II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 18 December 1996

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

(Only the Spanish text is authentic)

(97/181/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 Spanish authorities, by letter of 23 April 1996, and Telefónica de España SA, by letter of 30 May 1996, notice to submit their comments on the Commission's objections to the initial payment imposed on Airtel Móvil SA,

Whereas:

THE FACTS

The national measure in question

(1) The Spanish Government has imposed an initial payment for the grant of a second concession for the establishment and operation on Spanish 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) ('GSM service').

That requirement is laid down in Articles 9 (4) and Article 16 of the tendering criteria which were approved by Ministerial Decision (*Orden*) of 26 September 1994 [1]. That requirement does not apply to the public operator, Telefónica de España.

The undertaking and services concerned

(2) Telefónica de España is a Spanish public undertaking as defined in Article 2 of Commission Directive 80/723/EEC of 25 June 1980 concerning the transparency of financial relations between Member States and public undertakings [2].

The Spanish Government has decisive influence over Telefónica de España for three reasons:

(i) The Spanish State is the single largest shareholder in Telefónica de España. When the Commission opened this case, the Spanish State held 31,8 % of the issued share capital. It currently holds 21,16 % of the issued share capital. The remaining shares are divided between approximately 300 000 shareholders.

(ii) The Spanish Government has the right to appoint a representative with the right of veto over the decisions of the board of directors of Telefónica de España. Under Article 2 (9) of Royal Decree Law (*Real Decreto-Ley*) 6/1996 of 7 June 1996 [3], this post will only be abolished from 1 January 1998.

[1] Boletín Oficial del Estado (BOE) No 231, 27. 9. 1994, p. 29778.
[2] OJ No L 195, 29. 7. 1980, p. 35.
[3] BOE No 139, 8. 6. 1996, p. 18 975.

(iii) By virtue of the concession contract of 26 December 1991 ('Concession Contract') (1), the Spanish Government has the right directly to appoint 25 % of the members of the board of directors of Telefónica de España. As a result of this and the fact that the Spanish State is the largest shareholder, the Spanish Government appointed 18 out of the 25 current members of the board of directors including the president.

The shares of Telefónica de España are listed on the Spanish stock exchanges as well as in New York, London, Frankfurt and Tokyo. In terms of its turnover (PTA 1 740 500 million in 1995) and its reults (PTA 133 200 million in 1995), Telefónica de España is among the ten largest telecommunications operators in the world. It has a workforce of 69 570 employees and over 16 million subscribers.

Telefónica de España thus constitutes a public undertaking or an undertaking to which Member States grant special or exclusive rights within the meaning of Article 90 (1) of the EC Treaty.

(3) Telefónica de España provides 'transmission', 'final' and 'value added' telecommunications services throughout Spain by virtue of Telecommunications Act (*Ley de Ordenación de las Telecomunicaciones*) 31/1987 of 18 December 1987 (2) ('LOT') and the Concession Contract. Telefónica de España has been the monopoly provider of some of these services (such as voice telephony services falling within the meaning of Article 1 of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (3)), whereas there is limited competition for other services (such as GSM services). Telefónica de España has been also granted special rights together with Ente Publico Retevisión ('Retevisión') and the Organismo Autónomo de Correos y Telégrafos, both public undertakings, to provide transmission capacity for telecommunication services.

On 7 June 1996, by Royal Decree Law 6/1996 the monopoly on voice telephony and the oligopoly on corresponding infrastructures were formally abolished. The Spanish Government is now able to grant concessions to new national or regional operators. Retevisión will transfer its telecommunication assets to a new entity which has been licensed to provide full telecommunications services and has been mandated to sell 80 % of its shares in a restricted tender. However, it is not expected that the new entity will be operational before mid-1997.

Under the LOT and its Concession Contract, Telefónica de España has been able to provide GSM services without having taken part in any tendering procedure. This is more fully described in point 7 below. Telefónica de España has been authorized by the Spanish Government to transfer its licence for the provision of mobile telephone services — analogue and GSM — to Telefónica Servicios Móviles, S.A. ('Telefónica Servicios Móviles'), a wholly owned subsidiary of Telefónica de España. All references in this Decision are to Telefónica de España because the licence to operate GSM radiotelephony services was originally granted to this company.

