INTRODUCTION

Over the past decade, both the United States and the member states of the European Community ("EC") have undergone sweeping changes to their telecommunications ("telecom") markets. Beginning with the 1984 divestiture of AT&T, local calling services in the United States were delegated to seven regional Bell Operating Companies ("BOC"), leaving the former monopolist to supplying long-distance services. In contrast, throughout most of the EC's existence, state-owned monopolies have been the sole providers of both services and the necessary telecom infrastructure in member states. The EC recognized that liberalization of the telecom market, whether facilitated by divestiture of a private entity like AT&T or by removing legal monopoly status in place in the EC, promised an influx of competition into the telecom marketplace and with it: accelerated development of telecom technology, higher quality service and lower rates. To insure that potential competition would have to access needed infrastructure and services, the EC embarked on a legislative agenda in 1987 that sought to combine the goal of a competitive telecom marketplace with a common regulatory framework among member states.

During this phase of both liberalization and regulatory harmonization in Europe, the U.S. Congress was concluding nearly ten years of negotiations on omnibus telecom legislation. Whereas EC developments initially promised a competitive landscape which would stimulate many state-owned monopolies to privatize, U.S. legislation would allow private local and long-distance phone companies to compete with cable companies and other alternative providers of telecom services.

In this evolving environment, state-owned monopolies in the EC and the incumbent long-distance carriers of the United States foresaw that new and vigorous competition could deprive them of their traditional marketshare. In response to their common motives of maximizing their positions and providing new services in the vastly changing marketplace, global telecom companies such as AT&T, MCI, Sprint and former EC monopolies began forming international partnerships. Not since the dawn of railroad conglomerates during the industrial revolution has the development of huge, new corporate entities brought with it both the prospect of newer and faster consumer services and vast anti-trust implications. One such global partnership, Phoenix (later renamed Global One), involved the joining of two dominant state-owned monopolies, Deutsche Telekom ("DT") of Germany and France Telecom ("FT") with Sprint, the fourth

1 The EC is one of three separate pan-European alliances (also including the European Coal and Steel Community and Euratom) that form the core of the European Union ("EU"). Since the signing of the Maastricht Treaty in 1993 creating the EU, the titles of several EC institutions have changed. See Dr. Klaus-Dieter Borchardt, European Integration: The Origins and Growth of the European Union 59 (1995). However, as most of this paper is concerned with legislation arising under the Treaty of Rome creating the EC, the term EC will be used throughout.
2 See infra text accompanying note 16.
3 See infra text accompanying notes 21-22.
4 See infra note 26.
5 See infra text and accompanying note 25.
6 See infra text accompanying notes 28-29.
7 See infra text accompanying note 126.
8 See infra text and accompanying notes 261-263. The EC would similarly propose access to alternative providers as a means of beginning a competitive environment before full liberalization of the telecom marketplace. See infra text accompanying notes 117-118.
9 See infra text and accompanying note 131.
10 See infra text accompanying notes 139-141.
11 See infra text and accompanying notes 321-323.
12 See infra text accompanying notes 267-268.
13 See infra text accompanying notes 170-171.
largest long-distance carrier in the United States.\textsuperscript{14}

This Comment discusses the development of EC and U.S. telecom law during the past decade and the particular impact that authorization of Global One and similar alliances have had on effectuating the policy goals of both governments. Part I focuses on the development of both EC and U.S. telecom policy and legislation, from the divestiture of AT&T to the point at which the Global One joint-venture was first considered. Part II examines the EC and U.S. aspects of the legal process by which Global One moved from a concept to a government authorized global alliance, and discusses new legislative developments that emerged during that process. Finally, Part III addresses the twin issues of how the Global One alliance could be authorized despite its anti-trust implications and how authorization of the alliance will enable the EC and United States to bring several telecom policy goals to fruition. This Comment concludes that government approval of the Global One alliance was both necessary and prospective for four reasons. First, authorization of the alliance facilitates the opening of the German and French telecom markets, previously closed to competition. Second, alliances like Global One and French telecom markets, previously closed to competition. Second, alliances like Global One and French telecom markets, previously closed to competition. Second, alliances like Global One and French telecom markets, previously closed to competition. Second, alliances like Global One and similar alliances possessing the resources and skills necessary to advance development of the information superhighway. Fourth, EC and U.S. government structures and legislation presently in place are competent to check possible anti-competitive effects of Global One.

I. BACKGROUND

A. Laying the Groundwork for a Competitive Environment

By the mid-1980s, competition existed in the supply of equipment, services and in the long-distance infrastructure of the United States. A combination of legislative and regulatory intervention and legal actions brought under anti-trust legislation opened the U.S. market.\textsuperscript{15} The most important of these pro-competitive developments was the 1984 Modification of Final Judgment ("MFJ"),\textsuperscript{16} which settled an anti-trust suit brought by the U.S. Department of Justice ("DOJ") against AT&T in 1974.\textsuperscript{17} The DOJ’s anti-trust argument was based upon AT&T’s control of three separate telecom market segments: local telephone service, long-distance telephone service and the provision of customer premises equipment ("CPE").\textsuperscript{18} Although the DOJ considered the local service market a "natural monopoly", the long-distance and CPE markets were potentially competitive but dependent on local market interconnection.\textsuperscript{19} Because of AT&T’s aggressive efforts to limit competition by opposing terminal attachment and providing competitors with inferior lines, the DOJ concluded that AT&T was using its market power to perpetuate monopoly control, not to "protect [telephone] network integrity."\textsuperscript{20}

To settle the 1984 suit, AT&T agreed to divest itself of its twenty-two local telephone companies,\textsuperscript{21} leaving it to provide international, long-distance and other enhanced telecom services.\textsuperscript{22} Pursuant to the MFJ, the local telephone companies reorganized into seven regional BOCs.\textsuperscript{23}

\textsuperscript{14} See infra notes 236, 241.

\textsuperscript{15} Commission of the European Communities, Green Paper on the Liberalization of Telecommunications, Infrastructure and Cable Television Networks: Part II — a Common Approach to the Provision of Infrastructure for Telecommunications in the European Community, COM(94) 682 final at 37 [hereinafter COM (94) 682].


\textsuperscript{17} See James E. Meadows, Telecommunications Law in the Age of Convergence, in PRACTICING LAW INSTITUTE, ANNUAL INSTITUTE ON COMPUTER LAW 201, 205 (June 17, 1996). DOJ’s revised interest in anti-trust action against AT&T had been prompted by the corporation’s aggressive efforts to block competitive activity from then-fledgling MCI. See GERALD W. BROCK, TELECOMMUNICATION POLICY FOR THE INFORMATION AGE: FROM MONOPOLY TO COMPETITION 152 (1994).

\textsuperscript{18} See Brock, supra note 17, at 153. A home telephone, an example of CPE, could be purchased or leased only from AT&T prior to the 1984 MFJ.

\textsuperscript{19} Id. (explaining that, since the customer’s premises was only accessible through a local connection, long-distance competitors would require access to this local connection in order to provide this service).

\textsuperscript{20} Id. When AT&T supplied long-distance competitors with local connection, it was often in the form of inferior “line side” connections. Id.

\textsuperscript{21} See Catherine Arst and Michael Mandel, The Coming Telescramble: Deregulation is Launching a $1 Trillion Digital Free-For-All, BUS. WK., Apr. 8, 1996, at 65.

\textsuperscript{22} COM(94) 682, supra note 15, at 37 (explaining that a 1956 court imposed “line-of-business” restriction on AT&T, limiting it to local and long-distance markets, would be removed under the 1984 MFJ).

\textsuperscript{23} See Meadows, supra note 17, at 202-203. The BOCs included: Ameritech, Bell Atlantic, BellSouth, NYNEX, Pacific Telesis, SBC Communications and U.S. West. Id. at 206.
Eliminating all barriers to interconnection that AT&T had created, and allowing competitors access to crucial infrastructure, the MFJ required the BOCs to provide "access services to interexchange carriers and information service providers . . . equal in type, quality and price to the access services provided to AT&T and its affiliates."24

With the divestiture of AT&T, the EC not only recognized that increased competition would bring an energized U.S. telecom market, but new technology was transforming the industry.25 With all but one member state dominated by monopoly providers in 1987,26 the EC published the Green Paper on the Development of the Common Market for Telecommunications Services and Equipment ("Green Paper"),27 the most comprehensive review of telecom policy undertaken by the EC.28

The Green Paper proposed an aggressive legislative agenda for the transformation of the EC telecom market based on a two-pronged approach: liberalization (the gradual introduction of competition) and harmonization of the differing telecom standards (regulations) of member states.29 In a bid to combine the concepts of harmonization and liberalization in the best possible iteration of basic principles,30 the Council of the European Union31 adopted a Framework Directive32 on the Open Network Provision ("ONP Framework Directive")33 and the European Commission34 adopted a Directive on Competition in the Markets for Telecommunications Services ("Competition in Services Directive") on June 28, 1990.35

The requirements of the ONP Framework Directive, despite being separate and distinct from the Competition in Services Directive and from EC competition law, secured the foundation for introducing competition into the EC telecom market. The EC recognized that monopoly control of infrastructure was preventing new market entrants from competing for the supply of basic services. Therefore, the objective of the Open Network Provision ("ONP") was to guarantee competitive access to telecom networks and services formerly dominated by monopoly providers.36 This access was to be facilitated through clearly defined conditions standardizing tariff principles and the technical interfacing of network connections37 among member states. As most member state network monopolies were

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24 Id. at 217. Access services are services which allow competitors to originate and terminate interexchange telephone calls using AT&T infrastructure. Id.

25 See COM(94) 682, supra note 15, at 33. There was a fear that the communications revolution, led by companies whose entrepreneurial spirits and efficiency had been honed in competitive markets, would leave Europe far behind. See Alan Cane, Global Sell-off Gathers Pace, Fin. Times, Sept. 19, 1996, at 1.

26 The United Kingdom undertook privatization of its telecom market during the 1980s, which resulted in the dominance of British Telecom and Cable & Wireless as a pre-ordained duopoly. See Pekka Tarjanne, Telecoms Privatisations Do Work — If Structured Correctly, CommunicationsWeek Int'l No.161, Mar. 18, 1996. However, telecom markets in the rest of the EC, including that of Germany and France, still were dominated by wholly state-owned monopolies with exclusive operating rights for the provision of infrastructure. See, e.g., Nicholas J. Nikolopoulos, Fostering Corporate Networking in the European Union, 4 COMMLAW CONCEPTUS 27, 38 n.106 (Winter, 1996).

27 Green Papers are European Commission consultative documents setting out basic policy goals for public debate. See COM(94) 682, supra note 15, at 134.


