COMMISSION DECISION

of 29 December 2000

relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement

(Case No COMP/36.841 — Unisource)

(notified under document number C(2000) 4094)

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

(Text with EEA relevance)

(2001/143/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 EC Treaty [1], as last amended by Regulation (EC) No 1216/1999 [2], and in particular Articles 2 and 8(3)(a) thereof,

Having regard to Commission Decision 97/780/EC of 29 October 1997 relating to a proceeding pursuant to Article 85 of the EC Treaty and Article 53 of the EEA Agreement [3] (Case No IV/35.830 — Unisource),

Having regard to the application filed on 23 December 1999 by Unisource NV (Unisource) and its three shareholders, Koninklijke KPN NV (KPN), Swisscom AG (Swisscom) and Telia Ab (Telia) (collectively: 'the Parties'), for a review of the need for the conditions and obligations contained in Decision 97/780/EC,

Having regard to the summary of the application and notification published [4] pursuant to Article 19(3) of Regulation No 17,

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

Whereas:

I. THE FACTS

(1) According to the Parties, market developments over the past years as well as the losses accumulated during those years have forced them to abandon their wholly-owned subsidiary, Unisource NV, as the joint venture for conducting their international expansion strategy. Consequently, they have taken the irreversible decision to reduce Unisource's scope.

A. Creation of Unisource and related agreements

(2) The decision of the shareholders is to abandon the strategic alliance articulated through Unisource. They will, however, maintain until their expiry the Unisource agreements, that is to say, the instruments creating Unisource and the individual contractual restrictions contained therein. Unisource will continue to exist as a holding company for the joint ownership by KPN, Telia and Swisscom of AUCS communication services vof (AUCS). Management of the AUCS communication services, which offers services to multinationals in Europe, is now undertaken by Infonet (in which Unisource's parent companies have a 56 % stake).

B. Reduced scope of Unisource's activities

(3) According to the Parties, the only activity that remains of the Unisource activities described in Decision 97/780/EC is the provision of value added telecommunications services to multinational corporate customers [5]. This business is carried through AUCS (formerly Uniworld). On 29 May 1999, Unisource acquired 100 % of the shares of AUCS by taking over AT&T's shares. This transaction was declared compatible with the common market by Commission decision of 8 July 1999 in Case COMP/M.1581 [6].

(4) All the other activities described in Decision 97/780/EC have been abandoned. As a result, the only remaining subsidiary owned by Unisource is AUCS vof.

[1] OJ 13, 21.2.1962, p. 204/62.
[2] OJ L 148, 15.6.1999, p. 5.
[3] OJ L 318, 20.11.1997, p. 1.
[4] OJ C 217, 29.7.2000, p. 35.
[5] Namely, the provision of seamless, value added international voice, data, internet and messaging services to multinational companies operating in Europe.
[6] OJ C 328, 17.11.1999, p. 7.

Non-compete provisions

(5) As a consequence of the divestitures, all non-compete provisions contained in the original agreements have disappeared. There are no non-compete agreements between AUCS and Unisource's parent companies. KPN, Swisscom and Telia can compete with Unisource on the market for corporate telecommunications services or in any other market. The parent companies declare that their interest in Unisource is strictly financial.

Exclusive distributorship

(6) The exclusive distribution agreements between certain Unisource subsidiaries and the Unisource shareholders referred to in Decision 97/780/EC have become obsolete since those subsidiaries have been sold or their activities have been discontinued.

C. **Presence in the market**

(7) As was stated above, the presence of Unisource in the relevant markets described in Decision 97/780/EC is reduced in scope to the provision of value added telecommunications services via AUCS/Infonet.

(8) The competitive situation in the market for the provision of global telecommunications services to multinational corporate customers was assessed by the Commission in its decision of 21 February 2000 in Case M.1741 — MCI WorldCom/Sprint [1]. According to 1999 data, the market share of AUCS/Infonet in that market would be between 4 % and 11 %.

D. **Regulatory safeguards**

(9) In contrast to the regulatory situation when the Commission exempted the Unisource agreements, telecommunications markets in the Community are liberalised and each Member State has national regulatory authorities (NRAs) with wide powers to intervene in those markets.