(4) Cellular digital mobile telephony complying with the GSM standad has been developed recently in Europe and enables subscribers both to send and receive calls anywhere in the Community, as well as in some other European countries. This system, which uses digital technology, a code 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 under Council Recommendation 87/371/EEC of 25 June 1987 (4), one of the main objectives of the European Union's policy on telecommunications. 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 15-20 million in the year 2000 (5).

(5) The Council has adopted Directive 87/372/EEC of 25 June 1987 on the frequency bands to be reserved for the coordinated introduction of public

(1) BOE No 20, 23. 1. 1992, p. 2 132.
(2) BOE No 303, 19. 12. 1987, amended, *inter alia*, by Act 32/1992 of 3 December 1992.
(3) OJ No L 192, 24. 7. 1990, p. 10.
(4) OJ No L 196, 17. 7. 1987, p. 81.
(5) '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.

pan-European cellular digital land-based mobile communications in the Community (1) which reserves the 890-915 and 935-960 MHz frequency bands for the introduction of a common system of digital GSM radiotelephony. These common frequency bands allow several competing operators to coexist. The GSM service began operating commercially in the Community in late 1992; since then, every Member State except Luxembourg has granted licences to two operators, while Luxembourg has announced that it will follow the same path. Sweden has granted three GSM licences.

The European Conference of Postal and Telecommunications Administrations (CEPT), the forum for the national regulatory authorities of 36 countries (including Spain), has recommended that competition between operators of GSM services be actively encouraged and the regulatory barriers which are restricting such competition be abolished (2).

(6) Germany, Greece, 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. Under Article 2 of Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications (3), Member States must grant licences for operating mobile systems according to the DCS 1800 standard by 1 January 1998 at the latest. Further, Member States may not restrict the combination of mobile technologies or systems and in all circumstances must take account of the requirement to ensure effective competition between the operators competing in the relevant markets.

Background

(7) Following amendments to the LOT by Act 32/1992 of 3 December 1992, the market for the provision of GSM services was liberalized as from 31 December 1993. Therefore, the provision of GSM services is no longer regarded as a 'final' service for which special and exclusive rights can be granted. GSM services are now considered as 'value added' services which should be provided in competition.

Following this amendment to the LOT, the Spanish Government adopted Royal Decree 1486/1994 of 1 July 1994 (4) ('the Royal Decree'), which approves the technical regulation (*Reglamento Técnico*) for the provision of 'value added' mobile automatic telecommunication services. Article 2 of the technical regulation (Annex to the Royal Decree) states that GSM services are to be provided in competition. Article 4 of the technical regulation states that GSM services are to be provided by Telefónica de España and one competing licensee. The first Transitional Provision of the technical regulation indicates the procedure for Telefónica de España to obtain a licence without going through a tendering procedure.

The Royal Decree does not expressly provide for an initial payment for the GSM licence. However, Article 4, fourth paragraph, subparagraph (a), of the technical regulation states that one of the factors to be taken into account when assessing the application of the second operator for a licence is the 'maximization of financial contributions'.

(8) By Ministerial Decision of 26 September 1994 (5) the Spanish Government adopted the tendering criteria and opened the tendering procedure for a second operator's licence for the provision of GSM services. The second operator's concession is for 15 years with an extension envisaged for five years thereafter. The other terms of the concession are listed in the tendering criteria.

Articles 9 and 16 of the tendering criteria provided for a minimum initial payment to the Treasury of PTA 50 095 billion. Some indication of the relative weight that would be attached to the different tendering criteria was given. The effect of the last paragraph of Article 16 was that offers of less than PTA 50 000 million would automatically be eliminated.

The Ministry of Public Works, Transport and Environment awarded the second operator's concession by Ministerial Decision of 29 December 1994 (6) to Airtel Móvil SA (at that time known as 'Alianza Internacional de Redes Telefónicas, SA') in spite of the fact that the initial payment of PTA 85 000 million was not the highest initial payment offered (the highest initial payment offer being PTA 89 000 million).

(1) OJ No L 196, 17. 7. 1987, p. 85.
(2) *Review of the Requirements for the Future Harmonization of Regulatory Policy Regarding Mobile Communication Services*, CEPT/ECTRA (92) 57, p. 17.
(3) OJ No L 20, 26. 1. 1996, p. 59.
(4) BOE No 168, 15. 7. 1994, p. 22 672.
(5) BOE No 231, 27. 9. 1994, p. 29 779.
(6) BOE No 4, 5. 1. 1995, p. 464.

