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*Case No IV/JV.15 -  
BT/AT&T*

Only the English text is available and authentic.

**REGULATION (EEC) No 4064/89  
MERGER PROCEDURE**

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Article 8(2)

Date: 30/03/1999

## **Commission Decision**

**of 30 March 1999**

### **declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement**

**(Case No IV/JV.15 – BT/AT&T)**

**(Only the English text is authentic)**

**(Text with EEA relevance)**

**(1999/765 /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 and in particular Article 57 (2) (a) thereof,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings<sup>1</sup>, as last amended by Regulation (EC) No 1310/97<sup>2</sup>, and in particular Article 8 (2) thereof,

Having regard to the Commission decision of 3 December 1998 to initiate proceedings in this case,

Having regard to the opinion of the Advisory Committee on Concentrations,<sup>3</sup>

Whereas:

1. On 3 November 1998, the Commission received a notification of a proposed concentration pursuant to Article 4 of Regulation (EEC) No 4064/89 (“the Merger Regulation”) by which British Telecommunications plc (BT) and AT&T Corp. (AT&T) acquire within the meaning of Article 3(1)(b) of the Merger Regulation joint control of a newly created company constituting a joint venture.
2. On 3 December 1998, after examination of the notification, the Commission concluded that the operation fell within the scope of the Merger Regulation and raised serious doubts as to its compatibility with the common market, and decided to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation.

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<sup>1</sup> OJ L 395, 30.12.1989 p. 1; corrected version in OJ L 257 of 21.9.1990, p. 13.

<sup>2</sup> OJ L 180, 9. 7. 1997, p. 1; corrected version in OJ L 40, 13.2.1998, p. 17.

<sup>3</sup> OJ C xx, xx.xx.1999, p. x

## **I. THE PARTIES**

3. BT is a publicly traded limited company. BT is currently the fifth biggest telecommunications operator world-wide by turnover. Its principal activity is the supply of telecommunications services and equipment. Its main services and products are local and long-distance telephone calls in the United Kingdom the provision of telephone exchange lines to homes and businesses, international telephone calls made from and to the United Kingdom and the supply of telecommunications equipment for customer's premises. BT is also active internationally, notably in Europe through Concert (wholly owned subsidiary) and other European joint ventures previously notified to the Commission. BT also provides outsourcing services through its wholly-owned subsidiaries Syntegra Limited and Syncordia Limited.
4. AT&T is a publicly-traded telecommunications common carrier in the United States. AT&T is currently the second biggest telecommunications operator world-wide measured by turnover. It provides a broad range of services to businesses and private consumers including long-distance and international voice and data communication services, on-line Internet and advanced global communications in the United States. AT&T through AT&T Solutions provides outsourcing services. AT&T is also active internationally, notably in the United Kingdom where it operates a group of wholly-owned subsidiary companies providing telecommunications and information technology services including AT&T Communications UK Ltd, AT&T ISTEEL Ltd, which provides outsourcing services, and ACC Long Distance UK Ltd (ACC UK), a subsidiary of ACC Corp., which is wholly owned by AT&T. AT&T has also recently completed its merger with Tele-Communications, Inc. (TCI)<sup>4</sup>, a US corporation that owns approximately 22% in Telewest Communications plc, a UK cable company offering television channels, telephony services, data communications services, and Internet access. AT&T additionally retains a 40% share in the joint venture AUCS (AT&T- Unisource Communications Services), Unisource owning the remainder. It is a member of the WorldPartners alliance which is made up of AT&T [ %]\*, KDD [ %]\*, Singapore Telecom [ %]\*, Unisource [ %]\* and Telstra [ %]\*. Both AUCS and WorldPartners provide global telecommunication services to multinational corporations that AT&T distributes in the United States, as well as in the United Kingdom for AUCS services.

## **II. THE OPERATION**

5. On 23 October 1998, BT and AT&T entered into a Framework Agreement pursuant to which they agreed to establish a joint venture to which both parties will contribute significant revenues, profits and assets (the Framework Agreement). They will transfer to the joint venture all of their global network facilities, international gateway to gateway assets and operations, including all of their and their wholly-owned subsidiaries' international network facilities, assets and operations (e.g. BT's interest in the existing Concert facilities and assets). The joint venture will in particular have transferred to it the parents' existing correspondent contracts,

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<sup>4</sup> Commission decision of 4.12.98 in Case No IV/M.1252 – AT&T/TCI, OJ (not yet published).

\* Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

submarine cable ownership, cable landing stations and Indefeasible Rights of Use (IRUs) interests in cables, multi-function facilities that are predominantly designed to support transmission between or among two or more countries, all of AT&T's international satellite earth stations, all of BT's international satellite earth stations, with the exception of those satellite earth stations which are entirely or predominantly used for aeronautical or maritime or broadcasting services, plus relevant UK/US licensing, tariff and interconnect obligations. The joint venture will however not have transferred to it those cables or network facilities owned by BT's joint venture companies in Europe, nor will it include the Farland network that links those network facilities. The parties will also transfer to the joint venture their existing qualifying multinational corporate customers (QMNCs) contracts, with the exception of these AT&T contracts with QMNCs for the provision of WorldSource or AUCS services.

6. The joint venture will be organised into five different business units that cover the areas of product development, international carrier services, MNC customer relations, network and systems management, and technology research, namely the Product Unit, the International Carrier Services (ICS) Unit, the MNC Unit, the Network and Systems Unit, and the Technology Unit.
7. The two main activities of the joint venture at the time of its establishment will be to provide **global telecommunications services** to multinational corporate customers (MNCs), and more especially to so-called QMNCs in selected sectors<sup>5</sup>, as well as **international carrier services** to carriers. Until such time as the joint venture develops new products, including new enhanced global corporate calling cards services, global telecommunications services to MNCs will basically consist of the existing range of Concert products (such as managed data services, e.g. packet switching, Frame Relay, managed bandwidth, remote local access network and messaging services, Virtual Network Services (VNS) – global virtual voice and data network services, video and audioconferencing, VNS global calling cards, and call centres-, integrated access services, on-line and real-time network management tools, global billing and account management, etc.) along with AT&T Corp's global business communication services products (global software defined networks, international freephone, international Frame Relay, international ATM, international managed network services and messaging services), not comprising AT&T-WorldSource and AUCS services.
8. In the medium term, the joint venture is intending to develop and provide its customers with innovative Internet Protocol (IP) based services for a range of voice

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<sup>5</sup> The parties define MNCs as those non-governmental/non-reseller potential customers which meet the following criteria: annual turnover in excess of USD [ ]\*, annual international turnover (i.e. outside of the customer's home country) in excess of USD [ ]\* and operations on [ ]\* or more continents and in [ ]\* or more countries. MNCs are further subdivided for marketing purposes into QMNCs, Level 1 and Level 2 customers. QMNCs were selected from industries such as financial services, information and electronic technologies and petroleum, which have high information needs and in which companies tend to link global and domestic telecommunications services procurement. Level 1 and Level 2 customers are multinational corporations which do not currently meet the criteria of QMNCs either because they are limited global service buyers and primarily buy Global communications services on a local basis (Level 1), or, while they are significant global services buyers, do not buy communications services in a fully integrated global manner (Level 2). Both Level 1 and Level 2 customers, nevertheless, have a need for some Global communications services provided by the joint venture and may become QMNCs.

and data products. The joint venture will therefore seek to design, develop and implement an intelligent managed IP-based global layered network, together with a global IP Platform i.e. a platform analogous to a PC “operating system” based on this intelligent managed IP-based global network. This global IP platform will support innovative IP-based services such as global electronic commerce, global call centres and new Internet-based solutions to support global organisations and their executives, as well as applications developed by the joint venture or third parties, using Applications Programming Interfaces (APIs) made available to its partners. It is expected that once this global IP network and IP Platform are implemented, the joint venture's customers will be able to gain access to the joint venture’s platform through these APIs to create their own services and use them world-wide.

9. The product unit will develop the services intended for MNC customers. The MNC Unit will sell, on an exclusive basis, the venture’s and its parents’ services directly to QMNCs. The venture’s distributors (including its parents) will distribute its services to those MNCs which are not served directly by the MNC Unit. The Product Unit will also be in charge of selling the venture’s products to distributors. The ICS Unit will provide carrier services to BT, AT&T, the other joint venture business units and to third-party carriers. The joint venture will not be under an obligation to purchase necessary services or inputs exclusively from its parents. Thus, for example, the Product Unit will be free to purchase inputs from third parties where these offers are superior in terms of price, quality and competitiveness. There is however an important exception with respect to purchases by the MNC Unit of Communications Services<sup>6</sup> in the United Kingdom and the United States.
10. The joint venture will appoint BT and AT&T as its exclusive distributors in, respectively, the United Kingdom and the United States, subject to transitional arrangements in respect of MCI’s distribution rights of Concert services in the United States which will end two years after MCI’s withdrawal from Concert [ ]\*. BT and AT&T will in particular be the UK and US exclusive distributors (respectively) of the joint venture's global communications services as regards Level 1 and Level 2 customers. The parties will enter into an exclusive purchasing agreement with the joint venture for the supply of global communication services. As concerns Level 1 and Level 2 customers, BT and AT&T are allowed to provide directly the domestic portion of such services in their respective home countries (respectively the United Kingdom and the United States).
11. The ICS unit will be in charge of selling international carrier services to other carriers and resellers. The Framework Agreement also provides that the parties will purchase all of their requirements for International Carrier Services from the joint venture.
12. The parties will withdraw from the markets of the joint venture, subject to a certain number of exceptions, and in particular :

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<sup>6</sup> “Communications services” in the Framework agreement are defined broadly by the parties "as any services and applications, including enhanced services and applications, that involve the transmission of voice, data, sound, music, still and moving image or video and other elements by fixed media (such as wire, cable or fibre) or radio or other wave signal, and any similar or substitute service available or offered from time to time, and the business of developing, designing or offering content-based applications”.

- The Framework Agreement provides that the parties will not compete with the joint venture or with each other (or third parties) as distributors of the communications services provided by the joint venture, subject to requirements related to passive sales.

- In their notification, the parties stated the following:

AT&T will close down the AT&T UK subsidiary, and will withdraw its interests in AUCS, World Partners, and Arcor (Germany), at the end of a transitional period. AT&T will exercise its contractual right within WorldPartners not to agree to a further extension beyond December 1999. AT&T will exit AT&T-Unisource according to the contractual exit provisions in the joint venture, which allow for a permitted exit any time after July 2000. Existing AT&T's customers' contracts for WorldSource services and AUCS services will continue to be honoured until their expiry. AT&T will divest its equity interest in the Arcor joint venture on or before the [ ]\* anniversary of the Closing. AT&T has loaned certain specialist staff to Arcor. These staff are gradually being withdrawn from Arcor and the last person is scheduled to return to AT&T by September. The parties' arrangements in respect of outsourcing activities include their retention of certain outsourcing services. AT&T has undertaken to divest AT&T's subsidiary ACC Long Distance UK, as discussed below. Divestiture of the AT&T subsidiary ISTEEL is still to be decided.

- Finally, the Framework Agreement provides for certain exceptions to the non-compete clauses concerning acquisitions of competitors that, *inter alia*, are primarily domestic or fall below certain thresholds, or where the acquired party becomes a distributor of the joint venture, as well as exceptions relating to acquisitions that occur between the execution of the Framework Agreement and the Closing.

### **III. JOINT CONTROL**

13. BT and AT&T will own 50% of the share capital of the joint venture and retain equal voting rights and control. Each party will appoint three of the six Directors on the Board of the joint venture. Section 3 of the Framework Agreement provides that certain decisions require majority approval of the Board. These matters include appointment of senior officials, brand policy, annual budgets and operating plans. The effect of that section is that neither party can make a strategic business decision without the consent of the other party. Consequently, the joint venture will be subject to the joint control of BT and AT&T.

### **IV. FULL FUNCTION**

14. As described above, the parties will contribute to the joint venture most of the assets and facilities of their international network operations. In this regard, the parent companies will transfer their network facilities, customer contracts and employees, and will grant the joint venture certain intellectual property rights in their products and brands.
15. The joint venture will have its own organisation and employees, which will enable it to perform all its functions independently. The joint venture will acquire certain services from the parents. These procurements will be on an arms-length basis and the joint venture will be free to purchase services from third parties with superior offers in terms of better prices, quality, and competitiveness, with the exception described in paragraph 9. The joint venture will accordingly perform on a long-

lasting basis all the functions of an autonomous economic entity within the meaning of Article 3 of the Merger Regulation.

## V. COMMUNITY DIMENSION

16. In 1997 AT&T had a world-wide turnover of € [ ]\* million and in fiscal year 1997/1998 BT € [ ]\* million which taken together equals more than €5 billion. AT&T had a Community turnover of € [ ]\* million and BT approximately € [ ]\* million. The determination of the Community-wide turnover under the Merger Regulation involves the allocation of turnover on a geographical basis. There are various possible methods of allocating revenue earned by telecommunications companies providing services that generate revenue outside the country in which they are based. On all the variants proposed, BT and AT&T each has Community-wide turnover exceeding € 250 million. BT alone achieved two-thirds of its aggregate Community-wide turnover within one and the same Member State, namely the United Kingdom. AT&T did not achieve more than two-thirds of its Community-wide turnover in the United Kingdom. The concentration therefore has a Community dimension within the meaning of Article 1 of the Merger Regulation<sup>7</sup>.

## VI. BACKGROUND TO THE OPERATION

17. In the last decade, the telecommunications sector has seen a dramatic evolution in all respects with regard to the means of supply of telecommunications services, the demand for such services both in nature and quantity, the nature of telecommunications services, the technologies involved, the industry's structure, the applicable regulatory framework and the size, number and structure of market players.
18. Until recently, the telecommunications industry was characterised by the existence of government-owned vertically integrated telecommunications monopolies and public switched telecommunications networks (PSTNs) that had been created under a monopoly along national boundaries to serve national demands.
19. Fixed voice services delivered over the PSTN first constituted the bulk of telecommunications services. In particular, international telephone calls were, and are still mostly today, provided and delivered as retail international direct dialled (IDD) calls to end-users. IDD is an automatic method of making or receiving telephone, data, or facsimile calls over the public switched telephone network. These IDD calls are handled on a 'correspondent' basis, in which at least two international operators are involved in the process of originating and terminating (i.e. delivering) the call. The system for determining and settling the required level of payment between an originating and terminating operator for the exchange of international call traffic is known as the accounting rate system (see paragraphs 35 to 40). This system was designed in the context of national monopolies.

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<sup>7</sup> Turnover calculated in accordance with Article 5 (1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 23.2.1998 p. 25). To the extent that figures include turnover for the period before 1 January 1999, they are calculated on the basis of average ECU exchange rates and translated into euro on a one-for-one basis.

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20. In order to be able to transport such international calls, these monopolistic operators together created consortia to build and operate submarine cables. Similarly international organisations were created, of which these operators were signatories, in order to launch and operate telecommunications satellites.

