II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 4 October 1995

concerning the conditions imposed on the second operator of GSM radiotelephony services in Italy

(Only the Italian text is authentic)

(95/489/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 90 (3) thereof,

Having given the Italian authorities, by letter of 3 January 1995, and Telecom Italia SpA, by letter of 30 January 1995, notice to submit their comments on the Commission's objections to the intitial payment imposed on Omnitel Pronto Italia,

Whereas :

THE FACTS

The national measure in question

(1) The Italian Government has imposed an initial payment for the grant of a second concession for the establishment and operation on Italian territory of a network for the provision of a public mobile radiotelephony service using the pan-European digital system, GSM (global system for mobile communications). This requirement was laid down in the specifications and does not apply to the public operator, Telecom Italia.

The undertaking and services concerned

(2) Telecom Italia SpA is controlled by the Società Torinese Esercizi Telefoni (STET), which owns 55 % of its capital. STET is in its turn controlled by the Istituto per la Ricostruzione Industriale (IRI) and thus by the Italian Government. Telecom Italia thus constitutes a 'public undertaking' within the meaning of Article 90 (1).

In terms of its turnover, Lit 26 700 billion, Telecom Italia is the sixth largest telecommunications operator in the world. It has a workforce of 101 000 employees and over 25 million subscribers.

When Telecom Italia was set up in August 1994, it took over the exclusive rights to operate the public telecommunications network and the voice telephony service granted to Società Italiana per l'Esercizio Telefonico (SIP) in 1984 for a period of 20 years.

(3) Cellular digital mobile telephony complying with the GSM standard has been developed recently in Europe and enables subscribers both to send and to receive calls anywhere in the Community, as well as in some other European countries. This system, which used digital technology, a compact telephone and a subscriber identity module card, has greater potential than traditional analogue radiotelephony systems. Digital technology provides higher quality, high-speed data transmission and encryption enhancing the confidentiality of communications, and is more economical in its use of frequencies than analogue systems. Furthermore, the GSM system is based on common Community standards regarding common frequency bands approved at Community level and, unlike analogue systems which are often incompatible from one Member State to another, has the makings of one

of the pan-European services, whose promotion is one of the main objectives of the Community's policy on telecommunications (1). Lastly, the emerging market for GSM services is particularly dynamic : according to some studies, the number of users in western Europe could grow from a little over 1 million in 1993 to 15 to 20 million in the year 2000 (2).

(4) The Council has adopted a directive reserving the 890 to 915 and 935 to 960 MHz frequency bands for the introduction of a common system of digital GSM radiotelephony (3). These common frequency bands allow several competing operators to coexist. The GSM service began operating commercially in the Community in late 1992 : since which time the great majority of the Member States (Belgium, Spain, Italy, the Netherlands, Finland, Denmark, Germany, France, Greece, Portugal and the United Kingdom) have each granted licences to two operators, while the other Member States (Austria and Ireland) have announced that they will follow the same path or have already initiated the necessary procedures to that effect. Sweden has granted three GSM licences. Germany, France, the Netherlands and the United Kingdom have authorized or decided to authorize a third operator to offer cellular digital radiotelephony services, on a higher frequency band, on the basis of the DCS 1800 specifications.

The European Conference of Postal and Telecommunications Administrations (CEPT), the forum for the national regulatory authorities of 36 countries (including Italy), has recommended that competition between operators of GSM services be actively encouraged and the regulatory barriers which are restricting such competition be abolished (4).

Background

(5) By letter of 29 July 1993, the Commission requested the Italian Government either to terminate the monopoly enjoyed by Telecom Italia (at that time, SIP) in GSM radiotelephony or to present arguments meeting the Commission's objections to that monopoly. In response, the Italian Government decided to put out to tender a second concession for 15 years for the operation of a GSM network. A notice to that effect was published in the *Gazetta Ufficiale della Repubblica Italiana*, No 294 of 16 December 1993. No provision was made for an initial payment.

On 29 January 1994, the Italian Government sent the specifications to the businesses which had responded. They state that tenders must indicate 'the lump sum, in billions of lire, which the tenderer will pay when the concession is granted' (Article 4.9.1, page 44). The specifications also indicate that that amount will constitute one of the selection criteria (p. 51), without mentioning the weighting to be attached to it. The deadline for submitting tenders was 1 March 1994 (Article 3.9, page 19).

