COMMISSION DECISION

of 15 December 1994

relating to a proceeding pursuant to Article 85 of the EC Treaty and Article 53 of the EEA Agreement

(IV/34.768 — International Private Satellite Partners)

(Only the English and Italian texts are authentic)

(Text with EEA relevance)

(94/895/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 2, 6 and 8 thereof,

Having regard to the application for negative clearance and the notification for exemption, submitted pursuant to Articles 2 and 4 of Regulation No 17 on 28 June 1993 by the parties concerned below,

Having regard to the request made by the parties on 14 February 1994, to extend the application and notification to Article 53 of the EEA Agreement,

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

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

Whereas:

I. THE FACTS

A. INTRODUCTION

(1) On 28 June 1993, 20 agreements relating to the creation of a company were notified to the Commission. The company, International Private Satellite Partners (hereinafter referred to as IPSP) has been created under the form of a limited partnership organized under United States law, and has been formed to provide (a) international business telecommunications services to businesses in Europe and North America using its own satellite system on a one-stop shop basis; and (b) to offer bulk transmission capacity to third parties, to the extent that the capacity of the satellites is not fully utilized by IPSP or its partners.

Following the entering into force of the EEA Agreement, the parties requested the Commission on 14 February 1994 to extend the notification to cover also Article 53 of the EEA Agreement. Following such request the Commission started the relevant cooperation procedure with the EFTA Surveillance Authority.

B. THE PARTIES

(a.a) *The partners*

(2) Orion Satellite Corporation (hereinafter referred to as 'OrionSat'), which is a company organized under the laws of the State of Delaware, created by its ultimate parent company, Orion Network Systems, to serve as the general partner in IPSP. It holds the United States Federal Communications Commission (hereinafter referred to as 'the FCC') licence to construct, launch and operate IPSP's two satellites and has broad authority to manage and control IPSP's development and operations.

Orion Network Systems, which is also a limited partner in IPSP, provides telecommunications facilities and services, in particular point-to-point transmission services using subleased capacity.

OrionSat, as general partner, has a [. . .] [3] interest in the partnership that has to be added to an additional [. . .] held by Orion Network Systems.

(3) British Aerospace Communications, which is a limited partner of IPSP belonging to the British Aerospace group (hereinafter referred to as 'BAe') of companies, and formed by the latter specifically for the purpose of investing in IPSP.

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No C 305, 11. 11. 1993, p. 13 and OJ No C 159, 10. 6. 1994, p. 2.

(3) [. . .] Blanks between square brackets indicate business secrets deleted pursuant to Article 21 (2) of Regulation No 17.

It holds a [...] interest in IPSP. The British Aerospace Group is mainly engaged in the design and manufacture of civil and military aircraft, guided weapon systems, satellites and sub-systems, payloads and launch vehicle equipments and motor vehicles. In particular, it is the prime contractor for the IPSP satellites.

The total turnover of the BAe group in 1992 was £ 9 977 million (ECU 13 000 million).

(4) COM DEV Satellite Communications Ltd, which is a limited partner of IPSP in which it holds a [...] interest. It was incorporated specifically by its ultimate parent company, COM DEV Ltd, for the purpose of investing in IPSP.

The COM DEV group is an important supplier of satellite payloads subsystems for communications, space science and remote sensing applications.

(5) General Dynamics Commercial Launch Services, which is a limited partner of IPSP in which it holds a [...] interest. It provides spacecraft launch services and will also provide such services for the IPSP satellites.

It belongs to the General Dynamics Co. which is engaged in the manufacture and sale of weapon systems and platforms, space transportation, and building materials. The consolidated turnover of General Dynamics Co., in 1991 was US $ 8 751 million (ECU 7 250 million).

(6) Kingston Communications International Ltd (hereinafter referred to as 'Kingston'), which is a limited partner of IPSP in which it holds a [...] interest. It was incorporated specifically by its parent company, Kingston Communications (Hull) plc, for the purpose of investing in IPSP.

Kingston Communications (Hull) plc is a United Kingdom company, being the licensed operator of the public switched telephone network in the city of Hull and its surrounding area.

Kingston Communications (Hull) plc and BAe have incorporated a jointly controlled joint venture, Kingston Satellite Services Ltd, intended to act as the agent of both parent companies in discussions with IPSP concerning the offering of IPSP services.

The 1991 total turnover of the Kingston group was £ 59 million (ECU 77 million).

(7) MCN Sat. US, which is a United States corporation formed with the primary purpose of holding the investment of the French group Matra-Hachette in IPSP where it holds a [...] interest.

The Matra-Hachette group is active in aerospace, in particular in the manufacture of various types of satellites (through Matra Marconi Space), defence, telecommunication and CAD-CAM equipment, automobile transportation, publishing, broadcasting, movie production and advertising. Its overall turnover in 1992 was FF 55 000 million (ECU 8 350 million).

