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***Case No IV/M.538 -  
OMNITEL***

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**REGULATION (EEC) No 4064/89  
MERGER PROCEDURE**

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Article 6(1)(a) INAPPLICABILITY  
Date: 27/03/1995

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EUROPEAN COMMISSION

Brussels, 27.03.1995

PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(1)(a) DECISION

To the notifying party

Dear Sirs,

Subject : Case No IV/M.538 - OMNITEL

Notification of 24.02.1995 pursuant to Article 4 of Council Regulation No 4064/89

1. The above mentioned operation consists in the creation of Omnitel Pronto Italia S.p.A. ("OPI"), a joint venture between Omnitel Sistemi Radiocellulari Italiani S.p.A. ("OSR") and Pronto Italia S.p.A. ("PI"). OPI has been granted by the Italian Government the second cellular mobile GSM licence in Italy.
2. After examination of the notification the Commission has concluded that the proposed operation does not fall within the scope of Council Regulation No 4064/89.

#### **I. THE OPERATION AND THE PARTIES**

3. On February 23, 1994, OPI was created by OSR and PI with the purpose of submitting a joint bid for the second cellular mobile GSM (Global System for Mobile Communications) licence in Italy to be awarded by the Ministry of Post and Telecommunications.
4. The economic sector involved in the concentration is that of the mobile GSM telecommunications services. GSM (Global System for Mobile Communications) is now the European standard for digital mobile telephones and has become a worldwide success. Its implementation has been strongly supported by the EC and it has been sponsored by the GSM Memorandum of Understanding, a trade organisation to which all GSM operators belong.

5. Both OSR and PI, which had been individually invited to submit bids following the prequalification phase, are consortia formed by mobile telecom network operators in other countries and by other industrial and financial partners with a view to building and operating a GSM mobile cellular infrastructure network in Italy. OPI has been granted the GSM licence by a decree of the President of the Republic of Italy issued on 2 December 1994 and registered with the Corte dei Conti on 30 January 1995.
6. By its decision of December 22, 1994, the Commission has granted to OPI a derogation from the obligation to suspend the concentration, imposed by Article 7(1) of the Merger Regulation. This was necessary for OPI to be in a position to meet the deadlines established by the licence and to operate in competition with Telecom Italia, which has already built its GSM network and has a significant presence in the market for analog mobile telephony in Italy. At this purpose OPI has already undertaken some activities which are preliminary to the start up of its cellular service (such as the award of contracts for the construction of the network, the funding agreements, construction and installation of sites).
7. The share capital of OPI is held by OSR (70%) and by PI (30%). OSR and PI do not carry out any activity directly. Their shares are held as follows:

<b>Omnitel Sistemi Radiocellulari</b>	<b>%</b>
Olivetti S.p.A.	51.0
Bell Atlantic International	16.6
Cellular Communications International	14.7
Telia International AB	9.7
Lehman Brothers	8.0

<b>Pronto Italia</b>	<b>%</b>
Air Touch International	34
Mannesmann Eurokom GmbH	15
Banca di Roma S.p.A.	15
European Mobile Communications S.A.	12
Sesterzio s.s.	4.25
Asse s.s.	4.25
Sogersel Gestione Fondersel S.p.A.	4
Famiglia Giacometti	1.5
Tege Belegg Ingsmaatschappij B.V.	2.5
Merum s.r.l.	4.2
SITE S.p.A.	0.25
SPAL s.r.l.	0.25
Famiglia Marzotto	1.8
Gustavo Denegri	1

8. According to a put agreement dated February 24, 1994 all the Italian shareholders of PI (all the shareholders other than Mannesmann) have a put option to sell their participation in PI to Air Touch Communications.

9. Olivetti is an Italian stock company active in the field of electronic data systems, computers, networks and telecommunications equipment and services.