*Evolution on the demand side: enhanced global telecommunications services*

21. As a result of globalisation trends, corporations have been increasingly, over recent decades, operating outside national boundaries across continents and the number and size of multinational corporations have both increased. In parallel with these industrial structural changes, the needs of such multinational corporations with regards to communication services have evolved both in terms of nature, diversity, quantity, complexity, and geographic scope. While until the 1980's, multinational companies mostly needed voice services, with the development of IT and an ever-increasing usage of computers, their needs have evolved to a mix of voice/data services with a data component increasingly important. With the development of programs and applications common to all premises within a corporation and possibly shared with customers/suppliers, and the need to exchange or share data within and from one premise with other premises within the same company, and/or with other companies, the need for the networking of computers within so-called Local Area Networks (LAN) and then interconnect those different LANs via Wide Area Networks (WAN) on a global basis increased. That entailed the design of increasingly complex networks and services (depending on the different locations of the MNCs premises, specific quality requirements, etc.).
22. While multinational corporations' telecommunications needs started evolving in the early 1980's as described in paragraph 21, the market structure and regulatory frameworks did not make possible the provision of the services that MNCs were needing on a global basis. Traditional telecommunications incumbents were well positioned to offer enhanced domestic telecommunications services, but the structure of the supply side did not allow an easy offering of international services end-to-end on a seamless basis, with the adequate level of quality and security requested by the companies, as the operators were not able to manage and control the underlying transmission facilities and services offered end-to-end across borders.
23. As a result, MNCs started to design, build and operate in-house their own corporate networks, by leasing capacity, installing equipment on top of such capacity and in their premises such as switches, PABX and routers, and managing the whole in-house.
24. To date, as a result of the extreme complexity of such corporate networks and communications needs, design, self-provisioning and managing of such corporate networks requires more and more expertise. Customised enhanced telecommunications services have been developed to meet the corporations' requirements with regard to internal and external communications, both domestic and international, both data and voice: enhanced voice and data services, international free phone numbers, messaging services, call centres, video and audioconferencing services, intra/extranets, virtual private networks, dedicated access to the Internet and other value-added services, as well as other services such as corporate calling cards. MNCs request however ever more sophisticated services, higher transmission speeds, higher bandwidth, and higher connectivity of networks, desktop to desktop, while managed Intranet/Extranet types of services are increasingly popular.



Intranets/Extranets consist in managed networks that operate like the public Internet (see paragraphs 57 and following)) but are designed for respectively intra-corporate and inter-corporate use with more consistent performance and better security.

Options currently available to an MNC for the fulfilment of its corporate telecommunications needs

25. MNCs are by definition multi-continent and multi-country. This generates complex telecommunication needs both for voice and data services both in terms of intra-company (or within a defined closed group of users) and inter-company communications, as described above.
26. To fulfil such needs, there appear to be currently four grades of options and combinations thereof available according to the sophistication of the services being offered, the volumes of traffic involved, and possible strategic/purchasing policy of the company.
27. The least sophisticated solutions involve the sole reliance on non-customised basic telecommunications services such as voice telephony over the PSTN and standard data communications services over public data telecommunications networks (such as public ISDN or X.25 data networks, accessed through the PSTN or ISDN lines) purchased locally from various suppliers.
28. A second option includes the self-provision by MNCs of their own global telecommunications needs over their own networks. In such a case, they build their own internal corporate network by purchasing International Private Line Circuits (IPLC) and leased lines, and then adding on top of these lines the necessary equipment (e.g. switches, routers, etc.). Such a solution involves in-house management and maintenance of the corporate network, which could prove a very complex task, requiring numerous and skilled staff. Such MNCs would complement locally such owned-operated networks by purchasing basic public data and voice telecommunications services to cater in particular for their inter-company and dial-out communications, and/or link small and remote outlets from various suppliers.
29. The third option involves the in-house definition of the MNCs' needs in terms of telecommunications services and network, making requests for proposals/organising tendering procedures on the basis of very precise and detailed needs defined in-house for customised packages of enhanced and value-added corporate telecommunications services (this is the segment targeted by the joint venture's 'global telecommunication services') to fulfil such needs. Examples of elements of such customised packages include voice international virtual private networks possibly enhanced by various functionalities such as remote access (dial-in) or egress (dial-out) and internal numbering plan, data international virtual private networks running on X.25, Frame Relay, ATM, and/or IP, managed bandwidth and other value-added voice and data services such as managed Intranet/Extranet, Internet access, messaging services, call centres, global audio- or video-conferencing, etc. As managed Intranet/Extranet services are getting more and more popular among corporate customers, the network services provided within these customised packages of value-added and enhanced services are more and more advanced, and tend to go beyond the provision of WAN services, beyond the provision of the tail circuit up to customers' premises, to include managed desktop to desktop connectivity network services.

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30. Finally, the fourth and most sophisticated option consists in outsourcing the design, implementation, physical and logical management of the corporation's network and corporate telecommunications services, by means of purchasing sophisticated managed networks solutions. Such sophisticated managed networks solutions bundle the procurement of underlying transmission facilities and value-added services, with design services (i.e. the definition of the customers' needs and proposal of a solution), the physical but also the logical management of the facilities procured (management of the routers for example), and generally also comprise desktop and network/systems integration services (comprising project management, network systems and applications planning, design, integration and migration, and consulting services such as Y2K audits, IP migration services and Lotus Notes consultancy), involving a high component of IT services. Such managed solutions would, at the extreme level of outsourcing, comprise the total outsourcing of the management of the telecommunications needs and network of the company, through the transfer of corresponding assets and staff. Such services are offered by companies such as IBM or EDS.

*Globalisation and liberalisation : entrance on the market of new players and development of carriers' carrier services*

31. The process of liberalisation in the Community triggered an opportunity to meet previously unsatisfied demands and altered the structure of the industry. In the Community, this is leading to a change from a patchwork of national monopolistic operators to a series of competing players at both Community and national level.
32. Further liberalisation of the telecommunications industry arose from the World Trade Organisation (WTO) Global Agreement on Trade in Basic Telecommunications Services, which was signed on 15 February 1997 and came into force on 5 February 1998. As a result, the changes that have been seen in liberalised countries such as the Member States of the Community and the United States can now be achieved world-wide.
33. On the supply side, as a result of the evolutions and events described above, the telecommunications sector saw the emergence of alternative telecommunications operators, either vertically integrated or not, alternative telecommunications service providers, alternative carriers, providing either domestic or international telecommunications services or both, on a local/regional, national or more global basis. The evolution of the market structure is described in more detail below.
34. The sector subsequently saw the development of upstream and wholesale activities enabling such new market players to deliver their telecommunications services, such as carriers' carrier services, including direct/indirect transmission means, offerings of capacity, as well as international/domestic call termination services, i.e. the unbundled provision of all the elements necessary for an operator to carry international calls from end-to-end or close to, from their setting-up to their termination on the local loop, as an alternative to the traditional accounting rate system.

*The traditional and still prevailing accounting rate system*

35. Accounting rates were created at a time when each country had a monopoly provider of international services. An accounting rate is a negotiated rate between international carriers, premised on the idea that the carriers jointly provide international telephone

services by handing off traffic to each other at the half-way point between two countries. Therefore, an accounting rate in effect bundles the provision of an international half-circuit, international gateway switching, and the fee for the domestic termination of the call by carriers at each end.

36. When the telecommunications market in one country of a given country pair is liberalised, the problem then arises of redressing the balance of the relationship between the monopoly provider, and the suppliers of international telecommunications services in the liberalised country. This is why regulatory intervention took place in the form of proportionate return, and equal division of accounting rates. Under the proportionate return system an international carrier that enters into an operating agreement with a foreign correspondent should receive an allocation of return traffic from the foreign correspondent that is proportionate to the amount of traffic that the carrier sends outbound to the foreign correspondent. Equal division of accounting rates imposes an identical transfer price for every form of commercial relationship involving an international telephone service, in other words, no carrier can agree with a correspondent on a termination price which is different from the price charged by the same correspondent to other competing carriers in the same country.
37. The amount paid by the originating operator to the terminating operator for completing calls is usually half the accounting rate, and is known as the settlement rate. In practice operators set off the settlement rates they owe to each other, and if call traffic is in balance between the two countries concerned, very little money changes hands. But where the traffic flows are greater in one direction than the other, net cash flows can be set up. As a result, where traffic is imbalanced, the accounting rate may have significant consequences on operators' commercial strategies and options. If a carrier sends outbound a significantly higher volume of traffic to a foreign correspondent than he receives, the settlement payments to be made will reduce its ability to reduce its collection charges. Conversely, a carrier with a net traffic surplus would have little or no incentive to reduce the accounting rate because of the profits generated that way.
38. Over time the cost of international telecommunication has dropped, in recent years quite sharply, as a result of the reduced cost of both switching and transmission technology. However accounting rates generally have not fallen in line with the fall in underlying costs.
39. The WTO Agreement on liberalisation of basic telecommunications services together with liberalisation in Member States of the Community, should however have a significant impact on the current regime.
40. Under this agreement, major suppliers of those WTO Members that have made unlimited commitments on international telecommunication services and additional commitments on interconnection may for the time being maintain non cost-oriented accounting rates if they have not been required to grant cost-oriented interconnection, as this is not contrary to the additional commitments on interconnection. Discussions are currently taking place at the International Telecommunications Union (ITU), in order to reform the existing accounting rate system.

#### Direct transmission services

41. As a result of liberalisation and the entrance on the market of carriers and service providers that lack, in particular, international telecommunications facilities of their own, carrier activities consisting in the provision of direct transmission services were developed, namely wholesale IDD (basic service resale) and IPLC services. IPLCs are short-term contracts for utilisation of capacity on a wholesale purchase or lease basis, typically by customers with higher utilisation needs such as carriers or MNCs building their own international network. IPLCs are currently provided and charged in half circuits in most cases. An operator that would wish to control end-to-end the provision of international services on a given route, would in most cases seek to procure matching international half-circuits at both ends or whole circuits where available and permitted, in order to be able to self-correspond on that route. An MNC self-provisioning its corporate network would also have to purchase matching half-circuits from different suppliers on the various routes linking its various international sites. IPLCs are also used for the provision of International Simple Resale (ISR) where telephone services are provided by interconnecting the ISR carrier's circuits to the PSTN. ISR thus by-passes the accounting rate system by using private lines rather than the PSTN. First authorised in the United States and the United Kingdom in 1992, ISR is now legal in over 25 countries<sup>8</sup>.

#### Indirect transmission services

42. Furthermore, indirect international carriers' carrier services which offer alternatives to direct transmission on a country pair between carriers via the bilateral correspondent regime were developed. These include switched transit, dedicated transit, hubbing or re-origination services.
43. Switched transit is the transport of traffic over bilateral facilities from the originating carrier in country A to a transit carrier in country B and then from the transit carrier to the terminating carrier in country C, eliminating the need for direct bilateral facilities between the originating and terminating carriers, A and C. In a transit relationship, A and C are aware that A's traffic is being transported by B, and they each typically pay half of B's costs.
44. Dedicated transit is the offering of leased lines for the transit of traffic through the network of the transit carrier.
45. In hubbing or re-origination, A's traffic from A to C is routed via B to C as though it had originated in B. Under this arrangement, A pays B a fee, and B and C make their payment arrangements in accordance with the commercial arrangements and regulatory regime in effect for traffic between B and C rather than A and C.
46. Such services enable carriers to deliver their international traffic and provide carriers and resellers alike with alternatives to the direct routing of traffic between a country pair under the bilateral correspondent system (accounting rates system) – wholesale IDDs, and IPLCs.

#### Capacity offerings

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<sup>8</sup> Source : Telegeography 99.

47. As regards transmission means and underlying infrastructures, capacity is made available to those operators and service providers which lack their own facilities in the form of leased lines, both national and international, access to satellites capacity and spatial segments, as well as submarine cable capacity through Indefeasible Rights of Use (IRUs) on submarine cables, international half-circuits or whole circuits where available and permitted, etc. IRUs are a means by which operators which are not members of the consortium that owns a particular submarine cable can have access to and full usage on a long term basis of capacity on that cable, while not having any ownership interests/rights in the consortium. New submarine cables were subsequently built. Today, for example, there is an increasing number of cables that run or will run between the United Kingdom and the East Coast of America and carry or will carry traffic on this route (e.g. TAT8 (1988), TAT9 (1991), TAT10 (1992), TAT11 (1993), TAT12/13 (1995, with subsequent up-grades in 1998 and 1999), TAT 14 (2000), PTAT 1 (1989), Gemini (MCI/Worldcom – Cable & Wireless -1997), AC 1 (Global Crossing - 1998 and subsequent up-grade in 1999), and foreseen FLAG Atlantic 1 (Global TeleSystems Group - 2000) and Oxygen (end 2000)), which are either consortia (TAT cables) or privately owned (others). As a result, while, at the time of the BT/MCI (II) decision<sup>9</sup>, there were 4517 transatlantic 2mbit/s circuits (or “E1s”), this capacity will be more than 10 times higher once these new cables are operational and planned up-grades have taken place.

Cable landing stations, backhauls, interconnection services and access to the end-user

48. When not relying on the traditional accounting rates system for the delivery of international calls or any indirect transmission solution described above, an operator wishing to complete an international call would not only need to procure international capacity, as explained above, but would also need to obtain access to a certain number of facilities and purchase some interconnection services in the destination country. As explained below, in many instances, at some stage, new entrants would have to procure termination services and/or leased lines or other facilities from the incumbent.
49. First of all, as any traffic carried on an international cable has to pass through the cable head facilities at each end in order to be terminated on the domestic network in the country concerned, new entrants would need to have access to cable landing stations, as well as to the cables that run from those cable landing stations to a suitable point of interconnection, namely backhauls.
50. New entrants would also need to purchase domestic interconnection services, either from the incumbent or from some alternative domestic carrier, either at the international gateway, or further down at some point of the trunk backbone of the PSTN (double transit interconnection services), or at a regional (single transit interconnection services) or local level in order to be able to terminate international telecommunications services. The level at which these new entrants would interconnect would depend on whether they are authorised to install and operate networks in the country where they intend to terminate calls, and on how extensive their domestic network in that country is. To implement such a network, or complete their own network, these operators could alternatively/additionally lease lines and put

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<sup>9</sup> Commission Decision 97/815/EC in Case IV/M.856 - BT/MCI II, L 336, 8.12.97, p. 1.

on top of these lines their own routers, switches and other necessary equipment, subject to the issuance of a proper authorisation to do so.

