II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 18 June 1997

concerning the granting of additional implementation periods to Greece for the implementation of Directive 90/388/EEC as regards full competition in the telecommunications markets

(Only the Greek text is authentic)

(Text with EEA relevance)

(97/607/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement establishing the European Economic Area,

Having regard to Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services [1], as last amended by Directive 96/19/EC [2], and in particular Article 2 (2) thereof,

Having given notice [3] to to interested parties to submit their comments in accordance with Article 2 (2) of Directive 90/388/EEC,

Whereas:

A. THE FACTUAL AND LEGAL BACKGROUND

I. The requests submitted by Greece

(1) Pursuant to Article 2 (2) of Directive 90/388/EEC, the Greek Government, by letter of 25 June 1996, has requested the following additional implementation periods:

— until 1 January 2003 in respect of the abolition of the exclusive rights currently granted to the Hellenic Telecommunications Organization AE ('OTE') for the provision of voice telephony and the underlying network infrastructure. Pursuant to Article 2 (2) of Directive 90/388/EEC, that provision is to be implemented before 1 January 1998,

— until 1 July 2001 in respect of the lifting of restrictions on the provision of already liberalized telecommunications services on:

(a) networks established by the provider of the telecommunications service;

(b) infrastructures provided by third parties;

(c) shared networks, other facilities and sites.

Within the meaning of Article 2 (2) of Directive 90/388/EEC, those provisions were to be implemented before 1 July 1996. Those provisions do not relate to cable TV infrastructures, which are regulated by Article 4 of the same Directive.

The request is in conformity with the provisions of Council resolutions 93/C 213/01 [4] and 94/C 379/03 [5].

[1] OJ L 192, 24. 7. 1990, p. 10.
[2] OJ L 74, 22. 3. 1996, p. 13.
[3] OJ C 257, 4. 9. 1996, p. 3.
[4] OJ C 213, 6. 8. 1993, p. 1.
[5] OJ C 379, 31. 12. 1994, p. 4.

(2) Greece considers those additional implementation periods necessary for the following reasons:

2.1. Greece is currently carrying out a programme of digitalization and general modernization of OTE's infrastructure which requires significant capital investment. The constraints on Greece's financial resources, the high cost and the size of OTE's modernization programme, aggravated by the considerable expense of delivering telecommunications services throughout Greece (given its particular topography), necessitate a gradual pace of modernization. Even though advanced services are gradually being introduced over the already digitalized parts of the network, OTE's revenue will for several years continue to depend heavily on voice telephony.

2.2. OTE's substantial investment programme (exceeding Dr 1,1 trillion in the year 1996 to 2003) for digitalization and modernization would be prejudiced if full competition was introduced in 1998. This would deprive OTE of revenue needed both to finance the modernization of Greece's telecommunications infrastructure and to provide universal service to dispersed customers in remote areas of Greece.

2.3. The process of digitalization did not begin in Greece until 1990 owing to the lack of necessary financial resources. The size of the investment required for digitalization of the network dictates the pace of modernization of OTE's services. Of the abovementioned total expenditure, approximately 29 % will be spent on the modernization of the urban networks and 14 % on the digitalization of the exchanges.

2.4. In 1993 Greece started to implement a policy of adjusting tariffs to costs, which has resulted in increases in local call rates and reductions (in real terms) in long-distance rates. However, despite the progress achieved, the current tariff structure is still marked by a considerable gap between tariffs for local and long-distance calls. Further rebalancing of tariffs in the implementation period will be necessary to ensure OTE's financial stability and revenues (which are indispensable to the completion of digitalization and modernization). The pace of adjustment of tariffs to costs will depend, *inter alia*, on further modernization of OTE's networks, the introduction of analytical cost-accounting systems and customer's acceptance of tariff increases.

2.5. Structural adjustments are being carried out in order to transform OTE into a commercial organization, including the adaptation of its personnel to the environment of modern telecommunications technology, services, management and marketing methods.

2.6. Liberalization of alternative infrastructures cannot take place in Greece significantly in advance of the liberalization of voice telephony and public telecommunications networks. Were this to happen, providers of telcommunications services over such infrastructures would be able to circumvent the derogation for voice telephony and consequently deprive OTE of significant revenue which is crucial for the modernization of the public telecommunications networks and services in Greece.

(3) The Greek authorities provided a detailed description of the capital investments required for the development of the network, the tariff rebalancing planned and the restructuring of OTE in an annex to their letter of 25 June 1996.

(4) The Greek authorities stated that, if the derogations requested were granted, Greece would implement Directive 90/388/EEC as amended by Directive 96/19/EC into national law in accordance with the following timetable:

— first half of 1997: proposals for the introduction of appropriate legislation in order to introduce full competition,

— second half of 1997: publication of proposed legislative changes to implement full competition and remove all restrictions on the provision of voice telephony and public telecommunications networks and on alternative infrastructure by 1 January 2003 and 1 July 2001 respectively: consultation with interested parties,

— 1999: target for adoption of legislative changes,

— second half of 1999: publication of licensing conditions for all services and of interconnection charges as appropriate in accordance in both cases with relevant Community directives,

— end of 2000: target for the award of new licences and amendment of existing licences to allow the competitive provision of voice telephony and for the establishment of telecommunications networks.

In addition, the Greek authorities stated that by the end of 2000 digitalization will have reached 80,3 % and that by the end of 2003, digitalization will have reached approximately 100 % and tariff rebalancing will have been achieved to a great extent.

The request was delivered to the Commission on 25 June 1996.

II. The comments received

(5) Three undertakings submitted comments following the notice published by the Commission on 4 September 1996.