In accordance with Article 9 of the tendering criteria, Airtel Móvil had to make the initial payment when it formally obtained the licence by signing the concession contract on 3 February 1995. On the same day Telefónica de España was simultaneously granted a corresponding GSM licence without making any such payment.

(9) By letter of 6 February 1995 the Commission expressed its resevations about the procedure which had been adopted for the selection of a second operator which had included less favourable conditions for the second operator than for Telefónica de España.

By letter of 20 April 1995 the Spanish Government replied to the Commission setting out the circumstances of the licensing process which according to the Spanish Government compensated for the initial payment made by Airtel Móvil.

On 1 July 1995 Telefónica de España began operating its GSM services commercially.

By its letter of 18 July 1995 the Commission asked the Spanish Government for clarification on the right to use alternative telecommunication networks, on the right to interconnect directly with leased line networks and on the methodology that would be used to revise the interconnection tariffs with the fixed network. This was so that the Commission could assess whether those factors would give the second operator benefits which would outweigh the competitive disadvantage established by the imposition of the initial payment.

On 3 October 1995, Airtel Móvil began its operations.

By its letter of 27 November 1995 the Spanish Government replied to the Commission stating that the second operator could establish its own infrastructure, and also use Retevisión and Correos y Telégrafos infrastructure as an alternative to the Telefónica de España network, that no request for direct interconnection had been received by the Spanish Government and that the issue of tariff reductions would be examined in 1996.

At a meeting on 16 January 1996 between the Spanish Government and the Commission, the Spanish Government stated that it would be impossible to redress the imbalance between Telefónica de España and the second operator by imposing a similar initial payment fee of PTA 85 000 million on Telefónica de España. The Spanish Government proposed that a possible solution would be to reduce the interconnection tariffs over the 15-year period of the concession. The reduction would apply to both Telefónica de España and to the second operator. It stated that this would be finalized in September 1996 and would amount to a 25 % reduction in these tariffs.

The Commission remained of the view that this proposal would not affect the imbalance between the two operators.

By letter of 23 April 1996 the Commission gave formal notice to the Spanish Government either:

(i) to reimburse the initial payment to the second operator or adopt other corrective measures; or

(ii) to submit its comments on the Commission's arguments.

By letter of 30 May 1996 the Commission asked Telefónica de España for observations on its letter of 23 April 1996 to the Spanish Government. A copy of the letter of formal notice of 23 April 1996 was enclosed.

At a meeting on 28 April 1996 between the Spanish Government and the Commission, the Spanish Government proposed that the imbalance between Telefónica de España and the second operator could be corrected if Telefónica de España transferred the cost of operating the 'TRAC' project ('Tecnología Rural de Acceso Celular' or Cellular Rural Access Technology) to its mobile telephone branch, Telefónica Servicios Móviles. Under that service, Telefónica de España charges customers in sparsely populated upland regions fixed telephony rates for connections to the public fixed telephone network using mobile analog technology and infrastructure. The Commission investigated that proposal further and, by letters of 29 April 1996 and 10 May 1996 requested further information to complete its assessment of the proposal. Having received no reply to either of its letters, the Commission sent a reminder on 3 June 1996. By its letter of 7 June 1996, the Spanish Government provided some of the information requested. However, the information provided did not contain sufficient data on the real cost of the TRAC system to Telefónica Servicios Móviles. Consequently, the Commission could not assess the extent to which that proposal would redress the balance between the two GSM operators.

At a meeting with the Spanish Government on 9 July 1996, the Commission emphasized that the matter had not been resolved and that the Spanish

Government should put forward a new proposal. To date, no reply has been received by the Commission to its letter of formal notice of 23 April 1996, no observations have been submitted by Telefónica de España on the letter of formal notice of 23 April 1996 and no further proposals have been made by the Spanish Government.

THE COMMISSION'S ASSESSMENT

Article 90 (1)

(10) Article 90 (1) provides that, in the case of public undertakings and 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.