29 See STANBROOK AND HOOPER, KPMG EUROPEAN HEADQUARTERS, A BUSINESS GUIDE TO EUROPEAN COMMUNITY LEGISLATION 1035 (Bernard O'Connor and Christopher MacNulty eds., 1993).


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31 The Council of the European Union is composed of ministers representing member state governments. It is the principal law making body of the EU but acts only on recommendations from the European Commission. See STANBROOK AND HOOPER, supra note 29, at 5-6.

32 A directive is a piece of EC legislation binding upon each member state to which it is addressed, but leaves to national authorities the choice of forms and methods to implement a directive. The European Commission both proposes and polices implementation of directives. See STANBROOK AND HOOPER, supra note 29, at 39.


34 The European Commission is composed of 20 commissioners nominated by member states to fulfill five-year renewable terms. The European Commission is charged with initiating legislation under EU treaties and policing application of treaty provisions. Each commissioner heads a Directorate-Generale ("DG") to facilitate oversight of particular areas (similar to U.S. cabinet posts). See STANBROOK AND HOOPER, supra note 29, at 13-15.


36 See European Commission, supra note 30, at 1. ONP was first discussed in the 1987 Green Paper but legislatively set forth in the ONP Framework Directive. Id.

37 Id.
guaranteed exclusive rights,\textsuperscript{38} the ONP Framework Directive stipulated that conditions for open access to infrastructure should "facilitate . . . freedom of action [by potential competitors, but not] unduly limit the [monopoly provider's] responsibility" for insuring the function and best possible condition of network infrastructure.\textsuperscript{39} To safeguard this public interest, ONP measures would be proposed by the Commission through a cooperative process.\textsuperscript{40} Member states would then implement ONP measures by promulgating conditions for network use that are based on objective criteria, are transparent, published appropriately and guarantee non-discriminatory access.\textsuperscript{41} Finally, the ONP Framework Directive provided that these conditions for access would be defined and implemented in stages, affecting different sectors of the telecom market one at a time.\textsuperscript{42} Subsequently, specific legislative measures have applied the ONP principles to leased lines,\textsuperscript{43} packet-switched data services,\textsuperscript{44} ISDN,\textsuperscript{45} and most recently, public-voice telephony.\textsuperscript{46}

Also approved on June 28, the Competition in Services Directive instituted a "programme . . . for progressively introducing competition in the telecommunications market,"\textsuperscript{47} a market that presumably would be catalyzed by the implementation of harmonized regulatory conditions under the ONP. The Directive provided that all member states withdraw special or exclusive rights for the supply of telecom services other than public-voice telephony.\textsuperscript{48} In formulating this provision, the European Commission continued to rationalize that the provision of a network within a member state constituted a "distinct separate market" from the supply of services; therefore, network infrastructure could remain a monopoly function.\textsuperscript{49} Similarly, in defining the term "voice telephony" very narrowly,\textsuperscript{50} the Directive left services provided to the general public under monopoly control, while liberalizing other services such as closed user groups and cellular telephony.\textsuperscript{51}

B. Telecommunications and Anti-trust Enforcement

To understand why the European Commission initially chose to begin liberalization while leaving a substantial sector of the market under monopoly control, the relationship between the Competition in Services Directive and EC competition law must be understood. The Commission's issu-
ance of the Directive was not only based on competition law but served to clarify competition doctrine and the power of the Commission to apply it to the telecom sector. The fundamental principles of EC competition law were set forth in Articles 85, 86 and 90 of the Treaty of Rome. Under Article 85, the EC prohibits agreements, undertakings, decisions or practices which may or in fact affect trade within the European Common Market. However, subsection (5) of Article 85 provides for the exemption of an activity from the prohibitions of the Article, if the activity "contributes to the production or distribution of goods or to promoting technical or economic progress." Additionally, competitive restrictions that receive exemption must give consumers a "fair share of the resulting benefit" and must be "indispensable to the attainment of [economic] objectives."

Whereas the Article 85 prohibitions apply to agreements or collusions between market actors, Article 86 prohibits a market actor from abusing a dominant position within the Common Market "in so far as it may affect trade between member states." In simplest terms, this equates to prohibiting a market actor from using its dominant position to engage in activities prohibited under Article 85 or stifling the lawfully competitive inter-State activity of other market actors.

Article 90 applies the prohibitions of Articles 85 and 86 to "public undertakings and undertakings to which member states grant special or exclusive rights." Of particular importance to the Competition in Services Directive, subsection (2) of Article 90 provides that market actors "entrusted with the operation of services of general economic interest," shall benefit from a derogation of (exemption from) competition articles if application would obstruct the performance of the particular task assigned to them. In 1985, the judgment of the European Court of Justice ("ECJ") in British Telecommunications signaled it was for the European Commission to decide on any derogation to be granted and the court favored a narrow interpretation of that derogation.

In issuing the Competition in Services Directive, the European Commission was exercising its broad authority under Article 90(3) to insure the application of the competition provisions of the Treaty by directive. In maintaining a derogation of Article 90(2) for an undertaking providing a public telecom network, the Commission affirmed a prior ECJ decision declaring that the provision of a public network could be considered a service of general economic interest, qualifying exemption. Despite maintaining exclusive rights for the provision of infrastructure and voice telephony, after passage of the Competition in Services Directive, the prospect for eventual competition in the supply of basic services would motivate many state telecom organizations to consider privatization.

In part because of the far reaching implications of the Directive, it was chal-

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54 See generally EEC Treaty, supra note 52; see also Valentine Korah, An Introductory Guide to EC Competition Law and Practice 23 (5th ed. 1994) (explaining that the Treaty for the European Economic Area (EEA Treaty), entered into force in January, 1994, and replaced the Free Trade Agreements for most of the members of the EC. Articles 53 and 54 of the EEA Treaty correspond to Articles 85 and 86 of the Treaty of Rome).
55 See EEC Treaty, supra note 52, at art. 85(1). Specifically, Article 85 is concerned with activity which fixes prices, limits production or technical development or applies dissimilar conditions to equivalent transactions with other trading parties. Id. at art. 85(1)(a-e).
56 Id. at art. 85(3).
57 Id. at art. 85(3)(a).
58 See Korah, supra note 54, at 2.
lenged in the ECJ by several member states. Subsequent judgments confirmed not only the legality of the Competition in Services Directive but of the Commission’s power to issue such directives and obligate member states to comply.68

Whereas the Sherman Act, the Federal Trade Commission Act and the Clayton Act69 are the principal U.S. antitrust statutes, Section 7 of the Clayton Act is most relevant to this discussion of telecom policy.70 Section 7 of the Clayton Act prohibits “acquisitions of stock or assets that tend to create a monopoly or substantially lessen competition.”71 Other sections of the Act “address price discrimination, exclusive dealing and tie-ins, and simultaneous service by persons acting as officers or directors of competing corporations.”72

Similar to the broad grant of authority to the EC under Articles 85, 86 and 90, in amending the Clayton Act in 1950, the U.S. Congress only required that an activity “may” lessen competition or “tend to” create a monopoly before the government can take action.73 Section 1 of the Sherman Act,74 like Article 85 of the Treaty of Rome, prohibits contracts or other activity that constitutes “restraint of trade,”75 however, the courts have consistently ruled it “to prohibit only unreasonable restraints of trade,”76 a significantly lesser grant of authority.

Utilizing this broad authority, enforcement of the Clayton Act is not only shared under the general jurisdiction of the DOJ and the Federal Trade Commission (“FTC”), but also private parties are allowed to sue for violations of the Act.77 With specific regard to telecom, the states additionally have a role in insuring a competitive market by overseeing local service rates and verifying that the regional BOCs comply with a checklist of conditions to prove that their network infrastructure is open to competitive access.78

The Communication Act of 1934 was enacted to address the monopoly control over telephone services and to regulate the emergence of radio broadcast companies.79 The Federal Communications Commission (“FCC”) was charged with administering the Act.80 In exercising its regulatory authority over telecom, the FCC is expected to “consider anti-trust concerns” in applying its power.81 This anti-trust consideration plays a particularly important role when the FCC promulgates rules which encourage new or evolving telecom entities to compete against existing monopolies.82 In the years following the issuance of the MFJ, Senate Republicans on the Commerce, Science and Transportation Committee charged the FCC and the states with adopting “rules to remove barriers to entry, establish interconnection and network opening requirements, “and establish a joint federal-state board to support universal service.”83

Similar to that of the United States, a primary goal of developing EC telecom policy is to “reconcile increased competition with the public interest”84 in high quality universal service. Realizing that both goals could be facilitated by competi-

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68 Ungerer, supra note 51, at 1136.


70 See infra text accompanying notes 197-198.


tion in a liberalized marketplace, the European Commission accepted that continued derogation of competition rules for infrastructure and voice telephony service providers would impede further progress.

With an eye toward assessment prior to removing the derogations, the Competition in Services Directive provided for a full Commission review of the derogations, the Competition in Services Directive. The review showed new technological developments, the advent of a single [European] market and the changing international economic situation were diminishing the need for a "safety net" of exclusive rights for the provision of voice telephony services. Additionally, the review suggested the categorical expansion of ONP principles since existing member state regulations were still inappropriate to a European market for voice telephony. Consequently, the Council of the European Union decided in June 1993, to abolish exclusive and special rights for voice-telephony service providers by January 1, 1998. The Council's resolution acknowledged that there are less restrictive means than the grant of special or exclusive rights to insure the provision of voice telephony as a service of general economic interest. In addition, recognizing that monopoly provision of network infrastructure could impede the ONP goal of European universal service and interconnection, the Council directed that a Green Paper be published to determine whether the derogation for infrastructure should also be lifted.

C. Toward Development of an Information Society

By 1993, the Clinton Administration began to emphasize a dual agenda in regard to telecom policy, both in the introduction of the National Information Infrastructure ("NII") initiative and in the Administration's contention that anti-trust enforcement in the telecom sector would remain a priority. The NII initiative emphasized three closely related elements for the future of U.S. telecom policy: (1) the realization of sufficient capacity in a network infrastructure, (2) improvement of accessibility to that infrastructure and (3) the development of applications to be carried over information networks.

Whereas interconnection and compatibility concerns loomed large on the agenda or the EC, a key stumbling block to pursuing the NII initiative was the prohibitive cost of infrastructure capacity. While traditional circuits that make up the vast expanse of telecom in the United States are more than adequate for voice telephony, the 2,400-bits-per-second-speed of many circuits is too slow for Internet browsing, a quandary that the British have dubbed the "World-Wide Wait." The prohibitive cost of upgrading technology in the United States to optical fiber (roughly $1,000 per household in 1993) had consigned many companies to wringing higher speeds out of existing wire and circuits, making the second of the NII goals perhaps the toughest to meet.

