UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. SPRINT CORPORATION and JOINT VENTURE CO., Defendants.	)	Civil Action No. 95 CV 1304 Case - Filed: July 13, 1995 Filed: 8/14/95

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On July 13, 1995, the United States filed a civil antitrust complaint under Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, alleging that the proposed acquisition of a total of 20% of the stock of Sprint Corporation ("Sprint") by France Télécom ("FT") and Deutsche Telekom A.G. ("DT"), and the proposed formation of a joint venture between Sprint, FT and DT to provide international

telecommunications services, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, by lessening competition in the markets for international telecommunications services between the United States and France and Germany, and for seamless international telecommunications services, thereby depriving United States consumers of the benefits of competition -- lower prices and higher quality services. Defendants are Sprint and Joint Venture Co., a term collectively designating the entities which will become the joint venture of Sprint, FT and DT upon consummation of the agreements between them. The Complaint seeks injunctive and other relief.

The United States and Sprint have stipulated to the entry of a proposed Final Judgment, after compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b) - (h). Joint Venture Co. will also enter into this stipulation once it has been formed and satisfied other preconditions stated in the stipulation. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, and enforce the proposed Final Judgment and to punish violations of the Judgment. The United States and Sprint have stipulated, and Joint Venture Co. will also stipulate, that the defendants will abide by the terms of the proposed Final Judgment after consummation of the transactions between them, pending entry of the Final Judgment by the Court, permitting the transactions to go forward prior to completion of the Tunney Act procedures. Should the Court decline to enter the Final Judgment, Sprint has also committed in the stipulation, and Joint Venture

Co. will commit, to abide by the terms of the Final Judgment until the conclusion of this action.

II.

EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Proposed Transactions

On June 22, 1995, Sprint, FT and DT entered into a Joint Venture Agreement, providing for the formation of an international joint venture to provide various types of international telecommunications and enhanced telecommunications services. In addition, FT and DT entered into an Investment Agreement with Sprint on July 31, 1995, entitling FT and DT to acquire a total of up to 20% of the voting equity in Sprint for a variable price that could be as high as approximately $4.2 billion. As a result of the acquisition of Sprint's equity, FT and DT would also acquire special shareholder rights, including the right to appoint directors to a number of seats on Sprint's Board of Directors in proportion to their ownership interest (a 20% investment would give FT and DT three of the fifteen seats on Sprint's Board of Directors), with a minimum of two directors. These agreements finalize transactions that have been contemplated since June 1994, when Sprint, FT and DT entered into a Memorandum of Understanding concerning the creation of the joint venture and the acquisition of equity in Sprint.

Consummation of the Joint Venture Agreement between Sprint, FT and DT will establish Joint Venture Co., a group of related entities that will engage in the joint venture business, including the offering of (i) international data, voice and video business services for multinational corporations and business customers, (ii) international consumer services based on card services for travelers and (iii) carrier's carrier services including transport services for other carriers. In forming the joint venture, each of the parties will contribute most of their existing operations outside their respective home countries to Joint Venture Co., and will make capital contributions, for a total value of approximately $1 billion. FT and DT intend to hold and manage their interests in Joint Venture Co. together through their own joint venture, known as Atlas, which when formed will be owned 50% by DT and 50% by FT. Sprint, DT, and FT will have equal representation on Joint Venture Co.'s Global Venture Board, which will determine the strategic direction and oversee operations of Joint Venture Co. The international telecommunications facilities of Joint Venture Co., including switches, other transmission equipment, computer hardware and software, and leased lines, will form an international "backbone" network used to carry the joint venture's services. This backbone network will be owned 50% by Sprint and 50% by DT and FT through Atlas. The Joint Venture Co. entity responsible for worldwide activities outside the United States and Europe (the "Rest of World" or "ROW" entity) will have the same 50-50 ownership structure as the backbone network. The Joint Venture Co. entity responsible for activities in Europe but

outside of France and Germany (the "Rest of Europe" or "ROE" entity), however, will be owned 33⅓ % by Sprint and 66⅔ % by DT and FT through Atlas.

Sprint will have the exclusive right to provide Joint Venture Co. services in the United States, its home country, and FT and DT are to refrain from competing with Sprint in the United States in the joint venture's services and certain other telecommunications services. Similarly, Sprint is to refrain from competing with FT and DT in their home countries, France and Germany. Moreover, none of the owners of Joint Venture Co. will compete with Joint Venture Co. Therefore, FT's and DT's direct participation in the areas of business in which Joint Venture Co. is engaged will be limited to their ownership interests in the joint venture entities and sales of the joint venture services, and they generally will only be able to participate directly in United States telecommunications markets through their ownership interests in Sprint.

B. The Parties to the Transaction and the Relevant Markets

1. The Parties

This transaction is a strategic alliance between three of the largest telecommunications carriers in the world, creating vertical affiliation between a major U.S. long distance carrier and two of the largest foreign telecommunications monopolies. Together, DT, FT and Sprint had approximately $85 billion in revenues in 1994, considerably more than AT&T Corporation ("AT&T"), the largest

carrier worldwide,[1] and more than twice as much as the total revenues of British Telecommunications plc ("BT") and MCI Communications Corporation ("MCI"), the partners in the Concert strategic alliance consummated in 1994.[2] The United States, where Sprint's principal network is located, is by far the most important location for multinational customers of telecommunications services in the world. The home countries of the other two partners, France and Germany, are also key locations for multinational customers, matched in significance by only a handful of other countries.[3] To illustrate, more multinational companies have their headquarters located in either France or Germany, in combination, than in any single country other than the United States or the United Kingdom. FT and DT

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[1] A large part of the revenues of AT&T do not even come from telecommunications services markets, but from equipment manufacturing and other businesses. Thus, the aggregate competitive significance of the parties to this alliance, all of which derive the great bulk of their revenues from telecommunications services markets, is even larger relative to AT&T alone than a comparison of total revenues would suggest.

[2] In June 1994, the United States filed a suit and entered into a proposed consent decree with MCI and the joint venture being established by BT and MCI to provide international telecommunications and enhanced telecommunications services, now called Concert. The decree was approved by this Court in September 1994.

[3] Only the United States, the United Kingdom and Japan surpass Germany or France in numbers of headquarters of multinational corporations, though several other countries, including Switzerland, Sweden, Canada, the Netherlands, and Australia, also have a substantial number of multinational headquarters. Only in the United States and the United Kingdom have more multinational companies located their operations than in Germany or France, though there are a number of other countries, including Japan, Canada, the Netherlands, Australia, Switzerland, Italy, Belgium, and Spain, where many multinational companies have located their operations. The countries identified here are not the only ones where multinational corporations have a significant presence.

are the government-owned dominant telecommunications carriers in their home countries, where they have monopolies over public switched voice services and transmission infrastructure, representing more than 75% of all telecommunications revenues, and market power in other key services such as public data networks.

Sprint is one of the three principal domestic long distance and international telecommunications carriers in the United States. It provides long distance telecommunications and enhanced telecommunications products and services in the United States and international telecommunications and enhanced telecommunications products and services between the U.S. and other nations, including France and Germany. Sprint's 1994 revenues were more than $12.6 billion, about half of which came from domestic and international long distance services. Sprint's principal long distance domestic and international competitors in the United States are AT&T, the largest carrier, and MCI, the second largest carrier. These three carriers provide over 80% of domestic long distance service in the United States and almost all international voice telecommunications services originating in the United States; Sprint's market share in both domestic and international U.S. voice traffic is about 10%. Sprint, MCI and AT&T are also among the most important providers of international enhanced telecommunications services and data services in the United States, directly or through subsidiaries and affiliates (such as the Concert joint venture between MCI and BT). Sprint is one of the largest providers of domestic and international data

telecommunications services in the United States. For these types of services, Sprint's market share is generally much larger than its share of voice services. Indeed, for some data services Sprint is larger than any of the other U.S. international carriers in terms of revenues.[4/]

FT is owned by the government of France, and is the fourth largest provider of telecommunications services in the world. Its consolidated annual revenues in 1994 were 142.6 billion FF (approximately $28.5 billion) and its net income for 1994 was 9.9 billion FF (approximately $2.1 billion). FT provides local, long distance, and enhanced telecommunications services in France, and international and enhanced telecommunications services between France and other countries, including the U.S. and Germany. FT owns and operates the French public switched network, with about 32 million telephone access lines in service. FT is the state authorized monopoly provider of all public switched voice service, as well as all transmission facilities for domestic and international telecommunications in France. FT also has market power in the provision of public data network services in France, even though that area has been legally opened to competition since 1993.

DT is the second or third largest telecommunications company in the world, and Europe's largest telecommunications carrier. Its 1994 revenues were 61.2 billion DM (approximately $44 billion). DT provides local, long distance, and

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[4] International data services are also offered by some companies that are not voice carriers, such as Infonet Services Corporation.

enhanced telecommunications services in Germany, as well as international and enhanced telecommunications services between Germany and other countries, including the U.S. and France. Pursuant to a German telecommunications law enacted in 1994, DT became a private corporation on January 1, 1995, but the German government remains DT's sole shareholder. Sale of DT's shares to the public will not begin until sometime in 1996, and the German government is expected to hold a majority of DT's shares through 1999. DT owns and operates the German public switched network, with more than 37 million telephone access lines in service, and 87,000 kilometers of fiber optic lines installed, representing over a third of its total network. DT is the state authorized monopoly provider of all public switched voice service, as well as all transmission facilities for domestic and international telecommunications in Germany. DT also has market power in the provision of public data network services in Germany, even though this area of business has been legally opened to competition since 1990.

2. The Product and Geographic Markets

Broadly speaking, there are two types of markets of concern under the antitrust laws of the United States that are affected by the vertical relationships created in this transaction: the markets for international telecommunications services (including enhanced telecommunications services) between the United States and France and the United States and Germany, and the emerging markets for seamless international telecommunications (including enhanced

telecommunications) services.[5/] These broad markets may further encompass multiple distinct product markets. The various types of data telecommunications services, for example, are distinct from voice services in important respects, from the perspective of both consumers and service providers. For purposes of analyzing the vertical effects of this transaction, however, it is not necessary to distinguish between individual telecommunications services, since the monopoly power of DT and FT affects all of the possible markets at issue.

US-France and US-Germany international telecommunications services are used by individuals and companies in the US to exchange voice, data and video messages with individuals and companies in France and Germany. These services typically are provided on a correspondent basis, meaning that telecommunications providers in different countries agree to interconnect their facilities and services in order to permit international traffic to be completed.[6/] Correspondent

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[5] Other markets not within the scope of U.S. antitrust review, including markets for various types of telecommunications and enhanced telecommunications services in Europe, are also affected by this transaction. Issues involving those markets are being considered separately by the competition authorities of the European Union in a pending investigation.

[6] International correspondent telecommunications services primarily consist of the basic switched voice telephone call (which is known either as International Direct Dial ("IDDD") or International Message Telephone Service ("IMTS")), and International Private Line Service ("IPLS"). They also include certain other switched telecommunications and enhanced telecommunications services.

"Switched" traffic makes use of switching facilities and common lines. Consumers typically obtain switched correspondent services from the provider in the country where a call originates, and calls are handed off to the provider in the other country without direct customer involvement. IPLS consists of circuits dedicated to the use of a single customer, and the providers of IPLS in each

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relationships are established between international telecommunications carriers by entering into commercially negotiated operating agreements, and separate operating agreements often exist for distinct types of services and facilities. According to Federal Communications Commission data for 1993, the most recent year available, all U.S. international carriers received $600,869,527 in total revenues from traffic to Germany billed in the United States, and $261,896,962 in total revenues from traffic to France billed in the United States, for the standard type of switched voice telephone service provided under the correspondent system.[7] France and Germany are among the most important destinations for U.S. international switched voice traffic, and in 1993 France and Germany in combination accounted for over 13% of total international billed revenues of all U.S. international carriers for switched voice service, a share surpassed only by

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[6] (...continued)
country typically sell their "half" of the circuit to the user separately. Switched services constitute the great majority of international telecommunications services in terms of both traffic and revenues.

[7] Federal Communications Commission, Common Carrier Bureau, Industry Analysis Division, 1993 Section 43.61 International Telecommunications Data, International Traffic Data for All U.S. Points, Table A1 (Nov. 1994) (hereinafter 1993 International Telecommunications Data) . The revenue retained by U.S. international carriers from amounts billed to customers is greatly reduced, in the case of France and Germany by nearly half, due to payouts to the foreign carriers for delivering traffic, but at the same time revenues of U.S. carriers are augmented by payments from the foreign carriers for delivering traffic that is billed in the foreign countries. In the case of Germany, amounts paid out by all U.S. carriers for IMTS service to DT were $263,923,146, and amounts received from DT were $119,430,422, in 1993. For France, amounts paid out by all U.S. carriers for IMTS service to FT were $105,449,969, and amounts received from FT were $76,536,312, in 1993. Id.

Canada and Mexico.[8/] No close substitute exists for international telecommunications and enhanced telecommunications services between the U.S. and France or the U.S. and Germany. In order to compete effectively in providing international telecommunications services between the U.S. and France and the U.S. and Germany, U.S. providers must have nondiscriminatory access to FT's and DT's facilities and services in France and Germany to terminate traffic from the U.S., and to receive traffic from France and Germany.