Telefónica de España is a public undertaking which has been granted exclusive rights to operate the fixed telecommunications network and offer voice telephony and mobile analog radiotelephony services. The Concession Contract also grants Telefónica de España the right to operate a GSM radiotelephony network, which qualifies as a special right to the extent that this operator was designated otherwise than according to objective and non-discriminatory criteria.

The imposition of the initial payment on the second operator is a State measure within the meaning of Article 90 (1).

Article 86

The relevant market

(11) The relevant market is that for cellular digital mobile radiotelephony services. It should be distinguished from the market in fixed voice telephony and from the market for all other mobile telephone communications services.

(12) 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 radiotelephony services, which are excluded from its scope.

(13) Voice telephony within the meaning of that Directive is the principal service provided on the fixed public network, that is 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.

(14) According to the case-law of the Court of Justice of the European Communities [1], 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 not significant.

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 significant price differential.

Admittedly, wider dissemination of mobile radiotelephony might ultimately lead to a single telecommunications system serving 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 on developments that could take place at some unspecified time in the future.

(15) It having been established, for the above reasons, that mobile radiotelephony should not be regarded as forming part of the market in 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 (in Spain given the brandname *Movistar* by Telefónica de España) and cellular radiotelephony services using analogue technology (in Spain given the brandname *Moviline* by Telefónica de España).

The Commission notes that the GSM system of cellular mobile radiotelephony is more than just a technical refinement of the earlier analog techno-

[1] Case 27/76, *United Brands v. Commission*, [1978] ECR 207.

logy. 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. These include sophisticated call-line identification, voice mail (including short message services ('SMS')) and call-security services.

In view of the above, the simple replacement of analogue radiotelephony by the GSM system is not 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 [1], 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. These factors draw a distinction between the GSM and analogue markets.

(16) 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 separate market from the market for analogue mobile telephony.

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. As will be seen below (paragraph 21), this would only imply a slightly different formulation of the first hypothesis of abuse.

(17) In accordance with the case-law of the Court of Justice, this market, which currently extends over the whole of Spain, is a substantial part of the common market.

The dominant position

(18) In accordance with the case-law of the Court of Justice, 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 [2]. This applies in the case of Telefónica de España and its wholly owned subsidiary, Telefónica Servicios Móviles, which until recently were the only undertakings legally able to offer the telecommunications networks for the public, voice telephony and analog radiotelephony in Spain. These are therefore three markets in which they enjoy a dominant position. As stated above, the recent authorization granted to Retevisión to operate in the market for voice telephony and underlying infrastructures will not have any significant impact on the market share enjoyed by Telefónica de España for some time.

The abuse of a dominant position

(19) 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' [3].

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 Telefónica de España and its subsidiary, Telefónica Servicios Móviles.

[1] Ministerial Decision of 13 March 1995, BOE No 101, 28. 4. 1995, p. 12 573.

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

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

(20) Telefónica de España already enjoys the following major advantanges for acquiring a dominant share of the market in GSM radiotelephony:

(i) a head start: it began developing its network before the second operator and can therefore offer better geographical cover; it began its service on 1 July 1995 while the second operator began its services on 3 October 1995;

(ii) potential customers: Telefónica de España's analog radiotelephony service, Moviline, had 1 235 690 subscribers in October 1996 and is acquiring 10 000 to 20 000 new subscribers each month;

existing subscribers to Moviline, the analog service, may be seen as a potential customer base for Movistar, the GSM service;

(iii) an existing distribution network: the network is known to the public, since Telefónica de España can market its GSM service on a shared basis with its Moviline distributors;

(iv) specific information: through its experience with Moviline, it has specific informatin on the calling habits of Spanish subscribers, by consumer categories and region. Moreover, since it also enjoys a dominant position in the supply of fixed links for the networks of GSM operators, it will continue to obtain important information on traffic flows. In reality there is currently no realistic alternative for the second operator other than the Telefónica de España network;

(v) economies of scale for infrastructure: Telefónica de España was until June 1996 the sole licensee of fixed voice telephony services and is currently the sole operator active in that market. Telefónica de España was also until 3 October 1995 the sole operator of mobile telephony. As a result of this, Telefónica de España has had sites and aerials available for establishing its GSM network which are not available to its competitor. In addition, certain autonomous communities subsidise the development of the analog radiotelephony network in those areas where there is an insufficient wire network (via the TRAC-project).