With the convergence of the telecom, infor-

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87 See European Commission, supra note 84, at 3. The European Commission had justified special rights for voice telephony to safeguard monopolies' ability to invest in new generations of telecom infrastructure. Packet-switching and other advanced methods of distributing voice-telephony services were now becoming more commonplace. See Mos-
88 See European Commission, supra note 84, at 3.
90 Id. at 3.
91 Id.
92 Id. at 3.
mation technology, and software industries, mergers in the telecom and computer industries were becoming more lucrative, prompting administration concerns that such mergers would cause the extension of dominance from one market into another. In response, the Administration vowed to seek "appropriate conditions that will remove the anticompetitive effects" of horizontal or vertical integrations involving the telecom industry. However, vertical integrations in recent years were largely viewed as efficient and pro-competitive. Thus, few were challenged by the DOJ before 1994.

Affirming this belief and recognizing that NII principles would benefit from increased investment and access to foreign markets, in April 1994, the Clinton Administration agreed to participate in the Negotiating Group on Basic Telecom ("NGBT") promising to allow greater foreign investment in U.S. telecom for businesses of countries that invited similar openness.

In the interim between establishing the 1998 services-liberalization deadline and the publication of the proposed Green Paper, the European Commission issued two reports. Each report allied the agenda of competitive universal service through liberalization to the "Information Society." Both the report on Europe and the Global Information Society ("Bangemann Report") and the Delors White Paper on Growth, Competitiveness and Employment recognized that the information sector was already developing on its own, representing "nearly $600 billion in the European Union alone," a prospected growth "to $3 trillion by the end of the decade," and encompassing more than 60% of all jobs in the EC by the year 2000. As in the United States, the reality of a converging marketplace was strongly influencing telecom policy development. For these reasons, the issue of convergence has become a pillar of EC telecom policy, and subsequent priorities for the application of competition law to the telecom sector reflect this deference.

In the near term, the European Action Plan submitted concurrently with the Bangemann Report, placed a high priority on accelerated liberalization of telecom infrastructure as a necessity for the development of the information society. Subsequently, following the submission by the European Commission of Part One of the Green Paper on the Liberalization of Telecommunications Infrastructure and Cable Television Networks ("Green Paper on Liberalization"), and based upon its recommendations, the Council of the European Union quickly issued a resolution in December 1994, calling for the liberalization of infrastructure commensurate with the January 1, 1998 deadline for voice-telephony services.

Part II of the Green Paper on Liberalization agreed to competition in basic telecom services "equivalent in openness" to the U.S. offer. Ungerer, supra note 51, at 1112. Ungerer, supra note 51, at 1113.


It was also leading to some 'turf battles' as Directorates-General IV, X and XIII (responsible for competition, information and culture, and telecommunications, respectively) vied for responsibility over convergence issues. See EC Directorates Bid for Multimedia Power, New Media Metts., Apr. 4, 1996.


II. CURRENT DEVELOPMENTS

A. Why are Global Alliances Forming?

The telecom policy goals of both the United States and the EC can be jointly characterized as pursuing improved services and technology through competition in the marketplace while insuring the public interest in universal service. However, as each government is operating in a different stage of telecom-market development, the legislative agendas of each are different in meeting that common goal. Having reached a competitive turning-point in 1984, the United States benefits from a "single system of [inter-state regulatory] standards" promulgated by the FCC, a distinct advantage in facilitating uniform market development in a liberalized marketplace. In contrast, among member states of the EC, only the United Kingdom, Sweden and Denmark operate liberalized telecom markets. In addition, the process of pan-European regulatory harmonization which began with implementation of the ONP Framework Directive in 1990, will stop short of creating a single European "FCC" to facilitate its implementation. In 1994, the United States also was moving rapidly toward implementing legislation to allow long-distance companies, BOCs and cable operators to compete for provision of telecom services. For these reasons, the United States was perceived as going further than any other major nation to facilitate the building of information-super highway infrastructure through

(“Part II”), released on January 25, 1995, specifically addressed the particular regulatory framework necessary to encourage competition without damaging prospects for universal service. In as much as Part II provided a comprehensive picture of how regulatory harmonization would both facilitate and coexist with infrastructure liberalization, it provides a blueprint for further EC telecom development.

The primary recommendation of Part II is for the "removal of special and exclusive rights over infrastructure for the provision of telecom services." Foreshadowing full liberalization, the licensing and authorization schemes necessary for the provision of alternative infrastructure are to be tabled by 1996. Second, Part II provides that the Commission will propose a common framework to transparently set reasonable costs for member states to meet the universal service obligation. Third, Part II envisions a common European regulatory framework for the awarding of criteria for, and conditions attached to the awarding of licenses for infrastructure. And finally, recognizing that telecom services will still initially be provided through "dominant [infrastructure] operators controlling bottleneck facilities," extensive monitoring will need to be engaged in for the short-term to insure adequate enforcement of competition rules. In keeping with the Bangemann Report and Delors White Paper agendas, Part II also frames its recommendations under the rubric of a developing European Information Society.

See COM(94) 682, supra note 15.

See Council Resolution, supra note 113, at 4-5 (explaining that if the Commission was going to lift the derogation it had upheld for the provision of infrastructure in the 1990 Competition in Services Directive, it would insist on a comprehensive plan for regulatory implementation to address the universal service concern).

COM(94) 682, supra note 15, at 116.

Alternative infrastructure includes the use of available television cable networks, energy supply networks and railway power cables for telecommunications services. See The Information Society, infra note 123, at 11.

See COM(94) 682, supra note 15, at 116.

Id. at 119-20 (the costs of particular concern were those for interconnection and interoperability of infrastructure).

Id. at 120-22.

Id. at 122-23.

Id. at vi-vii.


Cane, supra note 25, at 1.

Less Prospect of EU Action on pan-European Regulator, FINTECH TELECOM MKTS., Mar. 14, 1996 (explaining that a study commissioned by DG-IV recommended more immediate emphasis on encouraging cooperation between member state regulatory agencies than creation of a single European regulator).

See infra text accompanying notes 260-263.
advanced-stage telecom deregulation.\textsuperscript{127}

Despite differences in the competitive stages of the markets, both the EC and the United States will achieve similar goals through competition. The competitive opening of telecom markets means not only faster networks, better services and lower prices\textsuperscript{128} but also a wider choice of suppliers, products and services.\textsuperscript{129} By combining the creation of a transparent and standardized regulatory environment with the 1998 deadline for liberalization, the EC is insuring that present member-state monopolies will not "crush competition before it starts."\textsuperscript{130} However, as a consequence, incumbent monopolies like DT and FT will be hit with decreasing profits as ensuing competition and lower technology costs drive down prices and profit margins.\textsuperscript{131} Whereas smaller carriers have commonly resorted to strategic alliances with larger competitors to shore up market position in a domestic market,\textsuperscript{132} in anticipation of 1998, large carriers like DT and FT are now seeking alliances to expand abroad and provide new services, while defending their traditional markets.\textsuperscript{133}

Similarly in the United States, legislation\textsuperscript{134} provoked Sprint, MCI, AT&T and the BOCs to not only defend their long-distance and local-calling markets, respectively but also to seek alliances to enter new markets and develop convergence products utilizing a telecom conduit. Despite that a decade of competition in the U.S. long-distance market has honed the marketing and research and development skills of carriers like Sprint,\textsuperscript{135} in some respects they are particularly vulnerable.\textsuperscript{136} While Sprint could seemingly enter the deregulated local-calling market immediately, it would take two to three years and huge investment to make the local connections.\textsuperscript{137} By contrast, once FCC approval has been received, the BOCs would be poised to immediately resell existing long-distance capacity already available at a 30 to 60% discount,\textsuperscript{138} despite their lack of competitive experience. In the upcoming legislative environment, alliances would provide the BOCs and long-distance carriers like Sprint access both to new markets and the necessary investment capital to improve domestic competitiveness.

The new global market that DT, FT, Sprint and their counterparts seek to reap benefits from is the market for telecom services for multinational businesses. However, most global companies prefer to deal with one company to service all of their telecom needs,\textsuperscript{139} allowing for the streamlining of communications and cutting costs.\textsuperscript{140} No single domestic carrier, however, in either the United States or the EC has the combined strengths of geographic reach, resources and skills to meet the full range of customer expectations in the $10 billion per-year multinational-business market.\textsuperscript{141} Therefore, strategic alliances are a necessity.

### B. The Predecessors

In mid-1993, British Telecommunications ("BT") and MCI notified\textsuperscript{142} the European Com-

\textsuperscript{127} Arnst and Mandel, supra note 21, at 64.
\textsuperscript{128} See supra note 26 (explaining that monopolies would otherwise fail to provide necessary leased lines or charge exorbitant interconnection fees to potential competitors).
\textsuperscript{129} See supra note 26 (explaining that as each BOC controls only one network per region of the United States, there is less excess capacity available for long-distance carriers to resell, and as a result, long-distance carriers can expect to initially offer no more than a 5 to 20% discount on resold local capacity). Hypothetically, it would take AT&T alone nearly $5 billion and 10 years to run its own lines to only the top 50 U.S. local markets. Id.
\textsuperscript{130} Id. However, years of operating in local monopoly markets have left the BOCs with outdated networks and poor competitive skills; $170 billion has been spent by the BOCs since 1984 simply maintaining existing network technology. Arnst and Mandel, supra note 21, at 66.
\textsuperscript{131} See supra note 26 (explaining that each BOC controls only one network per region of the United States, there is less excess capacity available for long-distance carriers to resell, and as a result, long-distance carriers can expect to initially offer no more than a 5 to 20% discount on resold local capacity). Hypothetically, it would take AT&T alone nearly $5 billion and 10 years to run its own lines to only the top 50 U.S. local markets. Id.
\textsuperscript{132} See supra note 26 (explaining that each BOC controls only one network per region of the United States, there is less excess capacity available for long-distance carriers to resell, and as a result, long-distance carriers can expect to initially offer no more than a 5 to 20% discount on resold local capacity). Hypothetically, it would take AT&T alone nearly $5 billion and 10 years to run its own lines to only the top 50 U.S. local markets. Id.
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\textsuperscript{135} Id. However, years of operating in local monopoly markets have left the BOCs with outdated networks and poor competitive skills; $170 billion has been spent by the BOCs since 1984 simply maintaining existing network technology. Arnst and Mandel, supra note 21, at 66.
\textsuperscript{136} Id. However, years of operating in local monopoly markets have left the BOCs with outdated networks and poor competitive skills; $170 billion has been spent by the BOCs since 1984 simply maintaining existing network technology. Arnst and Mandel, supra note 21, at 66.
mission of their intention to enter into a strategic alliance. The primary components of the alliance were two-fold. First, BT would invest $4.3 billion in MCI, taking 20% of the company, with appropriate board representation as the largest single shareholder. Second, a separate joint-venture company, Concert, would be created, 75.1% owned by BT and 24.9% owned by MCI. Under their agreement, BT and MCI would each contribute their international network facilities and outsourcing business, as well as appropriately consolidate their holdings in other world telecom organizations. In creating Concert, BT and MCI would be able to offer new, global services to customers quickly and cheaply. Of particular interest, BT and MCI could consolidate the risk in providing more advanced services (particularly enhanced and value-added services) on the large scale required by multinational companies and other large international users.