Seamless international telecommunications services are an emerging area of international telecommunications, developing in response to the limitations of the traditional correspondent system, over which the great majority of international telecommunications traffic is still carried. Seamless services represent an important market for the evolution of international telecommunications. Seamless international telecommunications services would be made available by a single provider using an integrated international network of owned or leased facilities, and would have the same quality, features, characteristics, and capabilities wherever they are provided, making them significantly superior to ordinary correspondent telecommunications services for many customers, particularly multinational corporations and other large users of international telecommunications. These services could overcome many of the inadequacies and differences in standards that now exist in various national

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[8] Id.

telecommunications systems, and they could offer scale economies by comparison with private networks individually organized by users.

Some types of international telecommunications services, such as data services, already are being offered between some countries in a seamless fashion, as well as through the correspondent system. However, creating seamless international networks that reach a large number of countries with a wide range of services will require a major commitment of resources and expertise that few firms can supply. While the providers of seamless services aim eventually to have a global reach, today there remain many differences between particular countries affecting both the legality and the technical feasibility of offering seamless services. Other participants in this market include the Concert alliance of BT and MCI, and AT&T's international partnerships, including Worldpartners (a non-exclusive partnership with several foreign providers including Japan's KDD) and Uniworld (an alliance with the national or principal telecommunications providers in Switzerland, Sweden, Spain and the Netherlands). Though the BT-MCI alliance and AT&T's partnerships share a general interest in the emerging market for seamless international telecommunications services, these other transactions are structured in somewhat different ways and vary in their degrees of exclusivity and investment.

Where available, seamless international telecommunications services will be used by multinational corporations and other users of international telecommunications services in the U.S. to exchange voice, data and video

messages with corporate offices, vendors, operations and persons in France and Germany as well as in other countries. Other types of international telecommunications and enhanced telecommunications services provided through the correspondent system are not likely to be close substitutes for seamless international telecommunications services as they fully emerge. Existing services often lack international standardization or advanced features that customers are expected to prefer, and may require that customers deal with multiple providers. To compete effectively in seamless international telecommunications services, providers must have nondiscriminatory access to the U.S., France and Germany. All of these countries are key locations for multinational customers. In combination, the United States, France and Germany have nearly half of all headquarters of multinational corporations, and most potential customers of these services need telecommunications services into and out of the U.S., France and Germany.

3. Monopoly Power of FT and DT

FT and DT occupy very similar market positions in their home countries, as both are the government-owned dominant providers of telecommunications services and continue to exercise extensive legal monopoly rights, making competitors dependent on FT and DT even in those areas of service that have been opened to competition. Access to FT's and DT's public switched network and transmission infrastructure is necessary for international telecommunications and

enhanced telecommunications services that originate or terminate in France and Germany. FT's and DT's legal monopolies in the provision of public switched voice telecommunications services and transmission infrastructure together account for over 75% of all telecommunications revenues in France and in Germany. Virtually all international telecommunications traffic between the U.S. and France and between the U.S. and Germany originates or terminates over FT's or DT's public switched networks, their transmission infrastructure, or both.

FT currently has a monopoly in the provision of both domestic leased lines in France and international half-circuits terminating in France, and DT has a similar monopoly in the provision of domestic leased lines in Germany and international half-circuits terminating in Germany.[9] Third party service providers that want to offer data or value added services between France and the United States, or between Germany and the United States, must obtain their transatlantic half-circuits terminating in France from FT[10] and in Germany from DT. FT's domestic leased lines in France and DT's domestic leased lines in Germany are essential inputs for many services that are open to competition in

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[9] DT also offers a managed leased line service referred to as DDV that is used by it and its competitors for transmission in much the same way as the monopoly leased line service. DDV, however, has better management and diagnostic facilities, back-up routing and service guarantees. Though DT's DDV service has been classified nominally as "competitive" under German law, DT effectively has a monopoly over this transmission infrastructure as well, since there is virtually no competition for DDV service.

[10] FT markets such facilities through its wholly owned subsidiary France Cables et Radio ("FCR").

those countries, such as data services and corporate networks serving closed user groups. A very large portion of the costs of competitors of FT and DT, both in domestic telecommunications and enhanced telecommunications services in France and Germany and international telecommunications and enhanced telecommunications services originating or terminating in France and Germany, are the costs of obtaining transmission infrastructure from FT and DT.

No other facilities outside of FT's or DT's control that are permitted today to be used for transmission of some types of telecommunications services in France and Germany, including satellite "Very Small Aperture Terminal" (VSAT) earth stations and cable TV infrastructure, are effective substitutes for FT's and DT's point-to-point leased lines for most telecommunications traffic, due to technical or economic limitations, lack of sufficient geographic scope or other factors. Indeed, unlike the U.S. and U.K., where cable television infrastructure is owned by independent providers and substantial penetration exists, in France a significant share of the cable infrastructure is owned by FT and penetration is low overall, while in Germany all of the cable infrastructure is owned by DT. Although some competition to the FT and DT public switched voice services and network would likely emerge were all legal restrictions on competition lifted, replication of the entire public switched network would be prohibitively expensive for any new entrant. Accordingly, any provider of telecommunications or enhanced telecommunications services, or seamless international telecommunications services, whether in the U.S., France, Germany or elsewhere, is and will continue

to be dependent to some extent for the foreseeable future on FT for origination and termination of telecommunications between France and anywhere else, and on DT for origination and termination of telecommunications between Germany and anywhere else.

FT has a dominant market position and market power in France, and DT has a dominant position and market power in Germany, in providing public data network services. These are services that are offered to the general public, rather than to an exclusive user or limited group, to carry data telecommunications through a network of transmission lines and nodes, the points of interconnection with the network. FT's and DT's continuing market power in their home countries in public data network services, which are legally open to competition,[11] is reinforced by their continuing monopolies over the transmission infrastructure used by their own data networks as well as those of their competitors. In addition, the German competition authority, the Federal Cartel Office, has found that DT extensively cross-subsidized its data network services from its transmission monopoly between 1989 and 1993, in the amount of 1.9 billion DM (approximately $1.3 billion).

FT offers these data network services through Transpac, a subsidiary that operates several types of data services, including the principal network based on the standard X.25 packet-switched protocol. FT and Transpac had a statutory

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[11] To provide these services in France, operators must be individually licensed.

monopoly in provision of public data network services in France until 1993, when competition in this area was first permitted. By the most current measures available, Transpac has a 94% share of French domestic data services, and a far more extensive network in France than any other competitor, including 597 node sites[12] and 105,000 customer connections.

DT has 833 data nodes and more than 86,500 access lines in its principal packet-switched data service network, Datex-P, which uses the standard X.25 data protocol. In 1994, DT had a share of more than 80% in packet-switched data network services in Germany. The next largest provider had less than 10% of the market, and the third largest provider was FT, through its 96.7% interest in its German-based subsidiary Info AG, which had a market share of less than 5%. All other providers of data network services in Germany depend on DT for access to DT's transmission infrastructure, and such access represents 50% to 90% of their costs of doing business.

Other means of delivering data through landline-based private networks, or through satellite-based telecommunications, are not fully adequate substitutes for FT's public data network in France or DT's public data network in Germany. FT and DT can be expected to continue to possess a dominant position in public data

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[12] The number of nodes in a data network provides a reliable measure of the penetration of data services. Nodes are the points of access for customers. Additional nodes bring the network physically closer to more users, which generally makes it less expensive for the users to access the services. Providers and users who face distance-sensitive tariffs (including the choice of making a local call or a more expensive long distance call to access the network) are likely to be competitively affected by the penetration of a data network.

network services in their home countries, so long as they retain their legal or effective monopolies on transmission infrastructure.

4. Regulation and Opening of the French and German Markets

The transaction between FT, DT and Sprint takes place within a context of significant regulatory changes in Europe. Regulation of telecommunications in Europe is carried out through a combination of European Union ("EU") and national law. EU directives provide an overlay of requirements which all member states, including France and Germany, are obliged to transpose into national laws. Although EU authorities can intervene directly in some circumstances, such as enforcement of the competition provisions of the EU's governing treaties, for the most part telecommunications regulation is the responsibility of the authorities of the member states. In Germany, the *Bundesministerium für Post und Telekommunikation* (Federal Ministry of Posts and Telecommunication) ("BMPT") is the regulatory authority responsible for supervising the conduct of DT and granting licenses or otherwise determining conditions of entry for new providers of telecommunications services. BMPT also supervises the newly created federal agency in Germany that holds the government's ownership interest in DT. In France, the *Direction Générale des Postes et Télécommunications* (Directorate General of Posts and Telecommunications) ("DGPT") is the regulatory authority, responsible for supervising the conduct of FT and granting licenses or otherwise determining conditions of entry for new providers of telecommunications services.

The French government's ownership interest in FT is held by a separate government ministry.

During the time that this transaction has been under investigation by the Department of Justice, regulatory developments in Europe have made it increasingly likely that the French and German telecommunications markets will be opened to competition within the next few years. The European Union, through its Commission and Council of Ministers, has set January 1, 1998 as the target date by which most member states, including France and Germany, are expected to fully "liberalize" the existing monopolies on public voice telecommunications services and transmission infrastructure, abolishing all exclusive rights or prohibitions on competition. Voice services liberalization had already been scheduled for 1998, but the Council of Ministers' resolution to fully liberalize the infrastructure at the same time was announced, much more recently, in June 1995. Carrying out the political agreement of the Council, the Commission of the European Union ("European Commission") adopted, on July 19, 1995, a draft directive that would mandate full liberalization of telecommunications infrastructure and voice services in most EU member states, including France and Germany, by 1998. Though the Council did not provide in its resolution for any partial liberalization of infrastructure at an earlier date, the European Commission's July 19 draft directive would also require EU member states to permit alternative infrastructure providers, such as electric, rail and water utilities, to begin using their networks in 1996 to carry all

telecommunications services other than public switched voice. Although competitors would still need to make use of at least some of DT's and FT's infrastructure, owing to the much greater comprehensiveness of their networks, implementation of this directive would offer at least a partial infrastructure alternative to competitors and promote reductions in the prices for leased lines in France and Germany, which currently are several times higher than in the United States.

To achieve the 1998 target for liberalization, however, many other specific directives, laws and regulations must still be developed and adopted both by EU bodies and the governments of the member states. This process is only now beginning at the EU level and in France and Germany. The changes to be adopted include not only the formal lifting of the legal monopolies, but also the establishment of conditions for licensing of competitors and the development of interconnection rights and requirements for the public switched networks of FT and DT. The EU has anticipated the necessary steps that will need to be taken and has outlined the principal measures, but neither the EU nor the German and French governments have reached a final resolution of the crucial regulatory issues accompanying liberalization. Mere lifting of the legal prohibitions on competition would not alone bring about real competition, since actual competitors must also be licensed to operate.

The EU authorities have exercised a very significant role in bringing about telecommunications liberalization in Europe, but there are important limits on the

scope of their authority. The decision whether to privatize the government-owned telecommunications carriers, and the pace at which this occurs, is wholly at the discretion of the member states. Moreover, the EU's powers to compel liberalization and protect competition relate to activities affecting commerce within or between the member states. The decision of whether and how to regulate the dealings of FT and DT with foreign telecommunications carriers outside the EU, including the terms on which operating agreements and leased lines are made available, has been left to the French and German authorities. It is not yet clear whether the EU's liberalization measures will confer any rights on providers from the United States and other countries outside the EU, or only on firms operating within the EU. The national governments at present are free to limit entry by such non-EU competitors, subject to the results of ongoing multilateral telecommunications trade negotiations.

C. The Competitive Effect of the Acquisition and Joint Venture

The Complaint alleges that the acquisition of 20% of Sprint by FT and DT, and the formation of the joint venture between Sprint, FT and DT may substantially lessen competition in the provision of international telecommunications services between the United States and France and Germany and in the provision of seamless international telecommunications services. Sprint's and Joint Venture Co.'s competitors in those markets must have access to the French and German public switched networks, infrastructure and public data

networks to provide competitive services, and access to these services and facilities is controlled by FT and DT. After this transaction is consummated, FT and DT would benefit, through their ownership interests, in the competitive success of the services offered by Joint Venture Co. and Sprint.

FT and DT would therefore have increased incentives and the ability, using their monopolies and dominant positions in France and Germany respectively, to favor Sprint and Joint Venture Co. and to disfavor their United States competitors in international telecommunications services in various ways. This conduct would make competitors' offerings less attractive in quality and price than those of Sprint and Joint Venture Co., lessening the ability of Sprint and Joint Venture Co.'s rivals to compete effectively in these services. As a result of this anticompetitive conduct, the price of international telecommunications services to France and Germany available to United States consumers could be increased, and the quality lessened, relative to what United States consumers would pay and receive in the absence of this behavior.