(8) STET — Società Finanziaria Telefonica per Azioni, which is an Italian company whose majority shareholder is the Istituto per la Ricostruzione Industriale (hereinafter referred to as 'IRI'), the largest Italian State company. STET's institutional function, as IRI's holding company for the telecommunications sector, is to guarantee the coordination of financial and commercial aspects in the provision of telecommunications services, manufacturing products and network installation. STET as limited partner holds a [...] interest in IPSP.

As will be described later, STET will have the exclusive responsibility for promoting the sale of IPSP satellite capacity and international business telecommunications services in Italy and 'Eastern Europe'.

(9) Trans-Atlantic Satellite, Inc., which is a subsidiary of the Japanese company Nissho Iwai Co., formed mainly for the purpose of investing in IPSP where it holds a [...] interest. In addition it will also work as a subcontractor to BAe for certain components of the IPSP satellites. In this respect it obtained a turnover of US $ 3 million (ECU 2,5 million) for the year ending 31 March 1992.

Nissho Iwai Co. is a general trading company active in trade in, and import and export of all types of domestic Japanese and foreign merchandise. Its turnover in the year ending 31 March 1992 was ECU 86 700 million. The Nissho Iwai Group has a substantial interest in a number of companies in the telecommunications business. In particular, it participates in the capital of Satellite Japan Corporation, a Japanese satellite operator, the main business of which is to sell bulk transponder capacity in Japan only. This company was merged with the Japanese company JC-Sat. The merger was cleared by the Commission last year.

(b.b) ***The limited partnership***

(10) IPSP has been organized first to provide international business telecommunications services (e.g. internal corporate networks, bulk data transfer, data collection and transport, fax and electronic document distribution, and network services by satellite and using very small aperture terminals (hereinafter referred to as 'VSATs') to multinational companies on a 'one-stop shop',

'end-to-end' basis covering North America and Europe; and secondly, to offer transmission capacity on its satellites to the extent capacity is not fully utilized by IPSP and its partners.

(11) The closing of IPSP under the notified structure started in 1982 when OrionSat filed an application with the FCC for a licence to operate an international satellite system. Following the granting of the licence, OrionSat initiated, in 1988, the process of consultation with Intelsat. The consultation lasted one year and, once finished in 1989, OrionSat entered into a contract with BAe as prime contractor for the construction and launch of the satellite system. At the same time and through the closing of the partnership, at the end of 1991, OrionSat held discussions and negotiations with prospective partners and negotiated a loan financing package from an international consortium of banks.

(12) Under the terms of the FCC's licence, IPSP or its customers were not allowed to interconnect the IPSP satellite facilities with a switched telephone network for the purpose of providing telecommunications services. However, in December 1993, the FCC adopted a new policy pursuant to which it is now possible for separate satellite systems (like IPSP) to apply to carry up to 1 250 64-kbps equivalent circuits of public switched traffic.

1. Service and facilities

(13) IPSP intends to build, launch and operate high-power Ku-band telecommunication satellites to be positioned in orbital positions 37°5 W and 47° W longitude. The first satellite, built using the Eurostar platform — developed jointly by BAe and Matra Marconi Space through a joint venture called Satcom International — will contain 28 transponders of 54 MHz bandwidth and six transponders of 36 MHz bandwidth, that will make 1 728 MHz of usable communications capacity per satellite. The geographical reach ('footprint') of the satellites will cover much of North America, much of the EEA and portions of central and eastern Europe.

(14) It is expected that the first satellite will be operational by December 1994 and the second sometime thereafter. Their design life will be 12 years.

(15) Prior to the launching and operation of its own satellites, IPSP will provide the services by relying on leased facilities.

(16) In addition, IPSP will operate its own tracking, telemetry and command facilities being built in the US to control the satellites, that will be backed up by additional facilities to be built in Italy.

(17) Customers of IPSP will have to install two-way VSATs on their premises in order to access the services.

2. Financial contribution

(18) The complex financial arrangements supporting IPSP are as follows:

(a) the partners have invested a total of US $ 90 million in equity distributed according to their respective interests in IPSP. OrionSat's contribution as general partner amounts to US $ 30 million made up of the FCC licence, certain contract rights and other tangible and intangible assets;

(b) in addition they have obtained a senior debt facility of up to US $ 251 million for the first satellite from a syndicate of international banks;

(c) certain of IPSP's partners have committed additional funds for an amount of US $ 9 million;

(d) furthermore, with a view to guaranteeing IPSP a sufficient level of utilization of the satellites' capacity, the limited partners have also agreed to lease capacity on the satellites up to a total amount of [. . .], and of [. . .] transponders. As will be described later that capacity could be re-leased by the limited partners to customers of IPSP;

(e) finally, the limited partners have entered into additional contingent lease capacity contracts with IPSP that will require them to make additional contributions to IPSP in exchange for additional transmission capacity up to [. . .] transponders, in case of negative cash flow, to allow IPSP to service the senior debt.

3. Central management and integrated operations

(19) As IPSP has been created to provide services to customers on the basis of a fully interconnected network enabling the provision of uniform services at uniform prices, the general partner is given exclusive responsibility for management and control of IPSP and, subject to certain limited rights of review and approval by the limited partners, has broad authority to carry out the development, operation and marketing and promotion of IPSP's business.