51. Arriving at the local loop level, depending on whether the end-user is a business or a residential user, and also depending on the type and volume of traffic involved, the traffic considered would be terminated in a different way. In this regard, it is important to note that while competition has developed in the long distance calls area, in most liberalised countries, alternative operators to the incumbent are usually still not in a position to be able to control the access to the end-user and terminate traffic on their own network, given the high investments required to build a local loop network. They would therefore in most instances seek solutions enabling them to by-pass the incumbent's local loop, where no alternative local loop, in the form of e.g. cable networks, is available.
52. Such alternative solutions could involve the renting of a dedicated line up to the end-users' premises, the usage of VSATs (Very Small Aperture Terminals) satellites, or the implementation of a wireless local loop, or where available, requesting direct access to the end-user through the so-called unbundling of the local loop.
53. However, in cases where the volume of traffic generated would not justify the use of either a dedicated access or VSAT solution, or investment in a radio local loop, and/or because of specific quality requirements that a VSAT solution or wireless local loop could not meet (lack of redundancy means, quality of transmission depending on weather conditions for VSAT, lack of transmission speed and bandwidth for wireless local loop, etc.) the traffic would have to be handed over to the local loop operator to terminate the call.
54. Given that wireless local loops are costly and do not currently support broadband applications, that VSAT solutions would not constitute an economically viable alternative where low volumes of traffic are involved, or in cases where wireline solutions are preferred by end-users for reliability/redundancy/quality reasons, and that leased lines would not be economically viable either in case of low volumes of traffic, it would appear that, in those areas where no alternative wireline local loop (e.g. cable networks) exist, the unbundling of the local loop and implementation of so-called xDSL (digital subscriber lines) technologies would provide in most cases the only viable alternative to the reliance on the local loop operator in order to offer high speed access to broadband services. OFTEL, the British telecommunications regulator, launched a public consultation on the unbundling of the local loop in December 1998.

#### *Evolution of technologies and of the nature of communication services/transmission means*

55. Voice traffic originally constituted the bulk of telecommunications services, and relied on PSTNs. Data transmission services developed later, thanks in particular to the development of the IT sector and to the convergence of IT and telecommunications industries. Such data transmission services were primarily provided on PSTNs using the circuit switched technology used for voice services. In such a case the whole circuit used for the transmission of the call between the two networks' termination points between which the communication is taking place is entirely reserved for and dedicated to this communication as long as it is taking place.

56. Packet-based transmission on the basis of standards such as X.25, Frame Relay or ATM (Asynchronous Transfer Mode) were then developed, enabling faster data communications and a more efficient usage of capacity, called bandwidth in telecommunications, as no circuit is exclusively dedicated to a single call. The data to be transmitted is broken down into packets, which are transmitted independently one from another on the network, until they are reconciled into the original data when the recipient of the data communication is reached. Such services are enabled by specific equipment such as advanced switches, multiplexers and/or routers which are put on top of underlying transport cables. As a result of the development of IT and convergence of IT with telecommunications, more and more sophisticated communication services are developed, and in particular advanced data network services such as virtual private networks, managed bandwidth, etc.. It is estimated that as of today, the volume of data traffic is as high as that of voice traffic, and it is expected to increase exponentially, while the volume of voice traffic would only slightly increase in comparison in the coming years.

*Technological evolution and emergence of IP- based services and networks*

57. In this regard, the emergence and development of the public Internet, i.e. a network of open and public networks based on the Internet Protocol, constituted an essential step in the increase of data traffic. The public Internet has emerged as a major, new medium for inter-computer communications, and as an alternative, in certain cases, to the traditional PSTN and the other pre-existing voice and data networks standards described above.
58. TCP/IP (Transmission Control Protocol/Internet Protocol) was first developed by the US Defence Department, before being adopted by academic and business institutions, and later on by the public at large, as the public Internet developed. This transmission protocol enables networks to carry data or voice at lower costs and higher standards than classical protocols. Its interest lies in particular in the fact that it permits an end-to-end connectivity of services and applications and interoperability of underlying networks whether they are based on the same or different lower-level transmission protocols such as Frame Relay, SDH (Synchronous Digital Hierarchy)/SONET or ATM on top of which it can run. Furthermore, and thanks to this characteristic, IP is also an enabler of applications, as the intelligence of the network is no longer in the network itself, but resides within the users' equipment: by implementing a global IP-based platform, i.e. a platform analogous to a PC "operating system" on top of the network and using Applications Programming Interfaces (APIs) made available to the users, the implementation of applications throughout such a global network could be set up, such as e-commerce applications enabling for example an MNC to make secure electronic transactions with its main suppliers/customers. APIs can be defined as the interfaces by which an application program accesses an operating system and other services.
59. The services provided over the public Internet are currently not secured, and often slow. The slowness of such services over the public Internet is not inherent to the Internet Protocol, which enables moving packets of data at speeds measured in hundreds of gigabits across geographical boundaries on a single underlying network. Such slowness is due to the high volumes of traffic sent over the public Internet and the existence of traffic bottlenecks. As a result, any transmission is subject to unpredictable congestion risk, making it difficult or impossible to guarantee the same

level of reliability as produced by the PSTNs or proprietary packet-switched networks. Such delays are unacceptable to customers, in particular corporate customers, which demand high quality, reliability and security for their telecommunications services. Multinational customers therefore do not rely on the public Internet in view of such a lack of security.

60. Therefore, proprietary networks are either being built or will be built or re-engineered to permit existing computer communications and IT systems to function more efficiently, while using the Internet Protocol. A certain number of operators have started implementing or have announced their intention to implement proprietary IP based networks, which will combine both the advantages and connectivity of IP based networks and the reliability and security of proprietary networks. To do so, they either up-grade existing Frame Relay, ATM or SDH/SONET networks by adding the necessary IP routers on top of these various protocols, which will enable the provision of IP-based services on such networks, or build truly pure IP networks.
61. In this regard, it is important to underline that there are different types of so-called “IP-based networks”. At one extreme is the “pure” IP network. In this network, all traffic (data, voice, video, etc.) is converted into IP packets as it enters the network through an IP router/switch. The router/switch converts the electrical signal to an optical signal and sends the IP packets over an optical fibre wavelength. It is probable that such technology will see wider availability over the next several years, but will be limited in use to very high capacity routes (e.g. 2.5 gigabits/second where data volumes warrant it). In virtually all cases today, and possibly over most network routes in the future, IP packets are and will be transmitted on top of other networks. This is most commonly the case for corporate Intranets. Most typically, IP packets are transferred over either an ATM backbone network (which can operate on top of an SDH/SONET transmission system) or directly over an SDH/SONET transmission system. In some cases, IP packets are transferred over a Frame relay backbone. Except in the case of residential dial-up access to an Internet access node, IP traffic is not normally sent over public switched circuits as the need to hold open the circuit for the duration of the connections reduces the cost advantages of using IP. In conclusion, as of today, most so-called “IP-networks”, including the one to be built by the joint venture, are in fact layered networks, as described above, with SDH transmission, ATM multiplexing and switching, Frame Relay service, and even PSTN-type circuit-switching beneath the IP layer.
62. Finally, as IP-based services demand not only increasing transmission speeds, but also capacity, it is important to note the development of new technologies such as dense wave division multiplexing (DWDM), which uses multiple wavelengths, or colours of light, to carry many channels of digital information at once over each physical fibre. Together with SDH digital transmission standard, ATM and IP protocols, these new technologies together transform the capacity and data speeds available from fibre already in the ground, making it possible to up-grade capacity and performance massively.

#### Evolution of the market structure

63. With the liberalisation and other structural changes outlined above, recent years have witnessed the emergence of global players in order to answer multinational corporations’ demands for global data and corporate voice communications. Most of



these global players are being formed through alliances between traditional telecommunications incumbents. For example, BT formed the Concert joint venture with its former partner, MCI, before notifying its intention to enter into a full merger operation with MCI. However, following the merger between MCI and WorldCom, this operation never took place, and instead, BT arranged the present agreement with AT&T. France Telecom, Deutsche Telekom and Sprint set up the Global One joint venture. PTT Netherlands, Telia, Swisscom have also formed the Unisource joint venture. Unisource eventually formed a further alliance with AT&T (AUCS). AT&T put in place the WorldPartners alliance with KDD, Singapore Telecom, Unisource and Telstra. Other companies such as Equant or IBM also started to offer international telecommunications services from their own network obtained through leasing arrangements with a number of telecom operators, together with IT services or managed network solutions/outsourcing, in the case of IBM.

64. Regarding the provision of international services in the United Kingdom, and in particular the provision of international services on the UK-US route, it should be noted that the operation will provide the joint-venture with the possibility of 'self-correspondence', that is to say, it will be able to carry transatlantic traffic over whole circuits owned or operated entirely by itself. However, whereas up to the time of the BT/MCI (II) decision, BT had had to face the competition of Mercury (now Cable & Wireless Communications) for the provision of international services in the United Kingdom. The present operation takes place against a background of liberalisation in the United Kingdom, with the issuing of more than 100 international facilities licences, which have now become operational. Some of these competitors on the transatlantic routes have, as a result of this liberalisation, been able to acquire facilities licences on both ends of the transatlantic routes as well as whole circuits and/or matched half-circuits, and have started to practise their own end-to-end correspondence. Additionally, significant amounts of capacity have been made available since the BT/MCI (II) decision on the UK-US route with the laying of new submarine cables or the up-grading of existing ones as set out above.

## **IX. COMPETITIVE ASSESSMENT**

### **A. Analysis under Article 2(3) of the Merger Regulation**

#### **A.1. Relevant markets**

65. In their notification, the parties identified the global market for 'global telecommunications services to multinational corporate customers', the 'UK market for the provision of international telecommunications services on the UK-US route', as well as a number of UK markets for certain UK services (business retail basic voice services –local, national and international, residential retail basic voice services –local, national, international, wholesale carrier services, domestic value-added voice services, teleconferencing, telex, domestic data services, Internet access, outsourcing services and mobile services) as relevant markets for the assessment of the present operation. They submitted that the relationship between the parties on these markets is both horizontal and vertical. As regards the horizontal aspects, they noted that the joint venture will result in the merger of the parties' activities in the first market they identified. They further submitted that horizontal relationships may also arise in respect of the other markets, because AT&T is currently active in the United Kingdom. Finally, they recognised that vertical relationships also existed since AT&T

and BT are both international correspondents supplying one another with the use of international and domestic telecommunications facilities and services.

66. The two main activities of the joint venture at the time of its establishment will be to provide **global telecommunications services** to multinational corporate customers (MNCs), as well as **international carrier services** to other carriers and resellers.
67. The Commission in its decision to initiate proceedings identified the following activities as possibly being relevant markets for the assessment of the proposed operation: the provision of global telecommunications services to multinational companies as described in various past cases, though under different terminologies, as consisting of the provision of packages of customised value-added and enhanced global corporate telecommunications services<sup>10</sup>, the provision of international carrier services as described in past cases as well<sup>11</sup>, the provision of UK-originated wholesale IDD services on the UK-US route and the provision of IPLCs on the UK-US route, as described in the BT/MCI (II) decision as being relevant activities with regard to the provision in the United Kingdom of international voice telephony on the UK-US route, as well as some UK services identified by the parties according to OFTEL characterisation.

### ***Relevant product markets***

#### Global telecommunications services

68. In their notification, the parties identified the market for 'global telecommunications services to multinational corporate customers' as being one of the relevant product markets possibly affected by the operation. They further stated that such a market for 'global telecommunications services' had indeed been described by the Commission in several previous decisions, though with various slight differences in the terminology employed to designate such a market. The parties in particular referred to the BT/MCI (II) decision, where the Commission had made reference to the market for the provision of global telecommunications services as consisting of the market for the provision of value-added and enhanced services to multinational business customers.
69. The parties further said that the slight differences in the terminology employed by the Commission in its previous decisions did not reflect a different market reality. They submitted that although the range and characteristics of the 'global telecommunications services provided to multinational customers' are in a state of constant evolution as a result of regulatory developments, technological changes and shifting customer requirements, the market definitions used in the Commission's recent decisions relating to global telecommunications alliances were still appropriate for the purpose of assessing the proposed joint venture. In those various decisions, the

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<sup>10</sup> Commission Decision 94/579/EC in Case No IV/34.857 - BT/MCI, OJ L 223, 27.08.94, p. 36 ("international value-added and enhanced services"); Commission Decision 96/546/EC in Case No IV/35.337 - Atlas, OJ L 239, 19.9.96, p. 23 and Commission Decision 96/547/EC in Case No IV/35.617 - Phoenix/Global One, OJ L 239, 19.9.96, p. 57 ("customised packages of corporate telecommunications services"); Commission Decision 97/781/EC in Case No IV/35.738 - Uniworld, OJ L 318, 20.11.97, p. 24 ("non-reserved corporate telecommunications services"); the BT/MCI (II) decision (global telecommunications services").

<sup>11</sup> The Phoenix/Global One decision; Commission Decision 97/780/EC in Case IV/35.830 - Unisource, OJ L 318, 20.11.97, p.1.

Commission had in particular described some of the most important features of the services included in the relevant product market considered, e.g. tailored capacity allocation, customised and/or one-stop billing, help-desk and technical assistance around the clock in local language, end-to-end seamless provision, provision on a one-stop-shop basis, provision of these services over high-speed large capacity leased lines linking sophisticated equipment on customer premises to the service provider's nodes or other sophisticated means such as satellite or mobile radio capacity, the provider of such services taking full responsibility for all services contained in the package from "end to end".

70. The parties argued that the market for the provision of 'global telecommunications services to multinational corporate customers' is one single relevant product market as the conditions of competition would be similar for all products and as multinational customers demand comprehensive services for global telecommunications. The parties further explained that global multinational companies are now increasingly seeking global services in a seamless, end-to-end environment. Seeking to define narrow product markets for isolated services included in the range of global services would, according to the parties, give a misleading picture as customers frequently alter the range of products they require, as their own needs and the relevant technologies evolve.
71. However, several third parties have suggested that the provision of global telecommunications services ought to be broken down into a number of narrower product markets. One third party in particular stated that from the demand side, individual services as listed above have their own prices, service characteristics and quality criteria which differ widely between service offerings.
72. Indeed, not all multinational corporate customers take up all of the above range of services in each and every case from the same provider. From the information provided by third parties, various patterns of purchasing global telecommunications services can be distinguished. Some multinational companies seem to purchase a wide range of global telecommunications services, for which they can only turn to a limited number of global suppliers with requests for proposals. Some then purchase all of their international telecommunications requirements from one single provider or more often, two or a very limited number of suppliers, in the form of packages of services, and others source on a service by service basis. In most cases the same set of global suppliers competes to offer these services. Moreover, while some services included in the packages of customised global corporate telecommunications services may be priced individually, it appears, from replies received from third parties, that suppliers of such packages of customised global corporate telecommunications services tend to offer a global price for the package of services supplied.
73. Taking into account the above, there appears to be a market for the provision of packages of customised enhanced and value-added global corporate telecommunications services, hereinafter referred to as the market for the provision of global telecommunications services. For the purpose of the assessment of the present operation, this market constitutes one single relevant product market that should not be broken down into narrower product markets for isolated services included in the range of global telecommunications services. The exact definition of this product

market could nevertheless be left open as it would not affect the conclusions of the Commission's analysis.

