II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 18 December 1996

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

(Case IV/35.518 — Iridium)

(Only the English text is authentic)

(Text with EEA relevance)

(97/39/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 Austria, Finland and Sweden, and in particular Article 2 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 11 August 1995,

Having regard to the summary of the application and notification published pursuant to Article 19 (3) of Regulation No 17 and to Article 3 of Protocol 21 of the EEA Agreement [2],

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

Whereas:

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No C 255, 3. 9. 1996, p. 2.

I. THE FACTS

A. Introduction

(1) The Iridium system was conceived by the United States company Motorola Inc. in 1987 to provide global digital wireless communications services using a constellation of low earth orbit (LEO) satellites. Services will include voice telephony, paging and basic data services (such as facsimile) and will be provided via portable hand-held (dual mode or single mode) telephones, vehicle mounted telephones, pagers and other subscriber equipment.

Iridium expects to be the first operational provider of global satellite personal-communications services (S-PCS). The system is expected to become commercially operational by 1 October 1998. For that purpose, 66 satellites will have to be launched and placed in orbit during the next 24 months.

B. Parties

(2) Motorola Inc., is a US provider of wireless communications and electronic equipment, systems, components and services for worldwide markets. Motorola is the originator of the Iridium concept and is the primary contractor to Iridium for the procurement of the space segment and a major supplier for other components of the Iridium system.

Motorola's investment percentage in Iridium is 20,1 %. It has reserved for itself the Mexican/Central American gateway (1), has an interest in the South American gateway and shares the North American gateway with Iridium Canada and Sprint.

Under the Space System Contract Motorola has agreed not to produce for itself or others any similar satellite-based system without Iridium's prior written approval until 31 July 2003 or the termination of the Space System Contract, whichever is earlier.

(3) Apart from Motorola, Iridium is owned by 16 strategic investors, including a number of telecommunication services providers and equipment manufacturers from around the world. Each of them (with the exceptions of Lockheed Martin and Raytheon) is expected to own and operate a gateway (individually or jointly) and may also act as service provider (or nominate others to do so) within its allocated exclusive gateway services territory.

Investors are the following: Iridium China (Hong Kong) Ltd (belonging to the corporate group China Great Wall Industry Corporation: investment percentage 4,4 %), Iridium Africa Co., (formed by the Saudi group Mawarid Overseas Company: 2,5 %), Iridium Canada, Inc., (owned by a Motorola subsidiary: 33 %; and by two subsidiaries of the Canadian company BCE, Inc.: 4,4 %), Iridium India Telecom Private Ltd. (India: 3,9 %), Iridium Middle East Co. (owned by two Saudi groups: 5 %), Khrunichev State Research and Production Space Center (Russia: 4,4 %), Iridium Sudamérica (owned by a Motorola subsidiary, a Venezuelan consortium and a Brazilian group: 8,8 %), Korea Mobile Telecommunications (controlled by the South Korean conglomerate Sunkyong Business Group: 4,4 %), Lockheed Martin (USA: 1,3 %), Nippon Iridium Co., (a consortium formed by two Japanese groups, DDI Co., and Kyocena Co., and a number of other Japanese investors: 13,2 %), Pacific Electric Wire & Cable Co., (Taiwan: 4,4 %), Raytheon Co., (USA: 0,7 %), Sprint (USA: 4,4 %) and Thai Satellite Telecommunications Co., Ltd (Thailand: 4,4 %).

Two European companies are also strategic investors; Stet (Italy: 3,8 %) and Vebacom (Germany: 10 %). Each of the two has its own gateway service territory covering different parts of Europe and the associated exclusive right to construct and operate a gateway within its respective territory. However, they have concluded an agreement to jointly install and operate their gateways. In order to do so, they will create a joint venture. The first gateway will be that in Italy.

Most of the above investors do not operate yet; they have been created for the purpose of investing in Iridium. In the building-up phase of the system, many of the investors will provide some services to Iridium, basically as subcontractors to Motorola. Thus, China Great Wall and Khrunichev will provide launching services, Lockheed Martin is a principal subcontractor in the construction of the Iridium satellites, Raytheon is primarily responsible for providing the satellite antennas and Stet, through its subsidiary Telespazio, will build and operate the backup system control facility.