(20) This control by OrionSat is also a requirement of the FCC in order that the licence that OrionSat holds can be transferred to IPSP.

4. **Marketing and distribution**

(21) IPSP will market and distribute its services with the assistance of a number of local marketing and operating companies that will be nominated by IPSP as representative agents or distributors. Apart from STET, which is the exclusive distributor for Italy and the exclusive representative agent for a group of countries collectively referred to in the agreements as 'eastern Europe' (Austria, Hungary, Poland, Romania, Bulgaria, Malta, the former USSR, the former Czechoslovakia and the former Yugoslavia), such agents or distributors will work on a non-exclusive basis. They may, but need not, be limited partners. As in some Member States licences to provide uplink services are not available yet, IPSP will have to work with the national telecommunications operators (hereinafter referred to as 'TOs') which will act as agents. This situation is expected to last until the Community's liberalization of satellite services is effective and implemented.

C. THE RELEVANT MARKET

(a.a) ***Product market(s)***

(22) IPSP will compete in two markets:

— that of international private business telecommunications services,

— that of the offer of bulk satellite transmission capacity.

1. **International business private telecommunications services**

(23) Services of the kind that IPSP will offer to its customers are intended to address the growing need of multinational companies for advanced end-to-end communications between their geographically dispersed locations around the world and/or between them and their customers and suppliers of raw materials and intermediate products. The services include, among others, voice calling, high-speed fax, data storage and transport and video conferencing.

(24) Such services can be included in the emerging market for international (or even global) value-added services to large corporations and other intensive users of advanced telecommunications services.

(25) This is one of the segments of the overall telecommunications market with the biggest potential for growth in the years to come, taking full advantage of the current ongoing process of liberalization of telecommunications and of the growing convergence of telecommunications and electronics, in particular software.

It is significant that most of the alliances in the telecommunications field being announced nowadays include provisions to enter the value-added segment (sometimes as a first step of a broader alliance), and in particular the provision of advanced value-added services to the world's biggest corporations.

(26) The services can be provided to customers either using terrestrial facilities and establishing physical links by means of coaxial or optical-fibre cables, or using satellite facilities and VSATs. It is widely accepted that satellites are particularly recommended as regards customers' locations in remote territories and in areas having a very poor terrestrial infrastructure.

(27) Although some of the other alliances being announced include also the provision of services by satellite — as part of a basket of services to be provided mainly through cables — IPSP is the first venture that will offer services only through satellites.

(28) Another particularity of IPSP is that contrary to most of the alliances being announced — that are formed by incumbent TOs — IPSP's partners are (apart from STET and Kingston) private companies not previously active in the telecommunications field.

(29) According to the parties, this lack of private initiative is due to the fact that such companies still face significant barriers to entry arising from:

— the remaining regulation of telecommunication services in many countries notwithstanding the substantial changes that are taking place. That means that IPSP will not be able to operate on its own where exclusive rights still exist and that it will have to apply for licences to provide uplink/downlink services where total liberalization of the satellites' earth segment is not achieved. In addition, IPSP will have to coordinate with the international satellite organizations to provide services via separate satellite systems,

— the size of the investment necessary to enter the market, in particular if the entrant is acquiring its own transmission facilities. In this respect, the cost of the construction, testing and launch of the two IPSP satellites alone is budgeted at a minimum cost of US $ 425 million,

— the difficulty, cost and length of time necessary to establish a business of sufficient size and reputation, including building up brand familiarity and a customer base, in this market in particular.

2. **Offering of bulk satellite transmission capacity**

(30) This is a market of secondary importance for IPSP. The parties have declared that they will be active

on it only in case demand for IPSP's services is less than expected.

(31) Up to now, the supply of space segment capacity is mainly in the hands of three international satellite organizations (hereinafter referred to as 'ISOs'): Intelsat, Eutelsat and Inmarsat. They are the ultimate owners of a considerable number of telecommunication satellites in orbit (Intelsat for instance currently operates 13 geostationary satellites). All three have a very similar structure, e.g. they are organizations implemented by a number of agreements signed by sovereign States, represented by their governments or by their designated public or private telecommunications operators (known as 'signatories'), to provide space segment required (a) for international public telecommunication services either to all areas of the world (Intelsat) or to Europe (Eutelsat) or (b) for improved maritime and aeronautical communications (Inmarsat).

(32) Under ISOs' respective conventions, direct access to satellite segment capacity and earth station terminal facilities are reserved to the signatories (who also own the terrestrial networks), so that private satellite operators, who are in competition with signatories, are compelled to ask them for obtaining the capacity. This situation places signatories in a very strong position that further reinforces their already strong position in the telecommunications market as a whole.