(6) According to those comments:

— the Greek authorities have exaggerated the financial burden of satisfying the universal service obligation ('USO') based on Greece's particular topography and the high cost of supplying some customers. According to the comments, the Greek authorities also ignore the potential for new entrants to supply services in remote/rural areas using, for example, wireless technology,

— it has proved extremely difficult to obtain leased lines and high-capacity bandwidth lines such as ISDN from OTE, despite its obligations under the relevant Community legislation,

— delays in implementing Community telecommunications Directives (notably Directive 90/388/EEC, Commission Directive 94/46/EC [1] with regard to satellite communications and Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines [2]), is not a justification for the short-term protection of OTE which will lead to further delays in crucial regulatory reforms. According to those comments, any further delay is a threat to the development of telecommunications in Greece,

— the Greek authorities have not included in their calculations the ECU 200,7 million allocated from the Community Structural Funds (CSF) under the Crash Programme for modernization of OTE and its infrastructure and for reforming the Greek regulatory framework,

— any additional implementation period would reinforce OTE's dominance in the telecommunications market in Greece and increase the danger of abuse of such dominance,

— all the major existing potential providers of alternative infrastructures are controlled by the Greek authorities which maintain a majority stake in OTE.

(7) By leter dated 21 October 1996, the Commission sent the Greek authorities the comments of the third parties, received following the publication of the Commission's notice of 4 September 1996. The Commission invited the Greek authorities to comment on the third party submissions.

III. The response of Greece

(8) In response to those comments, the Greek authorities, by letter dated 8 November 1996, stated *inter alia* that:

— expenditure under the telecommunications heading of the Crash Programme amounts to ECU 260,4 million. ECU 241,4 million was spent up until 31 December 1995 and the remainder was to be spent in 1996. While the Community was initially to contribute up to 50 % of total expenditure, its actual contribution amounted to only 27 % (ECU 71 million) of eligible costs up until 31 December 1993. The reduction of the Communtiy contribution was due to Greece's inability to complete the implementation of the planned measures before the end of 1993 as forecast. The delay in the implementation of the project was caused by administrative difficulties which arose in the start-up phase. The reduction was also caused by insufficient funds in the Community budget being available for the CSF to support any expenditure after 1993,

— assistance from the CSF was never considered to be sufficient to sustain the major part of OTE's planned modernization and digitalization programme. The new operational programme for 1994 to 1999 earmarks a total of ECU 321,821 million for Greece, whereas the costs of OTE's investments over the years 1996 to 2000 are estimated at Dr 1,245 trillion (ECU 4 130 million),

— as far as the difficulties of obtaining leased lines in Greece are concerned, demand will be satisfied once the extension of the ISDN network has been completed. This is currently in a pilot phase. Such an extension is necessary since there is no spare capacity on OTE's network,

[1] OJ L 268, 19. 10. 1994, p. 15.
[2] OJ L 165, 19. 6. 1992, p. 27.

— the planned privatization and commercial operation of the public undertakings which control alternative networks means that these undertakings could compete with OTE in the future, either alone or in an alliance with private partners.

On 6 December 1996, these issues were further discussed during a bilateral meeting between the Greek Minister for Telecommunications and the Member of the Commission responsible for competition. The latter expressed the view that as a result of the delays in implementing Community law in Greece, the market situation was currently significantly distorted to the advantage of OTE and that it was therefore not established that OTE would be affected to the extent claimed in the Greek application in the event of early liberalization of voice telephony. The market situation in Greece was further discussed during a bilateral meeting between experts of the Commission and the Greek authorities in Brussels on 24 January 1997. By letter of 24 March 1997, the Greek Minister for Telecommunications subsequently confirmed a time-schedule for the full implementation of Directives 90/388/EEC, 92/44/EEC and 94/46/EC and repeated Greece's request for additional implementation periods pursuant to Directive 96/19/EC.

On 21 and 22 April 1997, the Commission also heard the position of OTE regarding the situation of the Greek network and the need for further implementation periods. On 29 April 1997, a final meeting took place between the Greek Minister for Telecommunications and the Member of the Commission responsible for competition to discuss the Greek request and the preliminary assessment of the Commission at that date. By letter of 29 May 1997, the Greek authorities summarized the arguments given orally in these meetings.

IV. Article 2 (2) of Directive 90/388/EEC

(9) Detailed rules on the application of Article 90 (2) of the EC Treaty in the telecommunications sector were laid down in Directive 90/388/EEC which provides for the introduction of full competition in the telecommunications markets at the latest by 1 January 1998. However, pursuant to Article 2 (2) of Directive 90/388/EEC, the Commission is to grant additional implementation periods, on request, to a number of Member States allowing them (i) to derogate from the dates set out in Directive 90/388/EEC, and (ii) to maintain for a further period the exclusive rights granted to undertakings to which they entrust the provision of a public telecommunications network and telecommunications services. This is to allow for the implementation of measures which are necessary to carry out structural adjustments and is strictly to the extent necessary for those adjustments.

(10) As regards the provision of public telecommunications services and networks, it appears that OTE is entrusted with a service of general economic interest pursuant to Articles 1, 3 and 12 of Presidential Decree No 437/1995, based on Law No 2257/94 on the organization and operation of OTE. Article 1 of that Decree provides, *inter alia*, that the activities of the licence holder, OTE, not only contribute to the country's regional and industrial development but also ensure the provision of a technically reliable and financially accessible telecommunications service in a competitive environment. Pursuant to Article 12 of the Decree, OTE must provide voice telephony to the public, operate payphones and provide assistance services as well as emergency calls.

