II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 18 October 1991

relating to a proceeding pursuant to Article 85 of the EEC Treaty

(IV/32.737 — Eirpage)

(Only the English text is authentic)

(91/562/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 4, 6 and 8 thereof,

Having regard to the application for negative clearance and the notification for exemption, submitted under Articles 2 and 4 of Regulation No 17 on 17 May 1988 by Bord Telecom Eireann and Motorola Ireland Ltd of a joint venture agreement and related agreements and documents, concerning the setting up, promotion and operation of a nationwide interconnected paging service,

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

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

I. THE FACTS

(1) On 17 May 1988, Bord Telecom Eireann ('Telecom') and Motorola Ireland Ltd ('Motorola') submitted for negative clearance or alternatively exemption, joint venture and accompanying agreements relating to the setting up, promotion and operation of a nationwide paging system interconnected to the public telecommunications network. In the company set up for this purpose in April of 1988, 'Eirpage Ltd', the parties pool their complementary skills, namely Telecom's technological expertise in the provision of telecom infrastructure and services and Motorola's marketing and product expertise in radio-paging services.

A. The parties and the service concerned

(2) Telecom was corporatized in 1984. Pursuant to Section 87 of the Postal and Telecommunications Services Act 1983 (the Act), in conjunction with the Telegraph Act of 1869, it continues to enjoy a statutory exclusive privilege with respect to telecommunications infrastructures and the provision of certain telecommunications services, subject to the powers of Telecom itself (Section 89) and of the Minister for Communications (Section III) to grant licences to third parties to provide telecommunications services within the exclusive privilege of Section 87.

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No C 294, 24. 11. 1990, p. 3.

Since becoming corporatized, Telecom has introduced a number of new telecommunications services such as Eirpac (data network) and Eircell (cellular radio/mobile telephones). The joint venture with Motorola to provide paging services is the first time that Telecom has cooperated with another company to enter a new field.

(3) Motorola is a wholly-owned subsidiary of Motorola Inc. of Illinois, USA, which, with a worldwide turnover of US $ 9 billion in 1989, is one of the world leaders in mobile communications equipment and services. Before embarking on the Eirpage joint venture, Motorola, which had a turnover of £ Irl 10,7 million and 120 employees in 1989, offered merely telecommunications equipment, including paging receiver units, and not paging services (1).

(4) The paging service offered by Eirpage falls within the broader category of mobile communication services in general, which includes mobile telephones and mobile radios. Paging is a one-way means of communicating with someone on the move who carries a pocket-sized receiving unit, which receives varying signals, such as tone (beep), voice, numerical or computerized messages, depending on the sophistication of the receiver. The person carrying the pager can only receive messages, not reply to calls.

Interconnected paging is a particular kind of paging whereby a telephone, telex or data message can be transmitted via the public network to the receiving unit. In other words, one can dial the numer of a paging receiver on a normal telephone to have access to the wearer. Where paging is not interconnected, it is operator-assisted, which means that an operator will intervene to receive the message to be paged from the caller and transmit it to the paging unit of the customer.

(5) In Ireland, the mobile communications sector is at present composed of traffic via mobile radios (35 %), mobile telephones (40 %) and pagers (25 %). Eirpage at present covers 13 % of mobile communications, and with 7 400 subscribers, approximately 60 % of the overall paging sector.

Aside from Eirpage, there are at least eight companies providing operator-assisted paging services mainly in the Dublin area or other population centres such as Cork and Limerick. The number of subscribers of these companies ranges from under 100 to approximately 2 000. Eirpage plans to cover virtually all regions of the country and aims at achieving 10 000 customers, nationwide, by 1992. By July of 1991, 87 % of the geographical surface of the Republic of Ireland, representing 90 % of the population, was covered with more than 30 transmitters in operation.

B. The agreements as originally notified

(6) The notification involves six docments:

1. *The joint venture agreement:*

In order to establish and promote a nationwide paging service, Telecom and Motorola agree to set up a joint venture company, Eirpage Ltd, to be owned 51 % by Telecom and 49 % by Motorola. In view of these shareholdings, Eirpage is a subsidiary of Telecom for the purpose of the Act and thus enjoys the exclusive privilege of engaging in telecommunications services bestowed on Telecom by Section 87 of the Act without the need for a licence.

As far as the management of the company is concerned, Telecom and Motorola have equal powers: three directors are appointed by Telecom, three by Motorola, and all decisions by the Board require a majority vote, while most of the business decisions of any consequence require unanimity.