(33) In addition, owners of separate satellite systems, such as IPSP, have to undergo (i) a consultation process with Intelsat (and/or Eutelsat) designed to ensure that such separate satellite systems will cause no significant economic harm to ISOs' system and (ii) a technical coordination process, also with the relevant ISOs, to ensure the technical compatibility of the new facilities and their operation with the use of the frequency spectrum and orbital space used by the existing and planned ISOs' space segment.

To date, and following the consultation process carried out by IPSP with Intelsat, Sweden, Denmark, Germany, Belgium, Luxembourg, Italy, Ireland, Austria, the United States and the United Kingdom have currently granted landing rights to IPSP or its representative. In addition, IPSP has also initiated the consultation process with Eutelsat with the support of the United Kingdom, Italy and Ireland.

(b.b) *Geographic market*

(34) IPSP will be active primarily in the area covered by the geographic reach of the satellites, i.e. much of North America, much of the EEA, and portions of Central and Eastern Europe. It is considered that this would be the geographic market covered by the agreements. This area would however be further extended by using terrestrial links and networks to cover customers' premises located outside the footprints of the satellites.

(c.c) *Position of IPSP in the market*

(35) IPSP estimates that the total private line service market represented approximately ECU 8,4 billion in 1990, of which private corporate communications for transatlantic and intra-European services accounted for ECU 1,4 billion. IPSP's projections for 1995 anticipate the latter figure to grow to ECU 3,5 billion of which IPSP will account for some ECU [...] or a [...] market share.

D. THE NOTIFIED AGREEMENTS

(a.a) *List of agreements*

(36) IPSP in its present form is a result of a lengthy and complex negotiation by and between its current partners. This complexity is clearly reflected by the number of agreements included in the notification intended to cover the organization and financing of IPSP, the satellites, arrangements for IPSP to obtain the assistance of its partners and others in marketing and so on. They are the following:

— Second Amended and Restated Agreement of Limited Partnership (and related further amendments), which sets forth the basic principles under which IPSP has been organized and will be operating.

— Communications Satellite Capacity Agreements and Contingent Communications Satellite Capacity Agreements concluded between IPSP and each of the limited partners (or the affiliates thereof) through which the latter have entered into seven-year commitments for substantial capacity on the IPSP satellite system for their own internal needs but also for resale to third parties through IPSP and intended to ensure a minimal use of the satellites' capacity, and have also undertaken to use and pay for either additional contingent capacity or make capital contributions in case a cash flow deficit occurs. The letter agreements have been concluded to respond to requirements made for IPSP's senior debt lenders.

— Agreement of Principles setting forth the general principles under which IPSP will offer

its services to customers, including also the general terms upon which it may obtain the assistance of local marketing and operating companies as representative agents or distributors of IPSP.

— Amended and Restated Preferred Bidder Agreement under which IPSP will give preference to partners in procuring various products and services to the extent that such partners' bids for the products are at least as favourable to IPSP as those of other bidders.

— Service Provision and Distribution Agreement for Italy between IPSP and STET under which STET, for as long as the provision in Italy of international business telecommunications is regulated so that, under Italian law, only STET can provide them, is designated the exclusive distributor for IPSP in Italy. Once deregulation has occurred, and provided that STET complies with certain performance criteria, STET will keep the exclusive right to promote the sale of IPSP's services in Italy.

— First Refusal Agreement for Italy between IPSP and STET under which IPSP will give STET a right of first refusal for the provision of bulk satellite capacity to customers in Italy for services in Italy. This agreement will become effective if and when the provision of satellite capacity in Italy becomes liberalized.

— Representative Agent Agreement for the Sale of Satellite Capacity in eastern Europe between IPSP and STET which sets forth the terms and conditions (including targets to be met by STET) under which STET is designated the exclusive agent of IPSP for the sale of bulk satellite capacity in 'eastern Europe'.

— Service Provision and Representative Agent Agreement for eastern Europe between IPSP and STET under which STET is appointed the exclusive and representative agent of IPSP in 'eastern Europe' for the provision of services provided that STET complies with a number of performance criteria set forth in the agreement.

(b.b) ***Details of the specific arrangements***

1. **Provisions concerning the management and structure of IPSP**

(37) The agreements contain, in particular, the following provisions:

(38) — Under Article 7.01(a) of the Limited Partnership Agreement, the general partner of IPSP is given full, exclusive and complete discretion in the management, operation and control of the business and affairs of IPSP. Conversely, limited partners are prohibited from taking part in the day-to-day management of IPSP except as expressly provided in the agreements (Article 7.10 of the Limited Partnership Agreement, and Article 2 of the Agreement of Principles). This discretion of the general partner extends also to the setting up of IPSP prices and other commercial conditions.

