

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 20 May 1999

relating to a proceeding under Article 81 of the EC Treaty

(Case IV/36.592 — Cégétel + 4)

(notified under document number C(1999) 1194)

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

(Text with EEA relevance)

(1999/573/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

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

Having regard to the application for negative clearance and the notification for exemption submitted pursuant to Articles 2 and 4 of Regulation No 17 on 18 July 1997,

Having regard to the summary of the application and notification published pursuant to Article 19(3) of Regulation No 17 ⁽²⁾,

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

Whereas:

I. THE FACTS

A. INTRODUCTION

- (1) On 18 July 1997 the Commission received a notification pursuant to Article 4 of Regulation No 17 concerning a set of agreements, by which Compagnie générale des

eaux SA ('CGE'), British Telecommunications plc ('BT'), Mannesmann AG and SBC International Inc. ('SBCI') agreed on their respective contributions, interests and commercial relationships in connection with Cégétel (Compagnie générale de télécommunications).

- (2) This notification concerns the restructuring of Cégétel, a company which was created at the end of 1995 by CGE and has since been active on previously liberalised segments of the telecommunications market particularly in mobile telephony (Société française de radiotéléphonie — SFR) and in paging (Société française de transmission de données par radio — TDR).

It is related to the notification of the agreements between the SNCF (Société nationale des chemins de fer français) and Cégétel concerning Télécom Développement ('TD') (see notice pursuant to Article 19(3) of Regulation No 17 — Case IV/36.581 ⁽³⁾), a jointly controlled subsidiary to which SNCF has contributed its existing telecommunications network (9 000 km of optical fibre cables), now being developed into an alternative long-distance infrastructure network, by the additional roll-out of 6 000 km of optical fibre cables.

⁽¹⁾ OJ L 13, 21.2.1962, p. 204/62.

⁽²⁾ OJ C 238, 29.7.1998, p. 3.

⁽³⁾ OJ C 293, 22.9.1998, p. 4.

- (3) The purpose of the restructuring is to enable Cégétel to become the second full-service telecommunications operator in France, by offering a full range of telecommunications services, including fixed voice telephony. Cégétel has acquired the existing corporate telecommunications business of BT's affiliate in France ('BT France'). In partnership with SNCF, Cégétel is now constructing, through TD, a national, fixed, long-distance network. TD produces fixed long-distance, voice-telephony services and transmission capacities, which are commercialised to residential customers by Cégétel Le 7, and to business customers by Cégétel Enterprises. These two companies will in fact address all the telecommunications needs of their respective customer segments.
- (4) TD, Cégétel Le 7 and Cégétel Enterprises were granted the necessary licences in December 1997 and March 1998 (pursuant to Articles L 33-1 and L 34-1 of the French Posts and Telecommunications Code. Cégétel has been one of the first alternative operators to be granted a short 'E-prefix' for carrier selection and to start its long-distance services for residential customers. Cégétel launched its fixed, long-distance, telecommunications services in February 1998.

B. THE PARTIES

- (5) CGE, now named Vivendi, is a diversified company, providing a full range of services: water supply, waste management, building and public works, real estate and communication (multimedia, cable television, telecommunications). CGE's worldwide turnover in financial year 1996 was ECU 25 552 million (FRF 165 914 million), 3,6 % of which was in the telecommunications sector (mainly through SFR and TDR). It was not previously active in the fixed telecommunications market in France.
- (6) BT is the historical telecommunications operator in the United Kingdom and is now active worldwide. BT's worldwide turnover for the year ending 31 March 1997 was GBP 14 935 million (ECU 18 352 million). BT is the majority owner of Concert Communications (Concert) which provides value added and enhanced services to multinational companies. Prior to the 1998 full liberalisation, BT was already present in many other European countries, through joint ventures, in liberalised segments, like mobile communications and/or corporate telecommunications services. Through joint ventures similar to Cégétel it now enters the fixed voice-

telephony market in several of these countries. BT was previously active, through its subsidiary BT France, on the French market for liberalised corporate telecommunications services, with a very low market share (less than [...]) (*).