The joint venture agreement provides that neither party will engage in a competing paging service, either independently or in association with others, during the term of the joint venture agreement and three years following termination thereof.

2. The *business plan* annexed to the joint venture agreement sets out Eirpage's basic objectives and the forecast agreed by the parties as to the projected financial outcome of Eirpage's first five years of operation.

(1) As of 1 August 1991, an independent company, Sigma Wireless Communications Ltd, has taken over Motorola's role as importer of Motorola products in Ireland and as Eirpage agent.

3. The *marketing service and business development agreement* between Telecom, Motorola and Eirpage relates to the provision of expertise by Motorola to Eirpage and by the latter to Telecom personnel.

4. The *operating agreement* between Telecom and Eirpage fixes the terms under which Telecom will provide access to the public network to Eirpage. Telecom agrees to install and maintain the physical attributes necessary to operate the paging system, namely antennas, transmitters and the paging exchange needed to interconnect to the public network, cumulatively referred to as the 'Facilities'. These Facilities belong to Telecom and form part of the public telecommunications network. Although the cost was initially estimated at less than £ Irl 1 million, the actual expenditure has risen to twice that amount due, *inter alia,* to a wider geographical coverage than originally planned. Telecom received approximately £ Irl 500 000 for the project under the Community's 'STAR' programme which aims at developing less forward regions by improving access to advanced telecommunications services.

In order to cover this capital expenditure, and in return for the use of these Facilities, Eirpage agrees to pay Telecom an annual operating fee which is calculated to fully amortize this paging network investment by Telecom over a 10-year period, together with a return of 5 % over investment. The annual fee, furthermore, covers other services provided by Telecom, namely, rental of a space for the antennas on a Telecom tower, use of leased lines, rental of space on Telecom's premises for the paging exchange, maintenance of the paging network and the interconnect charge ; these services are charged at the normal, publicly-known commercial rates.

The operating agreement provides a proportionate reduction in the charges payable by Eirpage for the use of the Facilities in the event other paging operators share the use of the same Facilities.

5. The *standard agency agreement :*

Eirpage does not itself sell the paging service directly to customers, but does so via a network of independent, non-exclusive agents. Once an agent has found a new customer, the actual subscriber agreement is signed between the customer and Eirpage. The subscription rates and other conditions are fixed by Eirpage. Agents receive an on-going monthly commission ranging from 10 % to 30 %, depending on the number of subscribers they have found for Eirpage, and provided those subscribers remain 'live'. Agency agreements can be terminated by either party on an annual basis.

At the time Eirpage was launched, sellers of paging equipment, existing paging service providers and other interested parties were invited to become Eirpage agents. At present, there are 20 agents including three service providers which continue to offer their own operator-assisted, local rather than nationwide, paging services alongside finding subscribers for Eirpage. Among the sellers of paging equipment which act as Eirpage agents are TEIS, a Telecom subsidiary involved in the provision of terminal equipment, and Sigma Wireless Communications Ltd, which in August of 1991 took over Motrola's role as Eirpage agent.

Eirpage is obliged by the agency agreement not to discriminate amongst the agents. Sales leads which come to Eirpage are passed on to agents in a rotating alphabetical order.

Competition exists between the agents on various levels. As far as the Eirpage service is concerned, the fact that the subscription rates are necessarily fixed does not exclude price competition amongst the agents, who in practice are willing to discount on their commission in order to secure business, thereby offering advantageous subscription rates. Secondly, there is competition amongst agents with regard to the marketing and presentation of the Eirpage service. Finally, agents who are paging service providers in their own right continue to offer their own services alongside those of Eirpage.

Eirpage agents are free to sell whatever equipment they want, and with or without the Eirpage name or logo attached. In view of the fact that many agents are also paging equipment manufacturers and/or distributors, finding customers for Eirpage can have a direct beneficial effect on the sale of their own equipment.

6. The *standard subscriber agreement:*

the subscriber agreements are concluded directly between Eirpage and the customer found by an Eirpage agent. In order to cover the administrative costs of putting a new subscriber on the system, a minimum period of normally 12 months applies, after which notice can be given on a monthly basis. Subscribers pay a monthly charge to Eirpage which varies according to the sophistication of the pager being used and the geographical extent of the coverage desired by each individual subscriber, ranging from the home zone only up to full national coverage. Subscribers are free to use whatever type and brand of paging receive equipment they want, and may choose to rent or buy the pager, depending on the terms offered by the equipment provider, normally the agent through whom they wre brought into contact with Eirpage.