(4) Iridium LLC, a US-incorporated company with limited liability, has been formed to establish and commercialize the Iridium communications system. It will own the space-related portion of the system including the satellites and the related ground infrastructure for the delivery of Iridium services.

(5) As regards distribution of Iridium services, it will have a central role, issuing guidelines for the appointment of service providers by gateway operators and establishing commercial and pricing policies. In addition it will provide some business support functions required by gateway operators and service providers, including a clearinghouse to calculate the amounts due to and from Iridium and each gateway operator.

(6) Iridium will be managed by a Board of Directors made up of 24 members. Of these, 23 will be elected by the investors and the Chairman will be elected by the other 23. The Board of Directors will delegate certain executive authority to the management team of the company, which will include a Chief Executive Officer and a President. The Chairman of the Board of Directors will also be the Chief Executive Officer. The Chief Executive Officer will be in the general and active charge of the entire business and affairs of the corporation. The President shall have general charge of the business, affairs and property of the corporation under the supervision of the Board of Directors and the Chief Executive Officer. The management will be responsible for carrying out the directions of the Board of Directors and for informing it of progress in the company's development and business.

(1) For a description of a gateway, see recital 12.

(7) Decisions by the Board of Directors will be adopted by simple majority.

C. The Iridium system

1. *The network*

(8) The system [1] will consist of the space segment, the gateways and the user handheld terminals. Iridium will own the space segment, while gateway operator investors will own and operate the gateways and subscribers will purchase or lease the subscriber terminal equipment from service providers and other retailers.

(9) The space segment includes the satellites [2] and the system control segment (SCS) necessary to monitor, manage and control the satellites and the provision of services.

(10) Iridium intends to operate a constellation of 66 [3] satellites to be deployed in low earth orbit (780 km. above the earth's surface). The satellites will be arranged in six planes of 11 satellites each, in near polar orbit. Each satellite will circle the earth every 100 minutes and will cover a circular area with a diameter of approximately 4 700 km.

Satellites are equipped to communicate with subscriber terminals and to send traffic direct from one satellite to another. As regards the latter, each Iridium satellite will have four cross-link antennas to allow it to communicate and route traffic to the two satellites that are fore and aft of it in the same orbital plane as well as neighbouring satellites in the adjacent co-rotating orbital planes. Inter-satellite networking provides access to the Iridium system irrespective of gateway location by routing a call from satellite to satellite until it is connected to the gateway which is most appropriate to the destination of the particular call. In that respect, the system allows any user in any country that has authorized the Iridium service to receive a call originating from any gateway.

(11) The SCS includes a master control facility [4] (located in the USA), a back-up control facility (to be located in Italy) and two tracking, telemetry and control stations (TT&C) [5] located in Canada and Hawaii.

(12) Gateways are switches which communicate with subscribers' units and other satellites via the SCS and the constellation. They will serve as the interface between the satellite constellation and the public switched telephone networks (PSTN). As was stated above, they will be owned by investors. There will be 13 gateways in operation.

The concrete functions of a gateway will be to support the subscriber billing function, to process calls, to keep track of each user location and to communicate with PSTN to which it will be interconnected (in case of calls to fixed users).

(13) Finally, handsets will be produced by major manufacturers of equipment. Motorola has agreed to license to other suppliers the right to use its proprietary information to manufacture and sell Iridium-compatible subscriber equipment subject to reasonable terms and conditions acceptable to both parties. Most handsets will be capable of dual-mode operation with both satellite and terrestrial cellular (including GSM) systems, so that they will be able to select, either automatically or under user control, satellite or terrestrial modes of operation.

2. *Distribution of the services*

(14) Distribution of Iridium services will involve different participants in the notified agreements:

— Iridium will have responsibility for central functions, such as the space segment and certain business support systems including the clearing-house,

— gateway operators will be responsible for the gateway,

and

— service providers will provide services to customers and will sell and/or lease subscriber equipment.