- (7) Mannesmann AG is the ultimate parent of a diversified industrial group, with a worldwide turnover of DEM 34 683 (ECU 18 163 million). Mannesmann AG intends to become the second telecommunications operator in Germany, through its joint venture with Deutsche Bahn. Mannesmann AG operates the second GSM mobile network in Germany. Mannesmann was not previously active on the French telecommunications market, except through an interest in TDR.
- (8) SBCI is a wholly owned subsidiary of SBC Communications Inc. SBC is one of the seven regional telecommunications operators in the United States. It is one of the world's leading diversified telecommunications companies, with nearly 114 000 employees. SBCI was not previously active on the French telecommunications market, except through a 10 % interest in SFR.

C. THE NOTIFIED OPERATION

- (9) The notification contains a set of agreements concerning this operation, all dated 14 May 1997. The main agreements are: the shareholders' agreement, the master agreement, the framework cooperation agreement for international traffic operations, the Concert distribution agreement and the framework network supply and customer service agreement for Concert services.

Shareholding

- (10) CGE (currently named Vivendi) initially held 100 % of Cégétel. As a result of the agreements, the parties hold, directly or indirectly, the following participations in Cégétel: Vivendi (44 %), BT (26 %), Mannesmann (15 %), SBCI (15 %).

Management

- (11) Cégétel is managed by a board of directors, which comprises nine directors (five from Vivendi, two from BT, one from Mannesmann, one from SBCI), from whom a chairman is appointed.
- (12) The board of directors is assisted by several committees, in particular an executive committee, which is designed to play a key role in determining the common position of the shareholders regarding major strategic decisions, notably [...]. (*) The executive committee comprises the 'directeur général' of Cégétel, the 'directeurs généraux adjoints' of Cégétel, and one representative of each shareholder. It is chaired by either Cégétel's 'directeur général' or by the Vivendi representative at the executive committee.

(*) 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.

- (13) The executive committee is designed to operate by unanimous consent, but a dispute resolution mechanism is provided for. In the event that no agreement is reached on a matter, this matter is finally decided by the board of directors (at a 'final board meeting') by simple majority, subject to veto right and specific consent rights.

All parties hold veto rights concerning in particular [...] (*). BT has a specific veto right to [...] (*).

The parties hold specifies consent rights, pursuant to which a limited number of matters (notably [...] (*) must be agreed upon by at least one representative of each party in the final board.

Scope of business activities

- (14) Cégétel is active in France only, including overseas departments and territories. Under Article 2(1) (1) of the shareholders' agreement, it is prohibited from investing in infrastructure outside France.
- (15) Cégétel and the companies controlled by it offer a full range of domestic and international telecommunications products and services, in particular newly liberalised voice telephony services, as well as various voice and data services to end-users both residential and corporate, the distribution of Concert services, delivery of these services through the construction and operation of a domestic network and/or interconnection with other operators, international services, infrastructure services, outsourcing and facilities management, Internet access provision. Cégétel intends to have a market share in long-distance and international fixed voice telephony of approximately [...] (*) in 2006.

Cégétel will further develop its mobile telecommunications activities in France, which are currently carried out by its subsidiary SFR.

- (16) Telephony over cable-TV networks is not included in Cégétel's scope of business at this stage, unless the parties unanimously agree otherwise.

Non-compete clause

- (17) All parties agree, in Article 2(4), that Cégétel and its subsidiaries shall be the sole entities through which they will set up and carry out any telecommunications activity in France, subject to any applicable competition rules relating to passive sales. Some very specific inter-

national telecommunications activities are excluded from this non-compete clause (for example, [...] (*), etc.).