Contrastingly, the second operator is, as described, operating under more onerous constraints than Telefónica de España as a result of the initial payment mentioned above.

If Telefónica de España extended its dominant position on the market in wire telephony or analog 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), that would infringe Article 86. The same analysis would apply if there is one market for all mobile radiotelephony services and Telefónica de España strengthened its position in that market in the same way.

(21) Under Article 90 (1) of the EC Treaty, Spain must 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, Telefónica de España will have the choice between two commercial strategies of which each would be a violation of Article 90 (1) read in conjunction with Article 86. Those commercial strategies are: either (i) to extend or strengthen its dominant position; or (ii) to limit production, markets or technical development within the meaning of Article 86 (b).

(i) Extension [1] or strengthening of the dominant position of the public undertaking

The initial payment of PTA 85 000 million made by the second operator on this market will necessarily have to be covered from income. The second operator will therefore have difficulties in competing with the first operator through lower tariffs. The first operator, Telefónica de España, which does not have to make the same payment and which, moreover, is aware of the second operator's cost structure through its current dominance in the market for infrastructure, could be encouraged to extend its current dominant position on the fixed infrastructure market and the analogue mobile telephony market into the market in GSM radiotelephony by reducing its tariffs. If there is only one market for radiotelephony services, instead of an extension there would be a strengthening of Telefónica de España's dominant position in this market.

Moreover, Telefónica de España could use the PTA 85 000 million saving made to extend its distribution network, to price its services aggres-

[1] See, for example, the Judgment of the Court of Justice in Joined Cases C-271/90, C-281/90 and C-289/90, *Kingdom of Spain, Kingdom of Belgium and Italian Republic v. Commission*, [1992] ECR I-5833, paragraph 36.

sively in the GSM market where it faces competition from the second operator, to make special offers to potential subscribers and/or to conduct intensive advertising campaigns for example. The choice of this strategy induced by the State measure could threaten the economic viability of the second operator.

Thus, Telefónica de España is in a position where it could extend or strengthen its dominant position thanks to the competitive advantage provided by the distortion of the costs structure resulting from the initial payment. This renders 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)

The need to finance PTA 85 000 million will 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 either for appropriate investment in the development of its network or for tariff reductions. The second operator was indeed obliged to increase its capital by some PTA 40 000 million in February 1996 in order to be able to follow its investment plan.

That might also encourage Telefónica de España to delay the development of the GSM radiotelephony network and to concentrate its efforts on the Moviline analog system. The Moviline system is more attractive since the bulk of the investments have already been amortized and it has better coverage.

The initial investment for establishing a GSM network in Spain amounts to about PTA 250 000 million. The initial payment, when added to the initial investment, therefore increases the second operator's need for financing by more than one-third. The fact that applicants for the second concession were aware of the future distortion of competition on the GSM market in Spain in favour of Telefónica de España does not affect the existence of an imbalance. Undertakings which wished to enter the market had no choice but to take this handicap into account in their business plan.

In the second hypothesis, Telefónica de España which, as has been pointed out, is aware of the second operator's cost structure through its dominant position in the infrastructure market, might be encouraged to retain higher tariffs for its GSM services than it would in the absence of the State measure in question. It could limit production, markets or technical development within the meaning of Article 86 (b) as regards GSM, which involves a more advanced technology, to the benefit of the older analogue service. This would delay the move towards personal communications combining mobile and fixed networks, which will only be possible if the tariffs for mobile communications fall substantially.

The fact that Telefónica de España could behave in this way would be a consequence of the fact that, on the one hand, it benefits from a favourable position as a result of its monopoly over the Moviline system and is granted sufficient wavebands to continue this service, and, on the other, the Spanish Government has financially penalized the only undertaking authorized to establish a competing GSM service. The delayed roll-out of the GSM and the resulting limitation of technical progress to the detriment of consumers would therefore be caused by the State measure in question, that is the imposition of the PTA 85 000 million fee on the second operator alone.

The Commission has adopted a similar analysis in a case involving an initial payment in Italy. Having demanded corrective measures without result, the Commission adopted Decision 95/489/EC addressed to Italy under Article 90 (3) of the EC Treaty [1]. The Commission has since been informed that such corrective measures have been taken or are in the process of being taken.