First, FT's and DT's acquisition of a total of 20% of Sprint, and their formation of the joint venture with Sprint, will increase their incentives to use their market power over the public switched networks, transmission infrastructure and public data networks in France and Germany to discriminate in favor of Sprint and Joint Venture Co. vis-a-vis other United States international carriers, in the markets for international telecommunications services between the United States and France or Germany and for seamless international telecommunications

services. Sprint could receive various forms of favorable treatment from FT and DT with respect to its international correspondent services between the United States and France and Germany. For example, FT or DT could favor Sprint or disfavor its competitors with respect to the prices, terms and conditions on which international services are provided, or the quality of the provision of those services, and could provide to Sprint advance information about planned changes to its network that is not made available to other providers. FT or DT could also alter protocols and network standards to exclude competitors' services. Such discrimination could place other United States international carriers at a competitive disadvantage to Sprint in international correspondent telecommunications services, enabling Sprint to charge more for its services or to provide a lower quality of service than it would otherwise be able to do without losing customers. It could also lessen the ability of the competitors of Sprint and Joint Venture Co. to develop and offer new seamless international telecommunications services and to compete effectively in these services. As a result of this anticompetitive conduct, the quality of seamless international telecommunications services available to United States consumers could be diminished, and the price increased, relative to what United States consumers would pay and receive in a competitive market.

Second, FT and DT will have an incentive to favor Joint Venture Co. and Sprint over their competitors, particularly new entrants and providers of new services, by denying operating agreements to the competitors, or by offering such

agreements only on discriminatory terms. In order to have international traffic terminate in France or Germany through the correspondent system, an international carrier must enter into an operating agreement with FT or DT, and FT and DT can choose which carriers receive those agreements. The correspondent system is the only way to send public switched voice traffic, which represents the great majority of all telecommunications traffic, to France or Germany today, because of the FT and DT public switched voice monopolies. If new entrants and providers of new services are refused operating agreements with FT and DT and cannot otherwise have their traffic delivered to France and Germany on terms competitive with the carriers that have agreements, that could prevent or inhibit the development of competition in the markets for U.S.-France and U.S.-Germany international telecommunications services.

Third, FT and DT will have an increased incentive and ability to direct their switched telecommunications traffic from France and Germany disproportionately to Sprint rather than other U.S. international carriers, either directly as part of the correspondent system, or outside that system through the Joint Venture Co. backbone network. Because U.S. international telecommunications carriers typically send more traffic to France and Germany than they receive, they must make net settlement payments to FT and DT for delivery of their switched traffic.[13/] Disproportionate return of incoming traffic

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[13] The correspondent agreements governing switched services establish an "accounting rate" per minute of traffic, for each type of traffic sent over a

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from FT and DT to Sprint would increase the liability of Sprint's competitors to FT and DT for settlements paid on the net amounts of traffic sent and received between the U.S. and France or Germany, raising Sprint's competitors' costs of carrying such traffic. Because the settlement rates paid by FT and DT and the U.S. carriers to each other for delivering traffic are still well above the cost of delivery, notwithstanding decreases in recent years, this return traffic from France and Germany is of significant benefit to the carrier who receives it. The expectation of receiving a proportionate share of the return traffic has served to increase competition among the U.S. carriers for the traffic outbound from the U.S. This competition will be reduced to the extent that FT and DT are able to disproportionately return their traffic to Sprint. Moreover, to the extent that returning their traffic disproportionately to Sprint allows FT and DT to send

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[13] (...continued)
particular international route. The carriers in each country pay half the accounting rate (the "settlement rate") to their foreign correspondents for each minute of traffic completed. Settlement payments for outgoing traffic are offset by the settlement payments for incoming traffic. When there is an imbalance in the amount of outgoing and incoming traffic between carriers, the carrier with the most outgoing traffic makes a net settlement payment to its correspondent. In 1993, according to FCC data, the net outpayment of all U.S. international carriers to FT for IMTS calls between the U.S. and France was $28,913,657, and the net outpayment of all U.S. international carriers to DT for IMTS calls between the U.S. and Germany was $144,492,724. 1993 International Telecommunications Data, International Traffic Data for All U.S. Points, Table A1.

Today, United States carriers accept the same proportion of the total switched traffic from each of their correspondents in a foreign country as the proportion of total switched traffic to the correspondent that each of the United States carriers send. Federal Communications Commission policy supports this proportionate allocation of switched traffic, although the FCC has not adopted regulations governing proportionate allocation.

traffic to the U.S. at a rate other than the settlement rate (which will still be the rate they receive from U.S. carriers for traffic sent to France or Germany) FT or DT will have an increased incentive to negotiate for higher settlement rates and resist efforts to lower accounting rates.

Fourth, DT and FT will have an increased incentive and ability to cross-subsidize Joint Venture Co. and Sprint by providing revenues from the monopoly services or by shifting costs of Joint Venture Co. and Sprint to the monopoly services. In both France and Germany, over three quarters of the revenues of FT and DT are derived from services and facilities that are legally protected against competition. These monopoly activities can be used to cross-subsidize competitive services. Such cross-subsidization would facilitate a strategy of placing competitors of Joint Venture Co. and Sprint in a "price squeeze" by keeping prices for the monopoly inputs they need well above true economic costs, while simultaneously undercutting them on price in the competitive markets through Joint Venture Co. and Sprint, whose costs will have been artificially reduced. The result could be a substantial lessening of competition in both international telecommunications services and seamless international telecommunications services in the U.S.

Fifth, FT's and DT's ownership interest in Sprint and Joint Venture Co. would increase FT's and DT's incentives to provide Sprint and Joint Venture Co. with confidential, competitively sensitive information that FT and DT obtain from other United States carriers and competitors through their correspondent

relationships with FT and DT, or their arrangements to obtain interconnection with the French and German public switched networks or obtain transmission infrastructure from FT and DT. In order to use FT's and DT's correspondent switched and private line services and to negotiate terms of use, or to interconnect with FT and DT in France and Germany and obtain transmission infrastructure, United States international telecommunications providers must provide FT and DT various types of competitively sensitive information. This can include private line customer identities, service requirements, plans for the introduction of new services, changes in existing services, and future traffic projections. If FT or DT were to share this information with Sprint or Joint Venture Co., those firms could gain an anticompetitive advantage over their United States competitors. Disclosure of this competitively sensitive information to Sprint and Joint Venture Co. could substantially lessen competition in both international telecommunications services and in seamless international telecommunications services in the U.S. Allowing Sprint access to such competitively valuable information about its competitors would also increase the risk of price collusion.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

A. Prohibitions and Obligations

Under the provisions of the Antitrust Procedures and Penalties Act, the proposed Final Judgment may only be entered if the Court finds that it is in the public interest. The United States has tentatively concluded that the proposed Final Judgment is in the public interest.

1. Overview of the Proposed Final Judgment

Section 7 of the Clayton Act, 15 U.S.C. § 18, prohibits an acquisition of stock or assets where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Thus, the United States has sought to address in the proposed Final Judgment the competitive effects on United States markets that would result from the consummation of the transaction between Sprint, FT and DT. The issue properly considered by the United States under Section 7 is how the creation of vertical relationships between United States providers of international telecommunications services and these foreign telecommunications monopolies could further lessen competition in markets within the scope of the United States antitrust laws.[14/]

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[14] In addition to the vertical issues presented by the affiliation between FT, DT, the joint venture and Sprint, the United States also considered in its

(continued...)

This narrow question differs significantly from the issues relating to this transaction that are still under consideration by other United States and European authorities. Both the Federal Communications Commission ("FCC")

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[14] (...continued)
investigation horizontal competitive issues involving Sprint and Infonet Services Corporation, which is one of Sprint's principal competitors in the provision of various types of domestic and international data telecommunications services in the United States. FT and DT, as of the time of entering into the Joint Venture Agreement and the Investment Agreement with Sprint, were the largest shareholders of Infonet Services Corporation and were represented on Infonet's Board of Directors. The United States was concerned that violations would occur of both Section 7 of the Clayton Act and Section 8 of the Clayton Act, which prohibits interlocking directorates, had FT and DT become the largest shareholders of both Sprint and Infonet, with representation on both companies' boards of directors. This horizontal issue has now been fully remedied, and so does not form a part of the terms of the proposed Final Judgment. On June 20, 1995, FT and DT entered into a separate agreement with Infonet, requiring FT and DT to sell a substantial part of their shareholdings back to Infonet by August 3, 1995, and to fully divest the remainder of their shareholdings back to Infonet 45 days after the earlier of (1) the date as of which FT or DT acquire any of the securities of Sprint, or (2) six months after all governmental approvals necessary for the consummation of the investment in Sprint and the joint venture have been granted. Pursuant to the stipulation between Sprint and the United States entered on July 13, 1995, Sprint is prohibited from issuing any equity to be acquired by FT or DT, or acquiring an ownership interest in or contributing assets to the joint venture, until the initial divestiture of FT and DT shares in Infonet has been completed. The United States has been informed that as of the date of the filing of this Competitive Impact Statement, all but one of the several other shareholders of Infonet have completed repurchase of the initial divestiture of the FT and DT shares, but because a part of the shares included in the initial divestiture has not yet been sold, the initial divestiture has not yet been completed. The sale of the remaining shares in the initial divestiture is now scheduled to occur by the end of August 1995. Additionally, the stipulation requires Sprint and Joint Venture Co. to be maintained as separate and independent businesses from Infonet, with no transfer of proprietary business or financial information, pending completion of the full divestiture. Sprint is precluded by the stipulation from permitting any FT or DT directors to serve on its board if FT or DT directors of Infonet are still exercising voting rights, or if those directors remain on the Infonet board for more than 45 days after FT or DT have acquired any of Sprint's securities.

and the European Commission have separate pending investigations of this transaction, and the European Commission is also investigating the formation of the Atlas alliance between FT and DT. These authorities, based on their public statements, are expected to complete their investigations before the close of 1995. The FCC's review of this transaction, under the "public interest" mandate of the Communications Act of 1934, may involve broader issues of foreign market access and the appropriateness of permitting substantial investments in United States telecommunications carriers by foreign monopolists whose conduct already causes harm to United States consumers, subjects on which the FCC also has a general rulemaking procedure in progress.[15/] The European Commission's jurisdictional responsibilities differ from those of United States antitrust and regulatory authorities, being focused on commerce among and within EU member states. The European Commission has already indicated that it has serious concerns about the loss of actual or potential competition between FT and DT in Europe resulting from the formation of the Atlas alliance, an issue that is outside the scope of United States antitrust review and so is not addressed by the relief in the proposed Final Judgment.[16/] Thus, the entry of this Final Judgment is not

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[15] See Market Entry and Regulation of Foreign-affiliated Entities, IB Docket No. 95-22, FCC 95-53, Notice of Proposed Rulemaking (released February 17, 1995), and the Reply Comments of the United States Department of Justice, filed in this FCC rulemaking proceeding on May 12, 1995.

[16] On May 23, 1995, the European Commission sent a "warning letter" to FT and DT advising them of the intent of Commission staff to take a negative position with regard to the Atlas transaction and to propose to the Commission that the (continued...)

intended to affect the ability of the FCC or the European Commission to take additional measures they may find necessary to address the issues within their areas of responsibility.

The proposed Final Judgment in this case has many features and provisions in common with the consent decree previously entered by this Court on September 29, 1994 in United States v. MCI Communications Corp., No. 94-1317 (TFH) (D.D.C.), and published in the Federal Register at 59 Fed. Reg. 33009 (June 27, 1994), following the United States' investigation of the strategic alliance between BT and MCI to form Concert. That transaction aimed to provide similar international telecommunications and enhanced telecommunications services, and also involved a 20% equity investment by a foreign telecommunications provider in a United States international carrier. There are, however, crucial differences between this transaction and the BT-MCI alliance. Although BT continued to have some market power in basic telecommunications services and facilities and control over local bottlenecks in the United Kingdom at the time it formed its alliance with MCI, all of its lines of business were already open to competition and BT actually faced facilities-based competition to some extent at all levels, from

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[16] (...continued)
transaction be prohibited. The European Commission has expressed particular concern about the dominant positions of FT and DT in their home markets and the loss of competition in data telecommunications services. FT and DT have been given until September 15, 1995 to present proposals to change their transaction to meet the European Commission's competition concerns. If no satisfactory action is taken by that time, the next step in the European Commission's investigation would be to issue a formal "statement of objections," the European equivalent of an antitrust complaint.

independent carriers and cable television companies. Moreover, since 1993 BT has ceased to be government-owned, so that it is independent from its government regulator in the United Kingdom. Here, in contrast, FT and DT retain legal monopolies over three-quarters of all telecommunications business in France and Germany, as measured by revenues, and have market power over additional types of services such as public data networks that have already become competitive in the United Kingdom. FT and DT do not have the same degree of independent regulatory oversight of their conduct by national authorities as BT, because of their continuing government ownership. Accordingly, in this transaction it was necessary to impose more stringent conditions governing the relationship between FT and DT on the one hand, and Sprint and the joint venture on the other, particularly in the period before France and Germany fully liberalize their telecommunications markets pursuant to EU requirements, in order adequately to protect competition.