(11) Within the meaning of the Directive, the question which falls to be considered is therefore the extent to which the requested temporary exclusion of all competition from other economic operators is 'warranted by the need to carry out the structural adjustments and [is] strictly only to the extent necessary for those adjustments'.

(12) The starting point for such an examination is that the obligation on an undertaking entrusted with a task of general economic interest to perform its services in conditions of economic equilibrium presupposes that the undertaking will be able to offset less profitable sectors against the profitable sectors. This justifies a restriction of competition from individual undertakings in economically profitable sectors. Indeed to authorize individual undertakings to compete with the holder of the exclusive rights in the sectors of their choice would make it possible for them to concentrate on the economically profitable operations and to offer more advantageous tariffs than those charged by the holder of the exclusive rights since, unlike the latter, they are not bound for economic reasons to offset losses in the unprofitable sectors against profits in the more profitable sectors.

(13) Directive 90/388/EEC therefore granted a temporary exemption pursuant to Article 90 (2) in respect of special and exclusive rights for the provision of voice telephony. This was because financial resources for the development of the public telecommunications network and the maintenance of the USO still derived mainly from the voice-telephony service. The opening of the voice-telephony market to competition could, at that time, obstruct the performance of the task of

general economic interest and development of the network assigned to the telecommunications organizations. Restrictions on competition are only justified as regards services which, by their nature and the conditions in which they would be offered in a competitive market, would compromise the economic equilibrium of the provision of the service of general economic interest or affect it in some other way. For this reason, the restrictions on the provision of such services can only be permitted if substantive evidence is provided of such impact.

(14) Some comments mention that in practice new entrants could also contribute to the relevant tasks of general economic interest. The exception is indeed intended to protect the fulfilment of a task of general economic interest and not to shelter specific undertakings. In the short term, however, OTE will continue to be the only undertaking providing a universal telephone service to users in sparsely populated areas. For this reason, the Commission examined the additional implementation periods requested in order to determine whether their granting is necessary to allow OTE to perform its task of general economic interest and to have the benefit of economically acceptable conditions while the necessary structural adjustments are made.

B. LEGAL ASSESSMENT

I. Request for an additional implementation period regarding voice telephony and underlying network infrastructure

Assessment of the impact of the removal of the exclusive rights currently granted to OTE

Arguments submitted by Greece

(15) Generally, according to the Greek authorities, OTE faces particular difficulties in satisfying the USO because of the problems associated with developing the network taking into account the following:

— the topography of Greece characterized by numerous sparsely populated and remote mountain regions and islands,

— the low GDP per capita (approximately ECU 7 357,82 below the EU average),

— the high cost of supplying a disproportionately large number of customers. This is due to varying levels of demand because of high seasonal demand in numerous remote holiday resorts and isolated residential subscribers.

(16) More specifically, Greece considers an additional implementation period of five years indispensable in order to achieve the following structural adjustments.

(a) Digitalization and modernization of the network

(17) Greece emphasizes the poor level of digitalization of OTE's network, namely 31 % at the end of 1994 which was the lowest percentage in the Community. Digitalization rates at that time in Germany and Italy were 45 % and 67 % respectively. Significant capital investment is therefore required to upgrade OTE's network before competition is introduced.

(18) The Greek authorities have planned for a total expenditure of Dr 946 000 million in the years 1996 to 2000 to upgrade OTE's domestic network, infrastructure, telematics, international networks and international relations. Further investments of Dr 300 000 million in the years 2001 to 2002 are planned. Greece states that part of those investments will improve the level of digitalization to nearly 100 % by 2003.

(19) The Greek authorities maintain that due to constraints on national financial resources, the high cost and the size of OTE's modernization programme, aggravated by the burden of delivering telecommunications services throughout Greece, full digitalization by the year 2003 can only be achieved if OTE is further guaranteed sufficient revenues via the continuation until that date of its current exclusive rights.

(b) Improvements in telephone density and universal service

(20) While the precise cost of OTE's USO is not known, because OTE has not implemented an appropriate cost-based accounting system which would allow such a calculation, Greece has stated that the approximate connection costs of customers living in the 14 000 small rural conurbations in Greece would average at Dr 400 000 per customer as opposed to Dr 50 000 to 100 000 for an average customer. This additional cost could not be recovered from the relevant users in view of the average household income in Greece. The Greek authorities estimate that total investment costs until 2003 for these uneconomic users are Dr 100 000 million.

(c) Further adjustments in OTE's tariff structure

(21) The Greek authorities state that the current tariff structure of OTE is characterized by a considerable gap between local and long-distance rates compared with other Member States. The Greek authorities state that rates for local calls do not cover costs and are subsidized by revenue from long-distance national and international calls. OTE's tariff policy since 1 January 1993 has aimed at rebalancing tariffs and gradually adjusting them to costs, thereby fostering the convergence of tariffs for local, national and international calls. This policy has however been subject to the provisions of Article 2 of Law No 2257/94 which provides for a cap on tariff increases until the end of 1997.

(22) OTE's rebalancing has led to increases in local tariffs of 25 %, 28,5 % and 13,3 % in 1993, 1995 and 1996 respectively, starting from very low prices. Long-distance national tariffs (more than 160 km) have increased by only 25 %, 7,1 % and 2 % respectively in the same years. In 1993 international tariffs decreased by an average of 2,3 %. The increases in international tariffs of 5 % and 1,5 % in 1995 and 1996 respectively were, according to the Greek authorities, dictated by the overall financial strategy of OTE and the temporary need to cross-subsidize local calls.