(1) The total system's implementation costs are estimated at nearly USD 4.7 billion (not including handsets).

(2) The system will use a frequency in the range of 1616-1626,5 Mhz for user links (as reserved for S-PCS systems during WRC-92), 19,4-19.6 Ghz and 29,1-29,3 Ghz for feeder and gateway links (space to earth and earth to space) and 23,18-23,38 Ghz for the inter-satellite links.

(3) The system also includes a number of spare satellites in orbit, intended to replace failed ones.

(4) The master control facility will control the performance and status of satellites and manage the network. The back-up control facility will replace the master control facility in case of failure and will control spare satellites in orbit.

(5) TT&C stations will track the movements of the satellites and adjust their orbits to maintain the constellation.

(a) Gateway operators

(15) Under the stock purchase agreements, each investor in Iridium designated as a gateway operator will have exclusive rights to provide Iridium services within the geographic territory provided in the contract. Iridium will not authorize any other person to provide gateway services or construct gateways in the investor territory.

(16) In addition, gateway operators will have exclusive rights to act and/or designate others to act as service providers within their designated gateway territory. It is the intention of Iridium that every gateway operator shall create a network of service providers within its allocated territory.

(17) Finally, under each gateway authorization agreement, Iridium will provide the gateway operator, and its designated service providers, with continuous access to the Iridium space system. Such right is subject to continued compliance with the applicable mandatory provisions of the Iridium System Practices (1).

(18) In exchange, gateway operators have to:

— apply for, obtain and maintain all governmental authorizations and frequency allocations necessary to construct and operate the gateway and to provide services in each of the countries included in the gateway services territory,

— construct, operate and maintain the gateway,

— establish and maintain appropriate interconnection, access and settlement arrangements through and with every PSTN operating within the gateway services territory,

and

— provide gateway services to its designated services providers in each of the countries included within its allocated service territory.

(b) Service providers

(19) Service providers will be responsible for marketing and retail sale of the services and terminals and will have primary contact with end users within their territories. They will also be responsible for all aspects of account management and customer care including customer credit, billing, accounting and customer credit risk. In addition, they have to support gateway operators' efforts to obtain regulatory authorizations and frequency allocation within their territories

(20) Appointment of the service provider will in principle be non-exclusive in order to allow access to the largest customer base and to ensure adequate availability of subscriber equipment and customer service within the gateway service territory. Such would be the case in wireless markets open to competition. However, exclusive service provider agreements could also be possible in other markets. It is expected that most will also be local cellular service providers. In this respect, S-PCS services will, in general, be offered by wireless terrestrial networks as a premium service in order to extend coverage to areas outside terrestrial coverage or where terrestrial roaming is not possible.

It is contemplated that a single company could act as a service provider for more than one gateway operator investor. In addition, service providers can operate in more than one country within a gateway service territory.

(21) Service providers will be appointed by gateway operators in accordance with guidelines provided by Iridium. According to the notification, an initial screening of the service provider will assess financial standing, reputation, concern for customers and resources. The major determinants for selection will be the existence of a substantial subscriber base of wireless mobile users and the degree of performance of the potential service provider for customer care and billing services which are essential for an adequate provision of the service.

(c) Pricing

(22) Price to subscribers will be made up of four charges:

1. a payment by the gateway operator to Iridium for use of the space segment to be established by the Iridium Board of Directors;

2. a payment to the gateway operator for use of the gateway link at a price to be set by the gateway

(1) Iridium Systems Practices (ISP) is the set of guidelines, recommendations, rules, plans and other instructions related to technical and operational matters associated with the operation of the Iridium system. Some technical and operational portions of these practices are intended to be mandatory in order to secure a high degree of network integrity. The ISP has not yet been completed even in draft form.

operator, albeit following Iridium's guidelines and recommendations to the extent permitted by applicable law and regulation;

3. a payment to the service provider,

and

4. tail charges, if any, for the origination or completion of calls over the PSTN.