In regard to BT's 20% investment stake in MCI, the European Commission granted a negative clearance (authorization) under competition rules. In that BT and MCI were and would continue to be competitors as well as joint venturers, the Commission additionally ruled that the creation of Concert would fall under Article 85(1) of the Treaty of Rome and Article 53(1) of the EEA Agreement. However, the Commission was particularly troubled by two provisions in the agreement: one, which made BT the exclusive provider of Concert services in the EC, and a second, which kept MCI from entering into certain sectors of the EC market not addressed by Concert. Apart from initially granting Concert an exemption under Article 85(3), the Commission also granted BT and MCI individual exemptions only after the parties agreed to lift the restriction on MCI's access to the EC within five years and to provide that EC customers could obtain Concert services via MCI without unreasonable burden. However, the likelihood of European customers demanding Concert services explicitly through MCI mitigates the significance of this Commission concern.

Reflecting the Clinton administration's concern over foreign market access, the U.S. DOJ challenged BT's 20% acquisition of MCI under Section 7 of the Clayton Act. The DOJ argued that as the dominant telecom provider in the United Kingdom BT could discriminate in favor of MCI with respect to prices, terms and access to BT's international services, effectively diminishing the ability of MCI's competitors to offer similar services. In addition, in providing transatlantic services to MCI's competitors, BT would be in a position to provide MCI with proprietary information about its competitors. As a result, in its Final Judgment, conditionally approving the alliance, DOJ ordered BT and MCI to disclose detailed information regarding terms, conditions and prices for BT services provided to MCI. In addition, BT was forbidden from disclosing to MCI any proprietary information regarding MCI's competitors.

Even though the United States and United Kingdom markets are considered open and competitive, the Concert alliance is presently the only venture with full regulatory clearance from both the EC and United States. However, that full approval will likely be tested if BT completes a

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143 Commission Decision (94/579/EC) on BT-MCI (Case IV/34.857), 1994 O.J. (L 223) 36 [hereinafter Commission Decision on BT-MCI]. Having received notice from the Commission that the alliance did not constitute a "concentration" pursuant to regulation No. 4064/89, the partners converted the notice into a request for negative clearance and/or exemption pursuant to Regulation 17. Id.

144 Alan Cane, Stealing a March on Its Rivals, Fin. Times 2, Sept. 19, 1996.

145 Id.

146 Ungerer, supra note 51, at 1151 (explaining that MCI acquired most of BT's existing business in North America).

147 See Commission Decision on BT-MCI, supra note 143, at 50.

148 Value-added services rely on digital technology to manipulate data, as they are largely outgrowths of the use of computers as telecom tools. See Testimony of Ambassador Jeffrey M. Lang, supra note 104, at 12.

149 See Commission Decision on BT-MCI, supra note 143, at 49.

150 Id. (explaining that the principle reason for granting clearance was because the joint-venture agreement stipulated that BT could not "seek to control or influence" MCI).

151 Id. at 49.

152 Id. at 53.

153 Id. at 49.

154 Id. at 54 (explaining that the alliance would be approved only for a period of five years, at which time it will be reviewed for its competitive influence).

155 See supra text accompanying note 104.


157 Id. at 33,017.

158 Id.

159 Id. at 33,011.

160 Id. at 33,012.

161 Cane, supra note 144, at 2.
contemplated full buyout of MCI. In a deal announced on November 2, 1996, BT would purchase the remaining 80% of MCI for approximately $22 billion, making the combined company the third largest in the world. Importantly, the deal would consolidate the partners' sales organizations, whereas Concert services are presently offered individually by the partners.

In a related case involving AT&T, the European Commission, of its own initiation, opened investigations in April 1995 on the alliance of Unisource/Uniworld. Unisource is a joint-venture involving Telia of Sweden, PTT Telecom Netherlands and Swiss PTT Telekom. In mid-1995, the EC had agreed to allow AT&T to join with Unisource in the provision of voice services but not data or messaging, and this first-stage joint-venture was termed Uniworld. The Commission is currently investigating the new company called AT&T-Unisource Services for its possible anti-competitive effect. Unisource owns 60% and AT&T owns 40%. Like Concert, the purpose of the alliance is to combine the partners' existing liberalized services directed to target multinational corporate customers.

1. Phase One — Atlas is Notified to the Commission

When Deutsche Telekom ("DT") and France Telecom ("FT") first notified the European Commission of their intent to form the Atlas strategic alliance on December 16, 1994, each company was a state-owned monopoly provider of telecom infrastructure and services and enjoyed special and exclusive rights for the provision of each. For these reasons, BT had lodged a preliminary complaint with the Commission in regard to Atlas even before the public comment period on the notice began. In the interim, Karel Van Miert, Commissioner of Directorate-General IV on Competition, began pressing DT and FT for additional information on their agreement. Van Miert expressed the Commission's deep concern that the venture would give DT and FT a dominant position in the European market for voice and data services for business clients.

162 Mark Landler, A British Company Weighs Buying MCI in $22 Billion Deal, N.Y. TIMES, Nov. 2, 1996, at 1. "Federal law prohibits foreign companies from owning more than 25% of an American phone company." Concert had been given a waiver for BT to extend its investment in MCI to 35%, but the FCC will likely analyze the United Kingdom market for reciprocity with the United States to determine if it is in the public interest to lift the cap entirely. Id. at 1, 38.

163 Id. The full merger will also provide MCI with billions in additional capital and BT's expertise running local networks in Britain, crucial advantages as MCI tries to enter the U.S. local calling market. See Julia Flynn, Stanley Reed and Amy Barrett, WorldPhone Inc., BUS. Wk., Nov. 18, 1996, at 54.

164 A crucial aspect to the success of an international joint-venture involves the merging of sales organizations to facilitate the marketing of global services. See Landes, supra note 103, at 77-78.

165 See Ungerer, supra note 51, at 1162.

166 See AT&T, Unisource Merge European Services — but Need Approval, FINTECH TELECOM MKTS., May 23, 1996. Spain's state-owned telecom company Telefonica was slated to join Uniwunrd, but since it has postponed liberalization until 2000, prospects for EC approval of its joining the alliance are doubtful. See Michael Lindemann, Tensions Hard to Assid, FIN. TIMES, Sept. 19, 1996, at 2.

167 See AT&T, Unisource Merge European Services, supra note 166.

168 Id. Although "already providing services to customers," AT&T-Unisource has yet to receive regulatory approval from the EC "because the markets of its European parents are not yet liberalized." David Owen and Alan Cane, AT&T Alliance Bids for French Telecoms Network, FIN. TIMES, Nov. 8, 1996, at 14.

169 Id. Relations between the Uniwunrd partners have become complicated recently because each partner gets to keep the profits from new businesses that they introduce into the venture. See Lindemann, supra note 166, at 2. In addition, decision making in Uniworld has been hampered by its multi- alliance power structure, which has been compared to a "United Nations type arrangement." Id. Some have predicted that in the wake of strong alliances such as Global One and the impending BT-MCI merger, AT&T's expansion strategy must go beyond the loose Unisource/Uniworld alliance or risk falling apart. See John J. Keller, BT-MCI Merger Reshapes Telecom Industry, WALL. ST. J., Nov. 5, 1996, at B1.

170 Notification of Joint Venture (Case No IV/35,337—Atlas), 1994 O.J. (C 377) 9. Such notifications, pursuant to Article 4 of Council Regulation 17, must be filed one week after the conclusion of an agreement and that the Commission is bound by Article II(3)(b)(i) of the EEC-U.S. Cooperation Agreement to inform the U.S. DOJ and FTC of the notice. Frank L. Fine, Mergers and Joint Ventures in Europe: The Law and Policy of the EEC 264-61 (1994).


172 See supra text accompanying notes 26, 38, and 124; see also Appendix I, Figure 2.

173 James Pressley, Trade & Politics: EU May Block Telecom Deal Between France, Germany, WALL ST. J. EUR., Feb. 28, 1995, at 6. BT had the singular distinction of being the largest telecom carrier in the Community to be operating in a market that had already undergone liberalization—the United Kingdom. See Commission Decision on BT-MCI, supra note 143, at 37.

174 See Pressley, supra note 173, at 6.

175 Id.

176 See Pressley, supra note 173, at 6. To illustrate the point, the Commission released figures showing that while the European market for data transmission was worth Ecu3 billion in 1993, France accounted for 25% and Germany 18%
The European Commission had been aware of plans by DT and FT to include the third largest U.S. long-distance carrier, Sprint Corp. in a separate joint-venture since June 1994.\textsuperscript{177} Even with the Sprint dimension in mind,\textsuperscript{178} Van Miert suggested that if the German and French governments would agree to allow cable companies and other alternative carriers to provide any liberalized phone services ahead of the newly established 1998 deadline,\textsuperscript{179} it would significantly help the Atlas cause.\textsuperscript{180}

When German Post and Telecommunications Minister Wolfgang Bötsch proposed on January 31, 1995, to speed up the German liberalization process ahead of the 1998 deadline,\textsuperscript{181} DT strongly opposed the move, calling the terms "too favorable towards competitors."\textsuperscript{182} Although DT's sentiment should seemingly have dampened prospects for European Commission approval, German and U.S. officials had already quietly begun high-level meetings on the subject of Atlas.\textsuperscript{183}

Concluding a two-month preliminary assessment of Atlas on May 5, 1995, the European Commission issued a formal warning letter to DT and FT on May 23, detailing concerns and objections.\textsuperscript{184} In addition to being as yet unable to come to a definitive agreement with Sprint, the Atlas partners received the Commission's warning that it may block the joint venture,\textsuperscript{185} particularly because the high market share of DT and FT in their home countries would crowd out the choice of services for small businesses.\textsuperscript{186}

On June 22, 1995, after a year of negotiations, DT and FT signed an agreement in New York to pay $4.1 billion to acquire 20% of Sprint.\textsuperscript{187} The proposed joint-venture, dubbed Phoenix, would benefit from the already strong international presence of the three companies, with offices in fifty countries and 2,000 venture-dedicated employees world-wide.\textsuperscript{188} Unlike Concert and AT&T-Unisource, which were each aiming singularly at the business market, Phoenix would be ambitiously pursuing a three-market offensive aimed at businesses, consumer carriers and consumer services.\textsuperscript{189} Phoenix products would be distributed by DT and FT in France and Germany, by Sprint in the United States and by the "Rest of Europe/World" Phoenix operating group elsewhere.\textsuperscript{190}

2. Phase Two — Phoenix is Notified to the Commission

On June 29, DT, FT and Sprint officially notified the preliminary Phoenix agreements to the Commission.\textsuperscript{191} In a gesture aimed at easing the European Commission's anti-competitive fears regarding DT and FT, the partners submitted a list of proposed concessions on Atlas. The concessions included DT's sale of its 23.3% stake in In-


\textsuperscript{178} The Commission had often expressed that it would be much more willing to grant Atlas an Article 85 exemption if it had an international partner, particularly one from the United States. See infra text accompanying note 289.