(39) — Notwithstanding the above, limited partners can exert a certain influence on the management of IPSP through a permanent structure that is created and composed of the following committees:

(a) Partners Planning and Policy Review Committee

Created under Article 7.11(a) of the Limited Partnership Agreement, this Committee consists of one member nominated by each partner. The general partner is to submit a number of actions to the Committee, which has the right to approve or disapprove them by a majority vote. Most important of those actions are:

— the establishment of any pricing policy with respect to IPSP's sale of services which is intended to result in the sale of satellite transmission capacity to customers generally at prices which are lower than those charged to limited partners or the sale of satellite transmission capacity to certain IPSP partners at prices or terms materially different from the prices and terms offered or available to IPSP partners generally,

— the decision by the general partner to increase the budget above a given percentage,

— the approval of business plans for IPSP services concerning (i) IPSP resources, (ii) additional funding, and (iii) the initiation of IPSP services prior to the launch of the satellites.

(b) Technical Committee (Article 7.15 (b) of the Limited Partnership Agreement).

This is an advisory committee on all matters relating to the technology and operation of the IPSP satellite system and transmission networks. In particular, and with regard to IPSP services, it recommends technical standards for the equipment and operations.

(c) Under Article 7.04 of the Limited Partnership Agreement, certain major decisions by the general partner that would

have a significant impact on the limited partners' investmants, are subject to a majority vote by them. They include dissolution of IPSP, its merger or consolidation with another entity, and the sale of a material portion of IPSP's assets.

(40) — In order to ensure that OrionSat devotes its full-time efforts to the management of IPSP, under Article 7.06 of the Limited Partnership Agreement, the general partner is prevented from engaging in any business other than the management of the partnership without the prior written unanimous consent of the limited partners. In addition, neither OrionSat nor Orion Network Systems, Inc. may have other business interests or may engage in other business ventures that compete directly or indirectly with IPSP.

Conversely, limited partners are free to compete with IPSP in the provision of services to customers. They also remain free to acquire business interests or engage in other business ventures with competitors of IPSP or limited partners thereof (Article 7.06 of the Limited Partnership Agreement and Article 7 of the Agreement of Principles.

2. **Most favoured provisions**

(41) The agreements contain a number of provisions referred to as 'most favoured nation' under which IPSP warrants that limited partners will get the best prices, terms and other conditions that IPSP is offering to each of its customers for similar capacity and/or services. Such provisions are included in Article 16.02 of the Limited Partnership Agreement and also in Articles 16.01 of the various Capacity Agreements, 21.01 of the various Contingent Capacity Agreements, and in Articles 4.5 and 15.1 of the Service Provision and Distribution Agreement for Italy, 3.5 of the Capacity Sale Agreement for eastern Europe and 4.4 and 15.11 of the Service Provision Agreement for eastern Europe.

These provisions in turn give IPSP comparable protection as to services and equipment it obtains from partners in order to enable it to function at a competitive cost level. This protection, however, does not apply in the case of contracts between a limited partner and Intelsat, Eutelsat, Inmarsat and domestic satellite systems.

3. **Sales of satellite capacity at prices below those paid by limited partners**

(42) Under Articles 16.01 (b) of the Capacity Agreements and 21.01 (b) of the Contingent Capacity Agreements, if IPSP wants to sell or lease satellite capacity to third party customers at a pro rata price per MHz per month that is below the one that limited partners have agreed to pay to IPSP under the abovementined agreements, then IPSP must offer them the same amount of additional transponder capacity being offered to customers at the same price but with a 10 % discount and on the same other terms and conditions.

4. **Use by IPSP of satellite capacity contracted by limited partners**

(43) Under Article 8 of the Agreement of Principles, and as long as IPSP is generating sufficient positive cash flow to cover senior debt service, IPSP undertakes to make use first of capacity which limited partners have contracted on a firm commitment basis — i.e. under their respective capacity agreements — and which they are unable to use for their internal needs.

5. **Calls for tenders by IPSP**

(44) Under Article 2 of the Preferred Bidders Agreement, when IPSP calls for tenders worth more than US $ 1 million, if one or more limited partners supplies a bid which is no less favourable to IPSP than third party proposals with regard to price, design, performance, payment, delivery schedule and other terms and conditions, then, subject to a possible 'best and final' round of bids, IPSP is to award the contract to the limited partner(s) whose bid(s) achieve those criteria, terms and conditions.

6. **Marketing and distribution conditions**

(a) *General*

(45) The marketing and distribution of IPSP services will be centrally planned and managed but implemented in a decentralized manner. In addition, services will be offered at a uniform price and quality level.

(46) These principles are implemented through the following specific arrangements:

— IPSP has sole and exclusive control and operation of the satellite system (Articles 7.01 and 7.10 of the Limited Partnership Agreement, 8.01 of the Capacity Agreements and 13.01 of the Contingent Capacity Agreements),

— the marketing and distribution of international business telecommunications services are the responsibility of the general partner (Article 2 of the Agreement of Principles), who will also establish all prices for IPSP services (except where prohibited by law, given exclusive rights granted to the TO in certain countries to do so). In addition sales of services will be centrally managed by the general partner but primarily undertaken by representative agents chosen by the general partner (and that could include limited partners). In contracting with

agents or distributors, the general partner is to obtain competitive prices, terms and conditions and provide performance criteria and goals for such agents. Finally, contracts will be made in the name of IPSP,

— Attachment A of the Agreement of Principles provides that where IPSP services are to be provided in a territory where exclusive or special rights exist relating to the provision of such services, the IPSP services will be provided to the customer under a separate contract, drawn up in accordance with the laws applicable in that territory and concluded between the customer and IPSP's agent, that in such cases will normally be the national TO.