The proposed Final Judgment reflects the differences between the French and German telecommunications markets and that in the United Kingdom by operating in two phases. The first phase, "Phase I," is that period of time after the entry of this Final Judgment and before all of the conditions that must be met to commence Phase II have been satisfied. Essentially, Phase I of the proposed Final Judgment will be in effect until all prohibitions on competition have been removed, and actual competitors have been licensed, in France and Germany. The shift from Phase I to Phase II is assessed separately for France and for Germany,

so that the development of a competitive market in one country will be taken into account notwithstanding delays in the other.

Phase II begins for France, and for Germany, when the national government of that country has taken two key steps, as stated in Section V.Q. First, the government must have removed all of the legal prohibitions on (a) the construction, ownership or control of both domestic and international telecommunications facilities, and use of such facilities to provide any telecommunications or enhanced telecommunications services, and (b) the provision of public switched domestic and international voice services, by entities other than FT and DT and their affiliates. Second, the government must have issued one or more licenses or other necessary authorizations, to entities other than and unaffiliated with FT, DT, Sprint or Joint Venture Co., for all of the following: (a) the construction or ownership, and control, of both (i) domestic telecommunications facilities to serve territory in which one-half or more of the national populations of France and Germany reside, and (ii) international telecommunications facilities capable of being used to provide a competitive facilities-based alternative, directly or indirectly, between France and Germany and the United States; and (b) the provision of public switched domestic long distance voice services, without any limitation on geographic scope or types of services offered, and international voice service between the United States and France and Germany. The phrase "competitive facilities-based alternative," as used herein, signifies that the licensed competitors must have authority to

construct or own a sufficiently large amount of international capacity that other providers would have a realistic alternative to the use of the international facilities of FT or DT, and is not satisfied by authorization to construct or own an insubstantial number of international circuits. The requirement herein that all legal prohibitions on the provision of services and facilities have been removed refers only to prohibitions on entities' ability to provide service and to construct, own and operate facilities. It is not intended to apply to the establishment of neutral conditions for the provision of service by the national governments of France or Germany, such as contributions to the funding of universal service or obligations to obtain a license.

The substantive restrictions and requirements contained in Section II of the proposed Final Judgment continue throughout the entire term of the decree, which is five years from the commencement of Phase II in both France and Germany. The Section II restrictions are for the most part similar to those in the MCI decree, including transparency and confidentiality requirements, though in some respects they are broader, in particular with respect to open licensing of other United States competitors. Other restrictions, those contained in Section III, terminate at the onset of Phase II, separately for France and for Germany unless specifically stated otherwise. The Section III restrictions lasting through Phase I include limits on the scope of activities of Sprint and Joint Venture Co., and behavioral prohibitions applicable to Sprint and Joint Venture Co. These provisions are intended to foster competition in international telecommunications

services and seamless services, by ensuring that Sprint and Joint Venture Co. do not receive various types of advantages over competitors from their association with the FT and DT monopolies.

Generally speaking, during Phase II the proposed Final Judgment relies to a greater extent on enforcement by national regulatory authorities in Europe, the EU itself, and the FCC in the United States to protect competition, while during Phase I the proposed Final Judgment provides for additional types of injunctive relief to ensure that Sprint and Joint Venture Co. do not benefit from anticompetitive conduct by FT and DT. This distinction is reasonable in the circumstances of this transaction, because there is considerably greater potential for competitive abuses to occur in the period while competitors have no legal alternative to using FT's and DT's facilities and services, and before the EU and the French and German governments finish implementing their program of regulatory reform, which is necessary in order to ensure nondiscriminatory licensing and interconnection for competitors and provision of services by dominant carriers on an open and nondiscriminatory basis. Although the proposed Final Judgment does not specifically reference all of the directives and measures envisioned by the European authorities, an underlying assumption is that these authorities will carry out their publicly announced intention of having all the key regulatory measures needed for development of effective competition in place by the time full liberalization is to take effect in 1998.

The various requirements and restrictions of this proposed Final Judgment, in combination, will substantially diminish the risk of abuse of FT and DT's market power to discriminate or otherwise afford anticompetitive advantages to Sprint and Joint Venture Co.[17] They will do so by making discrimination, disproportionate return of traffic and cross-subsidization easier to detect and prevent, by precluding the misuse of confidential information obtained by FT and DT from Sprint's and Joint Venture Co.'s competitors, by precluding Sprint and Joint Venture Co. from benefiting by delays in licensing of competitors or refusal to license competitors by the French and German governments, by ensuring that Sprint and Joint Venture Co. are not the exclusive recipients of operating agreements from FT or DT for any services, and by ensuring that access to the public switched networks and public data networks in France and Germany is not impaired by adoption of proprietary or nonstandard protocols. The object of these substantive terms is to ensure that Sprint, as the result of its direct affiliation with FT and DT or its position as the exclusive distributor of Joint Venture Co. services in the United States, as well as Joint Venture Co. itself, are not given an advantage over their competitors in the United States to the detriment of competition or consumers.

Several key terms are employed throughout the substantive obligations and restrictions of Sections II and III of the Final Judgment, defining the scope of

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[17] Joint Venture Co. is broadly defined in Sections V.A and V.O to ensure that the entire joint venture will be subject to the Final Judgment, regardless of the forms that it may take or restructuring that may occur.

these provisions. "Telecommunications service" (as defined in Section V.U) includes ordinary switched voice telephony and private circuits as well as conveyance (including transmission, switching and receiving) of data and video information, and signaling, translation and conversion in the network. These basic telecommunications services are the bulk of existing telecommunications, and are licensed and regulated to some degree in the United States and in France and Germany, although not in the same manner in each country. There are relatively few major providers of these services in the United States, and in France and Germany FT and DT remain the monopoly or the dominant providers of most of these services. In contrast, an "enhanced telecommunications service" (as defined in Section V.H), uses telecommunications services as a foundation to provide various advanced and intelligent applications of additional value to users. Enhanced telecommunications services are subject to little or no regulation in the United States, and face considerably less regulation than basic services in France and Germany, with few if any legal restrictions on entry.[18/] The number of providers of enhanced telecommunications services is often greater than for basic telecommunications services, although all such providers must have access to basic

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[18] The definitions of "telecommunications services" and "enhanced telecommunications services" in the Final Judgment are based on the distinction between basic services and enhanced services recognized by the FCC, as well as similar concepts in EU law and in France and Germany, where "value-added services" are referred to in a sense similar to enhanced services. The definitions do not duplicate those used by any of the national regulatory authorities, which differ somewhat in terminology, but they incorporate as much as possible the underlying concepts, while ensuring consistent treatment within the context of this judgment for services offered in the United States, France and Germany.

telecommunications services, including network interconnection and transmission facilities, in order to do business.[19]

"FT or DT Products and Services" (as defined in Section V.L) are also referred to throughout the Final Judgment. This term encompasses any of an enumerated list of telecommunications and enhanced telecommunications services or facilities in France or Germany, or between the United States and France or the United States and Germany, that are provided by FT or DT. These services are correspondent services,[20] dedicated or switched transit services, leased lines, international half circuits between the United States and France and the United States and Germany,[21] and interconnection to the FT and DT public switched telephone networks (including Integrated Services Digital Network interconnection). All of the services covered by this term are ones over which FT and DT continue to exercise market power in their home countries, and many of the services described as "FT or DT Products and Services" are those within the scope of FT's and DT's legal monopolies, but the list of FT or DT Products and

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[19] If an activity is a "telecommunications service" as defined in the Final Judgment, it remains so when it is offered or bundled with enhanced services or other equipment, facilities, or services, or if it is called a "package of facilities" or something other than a telecommunications service.

[20] Correspondent services, under this proposed Final Judgment, include not only the standard switched IDDD international voice call, but also other services such as Virtual Private Networks offered on a correspondent basis.

[21] Leased lines and international half-circuits may be excluded from the list by mutual agreement of the United States and the defendants if they concur that effective competition exists to such facilities provided by DT or FT.

Services is not limited to services or facilities that are reserved exclusively to FT or DT under the laws of France or Germany.

One significant category of services over which FT and DT continue to have market power in their home countries, public data networks, is not included in the list of FT or DT Products and Services. Because data networks operate in significantly different ways from the public voice networks, and face some actual competition in France and Germany, the competitive risks arising from this transaction due to FT's and DT's market power in data services differed from the competitive risks associated with FT's and DT's provision of correspondent services, transit services, leased lines or connection to the French and German public switched networks. Several specific provisions of the proposed Final Judgment do, however, place restrictions and obligations on the relationship of the joint venture and Sprint with FT's and DT's public data networks in their home countries, in order to limit risks of abuse of FT's and DT's market power in this area. Moreover, the most important components of the public data networks, the leased lines, are included in the definition of FT or DT Products and Services.

Although the proposed Final Judgment generally makes no distinction between FT, DT, and their Atlas alliance, but treats them all together so as to ensure that Atlas is not used as a vehicle to circumvent the decree, the definition of FT or DT Products and Services does not include enhanced correspondent services that Atlas provides on its own, rather than by reselling or acting as a sales agent for FT or DT, unless the enhanced correspondent services involve

interconnection to the public data networks. This limited exception was intended to facilitate the development of enhanced services through Atlas, and not to permit FT or DT simply to transfer their existing correspondent activities into Atlas to escape the obligations of the proposed Final Judgment.

2. Restrictions in Effect for the Term of the Decree

Section II contains substantive restrictions and obligations which continue throughout the full duration of the decree. These include transparency requirements (Section II.A), confidentiality requirements (Section II.B.), and limitations on the ability of Sprint and Joint Venture Co. to offer international services involving France or Germany, or provide facilities to FT or DT for such services, if other United States international telecommunications providers are not permitted to provide the same services (Section II.C).

a. Transparency Requirements

Section II.A forbids Sprint or Joint Venture Co. from offering, supplying, distributing, or otherwise providing any telecommunications or enhanced telecommunications service that makes use of telecommunications services provided by FT in France or between the United States and France, or DT in Germany or between the United States and Germany, unless Sprint or Joint Venture Co. disclose certain types of information. Because these transparency requirements may be affected by changes in regulation or other circumstances,

Section II.A provides the United States with the ability to waive these requirements in whole or in part.

Pursuant to Section V.F, Sprint and Joint Venture Co. will provide the information to the Department of Justice, which may then disclose the information to any United States international telecommunications provider that holds or has applied for a license, from either the FCC, the French DGPT or the German BMPT, to provide international telecommunications services between the United States and either France or Germany, or who actually provides international telecommunications services between the United States and either France or Germany, for services where no license is required. This will enable the principal competitors of Sprint and Joint Venture Co. to monitor whether either of these companies is receiving more favorable treatment from either FT or DT than competitors receive, and would provide them with evidence that could be used to make a complaint to any governmental authorities in the United States or France or Germany. In particular, this information could be used by competitors to identify violations of the Phase I restrictions of the proposed Final Judgment to the Department of Justice while those provisions remain in effect, and the Department of Justice could also use the information to detect violations on its own initiative.

"United States international telecommunications provider," as defined in Section V.W, includes subsidiaries and affiliates of such providers, as well as entities with which a United States international telecommunications provider is

affiliated, where a 10% or greater equity interest exists, so that international joint ventures and foreign strategic allies with equity investments in a U.S. provider, as in the BT-MCI Concert relationship, can qualify for access to the information.

Disclosure by the Department of Justice to any provider described above will be made only upon agreement by the provider, in the form prescribed in the Stipulation entered into by Sprint and Joint Venture Co. and the United States on July 13, 1995, not to use such non-public information for commercial purposes and not to disclose such non-public information to any other person, apart from governmental authorities in the United States, France or Germany. The term "governmental authorities" is used broadly and includes independent agencies. Entities receiving this information from the Department of Justice would be required to sign a confidentiality agreement with the Department, obligating them not to disclose non-public information to any persons other than governmental authorities. The stipulation between the defendants and the United States describes the form of a confidentiality agreement in more detail. This confidentiality provision was adopted to prevent wider dissemination of defendants' non-public business information than is necessary to detect and prevent anticompetitive conduct.

Seven categories of information must be disclosed pursuant to the transparency provisions in Section II.A. Three of the categories apply to Joint Venture Co., two apply to Sprint, and two apply to both companies.

Joint Venture Co. will make extensive use of interconnection with the public switched telephone networks of FT and DT in France and Germany to provide telecommunications and enhanced telecommunications services, as well as obtaining leased lines and international half-circuits from FT and DT for Joint Venture Co.'s backbone network. These relationships make it necessary to impose disclosure obligations on Joint Venture Co. in the following areas.

First, under Section II.A.1, Joint Venture Co. must disclose the prices, terms and conditions, including applicable discounts, on which FT or DT Products and Services are provided in France or Germany to Joint Venture Co. pursuant to interconnection agreements. Interconnection agreements are specific arrangements (see Section V.N) by which other service providers in France and in Germany receive rights to connect their systems to FT's or DT's public switched telephone networks and have FT or DT complete delivery of traffic, on terms that may differ from those available to retail customers. Section II.A.1 will compel Joint Venture Co. to disclose to competitors the actual prices FT or DT charges it for interconnection, as well as non-price terms. Such publication is not required under current French or German law, which permits FT and DT to enter into individual commercial negotiations with their competitors for interconnection and not disclose the terms to other providers, thereby increasing opportunities for discrimination.