The specifications were sent to the Commission only on 2 March 1994, after the expiry of the deadline. By letter of 1 April 1994, the Commission expressed its regret that the specifications for selecting a second operator imposed on the firm to be selected conditions less favourable than those enjoyed by SIP, in particular the requirement of an initial payment (the bid) and a minimum annual charge to be paid by the operator for the first five years irrespective of turnover, while for SIP this charge is only 3,5 % on the amount of its actual income.

The Commission then suggested to the Italian Government that these two requirements should be deleted and the bids of the two remaining consortia be considered solely in the light of the other criteria mentioned in the specifications — that is to say, qualitative criteria.

On 18 April 1994, the Italian Government officially announced the consortium selected, Omnitel Pronto Italia, together with the weighting used in making the selection. The tenderers did not know the weighting. The consortium selected obtained the better score on every one of the selection criteria.

In its letter of 11 May 1994, the Commission replied that it continued to have reservations concerning the initial payment. Since Omnitel had been successful on all the other selection criteria, the Commission requested that the intitial payment be reconsidered but without calling in question or delaying the start of the operator's service.

(1) Council recommendation 87/371/EEC of 25 June 1987 (OJ No L 196, 17. 7. 1987, p. 81).
(2) 'Scenario Mobile Communications up to 2010 — study on forecast developments and future trends in technical development and commercial provision up to the year 2010'. Eutelis Consult, October 1993.
(3) Council Directive 87/372/EEC of 25 June 1987 on the frequency bands to be reserved for the coordinated introduction of public pan-European cellular digital land-based mobile communications in the Community OJ No L 196, 17. 7. 1987, p. 85).
(4) 'Review of the Requirements for the Future Harmonization of Regulatory Policy Regarding Mobile Communications Services'. CEPT/ECTRA (92) 57, p. 17.

Since there was no reply to this letter, the Commission sent a reminder on 27 July 1994 pointing out that it could not terminate the infringement procedure before the licence had been formally granted and again inquired what the Italian Government's current intentions were concerning the initial payment. Given the lesser impact of the minimum annual charge imposed solely on the second operator as compared to the initial payment, the Commission decided to concentrate solely on this latter aspect, without, however, accepting the former.

By letter of 8 August 1994, the Italian authorities replied to this last point to the effect that the tenderers, and therefore the consortium selected, were well aware of that obligation since it was expressly included in the specifications, adding that in the course of meetings between officials of the Ministry of Posts and Telecommunications and senior management of Omnitel Pronto Italia, the problem appeared to have been resolved. On 31 October 1994, the Commission replied that the acceptance by the applicant second operator of the conditions for obtaining the licence had no effect on whether these conditions were discriminatory or not, and it continued to press its request for the views of the Italian Government.

On 3 January 1995, the Commission gave formal notice to the Italian Government either to annul the second operator's obligation to make an initial payment or to submit its comments on the Commission's arguments. The Italian authorities replied on 28 February, 17 May and 10 August 1995.

THE COMMISSION'S ASSESSMENT

Article 90 (1)

(6) Article 90 (1) of the Treaty provides that, in the case of public undertakings to which Member States grant special or exclusive rights, Member States must neither enact nor maintain in force any measure contrary to the rules contained in the Treaty, in particular those relating to competition.

Telecom Italia is a public undertaking which has been granted exclusive rights to operate the fixed telecommunications network and offer voice telephony (within the meaning of Article 1 of Commission Directive 90/388/EEC [1]) and mobile analogue radio telephony services. On 22 December 1994, the Italian Government also granted it the right to operate a GSM radiotelephony network, which qualifies as a special right, since the operator had been designated otherwise than according to objective and non-discriminatory criteria.

In accordance with the case-law of the Court of Justice [2], the compatibility of this monopoly with the Treaty must be assessed in the light of Article 90 and the provisions to which it refers — in this instance, Article 86.

Article 86

The relevant market

(7) The relevant market is the market for cellular digital mobile radiotelephony services. This should be distinguished from the market in voice telephony and that (or those) in other mobile telephone communications services.