(23) According to the Greek authorities, there has been considerable public and political opposition to tariff rebalancing. The tariff policy followed from 1993 to date was designed both to avoid causing serious negative reactions from subscribers and to make gradual steps towards the necessary rebalancing and the cost-based tariff structure. In 1994, for instance, tariffs were not increased because of the increases in 1993.

(d) Improvements in OTE's efficiency and effectiveness, including training of personnel and staff redundancies

(24) The Greek authorities argue that unless OTE's exclusive rights over voice telephony and public telecommunications networks are continued until 2003, OTE will not be able to implement the restructuring of its personnel which is necessary to prepare for a competitive market. This restructuring will involve training and retraining staff to improve their ability to manage modern technology, to market effectively and to supply sophisticated telecommunications services.

(25) The Greek authorities claim that under the currently applicable legal and regulatory framework, OTE is not allowed to reduce its workforce (except by retirement or voluntary redundancy) and would thus not be able to reduce staff levels in time for competition on 1 January 1998. Moreover, the Greek authorities state that any attempt to reduce personnel will cause grave social and political problems, especially if done rapidly. OTE currently has 24 500 staff. For the next five years (1996 to 2000) a package of measures aimed at the voluntary retirement of a substantial number of employees has been discussed with OME-OTE, the relevant trade union. It is expected that by the end of 1999 the number of personnel will be reduced to 21 000.

Assessment by the Commission

(26) The Commission must assess whether those adjustments can be included within the scope of Article 2 (2) of Directive 90/388/EEC and whether the implementation of those adjustments would be jeopardized if there were new entrants in the sector currently reserved to OTE.

(27) Legislative amendments themselves and any potential delays in this process cannot be regarded as structural adjustments for the purposes of Directive 90/388/EEC which would justify an additional implementation period. That Directive refers to the necessary structural adjustments of the operator to the extent that they are necessary to protect the provision of the service of general economic interest. In the absence of the specific justification referred to in the Directive, Member States may not plead provisions, practices or circumstances existing in its legal system in order to justify an additional implementation period to comply with Community Directives [1].

(28) Pursuant to the general principle of proportionality, any additional implementation period granted must be strictly proportionate to what is required to achieve the necessary structural adjustments, mentioned by the Greek authorities, with a view to the introduction of full competition, that is (i) digitalization, modernization and increased density of the network, (ii) the further rebalancing of OTE's tariffs, and (iii) improvements in OTE's efficiency and effectiveness.

[1] Judgment of the Court of Justice of the European Communities in Case 1/86 Commission v. Belgium [1987] ECR 2797.

(a) Digitalization, modernization and penetration of the network

(29) The Commission recognizes that modernization, digitalization and improvements in the penetration of the network are required in Greece during the rebalancing of tariffs period. The Commission also recognizes that the cost of this required modernization (Dr 1 246 000 million) is particularly high in the specific case of OTE's fixed network for two main reasons: the digitalization rate is low (38 %) whereas the other Member States, including those to which an exemption has been granted, have higher digitalization rates (80 % in the case of Portugal). The cost of improvements in penetration is also high since Greece is characterized by sparse population, numerous mountain regions and numerous island regions.

(30) While recognizing that further digitalization and modernization is required in Greece, the Commission notes that the Greek authorities themselves acknowledge that one of the reasons for the delayed start of digitalization was that OTE's investment programme had been hampered by policy considerations and legal problems. In particular delays had been caused by legal challenges to OTE's procurement decisions by private parties before the national courts. The abolition of OTE's special and exclusive rights to operate voice telephony and establish public telecommunications network would therefore speed up the investment programme since, pursuant to Article 8 of Directive 93/38/EEC, the public procurement rules set out in this Directive must no longer be applied as soon as other entities are free [1] to offer the same services in the same geographical area and under substantially the same conditions.

According to the submissions of the Greek authorities, the investments have, in the past, deliberately been delayed in favour of other priorities. For example substantial subsidies were granted to postal services out of OTE's profits until 1992. Therefore the lack of investments to date is not due to a lack of resources.

(31) However, the issue at stake is whether OTE can, in a competitive environment, generate the required means to pursue the further modernization of its network, which would cost Dr 946 000 million during 1996 to 2000 and a further Dr 300 000 million during the years 2001 to 2002, that is less than Dr 190 billion per annum, or whether the introduction of competition could endanger OTE's economic balance and therefore also its ability to provide the service of general economic interest which is entrusted to it. From this point of view, the following factors should be taken into account:

(32) In 1993 the total revenues of OTE were Dr 356 754 million of which Dr 321 145 million was generated by voice telephony. The net profit of OTE was Dr 129 520 million [2]. The telecommunications market is a growing market. It is forecast that voice telephony revenues in Greece will increase from approximately ECU 1 135 million in 1993 to approximately ECU 1 818 million in 1998 (an annual growth of approximately 5 %) [3]. Moreover, Greece has recently implemented Directive 90/388/EEC. It has been possible to provide liberalized telecommunications services without restrictions in Greece since January 1997. This liberalization will increase traffic on the public telecommunications network and generate additional revenues. However, the expected growth of revenues will be negatively affected by various factors in relation to the very poor level of digitalization. This is creating, and will continue to create, in the medium term, large congestion problems in the fixed network, which is substantially slowing down the growth rate of telephony services and explains why the growth of telephony revenues in Greece is lower than in other Member States with a digitalized network. Moreover, and for the same reason, OTE cannot offer advanced services, which generate significant growth of revenues for the telephone operators. In all, a share of the investment cost can be borne by the profits of OTE.