Preferred-supplier principle

- (18) Article 6 of the shareholders' agreement provides that commercial contracts between Cégétel and any of the four shareholders or between Cégétel and its subsidiaries will be concluded on a preferred supplier basis. This means that when Cégétel is the purchasing party, it will select one of the shareholders as the supplier in priority to third parties, where the terms offered by this shareholder match or are more favourable than any agreement that could reasonably be reached with a third party, considering all relevant factors (price, volume, quality of service, etc.). Conversely, a shareholder will select Cégétel as its supplier where the terms offered by Cégétel are at least as favourable as any offer that could be made by a third party.

Preferred-supplier and preferred-customer principles for the international traffic between Cégétel and BT

- (19) Cégétel and BT will cooperate for the development of Cégétel's international traffic, on a 'preferred-supplier' basis, as was explained in recital 18 and on a 'preferred-customers' basis. BT will be the preferred supplier of Cégétel for termination of outgoing international traffic products and services⁽¹⁾. Cégétel will be the preferred supplier of BT for termination of incoming international wholesale voice traffic⁽²⁾ in France.

Cégétel will be BT's favoured customer for outgoing international wholesale voice traffic: BT will offer to Cégétel terms and conditions that are at least as favourable to Cégétel as those conditions that BT offers to other licensed operators in France. BT will be Cégétel's favoured customer for termination of incoming international voice traffic in France: Cégétel will offer to BT terms and conditions that are at least as favourable to BT as those conditions that Cégétel offers to any other operator in the United Kingdom. The other shareholders have the option of entering into similar arrangements.

The Concert distribution agreement

- (20) Cégétel is appointed as exclusive distributor of Concert's value added and enhanced international services ('global products') within France and agrees to obtain from BT all its requirements for global products. In the event that Cégétel is expressly required by a customer in France to provide a global product other than a Concert service, the case would be reported to the executive committee. The framework network supply and customer services agreement for Concert services contains provisions, to ensure that BT and Cégétel's networks interoperate to provide a seamless, managed, end-to-end service for Concert customers. Cégétel is restricted from providing support services related to non-Concert global services.

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⁽¹⁾ In this recital, outgoing international traffic refers to traffic from France to any other country and incoming international traffic refers to traffic from any other country to France.

⁽²⁾ International wholesale voice traffic means international basic voice services provided by an operator to another operator, but not on the basis of proportionate return nor of proportionate accounting rates.

D. THE RELEVANT MARKET

*Mobile telecommunications services***Product market**

- (21) Cégétel will address all segments of the French telecommunications market, both for fixed services and mobile services.
- (22) For fixed telecommunications services, it is the Commission's established practice to consider the relevant product markets as being the markets for domestic and international voice and data telecommunications services, with a segmentation between the voice market (in which both private households and business customers participate) and the data market (primarily used by business), and further segmentation into domestic and international markets. However, the precise product-market delimitation in this case can be left open since even on the narrowest possible definition the proposed transaction does not give rise to competition problems.
- (23) For **mobile telecommunications services**, the parties submit that this market includes all mobile voice services notwithstanding the standard they use (analogue, GSM, DCS 1800). However, the precise product-market delimitation in this case can be left open since even in the narrowest possible definition the proposed transaction does not give rise to any competition problem.

Geographical market

- (24) The scope of the geographic market in telecommunications is determined: (i) by the extent and the coverage of the network and the customers that can economically be reached and whose demand may be met; and (ii) by the legal and regulatory system and the right to provide a service.

Fixed telecommunications services

- (25) having regard to the licensing and regulatory framework for the provision of basic fixed telecommunications services, the geographic market for these services must be regarded as being **national** in scope.
- (26) On the other hand, the demand for customised packages of corporate telecommunications services like Concert exists in at least three distinct geographic markets, namely at global, cross-border regional and national levels (see Decision 96/546/EC in Case IV/35.337 — Atlas, at recital 12 ⁽¹⁾).