#### International carrier services

74. In the past, the Commission has looked at direct transmission services (namely wholesale IDD and IPLCs services) on a route-by-route basis in the framework of the assessment of the provision of international voice telephony. However, it has also taken the view that the increasing importance of switched transit, dedicated transit, re-origination, least-cost routing and hubbing services may also give rise to a separate product market for these services that can be analysed without reference to a distinct origin and destination pair.
75. In its Unisource decision, the Commission has in particular identified a separate relevant product market for carrier services, consisting of the provision of carrier services on a global basis, not restricted to a particular country-pair. The Commission described this market as comprising the lease of transmission capacity and the provision of related services to third-party telecommunications traffic carriers and services providers, with the most relevant of such services being switched transit, dedicated transit, traffic hubbing offerings and reseller services for service providers without international telecommunications facilities of their own. In the Unisource decision, the Commission indicated that the demand for such services was increasingly driven by domestic alternative carriers in liberalised countries concerned at entrusting their international traffic to the incumbent operator, and therefore seeking an alternative to the incumbent to handle their international traffic.
76. Several third parties have recognised that some carriers have a demand for connection to a collection of many other countries and carriers, and want to purchase service to this collection of points from one or a small number of suppliers, rather than on an individual location country-pair by country-pair. For this demand, service to carry traffic between individual location pairs would not be a good substitute. Only carriers that can supply service to a wide range of the desired locations could compete to satisfy this demand. One third party further indicated that the demand for service to collections of points is most pronounced for service to locations other than countries with the most international traffic. Another third party also indicated that, as a customer of carrier services, they were offered incentives to buy package/volume deals.
77. However, the parties as well as some other third parties have argued that the provision of carrier services should be looked at in terms of country pairs routes, as services on a given country pair route would not be substitutable with services on any other country pair route.
78. The Commission therefore also examined the situation with regard to the availability of capacity and competitiveness of provision of carrier services on a number of country pairs routes. However, since it did not find any evidence of creation or strengthening of any dominant position in the area of international carrier services resulting directly from the proposed operation that would significantly impede effective competition in the common market, either globally, regionally, or on a given country-pair route, the question of whether the provision of carrier services should be looked at in terms of country pairs routes or on a more global basis may be left open.

79. In light of the above, and in line with the approach taken in its Unisource decision, the Commission has identified as relevant for the assessment of the present case the market for the provision of international carrier services. In any event, as it does not affect the conclusions of the Commission's analysis, the exact definition of this market can be left open.

#### International voice telephony services on the UK-US route

80. The parties also identified, as being relevant for the assessment of the case, a market for the provision of international telecommunications services on the UK-US route originating in the United Kingdom, and made reference to the BT/MCI (II) decision, where the Commission had defined a UK market for the provision of international voice telephony on the UK-US route.
81. The parties described the services coming within this relevant product market as comprising both retail services – IDD and IPLCs -, as well as wholesale carrier services – including wholesale IDD, IPLCs, transit and re-origination through third countries, and the provision of cable and satellite capacity on this route.
82. In its BT/MCI (II) decision, the Commission had reasoned that from the customer's perspective, the market had to be defined with reference to traffic between any country pair. This is because different international country pairs cannot be considered as viable demand substitutes.
83. Having investigated the possibility of hubbing, i.e. re-routing UK-US traffic through third countries, as well as whether calling cards or call-back services represented a significant competitive constraint on the provision of international voice telephony services on the UK-US route, the Commission concluded that hubbing does not appear a viable commercial possibility on that route at present, nor do calling cards and call-back represent a significant constraint on the provision of the services considered on the UK-US route.
84. In accordance with its BT/MCI (II) decision, the Commission has concluded that for the purpose of the assessment of the notified operation, the market for the provision of international voice telephony services could be considered a relevant product market, for which both the share of capacity owned and volumes of bilateral traffic carried on the UK-US route constituted relevant indicators.

#### Certain UK services

85. The parties have identified a large number of UK based services, in relation to certain of which horizontal and/or vertical relationships arise. These services are:
- business retail basic voice services (local, national and international),
  - residential retail basic voice services (local, national and international),
  - wholesale carriers services (including interconnection services, and in particular termination of international calls services, provision of backhauls, of private circuits and other operator services),
  - domestic value added voice services (including national freephone, calling cards, and advanced voice services such as domestic voice virtual private networks),

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- teleconferencing (including both audio- and video-conferencing),
  - telex,
  - domestic data services,
  - Internet access,
  - outsourcing services and
  - mobile services.
86. These services are not in markets on which the joint venture will be operating, but on which BT and AT&T are currently operating. BT has a vertical relationship with AT&T on the wholesale carriers services market, for example, for the provision of international call termination services.
87. These service divisions are based on market classifications used by the UK regulator, OFTEL. According to the notifying parties, each of these activities is not necessarily a market in itself. They have however adopted these service divisions set out by OFTEL and provided OFTEL's most recent quoted market shares for those services as a practical basis for discussions.
88. In the light of the creation of the joint venture, which will offer global telecommunications services and international carrier services, the market investigation conducted by the Commission confirmed that the following activities were relevant to the assessment of the present operation and could be identified as relevant product markets, the exact definition of which could nevertheless be left open as it would not affect the conclusions of the Commission's analysis.
- business retail basic voice services (local, national and international),
  - residential retail basic voice services (local, national and international),
  - domestic wholesale carriers services,
  - domestic value added voice services,
  - teleconferencing,
  - domestic data services and
  - Internet access (both dial-up and dedicated access)

## **Relevant geographic markets**

### Global telecommunications services

89. According to the notifying parties, the market for the provision of global telecommunications services is world-wide. This has been substantially confirmed by third parties in their responses to the Commission's inquiry. The relevant geographic market for the provision of global telecommunications services can indeed be considered to be global because both the services in question, as well as the customers it intends to serve, are truly international/global – in the sense of intercontinental.

### International carrier services

90. As stated in the Unisource decision, by their very nature, both supply and demand for international 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 either use 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 a number of bilateral agreements with individual carriers. For international carrier services the geographic market of relevance for the purposes of assessing the current operation is therefore at least European wide and possibly global.

#### International voice telephony services on the UK-US route

91. The parties are both active in the provision of international voice telephony services. Both are licensed to operate as international facilities operators in their respective countries, and AT&T, through its various subsidiaries, has also acquired the status of IFL operator in the United Kingdom and is active in the United Kingdom in the provision of international voice telephony services. Both parties own interests in transatlantic cables.
92. In its BT/MCI (II) decision, the Commission had identified two distinct geographic markets within any international route, each comprised of the originating bilateral traffic from the countries concerned. Therefore, the relevant market with regard to the provision of international voice telephony services for the assessment of the notified operation is the UK market for the provision of international voice telephony services on the UK-US route.

#### Certain UK services

93. The relevant geographic markets for business retail basic voice services (local, national and international), residential retail basic voice services (local, national and international), wholesale carriers services, domestic value added voice services, teleconferencing, domestic data services and Internet access (both dial-up and dedicated access) considered as relevant product markets appear to be national. This is because for most of these services, a nationally granted licence is required or a certain presence is required within the country concerned to provide a service (such as a local rate telephone number for dial-up Internet access).

#### Conclusion

94. The subsequent inquiry has shown that in these different areas, including the area of the provision of packages of customised global corporate telecommunications services as indicated below, the existing competitive conditions would not be affected to any significant extent as a direct result of the proposed operation. Therefore, the exact definition of the corresponding relevant markets may be left open, as it would not affect the conclusions of the Commission's analysis.

## **A.2 Dominance**

95. The Commission examined four major areas in its investigation of the proposed joint venture between BT and AT&T under Article 2 (3) of the Merger Regulation. These included global telecommunications services for multinational corporate customers, international carrier services, telecommunications services on the UK-US route and certain services in the United Kingdom.

96. Following its investigation, the Commission however found that the proposed joint venture will not create or strengthen a dominant position in any of the areas identified above as a result of which effective competition would be significantly impeded in the common market.

### **Global telecommunications services**

97. Concerning the provision of global telecommunications services to multinational corporate customers, the Commission further investigated the market described under different terminologies in previous cases as consisting of the provision of packages of customised value-added and enhanced global corporate telecommunications services.
98. In this global market, the Commission, having identified the joint venture's competitors, and used different methodologies, calculated that the parties would have a maximum combined market share of about [35-45%]\* to more than [40-50%]\* depending on the method of market share calculation used. (see paragraph 105 and following). The Commission also investigated whether there were any bottlenecks that would constitute barriers to entry for new entrants or whether the joint venture would benefit from unmatchable advantages. It in particular investigated whether the current strong position on the local loop that BT has in the United Kingdom and/or the possibility of the joint venture locking in customers by means of APIs could create or strengthen a dominant position as the result of which effective competition would be significantly impeded in the common market.

### *The competitors*

99. In their notification, the parties argued that the global telecommunications needs of MNCs are met by a wide variety of local telecom operators (COLT, Esprit Telecom), global operators or alliances like MCI/Worldcom, Equant, C&W, Unisource, Infonet (controlled by Unisource plus Telefónica, KDD and Telstra), Global One, Swift, and IT/computing companies such as GE Information Services (GEIS), IBM and EDS. They argued in particular that suppliers do not need to have a global presence to operate on the market for global services, nor do they need to be able to satisfy all the communication requirements of multinational companies. According to the parties, many MNCs would still be reluctant to entrust all their telecommunications needs to one or a limited number of operators, or are not convinced that a single player can satisfy the breadth of their telecommunications needs. The parties further added that a significant number of operators and suppliers also specialise in the provision of a more limited set of products and that these players have a significant effect on both customers and on the competitive assessment.
100. On the basis of the information received by the Commission following its in-depth investigation, local operators such as Belgacom, Telstra and Darome and France Telecom were indeed mentioned by some of the MNCs as suppliers of some of their global telecommunications services. However, from studies like that of the Yankee Group<sup>12</sup>, it follows that users seek consistent global offerings with true global coverage and therefore tend to address their requests for provision of services rather

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<sup>12</sup> 'What do users want? Yankee Group User Survey Results', The Yankee Group 1997.



to global than to local operators. Local operators such as COLT or Esprit Telecom do not own a global network and would have to buy the capacity needed on an ad-hoc basis from different third parties world-wide in order to assemble such a network with intercontinental capabilities. For this reason, it can be argued that, as local operators, they would not be able to provide a multinational company requesting global services comprising the provision of services to and from other continents than Europe with the requested services, at least not with the reliability (as they would depend on the quality of the various network components procured from various operators, which they could not control on a seamless and integrated manner) and the availability (i.e. the amount of time the network is available for processing or transporting data) that MNCs, according to some of the third parties, currently demand. Therefore, it appears that these local operators as such should not necessarily be regarded as actual competitors on the market for global telecommunications services.

101. Moreover, Swift, a specialised carrier created by the banking industry under a co-operative structure, could be regarded as currently not being an active competitor on the relevant market. It operates a global network providing secured data communications services, where the added value lies in the recognised legal value of authenticated SWIFT transactions, to the financial community across the world for inter-banks transactions and as such cannot be considered to be actually competing with the joint venture for the provision of global telecommunications services consisting of the provision of packages of customised value-added and enhanced global corporate telecommunications services.
102. IT/computing companies such as CSC, EDS, offering services like management and information technology consulting, systems design and integration, IBM, offering sophisticated managed network solutions and outsourcing services, GEIS, expert in global electronic commerce and offering global networked solutions, electronic catalogues and electronic marketplaces and Infonet, providing mostly global network services for connectivity, electronic commerce and enterprise systems solutions, in general can not be considered as actual competitors on the market for customised global corporate telecommunications services. This is because these companies are competing on downstream markets from that of the joint venture. They do not generally speaking supply global telecommunications services to MNCs on a stand-alone basis. Where they supply such global telecommunications services, they would tend to supply such services as part of an integrated offer, where the added value lies in the IT component of the services provided, such as system integration, or additional services offered, such as consulting or outsourcing. The number of actual competitors on the relevant market therefore would seem to be more limited than the number argued by the parties. Moreover, IBM has announced (in December 1998) that it proposes to sell its network to AT&T and to concentrate its activities in other areas, and thus would not be active in the concerned area anymore.
103. Furthermore, following its subsequent investigation, some MNCs, in reply to the information requested, indicated that there was always a short list of suppliers that they could always consider when they issue a request for proposals (BT/Concert, AT&T/AUCS/Unisource/WorldPartners, Global One, Equant and Cable & Wireless). There did not seem to be any sub-category of customers who would consider only AT&T and BT as their potential suppliers. Information provided by third parties regarding their bid history over the last year for providing global

telecommunications services to MNCs confirmed that it was generally the same short list of suppliers which bid for those contracts, namely Equant, MCI Worldcom, BT, AT&T, C&W and Global One. In this context, it should be noted that the WorldPartners alliance is likely to disappear, further to the creation of the Global Venture, as is AUCS, once Unisource is left without a US partner.

104. The Commission concludes from the above that the main competitors to the Global Venture and its parents on the market for the provision of global telecommunications services to multinational corporate customers to be considered in the framework of the assessment of the competitive conditions, are the global operators such as Global One, MCI/WorldCom, Equant and Cable & Wireless. Therefore, the narrowest possible market on which the notified concentration could be assessed would consist of only five players, namely the Global Venture and its parents, MCI/WorldCom, Global One, Equant and Cable & Wireless.

Market shares analysis

105. According to the parties in their notification, their combined market share on the market for the provision of global telecommunications services, would vary between [1-10%]\*, depending on the total market size which, on the basis of different independent studies, is estimated at between USD 19 billion and USD 33 billion for 1997.
106. The Commission does not agree with these market shares given by the notifying parties. The notifying parties include a large number of companies in the market which, as set out above, the Commission does not consider to be on the market as identified above. The Commission has sought to estimate market shares on the narrowest possible market which could be identified. To do so, it has calculated market shares using two main methods<sup>13</sup>. One of the methods involved collecting data from companies on the market concerned on the basis of the sales of global telecommunications services as defined by a list of products which had been drawn up by the Commission on the basis of comments from the parties and third parties. These revenue figures represented the total sales for these global telecommunications services for the companies concerned. The results of this first method which the Commission obtained from the investigation of the market on a revenue basis for 1998 were as follows:

BT/AT&T	[40-50%]*
GlobalOne	[20-30%]*
MCI/WorldCom	[10-20%]*
Equant	[10-20%]*

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<sup>13</sup> The data in the tables below excludes the revenue of a proportion of existing BT Concert customers for whom MCI Worldcom is currently providing the billing. The network which these customers is using, however, is the Concert network. It is therefore possible that some of these customers will wish to avoid unnecessary switching costs by continuing using the Concert network and migrate to the joint venture's products, which would be distributed by AT&T in the United States.

C&W	[0-10%]*
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107. The above methodology was identified by BT as its preferred method of calculating market share.