In accordance with the case-law of the Court of Justice [2], 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, under either hypothesis, the State measure concerned is contrary to Article 90 (1) read in conjunction with Article 86 of the Treaty.

[1] OJ No L 280, 23. 11. 1995, p. 49.

[2] See, for example, Case C-41/90, *Höfner v. Macrotron*, [1991] ECR I-1979, Case C-260/89, *Elliniki Radiophonia Tileorassi Anonimi v. Dimotiki Etairia Pliroforissis and Others*, [1991] ECR I-2925, and Case C-323/93, *Société civile agricole d'insémination de la Crespelle/Coopérative d'élevage et d'insémination artificielle du département de la Mayenne*, [1994] ECR I-5077.

(22) Member States are liable pursuant to Article 90 (1) and Article 86 of the Treaty only where the behaviour of the company in question is capable of affecting trade between Member States. Trade between Member States could be affected here for the following reasons:

Any extension or strengthening of Telefónica de España's dominant position as well as any limitation of production, markets or technical development in relation to GSM is likely to delay the process of progressive reduction of tariffs for GSM telephony. In fact, in the absence of the initial payment of PTA 85 000 million imposed on the second operator, price competition would have been stronger since the introduction of GSM services in Spain and GSM tariffs would have fallen more quickly:

— if GSM tariffs do not fall as quickly as they would have done in the absence of the State measure in question, residents in other Member States will be less likely to take out subscriptions with Spanish operators as an alternative to other national or foreign operators. By way of illustration, a business or individual based in France will not be encouraged to purchase a Spanish SIM card and to make calls using the card under the roaming agreements between operators, because Spanish tariffs are not as low as they would have been had the second operator been able to use the initial payment of PTA 85 000 million to reduce its tariffs,

— any delay in the process of reducing tariffs would in turn delay the development of mobile telephony services such as improved subscription terms and conditions and more advanced technical services described above. This would discourage new investments in the Spanish telecommunication services markets by undertakings established in other Member States where there is effective competition and where new services have emerged,

— any delay in the process of steadily reducing tariffs may reduce generally the level of international telephone traffic from Spain. Undertakings and individuals with large mobile telecommunications needs will tend to subscribe to foreign operators or to use 'call back' systems in order to take advantage of lower tariffs in other Member States,

— any limitation of production, markets or of technical development within the meaning of Article 86 (b) may reduce the level of imports from other Member States of technical equipment required for investment in the mobile telephony market and for development of an effective and efficient infrastructure.

The reply of the Spanish authorities

(23) The Spanish Government has made the following submissions to the Commission:

— under the terms of the concession granted by the Spanish Government to Telefónica de España in 1991, Telefónica de España obtains a GSM concession without any further payment. Therefore, the Spanish Government cannot impose an initial payment of PTA 85 000 million on Telefónica de España. Further the Spanish Government argued, whilst rejecting the principle of compensation, that the relevant figure for the initial payment was PTA 50 095 000 million rather than PTA 85 000 million. It argued that Airtel Móvil had raised the original fee requested from PTA 50 095 000 million to PTA 85 000 million itself without an obligation to do so. The minimum initial payment imposed by law was PTA 50 095 000 million and that was the figure to be taken into account,

— the Spanish Government considered that a possible solution would be a reduction in the interconnection tariffs for the duration of the 15-year licence,

— finally, the Spanish Government also proposed to transfer to Telefónica Servicios Móviles the cost of the TRAC project.

The Commission's assessment

(24) Although the second operator itself offered a fee of PTA 85 000 million, the Commission disagrees with the argument that the initial payment was voluntary since it was one of the selection criteria in the tendering procedure [1]. Each tenderer had to offer the highest initial payment possible under its business plan to have a chance of winning the

[1] Case C-272/91, *Commission v. Italy*, [1994] ECR I-1409, paragraph 11.

concession. Only some indication as to the relative weight that would be attached to the different selection criteria was given. The most clear indication was given with respect to the minimum initial payment. The initial payment was thus one of the selection criteria under the tendering procedure and it was payable on the date that the concession was signed. It is, therefore, clearly a State measure.

The selection procedure for the second GSM operator was not in reality a tendering procedure as such. The selection procedure in Spain was a hybrid combining the characteristics of comparative bids and a tender. One of the criteria compared was the initial payment which the applicant offered to pay on obtaining the second concession. It was therefore difficult to know which of the criteria were essential. The fact that the concession was awarded in the absence of any clear indication implies that any of them could have been of importance.