(23) Service providers will be the collection point for charges paid by subscribers. Revenues will be distributed by the clearinghouse operated by Iridium.

The clearinghouse will hence act as a central point for collection of call detail record and will calculate and execute the net settlement position among Iridium and all gateways.

(24) End customers for voice services are expected to pay, on global average terms, a monthly fee of around USD 50 and a tariff per voice minute traffic of around USD 3 [1], plus any applicable PSTN tail charges.

D. Relevant Market

1. *Product market*

(25) The term S-PCS system denotes a network used to provide satellite personal communications services, usually on a worldwide basis. A S-PCS system encompasses a constellation of LEO (low earth orbit), MEO (medium earth orbit) or GEO (geostationary earth orbit) satellites [2], their control earth stations and a number of gateway earth stations through which access will be provided to terrestrial fixed or mobile networks. Such a configuration will support full user mobility and identification by a single number anywhere in the world, using 'intelligent' features, similar to those of digital terrestrial cellular systems (such as GSM), that will be located either in earth stations or, as in the current case, in the satellites themselves.

(26) It is expected that voice service will be the primary application for these systems, but other significant segments will involve so-called mobile personal digital assistants, data transmission and paging.

(27) LEO and MEO systems (to be used by most of the currently announced S-PCS systems) do not present a high degree of substitutability with existing or planned GEO systems. Geostationary satellites are more complex and expensive than other satellites. They require more cooperation from the end-user to establish an unobstructed, clear line of sight to one of the satellites. In addition, power losses over such great distances from earth make hand-held portability currently impossible [3]. Sheer distances from earth also cause echo and time delays (of a magnitude of around half a second that compares very badly with the 20-151 milliseconds of a LEO system like Iridium) that seriously degrade and confuse normal voice communications. In addition, GEO subscribers located at high latitudes (that is, near the Poles) experience a shadowing effect that makes the successful establishment of calls difficult.

(28) S-PCS systems are expected to act as a complement to both GSM and digital cordless telephony within fixed radius (DECT) wireless terrestrial mobile technologies. This will be particularly the case in areas where the cellular network has failed to penetrate (namely rural parts of the developed world and both urban and rural parts of lower income countries) or where terrestrial roaming is not available because of incompatible technologies. In this respect, they will be offered by GSM network operators as an additional feature priced at a premium rate.

However, S-PCS are not intended to compete with terrestrial cellular and paging systems in urban or other densely populated areas because of the advantages such cellular and paging systems have in terms of cost, voice quality and signal strength. In that respect, the performance of S-PCS systems will deteriorate in urban areas, given the existence of a large number of very densely spaced obstacles (such as buildings). That deterioration will be exacerbated in moving automobiles without external antennas and, in particular, inside buildings.

[1] Iridium will keep a part of the access fee and of the usage fee. In addition, Iridium expects to keep an additional amount as compensation for the clearinghouse function. The remaining will be used to compensate gateway operators, service providers and other parties.

[2] LEO satellites are located around 900 km over the earth. Full coverage of the earth's surface would require a minimum of 66 LEO satellites. This is the kind of orbit chosen by Iridium.
MEO satellites are located around 10 000 km over the earth. Full coverage of the earth's surface would require a minimum of 10 MEO satellites.
GEO satellites are located at 36 000 km over the earth. Full coverage of the earth's surface would require only 3 GEO satellites.

[3] The smallest GEO receiver is as big as a small briefcase.

(29) In addition, S-PCS systems are expected to act as a complement and even a substitute for the public switched fixed telephone network, enhancing service coverage in remote areas of low population density and/or where the terrestrial infrastructure is very poor.

(30) Major users of S-PCS will be international business travellers using their dual terminals [1] in the terrestrial mode within a given network and switching to satellite in areas outside terrestrial coverage or with incompatible networks. Other important categories of user will be rural communities, Government communications and aeronautical users.

2. *Geographical market*

(31) When fully operational, the Iridium system will be able, from a technical point of view, to provide a global coverage. However, the exact scope of the geographical market is difficult to ascertain. In addition, the conclusions of the Commission in this case will not be affected by whether the market is finally worldwide or smaller than that. For that reason, the precise dimension of the geographical market can be left open.