(b) *Specific arrangements with regard to STET*

(b.1) Regarding the Italian territory

(47) Under Article 2 of the Service Provision and Distribution Agreement for Italy, STET is appointed as IPSP's exclusive distributor in Italy for as long as the Italian telecommunications market is regulated [1].

If the Italian territory becomes deregulated, the exclusive right of STET will be converted into an exclusive right to promote the sale of IPSP's services in Italy. This right will be dependent upon STET's compliance with certain performance criteria expressed in terms of revenue targets. In case STET fails and does not take all reasonably necessary steps to remedy such failure within a period of 18 months, then IPSP is to be permitted to appoint other distributors in the Italian territory on a non-exclusive basis. However, STET will still be a non-exclusive distributor.

Conversely, STET undertakes not to promote IPSP services outside the Italian territory with the exception of the 'eastern European' territory [2] (Article 2.3. of the Service Provisions Agreement).

In spite of such exclusivity, if IPSP or one of its agents, distributors or partners after the Italian territory has been deregulated, is requested to provide services in Italy, they can do so.

Once deregulation is in place, if a customer located in Italy wants to purchase from IPSP a comprehensive package of international business telecommunications services, also including ground operations services with respect to its Italian site(s), then IPSP will in principle subcontract with STET for the purpose of providing ground operations services in Italy. However, the final decision as to the use of STET's ground operation services lies in the hands of customers; so that, if for cost or other reasons, customers prefer to obtain the ground operations services elsewhere, then IPSP would provide the package of services without the ground operations services.

(48) In addition, under the First Refusal Agreement for Italy, when the provision of satellite capacity in Italy becomes liberalized, IPSP is to give STET the opportunity, during a 60-day period, to provide the bulk satellite capacity requested by a customer located only in the Italian territory or, if the customer prefers to acquire the capacity from IPSP, to provide such capacity to IPSP on the same terms and conditions agreed with the customer. In any case, the capacity referred to is the capacity committed by STET and the IPSP's satellites. The purpose of this provision is to give STET a certain priority in discharging the risks it has assumed in undertaking such commitment. However, the price and terms of the lease or sale of satellite capacity to customers, and also to Italian customers, are determined by IPSP.

(49) Finally, under Article 3.3 of the Service Provision and Distribution Agreement for Italy, IPSP undertakes to forward to STET inquiries from prospective customers who wish to receive telecommunications services within the Italian territory and not extending beyond it.

(b.2) Regarding the countries collectively referred to as 'eastern Europe'

(50) The two relevant agreements are very similar to those regarding Italy except that in the present case STET is being appointed IPSP's exclusive representative agent for the purpose of offering IPSP's bulk satellite capacity and services.

(51) According to that exclusivity, and for as long as the countries concerned are regulated (and during the first year following their deregulation), IPSP and the limited partners undertake not to promote the sale of either bulk satellite capacity [3] obtained from IPSP or satellite telecommunications services offered on other satellite systems and satelite telecommunication services provided by IPSP or that are reasonably equivalent to the IPSP services promoted by STET.

[1] For the meaning in the text of the words 'regulated' or 'deregulated' as regards Italy, see recital (36), fifth indent.

[2] However, this provision does not prevent STET from engaging in passive sales outside Italy.

[3] This agreement applies only to customers located in the eastern European territory, and not to customers located elsewhere who require capacity for a number of sites, also including one or more sites in the eastern European territory.

(52) However, IPSP can sell bulk capacity in the countries independently from STET and limited partners are free at any time to market satellite capacity obtained from other satellite systems, international business telecommunications services provided using capacity on the IPSP's satellites, provided that the services are not reasonably equivalent to the IPSP's services marketed by STET. Furthermore, following one year after deregulation in the countries concerned, limited partners will be allowed to offer additional bulk satellite capacity obtained from IPSP and/or services that are equivalent to those marketed by STET, provided nonetheless that no logo or trade name belonging to IPSP is used.

Finally, any third person or entity having purchased satellite capacity from IPSP would be free at any time to sell the capacity or any satellite telecommunication services, provided that no logo or trade name belonging to IPSP is used.

(53) STET's exclusive rights under the two agreements will continue for as long as it meets certain performance criteria defined in the agreements.

7. No third-party observations

(54) Following the two publications pursuant to Article 19 (3) of Regulation No 17 made to cover Article 85 of the EC Treaty and Article 53 of the EEA Agreement respectively, no comments were received from third parties.

II. LEGAL ASSESSMENT

A. APPLICATION OF ARTICLES 85 (1) OF THE EC TREATY AND 53 (1) OF THE EEA AGREEMENT TO IPSP

(55) On the basis of arguments developed below, partners of IPSP are not to be considered as actual or potential competitors in the relevant markets to be addressed by IPSP.