C. The agreements as amended or clarified following the Commission's intervention

(7) The arrangements as notified presented a number of problems from the point of view of competition policy which stood in the way of a favourable attitude on the part of the Commission. During the course of the notification procedure, the following issues were resolved in a satisfactory manner:

1. *Market entry by third parties*

The Commission has sought assurances from Telecom and the relevant licensing authorities that companies interested in competing directly with Eirpage in the wide-area interconnected paging sector will be treated on exactly the same footing as Eirpage. Successful market entry depends on: (a) the availability of facilities such as those used by Eirpage to operate the service; and (b) the procurement of licences, including the necessary frequency allocation.

(a) Telecom has given a written undertaking to make available to persons satisfying the relevant licensing and financial requirements the facilities necessary for operating a wide-area interconnected paging service, under the same conditions as those which apply to Eirpage. These include the obligation on the paging operator to use such equipment for not less than a specified period mutually agreed upon by the parties on the basis of the total investment made by Telecom and the payment to Telecom of an annual charge calculated to remunerate the cumulative capital cost fully amortized over that period together with a reasonable return over the capital cost; in respect of the provision by Telecom of interconnection, space and other services, such as maintenance, the standard commercial charges shall apply, as they do to Eirpage.

Telecom has agreed to make the full text of the undertaking available to interested parties and to inform the Commission of any requests made pursuant thereto and the outcome of such applications.

The facilities referred to in Telecom's undertaking form part of Telecom's telecommunications network and are owned exclusively by Telecom. The undertaking does not of course in any way prejudice other options which market entrants may prefer, such as the choice to buy the necessary equipment themselves, whereby the services required of Telecom such as the use of leased lines would be made available at the normal rates. Interconnection to the public switched telephone network (PSTN), telex and public switched data network (PSDN-Eirpac) is universally available on a non-discriminatory basis to those operators meeting the relevant licensing requirements.

Finally, the Commission has noted that pursuant to an order from the Minister for Communications under Section 110 of the Act, Eirpage could be obliged to share the Facilities established for its use with other service providers. To reflect more accurately the Minister's power in this respect, the parties have agreed to redraft the provision in the operating agreement between Telecom and Eirpage which limited Telecom's right to expand the Facilities;

(b) licensing and frequency allocation:

the administrative procedure which an applicant paging service provider must successfully complete consists of one or alternatively two elements, depending on the type of service envisaged:

(i) All paging service operators, regardless of whether the service offered is interconnected, operator-assisted, regional or

national, must receive a frequency allocation in the form of a licence under the Wireless Telegraphy Act 1926. Frequency/spectrum management is carried out under the sole competence of the Minister for Communications. Thus, Eirpage itself is dependent on the Minister for frequency allocation on the same footing as other paging service providers, and has received licences to that effect.

(ii) Companies interested in providing a paging service interconnected to the public telecommunications network require in addition to the frequency allocation licence, a licence under the Telecommunications Act 1983. This licence can be granted at the applicant's choice either by the Minister for Communications, after consultation of Irish Telecom, whose opinion is, however, not binding, or by Telecom itself; refusals by the latter are subject to appeal. Contrary to the licence under the 1926 Act, Eirpage did not require a licence under the 1983 Act because it is a subsidiary of Telecom and thus enjoys the exclusive privilege bestowed on the latter under Section 87.

At present, the frequency allocation and licensing requirements do not appear to constitute a barrier to entry to the paging sector for interested companies. On the spectrum management side, the Department for Communications has reserved the 153 to 154 MHz band solely for paging services. According to the Department, the approximately 40 channels consequently available for paging service providers should be adequate to meet any foreseeable needs in this sector. If necessary, a new band could be opened to meet channel requirements.

As far as the licence under the 1983 Act is concerned, the relevant authorities have confirmed that licences would be available for national interconnected paging services on the basis of objective criteria, such as the technical capacity and financial resources of the applicant and the likelihood of a continuous service. Normal judicial review would apply in case of a refusal. To date, Eirpage, which as noted above did not require a licence under the 1983 Act, is the only company providing interconnected paging services, so that an actual application of the licensing procedure has not yet taken place.

2. *Cross-subsidization and preferential tariffs*

Written assurances have been provided by a chartered accountant that Eirpage pays full cost and expenses to Telecom and to Motorola for staff, facilities and services. Telecom does not cross-subsidize Eirpage's activities through revenues from services reserved to Telecom as the national telecommunications organization, nor does Eirpage enjoy any preferential tariffs for the use of facilities provided by Telecom, such as leased lines. Eirpage operates at arm's length from both parent companies with its own separate offices and all expenditure is funded through a bank overdraft facility which is entirely separate from either parent company. Eirpage establishes its own financial statements, independent of Telecom's annual accounts.