- (27) As regards the market for GSM service provision, the Commission has held in the past that there is an increasing trend towards a European market, due to a certain degree of substitutability throughout Europe between the various subscriptions allowed by 'roaming' agreements. The parties submit that, in view of the licensing and regulatory framework within which these services are provided, the relevant geographic market is **France**. They also submit that it is very unlikely that a French customer could consider taking a subscription in another Member State, notably because of the high international roaming charges. However, the definition of the relevant geographic market for mobile telecommunications may be **left open** since, given the amendments to the non-competition provisions mentioned in recital 31, the notified transaction does not give rise to competition problems.

Market shares of the parties

- (28) Except concerning the mobile telecommunications services, the parties' market shares on the described segments are currently negligible (below [...] ^(*) in 1997). SFR, a subsidiary of Cégétel, holds a market share of approximately 38 % in mobile telephony in France.

The main competitors on these markets

- (29) In France, as well as in most European countries, the incumbent telecommunications operator (in this case France Télécom), holds a dominant position in nearly all segments of the fixed telecommunications market, due to its former legal monopoly on infrastructure and services. On the mobile telecommunications market, France Télécom holds a market share of approximately 51 %, in terms of number of subscribers.
- (30) Many companies have entered or intend to enter the French telecommunications market, either globally (9 Telecom) or on specific segments: resale of voice telephony services (Axis, Kertel, etc.), telecommunications networks or services for corporate clients (WorldCom, Siris, Colt, Omnicom, etc.), local access (Lyonnaise des Eaux), and so on. By July 1998, 37 licences had already been delivered for telecommunications network and/or services provision, 18 applications for a licence were being analysed by the national telecommunications regulator. Seven operators had been granted a 'short prefix' for carrier selection.

Three operators are providing mobile telecommunications services in France: France Télécom, SFR and Bouygues Telecom.

⁽¹⁾ OJ L 239, 19.9.1996, p. 23.

^(*) 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.

E. CHANGES MADE FOLLOWING THE COMMISSION'S INTERVENTION

- (31) The Commission informed the parties that, given the potential substitutability throughout Europe between the various GSM subscriptions allowed by roaming agreements, the application of the non-compete clause to the marketing and sales of GSM services by the shareholders (sale of SIM cards) appeared to be incompatible with Community competition rules. Consequently the parties have agreed to amend the original agreements to exclude from the non-compete clause the provision by Cégétel's shareholders other than Vivendi of SIM cards to end-users located in France, and to allow Cégétel and the companies controlled by it to sell GSM services (SIM cards) outside France.

F. NO COMMENTS FROM THIRD PARTIES

- (32) Following the publication of a notice pursuant to Article 19(3) of Regulation No 17, the Commission did not receive any comments from third parties.

II. LEGAL ASSESSMENT

A. ARTICLE 81(1)

- (33) Cégétel combines the activities of its parent companies on the telecommunications market in France and will develop and provide new services on this market. This venture entails changes in the structures of the parent companies: Vivendi contributes to Cégétel its subsidiaries which were already active on the market, primarily in mobile and paging; Cégétel takes over the majority of business activities of BT France.
- (34) Cégétel is established on a lasting basis evidenced by, among other things, a substantial financial commitment by its parents. Indeed, Cégétel is incorporated under French law as a 'société anonyme'. After the restructuring, the shareholders' equity in Cégétel is estimated at [...] (*) and Cégétel's net liquid assets are [...] (*), and Cégétel controls 80 % of SFR, 100 % of TDR and Cégétel Enterprises.

Applicability of Article 81(1) to the restructuring of Cégétel

The context

- (35) This operation has to be assessed in the context of full liberalisation of the French telecommunications sector. France Télécom had until 1 January 1998 a monopoly over public voice telephony, by far the most important segment of the market. Before this date, competing voice services were allowed only within closed user groups and over private corporate networks. In this context, the operation appears to be pro-competitive. Cégétel is a new entrant on the French telecommunications market as a full service telecommunications operator. Before the restructuring, it was only active in the provision of mobile telecommunications services through SFR. Neither Vivendi had previously entered the fixed voice telephony market, nor BT, SBCI or Mannesmann had been active as a full service telecommunications operator outside their national markets; their presence in the French telecommunications market was confined to limited activities in previously liberalised segments.