(8) The Commission has defined the market in voice telephony in Directive 90/388/EEC. The Directive draws a distinction between 'services whose provision consists wholly or partly in the transmission and routing of signals on the public telecommunications network' and mobile radio telephony services, which are excluded from its scope.

(9) Voice telephony within the meaning of that Directive is the principal service provided on the fixed public network, meaning between given network termination points. These termination points are defined as 'all physical connections and their technical access specifications'. In mobile communications, on the other hand, the termination point is located at the radio interface between the base station of the mobile network and the mobile station, which means that there is no physical termination point. The definition of voice telephony services in Article 1 of the Directive therefore does not apply to mobile telephony services.

(10) According to the case-law of the Court of Justice, for a product to be regarded as forming a market which is sufficiently differentiated from other markets, it must be possible for it to be singled out by such special features distinguishing it from other products that it is only to a limited extent interchangeable with them and is only exposed to their competition in a way that is hardly perceptible [3].

[1] Commission Directive of 28 June 1990 on competition in the markets for telecommunications services (OJ No L 192, 24. 7. 1990, p. 10).

[2] See, for example, the judgment of 19 May 1993 in Case-320/91, Corbeau, paragraph 12.

[3] Case 27/76, United Brands v. Commission, [1978] ECR, p. 207, paragraph 22.

Clearly, there is very little interchangeability between mobile radiotelephony and telephony using the fixed network: users taking out a subscription for a carphone or portable telephone do not normally cancel their previous subscription for a telephone installed at their home or workplace. Therefore, mobile radiotelephony is indeed a new, additional service, not a substitute for traditional telephony.

This distinction is also reflected in a very significant price differential: according to a study conducted by the Organization for Economic Cooperation and Development (OECD) and based on a basket of services, the cost of mobile telephony to the user is, on average in the OECD area, four times that of the same services offered on the fixed network (1).

Admittedly, wider dissemination of mobile radiotelephony might ultimately lead to a single telecommunications system catering for markets that are for the time being separate. However, the conditions on which Article 86 is to apply must be assessed on the basis of present demand and not of developments that could take place at some unspecified time in the future.

(11) It having been established, for the above reasons, that mobile radiotelephony should not be regarded as forming part of the market voice-telephony services offered using the fixed network, it remains to be seen whether, and to what extent, there might be grounds for distinguishing between the cellular mobile radiotelephony services based on the GSM standard which are the subject of this Decision and cellular radiotelephony services using analogue technology.

The GSM system of cellular mobile radio telephony is more than just a technical refinement of the earlier analogue technology. In addition to the advantages offered by GSM in terms of the quality of voice reproduction and more efficient use of the available spectrum (thus accommodating substantially more users on a given frequency allocation), this service provides new facilities that cater for the needs of only some users of mobile radiotelephony:

(i) based as it is on a Community standard, GSM can become a pan-European service. Under 'roaming' agreements between network operators, the system permits any user to make calls from his phone outside the national territory of the operator with which he has taken out a subscription; this facility is available throughout the territory of the parties to the GSM Memorandum of Understanding in Europe and other parts of the world. Some users who, for business purposes, use mobile radiotelephony services only within the country or within a particular region, are not interested in this new feature. For others, however, this may be a reason for deciding to subscribe;

(ii) in addition to voice transmission, the GSM service can be used to transmit large quantities of data; again, this feature meets the specific needs of only some of the existing or potential customers for mobile radiotelephony services;

(iii) the digital coding of messages means that a far greater degree of security can be achieved than via the analogue system — again an advantage of interest to only some users (particularly business customers);

(iv) digital technology makes it possible to offer a whole range of advanced telecommunications services which are not available (or which can be made so only at considerably higher cost) via an analogue network;

(v) in the majority of the Member States, the tariffs applicable to GSM services currently remain higher than those for analogue mobile telephony.

In view of the above, the simple replacement of analogue radiotelephony by the GSM system is not generally envisaged, in the short term. On the contrary, it is likely that, even if there is a discernible drift of customers from one to the other, the two systems will continue to exist in parallel for several years to come, meeting largely different needs. It has been found that, even in countries where the GSM system is fully operational, some operators are continuing to invest in the analogue network.