Second, Section II.A.2 imposes similar disclosure obligations on Joint Venture Co. for the prices, terms and conditions, including any discounts, of any

other FT or DT Products and Services it obtains in France from FT or in Germany from DT for use in providing telecommunications or enhanced telecommunications services between the United States and France or the United States and Germany. Among the most important FT or DT Products and Services covered by this provision are the leased lines and international half-circuits that would be used in Joint Venture Co.'s own backbone network for seamless services. Although some of these types of information are already disclosed by FT and DT in their retail tariffs pursuant to French and German regulation, Section II.A.2 ensures comprehensive transparency to prevent discrimination, including disclosure of any commercially negotiated off-tariff discounts or special service arrangements, and disclosure of arrangements for international facilities, which are subject to less regulatory oversight than are domestic services in France and Germany. This provision also applies to the terms on which FT or DT Products and Services are provided to customers in France and Germany in conjunction with Joint Venture Co. services when FT or DT is acting as the distributor for Joint Venture Co., thus facilitating detection of discrimination in bundling of services.

Third, Section II.A.4 requires Joint Venture Co. to provide additional information about the specific FT or DT Products and Services that it receives from FT in France and DT in Germany for use by Joint Venture Co. to supply telecommunications or enhanced telecommunications services between the United States and France or Germany, as well as the services FT provides directly to

customers in France and the services DT provides directly to customers in Germany as the distributor for Joint Venture Co. Joint Venture Co. is required to disclose (i) the types of circuits, including their capacity, and other telecommunications services provided, (ii) information concerning the actual average times between order and delivery of circuits, and (iii) the number of outages and actual average times between fault report and restoration for various categories of circuits. These types of information are not otherwise disclosed under existing regulations in France or Germany, which only provide for disclosure of much more general and non-provider specific information concerning service quality. The mandated disclosures here are important to the detection of various types of discrimination involving provisioning and quality of services. Where Joint Venture Co. has to disclose particular telecommunications services provided, it is required to identify the services and provide reasonable detail about them (if not already published). However, if a product or service is sold as a unit, separate underlying facilities need only be disclosed to the extent necessary to identify the product or service and the means of interconnection. Joint Venture Co. is not required to identify individual customers or the locations of circuits and services dedicated to particular customers.

Sprint's relationship with FT and DT in the provision of international telecommunications services will be less complex than Joint Venture Co.'s, because of Sprint's agreements not to compete with Joint Venture Co. and not to compete with FT and DT in their home countries, France and Germany. Sprint will

continue to provide international correspondent switched services and private line services together with FT and DT. To ensure greater transparency in Sprint's dealings with FT and DT, Section II.A contains two sets of disclosure obligations specifically applicable to Sprint.

Section II.A.3 applies to any international switched telecommunications or enhanced telecommunications services provided by Sprint and FT or by Sprint and DT on a correspondent basis between the United States and France or between the United States and Germany. It requires Sprint to disclose both the accounting and settlement rates, and other terms and conditions, applicable to any of these services, including the methodology by which proportionate return of international traffic is calculated. When there is no specific agreement between Sprint and FT or between Sprint and DT setting forth this information, Sprint must state the rates, terms and conditions on which the service is actually provided. In addition, where different accounting rates exist for types of services that FT or DT combine for purposes of calculating the proportionate return due to United States international telecommunications providers, Sprint must disclose its own minutes of traffic in each separate accounting rate category so that the other United States providers can determine whether they are being sent the appropriate shares of traffic from FT or DT, unless they already receive the necessary data (such as total traffic volumes in each rate category). This latter obligation addresses a particular type of possible discrimination in international services, known as "grooming," by which a foreign carrier can favor particular United States

correspondents with traffic of superior value while appearing to allocate minutes of traffic on a proportionate basis. Today some of the types of information covered by Section II.A.3, such as agreed-upon accounting rates, are supplied to the FCC and are published, but other types of information, including proportionate return data, are only provided at the discretion of FT and DT pursuant to voluntary arrangements with U.S. carriers. Where information has already been made available to competitors, Section II.A.3 of the Final Judgment does not require Sprint to provide it to the Department of Justice. Section III.E, however, contains additional and more extensive obligations concerning disclosure of information on proportionate return traffic that are in effect during Phase I.

Section II.A.5 requires Sprint to provide information about the United States-France and the United States-Germany international circuits it provides jointly with either FT or DT. Sprint must disclose for international private circuits (i) the actual average times between order and delivery by FT or DT, and (ii) the actual average time intervals between fault report and restoration in specific areas of the international facility and the overseas network. This information is similar to types of information Joint Venture Co. provides under Section II.A.4 and serves similar purposes. Sprint is also required, for circuits used to provide international switched services on a correspondent basis between the United States and France and between the United States and Germany, to identify (i) average numbers of circuit equivalents available to Sprint during the busy hour and (ii) the percentage of calls that failed to complete during the busy

hour. None of the information disclosed under Section II.A.5 is made public today under existing regulation, and this information would have substantial value in facilitating detection of discrimination in the provision and quality of services.

Two types of information must be disclosed by both Joint Venture Co. and Sprint, as either company might be the beneficiary of discrimination in these areas. First, under Section II.A.6 Sprint and Joint Venture Co. are required to disclose information that either entity receives from FT or DT about any material change or decision relating to the design of, technical standards used in, or points of interconnection to the FT or DT public switched telephone networks that would materially affect the terms or conditions on which Sprint, Joint Venture Co. or any other person is able to have access to, or interconnect with these networks for telecommunications or enhanced telecommunications services within France or Germany or between the United States and France or the United States and Germany. Disclosure of information of this nature is important to ensure that Joint Venture Co. and Sprint, due to their affiliation with FT and DT, are not given commercial advantages over competitors through advance notice of network changes by FT and DT.

Second, under Section II.A.7, Sprint and Joint Venture Co. are required to disclose any discounts or more favorable terms offered by FT or DT to their customers, for FT or DT Products and Services, that are conditioned on Sprint or Joint Venture Co. being selected by the customers as the United States provider of a telecommunications or enhanced telecommunications service. This provision is

closely related to Section III.D.2, which prohibits during Phase I any such bundling or tying arrangements, but it continues for the duration of the decree to ensure that even after competition has been authorized, any such arrangements by FT and DT will have to be disclosed, permitting complaints to be made to regulatory authorities.

Under Section II.A, Sprint and Joint Venture Co. are required to disclose intellectual property or proprietary information only if it is one of the types of information expressly required to be disclosed by any of the transparency obligations, or if it is necessary for United States international telecommunications providers to interconnect with the public switched telephone networks of FT or DT, or is necessary for United States international telecommunications providers to use FT's or DT's international telecommunications or enhanced telecommunications correspondent services. Sprint and Joint Venture Co., as well as FT and DT indirectly, are thus protected against overly broad disclosure of such valuable commercial information.

b. Confidentiality Requirements

Section II.B of the proposed Final Judgment constrains the ability of Sprint and Joint Venture Co. to receive, or seek to receive, from FT or DT (including FT or DT-appointed directors on the board of Sprint), various types of confidential information that FT or DT obtain from Sprint and Joint Venture Co.'s United

States competitors. Existing regulatory requirements do not adequately protect any of this information from disclosure.

Under Section II.B.1 Sprint and Joint Venture Co. cannot receive information from FT or DT that other United States international telecommunications providers identify as proprietary and maintain as confidential, but that has been obtained by FT or DT as the result of their provision of interconnection or other telecommunications services to U.S. providers in France or Germany. In order to obtain interconnection with FT or DT, other providers would have to provide FT and DT with detailed information about their planned services and interconnection needs. As interconnection needs change over time, FT and DT would receive more confidential information. FT and DT may also learn the identities and service needs of particular customers of their competitors who need to have private circuits interconnected with FT or DT. Of course, there is no alternative to interconnection with either FT or DT because of their monopolies in France and Germany, respectively, and even after these monopolies are lifted, competitors will still need to interconnect with FT and DT to some extent because of their dominant market positions and the ubiquity of their networks in France and Germany.

Section II.B.2 similarly forbids Sprint and Joint Venture Co. from receiving from FT or DT confidential, non-public information that FT or DT obtain from other United States international telecommunications providers through correspondent relationships. United States international telecommunications

providers have no alternative at present to using FT or DT for the origination and termination of international correspondent traffic in France and Germany, and even after current monopoly restrictions are lifted, they are likely to remain at least partly dependent on FT and DT for delivery of much correspondent traffic. A limited exception is provided to allow Sprint to obtain certain types of aggregate information it may need to comply with its transparency obligations under Sections II.A.3(ii) and II.A.5, but in no circumstances may Sprint use this exception to receive individual information about other providers that is otherwise prohibited by this section.

Finally, Section II.B.3 addresses a specific competitive risk in the context of international correspondent relationships, by prohibiting Sprint or Joint Venture Co. from seeking or accepting from FT or DT any non-public information about the future prices or pricing plans of any competitor of Sprint in the provision of international telecommunications services between the United States and France or the United States and Germany. FT and DT and their United States correspondents, in the course of accounting rate negotiations, exchange considerable information including business plans and traffic projections. Section II.B.3 addresses the substantial risk of violation of Section 1 of the Sherman Act that would arise if FT or DT were to obtain non-public pricing information from Sprint's competitors once FT and DT become Sprint's largest owners, by precluding any sharing of price information through FT or DT. Risks of price

collusion, tacit or explicit, are considerable in an industry with a small number of large providers offering similar types of services.

Finally, Section II.B.3 safeguards against the circumvention of the above prohibitions by prohibiting Sprint and Joint Venture Co. from employing personnel who either (i) are also employed by FT or DT and have access to the types of information that Sprint and Joint Venture Co. are not permitted to receive from FT or DT under Section II.B, or (ii) have been employed by FT or DT within the preceding six months if during that time, they received any of the types of information that Sprint and Joint Venture Co. are not permitted to receive under Section II.B.

c. Open Licensing

Continued government ownership of FT and DT creates risks that other United States international telecommunications providers may not receive licenses or other authorizations from the French and German governments that are needed to provide international telecommunications and enhanced telecommunications services, or may have their applications substantially delayed. This is a particular concern in the emerging area of seamless services, where a provider needs to be able to offer a service on an end-to-end basis in both the United States and France or Germany. Conversely, Sprint and Joint Venture Co. may have more advantageous opportunities to obtain licenses in France and Germany due to their affiliation with FT or DT, or to provide seamless services using the licenses

of their monopoly partners. Because the entire area of public voice services has not yet been opened to competition in France and Germany, and other new services may also be developed, it is not possible to identify each service for which this type of concern may arise. International voice resale services, however, clearly come within the area of potential concern. Competition in international telecommunications and enhanced telecommunications services between the United States and France and Germany, including seamless services, would be adversely affected if Sprint and Joint Venture Co. could obtain rights to provide any services that are not available to other U.S. firms. Exclusive licensing arrangements could also enable FT and DT to divert international traffic from their home countries to the United States disproportionately to Sprint through the Joint Venture Co.'s backbone network, or other facilities supplied by Sprint.

Accordingly, Section II.C precludes Sprint and Joint Venture Co. from offering, or providing facilities to FT or DT enabling them to offer, any particular international telecommunications or enhanced telecommunications service between the United States or France or Germany, unless one of the following three conditions, designed to ensure competitive entry, is met. First, the service may be offered if no license is required in France, or in Germany, to offer the service. Second, if a "class license," a form of general regulatory authorization that does not require individual application, is required, the service may be offered if such a class license is in effect in France and in Germany for other United States international telecommunications providers not affiliated with FT, DT, Sprint or

Joint Venture Co. Third, if an individual license is required to offer a service in France or in Germany, established licensing procedures must be in effect as of the time of offering of the service by which other United States international telecommunications providers are also able to secure a license, and either (i) one or more United States international telecommunications providers other than, and unaffiliated with, FT, DT, Sprint or Joint Venture Co. must already have a license in France and in Germany, or (ii) if Sprint, Joint Venture Co., FT or DT is the first to seek a license, other United States international telecommunications providers are able to secure a license in France and in Germany within a reasonable time, in no event longer than it took Sprint, Joint Venture Co, FT or DT to obtain its license (unless the additional time required is due to delay caused by the applicant). These requirements are both service-specific and country-specific, so that Sprint and Joint Venture Co. would not be precluded from providing a service for which open licensing had been established merely because some other type of service remained closed, nor would they be precluded from providing a service involving one country that had open licensing merely because the other country had not satisfied any of the three conditions. Because government ownership of FT and DT is likely to continue even after the conditions for Phase II of the proposed Final Judgment have been satisfied, it is necessary to have this provision remain in effect for the entire duration of the decree.

Section II.C does not apply to existing correspondent services provided pursuant to bilateral agreements with FT or DT that have also been made

available to other United States international telecommunications providers. It is not necessary for a U.S. carrier to have a license in France or Germany to offer voice services, or other types of telecommunications service, from the United States to France or Germany on a correspondent basis using FT or DT, although it is necessary to have an operating agreement with FT or DT to do so.