108. A second method was based on a sample of 200 companies who formed the top international telecommunications spenders world-wide. This list was extracted from a wider list of the top 2000 companies by the same measurement. These 200 companies accounted for at least 35% of the telecommunications expenditure of the 2000 companies. The Commission then collected data from the companies on the market in order to discover the revenues which each company earned from global network services. In addition, information was requested from companies about whether they bid for contracts in this area from the customers concerned, whether they supplied any global network services and who was the largest supplier of these services to the companies concerned. The calculation using the data on the top 200 companies under this second method yielded the following results for 1998:

BT/AT&T <sup>14</sup>	[35-45%]*
GlobalOne	[10-20%]*
MCI/WorldCom	[20-30%]*
Equant	[10-20%]*
C&W	[0-10%]*

109. A third party carried out an analysis of the sample of 2000 companies mentioned above under the second method. Using the parties' assumptions about the likely division of the customers of Concert following the termination of the MCI WorldCom Concert distribution agreement, this would make BT/AT&T the principal supplier to [40-50%]\* of those top 2000 multinational customers. The same third party also carried out a revenue analysis. The total revenues from international traffic from Multinational Customers (17000 companies) in 2000 is estimated to be USD [..]\* ?. The joint venture's revenues in that market segment will be USD [...] ? or [40-50%]\* ?. The total revenue from international traffic from the top 2000 multinational customers amounts to USD [...] ? in the year 2000. The joint venture's revenues from those companies will be USD [...] ? or again [40-50%]\*.

110. The Commission also investigated the possibility of breaking down the market for the provision of global telecommunications services on a product by product basis e.g. Frame Relay, data VPN, voice VPN, etc. by collecting revenue figures both from third parties and MNCs for every global telecommunication service to be

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<sup>14</sup> This data is 1997 data increased by 12%. This rate of increase is a conservative estimate compared with the parties own growth rate set out in their business plan.

provided by the joint venture. However, no serious competition concerns were found on this basis.

111. Although these combined market shares, as found in the worst case scenario and in the narrowest possible market definition, are relatively high, they do not by themselves indicate a creation of a dominant position because of the presence of substantial competitors like Sprint/Global One, MCI/WorldCom, Equant and C&W, who are able to compete on relatively equal terms with the joint venture. These players will exercise competitive constraints on the notifying parties at the time of a bid for a contract from a customer, either because they are requested to bid as well by the customer or because the parties know that, faced with sophisticated customers, they could not impose their conditions because in that case the customer would extend the request for proposals to the other possible providers.
112. For example, MCI/WorldCom, the second largest long-distance provider in the United States, is an important market player that owns and operates its own network. It established itself as a local, facilities-based competitor in 16 countries throughout Europe, North and South America and the Asia-Pacific region and offers integrated voice, data and Internet communications services. It operates a global network and is present in 65 countries .
113. Equant operates and manages what it claims to be the world's largest telecommunications network, spreading over 220 countries and territories with more than 120000 user connections world-wide and a customer base which include multinationals like American Express, ING Bank, P&O Nedlloyd, Rhone-Poulenc, Samsung and Shell. Furthermore, Equant recently announced four new first-to-market global offerings that utilise IP-based technology on its global data network<sup>15</sup>.
114. Considering the strong presence and potential of these global players, the proposed joint venture would not be in a position to act independently from these competitors.
115. Furthermore, such a dominant position would not be sustainable as MNCs themselves, are nowadays sophisticated and powerful enough to look for alternative suppliers in reaction to price increases, and dictate their demands. The replies received by the Commission confirmed that most MNCs would re-tender following an increase (of 5%) of prices of services. Studies like the Yankee Group Study mentioned earlier also show that service costs are still considered by users to be important criteria when choosing suppliers. Moreover, one of the MNCs added that although up until recent times contracts were generally concluded for five year periods, in view of the volatility of the markets concerned and the pace of technical development, most contracts currently concluded had a duration of not more than one year. Provided that the MNC is satisfied with the services provided, it may extend the duration of the contract by another year but if not satisfied it would switch to another supplier.
116. In addition to the competitive constraints imposed by actual competitors, the parties will be facing potential competition on the part of other companies. Indeed, neither the IT/computing companies mentioned above nor the local operators should be

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<sup>15</sup> On 2 March 1999, Equant moreover invested \$100 million in global bandwidth.

excluded as potential competitors on the fast-moving market for the provision of global telecommunications services. Local operators could e.g. form strategic alliances, ventures or mergers, as some of them indeed have done or are in the process of doing (e.g. KPN/Qwest), which would enable them adequately to meet corporate customers' global requests. An example of the possibilities to enter the market for the provision of global telecommunications services is Global Crossing Ltd. In the space of two years it managed to build its own global network in creating the first independent, seamless, world-wide high capacity undersea fibre optic network, and it recently announced a merger with Frontier Corporation, one of the leading providers of facilities-based integrated communications and Internet services in the United States. The combination of these two companies would create the first owned and operated global IP-based fibre optic network able to provide customers with integrated world-wide Internet, data, long distance, telephone and conferencing services.

117. Finally, the parties have argued that is not necessary for a company entering this market to own underlying capacity/facilities. Indeed, they claim that of the existing global players competing on this market, only MCI WorldCom and C&W appear to have extensive world-wide facilities-based networks that they own, while others largely rely on leased lines. But in any case, even if facilities are necessary, capacity costs decrease fast, which would enable those operators to compete on a competitive cost base, at least in the longer term.
118. Although active on a downstream market, IT/computing companies which currently provide integrated managed network/IT solutions and outsourcing services, together, in certain cases, with the underlying global telecommunications services, could enter the relevant market, which can be considered as highly competitive and fast-moving, in reaction to a price increase decided by the joint venture. They already appear on the lists of current or possible suppliers of most MNCs, although not often as a main supplier.
119. Therefore, local operators and IT/computing companies although not actual competitors, can be regarded as serious potential competitors on the relevant market where the joint venture will become active.
120. The Commission concludes from the above that the proposed transaction would not lead to the creation or strengthening of a dominant position in the market for global telecommunications services.

#### *BT's position in the United Kingdom*

121. It has been suggested that the joint venture and its parents would be able to benefit from their position world-wide and in the United Kingdom in order to consolidate their position against competitors. BT operates a universal public telecommunications network in the United Kingdom and is the only telecommunications operator able to provide access to its own network anywhere in the United Kingdom. The joint venture and its parents therefore would seem to be the only telecommunications providers being able to provide seamless global telecommunications services in combination with local access services anywhere in the United Kingdom over their own infrastructure. All competitors would depend at least to some degree on local access provided by BT for the provision of global telecommunications services. The ability of the joint venture and its parents to offer

this combination of global services and national telecommunications services in the United Kingdom would make the joint venture the preferred provider for MNCs with extensive operations in the United Kingdom. Given that 13% of all MNCs world-wide are headquartered in the United Kingdom and that in addition a large number of MNCs headquartered outside the United Kingdom are operating in locations across the United Kingdom, the control of this bottleneck by one of its parents would seem to give the joint venture a significant and lasting advantage over its competitors. According to third parties, BT's position on the UK local access market would thus reinforce the joint venture's dominant position on the market for global telecommunications services to MNCs.

122. The Commission did not find any convincing evidence that BT's dominant position in the local loop in the United Kingdom would lead or help to the creation of a dominant position on the market for global telecommunications services. This is in particular because the customers targeted by the joint venture, namely the MNCs, would usually not rely on the local loop but on dedicated lines, as they have a considerable amount of traffic. For the sites where there is less traffic, alternative infrastructure e.g. cable, VSAT, exists in many areas in the United Kingdom which can provide access without relying on BT. In addition, it should be noted that OFTEL is currently engaged in a consultation process on the options for local loop access including the unbundling of the local loop.

*Possible locking in of customers*

123. The Commission investigated the possibility that, during the transition period from the traditional PSTN to the IP-based environment, the joint venture would be able to translate its current position into that new environment. It also investigated whether, if that was the case, this could lead to the creation of a dominant position by locking in customers by means of control of APIs.
124. According to the parties, [ ]\* The parties therefore would not be in a position to retain those of their current customers which would like to migrate immediately to an IP environment. It appears that the joint venture currently is not able to provide IP-based services as extensively and in as advanced a manner as some of its competitors. If MNCs did demand a rapid migration to IP-based services the joint venture would not seem to be able to maintain its customer base.
125. However, it would seem that a substantial migration by multinational customers to IP networks would most likely not take place overnight but only in several years time. This can be derived from the answers given by both US and European companies to the question asked in a recent report on Global Network Services, "How is your international data traffic carried, now and in two years time?"<sup>16</sup>. Some MNCs further indicated in their answers to requests for information sent out by the Commission, that they had just started to purchase some IP services but, in general, they would never replace all or a large part of existing services as such changes were almost always conducted gradually over a number of years. It is therefore reasonable to assume that traditional switched traffic will continue to play an important role in the provision of international telecommunications services. This would allow the

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<sup>16</sup> See pages 26 and 27 of "Global Network Services 1998: The User View", the Yankee Group, Boston, MA, USA (see also pages 22 and 23 for similar information on voice traffic).

joint venture to keep its current customers basis. However, the timing of such migration to an IP environment is uncertain.

126. The Commission then furthermore assessed whether, if the joint venture was able to translate its current position into that new environment, it could lead to the creation of a dominant position by locking in customers by means of control of APIs. As explained in paragraph 8, the joint venture will seek to design, develop and implement an intelligent managed IP-based global layered network, together with a global IP Platform based on this network. This global IP platform will support innovative IP-based services such as global electronic commerce, as well as applications developed by the joint venture or third parties, using Applications Programming Interfaces (APIs) made available to its partners.
127. Customers desire to be able to communicate with a large number of other customers and to have access to a large set of applications and services (like in the computer industry). Given the extent of the joint venture's current customer base, it is possible that its IP platform and APIs would become the "de facto" standard, thus giving the joint venture a possibility to strengthen its market position.
128. In announcing their joint venture, BT and AT&T stated that the APIs would be "open", in the sense that the parties would make them available to software companies that wish to write applications software and that distributors of the joint venture's services and other partners of the joint venture would have access to the APIs. According to the parties, customers, and certainly MNCs, nowadays demand such openness<sup>17</sup>. In the course of the proceedings, the parties have further represented to the Commission that the APIs to be used are or will, at the time they are used, be standard APIs.
129. It should be emphasised that the joint venture at present does not have a dominant position which would enable it to act independently from its customers. Furthermore, according to the Commission, it is not at all certain that customers will switch to an IP environment now or even in the short term. Anyway, for them to retain the parties as their main supplier no matter what would seem to be unlikely as MNCs are sophisticated and powerful customers. As such, they would therefore not accept that the APIs would be kept as the proprietary APIs of any single supplier.
130. Given the above, the Commission concludes that the creation of the joint venture is not likely to have a lock-in effect on customers and it would thus not find itself in a position to be able to act independently from its customers.

### Conclusion

131. In the light of the above analysis, the joint venture's market position in the market for the provision of global telecommunications services would not enable it to act independently from either its competitors or its customers. Therefore, the joint venture will not create or strengthen a dominant position in this market as a result of which effective competition would be significantly impeded in the common market.

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<sup>17</sup> An example in the computing industry of the success of such distribution of open and free applications software is the computer operating system of Linux.

### **International carrier services**

132. The Commission examined the effect of the creation of the joint venture in the area of international carrier services. For that purpose, it examined in particular the current and future situation with regard to European and transatlantic capacity. It looked more generally at the data provided by the parties as well as third parties, concerning their cable capacity and volumes of traffic globally, regionally and on a route-by-route basis in respect of major country pairs, as well as at those thinner routes where there were some overlaps between the parties.
133. To measure the market power of the various players in the field of international carrier services, since no reliable data seems to exist on a global basis, it appeared that the percentage of total bilateral traffic carried world-wide together with percentage of total capacity on submarine cables world-wide could constitute relevant indicators. With regard to capacity, the Commission examined whether satellite and cable are substitutable networks for the purposes of routing traffic, or whether they should be regarded as separate. On the basis of information supplied by the notifying parties and third parties, because of factors such as the delay inherent in satellite circuits, the Commission concluded however that cable and satellite are currently still not substitutable for the provision of international voice traffic, as far as both quality and reliability are concerned.
134. According to information gathered in the course of the investigation, including publicly available information<sup>18</sup>, the combined volumes of bilateral traffic carried by both parties would have amounted to about 17,5% of the total bilateral traffic world-wide in 1997, where at the same time, the combined volumes of bilateral traffic carried by FT/DT/Sprint amounted to about 14,5%, followed by MCI/WorldCom accounting for about 9%.
135. Furthermore, it appears that the international carrier services area is getting increasingly competitive with the entry on the market of numerous new international carriers. According to Telegeography 99, while the top ten international carriers still accounted for half of total international traffic, as of July 1998, over 1000 facilities-based international carriers were operational world-wide, while two years before, there were fewer than 500. In addition, according to that same source, North America, with over 200 new international carriers entering the US market between July 1997 and July 1998 led the world in new carriers. Spurred by the 1998 market opening, more than 400 facilities-based carriers now compete to provide international services in the Community. In July 1998, the United States and the United Kingdom were the countries with the highest numbers of authorised international carriers. A wave of new multinational carriers has appeared, including companies such as Primus, RSL, Esprit and LDI (Long Distance International). In the Community, new carriers such as COLT, Facilicom, Hermes and Tele2 have also appeared. Such new international carriers are likely to change the rules of the game. So does the appearance on the market of Internet-based bandwidth brokers such as Band-X, Arbinet, etc.
136. For the purposes of assessing the current operation, the position regarding carrier services can also be looked at in terms of capacity, and in particular of European and transatlantic capacity since, as explained above in section A.1 concerning the

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<sup>18</sup> See Telegeography 99.



definition of the relevant markets, international carrier services are regarded by the Commission as being provided globally and at least at a cross-border regional level for the purpose of the assessment of the notified operation. The situation prevailing with regard to capacity on a certain number of routes has however also been examined, since, as explained above, some have taken the view that international carrier services could also possibly be examined on a route-by-route basis.