- (36) The French telecommunications services market is one of Europe's largest. As other newly liberalised telecommunication markets, it is characterised by a number of barriers to entry, including the substantial amount of investment required (in six years, Cégétel will invest [...] (*) in fixed activity, mainly for network rollout, the fast evolving technology and commercial landscape that makes rapidity a key factor in a successful entry in such market, the long established dominance of the incumbent operator, France Télécom, which has scheduled progressive decrease of its tariffs, the necessity to establish a strong brand image to overcome the customers' loyalty to France Télécom and the substantial amount of universal service financing.

No actual competitors in the relevant market

- (37) BT and SBCI are incumbent telecommunications operators on other national markets and have telecommunications activities, on liberalised segments of the markets, or interests in telecommunications operators in many countries, although they had not entered markets, other than their own national markets, as full service operators prior to the 1998 full liberalisation. Mannesmann is a new entrant in this sector in Germany and has already started to expand into telecommunications markets in other European countries through alliances, but had not entered fixed voice telephony markets prior to the 1998 liberalisation. BT and Mannesmann actually compete, through joint ventures, with each other on some markets, in Germany and Italy for example.

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(38) However, before the notified operation, the parties did not compete to a significant extent with each other in the French telecommunications market. Their activities on this market were extremely limited (except in mobile telephony). The only segment on which some parties could be considered as currently competing with each other is the provision of corporate telecommunications services — essentially data services, virtual private networks (VPN). However, such competition was very limited, given their very low market shares and the dominance of France Télécom: Cégétel was only active on this market to a very limited extent (through its previous participation in Siris) and BT France's share of the market for corporate telecommunications services was below [...] (*) in 1996. At the end of 1996, Cégétel withdrew from Siris, a venture set up in 1995 with Unisource and which remains active in the corporate telecommunications market in France. Mannesmann and SBCI had no direct activities in the telecommunications sector in France.

(39) For the provision of mobile telecommunications services, the parties can be regarded as actual or potential competitors, only if the relevant market is considered to be European-wide. BT and Mannesmann have indeed participations in various mobile-telephony operators across Europe. However, potential competition between the parent companies and SFR on this market is not altered by the Cégétel agreements: these agreements only concern the French market, and the sale of SIM cards (GSM subscription) has been excluded from the non-compete clause.

No reduction of potential competition

(40) It must also be analysed whether this operation restricts potential competition on the relevant markets. Formally, it could be considered that the parent companies had and still retain the necessary financial and technical resources to enter separately these markets. probably, the parties could individually have entered 'niche' segments of the telecommunications market in France but, given notably the amount of investment required, they would not have been able to engage in the same global telecommunications activities as Cégétel and to provide a full range of telecommunications services with the same efficiency.

(41) Even if BT or SBCI are incumbent operators on their home market, they have to be considered as a new entrant in France and in any other national telecommunications markets, as regards the newly liberalised

segment of fixed voice telephony, which represent by far the most important part of the market.

(42) The strategies in the telecommunications sector of BT, SBCI and Mannesmann are European-wide or worldwide. BT and Mannesmann are currently developing activities in several newly liberalised telecommunications markets in Europe. They enter these markets through alliances with local or international partners in order to combine financial resources and complementary strengths. For example, partners with a mobile-telephony licence and/or with a privileged access to an infrastructure represent an important advantage. They could obviously not follow such global strategies if they entered each market alone: this would require enormous financial resources. For instance, in Cégétel business plan, the cumulated capital expenditure for the fixed services is estimated at [...] (*) in six years, most of it being spent in the first three years, primarily on the network roll-out.