(33) Moreover, OTE has relatively little debt compared with operators which have invested heavily in the modernization of their network: at the end of the fiscal year 1995/1996, the debt/equity ratio or gearing of OTE was 39,4 as compared to 139,9 for Telecom Eireann, 124,3 for Telefónica de España, and 65 for Portugal Telecom. In June 1996, long-term debt was Dr 123 000 million relative to total investments by shareholders of Dr 600 000 million. OTE has thus still considerable room for debt financing of the relevant investments.

(34) Finally, a share of the necessary investments will be subsidized by the CSF. Under the new operational programme for Greece for the period 1994 to 1999, the ERDF (European Regional Development Fund) should provide ECU 173,243 million, of which ECU 112,377 million is earmarked to support the improvement of the quality of service of OTE. However, the share of the necessary investments (ECU 4 130 million), which will be thus financed, is still modest, more than 90 % of their cost having to be borne by OTE.

[1] For an entity to benefit from the derogation, there must be *de facto* a sufficient degree of competition (Judgment of the Court of Justice in Case C-392/93 British Telecommunications [1996] ECR I-1631).

[2] *Public network services in Europe 1995*, CIT research, p. 88.

[3] Op. cit. p. 303.

(35) However, as long as OTE's tariffs are not sufficiently rebalanced, new entrants will be able to undercut the high tariffs applied by OTE for trunk and international calls. OTE would then either lose traffic or have to rebalance its tariffs faster than the growth of market demand. This could, in the short term, depress the rise of revenues of the public operator, and reduce its margin to finance its investments.

This state of affairs justifies an additional implementation period to allow OTE to continue its progressive tariff rebalancing.

Once tariffs are sufficiently rebalanced, both the price reductions and the emergence of competition will indeed lead to increased usage of OTE's network. Experience in other Member States has shown that the growth of the market can compensate for loss of market share.

(b) Telephone density and universal service

(36) Generally, the Commission accepts that, compared with other Member States, the estimated cost of the USO in Greece is relatively high owing to, in particular, more difficult geographical conditions which cause higher infrastructure costs. This means that the provision of the service of general economic interest may be more difficult in Greece than in other Member States.

(37) Telephone penetration in Greece has already reached a level comparable to Member States which do not qualify for additional implementation periods. In 1994 there were 48 main lines per 100 inhabitants in Greece, in comparison with 55 in France, 48 in Germany, 43 in Italy. Telephone penetration in the other Member States which qualify for additional implementation periods is significantly lower than in Greece: 37 in Spain and 35 in Ireland and in Portugal. It would therefore appear that there is less unsatisfied demand for further telephone lines for households in Greece than in those Member States. Greece claims that those figures misrepresent the reality of network coverage. Much of this telephone density figure is attributable to the fact that there are a large number of holiday resorts with significant concentrations of lines which are only used seasonally, and to the fact that many subscribers have more than one home. The Greek authorities maintain that the level of telephone penetration must be increased to meet demand.

(38) Moreover, taking into account geographical and demographic constraints, the cost of improving the penetration rate will be comparatively high. GDP per capita in Greece is also below the EU average and below that of the most directly comparable countries which have requested an additional period for the implementation of Directive 90/388/EEC. For both those reasons, a higher penetration rate is linked to the pace and level of tariff rebalancing as regards both financing capacity and evolution of the relevant demand.

(39) The Commission is, in principle, of the view that there is no reason to delay competition until a high level of telephone penetration is achieved. The United Kingdom for example introduced competition when telephone penetration was below the level achieved by OTE in 1994 so that new entrants could improve penetration. Nevertheless, the Commission accepts that enabling OTE, while it is rebalancing its tariffs, to pursue its costly development programmes to improve further telephone penetration will benefit the consumer generally. This improvement will to a certain extent also benefit future new entrants since the more users are connected to the public telecommunications networks, the more calls will be generated both for the incumbent and for the new entrants. Once OTE's tariffs are sufficiently rebalanced, new entrants will generate additional traffic instead of diverting the current traffic of the Greek public operator.

The need to increase penetration can therefore justify a continuation of the current exclusive rights granted to OTE but only for the time necessary for OTE to rebalance its tariffs.

(c) Tariff rebalancing

(40) The Commission notes that although the increases in local tariffs, especially in the years 1993 and 1995 appear substantial, it should be noted that OTE did not previously charge for local calls at all. Nevertheless, the following table, based on information in the Commission's possession [1], compares certain telephone tariffs of OTE and the equivalent figures for one operator which has already rebalanced its tariffs (British Telecom) [2] and one operator (Portugal Telecom) of a Member State, which was granted an additional implementation period by Commission Decision 97/310/EC [3] of 12 February 1997. This table shows that OTE's need for further rebalancing is, on average, quite similar to that of Portugal Telecom.

[1] Tarifica study implemented for the European Commission DG XIII.

[2] A direct comparison of the telephony tariffs of OTE with the Community average (which is not a weighted average) would not be appropriate, given that the tariff structures of the 15 Community TOs are still widely divergent and in addition, given that they are currently in the process of rebalancing tariffs.

[3] OJ L 133, 24. 5. 1997, p. 19.

Tariffs in ecu on 1 January 1996	OTE	British Telecom	Portugal Telecom
Initial connection charge	188,98	137,53	76,66
Bi-monthly rental	12,47	19,53	18,53
Local calls, resp. 3/10 minutes (cheap rate)	0,04-0,08	0,06-0,19	0,06-0,12
Local calls, resp. 3/10 minutes (peak rate)	0,04-0,15	0,14-0,47	0,06-0,23
Trunk calls, resp. 3/10 minutes (peak rate)	1,16-3,86	0,35-1,16	1,17-3,91
Intra EC, resp. 3/10 minutes (peak rate)	1,62-5,41	1,29-4,31	2,31-7,70

(41) Given that due to technical progress in the network, cost is increasingly less dependent on distance, cost orientation of tariffs means as a general rule that prices are adjusted such that revenues are rebalanced with costs, that is to say:

— connection and rental revenues cover fixed costs (plus a standard margin),

— call revenues cover call costs (plus a standard margin).