3. *The paging equipment market*

Eirpage only provides a paging service and does not sell paging equipment. The parties have stated that the Eirpage system has been configured specifically to offer maximum compatibility with the products of all manufacturers. As stated above, Eirpage agents are free to sell whatever equipment they want, with or without the Eirpage name or logo attached. In case of enquiries to Eirpage concerning manufacturers' equipment, information is provided regarding all manufacturers or their representatives in Ireland. Only average prices are quoted to customers, not the prices of a particular brand of equipment.

In order to further reassure paging equipment manufacturers that the joint venture will not give an unfair advantage to sales of Motorola equipment, the parties have confirmed that:

(a) Eirpage will cooperate with all paging equipment manufacturers or dealers to the extent technically possible that their products can be used on the Eirpage system;

(b) Motorola pagers will be sold with the same discounts to all Eirpage agents subject to the normal commercial criteria based on volume and credit.

Furthermore, clarifications regarding the type-approval procedure for paging equipment have provided the necessary reassurances that manufacturers competing with Motorola cannot be discriminated against in any way. Contrary to a mistaken belief, it is not Telecom, but the Ministry for Communications which establishes the criteria for type-approval. Although Telecom does provide some type-approval services, this is done on an agency basis only, which means that the testing carried out by Telecom is an application of the standards established by the Ministry. Furthermore, a second testing agency, Eolas, exists, so that equipment manufacturers and importers have a choice. Finally, the Ministry for Communications has confirmed that although type-approval is strictly speaking still required for paging equipment, in practice such receive-only equipment which is not liable to harm the network in any way is not subjected to testing by either test house.

4. *The standard agency agreement*

Certain amendments were required to ensure that the agency agreements do not have restrictive effects, notably *vis-à-vis* paging service providers who continue to provide their own complementary services next to those of Eirpage. To this end, the parties have agreed to the following changes in the standard agency agreement (references are to the November 1988 version):

(a) clause 4 (a) has been redrafted in order to clarify that only sales leads which have been passed on to a given agent by Eirpage must first be used by that agent to promote the Eirpage service; if the latter is not suitable for the customer, the agent is subsequently free to promote his own service. In all other contacts with potential customers, the agent is free to promote his own service first or in any case on the same basis as the Eirpage service;

(b) clause 4 (c) which imposed an absolute obligation on agents of loyalty to Eirpage 'in all matters', was too broad and has been redrafted to reflect the agent's freedom to continue pursuing his own interests; Eirpage's instructions need only be followed in respect of specific Eirpage matters;

(c) clause 4 (f) obliged an agent to bring to the attention of Eirpage any information it received which was likely to be of benefit to Eirpage in marketing the services. This obligation could not be reconciled with an agent's legitimate wish to continue or start competing with Eirpage and has been deleted;

(d) in clause 4 (l), it has been clarified that the designation 'Eirpage Authorized Agent' is subsidiary to the agent's own denomination;

(e) the post-term non-compete obligation of Clause 9.7 (i), whereby agents were prevented for a period of three years following the termination of the agency agreement from soliciting persons who at the time of termination were Eirpage subscribers, has been deleted;

(f) direct competitors of Eirpage, i.e. paging companies providing interconnected paging services, should not be permitted as agents. This also means that existing agents who do not yet provide such services but decide to enter that specific sub-market at a later date, must at that point relinquish their position as an Eirpage agent. Furthermore, an Eirpage agent may not at the same time be the agent for other paging service providers offering interconnected paging services. Provisions reflecting the above have been added to the agency agreement.

5. *The parties' position after termination of the joint venture*

In the event the joint venture agreement is terminated, Telecom and Motorola must be free to compete with each other immediately. To that end, the post-term non-compete obligation provided for in Article 18.2 of the joint venture agreement has been deleted at the request of the Commission.

D. Third parties' observations

(8) The Commission did not receive any observations following publication of the notice required by Article 19 (3) of Regulation No 17.

II. LEGAL ASSESSMENT

A. Article 85 (1)

(9) Although Motorola owns 49 % of the joint venture company and is thus, strictly speaking, a minority shareholder, the Board of Directors which actually runs Eirpage consists of an equal number of directors representing each parent company, whereby all decisions of the Board require a majority vote and most business decisions of any consequence unanimity. Consequently, the two parties to the agreement, both of which are economic operators involved in commercial activities, in reality share joint control of the joint venture, so that the arrangements involve agreements between two independent undertakings and must thus be considered under Article 85 (1). In this context, it is not only the joint venture agreement itself which must be assessed, but the accompanying agreements which implement certain aspects of the cooperation, namely the operating agreement between Telecom and the joint venture company, the standard agency agreement which establishes the system whereby the service is offered to consumers and the standard subscriber agreement.