\textsuperscript{179} See supra text accompanying note 113.

\textsuperscript{180} See Pressley, supra note 173, at 6.

\textsuperscript{181} Gail Edmonson, Karen Lowry-Miller, Julia Flynn and Mark Lewyn, \textit{Bonn's Telecom Bombshell: Breaking DT's Monopoly will have Huge Repercussions}, \textit{Bus. Wk.}, Feb. 13, 1995, at 22. Many insiders claimed that Bötsch vowed behind closed doors to do much more; by allowing business clients access to alternative carriers and newer high-tech services by summer, 1995, Bötsch would break the DT rate which could be as much as 300% higher than that in the United Kingdom for similar services, yet preserve DT's voice monopoly, appeasing German labor. \textit{Id.}

\textsuperscript{182} \textit{Deutsche Telekom Against German Liberalization Plans, Multinational Serv.}, May 6, 1995.

\textsuperscript{183} \textit{Liberalization Needed for Atlas, Bangemann Says}, \textit{Wall. St. J. Eur.}, Mar. 10, 1995, at 6. The purpose of the U.S.-German meetings "was to make it abundantly clear" that the United States would only clear Sprint involvement in Atlas if Germany would liberalize its telephone and network monop-

\textsuperscript{184} \textit{Business Brief, supra note 171, at 2.}

\textsuperscript{185} \textit{Business Brief, supra note 171, at 2.}

\textsuperscript{186} \textit{Business Brief, supra note 171, at 2.}

\textsuperscript{187} Gautam Naik, \textit{Sprint Signs $4.1 Billion Agreement with French, German Phone Carriers}, \textit{Wall. St. J.}, June 23, 1995, at B2. If Sprint decided to sell its cellular subsidiary before the deal was finalized, the price would go down to $3.5 billion. \textit{Id.}

\textsuperscript{188} \textit{Id.} Annual start-up revenues were then estimated at $500 million. \textit{Id.}

\textsuperscript{189} \textit{Id.}

\textsuperscript{190} Notification of a Joint Venture (Case No IV/35.617 — Phoenix), 1995 O.J. (C 184) 11 (July 18, 1995) [hereinafter Notice]. Phoenix would provide calling card services for travelers and global telecom service for multinational business, including: data network services, virtual private networks, customized networks, and outsourcing and VSAT services. \textit{Id.} Importantly, the global sales and marketing organizations of the partners would be consolidated under the Rest of Europe/World operating group, whereas Concert services are presently provided and marketed separately by BT and MCI. See supra note 164.

\textsuperscript{191} See Notice, supra note 164, at 11.
fonet Services Corporation (ISC), Los Angeles and its 80% stake in Infonet Services Deutschland GmbH, Frankfurt,192 freeing-up the private international data network which would have otherwise been eliminated as a market competitor by the venture.

Despite initial concessions and the fact that the addition of Sprint provided the global dimension to the joint-venture that the European Commission preferred,193 Van Miert sent stern warning letters to the German and French telecom ministers and the CEOs of the three companies.194 Addressing continuing concerns regarding the Atlas portion of the alliance, Van Miert gave DT and FT until September 15 to make changes to the structure of the venture and reiterated that Atlas would only be approved if both the German and French governments agreed to allow competitive access to the national infrastructure for data transmission.195

Meanwhile, on July 13, the DOJ filed a draft consent decree proposing clearance of Phoenix subject to extensive structural and behavioral conditions.196 The restrictions DOJ proposed to apply to Phoenix were conditioned on the German and French governments opening their markets to competition by 1998. Without application of the restrictions, DOJ contended, the proposed venture would constitute a violation of Section 7 of the Clayton Act,197 lessening competition both in the provision of international telecom services between the United States and Germany, and the United States and France, and in the provision of seamless international telecom services.198

To alleviate possible anti-competitive affects of the alliance, the DOJ’s proposed authorization of Phoenix divided consent into two phases.199 The first phase would commence with adoption of the consent decree and FCC approval of Phoenix and would end with Germany and France complying with the EC January 1, 1998 deadline for market liberalization.200 During the first phase, Sprint would be prohibited from providing services in which DT or FT have special rights, except in limited non-exclusive circumstances,201 nor could Sprint own or control public data networks in France or Germany.202 In addition, Sprint would not be allowed to own any assets of DT or FT, nor could access to the public switched or data networks of either France or Germany be limited for Sprint or Phoenix competitors.203 Importantly, approval in the first phase would allow Sprint to participate in the creation of the separate Phoenix joint-venture company,204 and as a result, receive the $4.1 billion in funds that DT and FT would contribute for a combined 20% stake in Sprint.

Granting that both Germany and France have complied with the 1998 EC deadline for liberalization, most of the phase one restrictions on Sprint and Phoenix will be scaled back, with the exception of extensive reporting requirements. During phase one and continuing through phase two, which effectively would begin on January 1, 1998,205 DT and FT’s prices and terms of services to Sprint and Phoenix must be made public.206

The proposed consent decree will be effective for five years subsequent to the start of phase two.207 However, Sprint is prohibited from ever utilizing its access to FT and DT to obtain proprietary information about its competitors, similar to a provision in the consent decree for Concert.208

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193 Emma Tucker, *Van Miert Sets Atlas Deadline,* Fin. Times, July 19, 1995, at 2 (explaining that Van Miert was previously concerned that Atlas would not be in a position to address the global needs of multinational companies, as Concert would be); *see also infra text accompanying note 289.
194 *See Business Brief,* supra note 171, at 2.
195 *See Tucker,* supra note 193.
196 *See Business Brief,* supra note 171.
198 *Id.* at 44,058 (Competitive Impact Statement).
199 *Id.* at 44,049.
200 *Id.* at 44,056.
Apart from the proposed U.S. consent decree passing judicial review and a period of public comment, Phoenix also needed to win approval from the FCC. While applauding the Clinton Administration's "fair and reasonable" decision to propose that the venture proceed,\(^2\) by late August 1995, DT and FT were attempting to address some of the changes that Van Miert had demanded by September 15. One concession, sale of DT's interest in Germany's third-largest carrier, INFO A.G., was proposed by DT Chairman Ron Sommer in an August meeting with Van Miert.\(^3\) However, it is likely that Van Miert's more immediate concern was getting the German and French governments to agree to a timetable for opening up their markets for alternative infrastructure.\(^4\) The prospect of early liberalization of a portion of the market promised greater competitive activity than a DT concession on a single competitor.

3. Phase Three — EC and U.S. Opinions are Finalized

The ice began to break on September 29, 1995, when French Telecommunications Minister Francois Fillon and Bötsch met with Van Miert and agreed to open German and French alternative infrastructure to all liberalized services by July 1, 1996,\(^5\) set up independent regulators and allow competitors fair access to state-owned networks.\(^6\) However, it was not until the German and French Ministers met with Van Miert and the CEOs of DT and FT on October 17 that a preliminary agreement authorizing Atlas/Phoenix was signed.\(^7\)

As the EC gave preliminary approval to Atlas and Phoenix, the French Direction Generale des Postes et Telecommunications (DGPT) published a consultative document outlining the steps to be taken and timetable for implementation of competition.\(^8\) According to the document, the French government planned in March, 1996, to introduce reform legislation for the full introduction of competition by 1998.\(^9\) In addition, by the end of 1996, regulations establishing principles for interconnection and licensing of competitors would be put in place.\(^10\) Similar progress was being made in Germany. The German Government had set out its proposals for liberalization in March 1995 and draft legislation in June.\(^11\) The legislation was expected to pass both houses of the German federal legislature by Spring 1996, and Germany also expected to be issuing competitive licenses by early 1997.\(^12\)

Awaiting an EC decision on Atlas and Phoenix, FCC Chairman Reed Hunt declared that the FCC would rule on Phoenix approval and related foreign telecom market access concerns in a two-stage process by the end of 1995.\(^13\) Now that the EC had made a commitment to pursue an Article 85(3) exemption for both alliances,\(^14\) the FCC issued the first opinion relating to Phoenix concerns on December 7, 1995.\(^15\) Although the FCC's Report and Order did not speak directly to the Phoenix venture, it referred to it in adopting standards for regulating the entry of foreign carriers into the U.S.-international telecom services market. Acting under its authority to conduct

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\(^4\) Id. Although France had taken some steps toward opening up SNCF rail networks for alternative use, German Telecommunications Minister Bötsch was suggesting in September, 1995, that the original alternative infrastructure deadline of January 1, 1996 was unrealistic. Id.

\(^5\) *Telecommunications: France & Germany will Open Infrastructure by July if Atlas Cleared, MULTINATIONAL SERV.*, Oct. 1, 1995. The meeting was held at the request of both ministers and was indicative of the importance both governments attached to the Atlas alliance. Id.


\(^7\) Id.

\(^8\) See generally Notice pursuant to Article 19(3) of Council Regulation No. 17 and Article 3 of Protocol 21 of the European Economic Area Agreement concerning a request for negative clearance or an exemption pursuant to Article 85(3) of the EC Treaty and Article 53(3) of the EEA Agreement — Case No. IV/35.337 — Atlas, 1995 O.J. (C 357) 2, 13 (Dec. 15, 1995) (hereinafter, *Notice, Atlas*).

public interest analysis, the FCC developed six criteria for determining whether a foreign country had effective market access: (1) whether a U.S. carrier can offer services similar to those that the foreign entity seeks to offer in the United States; (2) whether competitive safeguards exist in the foreign country, including; (3) the availability of published charges, terms, and conditions for interconnection; (4) timely and nondiscriminatory disclosure of technical information needed for interconnection; (5) and the protection of carrier proprietary information; and (6) whether an independent regulatory body with fair and transparent procedures is established to enforce competitive standards.