3. *Competition in the future S-PCS market*

(32) S-PCS systems represent a market which is expected to result in revenues of ECU 10 000 million to 20 000 million during the next decade. Competition is expected to be very intense and to come not only from other S-PCS systems, but also from terrestrial networks.

(33) A number of alternative projects are known to be trying to offer hand-held telecommunication services through satellite, some of them (the so-called 'little LEOs') having a more limited product and/or geographical coverage, whilst others (the so-called 'big LEOs') are aiming at the same relevant market as Iridium. Most planned S-PCS systems are US-led initiatives. However, European industry is already substantially involved in the announced S-PCSs. The most important competitors of Iridium will be:

— Inmarsat-P/ICO [2]

(34) ICO is a S-PCS system sponsored by Inmarsat and a substantial number of its signatories. Unlike Iridium it will use 10 satellites in ICO (intermediate circular orbit, an orbit which is included among MEO orbits) to provide global mobile and other ancillary telecommunications services. The system is expected to be operational by the end of the year 2000. The cost of the system approaches USD 3 billion.

— Globalstar

(35) Globalstar intends to set up a S-PCS system using 48 LEO satellites. The Globalstar consortium is led and sponsored by the Loral Corporation, a leading US defence electronics and space company. Partners/contractors include the European aerospace companies Alcatel (France), Aerospatiale (France), Alenia (Italy), Deutsche Aerospace (Germany) and Tesam, a joint venture created by Alcatel and France Télécom. The total cost of the system is estimated at USD 2 000 million.

Globalstar expects to begin launching satellites in the second half of 1997 and to commence initial commercial operations via a 24-satellite constellation in 1998. Full global coverage, via the 48-satellite constellation, is expected to be established in the first half of 1999.

— Odyssey

(36) The Odyssey S-PCS system is supported by the US aerospace company TRW and the Canadian telecommunications operator Teleglobe Inc. Odyssey will consist of 12 MEO satellites and is expected to be operational by 1999.

E. The notified agreements

(37) The notified agreements are the following:

— the 'terrestrial network development contract' between Iridium and Motorola,

— the 'stock purchase agreements', including those signed with Stet and Vebacom,

— the 'space system contract' between Iridium and Motorola,

[1] It is expected that the price differential between dual-mode (satellite and GSM) and single-mode terminals (GSM only) will be as low as 10 %.

[2] For details of the Inmarsat-P system see Article 19 (3) Notice: OJ No C 304, 15. 11. 1995, p. 6.

— the 'Iridium communications system operations and maintenance contract' between Iridium and Motorola, and

— the 'gateway authorization agreements' concluded between Iridium and Stet and Vebacom.

(38) In a subsequent submission, the parties provided a standard (non-binding) MoU to be used by gateway operators for the appointment of service providers and the 'service provider appointment guide for Iridium gateway operators'.

F. Third party observations

(39) Following the publication pursuant to Article 19 (3) of Regulation 17 and Article 3 of Protocol 21 of the EEA Agreement, comments were received from three interested parties. These comments were fully assessed by the Commission but proved not to be such as to cause the Commission to modify its original favourable position.

II. LEGAL ASSESSMENT

A. Application of Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement to the creation of Iridium

(40) On the basis of arguments developed below, the partners of Iridium are not to be considered to be actual or potential competitors in the S-PCS market:

— the S-PCS concept is yet untried. By its nature, S-PCS network implementation is a complex programme involving considerable risk, and will not prove itself until deployed in the operational configuration and loaded with a significant volume of traffic, something which will not happen until the early years of the next century,

— no investor in Iridium could reasonably be expected to make the necessary financial investment to set up and operate a worldwide S-PCS system. As indicated above, the investment required for the setting-up of the Iridium system approaches USD 5 000 million. Such an amount is furthermore comparable to that of competing S-PCS world-wide systems,

— in addition, no investor in Iridium is in a position to assume the substantial risk of technical failure inherent in space operations. Launching failures [1], satellites which are unable to reach their final position from their transit orbit, and satellites which do not work properly or which go out of control once in their final position are still quite common hazards in space operations, and if one of these happens, it usually entails the total loss of the satellite (it is already possible to recover or repair a satellite in orbit, but doing so is prohibitively expensive).

