworld and in respect of the individual restrictions discussed above.

C. Duration of the exemption, conditions and obligations

(87) Pursuant to Article 8 of Regulation No 17 and to Protocol 21 to the EEA Agreement respectively, a

[31] See Decision 96/546/EC (Atlas), at point 58 (see footnote 16).

[32] At points 39 to 71.

Decision in application of Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement is to be issued for a specified period and conditions and obligations may be attached thereto. Pursuant to Article 6 of Regulation No 17, the date from which such a decision takes effect cannot be earlier than the date of notification. In that respect, in the present case the Decision, in so far as it grants exemption, should take effect as regards the creation of Uniworld and related agreements as described above, from the date of commencement of validity of the Unisource Decision to the end of the period of validity of that Decision. In reaching this conclusion, the Commission has taken into account the link between the two cases, in particular the fact that Unisource is one of Uniworld's parent companies.

(88) This Decision should be subject to the conditions described in recitals 45 to 49 above. Furthermore, this Decision should 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, at the parties' request, review the need for any particular condition and obligation attached to this Decision if circumstances change substantially before the period of exemption expires.

(89) In so far as relates 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 such obligation.

(1) *Auditing*

All entities created under the present transaction must be audited every year, and that audit is to 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 figures are accurate.

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

(2) *Recording obligations*

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

(3) *Inspection of records*

For the purpose of ascertaining and ensuring compliance by the shareholders of Unisource or by Unisource itself with the above conditions, each of the shareholders and all entities created pursuant to the Uniworld agreements must, 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 above recording obligations and to receive oral explanations relating to such documents.

(4) *Reporting obligations*

The shareholders of Unisource and all entities created pursuant to the Uniworld 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 Uniworld 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.

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

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement, the provisions of Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement are hereby declared inapplicable for the period of validity of the Unisource Decision to:

(1) the Uniworld joint venture as notified to the Commission, including the ancillary obligations regarding (i) the relationship between Uniworld and its parent companies concerning purchasing by

Uniworld or supply to it under Article 10 of the Joint Venture Agreement and (ii) the non-competition provision under Article 12 of the Joint Venture Agreement;

(2) the exclusive distribution arrangements in respect of the countries of the shareholders of Unisource.

Article 2

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

(1) *Non-discrimination*

(a) Every shareholder of Unisource and Unisource itself shall undertake that neither it nor any of its subsidiaries will offer terms and conditions to Uniworld in respect of interconnection to the PSTN, ISDN and PSDN networks as well as leased lines in the home countries of the Unisource shareholders which are discriminatory in favour of Uniworld.

(b) Every shareholder of Unisource shall undertake that all dealings with (i) AT&T and (ii) any other shareholder in respect of correspondent bilateral traffic will be 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 still have a dominant position after full and effective liberalization of telecommunications infrastructure and services in each of their respective countries.

(2) *No misuse of confidential information*

Unisource and every one of its shareholders shall undertake not to misuse confidential information obtained from third parties to the benefit of Uniworld and will, in relation to Uniworld, ensure and facilitate the respect of the undertakings related to misuse of confidential information given in the context of the Unisource Decision.

(3) *Prevention of cross-subsidization*

Every shareholder of Unisource shall undertake not to grant any cross-subsidies to any entity created pursuant to the Uniworld 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.

(4) *Prevention of tying*

Every shareholder of Unisource shall undertake that it will not tie in the sale of any service provided by Uniworld with any service provided by each of them. Each 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 Uniworld 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.

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

Article 3

This Decision shall be subject to the following obligations:

(1) *Auditing*

All entities created under the Uniworld transaction shall be audited every year and that 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 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 of Unisource and all entities created pursuant to the Uniworld agreements shall each keep records and documents suitable to prove compliance with the terms of the conditons set out in Article 2 ready for inspection by the Commission.

(3) *Inspection of records*

For the purpose of ascertaining and ensuring compliance by the shareholders of Unisource or by Unisource itself with the conditions set out in Article 2, each of the shareholders and all entities created pursuant to the Uniworld 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 above recording obligations and to receive oral explanations relating to such documents.

(4) *Reporting obligations*

All shareholders and all entities created pursuant to the Uniworld agreements shall provide to the Commission, for the purpose of determining whether they comply with the obligations set out 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 Uniworld 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 4

This Decision is addressed to:

Unisource NV,
Transpolis,
Polarisavenue, 97,
PO Box 2042,
NL-2132 JH Hoofddorp.

AT&T SA/NV,
1945, Chaussée de Wavre,
B-1160 Brussels.

Done at Brussels, 29 October 1997.

For the Commission
Karel VAN MIERT
Member of the Commission