A second FCC ruling was adopted on December 15, 1995, and it was directed specifically at the Phoenix venture. In as much as the equity investments by DT and FT do not result in transfer of control of Sprint, the FCC ruled that the investment itself does not require prior approval. However, the fact that both France and Germany have recently agreed to a timetable for introduction of competition mitigated what would have been a negative analysis of competitive opportunities under the guidelines published December 7. As part of the Declaratory Ruling and Order, the FCC restricted Sprint from operating new international circuit capacity until liberalization occurs in the German and French markets. Also, as “dominant carrier” with respect to traffic between the United States and Germany and France, Sprint will now be required to obtain approval for any additional circuits to those countries, either for itself or Phoenix. With regard to traffic or revenue flows, Sprint will not be allowed to accept any “special concessions” from DT or FT. Finally, Sprint will have to file six-month reports concerning the status of telecom markets and regulation in Germany and France, keeping the FCC apprised of liberalization developments.

On the same day that the FCC opinion was adopted, the European Commission published a detailed assessment of its preliminary agreements on Atlas and Phoenix. Under changes made to the original Atlas agreement, Atlas would not acquire ownership or control of the German and French low-level public data transfer networks before the 1998 scheduled liberalization. Additionally, DT would not be able to include INFO A.G. in the Atlas venture. As monopoly providers, both DT and FT control the public-switched telecommunications network (PSTN) on which voice telephony service is dependent, therefore, the terms and conditions and scope of services made available to Atlas must be similar to those made to other providers. Finally, the preliminary authorization provides that DT and FT could not engage in cross-subsidization.

The European Commission’s preliminary authorization places fewer restrictions on the Phoenix component of the overall joint-venture, reflecting its previous contention that a global partner would improve the prospects for Atlas. The Commission likewise prohibited DT and FT

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227 See In re Matter of Market Entry and Regulation of Foreign-Affiliated Entities, supra note 225, at 3889.
228 See In re Matter of Sprint Corp. Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1934, (as amended, at 11 FCC Rcd. 1,850 (Dec. 15, 1995)).
229 Id. at 1,855-57.
230 Id. at 1,860-61.
231 Id. at 1,868-69 (explaining that Sprint must utilize existing idle capacity it has via several submarine cables until liberalization in Germany and France allows competition in services other than public-switched voice, including resale of international traffic services).
232 Id. at 1,867-68. Sprint had objected to application of the December 7 guidelines on market access for Foreign Carrier Entry, stating that Sprint’s petition for clearance of Phoenix by the FCC had been pending long before the FCC separately adopted final rules in the Foreign Carrier Entry proceeding; the FCC replied that it was well within its discretion to “apply new rules and policies to pending matters.” Id. at 1,855.
233 Id. at 1869 n.166 (citing 47 C.F.R. § 63.14 (1996)).
234 Id. at 1,871-72. Having found that U.S.-France traffic accounting rates are 28% higher than those for U.S.-U.K. or U.S.-German traffic, the FCC also required Sprint to secure written commitment from FT to lower rates within two years. Id. at 1,865.
236 See generally Notice Pursuant to Article 19(3) of Council Regulation No. 17 and Article 3 of Protocol 21 of the European Economic Area Agreement concerning a request for negative clearance or an exemption pursuant to Article 85(3) of the EC Treaty and Article 53(3) of the EEA Agreement — Case No. IV/35.617 — Phoenix, 1995 O.J. (C 357) 13 (Dec. 15, 1995) [hereinafter Notice, Phoenix].
237 Id. at 8.
238 Id. at 9-10.
239 Id. at 9. In accordance with the German and French agreement to open up alternative infrastructure to competition by July 1, 1996, DT and FT must also maintain third-party access to their public switched data networks from that point on. Id. at 10-11.
240 Id. at 10.
241 Despite that DT, FT and Sprint are the second, fourth and eleventh largest telecom carriers in the world, re-
from granting any Phoenix-related entities discriminatory terms and conditions or scope of services, as it had in the Atlas opinion. Further, neither DT or FT or Sprint are allowed to make use of Phoenix international services by a customer conditional upon purchase of services or products from any of the partners individually. And finally, with regard to the Phoenix venture, neither DT nor FT can engage in cross-subsidization, as had been prohibited in the Atlas authorization.

As the comment period on DOJ's draft consent decree had ended on October 23, 1995, a summary of comments and the DOJ response was issued on January 18, 1996. The most ardent criticism of Phoenix authorization by DOJ was raised by AT&T, MCI, British Telecom North America, Esprit Telecom and Cable & Wireless. They argued that despite the transition from phase one to phase two, and the legal removal of DT and FT's monopoly rights, both companies will likely still have de-facto market prominence as competition would take substantial time to develop. DOJ responded that the Final Judgment must be considered in conjunction with parallel measures being taken by the EC and in Germany and France. Both Germany and France had agreed to early liberalization of alternative infrastructure by July 1, allowing potential competitors the opportunity to establish alternative networks a full year-and-a-half before the earliest time at which phase one would conclude. In addition, DOJ argued that Germany and France had each separately begun legislative procedures to insure that liberalization measures begin before the EC imposed 1998 deadline. Having responded to comments, the court adopted the consent decree on February 16, 1996.

4. The Final Chapter — Further Legislative Developments and Phoenix (Global One) is Finally Approved

On January 30, the German government had in fact adopted a draft law providing that interested telecom operators, regardless of size or number, could apply for a license to provide telecom services and/or networks, and the dominant company in control of networks in given areas of Germany must in turn provide good quality, affordable access. Paralleling measures at the member-state level, the European Commission and Council of the European Union had issued several directives and draft directives prompting further member state progress toward compliance with the 1998 liberalization deadline. On July 19, 1995, the Commission had issued a proposed draft directive applying ONP principles to the manner in which monopoly carriers would provide for seamless and non-discriminatory connection. Under the proposed directive, DT, FT and other monopoly carriers, would have to establish transparent, unbundled, cost-oriented interconnection charges for carriers needing to access network infrastructure for the provision of services. In addition, in November 1995, the Commission both adopted a proposed draft directive on licensing and announced proposed amendments to the original
ONP Framework Directive. Under the draft directive on licensing, member states could not impose limits on the number of licenses granted to provide particular services or facilities, and procedures adopted for licensing would have to be open, transparent and non-discriminatory. Proposed amendments to the ONP Framework Directive required that member states retaining a significant degree of ownership or control of a telecom provider would have to take additional measures to insure that regulatory authorities would be both “legally distinct and functionally independent” of telecom organizations. This directive would prove particularly applicable to DT and FT as neither the German nor French governments had as yet adopted a timetable for public offerings of the telecom organizations. And finally, reflecting developments achieved through negotiations with Germany and France, the Commission adopted a Directive on March 13, 1996, affirming the July 1, 1996 deadline for liberalization of alternative infrastructure and the January 1, 1998 deadline for full liberalization.

Meanwhile, in February President Clinton signed into law the Telecommunications Act of 1996, concluding nearly ten years of negotiations in the U.S. Congress. The Conference Report on the Act states that its objective is “to accelerate rapidly private sector deployment of advanced telecommunications . . . by opening all telecommunications markets to competition.” The key provisions of the Act include both opening up local telephone service to competition from long-distance companies and cable companies and opening up the long-distance market to competition from the BOCs. Additionally, the Act ordered the FCC to promulgate rules necessary to maintain universal service, promulgate interconnection and access requirements and the sharing of necessary infrastructure.

Having renamed the Phoenix venture Global One on January 22, 1996, DT, FT and Sprint received the final European Commission decision approving Atlas and Global One on July 17. In addition to conditions imposed by the preliminary authorization published in December, in granting an Article 85(3) exemption, the Commission would only approve Atlas for five years. In 2001 the Commission will review the Atlas venture for possible anti-competitive effects, the same time at which a similar review will be conducted for Concert. During phase one of the opinion, Atlas/Global One will be precluded from offering global or value-added services until Germany and France have granted the first two alternative telecom infrastructure licenses. At phase two, DT and FT may incorporate into Atlas their national public switched data networks only if both Germany and France have fully liberalized all telecom services, including public voice and all network infrastructure. In regard to all services offered or infrastructure controlled by Atlas/Global One on January 22, 1996. The Conference Report on the Act states that its objective is “to accelerate rapidly private sector deployment of advanced telecommunications... by opening all telecommunications markets to competition.”

**Footnotes:**
257 See COM(95) 543, supra note 255, at 3.
258 See COM(95) 543, supra note 256, at 21.
260 See Telecommunications Act, supra note 134.
262 Id. at § 271.
263 Id. at § 254.
264 Id. at §§ 251-52.
265 Id. at §§ 259.
268 See Commission Decision, Atlas, supra note 267, at 50. Phoenix would be similarly authorized for an initial period of only seven years. See Commission Decision, Phoenix, supra note 268, at 74 (explaining that as the European market is in a period of fast change, Atlas’ competitive impact would need to be analyzed sooner).
269 See Commission Decision, Atlas, supra note 267, at 50 (explaining that DT and FT may request review of specific provisions of the Decision once both the German and French legislative agendas for liberalization are fully in place).
270 Id. at 51 (explaining that fulfillment of this condition was immanent as both the German and French legislatures had passed legislation implementing the agreed-to timetable for alternative infrastructure and non-voice services liberalization by July 1, 1996).
271 Id.
Global One, the co-venturers and joint-venture companies must allow non-discriminatory access and interconnection to all third party competitors.\footnote{Id. at 54; see also Commission Decision, Phoenix, supra note 268, at 75-76.}

III. ANALYSIS

The rapidly changing global telecom marketplace of the past decade has set in motion several high-profile global joint-ventures between firms that in many cases were perceived as monopolies in their home countries. However, the unique nature of Atlas/Global One is the EC and United States were able to use authorization of the alliance not only to advance the goals of the individual partners, but also to create opportunities for competitors in open French and German markets, furthering key EC and U.S. telecom policy goals.