To that risk has to be added the possibility of commercial failure inherent in the fact that S-PCS systems are a completely novel and even revolutionary concept which, in the developed part of the world, are expected to encounter tough competition from cellular terrestrial mobile services and from competing S-PCS systems,

— furthermore, given the global reach of the system, no investor in Iridium holds the necessary authorizations and licences to provide international telecommunication services on a worldwide basis through satellite. In order to set up and operate a S-PCS system, such as Iridium, the following regulatory approvals are required:

(a) the international allocation by a World Radiocommunication Conference (WRC) of the International Telecommunications Union (ITU) of the spectrum required for the system user, gateway and inter-satellite links. WRC-92 and 95 dealt with the spectrum allocation issues,

(b) a licence by the relevant regulatory authority for the construction, launch and operation of the satellite constellation (as regards Iridium, the Federal Communications Commission of the US granted the required licenses in January 1995. Four other US-based S-PCS systems, including Globalstar and Odyssey, were also granted licences),

(c) in each country in which a gateway or a system control terminal will be located, an authorization to construct and operate those facilities,

(d) in each country in which subscriber equipment will operate, authority to operate that

[1] The level of launch concentration in Iridium (66 satellites to be launched — launching several satellites at a time — in just 24 months) has not previously been undertaken on a commercial basis.

equipment with the system, including the necessary user link spectrum [1],

(e) international coordination of the system with other entities using or proposing to use the spectrum required for the system in order to ensure the avoidance of harmful interference,

and

(f) consultation with Intelsat and Inmarsat to ensure technical compatibility and to avoid significant economic harm to them,

— finally, the array of technologies required for a S-PCS system is outside the individual capabilities of investors in Iridium. Even if Motorola has title to many of the technologies required for the Iridium system, a number of the investors have a crucial role in developing important elements of the system that are outside the capabilities of Motorola. That is the case of Lockheed Martin for the satellites themselves, of Raytheon for the antennas, of China Great Wall and Khrunichev for the launchers, and so on.

(41) In conclusion, in view of the above, the creation of Iridium means the introduction of a viable competitor in a completely new mobile telecommunications field and, as such, 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 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement to the pricing policies of Iridium and to the distribution of Iridium services: ancillary restraints

(42) According to paragraph 3 (1) of each gateway authorization agreement, the Iridium BOD will establish the charge for accessing the space segment (owned by Iridium). In addition, it may suggest pricing policies as guidelines. Under the guidelines, which take into account Iridium's charge for access to the space segment, gateway operators are free to set their own prices within a certain range. The guidelines refer also to rules for the repartition of charges between gateways in calls that use multiple gateways, currency requirements and exchange rates. Each gateway operator is expected to comply with these guidelines to the extent permitted by applicable law and regulation.

The guidelines are aimed at maintaining the coherence and the integrality of the world-wide service that Iridium will provide. Such coherence is particularly important for potential users of the system. They will most of the time be moving in different areas of the world but they will nevertheless want to receive a single bill in a single currency. On that basis, as was recognized in the IPSP Decision [2], the principle of uniform prices and other conditions in different territories, together with the implementation of marketing practices in a decentralized manner, seems appropriate to fulfil customers' needs.

(43) The distribution of Iridium services will be organised around on the one hand the gateway operators — the strategic investors in Iridium — which have exclusive rights over their respective territories and on the other hand the service providers which are nominated by gateway operators, in general on a non-exclusive basis. Iridium, as 'producer' of the services will keep some central functions to ensure the coherence of the system.