(12) On the basis of the abovementioned considerations and the current circumstances, and taking into account the possible evolution of the market, GSM radiotelephony services should therefore probably be regarded as also constituting a market separate from the market for analogue mobile telephony.

(1) OECD study, published 24 February 1993.

In any event, the conclusions of the legal analysis would not be different, even if analogue mobile telephony and GSM constituted two segments of the same market.

(13) In accordance with judgments of the Court of Justice this market, which currently extends over the whole of Italy, is a substantial part of the common market.

The dominant position

(14) The Court of Justice has held that an undertaking which has a legal monopoly in the provision of certain services may occupy a dominant position within the meaning of Article 86 of the Treaty [1]. This applies in the case of Telecom Italia and its subsidiary, Telecom Italia Mobile, created in July 1995, which together are the only undertakings permitted by law to offer the telecommunications networks for the public, voice telephony and analogue radiotelephony in Italy, three markets in which they therefore enjoy a dominant position.

The abuse of a dominant position

(15) The Court of Justice has ruled that 'a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators' [2].

Such equality of opportunity is particularly important for new entrants to a market in which a dominant operator on a related but separate market is in the course of establishing itself, like Telecom Italia and its subsidiary, Telecom Italia Mobile.

(16) Telecom Italia Mobile already enjoys the following major advantages for acquiring a dominant share of the market in GSM radiotelephony:

— a head start: it is already in a position to market its service while the second operator will not be ready until the second half of 1995,

— potential customers: Telecom Italia Mobile's analogue radiotelephony service, TACS, had more than 2,2 million subscribers (February 1995) and is acquiring 100 000 new subscribers each month.

However, this service will become less attractive in future in view of GSM's superior facilities. In addition, TACS operates in wavebands reserved to GSM radiotelephony. With time some TACS subscribers will therefore change to GSM. Accordingly, Telecom Italia Mobile already has potential customers for its GSM service,

— an existing distribution network: the network is known to the public, since Telecom Italia Mobile can market its GSM service through its TACS distributors,

— specific information: through its experience with TACS, it has specific information on the calling habits of Italian subscribers, by consumer categories and region. Moreover, since it also enjoys a monopoly in the supply of fixed links for the networks of GSM operators [3], it will continue to obtain important information on traffic flows,

— economies of scale for infrastructure: since it is at present the sole operator of fixed and analogue mobile telephony, it has available sites and aerials for establishing its GSM network which are not available to its competitor.

Telecom Italia would be unable to extend its dominant position on the market in wire telephony or analogue mobile telephony into the market in GSM radiotelephony by increasing the costs of its rival, for example by imposing interconnection charges which were not justified by the costs involved, without infringing Article 86 of the EC Treaty.

(17) Pursuant to Article 90 (1) of the EC Treaty, Italy must at the same time refrain from enacting measures which would, by increasing the costs of access of the sole rival of a public undertaking on a market newly opened to competition, significantly distort this competition. Given the additional financial burden imposed on its only competitor, Telecom Italia Mobile will indeed have the choice between two commercial strategies, of which each would be in breach of Article 90 (1) read in conjunction with Article 86 of the Treaty.

[1] Case 311/84, Centre belge d'études de marché — Telemarketing (CBEM) SA v. Compagnie luxembourgeoise de télédiffusion SA and Information publicité Benelux SA, [1985] ECR, p. 3261.

[2] Case C-202/88, France v. Commission, [1991] I, p. 1223, paragraph 51, p. 1271.

[3] Telecom Italia and its subsidiary Telecom Italia Mobile operate the fixed network and mobile services. On the other hand, Omnitel Pronto Italia can only establish radio links if it can show that Telecom Italia cannot provide it with the leased lines requested within a reasonable time.