3. Restrictions Lasting Through Phase I

Section III contains the additional restrictions and obligations that are in effect through Phase I of the decree, prior to the removal of all prohibitions on facilities-based telecommunications competition in France and Germany and the licensing of competitors in those countries providing a substantial competitive alternative to FT and DT. These restrictions are necessary now to protect competition, due to the monopolies FT and DT continue to hold in their home countries combined with their government ownership, and the significant limitations on effective protection of competitors and consumers under the current French and German regulatory regimes. These restrictions in Section III are expected to become less necessary once competition has been introduced in France and Germany, which should occur concurrently with the regulatory reform program being undertaken by the EU authorities. At that point, competitors will be less vulnerable to abuses of market power by FT and DT because of the alternatives available for transmission infrastructure, and should be better

protected by European regulatory requirements to the extent that they continue to depend on the services and facilities of FT and DT.

The Section III restrictions include: (i) limitations on the ability of Sprint or Joint Venture Co. to acquire ownership interests in or control over certain types of facilities now owned or controlled by FT or DT (Section III. A-B); (ii) a prohibition on Sprint or Joint Venture Co. providing FT or DT Products and Services on an exclusive basis (III.C); (iii) a prohibition on Sprint or Joint Venture Co. obtaining FT or DT Products and Services on a discriminatory basis (III.D); (iv) prohibitions on Sprint's acceptance of correspondent telecommunications traffic on a disproportionate basis (III.E), or having any exclusive operating agreements with FT or DT (III.G); (v) prohibitions on cross-subsidization of Sprint or Joint Venture Co. by FT and DT (III.F), and (vi) requirements that Sprint and Joint Venture Co. not provide telecommunications or enhanced telecommunications services using FT or DT Products and Services or public data networks, if FT or DT have established proprietary or nonstandardized protocols or interfaces and have failed to continue to provide other competitors with access to those services and networks on a standardized basis (III.H-I).

a. Limitations on Facilities Ownership

Section III.A of the proposed Final Judgment prohibits Sprint and Joint Venture Co. from acquiring ownership interests in or control over (i) any facilities in France or Germany that are legally reserved to FT or DT (which would include,

for example, the public switched networks and transmission infrastructure), or (ii) international half circuits terminating in France or Germany that are used for telecommunications services between the United States and France or Germany. If other providers unaffiliated with FT, DT, Sprint or Joint Venture Co. actually own and control such international half-circuits, Sprint and Joint Venture Co. can also acquire ownership and control of international half-circuits, but only to the extent that and in no greater quantity than the aggregate amount of such half-circuits that other providers have. The limitation on ownership or control of international half-circuits can be lifted, if the United States and defendants agree that meaningful competition exists to the half-circuits provided by FT or DT. At present, although the international half-circuits terminating within France and Germany are strictly speaking not within the scope of the domestic monopolies, no providers other than FT and DT have been authorized to operate such facilities, and no meaningful competition to FT's and DT's international half-circuits exists. Precluding Sprint and the joint venture from acquiring ownership interests in, or any form of managerial or operational control over, these types of facilities will help to reinforce the effectiveness of the behavioral prohibitions and obligations and ensure that misconduct is more readily detected.

In addition, Section III.B of the proposed Final Judgment prohibits Sprint and Joint Venture Co. from acquiring ownership interests in or control over the Public Data Networks in France and Germany, which are now owned and controlled by FT and DT, respectively, either directly or through subsidiaries (the

French public data network is operated by a company called Transpac, almost entirely owned by FT) . While the Public Data Networks are not subject to any legal monopoly rights and face limited competition, the unmatched size and ubiquity of these networks in France and Germany give FT and DT effective market power in the provision of data telecommunications services in their home countries. Precluding Sprint or the joint venture from acquiring ownership interests in, or any operational or managerial control over, these Public Data Networks will help to ensure that the behavioral restrictions pertaining to those networks remain enforceable, and that Joint Venture Co. is not placed in a dominant position in providing data telecommunications services to and from France and Germany.

b. Non-Exclusive Distribution

Pursuant to Section III.C of the proposed Final Judgment, Sprint and Joint Venture Co. are prohibited from providing FT or DT Products and Services, except pursuant to a sales agency or resale agreement, and then only if the sales agency or resale agreements are non-exclusive. Non-exclusivity will be assessed not only on the facial terms of the agreement but also on the actual practice of FT and DT. Moreover, FT or DT Products and Services must continue to be available directly to other United States international telecommunications providers directly from FT and DT on a nondiscriminatory basis. The term "nondiscriminatory" in Section III.C will be construed in the same manner as the more specific

nondiscrimination provisions of Section III.D. Section III.C ensures that Sprint and Joint Venture Co. cannot through their association with FT and DT obtain any exclusive rights or special advantages in marketing or providing any of the FT or DT Products and Services, which are needed by other United States international telecommunications providers to offer their own services, and over which FT and DT continue to have monopoly rights or market power.

c. Non-Discrimination Provisions

There are two antidiscrimination provisions of the proposed Final Judgment in Section III.D. The first, Section III.D.1, prohibits Sprint or Joint Venture Co. from purchasing, acquiring or accepting FT or DT Products and Services on terms which are more favorable to Sprint or Joint Venture Co. than are made available to other United States international telecommunications providers.[22/] This section is designed to prevent FT or DT from using their monopolies and market power in France and Germany to favor Sprint and Joint Venture Co. in the provision of products and services that other providers must also have to compete effectively. In order to ensure clarity and specificity, and aid enforcement, Section III.D.1 specifies various types of conduct as to which discrimination is not permitted,

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[22] The proposed Final Judgment provides that for discrimination to exist, the United States international telecommunications providers who receive less favorable treatment must be "similarly situated" to Sprint and Joint Venture Co. For the purposes of this paragraph, "similarly situated" means that the provider is generally comparable to Sprint and Joint Venture Co. with respect to the volume and type of service acquired from FT or DT, provided that volume and type are relevant distinctions in establishing service conditions.

including (i) prices of products and services, (ii) volume and other discounts, and material differences in non-price terms of service, (iii) material differences in the type and quality of service, including leased lines and international half-circuits, (iv) interconnection with the FT and DT public switched telephone networks and number availability, and (v) the terms of operating agreements for correspondent services and connection of international half-circuits. If defendants seek to rebut a claim of discrimination pursuant to this section by establishing the existence of a cost justification, they have the burden of proof, and must make available to the United States all of the information that was available to them, directly or indirectly from FT or DT.

Section III.D.2 prohibits Sprint and Joint Venture Co. from benefitting from any discount or more favorable term offered by FT or DT to any customer for FT or DT Products and Services, that is conditioned on Sprint or Joint Venture Co. being selected as the United States provider of a telecommunications or enhanced telecommunications service. This provision is designed to prevent Sprint and Joint Venture Co. from receiving benefits of discrimination indirectly, through special deals or arrangements that FT and DT offer to customers in order to induce them to obtain services from Sprint or Joint Venture Co., rather than through more favorable terms offered directly to Sprint or Joint Venture Co. addressed by III.D.1. Thus, this provision encompasses forms of discrimination in addition to those specified in III.D.1, including activities involving the sale, marketing, and distribution of Sprint and Joint Venture Co. services by FT and

DT. Any offering of such conditional deals by FT or DT would be considered a benefit to Sprint or Joint Venture Co.

Although FT and DT have some nondiscrimination obligations under French and German law and regulations, and the FCC has authority to preclude Sprint from accepting "special concessions" from foreign carriers, the provisions of the proposed Final Judgment are considerably more specific and comprehensive than any existing regulatory obligations applicable to Sprint, FT or DT, because Joint Venture Co. may not be subject to direct or complete oversight by any United States, French or German telecommunications regulator. Moreover, during the period while FT and DT continue both to be government-owned and to enjoy monopoly rights in France and Germany, and regulatory regimes in France and Germany are not fully developed, it is important for the protection of competition that additional safeguards be in place so that United States international telecommunications providers can have access to FT's and DT's facilities and services comparable to Sprint and Joint Venture Co.

d. Proportionate Return of Traffic

Section III.E prohibits Sprint from accepting correspondent voice telecommunications traffic from FT in France or DT in Germany, unless that traffic is transmitted to all licensed U.S. international telecommunications carriers that have operating agreements with FT and DT in the same proportions as the correspondent voice telecommunications traffic from the United States to France

or to Germany that FT and DT receive from such U.S. carriers. Nor may Sprint accept any correspondent telecommunications traffic from FT in France, or DT in Germany, in a manner inconsistent with the policies of the FCC concerning proportionate return. In addition, Sprint is also prohibited from accepting or benefitting from any change in the methodology by which FT or DT allocates proportionate return traffic among United States international telecommunications providers, if such a change would substantially favor Sprint in relation to all other United States international telecommunications providers either in the value or volume of traffic, or would be inconsistent with the policies of the FCC with respect to Sprint, FT and DT.

In order to ensure compliance with these provisions, section III.E.1 requires Sprint and Joint Venture Co. to disclose on a quarterly basis the volume of correspondent telecommunications traffic sent to and received from FT and DT, showing each type of traffic, how traffic has been pooled for purposes of calculating proportionate return, and what volume of traffic has been counted for the purposes of proportionate return and what has been excluded. These reporting requirements, which are substantially more detailed than the proportionate return reporting obligations in Section II.A.3, are in addition to the obligations of Section II.A.3 while Phase I of the decree remains in effect. Section III.E.2 provides that the United States, if it believes that Sprint has accepted correspondent traffic in violation of Section III.E, shall notify Sprint and may also notify the FCC. Within 90 days of receipt of such notification, Sprint is required

to respond in writing and take all necessary measures to ensure its compliance with the provisions of Section III.E.

At present, the FCC has a policy generally requiring proportionate allocation of incoming international traffic among U.S. international carriers, but this policy is not embodied in specific regulations, and the FCC does not supervise the methodology or details of proportionate return, or require the approval of proportionate return arrangements, which are negotiated among U.S. and foreign carriers. Nonetheless, the FCC has historically been the only regulatory agency that has addressed proportionate return at all, since foreign telecommunications regulators, including those in France and Germany, generally have dealt with a single international carrier in their home countries and have not imposed any form of proportionate allocation requirement on their national carriers. The provisions of Section III.E are intended to supplement for this particular transaction, not to supplant, the FCC's role in regulating proportionate return. Indeed, Section V.R provides that if the FCC adopts specific proportionate return policies for the relationship of Sprint, FT and DT that would conflict with the proportionate return commitment in this decree, Sprint's proportionate return obligation herein shall be modified to be consistent with the FCC policies.

e. Preclusion of Cross-Subsidization

Section III.F contains several provisions intended to ensure that FT and DT do not cross-subsidize Sprint or Joint Venture Co. during Phase I of this Final

Judgment, while FT and DT continue to realize most of their revenues from their state-sanctioned monopolies. Existing regulatory safeguards against cross-subsidization in France and Germany are very limited and have not prevented instances of massive cross-subsidy, in particular the $1.3 billion transfer to DT's Datex-P public data network over several years that was uncovered by the German competition authorities in 1994. Once FT and DT face competition in the areas of their business now protected by monopoly rights, and the EU authorities have improved safeguards against cross-subsidy as part of their liberalization program, there is reason to believe that the risks of such conduct should diminish, but for now it is not possible to rely entirely on national regulatory authorities to prevent cross-subsidization of the joint venture or of Sprint by FT and DT.

The preclusion of cross-subsidization is here addressed by a combination of structural, behavioral and accounting requirements. Section III.F.1 requires that Joint Venture Co. be established and operated as a distinct entity separate from FT or DT until Phase II of the Final Agreement takes effect for both France and Germany. Under Section III.F.2, Joint Venture Co. and Sprint are required to obtain their own debt financing on their own credit, though Sprint, FT and DT may make capital contributions and commercially reasonable loans to Joint Venture Co., may pledge their business interests in Joint Venture Co. for non-recourse financings, and may guarantee the indebtedness of Joint Venture Co., provided that Sprint, FT and DT only make payments pursuant to such guarantee following a default by Joint Venture Co. Section III.F.3 requires that Sprint and

Joint Venture Co. maintain accounting systems and records which are separate from those of FT and DT and which identify any payments or transfers to or from FT or DT relating to the purchase, acquisition or acceptance of any FT or DT Products and Services, as well as identifying those Joint Venture Co. services for which the FT or DT Products and Services are used. Section III.F.4 prohibits Sprint and Joint Venture Co. from allocating any part of their operating expenses, costs, depreciation, or other business expenses directly or indirectly to any parts of FT's or DT's business units responsible for FT or DT Products and Services. Finally, Section III.F.5 prohibits Joint Venture Co. and Sprint from receiving any material subsidy, including debt forgiveness, from FT or DT, and also prohibits any other investment or payment from FT or DT that is not recorded by Sprint or Joint Venture Co. as an investment in debt or equity. The net effect of these provisions is to allow FT and DT, as parent entities, to make their initial investments and capital contributions in Joint Venture Co., and to follow up those investments with legitimate loans in order to enable Joint Venture Co. to start up and conduct its business, but to prevent FT and DT otherwise from subsidizing Joint Venture Co. or Sprint, or from shifting costs from Joint Venture Co. or Sprint to FT's or DT's monopoly services.

f. Operating Agreements

FT and DT are not obligated by any French or German law or regulatory requirement to make operating agreements available to particular United States

international telecommunications providers. Although four United States international carriers -- AT&T, MCI, Sprint and IDB -- now have operating agreements with both FT and DT for standard switched voice services and other types of traffic, the discretion that FT and DT enjoy to award or deny operating agreements to particular carriers could be used to favor Sprint with exclusive rights to provide new types of correspondent services. Moreover, denial of operating agreements can act as a barrier to new entry by smaller providers by limiting their ability to achieve cost economies and large volumes of traffic. For several years, IDB, the smallest of the U.S. facilities-based international carriers, was unable to obtain an operating agreement with DT, and only received its agreement in November 1994, during the pendency of this antitrust investigation.