(44) According to paragraph 3 of every Stock Purchase Agreement, investors in the Iridium system (that is, the gateway operators) will get exclusive rights for the territory provided for in that agreement. The exclusive rights basically mean that no other company will acquire rights from Iridium (i) to build and operate a gateway within that territory and (ii) to provide the Iridium services inside the territory. In exchange, gateway operators must build, maintain and operate the gateway and perform several other tasks, such as obtaining the necessary regulatory approvals for the Iridium system in the countries included in their respective territories, which can be costly and cumbersome. In this respect, and taking into account the very high risks entailed by the Iridium system and the need to attract gateway operators covering all parts of the world, such exclusivity can be seen as an incentive to investors to assume these risks.

(45) In addition, any possible restrictive effect resulting from the exclusivity is reduced by the following facts:

1. neither gateway operators nor service providers are prevented from dealing with competing systems. As regards services providers, it is indeed expected that some of them (usually terrestrial cellular operators) will be service

[1] In the Community, although exclusive and special rights in respect of the use of terminal equipment and of the provision of telecommunication services (excluding voice telephony until 1998) have been recently abolished (Commission Directive 94/46/EC of 13 October 1994; OJ No L 268, 19. 10. 1995, p. 15), a common approach to frequency-licensing has not been developed yet.

[2] OJ No L 354, 31. 12. 1994, p. 75 (paragraph 55).

providers for as many S-PCS systems as possible in order to increase the attractiveness of their own cellular offerings to customers (S-PCS systems will be a premium, complementary service to cellular terrestrial offerings).

In this respect, as regards STET, which is the only partner still having exclusive rights for the provision of telecommunications services and infrastructures, the parties have confirmed that the Iridium agreements will not affect the ability of any other company or person to gain access to the telecommunications infrastructure of STET other than those STET facilities specifically developed for the Iridium system;

2. the agreements do not prohibit service providers from selling the Iridium service to customers which are not located in the same area or country as the gateway operator investor;

3. the intelligence on board the satellites allows any user to be reached from any gateway. In this respect, it is planned that subscribers (customers) of a given gateway that move to another area will keep their former contract and will not be obliged to sign a new contract with a service provider of the gateway operator with exclusive rights over the new country to which they have moved;

4. given the global nature of the services, a single call will usually involve several gateways;

5. the intense competition for Iridium services expected from other S-PCS systems and other terrestrial cellular systems;

and

6. all capacity provided for by the Iridium system satellites will be used by Iridium, its gateway operators investors and designated service providers for their telecommunication services. There will be no spare capacity available for third parties.

(46) Finally, exclusivity is also a result of the configuration of the satellites: each satellite has antennas to link at any one time with only three gateways within its footprint (a fourth antenna is kept as reserve in case of failure). This feature requires a limited number of gateways.

(47) As for the guidelines for the appointment of service providers, it appears to the Commission that selection criteria described above are objective and qualitative.

(48) On the basis of the particular circumstances of the present case, it can be concluded that the pricing policies as guidelines, the exclusivity granted to gateway operators and the guidelines for service provider selection are directly related and necessary to the successful implementation and operation of the Iridium system. Hence they have to be regarded as ancillary restraints to the Iridium system under the competition rules of the EC Treaty and the EEA Agreement.

However, the above conclusion regarding the ancillary nature of the exclusive rights granted to gateway operator investors could be revisited should the particular circumstances of the case change in a substantial manner. Such would be in particular the case should Iridium acquire a dominant position in respect of the actual provision of S-PCS services.

(49) Ancillary restraints are to be assessed together with the creation of the company. In this respect, as Iridium has been found not to fall within the scope of both Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA Agreement, then neither do 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 Iridium.

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 pricing policies to be established by Iridium as guidelines under Paragraph 3.1 of each Gateway Authorization Agreement, in respect of the exclusive distribution rights granted to gateway investor operators under Paragraph 3 of every Stock Purchase Agreement and in respect of the guidelines for service provider selection as notified.

Article 3

This Decision is addressed to:

Iridium LLC,
1401 H. Street, NW,
Washington, DC 20005,
USA.

Done at Brussels, 18 December 1996.

For the Commission
Karel VAN MIERT
Member of the Commission