(25) The Commission does not accept that the reduction in interconnection tariffs proposed by the Spanish Government would restore the level playing field, because the Spanish Government refused to consider an asymmetric tariff reduction in favour of the second operator alone.

(26) The solution offered by the Spanish Government whereby investments in the TRAC project would offset the second operator's initial payment cannot be accepted in the present circumstances.

Apart from the fact that the information provided by the Spanish authorities does not allow a proper evaluation of the real impact of such investments, and that it is not possible to ensure that this solution is anything more than a pure accounting operation, the solution cannot be accepted at this stage since the provision of a universal service by Telefónica de España, including the service in remote areas, is in the current circumstances balanced out by the exclusive or special rights granted to Telefónica de España. Moreover, in implementing the TRAC system, Telefónica de España has benefited from public subsidies including ERDF aids.

(27) The Commission considers that in this case the obligation imposed on the second Spanish operator alone to make the initial payment of PTA 85 000 million is incompatible with Article 90 (1) together with Article 86.

(28) The aim of this procedure is to cause the Spanish Government to take the necessary steps to remove the distortion of competition; the most obvious step would be to reimburse sum paid by Airtel Móvil.

If the Spanish Government so requests, the Commission would be prepared to examine whether the infringement could be terminated by adopting other corrective measures, provided that they properly balance out the disadvantage suffered by the second operator.

It is incumbent upon the Spanish Government to make proposals in this respect. The Spanish Government should in any case provide figures for such proposals, showing that they properly offset the PTA 85 000 million paid by the second operator.

However, imposing on Telefónica Servicios Móviles an identical payment would not be considered an adequate compensatory measure in the present circumstances, in particular as long as no cost accounting is implemented serving to ensure that the burden of such payment is allocated to Movistar only.

(29) Certain corrective measures have already been mentioned during bilateral talks with the Spanish Government:

(i) granting Airtel Móvil access to Telefónica de España's TACS 900 customer database, while maintaining the confidentiality of personal data;

(ii) revision of the tariff conditions on an asymmetrical basis for interconnection with Telefónica de España's switched telephone network;

(iii) non-discriminatory access by both Telefónica Servicios Móviles GSM service and Airtel Móvil to the same number of GSM frequencies including the acceleration of the liberalization of the GSM frequencies currently used by Telefónica de España for its analog service;

(iv) extending the duration of Airtel Móvil's concession in line with the recent Spanish decision regarding the cable television licences.

Moreover, the revocation of the concession already granted to Airtel Móvil can in no circumstances be considered to be an appropriate remedy for the breach. It would eliminate the only existing competitor to Telefónica Servicios Móviles on the GSM market and the monopoly enjoyed by Telefónica de España for analog mobile telephony and

GSM services during the period necessary for a new tendering procedure would render competition even more difficult as a result of the extra time advantage.

Article 90 (2)

(30) 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 competition, 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 Spanish Government has not relied on this provision to justify imposing the initial payment on the second operator alone.

The Commission considers, for its part, that in this case a derogation under Article 90 (2) is not warranted, because there are no factors to support the conclusion that the initial payment is justified by the performance in law or in fact of a service of general economic interest.

CONCLUSION

(31) In view of the foregoing, 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 Spain constitutes an infringement of Article 90 (1) of the Treaty read in conjunction with Article 86,

HAS ADOPTED THIS DECISION:

Article 1

Spain shall take the steps necessary to remove the distortion of competition resulting from the initial payment imposed on Airtel Móvil SA and to secure equal conditions for operators of GSM radiotelephony on the Spanish market by 24 April 1997 at the latest by:

(i) reimbursing the initial payment imposed on Airtel Móvil, or

(ii) adopting, after receiving the agreement of the Commission, corrective measures equivalent in economic terms to the obligation imposed upon the second GSM operator.

The measures finally adopted shall not undermine the competition resulting from the authorization of the second GSM operator on 29 December 1994.

Article 2

Spain shall inform the Commission within three months following notification of this Decision of the steps it has taken to comply with it.

Article 3

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 18 December 1996.

For the Commission

Karel VAN MIERT

Member of the Commission