137. In Europe much of the capacity is held by incumbent telephone operators. Although BT has been building city to city networks (the Farland network linking its various European subsidiaries' national networks), AT&T does not have a substantial presence as a capacity holder on this side of the Atlantic. Furthermore, several operators (such as Esprit Telecom, COLT, MCI/WorldCom, Viatel, Carrier One, Global Crossing, Hermes, Level 3) have built or started building high-speed broadband, pan-European networks. Other competitors such as France Telecom/Deutsche Telekom are intending to do so.
138. In relation to transatlantic capacity, information provided by the parties suggests they would have a combined share of notional capacity holdings of [less than 20%]\* in year 2000, which would make the joint venture one of the main owners of transatlantic capacity, together with MCI/WorldCom, Global Crossing and Cable & Wireless, based on the construction of Gemini and AC-1 cables. According to the investigation led by the Commission, it appears however, as further set out below, that no shortage of transatlantic capacity is foreseen in a foreseeable future. As plans are being drawn up for upgrading some existing cables (TAT12/13's notional capacity to be tripled) and for yet more cables (such as TAT14, which will go into service in 2000), and in particular private cables (AC1 (Global Crossing), Gemini (MCI/WorldCom together with Cable & Wireless), Oxygen, etc.) and as these come on stream, as new technologies such as SDH, DWDM (Dense Wave Division Multiplexing) are introduced which double the existing capacity and diminish the cost of capacity on submarine cables and of routing calls exponentially, any advantage which the joint venture might temporarily currently hold by possession of capacity on the currently existing transatlantic cables is likely to be quickly eroded.
139. Furthermore, while the parties' combined networks' global reach is considerable (with direct correspondent relationships with more than 170 countries), it appears that other competitors such as Global One together with its parents' companies, with also more than 150 direct correspondent relationships enjoy networks of comparable global reach.
140. One third party claimed that nevertheless on certain remote destinations, the proposed operation would result in considerable overlaps between the parties, where on these routes the parties were currently the two main providers of inbound traffic to those remote destination countries. However, on the basis of information received from the parties and third parties, the Commission could not find any evidence of any significant overlaps in any indicated country pair which were so-called "thin-routes". From the information gathered, it appears that when looking at the parties' combined shares of incoming IDD traffic in individual countries in 1996, excluding the United Kingdom and the United States, there were six countries for which the combined share of the incoming traffic was more than [40%]\*, while for four of those countries, [BT's share was negligible]\*. For the other two countries, the combined share was of [40-50%]\* (Guyana) and [40-50%]\* (Ghana). BT added [5-10%]\* to AT&T's share

of [30-40%]\* in Guyana, and [10-20%]\* to AT&T's share of [20-30%]\* in Ghana. However, it should be noted that these data do not constitute a measure of bilateral traffic for individual country pairs (which is the normal way to define markets as set out in paragraph 82), but an indication of a percentage of total inbound traffic to those countries from the rest of the world. Concerning ownership of capacity in submarine cables, apart from the transatlantic route, no significant overlap could be found in other cables, on the basis of the information provided by the parties.

### Conclusion

141. From the above, the Commission concluded that the present operation would not lead to the creation or strengthening of a dominant position in the area of international carrier services. This is because of the emergence of a number of new competitors, because the combined volumes of international traffic carried by both parties and volumes of international traffic carried by its main competitors are comparable, because there is no lack of capacity either in the Community or on transatlantic routes, due to the existence of alternative pan-European networks and new and planned high-capacity submarine transatlantic cables, because no significant overlap in capacity ownership except on the transatlantic routes could be found, and because the cost of capacity is decreasing fast.

### **UK market for the provision of international voice telephony services on the UK-US route**

142. In accordance with the reasoning set out in the BT/MCI (II) decision, the Commission investigated the possible constraining factors that could prevent the joint venture's competitors from competing on a level playing field with it for the provision of telecommunications services, and more particularly of international voice telephony services on the UK-US route (e.g. areas of wholesale IDD and IPLCs on the UK-US route as described in the BT/MCI (II) decision) and react to any small increase of prices from the joint venture so as to make it unprofitable. The factors that appeared to be relevant for the assessment of this area include access to transatlantic transmission capacity, as well as domestic interconnection with transatlantic cable capacity and local loop access at the UK end, as well as the possibility of other competitors, in particular the main competitors in terms of volumes of traffic handled, to self-correspond on the UK-US route.
143. On the basis of information provided by the parties and third parties, the joint venture would account for approximately half of the two-way bilateral traffic between the United States and the United Kingdom, with, at the UK end, Cable & Wireless currently terminating approximately a quarter of UK-inbound US-UK bilateral traffic, and carrying approximately a quarter of UK-outbound UK-US bilateral traffic as well. As for IPLCs, according to the parties, the joint venture's share would be of [30-40%]\*.

### Numerous competitors

144. Until the end of 1996, BT's only competitor for bilateral outbound traffic from the United Kingdom and termination of bilateral inbound traffic in the United Kingdom had been Mercury (Cable & Wireless). However, since then, as already stated above, more than 100 International Facilities Licences (IFL) have been granted in the United Kingdom. As a result, more than 100 IFL operators will be competing with

the joint venture on the UK-US route, notwithstanding competition arising from ISR operators. Likewise, the supply of IPLCs on the UK-US route is available from a number of operators in the United Kingdom. Any IFL operator can enter the market for the supply of IPLCs. Moreover, competition is not restricted to IFL operators, as a purchaser of large IPLCs can subdivide them through multiplexing and then resell them as a number of smaller IPLCs. Examples of competitors include Global One, MCI/Worldcom, Cable & Wireless, Viatel, Sprint, COLT and TMI (a large resale operator). As a result, should the joint venture try to raise prices for the provision of these services on the UK-US route, customers would transfer their business to one of the joint venture's numerous competitors. It appears that the UK-US route is currently one of the most competitive routes for the provision of telecommunications services, and more particularly international voice telephony services, with accounting rates, termination rates and retail prices among the lowest in the world.

Availability of transatlantic capacity

145. Having regard to the definition of the relevant market given in section A.1, the current and future principal cables (i.e. TAT8, TAT9, TAT10, TAT11, TAT12/13, TAT 14, PTAT 1, AC1, Gemini, FLAG Atlantic 1 and Oxygen) which carry or will carry traffic and which run or will run between the United Kingdom and the East Coast of America are the cables over which the services on the UK-US route identified as relevant to the assessment will be provided as set out in paragraph 47.
146. With regard to transatlantic capacity, as set out above, it appears that the capacity owned by the joint venture on all transatlantic cables will be less than 20% in 2000. Whereas at the time of the investigation of the operation in the BT/MCI (II) decision, it appeared that not enough capacity was available on transatlantic cables, since then, more capacity has been or will be made available thanks to the laying of new cables such as TAT 14, Gemini, AC1, FLAG Atlantic 1 or Oxygen, and upgrading of TAT 12/13 and AC1. As also set out in paragraph 47, capacity will increase more than ten times when those new cables are operational and planned up-grades have taken place compared with the capacity available at the time of the BT/MCI (II) decision. As an element of comparison, the capacity available on TAT14 alone when operational, will be of 640 Gbps (equivalent to 7741440 circuits of 64 Kbps), to be compared to a combined capacity of around 5 Gbps on TAT9, TAT10 and TAT11 together (equivalent to 68040 circuits of 64 Kbps). More importantly, the unit cost of capacity on the newest cables is significantly lower than that on the older consortium cables such as TAT8. It appears, from figures gathered from one third party that for example, capacity unit cost on AC 1 cable (Global Crossing- operational since 1998), taking depreciation into account, would represent only 6% of that on TAT 8 (which entered into service in 1988). In the light of the above, therefore, no barriers to entry of new competitors on that route would result from any lack or excessive price of capacity on that route

Domestic interconnection with transatlantic cable capacity and local loop access

147. Regarding cable landing stations and backhails, it appears that since the BT/MCI (II) decision, the situation has evolved towards more competition, with Cable & Wireless, WorldCom/MCI and Energis competing with BT.

148. While BT still enjoys a very strong position in the domestic markets, including in the areas of cable landing stations, backhauls, domestic leased lines, and local loop, it appears that the current UK regulatory regime would not enable BT to use this strong position to underpin the joint venture's position on the UK-US route. This is because in particular network access services, including access to cable landing stations, interconnection and leased lines are regulated, in accordance with the ONP legislation. While the pricing of backhauls is not regulated in the same way, BT would not be able to discriminate against its competitors in the provision of such services, resulting from the general non-discriminatory conditions set out in its licence. Other issues related to certain UK activities are set out below.
149. During the course of the investigation of this operation, a number of competitors have argued that equal access should be imposed in the United Kingdom as a condition of approval of the operation. Equal access implies that customers making international calls have to dial the same number of digits to select any long-distance carrier or can pre-select an alternative carrier as their long-distance or international carrier. Under the current regulatory framework, BT would be the carrier selected by default, whereas customers need to dial additional digits to select any other carrier. The Commission has however concluded that the notified operation itself had no impact on the possible difficulties competitors might have as a result of the UK regulations regarding numbering, which were already in existence.
150. A number of competitors have also argued that the unbundling of the local loop should be imposed on BT in the United Kingdom so that competitors can terminate and collect traffic themselves on an end-to-end basis. However, as it did not appear that as a direct result of the joint venture's position on the UK-US route, BT's position on the local loop would be significantly reinforced, the Commission has concluded that the difficulties competitors might have with regard to access to the local loop were not to be solved in the framework of the assessment of the present case, as set out below. Furthermore, the question of the unbundling of the local loop is currently being addressed by OFTEL.

*Self-corresponding*

151. As a result of the exclusivity clause included in the Framework Agreement concerning the parents' international traffic, AT&T will send all its outbound traffic to the United Kingdom to the joint venture. Similarly, BT will send all of its outbound traffic to the United States to the joint venture. Accordingly that part of both parties' outbound traffic which was handed to some of the other party's competitors will be handed to the joint venture. As a consequence, both BT and AT&T's competitors would receive less traffic to terminate if they did not react. They would therefore have to compete with each other and the joint venture for the remaining traffic, e.g. by means of offering attractive termination rates.
152. In this regard, one third party stated that the return traffic it was currently receiving from one of the parties accounted for half of the bilateral traffic it was currently terminating. That third party further stated that once that traffic was handed to the joint venture, it would not be able to cover for the corresponding loss of revenues by means of terminating other competitors' return traffic, given the level of volumes of traffic concerned, and that, as a consequence, this would significantly increase its costs for terminating traffic on the other side of the Atlantic. That third party further stated that

it would also incur significant costs from stranded half-circuits currently matched with one of the parties. According to that third party, as it would not correspond anymore with the concerned notifying party, and as the concerned notifying party would have no incentive to let it rematch such half-circuits with another correspondent by means e.g. of a swap of half circuits, the corresponding capacity would not be used anymore, while maintenance and other costs would still be incurred, and corresponding investments would be lost. On this basis, that third party suggested that as a minimum some conditions should be imposed on the joint venture, such as the sale/swap of some of its current half circuits to competitors at market prices, as well as preventing the joint venture from immediately self-corresponding by imposing on the joint venture an obligation to give some return traffic to its competitors for a certain time.

153. The Commission investigated these concerns. As for the alleged detrimental loss of revenues and subsequent increase of costs caused to the joint venture's competitors, the Commission further investigated whether the other US carriers, currently corresponding with BT, would be able, in the short term, to react to the loss of return traffic received from BT for example by corresponding with competing IFLs, (the main one being Cable & Wireless) and whether BT's competitors, currently corresponding with AT&T, would also be able to react to the loss of return traffic received from AT&T. It appeared that they could do so, given the current traffic matrix and given the increasing rate of bilateral traffic on the UK-US route. As a matter of fact, it appears that the volume of return traffic that would be "lost" by the complainant as a result of the notifying parties corresponding with one another would represent only about 12% of the total bilateral traffic on that route in that direction. This traffic would thus be relatively easy to replace with traffic from other operators in what is an expanding market.
154. The Commission further concluded that traffic rearrangements, if necessary, could take place, given the incentives for all concerned operators, including the notifying parties, to ensure an efficient use of any mismatched half-circuits as a result of the operation, including, where necessary, their reallocation/swap/matching with new correspondents, and the general availability of capacity on that route at sharply decreasing cost. The Commission in particular noted that BT and AT&T currently have a substantial mismatch between themselves in terms of half circuits. To keep the complainant's half circuits stranded would incur a cost for the notifying parties, as they would also have sunk costs for those half circuits on which they would receive no revenues. In any case, even if the notifying parties were to leave those half circuits stranded, switching to another newer cheaper cable with higher capacity would be a viable alternative for the complainant.
155. Moreover, the Commission noted that the current revenues enjoyed by certain UK operators were mostly inherent in the existing imbalance of traffic with US carriers, which generates a volume of settlement inflows significantly larger than their settlement outpayments to US correspondents, thus leaving such operators without any incentive to move away from the current accounting rates system and the proportionate return rule to a more competitive environment and cost-oriented termination charges.
156. Furthermore it appears that several operators, including the complainant, have already started to self-correspond or would be in a position to self-correspond, thus by-passing the accounting rate regime and rules of proportionate return traffic, as ISR operators are already in a position to do. In this regard, it appears that the

creation of the joint venture would accelerate the move away from the accounting rates system on the UK-US route towards cost-oriented interconnection rates, which is a positive development of competition, provided that sufficient competitive constraints make it possible for consumers to benefit from lower prices.

157. In this regard, it appears, that, generally speaking, thanks to ever more capacity being made available on the UK-US route at a lower cost, the joint venture's competitors could, if the joint venture tried to take advantage of its position to raise prices on this route, react by acquiring additional capacity in order to handle additional traffic and offer better prices, and new competitors could enter easily on this market. The availability of excess capacity undoubtedly applies competitive pressure on all carriers to deliver their services at the lowest price. Given the availability of excess capacity on the UK-US route, the joint venture would not be in a position to prevent other competitors from providing end-to-end services for a significant volume of traffic. The Commission therefore concluded that the joint venture would not be able either to raise its competitors' costs nor to act independently from its competitors and customers with regard to the provision of telecommunications services on the UK-US route.
158. In conclusion, following its investigation, it appears that neither the joint venture nor its parents would be in a position to restrict or control the entry opportunities for the prospective new operators on the UK-US route and at its UK-end. Nor would they be able to significantly weaken the development of effective competitive constraints on its market behaviour in the provision of telecommunications services, and more particularly international voice telephony services on the UK-US route. Therefore, no concerns arise with regard to the provision of telecommunications services on the UK-US route as a result of the present operation.

### Conclusion

159. Given that numerous facilities-based operators have been authorised to operate, given that several operators have already started to self-correspond, and given the availability of excess capacity at decreasing costs on the UK-US route as set out above, the Commission concluded that the joint venture would not be able either to raise its competitors' costs in an anti-competitive manner or to act independently on this route from its competitors and customers. These conclusions have been supported by many third parties, which have admitted that the provision of telecommunications services on the UK-US route is competitive.

### **Certain UK services**

160. The Commission investigated the possibility that the creation of the joint venture would strengthen BT's dominant position on certain UK markets for telecommunications services.
161. According to figures provided by the notifying parties on the basis of data from OFTEL, BT had for the fiscal year 1997/98, the following market shares for the UK services identified as relevant markets above: business retail basic voice services (local [80-90%]\*, national [60-70%]\* and international [30-40%]\*), residential retail basic voice services (local [80-90%]\*, national [80-90%]\* and international [70-80%]\*), wholesale carrier services [50-60%]\*, domestic value added voice services (inbound services [60-70%]\*, Centrex [40-50%]\* post-paid card services [80-90%]\*,

teleconferencing [50-60%]\* and domestic data services [50-60%]\*. These current shares, the ubiquity of its network and the cost of establishing a universal telecommunications network throughout the United Kingdom could make it difficult for other companies to challenge BT's position in the foreseeable future.