(43) The restructuring of Cégétel, which has the same aim and effect as a genuine company formation, allows a fusion of the parties' strengths in order to enter a market strongly dominated by France Télécom. The combination of their significant financial commitments, their extensive knowledge of telecommunications markets and their experience in building up and managing new telecommunications activities will allow Cégétel to offer new services more quickly, cheaply and of a more advanced nature than the parties would have been capable of separately. Their respective strengths indeed appear to be complementary and will allow significant synergies: Vivendi has contributed to Cégétel the highest financial investment, together with its subsidiaries which were already active in mobile telecommunications. BT has contributed its existing activities on the French market for corporate services, its technological and marketing expertise and the highly sophisticated Concert services. SBCI has an extensive marketing and commercial experience gained in one of the most competitive markets in the world. Mannesmann has the experience of building up and operating a large terrestrial network, especially in the case of backbone networks based on railway infrastructure.

(44) The fact that Cégétel will address all segments of the market will allow cost savings resulting from economies of scale at a technological and operational level. For example, Cégétel's network activities, carried out through its joint venture with SNCF, will benefit from the traffic generated by SFR, by the local fibre-optic networks built for business customers and possibly from the international traffic generated by the networks of its parents in the United Kingdom, Germany and the United States.

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- (45) Even on specific segments on which the parties could in theory have entered alone (like data services or VPN for corporate users), potential competition is not reduced. Cégétel will compete strongly with France Télécom on these segments, and probably more effectively than the parties would have been able to do separately, because of the efficiencies underlined in the previous points. Furthermore, as was indicated in recital 30, Cégétel will face many competitors on every segments of the relevant markets. BT is the only European incumbent operator involved in the Cégétel alliance and potential competition exists from many other telecommunications operators.

Conclusion

- (46) In conclusion, Cégétel creates a more effective competition to the incumbent operator than the parent companies would have been capable to create separately. Cégétel's restructuring does not restrict actual or potential competition on the French fixed voice telephony market (since the parties could not enter this market alone), for on any other relevant segments of the telecommunications market (since Cégétel will be able to compete strongly on these segments and since there are numerous other competitors), nor on the potential European market for mobile telecommunications services. Therefore, Cégétel's restructuring falls outside the scope of Article 81(1) of the Treaty.

Applicability of Article 81(1) of the Treaty to other contractual provisions

- (47) It must be examined whether the following provisions further restrict competition:
- the general restriction on competition in Article 2(4),
 - the appointment of Cégétel as the exclusive distributor of Concert services in France, the obligation in Cégétel to obtain all its requirements in global products from Concert and the restriction on Cégétel to provide support services for non-Concert services,
 - the preferred supplier and preferred customer provisions as described in recitals 18 and 19.

(a) Restriction on competition

- (48) The general restriction of competition on the parent companies in the expression of the firm commitment of the shareholders towards Cégétel and is necessary to guarantee Cégétel's shareholders that each one will focus its efforts on the French market in the joint venture. As

long as the parties keep their current influence over Cégétel's operation, as it is described in recitals 11, 12 and 13, this clause can be regarded as ancillary to the creation and successful operation of a new full service telecommunications operator in the French market through Cégétel's restructuring and will therefore not be subject of an assessment under Article 81 of the Treaty separate from that of Cégétel's restructuring itself.

(b) Exclusive distribution of Concert services

- (49) Prior to this operation, BT France was the exclusive distributor of Concert services in France. The general exclusive distribution scheme for Concert services was exempted by Commission Decision 94/579/EC — Case IV/34.857 ('BT/MCI') ⁽¹⁾.
- (50) In that Decision, the Commission concluded that the exclusive arrangements for the distribution of Concert services fell within the provisions of Article 81(1) of the Treaty. The same conclusion is reached for the exclusive arrangements for the distribution of Concert services in France: the appointment of Cégétel as exclusive distributor of Concert services in France falls under Article 81(1) of the Treaty because it has as its object or produces as its effect the isolation of France against imports of these services from other Member States, which may affect competition within the Community. In addition, it cannot be considered as ancillary to the restructuring of the joint venture.

Effect on trade between Member States

- (51) In view of the international nature of Concert services and since Cégétel aims at becoming the second full-service telecommunications operator in France, these exclusive distribution arrangements will substantially affect trade between France and other Member States.