(a) In order for IPSP to enter the market as a facilities-based provider, it has been necessary to obtain a number of authorizations and licences, and to arrange for the financing, construction, launch and operation of two satellites. In this respect, it is considered that none of the partners is in a position to meet all of those requirements alone but only through cooperation in a venture like the present one. In this respect,

— only IPSP's general partner, OrionSat, has the necessary authorizations and licences from the FCC and Intelsat to launch and operate the satellites. Moreover, the terms of the FCC licence prevent the general partner from releasing control over it without prior FCC approval and define very clearly the kind of services that IPSP would be allowed to provide (see recital (12)),

— none of the IPSP partners holds the necessary authorizations and licences to provide international telecommunications services in all the countries inside the footprint of the satellites. Only STET and Kingston (apart from OrionSat itself) hold any licence to offer telecommunications services but STET is limited to Italy, and Kingston to the town of Hull and the surrounding area. As regards the other limited partners, they (or their ultimate parent companies) are industrial companies active in different segments of the aerospace market and have neither the licences nor the experience required in providing communication services to other companies on a competitive basis (although some of them have gathered some experience by managing their own internal networks).

(b) None of the IPSP partners could reasonably be expected to make the investment, and assume the substantial risk associated with it, required to enter the market. The very high barriers to entry, the substantial amount of market power in the hands of the incumbent TOs in the overall telecommunications market and of ISOs in the satellite transmission market, the advanced technologies involved, the substantial inherent risk of failure associated with space operations and the broad geographic area covered, together with the amounts required and the bargaining power of customers (in particular the big multinational corporations), make this venture very risky. In view of the above, it is not realistic to consider, from an economic point of view, that any of the partners would enter the market alone.

(c) In addition, as regards marketing and distribution, the principle of uniform prices and other conditions in different territories, together with the implementation of such marketing in a decentralized manner, seems appropriate to fulfil the needs for world-wide telecommunications services, on a one-stop-shopping and billing basis, of customers having branches or subsidiaries dispersed in different territories.

The provision of such services is not adequately guaranteed by the existing bilateral arrangements between TOs, under which each one provides its own facilities within its own country. This means that each national TO prices its portion of the network separately, contracts with the customer seperately, and bills it separately, for a set of services that is often not uniform in all territories involved given the different technical features of each network involved. In this respect, the result of a combined network so created is as strong as its weakest link and so, the number of services and the features thereof are those supported by the less performant national network involved. In addition, operational matters such as monitoring quality, correcting faults and providing customer service are also performed separately.

National TOs are becoming increasingly aware of the importance of the market for international business telecommunications and of the inconveniences resulting from the situation described. As indicated, they are trying to overcome them by forming consortia with other TOs to offer such services (and, in most cases, to do other things). Some of them have already been notified to the Commission.

(56) The creation and implementation of IPSP, by introducing a new competitor, may be expected to increase the level of competition in a fast-growing segment of the overall telecommunications market, until very recently reversed to companies holding exclusive rights. This would help to accelerate the pace at which new and uniform services are offered to customers and to improve their price and performance.

(57) The impact in the market for bulk satellite transmission capacity is expected to be positive as well as quite imporant, in particular, because the creation of IPSP means creating an alternative, and private, supplier of space segment capacity to the incumbent and very strong ISOs and to national systems controlled by national TOs. Thus, IPSP would mean increasing the choice available to service providers demanding space segment capacity.

(58) In conclusion, the implementation of IPSP, one of the first private ventures to enter the evolving telecommunications market, falls outside the scope of both Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement.

B. APPLICATION OF ARTICLE 85 OF THE EC TREATY AND ARTICLE 53 OF THE EEA AGREEMENT TO CONTRACTUAL PROVISIONS

(59) The following provisions fall outside both Article 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement:

— the fact that STET is nominated exclusive distributor of IPSP's services in Italy while the Italian market is regulated. This provision merely reflects the fact that under Italian law STET still enjoys exclusive rights in some of the areas to be addressed by IPSP. Even in the absence of the agreement, no other company would have been able to distribute IPSP's services in Italy,

— provisions concerning the nomination of STET as exclusive representative agent in 'eastern Europe' apart from Austria. As the countries concerned are outside the EC and the EEA, these provisions do not produce any appreciable effect in the EEA.

(60) The following provisions are to be considered as non-appreciable restrictions of competition:

— As regards the agreements relating to the Italian territory, the exclusive right to promote the sale of IPSP's services in Italy granted to STET after deregulation has occurred is not an appreciable restriction of competition because:

(a) IPSP's services are by definition international, so that Italian customers can sign a contract for the same services with agents or distributors not located in Italy through their subsidiaries or facilities outside Italy,

(b) potential customers of IPSP will be big corporations often having facilities in several countries,

(c) as the only exclusivity remaining after liberalization will be the exclusivity to promote the sale of the IPSP's services in Italy, IPSP's agents and distributors other than STET will be free to sell the IPSP's services in Italy,

(d) STET is not prevented from dealing with competitors of IPSP, and

(e) most importantly, IPSP is expected to have a market share below 5% of the two markets concerned.