(i) Extension of the dominant position (1) of the public undertaking

The initial payment of Lit 750 billion made by the second operator on this market will necessarily have to be covered by income. The second operator will therefore have difficulties in competing with the first operator through lower tariffs. The first operator, Telecom Italia Mobile, which must not depreciate the same payment and which moreover is aware of the second operator's cost structure through its monopoly of the infrastructure (2), could be encouraged by reducing its tariffs, to extend its current dominant position on the fixed infrastructure market and the analogue mobile telephony market into the market in GSM radiotelephony. It is a question of the extension of a dominant position thanks to the competitive advantange provided by the distortion of the cost structure due to the intitial payment, rendering the State measure contrary to Article 90, read in conjunction with Article 86.

(ii) Limitation of production, markets or of technical development within the meaning of Article 86 (b)

Moreover, the need to finance Lit 750 billion will also delay the investments of the new entrant, which will have to use part of its initial capital to cover the initial payment, which will therefore not be available for investment in the development of its network, quite apart from the capital needed for establishing its service in compliance wiht the minimum requirements set out in the licence. This will delay the development of the network and could also encourage Telecom Italia Mobile to delay marketing its GSM service (3). The TACS system is more attractive in that it guarantees Telecom Italia Mobile a definite income since the services are operated as a monopoly and moreover the bulk of the investments have already been amortized.

The Telecom Italia group, which, as has been pointed out, is aware of the second operator's cost structure through its infrastructure monopoly, would therefore be encouraged to retain higher tariffs for its GSM services than it would otherwise do, in the absence of the State measure in question. In so doing, it would limit production, output or technical development at the expense of the users within the meaning of Article 86 (b) as regards GSM, which involves a more advanced technology, so as to benefit the older analogue service.

In addition, this would delay the move towards personal communication combining mobile and fixed networks, which will only be possible if the tariffs for mobile communications fall substantially.

As the Court of Justice has held (4), Article 90 (1) precludes Member States from enacting measures likely to cause an undertaking to infringe the provisions to which it refers — in particular, in the case in point, those contained in Article 86.

In conclusion, on either hypothesis, the State measure concerned is therefore contrary to Article 90 (1), read in conjunction with Article 86 (b) of the Treaty.

(18) The responsibility of Member States pursuant to Articles 86 and 90 (1) of the Treaty only arises where the improper behaviour of the company in question is capable of affecting trade between Member States. Such a potential effect exists in this instance because the commercial activity of the Italian GSM operators may affect the residents of other Member States, who may acquire the 'SIM' cards in Italy just as in the territories of the other Member States, thanks to the roaming agreement with the operators covering those Member States.

(1) See, for example, judgment of the Court of Justice of 17 November 1992, Joined Cases C-271/90, C-281/90 and C-289/90, The Kingdom of Spain, the Kingdom of Belgium and the Italian Republic v. Commission, [1992] ECR I, p. 5833, paragraph 36.

(2) The specifications provide for a reduction of 50 % of the public tariff for lines leased by SIP to the second operator. Despite this reduction, the cost of leased lines for the second GSM operator in Italy remains three times higher than that applied by BT in the United Kingdom to cellular telephony operators.

(3) As the Commission has already emphasized in its letter of 29 June 1993, 'since the public undertaking holds a monopoly in the supply of mobile radiotelephony services, it has no great interest in introducing an alternative, the GSM service, quickly'.

(4) See, for example, Case C-41/90, Höfner v. Macrotron [1991] ECR I, p. 1979 as well as the judgments of 18 June 1991, Case C-260/89, Dimotiki Etairia Pliroforissis v. ERT, [1991] ECR I, p. 2925, and of 5 October 1994, Case C-323/93, Société civile agricole d'insémination de la Crespelle v. Coopérative d'élevage et d'insémination artificielle du département de la Mayenne [1994] ECR I, p. 5077.

The reply of the Italian authorities

(19) In its letter of 28 February 1995, the Italian Government emphasized that the initial payment had been one factor in selecting the second operator. The sum proposed by the second operator would therefore be determined as part of its strategic choice, since the specifications do not mention either a minimum or a maximum figure.

Moreover, the specifications allow the tenderer to propose further conditions, such as waiving the initial payment or spreading it over a number of years. In addition, the tenderers knew that Telecom Italia Mobile was not required to make an initial payment.

It was impossible to oblige Telecom Italia Mobile to make the same payment since it had already made its investments and thereore relied on amortizing them by operating the service as a monopoly.