Consequently, telecommunications organizations have had to raise bi-monthly rental and local calls (or at least not decrease these charges) and reduce tariffs for long-distance calls. It is clear from the above that significant tariff rebalancing is required, in particular as regards the tariffs for trunk calls.

Given the need not to affect the resources required to modernize the network in the coming years, the continuation of the gradual approach envisage by Greece for further tariff decreases of trunk and international calls does therefore appear justified. In fact, taking into account the average GDP in Greece, a progressive approach is justified. This is in order to avoid increases which would be too large and too fast in the context of the necessary rebalancing, hence slowing down demand and therefore reducing the development of the operator's revenues and profits (which could in turn affect its ability to finance the network's modernization), possibly also to the detriment of its capacity to ensure the provision of the service of general interest with which it is entrusted.

Taking into account the necessarily progressive pace of rebalancing and the heavy burden of modernizing the network both in terms of penetration and of digitalization, the Commission considers that OTE's tariffs can be sufficiently restructured by 31 December 2000. OTE could even accelerate the pace of rebalancing, if it introduced flexible tariff structures instead of implementing across-the-line tariff adaptations.

(42) The further arguments provided by the Greek authorities to justify delays in the rebalancing of OTE's tariffs cannot be accepted, however, and in particular, the argument that OTE does not currently use a modern, cost-based accounting system providing accurate information on the cost per category of service does not justify an additional implementation period. Greece was obliged to implement cost-accounting systems by 31 December 1993 pursuant to Directive 92/44/EEC and by 31 December 1996 pursuant to Directive 95/62/EC of the European Parliament and the Council of 13 December 1995 on the application of open network provision to voice telephony [1]. As a matter of fact, the relative costs of such services do not vary substantially from one Member State to another and, pending the establishment of such a cost-based accounting system, OTE can use the examples of tariff rebalancing implemented in other Member States where competition has already been introduced.

(d) The restructuring of OTE

(43) Generally, the Commission does not accept the submissions of Greece on the restructuring of OTE because the problems mentioned are not specific to Greece or to countries with less developed networks. More specifically, the submission is rejected for the following reasons:

— although the productivity of OTE can be improved, it is already better than in some Member States, which are not entitled to request additional implementation periods. OTE operated 217 lines per employee in 1996 in comparison with 183 for Belgacom, 174 for Deutsche Telekom, 162 for Portugal Telecom and 99 lines per employee in Ireland. However, revenue per employee is substantially higher in Belgium and Germany whereas telephone penetration is lower in Portugal and Ireland,

[1] OJ L 321, 30. 12. 1995, p. 6.

— Greece will receive under the agreed operational programme (1994 to 1999), over ECU 45 million for the reorganization of OTE and the training of personnel (of which ECU 30,5 million will be provided from the European Social Fund). In that context, OTE committed itself to reach the levels of productivity and efficiency that the Commission considers important in order to function as a competitive and modern company by the end of 1999.

Development of trade

(44) The aim of the postponement of the liberalization of voice telephony is to delay the entry of competing carriers in the voice-telephony market. This will affect trade since it will prevent large international players from investing and providing their services in Greece. The emergence of alternative national telecom operators will also be delayed and this will, in due course, reduce the ability of such alternative national operators to expand outside Greece.

The establishment of a new public-telephony operator must be prepared over many months or even years if the operator is not yet present in the neighbouring market of liberalized telecommunications services and has not yet been able to acquire a customer base.

When assessing the Greek request for derogation, the Commission noticed that due to delays in implementation of Community law, no effective competition had yet been authorized in markets for data services and voice services to closed user groups. Moreover, OTE had been granted the exclusive right to establish cable TV networks. In this context, allowing competition on voice telephony by 1 January 1998 could have had a significant impact on the turnover of OTE.

Moreover, it appears from the Greek submission that the planned digitalization of OTE's network aims at increasing the range of services which can be provided to end users. While the old analogue lines have capacity to carry only voice services, the Greek authorities state that new digital lines will also provide enhanced telecommunications services, liberalized pursuant to Directive 90/388/EEC. This means that the goal of the ongoing network investments is to enable OTE to extend its range of services beyond universal voice telephony.

In such circumstances, the granting of additional implementation periods could affect the development of trade to an extent incompatible with the interest of the common market since it could enable OTE to extend its current dominant position into new markets distinct from the voice-telephony market.

However, by letter of 24 March 1997, expanded on orally by the Greek Minister for Telecommunications during a bilateral meeting in Brussels on 28 April 1997, the Greek authorities announced the following:

(1) Directive 94/46/EC on satellite communications will be implemented by Presidential Decree in Greek law by 1 August 1997. In the meantime, the Greek National Regulatory Authority, the National Telecommunications Committee (EET) will already accept applications for satellite communications. They will be examined without delay and licences will be granted, in so far as they meet the criteria set out in the Decree, to the applicants as soon as the relevant Decree is published.

(2) The Presidential Decree implementing Directive 96/2/EC will be published and enter into force by December 1997.

(3) Law 2328/95 will be modified regarding the establishment of cable TV infrastructure before 1 May 1998. This modification will be made simultaneously with the transposition into national law of Directive 95/51/EC.