(10) The market directly concerned by the joint venture agreement is the provision of paging services, i. e. a one-way means of contacting someone on the move. Paging offers the advantage above other forms of mobile communications of being relatively — up to 50 % — cheaper in terms of the price of equipment and running costs. Also, mobile telephones are larger in size and thus more unwieldy than paging receive units. In this sense paging at present represents a distinct market. These factors could be expected to fade in the future, so that the choice between a mobile telephone and a pager would no longer depend on size or cost. Paging would, however, continue to exist as a separate option in the mobile communications sector because if offers one-way communications, a distinct advantage in keeping down the billing costs.

(11) Telecom and Motorola are potential competitors for the provision of paging services. Telecom's expertise in the provision of infrastructure has in the past facilitated its entry into markets for various value-added services, such as Eirpac and Eircell. Given Telecom's general know-how and more specifically and technological similarities between communicating by mobile telephone and paging, and in view of its financial position, this ease of entry would also apply with respect to the paging sector.

Although the Motorola company in Ireland did not provide paging services prior to Eirpage, but was solely a manufacturer of telecommunications hardware, including paging equipment, the Motorola group worldwide has extensive experience in this sector which is in fact available for the benefit of Eirpage pursuant to the Marketing Services and Business Development Agreement. Motorola is therefore a potential competitor for the provision of the service.

(12) Through the Eirpage joint venture, Telecom and Motorola have joined together to set up and provide a service which they could potentially have pursued individually; the joint venture agreement prohibits either party from engaging in a competing wide-area interconnected paging service either independently or in association with others. The consequence of these arrangements is that instead of two competing companies offering the service in question there is only one, which must be considered to be a restriction of competition. Also, the fact that potential competitors are faced by a joint venture between the national telecommunications company and a subsidiary of one of the world leaders in mobile telecommunications which will initially and indefinitely — until further licences are granted — be the only provider of interconnected paging services, may have a deterrent effect on potential market entrants and thus further restrict competition.

In view of the foregoing considerations, the agreements which form the basis for the creation and operation of the joint venture are deemed to constitute restrictions of competition falling within Article 85 (1). The same is true with regard to the system whereby intermediaries are used to offer the service to end-users, as laid down the standard agency agreement. These arrangements form an integral part of the operation of the joint venture. Moreover, the restrictions flowing from the agency system are reinforced by the fact that companies offering paging services in competition with the Eirpage service have been appointed as Eirpage agents.

(13) The notified arrangements relate to a service extending over the entire territory of the Republic of Ireland and as such are capable of affecting trade between Member States. The fact that an agreement has as its object only the marketing of products (or services) in a single Member State does not mean that trade between Member States cannot be affected. In the case at hand, both a detrimental and a beneficial impact on trade from other Member States can be envisaged as regards the paging service market. The fact that the joint venture company will initially be the only provider of interconnected wide-area paging services in Ireland may have a dissuasive effect on market entry by competitors from other Member States. Conversely, the promotion of the concept of paging as such which the joint venture company is committed to accomplishing, may be expected to attract other providers of (complementary) paging services also from other Member States, which are free to apply for the necessary licences and start operating once these have been obtained.

In the closely linked paging equipment market, which was, even before the inception of Eirpage, characterized by an overriding presence of distributors and subsidiaries of equipment manufacturers from other Member and non-Member States, the stimulation of sales brought about by the joint venture is likely to attract further imports or investments.

Furthermore, Motorola forms part of a group operating throughout Europe (and worldwide) in the mobile communications services and equipment markets; Motorola's activities in Ireland must be seen as part of the European operations of the group as such, which necessarily implies repercussions also outside Ireland.

In view of the foregoing circumstances, the joint venture arrangements can be expected to have an appreciable effect on intra-Community trade, and Article 85 (1) applies.

B. Article 85 (3)

(14) Subject to the changes implemented by the parties in the agreements as notified and in view of the undertakings provided with respect to a number of issues which originally stood in the way of a favourable decision, the Commission has concluded that the cooperation between Telecom and Motorola contributes to the development of telecommunications services in Ireland, thereby directly benefiting consumers of such services as well as undertakings involved in the telecommunications sector. These benefits could not have been achieved as rapidly and to the same extent in the absence of the joint venture and therefore outweigh the restriction of competition brought about by the joining together of two potential competitors.