By determining the amount of the initial payment which it would be prepared to make, the second operator of necessity took into account positive factors such as the investments already made by Telecom Italia Mobile and its right to use Telecom Italia Mobile network through national roaming.

It therefore denies that the dominant positions of Telecom Italia and its subsidiary Telecom Italia Mobile have been strengthened. It also denies that the initial payment produced a negative impact on investments or on the level of tariffs, in so far as the second operator's concession fixes specific obligations on this point.

Lastly, it refuses to abolish the initial payment. In its view, relinquishment of this criterion would mean that the selection procedure would have to be begun again if the principles of transparency and non-discrimination were to be respected. According to the Italian Government, the removal of an element such as the offer to pay a sum in order to enter the GSM market would necessarily lead to the opening of a new bidding process. Without the requirement of the initial payment, the competitors might well have made different bids. This argumentation was confirmed by the Italian authorities by letter of 10 August 1995.

(20) In its letter of 17 May 1995, the Italian Government distinguished between the question of the initial payment and the risk of extending the dominant position.

As far as the initial payment is concerned, the Italian Government maintains that, in the past, Telecom Italia Mobile has spent larger sums than that on developing the new service and that furthermore the opening up of the GSM service to competition has had a negative effect on the expected profits of Telecom Italia Mobile for running the service. Moreover, to reimburse the initial payment would allow the candidate who was not chosen to attrack Omnitel's concession, and the selection procedure would have to start again. On this point, the Italian Government reaffirmed that the abolition of the obligatory initial payment on the part of the second operator would necessitate the opening of a new selection process.

As for the risk of extending the dominant position of Telecom Italia and its subsidiary, Telecom Italia Mobile, the Italian Government emphasized that, following its intervention, agreements had been concluded between Telecom Italia and Omnitel relating to the interconnection of Omnitel's GSM network to the fixed telephone network of Telecom Italia, to experimental roaming of Omnitel's service via Telecom Italia Mobile's GSM network, to the distribution system of Telecom Italia Mobile's GSM and to the keeping of separate accounts for GSM and Telecom Italia's other activities.

The Commission's rebuttal

(21) The Commission has not challenged the Italian Government's decision to use two distinct procedures in awarding the GSM concessions. Nevertheless, it has repeatedly urged the Italian Government to ensure that the procedures used and the criteria adopted in granting the second licence should not have the effect of increasing the costs of access by the new entrant to the GSM market, as compared with those of the public operator.

The initial investment for establishing a GSM network in Italy amounts to about Lit 2 000 billion. The initial payment, when added to the initial investment, therefore increases the second operator's need for financing by more than one-third. Since Telecom Italia mobile does not have to make the same payment, it is wrong to say that the initial payment has not stengthened its position. It can use the money thereby saved to extend its distribution network or make special offers to potential subscribers.

Moreover, Telecom Italia Mobile possesses a temporal advantage to recoup the major sums invested for the development of GSM. When it puts its network at the disposal of the second national operator, in the context of national roaming, the latter will not benefit freely from this investment but will have to participate in financing it.

(22) The fact that applicants for the second licence were aware of the future distortion of competition on the GSM market in Italy in favour of Telecom Italia Mobile does not mean that there is any less of an imbalance here. Moreover, firms which did wish to enter the market had no choice but to take this handicap into account in their business plan.

It is therefore wrong to say that the initial payment will have no impact on prices charged or the coverage offered. The second operator's concession adopts the objectives which it has itself undertaken to attain after making allowance for the initial payment. The Italian Government itself concedes that, without the initial payment, tenderers 'could have modified their economic objectives for each of the valuation parameters'. Moreover, the mere fact that the specifications make provision for national roaming is certainly not sufficient compensation for the second operator's disadvantage. The Italian Government has not as yet informed the Commission of an agreement on this matter with the second operator.

(23) Lastly, the argument that, if the initial payment were waived, the tendering procedure would have to be repeated in order to comply with the principles of transparency and non-discrimination is not convincing.

Bearing in mind the fact that the consortium chosen submitted the better tender on all other selection criteria, the Commission, in its letter of 11 May 1994, determined that it was possible and necessary to reconsider this initial payment without calling in question or delaying the commencement of the second operator's service.