(4) The Presidential Decree completing the implementation of Directive 92/44/EEC will be adopted and brought into force by the end of 1997.

In so far as those announced measures are adopted and implemented in good time, an additional implementation period for the abolition of the exclusive or special rights granted to OTE for the provision of voice telephony and the establishment of public telecommunications networks until 31 December 2000 could be envisaged, since it would not completely foreclose the telecommunications market in Greece. As a matter of fact, the negative effect of such additional implementation periods on the development of trade in the Community will be limited owing to:

— the limited size of the telecommunications market in Greece in comparison to the Community market; it is probable that, as from 1 January 1998, the largest number of investments will mainly occur in Member States with more developed markets where a higher return on investment might be expected,

— the duration of the derogation granted; the harm done to potential investors by an additional implementation period of 36 months will

be limited if, in the mean time, they can already plan investments so as to be ready to be operational in advance of 31 December 2000 in particular in the framework of the lifting of restrictions on the use of own and alternative infrastructures from 1 October 1997, as mentioned below,

— the fact that the additional implementation period will apply to voice telephony as narrowly defined in Article 1 of Directive 90/388/EEC, and that all other voice services are fully liberalized.

(45) Such effect will further be reduced in the following circumstances:

— OTE is not expanding its operations in Member States which have liberalized their markets. If that were the case, the derogation enabling OTE to maintain higher prices on its domestic market could be used not only to achieve the necessary adjustments but also to cross-subsidize operations in foreign markets. This would obviously distort competition at the expense of the incumbents and of other new entrants in the relevant Member States and would be against the Community interest,

— the lifting of restrictions on the use of own and alternative infrastructures is effective from 1 October 1997, as mentioned below. This would allow potential new entrants to operate and provide already liberalized telecommunications services on such networks from that date on, in preparation for full competition, and in particular to provide voice services over corporate networks and/or to closed user groups via such infrastructures,

— the full implementation of the provisions of Directive 90/388/EEC is not subject to the current derogation or Directive 95/62/EC.

Conclusion

(46) On the basis of the above assessment, the Commission considers that the granting of an additional implementation period until at the latest 31 December 2000 as regards the abolition of the exclusive rights currently granted to OTE for the provision of voice telephony and public network infrastructure, instead of 1 January 1998 pursuant to Article 2 (2) of Directive 90/388/EEC, does not affect the development of trade to such an extent as to be contrary to the interests of the Community in so far as the circumstances set out above are fulfilled.

II. Request for an additional implementation period regarding the lifting of restrictions on the provision of already liberalized telecommunications services on own and alternative infrastructures

Assessment of the impact of the immediate lifting of restrictions

Arguments submitted by Greece

(47) Greece states that the liberalization of alternative infrastructures cannot take place in its territory significantly in advance of the liberalization of voice telephony and public telecommunications networks. Were this to happen, providers of telecommunications services over such infrastructures would be able to circumvent the derogation for voice telephony and consequently deprive OTE of significant revenue which is crucial for the modernization of the public telecommunications networks and services in Greece.

(48) Secondly, Greece states that the loss of revenue from leased lines (approximately 3 to 4 % of OTE's forecast turnover for the years 1996 to 2000) would further aggravate the risk of jeopardizing the completion of the planned structural adjustments.

Assessment by the Commission

(49) The argument that restrictions must be maintained on the provision of alternative network capacity to prevent authorized providers of liberalized services from circumventing the voice-telephony monopoly cannot be accepted. There are less restrictive regulatory means to prevent the bypassing of voice telephony until 31 December 2000. Under Greek Law No 2246/94 as modified on 6 February 1997, the provision of liberalized services on leased lines is subject to a declaration regime. In that context, the Greek national authorities can check that the service provided is not voice telephony as defined in Article 1 of Directive 90/388/EEC. According to that definition, the voice-telephony service which may be reserved must be offered to the public.

For this reason, as the Commission stated in its communication on the status and the implementation of Directive 90/388/EEC on competition in the markets for telecommunications services [1], 'unofficial' bypassing cannot occur to any significant extent without being noticed by the relevant Member State. A service which is offered to the public must, *ipso facto*, be public knowledge.

[1] OJ C 275, 20. 10. 1995, p. 2.

In particular, given that any commercial offer would normally involve advertising (of the services available) or, at the very least, issuing price lists, contracts and invoices, such bypassing should be evident from an early stage. Bypassing would also be distinguishable from legal voice telephony, due to differences as regards numbering and interconnection charges.

New operators generally have shown that they will respect the voice-telephony monopoly. Service-providers do not want to take the risk of having their registration revoked and being unable to fulfil their obligations towards their clients. Many service-providers therefore, before starting their services, first checked with the national regulatory authorities or with the Commission whether the voice service they envisaged providing was liberalized.

In their letter of 24 March 1997, the Greek authorities confirmed that all necessary measures under Law No 2246/1994 have been taken in order to secure the administrative and financial independence of the national telecommunications committee (EET) and that the draft Presidential Decree setting out the staff regulation of that body would be adopted and brought into force by 1 August 1997. EET will be fully operational by the end of September 1997 and able to monitor that the companies registered for the provision of liberalized services do not provide voice telephony. For this reason, no additional implementation period extending beyond 1 October 1997 could be justified. Possible delays in the calendar set out by the Greek authorities cannot be taken into account by the Commission when considering this request for an additional implementation period since that calendar appears reasonable and also since, as the Court of Justice has held, Member States may not plead provisions, practices or circumstances existing in their legal systems in order to justify additional implementation periods to comply with Community directives.