(c) Preferred-supplier and preferred-customer provisions

- (52) The preferred-supplier mechanism in the framework cooperation agreement for international traffic guarantees a regular and steady supply of the international traffic between BT and Cégétel. This preference given by BT to Cégétel for incoming traffic in France represents one of the contributions to the joint venture expected from BT. On the other hand, BT was prepared to invest in Cégétel and transfer its existing activities in France to it only if it could maintain all the synergies between its operation in France and its operations in other countries, notably for international traffic.

⁽¹⁾ OJ L 223, 27.8.1994, p. 36.

- (53) This mechanism does not give the 'preferred supplier' the option of reviewing any offers which are submitted by any other supplier and does not automatically result in a situation where the preferred supplier is obliged to match any better offer. Thus, it does not result in any price transparency, which would be to the prejudice of third-party suppliers. It does not limit price competition, since Cégétel remains free to choose other suppliers if they offer better conditions than BT.
- (54) The preferred-customer principles ensure that Cégétel will get access to BT's services for termination in the United Kingdom of international calls from France at the best conditions available and that BT will have access Cégétel's services for termination in France of international calls from the UK at the best conditions available.
- (55) The clauses allow for cooperation between Cégétel and its parent companies for the future development of Cégétel's business at lower costs. The Commission concludes that, as far as restricting competition is concerned, the provisions are ancillary to the restructuring of Cégétel and will not be subject to a separate assessment under Article 81 of the Treaty.
- (56) The same conclusions can be reached in regard to the general preferred-supplier principle between Cégétel, its subsidiaries and its parent companies, as provided by Article 6 of the shareholders' agreement.

B. APPLICATION OF ARTICLE 81(3) OF THE TREATY TO THE EXCLUSIVE DISTRIBUTION OF CONCERT SERVICES IN FRANCE

Technical and economic progress

- (57) By appointing a single distributor in France, BT will not need to maintain numerous business relations with a large number of distributors there, and hence will be in a position to reduce its transaction costs, allowing for the realisation of efficiencies in distribution. BT will also be able to overcome more easily distribution difficulties in the provision of Concert services and to protect better its intellectual property rights. The ability to provide customers with a single contact point for anything relating to the services provided is a competitive advantage in this kind of service.
- (58) Moreover, the exclusivity given to Cégétel will facilitate the promotion of Concert services and lead to intensive marketing while at the same time nationalising distribution. Exclusivity will ensure an adequate level of quality in the provisions of additional support services by Cégétel as a distributor. On the contrary, the appointment of numerous distributors could lead to underinvestment in those activities. This intensified promotion

will stimulate competition between the different providers of global services and can be considered as the most effective way to compete effectively with France Télécom in the market for global services.

- (59) Moreover, the appointment of Cégétel as exclusive distributor of Concert services, which is one of the important contributions of BT to the joint venture underlined above, by completing the array of services being offered by it to customers, will allow Cégétel to better position itself as a fully-fledged competitor of France Télécom (the exclusive distributor in France of GlobalOne services).
- (60) Finally, the economies of scale allowed by Cégétel, mentioned in recital 44, will improve the competitiveness of Concert services in France. Cégétel has more resources and advantages to distribute Concert services effectively than BT France had before the operation.

Benefits to the consumers

- (61) Through the notified arrangements BT will assist Cégétel in launching and improving a wide range of sophisticated Concert services quickly and effectively. Customers will benefit from the efficiencies in the distribution underlined above, from appropriate support from Cégétel, and from the rapid availability of Concert services in France. Telecommunications users will also benefit from an intensified promotion of Concert services, which will increase competition on this segment of the French telecommunications market.
- (62) In addition, the exclusivity offered to Cégétel is not absolute: neither BT nor any other member of the Concert alliance will be prohibited from having customers in France when a customer requests such services from them. As pointed out in the BT/MCI decision, potential users of Concert services are usually highly sophisticated telecommunications purchasers requiring cross-border services, and have a considerable bargaining power, which gives rise to pressure on margins and an expected high level of competition among suppliers. Parallel imports of Concert services are thus a real possibility.