The potential competitive problems associated with denial of operating agreements are dealt with in two ways in the proposed Final Judgment. Section III.G.1 prohibits Sprint from offering, supplying, distributing or otherwise providing any correspondent telecommunications or enhanced telecommunications service between the United States and France or Germany, pursuant to any operating agreement with FT or DT, unless at least one other United States international telecommunications provider has also obtained an operating agreement with FT and DT to provide the same service between the United States and France and Germany. While Section III.G.1 does not mandate that all carriers seeking operating agreements have received them, Section III.G.2 ensures a competitive alternative for providers that have not yet been able to obtain

operating agreements. Under this provision, where another United States international telecommunications provider has requested but not received an operating agreement to provide IDDD voice service or any other service that uses interconnection with the FT and DT public switched telephone networks, Sprint must offer to carry the international traffic for that provider on rates and terms that are competitive with other United States international telecommunications providers that are able to provide service pursuant to operating agreements. The rates charged by Sprint to carry traffic for these providers must reflect the estimated value of proportionate return traffic from France and Germany that is attributable to the traffic originated by providers that are using Sprint's international facilities to carry their traffic.

g. Access to FT and DT Products and Services

Section III.H prohibits Sprint and Joint Venture Co. from providing telecommunications or enhanced telecommunications services involving use of FT or DT Products and Services, if FT or DT have established any proprietary or non-standard protocols or interfaces used by Sprint or Joint Venture Co. for access to these products and services, and FT and DT no longer provide access to the products or services through non-proprietary or standardized interfaces or protocols on a basis consistent with previous operations. This provision ensures that Sprint and Joint Venture Co. will not be given effectively exclusive access to any FT or DT Products and Services, through the control that FT and DT can

exercise over the protocols and interfaces used for access to their facilities and services. This provision will have a significant role in ensuring that competitors can obtain interconnection to the public switched networks in France and Germany. At the same time, it does not forbid FT and DT from developing any proprietary and nonstandardized protocols or interfaces for the seamless services to be offered by Joint Venture Co., so long as competitors are left with an alternative, nonproprietary means of obtaining access, and so strikes a balance between the goals of protecting competition and promoting the availability of new and innovative services for consumers.

h. Access to Public Data Networks

Section III.I is the counterpart to Section III.H for the FT and DT public data networks, which are not within the definition of FT or DT Products and Services. This provision prohibits Sprint and Joint Venture Co. from providing any data telecommunications service or enhanced data telecommunications service making use of FT's and DT's public data networks in France and Germany, unless access to such networks is available to all other United States telecommunications providers on nondiscriminatory terms to complete data telecommunications between the United States and France or Germany, and within France and Germany, through standard protocols. The X.75 protocol for interconnection of data networks, specifically identified in this provision, is the standard one used in conjunction with data services operating on the X.25 protocol, which is the basis of

both FT's and DT's public data networks. X.75 may not remain the only standard interconnection protocol, or may be changed, and so this provision permits use of any generally accepted standard network interconnection protocol that may modify or replace the X.75 standard. Section III.I is the principal safeguard in this proposed Final Judgment for competitive access to DT's and FT's public data networks in France and Germany.

4. Persons to Whom the Final Judgment is Applicable

Section IV of the proposed Final Judgment makes the judgment binding upon the defendants, who are Sprint and Joint Venture Co. as defined in Sections V.O and V.T. It also makes the judgment binding on Sprint's and Joint Venture Co.'s affiliates, subsidiaries, successors and assigns, officers, agents, servants, employees and attorneys. However, the proposed Final Judgment will not continue to bind any Sprint business that is spun-off or otherwise divested and in which neither FT or DT has any ownership interest, thus facilitating Sprint's planned divestiture of its cellular radio properties. In addition, because affiliates and subsidiaries are broadly defined in Section V.A. to include any entity in which a person has equity ownership, Section V.A also specifies that affiliates and subsidiaries of Sprint and Joint Venture Co. that are not controlled, as defined in Section V.C, by Sprint or by Joint Venture Co. do not have substantive compliance obligations under Sections II and III of the proposed Final Judgment.

5. Visitorial Provisions

Section VI of the Final Judgment allows the Department of Justice to monitor defendants' compliance by several means. Section VI.A obliges defendants to maintain records and documents sufficient to show their compliance with the Final Judgment's requirements. Sections VI.B and VI.C enable the United States to gain access to inspect and copy the records and documents of defendants, and also to have access to their personnel for interviews or to take sworn testimony. Section VI.B covers access to Sprint, as well as to Joint Venture Co.'s operations in the United States. To avoid difficulties that might arise in applying this visitorial procedure to discovery directed at foreign operations of Joint Venture Co., Section VI.C provides that Joint Venture Co. documents and personnel, wherever located (including abroad), would be produced by Joint Venture Co. in the United States, within sixty days of the request in the case of documents, and subject to the reasonable convenience of the persons involved in the case of requests for interviews or sworn testimony. Section VI.D permits the United States also to require any defendant to submit written reports relating to any matters contained in the Final Judgment. Finally, Section VI.E supplies confidentiality protections for information and documents furnished by defendants to the United States under the other provisions of Section VI. It permits the Department of Justice to share information and documents with the Federal Communications Commission (subject to confidentiality protections), and to share

information with the French and German telecommunications regulators, DGPT and BMPT.

6. Modifications

Section VIII, the modifications provision, affords the means of expanding, altering or reducing the substantive terms of the Final Judgment, and is essential to the protection of competition. Modifications that are not contested by any party to the Final Judgment are reviewed under a "public interest" test. See, e.g, United States v. Western Electric Co., 993 F.2d 1572, 1576-77 (D.C. Cir. 1993). As it is not the intent of the parties to place Sprint at a competitive disadvantage in such a way as to harm competition, the Final Judgment recognizes in VIII.C that defendants are permitted to identify to the United States any changed circumstances that they believe cause any terms of the Final Judgment to operate in a way that is harmful to competition, but it is in the sole discretion of the United States whether to agree to any modification on this basis. The only grounds on which a modification can be obtained over the opposition of a party are those stated in VIII.A for contested modifications.

Where a proposed modification is contested by any party to the Final Judgment, the Court must determine both whether modification is required, and whether the particular modification proposed is appropriate. The United States is able to seek changes to the substantive terms and obligations of the Final Judgment from the Court, including additional requirements to prevent receipt of

discriminatory treatment by defendants, in order to avoid substantial harm to competition or consumers in the United States. The defendants are able to seek modifications removing obligations of the Final Judgment in order to avoid substantial hardship to themselves. In either case, the party seeking modifications must make a clear showing that modification is required, based on a significant change in circumstances or a significant new event subsequent to the entry of the Final Judgment. As recognized in VIII.B, such a change in circumstances or an event subsequent to the entry of judgment need not have been unforeseen, nor need it have been referred to in the Final Judgment.

Section VIII.A would, for example, enable the United States to seek modification of the decree if, after the termination of Phase I, discrimination against other United States international telecommunications providers or other types of conduct occur that would have been prohibited under the Phase I restrictions, resulting in a substantial harm to competition. Such a harm to competition could occur if the entry of other licensed competitors in France or Germany has been significantly delayed after the granting of licenses, or has otherwise not proven sufficient to provide a competitive alternative, and the regulatory authorities in France or Germany have failed to take effective steps to prevent the misconduct. Before concluding that such discrimination or other conduct during Phase II required the United States to seek a modification of the Final Judgment to protect competition or consumers, the Department of Justice would ordinarily inquire at the outset whether injured competitors had availed

themselves of existing regulatory remedies, if any, in France or Germany as well as the United States, and what relief had been provided or action taken, if any, by the telecommunications regulatory agencies.

If the Court concludes that any party has met its burden of showing that the Final Judgment should be modified over the opposition of another party, it would then be empowered to grant any particular modification that meets three criteria. The modification must be (i) in the public interest, (ii) suitably tailored to the changed circumstances or new event that gave rise to its adoption, and must not result in serious hardship to any defendant, and (iii) consistent with the purposes of the antitrust laws of the United States, and the telecommunications regulatory regimes of the United States, France and Germany. This standard protects against overbroad modifications. It also recognizes that mere inconvenience or some hardship to a defendant will not preclude a modification, but only "serious" hardship. The loss of opportunity to profit from anticompetitive conduct is not a "serious" hardship within the meaning of this standard. Any proposed modification, to be consistent with the antitrust laws, must not be of an anticompetitive character, and must protect competition or consumers in the United States. Modifications must also be consistent with the system of regulation of telecommunications in the United States, France and Germany. This does not mean that modifications must mirror the telecommunications regulations, but at the least, conflicting obligations should not be created.

Section VIII.B permits the United States, where any party has sought modifications of the Final Judgment, to invoke any of the visitorial provisions contained in Section VI of the Final Judgment in order to obtain from defendants any information or documents needed to evaluate the proposed modification prior to decision by the Court.

7. Term of Agreement

Section X.B of the proposed Final Judgment specifies that the substantive restrictions and obligations of the Final Judgment shall expire five years after the date that Phase II has taken effect with respect to both France and Germany. Only the substantive restrictions in Section III are removed at the conclusion of Phase I, but for these purposes the date on which Phase II has taken effect is assessed separately for France and for Germany, as one country might liberalize its telecommunications markets significantly sooner than the other. The duration of the proposed decree is reasonable because the international telecommunications markets, including the markets for international telecommunications services between the United States and France and Germany and the emerging markets for seamless international telecommunications services, may evolve rapidly during the next several years, in part due to the transactions under consideration in this case and the Final Judgment, as well as the regulatory changes taking place in the EU. In the BT-MCI transaction, this Court approved a duration for the consent decree of five years. The greater duration here is

based on the important differences that now exist between the French and German telecommunications regimes and the more open environment in the United Kingdom. It is possible for this decree to have an indefinite duration, should France or Germany fail ever to meet the conditions set forth in Section V.Q for the shift to Phase II, but if liberalization is completed and competitors are licensed on the schedule now projected by the EU authorities, the total duration of the decree is most likely to be about eight years. The five-year duration of Phase II will give the United States ample time to evaluate whether competition is developing in France and Germany as anticipated, and to seek modifications of the decree if competition fails to develop and United States international telecommunications providers are subjected to anticompetitive conduct by FT or DT. Under these circumstances, the United States does not consider it necessary to impose a lengthier duration on the substantive provisions of the proposed Final Judgment.

B. Effects of the Proposed Final Judgment on Competition

The transaction contemplated between Sprint, FT and DT represents the second opportunity that the Department of Justice has had within the past three years to consider the major changes now taking place in international telecommunications, and the competitive significance for United States consumers of the development of strategic alliances. Notwithstanding the many common features that the Sprint-FT-DT alliance and the MCI-BT alliance share, including

the overall level of investment in the U.S. carrier, the non-compete agreements and the wide range of international services contemplated by the parties' joint venture, the important differences between the two transactions have meant that the Department has had to conduct a separate and thorough investigation of this new alliance, lasting for over a year from the initial announcement of the planned transaction. The differences between these transactions turn principally on the market positions of the foreign parents.

The Sprint-FT-DT joint venture may enable the parties to offer some international services of a type or on a scale that they would not otherwise provide. But the alliance as currently structured also poses substantial risks to competition in the United States, of an even greater magnitude than did the MCI-BT alliance. FT's and DT's monopolies over public voice services, the public switched network and transmission infrastructure in France and Germany, as well as their market power in public data network services, would when combined with Sprint's competitive long distance services and facilities in the U.S. and its strong position in data services give rise to increased incentives for FT's and DT's monopoly power to be used to favor Sprint and Joint Venture Co. and to disadvantage competitors in the United States. These factors made it necessary for the United States to obtain, by agreement with the parties, considerably more extensive relief than in the BT-MCI transaction, in order to be assured that the competitive problems here were adequately addressed.