— As regards the agreements relating to the Austrian territory, the above reasoning concerning the Italian territory is also valid. In addition, the exclusive rights that STET has, as agent for IPSP, are more limited than those STET has as regards Italy (see recitals 51, 52 and 53), given that IPSP can address itself directly to customers and that limited partners can market capacity and/or services obtained from other satellite systems and even services making use of satellite capacity obtained from IPSP.

(61) For the following reasons, the provisions detailed below, while putting restraints on the partners' freedom of action, are concluded to be directly related and necessary to IPSP, and do not exceed what the creation and operation of IPSP requires. Consequently they are to be treated, under the competition rules of the EC Treaty and of the EEA Agreement, as ancillary restraints.

(a) The non-competition provision is ancillary because it refers only to the general partner and is a locigal consequence of the sole responsibility granted to it. The provision is aimed at ensuring that the general partner devotes itself to the management of IPSP's business on a full-time basis. As for limited partners, as indicated above, they are free to compete with IPSP.

(b) The 'most favoured nation' provisions are ancillary because they are intended to ensure that IPSP treats each limited partner, which will normally also be a customer of IPSP, on an equal basis — but not on more favourable terms — as regards the other limited partners and, in particular, third party customers, with no investment made in IPSP.

(c) The preference to be given to limited partners in respect of certain calls for tenders issued by IPSP, under the Preferred Bidder Agreement, can also be considered ancillary on the basis that a certain preference towards limited partners seems natural, in exchange for the substantial amounts of money they have invested in the venture, and considering that most of them are themselves active in different segments of the aerospace market, and so are manufacturers of equipment of the same kind as that required by IPSP. It has also to be noted that the provision, as it reads, does not give limited partners any advantages as to price or other terms and so it is not expected to produce any appreciable foreclosure effect affecting the competitive position of third parties. In any event, and given both the structure of the relevant markets and in particular the presence of powerful incumbent companies, any abusive interpretation of this provision seems to be excluded if the venture is to succeed in gaining a presence in the markets it will address.

(62) Ancillary restraints are to be assessed together with the company created. In this respect, as IPSP has been concluded not to fall within the scope of Article 85 (1) of the EC Treaty and of Article 53 (1) of the EEA Agreement, then neither do the provisions detailed above,

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in its possession, the Commission has no grounds for action under Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement in respect of the notified agreements relating to the creation of the International Private Satellite Partners company (IPSP).

Article 2

On the basis of the facts in its possession, the Commission has no grounds for action under Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement in respect of the non-competition obligation on the general partner under Article 7.06 of the Limited Partnership Agreement, the 'most favoured nation' provisions under Article 16.02 of the Limited Partnership Agreement, under Article 16.01 of each Capacity Agreement, under Article 21.01 of each Contingent Capacity Agreement, under Articles 4.5 and 15.1 of the Service Provision and Distribution Agreement for Italy, under Article 3.5 of the Capacity Sale Agreement for Eastern Europe and under Articles 4.4 and 15.11 of the Service Provision Agreement for Eastern Europe, and in respect of the preference to be given to limited partners under Article 2 of the Preferred Bidder Agreement, the appointment of STET as exclusive distributor of IPSP in Italy under Article 2 of the Service Provision and Distribution Agreement for Italy and the appointment of STET as exclusive representative agent of IPSP under Articles 2 of the Representative Agent Agreement for the Sale of Satellite Capacity in Eastern Europe and of the Service Provision and Representative Agent Agreement for Eastern Europe.

Article 3

This Decision is addressed to:

International Private Satellite Partners, L.P.,
2440 Research Boulevard, Suite 400
Rockville, Maryland 20850
USA

Orion Satellite Corporation
2440 Research Boulevard, Suite 400
Rockville, Maryland 20850
USA

British Aerospace Communications Inc.,
Suite 500, 13873 Park Center Road
Herndon, Virginia 22071
USA

COM DEV Satellite Communications Ltd
155 Sheldon Drive
Cambridge, Ontario N1R 7H6
Canada

Kingston Communications International Limited
Telephone House,
Carr Lane
GB-Hull HU1 3RE

MCN SAT U.S., Inc.,
c/o Matra Aerospace, Inc.,
1735 Jefferson Davis Highway
Suite 810
Arlington, Virginia
USA

Orion Network Systems
2440 Research Boulevard, Suite 400
Rockville, Maryland 20850
USA

STET — Società Finanziaria Telefonica per Azioni
Corso d'Italia 41
I-00198 Rome

Trans-Atlantic Satellite, Inc.,
c/o Nissho Iwai American Corporation
1211 Avenue of the Americas
New York, N.Y. 10036
USA

General Dynamics Commercial Launch Services, Inc.,
9444 Balboa Avenue
San Diego, California 92123
USA.

Done at Brussels, 15 December 1994

For the Commission
Karel VAN MIERT
Member of the Commission