162. The Commission examined whether the creation of the joint venture could strengthen BT's position on any of these markets. For example, the Commission examined the claims of a number of third parties indicating that BT would be able to tie the sales of the joint venture products with its own services to corporate customers, which they presently provide to MNCs located in the United Kingdom or cross subsidise one element of the component of that offering to customers by charging more for another element within the bundle. This might enable BT to enhance its market position with the suppliers and customers of the MNC because of the better technical integration of the BT and the joint venture's services. The same scenario could apply for wholesale carrier services.
163. The Commission investigated the likelihood of the realisation of the above scenario, and reached the following conclusions. First of all, as has been explained above, the joint venture will not hold a dominant position on any of the markets in which it will be active, so any tying of BT's services to those offered by the joint venture could not lead to any increase in market power, since any advantage that BT could obtain from the creation of the joint venture could be matched by other UK operators either on their own or in conjunction with the joint venture's competitors. For example, competitors to BT in the United Kingdom could respond by bundling their own products with those of the joint venture's competitors. Moreover, it must be noted that the current and future regulatory regime in accordance with the Community regulatory framework to be applied to both BT and the joint venture by OFTEL would prevent BT from adopting such behaviour, in such a way as to strengthen its position on UK markets.

#### Conclusion

164. The Commission therefore concluded that BT's position on certain UK markets would not be strengthened as a direct consequence of the creation of the joint venture as a result of which effective competition in the common market would significantly be impeded.

#### **B. Analysis under Article 2 (4)**

165. Pursuant to Article 2 (4) of the Merger Regulation, to the extent that the creation of a joint venture has as its object or effect the co-ordination of the competitive behaviour of undertakings that remain independent, such co-ordination is to be appraised in accordance with the criteria of Article 85 (1) and (3) of the EC Treaty. In order to establish a restriction of competition within the sense of Article 85 (1) and (3) of the Treaty, it is necessary that the co-ordination of the parent companies' competitive behaviour is likely and appreciable and that it results from the creation of the joint venture, be it as its object or its effect.
166. In its decision to initiate proceedings, the Commission identified two areas of concern which led to serious doubts under Article 2(4) of the Merger Regulation. These concerns were the presence of ACC UK on the UK market and the 22% stake in Telewest held by TCI, which has recently been purchased by AT&T. During the

course of its investigation, the Commission discovered a further concern on the distribution of AUCS services in the United Kingdom.

## **ACC UK**

### Candidate markets.

167. Candidate markets for co-ordination are those on which the joint venture and at least two parent companies are active, or closely related neighbouring markets where at least two parent companies remain active.

168. According to the notifying parties, BT and ACC UK are both active in a number of categories of service, as defined by Of tel in the United Kingdom, including the following:

- Business retail basic voice services – local
- Business retail basic voice services – national
- Business retail basic voice services – international
- Residential retail basic voice services – local
- Residential retail basic voice services – national
- Residential retail basic voice services – international
- Wholesale carrier services (UK)
- Domestic value added services – inbound
- Domestic value added services – post-paid cards

169. In order to offer international telecommunications services, a supplier has to provide, inter alia, both the international portion and local termination and/or origination to the final consumer. The joint venture will be offering international telecommunications services to the parent companies and to third parties. BT and ACC UK, as set out in the table above, offer wholesale carrier services in the United Kingdom as well as international retail basic voice services in the United Kingdom. The joint venture offers wholesale international carrier services and the wholesale international portion of basic international voice services.

170. According to the notifying parties, each of these services is not necessarily a market in itself, though they are components of other markets, such as voice telephony. Whatever the precise market definition, the two companies are present on the same markets in the United Kingdom. BT has a strong market position, in particular in the residential activities above.

171. ACC UK is a subsidiary of ACC Corp. which is a switch based provider of telecommunications services to businesses, residential customers and educational institutions. ACC Corp is wholly owned by AT&T. As set out above, ACC UK competes with BT on certain services in the United Kingdom.

172. The joint venture will be active on neighbouring and closely related markets to BT and ACC UK. It will provide the two companies with international carrier services and wholesale IDD services which will carry and ultimately terminate the two companies' international voice traffic and provide the international portions for data services. Under the terms of the framework agreement, BT is obliged to source its international telecommunications requirements from the joint venture, which



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operates on the neighbouring and closely related market of international carrier services to the parent companies.

173. Therefore, the markets on which BT and ACC UK are active are markets neighbouring and closely related to the joint venture within the meaning of Article 2(4) of the Merger Regulation.

*Likelihood of co-ordination*

174. In its decision to initiate proceedings, the Commission considered that, following the formation of the joint venture, each parent company would have an incentive to avoid competing directly with the companies associated with the other parent which are likely to use the joint venture to carry their traffic. As a result, each parent also would have an incentive to increase the traffic over the joint venture's network. Each parent would therefore have an incentive to ensure that its associated companies use the joint venture to carry their international traffic.

*Appreciable restriction of competition*

175. Even if the market shares held by ACC UK at present are not high, with the support of AT&T those market shares could be expected to increase in the future. In any event, the market shares of BT on all the markets in which BT and ACC UK are active are considerable. ACC UK, supported by AT&T seemed likely to be one of the strongest potential competitors of BT in the United Kingdom in the areas in which ACC UK has been active. The more successful ACC UK became, and the more business it gave to the joint venture, the greater would be the incentive for ACC UK and BT to avoid competing directly with one another.

*Effect on trade between Member States*

176. Any such co-ordination would have an effect on trade between Member States. BT is a large telecommunications operator with many activities outside the United Kingdom and alteration of its behaviour by BT on its major domestic markets would have an effect on the international traffic flows to and from the United Kingdom, including those from and to other Member States.

*Undertakings submitted by the parties*

177. When these concerns were communicated to the parties, the parties offered a remedy as set out in Section X. The remedy consists of AT&T divesting itself of ACC (UK) to a suitable purchaser within [ ]\*.
178. This undertaking, when implemented carried out will remove the Commission's serious doubts that the creation of the joint venture could have as its effect the co-ordination of BT and AT&T's competitive behaviour in relation to ACC on the markets for certain services in the United Kingdom according to Article 10(2) of the Merger Regulation.

**Telewest**

*Candidate markets*

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179. Telewest is a UK cable television company. The candidate markets in which a co-ordination of competitive behaviour between Telewest and BT should be considered include business and residential retail basic voice services (local, national and international) and dial up Internet access, as defined in section A.1 - Relevant markets above. The geographic scope for these markets is national. In terms of the markets of the joint venture, the market for both residential and business telecommunications services, including international calls, can be regarded as a neighbouring and closely related market to that of the joint venture, as those calls will be carried on the joint venture's network, or that of its competitors.
180. The markets on which BT and Telewest are active are neighbouring and closely related markets to the joint venture within the meaning of Article 2(4) of the Merger Regulation.

*Relationship between AT&T, TCI and Telewest*

181. In order to examine the possibility of co-ordination between BT and AT&T through TCI and Telewest, it is necessary to examine the relationship between Telewest and TCI at present, and to examine the future relationship between AT&T and the portion of TCI which will hold the shares in Telewest, namely Liberty Media Group (Liberty).
182. AT&T has recently obtained regulatory approval for its purchase of TCI. [ ]\*
183. [ ]\*.
184. [ ]\*.

*Likelihood of co-ordination.*

185. According to the parties, these arrangements make it impossible for AT&T to influence the practical operating control of Liberty. [ ]\*
186. TCI holds approximately 22% of Telewest. This stake will be transferred to Liberty Media Group. TCI jointly controls Telewest with MediaOne, a US based telecommunications operator, which holds approximately 29% of Telewest. The remaining shareholding is widely spread. It could be argued that MediaOne, a US competitor to AT&T, would have no interest in letting a partner of AT&T (i.e. BT) benefit from Telewest's behaviour.
187. For the following reasons, the Commission did not consider (in its decision to initiate proceedings) the so-called firewall arrangements to be sufficient to avoid the risk of co-ordination of competitive behaviour between BT and Telewest. [ ]\*

*Appreciable restriction of competition*

188. Telewest is one of the three major cable TV companies in the United Kingdom following recent industry consolidation. Telewest has approximately 5.6 million homes in its franchise areas, of which 3.9 million are passed by the cable and 1.2 million are connected for telephony purposes. The total number of households in the United Kingdom is approximately 27 million, so Telewest has 21% of UK households in its franchise areas. Within its franchise areas, Telewest will be the

only local loop competitor to BT because of the policy of exclusive franchises. In addition, Telewest has 365000 businesses in its franchise areas.

189. Telewest currently competes with BT on the provision of telecommunications services and dial up Internet access services. It expects in the future to compete with BT on the provision of digital broadcast interactive services and broadband high speed data services. In its franchise areas, Telewest will be at least the primary and probably the only (cable) network competitor to BT for both residential and business customers. Other competitors also offer indirect access service competition to Telewest and BT in the Telewest franchise areas.
190. A third party has argued that any co-ordination between Telewest and BT could hinder their access to the local loop to deliver broadband services. At present, without the possibility of the co-ordination with BT, third party Internet Service Providers have three main channels of access to customers' homes in the United Kingdom: BT local loop telephony, the new BiB interactive services platform and the cable TV operators. BT controls the local loop, has a shareholding in the BiB joint venture and now has the opportunity to co-ordinate with Telewest to make access difficult over one of the major cable TV networks. In the event that the third party's concerns are correct, then the denial of access would strengthen the appreciability of the restriction of competition arising from any co-ordination.

Effect on trade between member states

191. Both BT and Telewest provide international telecommunications services, so any co-ordination would have an appreciable effect on trade between Member States in the handling of that telecommunications traffic.

Undertakings submitted by the parties

192. When these concerns were communicated to the parties, the parties offered a remedy as set out in Section X - Undertakings submitted by the parties. The remedy consists of AT&T ensuring that the AT&T directors in Liberty have no information on, nor influence over Liberty in respect of its shareholding in and dealings with Telewest.
193. This undertaking when implemented, will remove the Commission's concerns that the creation of the joint venture could have as its effect the co-ordination of BT and AT&T's competitive behaviour in relation to Telewest on the markets for certain services in the United Kingdom for the purposes of Article 10(2) of the Merger Regulation.

**Distribution of AUCS services in the United Kingdom**

Candidate markets

194. AT&T Communications UK Ltd distributes the voice and data services for AT&T-Unisource Communications Services in the United Kingdom. As set out above, the market for the services of AUCS falls within the existing Commission definition of global telecommunications services which the parties have used in their notification and the Commission has used in previous decisions. It is common for a national telecommunications company to be distributor of the global telecommunications services provider: e.g. BT for Concert in the United Kingdom. AT&T is currently

the exclusive distributor for AUCS services in the United Kingdom. Accordingly, whilst the geographic market for the services themselves is wider, the distribution arrangements often take place at a national level.

Likelihood of co-ordination

195. The Commission made AT&T aware of the following concern. AT&T Communications UK Ltd is the exclusive distributor of AUCS services in the United Kingdom. AUCS does not itself deal with customers but relies on distributors to distribute its services. AT&T Communications UK Ltd will be withdrawn from the United Kingdom after having contributed its UK-based international facilities to the joint venture. Once AT&T Communications UK Ltd is withdrawn from the market, without changes in the current distribution arrangements, AT&T would be in a position to prevent Unisource from addressing UK-based potential customers and to encourage both actual and potential customers to move to the joint venture, whose services are distributed to most customers in the United Kingdom by BT.

Undertakings submitted by the parties

196. In order to meet this concern, AT&T submitted an undertaking to waive any right it may have to object to the appointment by AUCS from the date of adoption of the Commission's decision on the above case of an additional UK distributor of AUCS services, in which case AT&T Communications UK Ltd would cease to be the exclusive distributor of AUCS services in the United Kingdom. AT&T will inform the Commission in writing of the progress of the arrangements set out above.

197. This undertaking, when implemented, will remove the Commission's concerns that the effect of the creation of the joint venture would have as its effect the co-ordination of BT and AT&T's competitive behaviour in relation to the distribution of AUCS services.

Conclusion

198. In the case of each area of concern pursuant to Article 2(4) of the Merger Regulation, the undertaking offered by the parties solved any issue of risk of co-ordination between the parent companies. Accordingly, the Commission did not carry out any analysis under Article 85(3) of the Treaty.

**X. UNDERTAKINGS SUBMITTED BY THE PARTIES**

199. The undertakings are as follows:

“In order to resolve the Commission's concerns in the above-referenced case, AT&T Corp (“AT&T”, a corporation organised under the laws of the State of New York), hereby gives the following undertakings:

1. The Commission has stated to AT&T that its ownership of ACC Long Distance UK Ltd. (“ACC (UK)”, a UK subsidiary of ACC Corp., a Delaware corporation), raises a risk of co-ordination which would not be compatible with the common market pursuant to Article 2(4) of the Merger Regulation and that a behavioural undertaking

would not bring the proposed concentration into compatibility with the common market.

2. Under such circumstances AT&T undertakes (hereinafter the “ACC Undertaking”) to enter into a binding agreement to sell ACC (UK) to a suitable purchaser, within [ ] \* (hereinafter “the Effective Date”), subject to the provisions of paragraphs 5 to 12 below. Prior to the sale, AT&T will obtain the confirmation of the Commission that the purchaser is suitable. AT&T undertakes to keep the Commission informed in written form of all material actions taken regarding the above. In addition, AT&T undertakes:
  - (i) until such sale is complete to continue to maintain ACC (UK) as a legally separate entity and to operate it in a manner which enables it to maintain its viability and marketability pending its sale and final disposal;
  - (ii) to ensure that all services provided by AT&T or any of its subsidiaries to ACC (UK) will continue to be provided efficiently and satisfactorily in accordance with any existing contractual obligations; and
  - (iii) except with the consent of any Trustee appointed pursuant to paragraphs 5 to 12 below, not to employ or offer employment to any employee of ACC (UK) nor to participate in the solicitation of any such employee by any third party until one year after closing of the sale of ACC (UK).
3. AT&T undertakes to use best efforts to obtain agreement effective on the closing of the AT&T-BT joint venture (1) to create a committee of the Board of Directors of Liberty Media Group, in which the Class A directors (i.e. designees of AT&T) will not participate; (2) that the Board of Directors of Liberty Media Group will delegate to such committee its authority to discuss and receive information and take all decisions as regards to Telewest; Telewest Communications plc (“Telewest”, a public limited company incorporated in England and Wales) or its subsidiaries, and that the Board of Directors will not participate in any discussions or decisions regarding Telewest or its subsidiaries and (3) that Class A directors (i.e. designees of AT&T) will not accept or receive information regarding Telewest. In the event that AT&T cannot effect this arrangement, AT&T undertakes that it will, effective on the closing of the AT&T-BT joint venture, implement a governance arrangement having equivalent effect or ensure that the Class A directors (i.e. designees of AT&T) will not accept or receive information regarding Telewest and will recuse themselves from all discussions or decisions of the Board of Directors regarding Telewest. AT&T will inform the Commission in writing of the progress of the arrangements set out above.
4. AT&T undertakes to waive any right it may have to object to the appointment by AT&T-Unisource Communications Services vof (“AUCS”, registered number 34097149, Chamber of Commerce, Amsterdam) from the date of adoption of the Commission’s decision on the above case of an additional UK distributor of AUCS services, in which case AT&T Comms UK would cease to be the exclusive distributor of AUCS services in the UK. AT&T will inform the Commission in writing of the progress of the arrangements set out above.