(15) In a country where two-thirds of the population lives in sparsely populated rural areas, Eirpage has undertaken to provide a service beyond the more profitable urban areas in which existing paging service providers had hitherto concentrated their activities. By the end of 1991, 34 transmitters should be installed at strategic points throughout the national territory, thereby covering virtually all of Ireland. These truly nationwide communications links can be expected to contribute to business efficiency and especially enable small and medium-sized business to expand their activities geographically, thereby contributing to economic progress in Ireland.

Although the joint venture arrangements relate only to the provision of paging services, the directly connected paging equipment market can be expected to benefit from the increased number of paging service subscribers requiring paging receive units, thus stimulating production in this sector.

(16) A fair share of the benefits resulting from the cooperation accrue directly to consumers.

End-users, that is subscribers to the service, can benefit from an enhanced paging service which offers several features not available from existing paging companies, in particular nationwide coverage and interconnection to the public network. Furthermore, Eirpage offers a wider choice of services than previously available from one single source, ranging from the simplest tone only communication to the more sophisticated alphanumeric and voice messages. Within this

range of possibilities the individual needs and budgets of each user will allow him to opt for full nationwide or regional coverage, and for the simpler or the more sophisticated type of service. These options offer advantages for all users, namely those using the service primarily for private, e. g. family or social, purposes, and business users who can thus ensure varying degrees of communication to increase their operating efficiency.

The Eirpage service is offered to customers not by the joint venture company itself, but via a network of agents who have a direct financial interest in finding new clients and keeping existing ones, and therefore compete with each other. This agency system ensures that there is a choice for consumers as regards the agent with whom he wants to deal and the conditions he can enjoy for using the Eirpage service. Furthermore, the standard form agency agreement between Eirpage and its agents obliges the latter to ensure adequate maintenance and after-sales service, and perform guarantees with respect to the paging equipment supplied to subscribers. The maximum one-year duration of the standard subscriber agreement leaves consumers free to change to another service provider at reasonable notice.

Finally, the paging equipment market will automatically expand along with an increasing number of subscribers to paging services. This increased demand for paging receive units and the freedom of agents and subscribers to choose whatever brand they wish, can be expected to lead to a wider choice of products, and at lower prices.

(17) The arrangements between the parties contain no restrictions which are not indispensable to the attainment of the ensuing benefits for the duration of the exemption.

(18) The joint venture agreement itself was indispensable in enabling the parties to offer as rapidly as possible a service which in terms of technical features and geographic coverage represents a new option in this sector. Neither party acting on its own could have offered the service as rapidly and effectively as their cooperation has enabled them to do.

Having been corporatized relatively recently, Telecom's transition from a governmental department to a commercial operator has been gradual, and initially its activities centred on traditional telecommunications services. Although Telecom was admittedly able to set up a mobile telephone service (Eircell) by itself, selling telephones, which are familiar to everyone, is easier than selling the new and unknown concept of paging, especially in rural areas where the population may be less susceptible to new technologies. By way of comparison, Telecom's experience in launching Eirpac (data network) has been less favourable. Acting alone, Telecom could have set up a paging system in the Dublin area only, which would have deprived the general population of the enhanced services now offered by Eirpage nationwide.

Unlike Telecom, Motorola is a purely commercially driven company and does not have Telecom's determination to provide nationwide telecommunications services. Thus, even if Motorola had obtained a licence to provide a paging service interconnected to the public network, it would not have been interested in extending the service to marginally profitable rural areas; the same would have applied to any other purely commercial operator. Given the fact that two-thirds of the population lives in rural areas, this solution would have resulted in a much less extensive coverage. In fact, existing paging companies have until now confined their services to Dublin and the four or five other larger towns in Ireland where investment per customer is minimized.

Lesser geographic coverage of a service provided by Motorola alone would also have resulted in a more limited development of the paging concept as such, to the detriment of other service and equipment providers.

Finally, Motorola could not have been expected to bring to an independent venture Telecom's commitment to ensure maximum compatibility of all brands of paging equipment with its system.

The foregoing considerations have brought the Commission to the conclusion that in the absence of the combined efforts by the parties in setting up the Eirpage system, no nationwide enhanced interconnected paging service would have been available on the rapid timescale achieved as a result of their collaboration.