The pivotal element of the alliance for the Clinton Administration proved to be the leverage that could be utilized in weighing approval of Global One against Germany and France’s commitment to open their telecom markets.\footnote{When Vice President Al Gore announced government intentions to lift foreign telecom-investment restrictions for certain competitors, the announcement was seen as a specific attempt to exert pressure on Germany and France to open their markets ahead of the 1998 EC deadline. See Alan Cane and Emma Tucker, U.S. Offers Telecoms Incentive to Europe, FIN. TIMES, Feb. 27, 1995, at 4.} From the earliest days of 1995, when Atlas was being solely considered by the EC, the United States made it clear that Sprint would only be allowed to join DT and FT if the German and French governments agreed to the EC 1998 deadline for full liberalization.\footnote{Silvia Ascarelli, German Officials Fear U.S. Will Influence Telecom Rules, WALL ST. J., Sept. 13, 1996, at 3. See supra text accompanying notes 196-198.} Most recently, when interconnection regulations were temporarily stalled in the Bundesrat, German officials feared that the FCC would exert pressure to resolve the dispute, prompting Telekom Minister Bötsch to state publicly that he would travel to the United States and speak on behalf of DT and German liberalization if necessary.\footnote{Culminating a lengthy comment period, release of the FCC’s final order listing six generalized criteria for determining the openness of a foreign market had been timed to coincide with release of the FCC’s Phoenix opinion; although the final order had been drafted to address market access concerns and foreign investment in U.S. telecom in general, the Phoenix venture provided the FCC with a case-on-point to address market reciprocity concerns. See supra text accompanying notes 225-227. The December 15, 1995, Phoenix opinion represented the first practical application of the six comparative market access criteria, colloquially known as the ‘Ecotest.’} The closed nature of the German and French markets had provided the United States with the basis for anti-trust objections to the alliance.\footnote{In fact, the fourth largest U.S. long-distance carrier, WorldCom, replaced DT as the telecom supplier for the lower house of the German Parliament, and U.S.-based MFS received a license to build a fiber-optic network in Paris. Steven Lipin, Leslie Cauley and Douglas Lavin, Wake-up Call: WorldCom, MFS Give EU Phone Companies a $14.4 Billion Surprise, WALL ST. J. EUR., Aug. 27, 1996, at 1.} In addition, however, the unique status of the joint-venture partners as state-owned monopolies gave the DOJ and the FCC the opportunity to address market access issues both specifically, and generally in regard to Germany and France.\footnote{Pursuant to the goals of the ONP Framework and Competition in Services Directives, the opinion authorizing Atlas stipulated that both the French and German governments would have to privatize DT and FT, respectively, and separate member state regulatory functions from their operations. See Commission Decision, Atlas, supra note 267, at 38.} When Germany and France did finally agree to an expedited liberalization timetable,\footnote{The figures are according to 1995 estimates among the top eight member state markets. See Alan Cane, Competition Down the Line, FIN. TIMES, Jan. 19, 1995, at 15; see also Appendix I, Figure 1.} the opening of both markets could be foreseen as beneficial to U.S. policy in providing other telecom organizations with the opportunity to enter a previously restricted marketplace.\footnote{Apart from DT’s 210,000 employees representing a large voting block of the Christian Democratic Party (Germany’s party in power), the population commonly felt that liberalization would allow foreigners to dominate the German market. See Kenneth Propp and Donald Koblitz, Will Germany Hang Up on Telecom Reform?, WALL ST. J. EUR., Feb. 1, 1996, at 8.} As state-owned entities, both DT and FT’s interests were tied to that of government,\footnote{See generally Commission Decision, Atlas, supra note 267, at 23.} and as Germany and France accounted for roughly 47% of European telecom market share,\footnote{See supra text and accompanying note 267.} DT and FT perhaps stood to lose the most in a competitive environment. The European Commission realized early on that securing assurances that liberalization timetables would be met by Germany and France would be particularly difficult.\footnote{90} In conditionally authorizing Atlas,\footnote{91} the Commission...
was, like the United States, provided with immense leverage, but the goal was to push both Germany and France down the path of telecom reform. Despite occasional delays, both countries have in fact begun fulfilling the legislative conditions of the EC opinion and embarked on a path toward privatization since liberalizing the market for alternative infrastructure on July 1, 1996.

As the EC recognized, the Atlas portion of the alliance would give DT and FT the opportunity to secure European market position in the face of competition brought about by the liberalization agenda. As expected, within a few short months, several large European carriers were taking advantage of newly liberalized alternative infrastructure in Germany and France. Similarly for Sprint, the influx of capital that would come with authorization of the Global One venture would assist the carrier in positioning itself in a vastly changing U.S. telecom marketplace. The Telecommunications Act of 1996 allowed traditional long-distance carriers such as Sprint, the opportunity to enter the local calling among other new markets. In addition to allowing Sprint added advantage in securing market share in new endeavors, the additional capital would make Sprint more competitive in its traditional long-distance provider role.

The greatest stumbling block to overcome with regard to having Atlas/Global One approved involved anti-trust issues. As the third, fourth and eleventh largest carriers in the world, DT, FT and Sprint, respectively, already controlled sizable market share. Both the European Commission, the DOJ and FCC recognized the obstacles that needed to be overcome in approving the venture. To address these concerns, the opinions of each body included four basic principles in attaching conditions to Atlas/Global One approval.

First, both the EC and U.S. opinions provided that none of the partners individually, nor in their capacity as Global One, could provide each other with access to infrastructure or services at rates

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286 When the Bundesrat stalled passage of interconnection regulations in mid-September, several U.S. carriers did in fact complain to the FCC that German privatization was not occurring fast enough. See Ascarelli, supra note 276, at 3.

287 The French Constitutional Council gave its approval to opening alternative infrastructure to competition in early July and an additional 30 more decrees are expected by the end of the year concerning licenses, fees and the creation of an agency to allocate frequencies. See Regulatory Watch, Convergence: A Mag. of the Wall St. J. Eur., Autumn, 1996, at 24.

288 France will offer the first 20% of FT for sale in April 1997, with the full value of the company estimated at $29 to $34.8 billion. Douglas Lavin, France Telecom to Sell 20% of Capital to the Public, Touting it as a Safe Bet, Wall St. J., Oct. 9, 1996 at A19. Trading of the first 500 million shares in DT, worth $797.9 million, would begin on November 18, 1996. Deutsche Telekom Confirms Plan for IPO, Sets Dividend, Wall St. J., Oct. 7, 1996, at A18. On November 18, more than two million private German investors bought shares in the Telekom floatation, the second largest in the world, accounting for more than half of the previous total number of private shareholders in Germany. See Wolfgang Munchau and Andrew Fisher, Telekom's Shares Surge in Busy First Day Trading, Fin. Times, Nov. 19, 1996, at 1.

289 See Commission Decision, Atlas, supra note 267, at 45-46. Acting on the opportunity that the alliance provided, FT and Sprint's most ambitious undertaking is its Sprint Spectrum partnership (in which Sprint owns 40%) with cable companies to provide PCS (personal communications system) service, a higher cost but better quality, higher capacity wireless service than traditional cellular. See Elstrom, supra note 291, at 72.

290 Deregulation and accompanying competition have squeezed profits at a time when Sprint was concentrating on capital-intensive expansion, and until lately Sprint seemed the most vulnerable of the "big three." Peter Elstrom, Did You Say Sprint was No. 1?, Bus. Wk., Sept. 2, 1996, at 72.

291 See supra text accompanying notes 262-263.

292 Despite that AT&T, MCI, Sprint and WorldCom presently account for 55%, 20%, 9% and 4.8% of the U.S. long-distance market, respectively, the BOCs expect to acquire 15-25% of that market within three years; AT&T alone spent $1.5 billion during the second quarter of 1996 in defense of its long-distance customer base. Id. at 72-73; see also Appendix I, Figure 4.

293 See supra note 241; see also Appendix I, Figure 3.
that were discriminatory.296 Transparent and non-discriminatory access to infrastructure and services are core principles of the ONP Framework Directive297 and will insure that the partners will not inhibit competition through inflated cost access to necessary infrastructure. Second, both sets of opinions stipulated that authorization of the venture was conditional on eventual review of its competitive impact. The Commission’s opinion made this review stipulation explicit in authorizing Atlas/Global One only for a period of five and seven years, respectively.298 Both the DOJ299 and FCC300 implied a review provision in that both would monitor Sprint reports to determine whether the German and French markets had truly liberalized. Third, both sets of opinions placed ownership restrictions on Sprint, DT and FT individually. Both DT and FT are precluded from including their public switched data networks in the venture until the liberalization deadline had been met.301 Similarly, Sprint is precluded from owning or controlling DT or FT assets during the first phase of the DOJ authorization or from increasing its international long-distance capacity to Germany and France beyond that which it already has.302 Finally, both opinions apply strict reporting requirements to each of the partners and Global One,303 the most vital tool in insuring that possible anti-competitive effects are addressed promptly.304 The inclusion of these four conditions, among others in the EC and U.S. opinions, serves to check possible anti-competitive activity by Global One in the near term.305 Importantly for the United States, authorization of the venture also affirms the DOJ’s policy of insuring that possible anti-competitive affects of a venture are mitigated by appropriate conditions, while assuring that possible benefits of the joint-venture remain intact.306

With changing conditions in the global telecom marketplace and an anti-trust waiver for Global One, many have expressed fear that the present wave of alliances will likely result in a handful of global “supercarriers.”307 In this regard, the EC Competition in Services Directive did not address potential private monopolies308 that might result from liberalization of the predominantly state-owned market. However, at least at this stage of telecom market development, having several large, global carriers is likely necessary to achieving longer-term benefits. The Global One alliance provides its partners, DT, FT, and Sprint, access to global markets and infrastructure under “one roof,” a crucial element to properly provide seamless basic and value-added services to large multinational customers.309 As global consortia like Global One, Concert and AT&T-Unisource are best positioned to provide “one-stop-shopping” for the international needs of multinational companies,310 they are filling a vital need in the

296 See supra text accompanying notes 204, 239, and 242.
297 See supra text accompanying notes 36-42.
298 See supra text and accompanying note 269.
299 See supra text accompanying notes 208-209.
300 See supra text accompanying note 234.
301 By keeping the data networks out of the alliance until liberalization, DT and FT will not be collectively controlling 79% of the German and 77% of the French market for all data communication services while still maintaining special and exclusive rights. See Commission Decision, Atlas, supra note 267, at 27. The decision to keep the data networks out of the alliance will not likely impact competitive access but does provide the Commission with an additional ‘carrot and stick’ to insure DT and FT’s compliance with the liberalization timetable.
302 See supra text accompanying note 203. Until 1998, Sprint will not be able to improve on overseas connections which already distinguish it as the dominant carrier for U.S.-German and U.S.-French telecom traffic. See supra text accompanying notes 231-232.
303 See e.g., supra text accompanying note 234.
304 See Tarjanne, supra note 103, at 9 (explaining that information flow is vital for the efficient operation of markets, for policy evaluation and for further regulation). This will be particularly important in monitoring Germany’s regulatory environment, which many believe will continue to protect
305 See Commission Decision, Phoenix, supra note 268, at 72 (explaining that as the EC regards global markets as still emerging, entry of a carrier like Global One is additionally appropriate in that Concert is presently the dominant player in that market).
306 See supra text and accompanying note 103. DOJ conditions were applied to eliminate possible anti-competitive “output-restricting practice[s]” of the venture, while employing an “economic rule of reason analysis” to realize “prospect[s] for substantial benefits.” Landes, supra note 103, at 82.
307 See Cane and Owen, supra note 129, at 21. As a result, smaller carriers will have to decide whether to ally themselves with a supercarrier or seek a profitable market niche. See Cane, supra note 131, at 17.
308 See Harkness, supra note 67, at 193.
309 In this regard, “[t]he customer is leaving regulators with little choice” but to approve such alliances as global companies are tired of dealing with a myriad of suppliers. The Global Free-for-All: As Huge New Telecom Markets Open, Carriers Aim to Carve Up the World, Bus. Wk., Sept. 26, 1994, at 119.
310 See supra text accompanying notes 139-141.
marketplace. Additionally, by adding international perspective to their joint-venture scenario, the alliance partners were adding a global dimension to their operations that both the United States and EC respectively, considered vital to each partner's ability to remain competitive in the changing marketplace.