Moreover, the weighting of the various selection criteria was not communicated to the various applicants. The candidates could not therefore say that they would have made a better offer it they had known that the initial payment would be abandoned. The weighting attached to the initial payment could, in fact, have been very slight or zero.

In any case, in order not to interfere in a question which relates in part to the internal law of Italy, the Commission leaves to the Italian Government the choice of the means of remedying the breach, without expressly envisaging the reimbursement of the initial payment. Such reimbursement is not the only conceivable means of redressing the imbalance that it creates. The Italian Government could either impose an identical payment on Telecom Italia Mobile, or it could adopt corrective measures such as those mentioned in the context of contacts between the Commission and the Italian authorities, for example :

— a grant without delay to any operator of an unconditional right to establish its own infrastructure (the provision of the radio frequencies necessary for microware links) or to use the existing infrastructure of other undertakings such as the national railways, the motorways or ENEL (the national electricity agency),

— the effective application of the roaming agreement between the two GSM-radiotelephony operators, which from a technical and tariff standpoint would compensate for the second operator's delay,

— the grant of access to Telecom Italia's TACS 900 customer database, while maintaining the confidentiality of personal data,

— the revision of the tariff conditions for interconnection with Telecom Italia's switched telephone network,

— the grant to any operator of the right to apply alternative technologies such as DCS-1800 or DECT to provide its service.

The revocation of the concession already granted can in no circumstances be considered to be an appropriate remedy for the breach, bearing in mind that that would eliminate the only existing comeptitor to the public company Telecom Italia Mobile on the GSM market, and also bearing in mind the current monopoly of Telecom Italia as regards fixed telephony and GSM during the whole period necessary for the opening of a new call for offers, thus rendering competition even more difficult because of the additional time-lead.

(24) The Commission's objections to the initial payment imposed on the second operator but not on Telecom Italia Mobile are not based on Article 6 of the Treaty. In this procedure the issue is not the discrimination in itself but the effect of the State measure which is, as has been shown at points 17 and 18, to lead the telecommunications agency to extend its dominant position or to limit production, markets or technical development.

The aim of this procedure is to cause the Italian Government to take the necessary steps to preclude that effect; the most obvious would be a requirement that Telecom Italia Mobile make an identical payment.

(25) Likewise, if the Italian Government so requests, the Commission would be prepared to examine whether the infringement could be terminated by adopting other measures, provided that they offset properly the second operator's disadvantage.

It is incumbent upon the Italian Government to make proposals in this matter. The Italian Government should in any case provide figures for these proposals, showing that they properly offset the Lit 750 billion paid by Omnitel.

Article 90 (2)

(26) Article 90 (2) of the Treaty provides that undertakings entrusted with the operation of services of general economic interest are subject to the rules on cometition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The Italian Government has not relied on this provision to justify imposing the initial payment on the second operator alone.

(27) The Commission considers for its part, that in this case Article 90 (2) does not apply, because there are no factors which would permit the conclusion that the initial payment is justified by the performance in law or in fact of a service of general economic interest.

CONCLUSION

(28) In view of the above the Commission considers that the competitive disadvantage in the form of the initial payment imposed on the second operator alone for its concession to operate a GSM network in Italy constitutes an infringement of Article 90 (1) of the Treaty, read in conjunction with Article 86,

HAS ADOPTED THIS DECISION:

Article 1

Italy shall take the steps necessary to abolish the distortion of competition resulting from the initial payment imposed on Omnitel Pronto Italia and to secure equal conditions for operators of GSM radiotelephony on the Italian market at the latest by 1 January 1996, by means of the following:

— a requirement that Telecom Italia Mobile make an identical payment, or

— the adoption, after receiving the agreement of the Commission, of corrective measures equivalent in economic terms to the payment made by the second operator.

The measures definitively adopted may not impair the competition created by the licensing of the second GSM operator on 2 December 1994.

Article 2

Italy shall inform the Commission within three months of notification of this Decision of the steps it has taken to comply therewith.

Article 3

This Decision is addressed to the Italian Republic.

Done at Brussels, 4 October 1995.

For the Commission

Karel VAN MIERT

Member of the Commission