Furthermore, the Commission considers that the Eirpage system could not be set up or at least could not function satisfactorily, if the parties were not obliged for a limited period to refrain from engaging in directly competing projects. Also, it would be unreasonable to expect either party to invest its funds and expertise in the joint project, if there was a risk that the other would use those contributions either independently or in association with third parties who have not made the same commitment. In this context the Commission considers the non-competition obligation imposed by the joint venture agreement on the parties to be indispensable. It should be noted that this restriction is limited to the life of the agreement and applies only to one-way wide-area paging services interconnected to a fixed telecommunications network, which means that the parties remain free also during the term of the agreement to engage in other types of paging services, such as those referred to under recitals 4 and 5 above.

(19) Certain aspects of the notified agreements which were not indispensable for achieving the benefits thereof were eliminated by the parties at the Commission's request in order to bring the arrangements in line with the requirements of Article 85 (3).

In the joint venture agreement itself, the three-year post-term non-competition obligation has been deleted, so that in case of dissolution of the joint venture, the two parties would immediately be free to compete with each other and with third parties on the market.

A number of clauses in the original standard agency agreement likewise required amendment or suppression; these changes are listed above under point 4 of recital 7.

(20) The arrangements as they stand following the Commission's intervention during the course of the notification procedure do not afford the parties the possibility of eliminating competition in respect of a substantial part of the services and products in question.

In the first place, Eirpage is subject to actual competition from existing paging service providers, which account for 40 % of the paging sector and which in many cases offer a service complementary to that of Eirpage. Certain customers will prefer to opt for operator-assisted paging services, such as notably medical paging, and these services are thus unaffected by Eirpage. The same applies to purely local paging systems.

Secondly, nothing prevents licensed operators from competing directly with Eirpage in the provision of interconnected (nationwide) paging. In view of the undertaking which Telecom has given during the course of the notification procedure to make facilities similar to those used by Eirpage available to other operators (see above under point 1 (a) of recital 7), competitors can either use that possibility or invest directly in the necessary facilities, which would in that case belong to them and not to Telecom.

In the light of the assurances given by the Department for Communications, the licensing requirements involved in offering paging services which were examined during the course of notification procedure were found not to form barriers to market entry. Although the licensing procedures are not within the power of the parties who have sought clearance or exemption from the Commission, the latter would be obliged to consider withdrawing the exemption granted under the present Decision if in the future it appears that those procedures act as a barrier to entry or deterrent to competition in the paging sector.

The one-year duration of the Eirpage subscriber agreement allows customers to switch upon a reasonable period of notice to an Eirpage competitor, if they so wish.

Thirdly, the paging market is directly influenced by developments in the mobile telephone and radio markets, as well as new technologies which are at present developing, such as Personal Communication Networks (PCN). At present, paging represents 25 % of the mobile communications sector in general.

Finally, Eirpage cannot merely be expected not to eliminate competition in the paging sector, but may in fact stimulate development also for the benefit of other paging service providers. This circumstance is due to the fact that Eirpage's marketing and advertising efforts promote the concept of paging as such, and not merely Eirpage's own service.

Also, although the Eirpage service does not tie in the sale of paging equipment, the increased use of paging services which is expected to develop, both with regard to Eirpage subscribers and those of

other paging service providers, will stimulate competition in the paging receive equipment market.

(21) One issue which requires individual attention is the position of paging service providers who at the same time act as Eirpage agents. Of the eight paging service providers established in Ireland before Eirpage came on the market, three took the opportunity offered of becoming Eirpage agents. The services these companies offer can be distinguished from the Eirpage service in that they consist of operator-assisted as opposed to interconnected paging. One advantage of operated-assisted paging is that calls are screened by an operator; direct contact between the caller and the person carrying the paging unit is thus excluded. Certain categories of subscribers — such as doctors who do not want to be contacted directly by their patients — prefer this service above the direct communication made possible by interconnection. Also, the services of these companies are geographically limited to Dublin alone or a small number of other urban areas. Given the fact that the services provided by these companies fulfil different needs from those to which Eirpage caters, it can be expected that these three companies will continue to sell their own services next to those of Eirpage, whereby their independence has been improved by the various amendments in the standard agency agreement made at the Commission's request. Furthermore, by acting as Eirpage agents, these companies may be expected to acquire first-hand experience relating to interconnected paging services, thereby enhancing their competitive position if one day they decide to offer such services themselves in direct competition with Eirpage; in that case they could of course no longer act as Eirpage agents. Nevertheless, the Commission is aware of the potential conflict which may exist with respect to agents which offer their own services next to those of Eirpage, and will review the situation of these companies and any other paging service providers who become Eirpage agents within a short time-frame to assess whether this arrangement continues to fulfil the conditions of Article 85 (3).