(10) The Commission's view is that, while it is true that KPN, Telia and Swisscom maintain very high market shares in almost all domestic telecommunications services markets in their respective home countries, telecommunications are now fully liberalised in the Netherlands and in Sweden. Indeed, in contrast to the market situation when Decision 97/780/EC was adopted, competition is taking place in those countries as well as in Switzerland (see Commission's Fifth Implementation Report on the implementation of the telecommunications regulatory package [2].

[1] See Press Release IP/00/668.
[2] COM(1999) 537 final of 10 November 1999 — available at http://europa.eu.int/ispo.

E. **Comments of interested parties**

(11) No comments were received from third parties in response to the Commission's notice pursuant to Article 19(3) of Regulation 17.

II. **LEGAL ASSESSMENT**

A. **Application of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement to the Unisource agreements**

(12) In Decision 97/780/EC, the Commission establishes that the Unisource agreements fall within Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement. Although the Parties will maintain those agreements until they expire, they have notified to the Commission their irreversible decision to abandon the Unisource alliance as originally conceived and the irreversible character of the divestments, resulting in a discontinuation of the Unisource group.

(13) As a result of that decision and those divestitures, the scope of activities of Unisource described in the Commission's decision of 29 October 1997 has been reduced considerably. As was stated above, Unisource's sole presence in the market is through AUCS/Infonet. All the other subsidiaries listed in the Commission's decision have been sold. All other activities apart from the provision of value added telecommunication services have been abandoned. Consequently, it can no longer be considered that the parent companies pool a significant number of assets in connection with the provision and marketing of telecommunications services as listed in recital 75 of Decision 97/780/EC.

(14) According to the Parties, the only remaining subsidiary of Unisource, namely AUCS, would represent in terms of 1999 figures less than 3 % of the revenues of any of its parent companies. The declared intention of the Parties is to limit Unisource's relations with its parent companies to a financial relationship. Given the nature of the changes to Unisource's structure, the risk of coordination of the competitive behaviour between the parent companies considered in Decision 97/780/EC appears remote.

(15) Furthermore, contrary to the original intentions of the parent companies, the abandoning of the original scope of the Unisource alliance means that each parent will address the relevant markets listed in Decision 97/780/EC on its own. In particular, KPN, Swisscom and Telia will even compete with AUCS/Infonet in the market for the provision of global telecommunications services to multinational corporate customers. The maintenance of AUCS/Infonet as an independent market player will increase competition in that market, in which only a reduced numbers of companies are active at world-wide level [3].

[3] See Commission's decision of 21 February 2000 in Case M.1741 — MCI WorldCom/Sprint.

B. **Application of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement to the contractual provisions**

(16) The contractual provisions identified in Decision 97/780/EC as being caught by Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement no longer apply.

(17) The only remaining activity of Unisource is the ownership of AUCS. There is no non-compete agreement between the parent companies and Unisource for the service provided by AUCS. KPN, Telia and Swisscom are free to compete with AUCS for the provision of value-added telecommunications services to multinational corporate customers. For instance, KPN has set up a joint venture (KPN Qwest) that provides global telecommunications services. Swisscom and Telia both offer such services to their respective customers, in direct competition with Unisource/AUCS.

(18) The exclusive distribution agreements originally envisaged no longer exist and therefore do not affect the conditions of competition within the EEA and Switzerland [1]. No new exclusive forms of distribution have been entered into between Unisource and its shareholders in regard of AUCS services.

(19) In view of the above, it can be considered that the Unisource agreements do not appreciably restrict competition in the relevant markets,

HAS ADOPTED THIS DECISION:

Article 1

Decision 97/780/EC is hereby repealed.

Article 2

On the basis of the facts in its possession, the Commission has no grounds for further action under Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement in respect of the modified scope of cooperation between Koninklijke KPN NV, Swisscom AG and Telia AB in regard of their joint subsidiary Unisource.

Article 3

This Decision is addressed to:

1. Koninklijke KPN NV
   Telecomplein 5
   2516 CK Den Haag
   The Netherlands

2. Telia AB
   Marbackagatan 11
   S-123 86 Farsta

3. Swisscom AG
   Lindenhofstrasse 1
   CH-3048 Worblaufen

4. Unisource NV
   'Transpolis'
   Polarisavenue 97
   2137 JH Hoofddorp
   The Netherlands

Done at Brussels, 29 December 2000.

For the Commission

Mario MONTI

Member of the Commission

[1] See recital 83 of Decision 97/780/EC.