(50) The Commission also cannot accept the submission that loss of revenue from leased lines would further aggravate the risk of jeopardizing the completion of the planned structural adjustments for the following reasons:

— pursuant to Directive 92/44/EEC, OTE had to offer leased lines on a cost-oriented basis. Pursuant to Article 10 of that Directive, Greece had the obligation to ensure that OTE put in practice, by 31 December 1993, a cost-accounting system for leased lines. Although such a possibility was allowed in Directive 92/44/EEC, Greece did not request any deferment in favour of OTE for the implementation of this obligation. The present non-compliance of Greece with this obligation has already been recognized by the Court of Justice in its judgment of 6 July 1995 [1]. Given this obligation and given that Member States must comply with it, the opening of alternative supply possibilities is not expected to alter the market position of TOs in this area substantially,

— all major alternative network providers presently belong to public entities (railways, water utilities, etc.) and most fall within the competence of the same Ministry as OTE. Therefore, it is unlikely that they will cut their prices and really compete with OTE, another undertaking in the public sector,

— competition would be an incentive for OTE to accelerate digitalization and modernization of its network,

— the revenues generated by the provision of leased lines are marginal in comparison with those from voice telephony,

— if potential alternative network operators were authorized to establish their infrastructure, they would focus on high-capacity circuits (8, 34 and 140 Mbs), which OTE currently does not provide. Therefore, the assumption that OTE will suffer a loss of leased lines revenue is not accepted fully,

— the arguments of the Greek authorities start from a static perspective. In fact, if Greece fully implemented Directive 90/388/EEC and authorized new entrants to provide all telecommunications services other than voice telephony making use of more than 2 times 64 kbits, that would increase the demand for leased circuits. That new demand will more than compensate the possible impact of the provision of alternative infrastructure capacity in Greece. If must be emphasized in this context that many operators of liberalized services using alternative networks will in any case lease lines from OTE in addition to ensure sufficient back-up capacity. Given the expected growth in the leased-lines market, OTE could probably maintain its total profits in this area even if it introduces volume discounts on its current leased lines tariffs, to further align them with the underlying costs.

[1] Case C-259/94 Commission v. Hellenic Republic [1995] ECR, I-1947.

Development of trade

(51) As a consequence of its monopoly for the provision of public telecommunications infrastructures, OTE is the sole supplier of leased lines and interconnection to providers of liberalized services. It therefore determines to a large extent the costs of its competitors in the liberalized services sector. This is shown *inter alia* by the abovementioned current high tariffs for leased lines, which make the supply of some liberalized services uneconomic. Furthermore, this potential knowledge by OTE of the costs of its competitors will increasingly affect trade, since OTE is likely to develop even further the liberalized services it offers, although this growth is likely to be slow in the short term. Whereas OTE could use its own infrastructure to provide such services, competitors providing global liberalized services, such as VPN or voice services to closed user groups, would thus be obliged to rely only on circuits leased from the operator they want to compete with. This situation would be aggravated by the fact that OTE currently does not produce accounts which are sufficiently transparent to allow an adequate separation of its activities in the monopoly sector from those in the liberalized sector. Furthermore, there is no structural separation, to prevent staff in the infrastructure side of OTE from passing information to colleagues selling liberalized services.

Conclusion

(52) There are less restrictive regulatory means to prevent the bypassing of the voice-telephony monopoly until 1 January 2000 and such means could be implemented by EET which was set up in Greece, but which is not yet fully operational. Given that the presidential decree defining the staff regulations of EET will be in force by 1 August 1997, allowing EET to be fully operational by 1 October 1997, the granting of an additional implementation period extending after that date does not therefore seem justified.

(53) The Commission therefore considers that the development of trade resulting from the granting to Greece of an additional implementation period regarding the liberalization of alternative infrastructures is not affected to such an extent as to be contrary to the interests of the Community provided that the abovementioned period does not extend beyond 1 October 1997,

HAS ADOPTED THIS DECISION:

Article 1

Greece may postpone until 31 December 2000 the abolition of the exclusive rights currently granted to the Hellenic Telecommunications Organization AE as regards the provision of voice telephony and the establishment and provision of public telecommunications networks, provided that the following conditions are implemented according to the following timetable:

— no later than 1 October 1997, instead of 1 July 1996: notification to the Commission of all measures necessary to lift restrictions on the provision of already liberalized telecommunications services on:

  (a) networks established by the provider of the telecommunications service;

  (b) infrastructures provided by third parties;

  (c) the sharing of networks, other facilities and sites,

— no later than nine months after the adoption of this Decision, instead of 11 January 1997: notification to the Commission of legislative changes necessary to implement full competition by 31 December 2000, including proposals for the funding of universal services,

— no later than 31 December 1999, instead of 1 January 1997: notification to the Commission of draft licences for voice telephony and/or underlying network-providers,

— no later than 30 June 2000, instead of 1 July 1997: publication of licensing conditions for public voice telephony and of interconnection charges as appropriate in accordance in both cases with relevant Community directives,

— no later than 31 December 2000, instead of 1 January 1998: award of licences and amendment of existing licenses to enable competitive provision of voice telephony.

Article 2

Greece may postpone until 1 October 1997 the lifting of restrictions on the provision of already liberalized telecommunications services on:

(a) networks established by the provider of the telecommunications service;

(b) infrastructures provided by third parties;

(c) shared networks, other facilities and sites.

Greece shall notify to the Commission, no later than 1 October 1997 instead of 1 July 1996, all measures adopted to lift such restrictions.

Article 3

This Decision is addressed to the Hellenic Republic.

Done at Brussels, 18 June 1997.

For the Commission
Karel VAN MIERT
Member of the Commission