C. Duration of the exemption and obligations

(22) Pursuant to Article 6 (1) of Regulation No 17, the Commission is required to specify the date from which an exemption is granted. The arrangements as notified on 17 May 1988 presented several aspects which prevented the granting of an exemption in this case. Following discussions with the Commission, the notifying parties made several firm proposals to meet the Commission's objections. These proposals concerned in particular the necessary amendments to the joint venture agreement itself, the operating agreement and the standard agency agreement. Furthermore, Telecom established the undertaking referred to above under point (1) (a) of recital 7 with regard to making available facilities similar to the Eirpage facilities, thus ensuring fair market entry to third parties interested in interconnected paging. Accordingly, the date on which the exemption takes effect will not be the date of notification, but 26 March 1990, the date by which all the required amendments and the undertaking by Telecom had been presented to the Commission.

(23) Article 8 (1) of Regulation No 17 provides that exemptions under Article 85 (3) may be granted only for a specific period and that conditions and obligations may be attached to them.

In view of the characteristics of the Irish market which is characterized, *inter alia*, by slow growth, the novelty of the service being established by the parties, and the emergence of competing new technologies, the development of the joint venture can be expected to require a substantial period of time. Also, a joint venture involving the provision of a service, as opposed to, for example, the production of goods, requires a certain continuity in the relationship between the joint venture parents and third parties.

The final capital investments involved in setting up the infrastructure of the nationwide paging network were made by July 1991, whereupon the 10-year formula according to which Telecom will be reimbursed by Eirpage for its expenditures went into effect.

In view of the foregoing considerations, the Commission has concluded that a period of exemption ending on 31 July 2001 is appropriate in this case.

(24) In order for the Commission to perform its supervisory functions pursuant to Article 8 (3) of Regulation No 17, the parties must comply with the following reporting requirements during the period of exemption:

1. Telecom must inform the Commission forthwith and on a continuing basis of any requests for paging facilities made to it by third parties pursuant to its undertaking referred to above under point 1 (a) of recital 7, and the outcome of such requests.

2. Eirpage must submit its annual financial statements to the Commission each year upon their issuance to allow for verification regarding cross-subsidization and preferential tariffs.

3. At the same time as the submission of the annual financial statements, Eirpage shall provide the Commission with an updated list of all agents selling the Eirpage service and indicate which agents are at the same time paging service operators in their own right.

4. In January 1995, the parties shall make available to the Commission information enabling it to review: (i) the development of the paging service market in Ireland; and (ii) the development of sales of Motorola paging receive equipment in Ireland compared to that of other brands.

5. All three parties are required to inform the Commission forthwith of any amendments or additions to the joint venture agreement itself, the operating agreement, the standard Eirpage agency agreement, the standard Eirpage subscriber agreement, and likewise any change in the scope, nature or extent of the cooperation between them,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 85 (3) of the EEC Treaty, the provisions of Article 85 (1) are hereby declared inapplicable for the period 26 March 1990 to 31 July 2001 to the joint venture agreement dated 23 February 1988 between Bord Telecom Eireann (Telecom) and Motorola Ireland Ltd (Motorola) and the relevant notified accompanying agreements: the operating agreement between Telecom and the joint venture company, the standard Eirpage agency agreement and the standard Eirpage subscriber agreement.

Article 2

The declaration of exemption contained in Article 1 shall be subject to the following obligations:

(a) Bord Telecom Eireann shall inform the Commission forthwith and on a continuing basis of any requests made under the undertaking it has given to make paging facilities available to third parties;

(b) Eirpage Limited shall submit its annual financial statements to the Commission each year upon their issuance;

(c) Eirpage Limited shall at the same time as the submission of its annual financial statements provide the Commission with a list of all Eirpage agents and identify which agents are at the same time paging service operators in their own right;

(d) in January 1995, the parties shall submit a report to the Commission setting out (i) the development of the paging service market in Ireland, and (ii) the development of sales of Motorola paging receive equipment in Ireland compared to that of other brands;

(e) all three parties are required to inform the Commission forthwith of any amendments or additions to the agreements referred to in Article 1, and of any change in the scope, nature or extent of the cooperation between them.

Article 3

This Decision is addressed to the following undertakings:

1. Bord Telecom Eireann,
Merrion House,
Merrion Road,
IRL-Dublin 4.

2. Motorola Ireland Limited,
Unit 12C,
Santry Industrial Estate,
IRL-Dublin 9.

3. Eirpage Limited,
Anglesea House,
Donnybrook,
IRL-Dublin 2.

Done at Brussels, 18 October 1991.

For the Commission

Leon BRITTAN

Vice-President