Indispensability

- (63) The exclusive nature of the Concert distribution agreement itself is indispensable for achieving the pro-competitive efficiencies described above. Indeed, this exclusivity is indispensable in order to concentrate Cégétel marketing and sales efforts on Concert services, allowing it to compete vigorously with other providers of global telecommunications services.

(64) Furthermore, the prohibition imposed on Cégétel from selling, or providing support services for, services competing with Concert services is also indispensable to assure BT that Cégétel will concentrate its efforts on the distribution of Concert services. These clauses also enable BT and Concert to plan sales of the services with greater precision and for a longer period, and ensure that the distributor's requirements will be met on a regular basis. The 'framework network' agreement, designed to ensure that BT and Cégétel's networks inter-operate to enable a seamless managed end-to-end service to Concert customer, is necessary to enable the distribution of Concert services in France.

(65) In addition, as recognised by the Commission in previous decisions concerning joint ventures active on the market for global telecommunications services (see Atlas Decision, at recital 58, and Decision 97/780/EC — Unisource — at recital 93) ⁽¹⁾, exclusive distribution protects the intellectual property rights of Concert's parent companies better than other arrangements.

(66) In any event, the exclusivity given to Cégétel will not be absolute. Neither BT nor any other member of the Concert alliance is prohibited from having customers in France when a customer requests such services from them. Conversely, the Concert distribution agreement allows passive sales by Cégétel into territories where BT or a third party is the appointed Concert distributor.

No elimination of competition

(67) Concert services will be in competition with other lines of global products, notably GlobalOne services distributed by France Télécom, the dominant provider of telecommunications services and networks in France. As was said in recital 30, many firms will provide corporate international telecommunications services in France (Siris, WorldCom, Colt, etc.). These services will, at least partially, compete with Concert services. Several of these operators will develop their own networks. The parties also expect competition, at least for components of value-added telecommunications services, coming from players including computer and data-processing companies (like IBM), and information service companies (like GEIS). Moreover, multinational or other big companies often have the ability to manage their own private network solutions. In addition, passive sales from

distributors of Concert services in other countries will also be possible.

Conclusion

(68) The Commission concludes that all conditions for an individual exemption pursuant to Article 81(3) of the Treaty are met in respect of the exclusive arrangements for the distribution of Concert services in France.

C. DURATION OF THE EXEMPTION

(69) Pursuant to Article 8 of the Regulation No 17, a decision in application of Article 81(3) of the Treaty must be issued for a specified period. Pursuant to Article 6 of the Regulation No 17, the date from which such a decision takes effect cannot be earlier than the date of notification. In the present case, given the time necessary for Cégétel to capture a significant market share for corporate telecommunications services in France and to be paid back from its investments for fixed telecommunications services a long exemption period can be granted. In so far as the decision grants exemption, it should take effect for 10 years from the date of notification,

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in its possession, the Commission has no grounds for action under Article 81(1) of the EC Treaty or Article 53(1) of the EEA Agreement in respect of the notified agreements relating to the restructuring of Cégétel, including the ancillary provisions regarding: (i) the general restriction on competition contained in the shareholder's agreement and binding on each party, as long as the respective influence of such party over Cegetel's operation remains unchanged relative to the situation described in recitals 11, 12 and 13 of this Decision; (ii) the preferred-supplier and preferred-customer provisions.

Article 2

Pursuant to Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement, the provisions of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement are hereby declared inapplicable, for a period of 10 years from 18 July 1997, to the arrangements for the exclusive distribution of Concert services by Cégétel in France.

⁽¹⁾ OJ L 318, 20.11.1997, p. 1.

Article 3

This Decision is addressed to:

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Done at Brussels, 20 May 1999.

For the Commission

Karel VAN MIERT

Member of the Commission