#### *Implementation of ACC Undertaking*

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5. At any time after a period of [ ]\* has elapsed since the adoption of the Commission's Decision, the Commission shall have power to require AT&T to appoint a Trustee in accordance with the provisions of paragraph 5 to exercise the functions set out in paragraphs 6 and 7 below.
6. (a) If the Commission decides to exercise the powers referred to in paragraph 5 above, it shall request AT&T to propose to the Commission, within seven days of AT&T receiving notification of such request, the names of at least two institutions, independent from either of AT&T and BT, and either of whom AT&T considers appropriate to be appointed as Trustee.
  - (b) The Commission shall have the discretion to approve or reject one or both of the names submitted. If only one name is approved, AT&T shall appoint the institution concerned as Trustee. If more than one name is approved, AT&T shall be free to choose the Trustee to be appointed from among the names approved.
  - (c) If all the names submitted are rejected, AT&T will submit the names of at least two further such institutions ("the further names") within seven days of being informed of the rejection. If only one further name is approved by the Commission, AT&T shall appoint the institution concerned as Trustee. If more than one further name is approved, AT&T shall be free to choose the Trustee to be appointed from among the names approved.
  - (d) If all further names are rejected by the Commission, the Commission shall nominate a Trustee to be appointed by AT&T.
7. As soon as the Commission has given approval to one or more names submitted, or nominated a Trustee, AT&T shall appoint the Trustee concerned within seven days thereafter.
8. The Trustee's mandate shall include the following functions:
  - (a) to monitor AT&T's maintenance of the viability and marketability of the assets and business activities to be divested in accordance with the ACC Undertaking, and that the assets and activities concerned are operated on an independent arms' length basis consistent with their status, until their divestment to a suitable purchaser;
  - (b) to monitor the satisfactory discharge by AT&T of the obligations entered into by AT&T in the ACC Undertaking. In particular the Trustee shall
    - (i) monitor and advise the Commission as to the adequacy of the procedure for selecting the purchaser and as to the conduct of the negotiations;
    - (ii) monitor and advise the Commission as to whether the agreements with the purchaser will properly provide for the

divestiture of the relevant assets and business activities as provided for in the ACC Undertaking;

- (c) to provide written reports (“the Trustee reports”) to the Commission on progress with the discharge of the Trustee’s mandate, identifying any respects in which he has been unable to discharge his mandate. Such reports shall be provided at regular monthly intervals commencing one month after the date of his appointment, or at such other time(s) or time periods as the Commission may specify.
9. At any time during the term of the Trustee’s appointment, if the Commission believes that the ACC Undertaking is not being properly complied with or if AT&T fails to enter into a binding agreement with a suitable purchaser by the Effective Date despite having used best efforts to do so, the Commission may request the Trustee to carry out the following additional functions (“the Request”), and the Trustee’s mandate shall be deemed to be extended accordingly. In the event of conflict with the initial functions, the Trustee shall give priority to the discharge of these additional functions:
- (a) to ensure that all assets and business activities to be divested in accordance with the ACC Undertaking are operated on an independent arms’ length basis consistent with their status;
  - (b) to ensure the proper divestment of all relevant business assets and activities;
  - (c) in the Trustee’s reports, or in any event within no later than [ ]\* of being notified of the Request, to submit to the Commission a proposal for the method and timescale proposed by the Trustee for the divestiture in accordance with the ACC Undertaking of the relevant assets and business activities. The Commission will, as soon as reasonably practicable, approve the proposal or indicate any changes that it may require.
  - (d) in the Trustee’s reports, or as soon as negotiations are entered into with prospective purchasers, to provide to the Commission sufficient information to enable it to decide on the suitability of the purchasers in question.
  - (e) to break off negotiations with any prospective purchasers, or to instruct AT&T to break off such negotiations, if it appears to the Commission that the negotiations concerned are being conducted with an unsuitable purchaser; and
  - (f) within [ ]\* (or such other date as the Commission may specify) of being notified of the Request, to submit to the Commission for approval an agreement for sale of ACC (UK) to a suitable purchaser; such agreement to be unconditional on both purchaser and seller and irrevocable except for the approvals of any appropriate regulatory body and customary closing conditions.

Nothing in this paragraph 9 may result in the divestment of the assets and business activities to be divested in accordance with the ACC Undertaking

prior to the closing of the AT&T-BT joint venture. Nothing in this paragraph 8 or in the ACC Undertaking shall preclude the closing of the AT&T-BT joint venture.

10. AT&T undertakes to provide the Trustee with all such assistance and information, including copies of all relevant documents, as he may require in carrying out his mandate, and to pay reasonable remuneration for his services.
11. If BT and AT&T should announce that their proposed joint venture has been irrevocably abandoned, the Trustee's mandate(s) shall be deemed to be discharged, and his appointment shall be deemed to be terminated.
12. The Commission will use its best endeavours to inform AT&T, as soon as reasonably practicable, as regards the suitability of any proposed purchaser(s). The Commission, in determining whether any proposed purchaser is suitable, will take into account whether the prospective purchaser concerned (i) appears to it to possess the status and resources necessary to own and operate ACC (UK) over the long term as a viable and significant competitor to BT, (ii) is independent of AT&T and BT, (iii) can be shown not to have significant and relevant commercial connections with them and, (iv) has, or reasonably can obtain, all necessary approvals for the purchase from the relevant competition and other regulatory authorities in the European Community and elsewhere."

## **XI. ASSESSMENT OF THE UNDERTAKINGS**

200. As set out in the analysis under Article 2(4) of the Merger Regulation, the undertakings satisfy the Commission's concerns in the three areas where the creation of the joint venture could have as its effect the co-ordination of the competitive behaviour of BT and AT&T, following its appraisal in accordance with the criteria of Article 85 of the Treaty, with a view to establishing whether or not the operation is compatible with the common market.
201. The Commission sought comments from various third parties on the commitments. Some of these third parties commented in detail on the undertakings, whilst others had no comments. Some third parties believed that the Telewest undertaking should have been for a divestment, whilst others believed that the Unisource distribution undertaking should have been gone further and measures should have been applied to the winding up of AUCS itself.
202. The divestment of ACC UK is a structural undertaking which removes the possibility of any co-ordination between BT and AT&T through ACC UK.
203. The structural separation which prevents the AT&T directors of Liberty from receiving information on or considering issues relating to Telewest, in combination with the pre-existing firewall arrangements, which were not designed for competition purposes, will be sufficient to remove the possibility of co-ordination between AT&T and BT through Telewest. Given the level of AT&T's stake in Telewest, this solution is proportionate to the risk of co-ordination between BT and AT&T through Telewest.
204. The ability of Unisource to appoint another distributor in the United Kingdom to distribute AUCS services removes the possibility of co-ordination between BT and AT&T in respect of the distribution of AUCS services in the United Kingdom.



Unisource will be able to compete with BT for customers on the UK market. As AT&T is withdrawing from AUCS, this solution is proportionate to the problem which Unisource will have in addressing new customers in the United Kingdom until the AT&T withdrawal from AUCS. With regard to the third party comment above, the undertaking by AT&T addresses the co-ordination problem identified by the Commission. To seek a wider undertaking would have gone beyond the scope of the co-ordination problem identified.

205. In conclusion, as a result of the undertakings given by AT&T, the Commission concludes that these undertakings are sufficient to remove its serious doubts identified in its decision to initiate proceedings and in its subsequent investigation of the operation, in relation to Article 2(4) of the Merger Regulation and taking account of Article 10(2) of that regulation.

## **XII. ANCILLARY RESTRAINTS**

206. The Parties have notified a number of provisions of the Framework Agreement as possible restraints ancillary to the concentration.

207. The Parties notified a provision in Article 7.1 (a) and (b) of the Framework Agreement, that stipulates that the MNC NewCo<sup>19</sup> Subsidiaries<sup>20</sup> will serve as the exclusive sales channel to Qualifying MNC Customers, and will act as the reseller of all Communications Services of the joint venture's parents, as well as those of the joint venture, to Qualifying MNC Customers. As far as NewCo distributes its own products, this provision reflects the parties' withdrawal from the market of the joint venture, as the parents are contributing their industry-specific sales forces to the joint venture, and can be considered an integral part of the operation. For the distribution of the parent companies' Communications Services, the joint venture needs to establish itself on the market and build up its activities. After [ ]\*\* years, this can reasonably be expected to have taken place and restrictions on the parent companies' freedom to sell to these MNCs directly will then need to be assessed under Article 85. In as much as NewCo is distributing the parent companies' Communications Services, this can be considered as directly related and necessary to the implementation of the concentration for a period of [ ]\* years.

208. Article 7.3 (c) of the Framework Agreement provides that when the parents or their subsidiaries provide Outsourcing Professional services<sup>21</sup> in connection with Global

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<sup>19</sup> The joint venture is referred to as "NewCo" in the Framework Agreement.

<sup>20</sup> MNC Newco Subsidiaries are defined in the Framework Agreement as meaning "the Newco Subsidiaries and any other members of the Newco Group to the extent that any of the foregoing engages in the business and activities of the MNC Unit" (i.e. the Business Unit which e.g. deals with the Communications services provided or targeted to Qualifying MNC Customers).

\*\* All periods of time deleted for business secrets reasons in Section XII Ancillary Restraints are less than five years.

<sup>21</sup> Outsourcing Professional Services are defined in the Framework Agreement as consisting of "the provision of professional services relating to network architecture validation, implementation, operations and life cycle management, including business process consulting, migration planning and implementation, but excluding Managed Network Services, and may include the ownership and acquisition of assets from and on behalf of customers related to the provision of Outsourcing Professional Services".

Communications Services, they are obliged to use the Managed Network Services<sup>22</sup> of the applicable MNC NewCo Subsidiary, and the joint venture is obliged to make such Managed Network Services available.

209. To the extent that the provision sets out a supply and a procurement obligation for Managed Network Services, this obligation may be necessary during an initial phase after the creation of the joint venture. However, lasting supply and procurement obligations are not necessary for the implementation of the concentration. The provision can therefore only be considered as ancillary for a period of [ ]\* years after the implementation of the joint venture.
210. Article 9.2 (a) of the Framework Agreement requires the parents to purchase all their requirements for Global Communications Services from the NewCo Group. Such a procurement obligation ensures a demand for the joint venture's product which may be necessary during an initial phase after the creation of the joint venture. However, a lasting exclusive procurement obligation is not necessary for the implementation of the concentration. The provision can therefore only be considered as ancillary for a period of [ ]\* years after the implementation of the joint venture.
211. Article 9.2 (b) of the Framework Agreement stipulates that NewCo and its group companies will, subject to certain exceptions applicable during a transition period, appoint the parents as their exclusive distributors for the sale of Global Business Communications Services of NewCo in their Home Countries. The provision is necessary for the joint venture to establish itself on the market in terms of the goodwill transferred from the parent companies and the brand image which the joint venture will wish to build up. Beyond that time, the absence of the possibility for the joint venture to appoint other distributors cannot be considered to be ancillary to the concentration. Therefore, this provision can be considered to be directly related and necessary for the implementation of the concentration for a period of [ ]\* years from the date of this decision.
212. Pursuant to Article 9.3 of the Framework Agreement, the parents and their subsidiaries are required to purchase all their requirements for International traffic termination Services from NewCo Group. This procurement obligation ensures a demand for the joint venture's product, which may be necessary during an initial phase after the creation of the joint venture. However, a lasting exclusive procurement obligation is not necessary for the implementation of the concentration. The provision can therefore only be considered as ancillary for a period of [ ]\* years after the implementation of the joint venture.
213. The Parties notified Article 11 of the Framework Agreement as ancillary to the concentration. This Article provides for a series of non-competition provisions. In particular it stipulates that for as long as the Framework Agreement and other Transaction Agreements remain in effect, AT&T, BT and their subsidiaries or affiliates must not, other than through the joint venture:

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<sup>22</sup> Managed Network Services are defined in the Framework Agreement as "the provision of service to a customer consisting of the management of the logical and physical elements of a customer's end-to-end communications network, including network transport and equipment, and incremental, directly related network systems and applications planning, design, integration and migration, and customer support functions".

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- offer, sell or distribute any global business communications services provided by the joint venture or any services which compete with these;
- offer, sell or distribute to any Qualifying MNC Customers any communications services other than through the joint venture ;
- provide any International Carrier Services;
- own, operate or manage any global network facilities;
- offer, sell or distribute any global business communications services provided by the joint venture in the other parent's Home Territory<sup>23</sup>; or
- compete with the other parent or any other distributor of the joint venture in the other parent's Home Territory as a distributor or supplier of Communications services of the type supplied by the joint venture. The non-compete provisions are subject to certain limited exceptions that are principally designed to address the acquisition by the parties of businesses whose activities may breach these non-compete provisions.

214. With the exception of the second indent in the paragraph 213, these non-compete provisions reflect the parties intention to withdraw from the market of the joint venture and can therefore be considered as covered by this decision.. The non-compete clause covering the supply of Communications Services to Qualifying MNC Customers other than through the joint venture goes beyond the implementation of the concentration but is necessary for the establishment of the joint venture on the market. Therefore, it can be considered to be directly related or necessary to it for a period of [ ]\* years from the date of adoption of this decision.

215. The parties notified a provision in Schedule 7.10 (MNC Unit Principles) to the Framework Agreement setting out the intent that the NewCo Group will treat AT&T, BT and the MNC Unit equivalently, i.e. that the NewCo Group will furnish its Global Communications Services to the parents on the same essential commercial terms, with the same degree of product, technical and sales support as are available to the MNC Unit. This provision is a direct prerequisite of the transfer of interests of the notifying parties to the joint venture. To the extent that this provision constitutes a restriction of competition it must be considered as directly related and necessary to the implementation of the concentration.

## **CONCLUSION**

216. The notified operation between AT&T and BT should be declared compatible with the common market and the functioning of the EEA Agreement, subject to the condition of full compliance with the Undertakings given by the notifying parties to the Commission, as set out in Section X.

HAS ADOPTED THIS DECISION:

### *Article 1*

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<sup>23</sup> Home territory is defined in the Framework Agreement as meaning “when used with respect to BT, the European Region and BT’s Home Country, and when used with respect to AT&T, the NAFTA region and AT&T’s Home Country”.

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The concentration notified by British Telecommunications plc and AT&T Corp. on 3 November 1998, by which British Telecommunications plc and AT&T Corp. acquire joint control of a newly created company constituting a joint venture, is declared compatible with the common market and the functioning of the EEA Agreement, subject to the condition of full compliance with the Undertakings given by the notifying parties to the Commission, as set out in Section X.

*Article 2*

This Decision is addressed to:

British Telecommunications plc  
81 Newgate Street  
London EC1A 7 AJ  
United Kingdom

AT&T Corp.  
32 Avenue of the Americas  
New York, NY 10013-2414  
United States of America

Done at Brussels,

For the Commission,