In other circumstances involving vertical integration between large monopoly providers of local exchange telecommunications services and competitive long distance providers in the United States, the Department of Justice has obtained various forms of relief under the antitrust laws to protect competition. See, e.g., United States v. American Telephone and Telegraph Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd mem. sub nom. Maryland v. United States, 460 U.S. 1001 (1983); United States v. GTE Corp., 603 F. Supp. 730 (D.D.C. 1984). In each of these cases, the United States has dealt with distinct factual situations and legal contexts. The relief proposed here, while not the same as in the other cases, serves a similar competitive purpose, taking into account the particular circumstances and risks associated with the transactions between Sprint, FT and DT. These include, as in the BT-MCI case, the unique practices and relationships between carriers in the provision of international telecommunications services, the continued existence of Sprint as a separate entity following these transactions, and the involvement of foreign telecommunications providers subject to distinct regulatory regimes overseas. In this case, an added complication was created by the government ownership of the foreign carriers at issue. While it was not appropriate in this transaction to accord deference to separate telecommunications regulation in France and Germany to the same extent as was done for the United Kingdom in the BT-MCI transaction, given the absence of privatization and the continued existence of de jure monopolies in France and Germany, the progress toward a more competitive telecommunications environment now being made in

the EU and the plans for introduction of full competition in France and Germany by 1998 have been taken into account. These regulatory developments have fundamentally affected the two-stage structure of the proposed decree, and the feasibility of shifting to a more limited form of relief in Phase II.

The United States believes that the relief proposed here, including both the substantive restrictions and obligations and the ability of the Court to modify the Final Judgment to respond to additional competitive problems, will substantially benefit competition. The ability of Sprint and of Joint Venture Co. to realize anticompetitive advantages in the United States will be substantially constrained.

Entry of the proposed Final Judgment will allow the transactions between Sprint, FT and DT to proceed and any benefits to consumers to be realized, subject to further review by the Federal Communications Commission and the European Commission, and any additional modifications that may be made to satisfy their separate concerns. At the same time, entry of the proposed Final Judgment will provide extensive protections to competing United States international telecommunications providers during the period preceding full liberalization in France and Germany, as needed to protect competition. After liberalization, the Final Judgment will continue to provide United States competitors with increased means to detect discrimination, protection against the misuse of confidential business information, and safeguards against licensing advantages for Sprint and Joint Venture Co. for an additional five years, while competition develops in France and Germany. During the entire duration of the decree, the United States

will have a mechanism to seek modification of the Final Judgment without having to initiate separate antitrust litigation, should competition and regulatory protections in the EU, France and Germany not develop as anticipated and substantial competitive harms arise. This opportunity to impose additional restrictions on defendants, or to extend the existing restrictions in Phase I for a longer time, in order to protect competition and consumers in the United States, responds to any risk that the other substantive provisions of the Final Judgment and separate regulatory requirements may prove insufficient to protect competition. Thus, the modification provision will serve as an additional important deterrent to anticompetitive behavior.

IV.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages suffered, as well as costs and reasonable attorney's fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of such actions. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuits that may be brought against defendants in this matter.

In addition, persons affected by unreasonable discrimination on the part of Sprint, in violation of 47 U.S.C. § 202, may complain to the Federal Communications Commission as provided by 47 U.S.C. § 208, for such relief as is available under the Communications Act and the Commission's regulations, or bring suit for damages pursuant to 47 U.S.C. § 206. Persons affected by discrimination, refusal to interconnect or other conduct by FT or DT in violation of French or German law may complain to the French DGPT or the German BMPT for such relief as those bodies are authorized to provide, or to the competition authorities in Germany, France and the European Union. Entry of the proposed Final Judgment will not impair the bringing of such complaints and actions, and indeed will likely facilitate the effective detection and prevention of anticompetitive conduct through existing regulatory mechanisms.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

As provided by the Antitrust Procedures and Penalties Act, any person believing that the proposed Final Judgment should be modified may submit written comments to Donald J. Russell, Chief, Telecommunications Task Force, U.S. Department of Justice, Antitrust Division, 555 Fourth Street, N.W., Room 8104, Washington, D.C. 20001, within the 60-day period provided by the Act. These comments and the Department's responses, will be filed with the Court and

published in the Federal Register. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Judgment at any time prior to entry. The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate to carry out or construe the Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish any violations of its provisions. Modifications of the Final Judgment may be sought by the United States or by the defendants under the standards described therein.

VI.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

As an alternative to the proposed Final Judgment, the United States considered litigation to seek an injunction to prevent the proposed transaction between Sprint, FT and DT. The United States rejected that alternative based on a combination of the following considerations. First, the relief in the proposed Final Judgment, together with the planned liberalization of all telecommunications markets and developing regulatory safeguards in the EU, France and Germany, and existing U.S. telecommunications regulation applicable to Sprint, should provide a reasonable degree of protection against significant lessening of competition in the U.S. markets at issue. Second, litigation of this matter would have been highly complex and the result uncertain, in part because

the United States would have borne the burden of proof in demonstrating the extent to which this transaction would have led to additional lessening of competition and also because foreign markets were involved. Therefore, avoiding litigation represents a substantial savings of public resources.

The United States also considered, in formulating the proposed Final Judgment, significantly limiting the level of equity investment that FT and DT would be permitted to make in Sprint prior to full liberalization of the telecommunications markets in France and Germany. Extensive changes to the equity investment contingent on full liberalization would, however, have created a substantial likelihood that the parties would have declined to consummate the transaction in any form, since full liberalization is still some three years away. To insist on such changes would have made it likely that the parties could not have entered into any settlement, leading to litigation. Had a restriction on the equity investment been the only way to prevent this transaction from giving rise to a further lessening of competition (beyond that already occurring in international markets due to the existence of DT's and FT's monopolies), this might nevertheless have been necessary. But, while the level of equity investment here does play a substantial role in creating additional incentives for FT and DT to favor Sprint, it was not clear that reducing the current investment in Sprint would have eliminated those incremental incentives, given the additional extensive investments that the parties also are planning to make in the joint venture. Ultimately, the United States concluded that the other provisions of the

decree, particularly those in Section III, would provide a reasonable level of protection against increased harm to competition in United States markets arising from this specific transaction, so that it was not essential to insist on a change to the equity investment to accomplish the purposes of the antitrust laws.

The United States has also considered issues of international comity in shaping the proposed Final Judgment. International transactions, particularly where activities of foreign governments and their enterprises are in issue, give rise to special considerations not present in the domestic context. Consistently with its longstanding enforcement policy, see, e.g., U.S. Department of Justice and Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations, at 20-28 (1995), the United States sought in the substantive restrictions and obligations of Sections II and III of the proposed Final Judgment to avoid situations that could give rise to international conflicts between sovereign governments and their agencies. The United States is not aware of any such conflict that would arise from the implementation of the substantive provisions of the proposed Final Judgment as currently drafted. FT and DT have not been made defendants in this case, so that the United States is not imposing direct obligations on any foreign government-owned entity. Moreover, the substantive obligations, to the extent that they may indirectly affect the conduct of FT and DT, apply to practices over which either foreign regulation is insubstantial or nonexistent, or, to the extent that regulation exists, it also condemns in a general sense the practices that the proposed Final Judgment seeks to prevent. The

latter is particularly true with respect to the key prohibitions on discrimination and cross-subsidy. Here, the competitive concern is not that French or German regulation directs FT or DT to discriminate against competitors or to cross-subsidize their own competitive services -- quite the contrary -- but that regulation is at present insufficiently developed to safeguard competition adequately by itself, in the absence of alternative telecommunications infrastructure that can be used by all competitors in France and Germany.

VII.

STANDARD OF REVIEW UNDER THE TUNNEY ACT FOR THE PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States are subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed final judgment "is in the public interest." In making that determination, the court *may* consider:

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e) (emphasis added). The courts have recognized that the term "public interest" "take[s] meaning from the purposes of the regulatory legislation." NAACP v. Federal Power Comm'n, 425 U.S. 662, 669 (1976); United States v.

American Cyanamid Co., 719 F.2d 558, 565 (2d Cir. 1983), cert. denied, 465 U.S. 1101 (1984). Since the purpose of the antitrust laws is to "preserv[e] free and unfettered competition as the rule of trade," Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4 (1958), the focus of the "public interest" inquiry under the Tunney Act is whether the proposed final judgment would serve the public interest in free and unfettered competition. United States v. Waste Management, Inc., 1985-2 Trade Cas. ¶ 66,651, at 63,046 (D.D.C. 1985). In conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[23] Rather,

> absent a showing of corrupt failure of the government to discharge its duty, the Court, in making the public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

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[23] 119 Cong. Rec. 24598 (1973). See United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. Rep. 93-1463, 93rd Cong. 2d Sess. 8-9 (1974), reprinted in 1974 U.S.C.C.A.N. 6535, 6538-39.

It is also unnecessary, and inappropriate, for the district court to "engage in an unrestricted evaluation of what relief would best serve the public." United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981), quoted with approval in United States v. Microsoft Corp., 56 F.3d 1448, 1995-1 Trade Cas. ¶ 71,027, at ¶ 74,830 (D.C. Cir. 1995). In the recent Microsoft decision by the United States Court of Appeals for the District of Columbia Circuit, which reversed the district court's refusal to enter an antitrust consent decree proposed by the United States, the court of appeals held that the provision in Section 16(e)(1) of the Tunney Act allowing the district court to consider "any other considerations bearing upon the adequacy of such judgment," does not authorize extensive inquiry into the conduct of the case. 1995-1 Trade Cas. ¶ 71,027, at ¶74,830. The court of appeals concluded that "Congress did not mean for a district judge to construct his own hypothetical case and then evaluate the decree against that case." Id. To the contrary, "[t]he court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," and so the district court "is only authorized to review the decree itself," not other matters that the government might have but did not pursue. Id.

The district court's legitimate functions in reviewing a proposed consent decree, according to the Microsoft decision, include consideration of both the decree's "clarity" in order to protect against ambiguity, and also its "compliance mechanisms" in order to avoid future "difficulties in implementation." United

States v. Microsoft Corp., 1995-1 Trade Cas. ¶ 71,027, at ¶¶ 74,832-33. The court may also appropriately consider claims of third parties "that they would be positively injured by the decree," when brought to the court's attention consistent with the requirements of the Tunney Act and accepted process in federal courts. Id. at ¶¶ 74,833-34. But

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[24]

Although the court "is not obliged to accept [a proposed decree] that, on its face and even after government explanation, appears to make a mockery of judicial power . . . . [s]hort of that eventuality, the Tunney Act cannot be interpreted as an authorization for a district judge to assume the role of Attorney General." United States v. Microsoft Corp., 1995-1 Trade Cas. ¶ 71,027, at ¶ 74,833. In sum, a district judge "must be careful not to exceed his or her constitutional role." Id.

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[24] United States v. Bechtel, 648 F.2d at 666 (quoting United States v. Gillette Co., 406 F. Supp. at 716). See United States v. Microsoft Corp., 1995-1 Trade Cas. ¶ 71,027, at ¶ 74,832; United States v. BNS, Inc., 858 F.2d 456, 463 (9th Cir. 1988); United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); see also United States v. American Cyanamid Co., 719 F.2d at 565.

A proposed consent decree is an agreement between the parties which is reached after exhaustive negotiations and discussions. Parties do not hastily and thoughtlessly stipulate to a decree because, in doing so, they

> waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and the elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

United States v. Armour & Co., 402 U.S. 673, 681 (1971).

The proposed consent decree, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a merger or whether it mandates certainty of free competition in the future. The court may reject the agreement of the parties as to how the public interest is best served only if it has "exceptional confidence that adverse antitrust consequences will result . . . ." United States v. Western Electric Co., 993 F.2d 1572, 1577 (D.C. Cir.), cert. denied, 114 S. Ct. 487 (1993), quoted with approval in United States v. Microsoft Corp., 1995-1 Trade Cas. ¶ 71,027, at ¶ 74,831.

Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'"[25/] Under the public interest standard, the court's

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[25] United States v. American Tel. and Tel. Co., 552 F. Supp. 131, 151 (D.D.C. (continued...)

role is limited to determining whether the proposed decree is within the "zone of settlements" consistent with the public interest, not whether the settlement diverges from the court's view of what would best serve the public interest. United States v. Western Electric Co., 993 F.2d at 1576 (quoting United States v. Western Electric Co., 900 F.2d 283, 307 (D.C. Cir. 1990)); United States v. Microsoft Corp., 1995-1 Trade Cas. ¶ 71,027, at ¶ 74,831. Indeed, a district court should give a request for entry of a proposed decree even more deference than a request by a party to an existing decree for approval of a modification, for in dealing with an initial settlement the court is unlikely to have substantial familiarity with the market involved. United States v. Microsoft Corp., 1995-1 Trade Cas. ¶ 71,027, at ¶¶ 74,831-32.

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[25] (...continued)
1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983) (quoting United States v. Gillette Co., 406 F. Supp. at 716); United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky 1985). See also, United States v. Microsoft Corp., 1995-1 Trade Cas. ¶ 71,027, at ¶ 74,831, citing United States v. Western Electric Co., 900 F.2d 283, 309 (D.C. Cir. 1990) (citing and quoting Bechtel, 648 F.2d at 666, in turn quoting Gillette, 406 F. Supp. at 716).

VIII.

DETERMINATIVE MATERIALS AND DOCUMENTS

No documents were determinative in the formulation of the proposed Final Judgment. Consequently, the United States has not attached any such documents to the proposed Final Judgment.

Dated: August 14, 1995

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