The interrelation of global telecom companies has already resulted in increased and faster development of new technologies, particularly in regard to the Internet. Resulting telecom services will also reach customers at a faster rate than would have been possible if each carrier in the alliance had acted alone. These innovations in the marketplace serve to enhance both the EC and U.S. ability to achieve "Information Society" goals. To facilitate development of the information super highway, it is necessary to not simply connect networks, a basic skill, but to fully integrate network systems, making seamless service and network management possible. This precept recognizes that the "information super highway" already exists in disparate pieces. Companies with sufficient capital and technology to integrate networks and increase their speed and efficiency will facilitate this development and the global alliances are in the best position to fulfill this need.

The prospect that global competition will lead to rationalization of telecom resources, leaving a handful of carriers with the capital and geographic reach to service the multinational market, is similar in many respects to the development of the railroads during the industrial revolution. Globalization of the world workforce is both driving and being driven by developments in telecom technology, as development of the railroads both drove and was driven by U.S. westward expansion. Like the prospects for the global telecom alliances, it took the investment and size of the railroad conglomerates (i.e., Union Pacific, New York Central, B&O etc.) of the 1800s to push lines across the country, facilitating both interconnection and capacity in the rail industry.

In passing the Sherman and Clayton acts of the late nineteenth and early twentieth centuries, respectively, the government was acting retroactively to break up a nearly 100 year development of industrial trust facilitated by vast railroad networks. Had the government acted earlier to break up the rail monopolies, perhaps we would not have the rail networks that exist today. In the case of modern telecom, the prospect of divestiture and close scrutiny has already existed for more than a decade to let private firms do the work.

Despite being prohibited from advertising in Europe until the fall of 1996, See Lindemann, supra note 166, at 2, Global One has acquired more than 50,000 global business customers since February 1996, Martin Rosenberg, Global One President Chosen; New European Executive Will Operate from Headquarters in Brussels, Belgium, KAN. CITY STAR, Sept. 10, 1996, at D3.

See Proposed Final Judgment, supra note 197, at 44,061 (explaining that the global consortia concept is necessary to meet the needs of multinational customers).

Commission Decision, Phoenix, supra note 268, at 71 (explaining that "only a truly global dimension would make the cooperation between DT and FT in the framework of Atlas sufficiently important to consider an exemption from the prohibition of Article 85(1)").

Global One will begin offering intranet (internal corporate network) services early in 1997, providing messaging, groupware and Web hosting. Sprint and its Partners in Europe Plan Foray into Intranet Market, WALL ST. J., Oct. 7, 1996. Concert has recently installed twelve large ATM switches and fiber optic links which will increase global Internet capacity by about one-third. See Cane, supra note 144, at 2.

See Commission Decision, Phoenix, supra note 268, at 71 (explaining that Global One alliance will allow consumers to reap technological benefits sooner than would have been possible had each carrier acted alone).

Vice President Gore had stated early in the Clinton Administration that the information superhighway should be built by an "aggressive, forward-thinking" public sector, and most recently, the Administration has publicly stepped aside to let private firms do the work. E.K. Schlesinger, Finance: Top 10 Fat Cats, GEORGE, Nov., 1996, at 104.

See Cane, supra note 144, at 2 (explaining that such seamless service and management is necessary to properly utilize a telecom conduit to furnish convergence applications).

Venture Capitalists Don Valentine and Michael Moritz have Plenty of Opinions about Who will Win and Lose in the Telecom War, WALL ST. J., Sept. 16, 1996, at R23.

DT presently owns the world's largest ISDN network, comprising one of every three ISDN connections in the world. Michael Lindemann, Doubts Over Earnings Potential, FIN. TIMES, Sept. 19, 1996, at 4.

At the core of Global One's business will be the implementation of a "common global network and information systems platform rationalizing and integrating the international data, voice, and overlay networks of the partners." See Commission Decision, Phoenix, supra note 268, at 63.

Vast expansion in the rail industry and competition between large conglomerates had in fact led to consolidation and rationalization of resources in the late 1800s. See Stuart Daggett, Ph.D., RAILROAD REORGANIZATION 358-40 (1908).

Martin Orth, Management Consultant Roland Berger on Income, the Jobs of Tomorrow, and Human Creativity, DEUTSCHLAND, Aug., 1996, at 8.

Between 1865 and 1890, the number of miles of track in the United States grew from 35,000 to 166,000, much of it running through sparsely populated lands. See Arnst and Mandel, supra note 21, at 66.
ade, both in the United States and in the EC. Additionally, globalization of competitive principles has begun to insure that there will no longer be "islands of high earners without concomitant high performance."\textsuperscript{324} Global alliances and national government entities that monitor competition must work in close cooperation, and the existence of the U.S./European Community Agreement on Anti-trust Cooperation is an example of the type of teamwork that must be fostered.\textsuperscript{325} In tolerating the potential monopolistic activity of Global One, the EC is affirming the necessity for activity that is of vast economic benefit flowing directly to the consumer.\textsuperscript{326} With the proper government organizations and pro-competitive regulations in place, as are presently evident in both the EC and United States, we should take the opportunity to enjoy a period of enormous growth in the telecom marketplace and the developments that a global venture like Global One will bring. As long as the EC, the DOJ and FCC remain vigilant defenders of competition, vigilance that they have shown conditionally approving Global One,\textsuperscript{327} the benefits of innovation will outweigh reactionary fears of a "telecom trust."

IV. CONCLUSION

EC and U.S. telecom initiatives of the past decade have been geared toward development of increased competition in the marketplace and concomitant preservation of the public interest in universal service. In addition, with the EC approaching full liberalization of its telecom markets in 1998 and the U.S. market invigorated by competition among long-distance, local and alternative telecom carriers, consumers in both the EC and United States will benefit from lower rates and the availability of new and technologically advanced services. However, the same competitive engine that will drive consumer developments also has begun to force incumbent telecommunications companies in the EC and United States to seek alliances to preserve revenues and enter new markets.

Within these competitive developments, DT of Germany and FT of France have forged the Global One joint-venture with Sprint of the United States, prompting concern over the prospect of a new private telecom monopoly. In addressing the possible anti-competitive activity that could emanate from the venture, the EC and United States were primarily concerned the closed nature of the German and French telecom markets. Approval of the alliance gave each government tremendous leverage to insure these markets would eventually open to competition.

In granting conditional authorization of Global One, the EC and United States are insuring that it will not deter competition before the German and French markets are liberalized. In addition, both governments recognize that the alliance fills a vital role in the marketplace, apart from the market-opening leverage it created. The emerging market that Global One and similar alliances seek to enter, the provision of telecom services for multinational companies, can only be properly served by a company with enormous geographic reach and capital resources. Multinational corporations prefer "one-stop shopping" in servicing their telecom needs, and no single telecom company alone has the resources and skills to fill that market need.

Additionally, in combining the resources of DT, FT and Sprint, Global One will be accomplishing a global integration of networks, a task that is vital to further development of the information superhighway. Both the EC and United States have supported development of the information superhighway as a near-term telecom policy goal, and each has acknowledged that the private sector is in the best position to further this goal.

The present wave of consolidation among huge, global telecom carriers, a movement that Global One is indicative of, is commensurate with vast railroad development and subsequent ration-

\textsuperscript{324} See Orth, supra note 322, at 8.

\textsuperscript{325} See Ungerer, supra note 51, at 1175.

\textsuperscript{326} See supra text accompanying notes 56-57.

\textsuperscript{327} In the wake of the BT-MCI merger announcement, Global One began talks with Britain's Cable & Wireless ("C&W"), citing that C&W's inclusion in the alliance would be "logical," expanding Global One's reach into Asia where C&W owns 57\% of Hong Kong Telecom. Douglas Lavin,
alization of resources during the industrial revolution. Anti-trust concerns regarding the railroad industry and industrial development remained unaddressed until passage of the Sherman and Clayton Acts in 1890 and 1914, respectively. By contrast to that period however, the present-day telecom market has undergone anti-trust scrutiny for over a decade. In addition, globalization of the marketplace and resulting competition, will insure that high earnings among telecom market actors will not occur without concomitant high performance. With legislation and government structures that are presently in place and anti-trust cooperation between the EC and United States, authorization of Global One and similar ventures will translate into consumer benefits in a streamlined global telecom environment.
APPENDIX I

Figure 1
Percent of EC Telecom Revenue Share Held Among Top Eight Member State Markets (1995) (out of US$176.2 billion)

- U.K. 16%
- France 18%
- Switz. 5%
- Sweden 5%
- Spain 8%
- Neth. 5%
- Italy 14%
- Germany 29%


Figure 2
Percent of French Telecom Revenue Share Controlled by FT (1995) (out of US$30.96 billion)

- Other French Carriers 4%
- FT 96%

Percent of French Telecom Revenue Share Controlled by DT (1995) (out of US$53.36 billion)

- Other German Carriers 25%
- DT 75%

Figure 3

Percent of World Telecom Revenues
Held by Major U.S. and EC Carriers (1995)
(out of US$500 billion)


Figure 4

Percent of U.S. Telecom Revenues
Held by Major U.S. Carriers (1995)
(out of US$215 billion)