Bell Atlantic International Inc. is a holding company for a number of Bell Atlantic's investments. It is controlled by Bell Atlantic Enterprises International Inc. which in turn is controlled by Bell Atlantic Investment Inc., which is a wholly owned subsidiary of Bell Atlantic Corporation, a publicly traded company in which no individual shareholder owns more than 5% of the shares outstanding. The Bell Atlantic group is active in different fields of telecommunications services, including cellular telecommunication.

Cellular Communications International Inc. develops opportunities in cellular markets outside the USA and is active in telecommunications services, marketing and users' assistance. It is controlled by Cellular Communications which is a publicly traded company in which no individual shareholder owns more than 15% of the shares outstanding.

Telia International AB is a company controlled by Telia AB, the operator of the Swedish public telephone network. Both companies are active as operators of cellular telecommunications networks and services. The parent company Telia AB is 100% owned and controlled by the Swedish State.

Lehman Brothers is a global investment bank.

Air Touch International is a company which pursues throughout the world international ventures involved in wireless telecommunications opportunities such as cellular and paging. It is wholly owned by Air Touch Communications of California, which in turn is a wholly owned subsidiary of Air Touch Communications Inc., Delaware.

Mannesmann Eurokom GmbH is controlled by Mannesmann AG and has as its activity the construction and operation of telecommunications networks and the provision of related services, as well as the acquisition of companies active in the field of telecommunications.

10. The activity of all the other shareholders of PI (with the exception of Banca di Roma, a commercial bank, of SITE which is involved in the installation of telecommunications networks and of SPAL which distributes cellular telephones) consists in the acquisition of shareholdings in other undertakings.

## **II. COMMUNITY DIMENSION**

11. The operation has a Community dimension. The worldwide turnover of all undertakings concerned amounts to more than ECU 5,000 million. The Community-wide turnover of each of at least two of the undertakings concerned exceeds ECU 250 million and the undertakings concerned do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State.

### III. CONCENTRATION

#### Joint control

12. The share capital of OPI is held by OSR (70%) and by PI (30%) The board of directors of OPI is composed of ten members. Pursuant to the by-laws of OPI, OSR and PI have the right to appoint seven and three directors respectively. According to Article 8.7 of the agreement between the shareholders of OPI, the favourable vote of at least eight out of ten directors is required for the adoption of major decisions relating to the business activities of the company, and in particular those relating to its commercial strategy (including inter alia the adoption and amendment of annual budgets and of business plans). Therefore the affirmative vote of at least one of the directors appointed by PI is required. According to OPI's shareholders' agreement certain key officers of the company, including the managing director and the chief financial officer, have to be appointed by OSR, and other key officers (the non executive chairman) are to be appointed by PI; the chief technical officer is designated jointly by Bell Atlantic and by Air Touch
13. With regard to OSR, its board of directors is composed of 9 members. According to the agreement between the shareholders of OSR, Olivetti will designate five directors and one each the other shareholders. All essential decisions, including the adoption or amendment of business plans and annual budgets, require the affirmative vote of directors representing Olivetti and all the shareholders of OSR.
14. As regards PI, the proportional representation of all the shareholders on the board of directors is established by the by-laws. The members of the present board of PI have been appointed as follows: 5 by Air Touch International, 1 by Mannesmann Eurokom, 2 by Banca di Roma, and 5 by the remaining shareholders. According to the by-laws and the shareholders' agreement of PI, the affirmative vote of at least 10 directors is required for all main decisions, including the adoption of business plans and annual budgets, the exercise of voting rights in OPI, investments for amounts in excess of lit. 500 million and capital increases. The effect of these provisions is that, on the one hand, none of the above mentioned decisions can be adopted without the affirmative vote of the directors appointed by Air Touch and that, on the other, these directors can not adopt any decision without the affirmative vote of at least five other directors.
15. In accordance with the above, and in particular given the cumulative effect of the by-laws and shareholders' agreements of OPI, OSR and PI, all main decisions of OPI require the affirmative vote of PI, as well as that of all the shareholders of OSR. Therefore, OPI is jointly controlled by OSR and by PI.

#### Full function entity

16. OPI has been granted by the Italian Government a licence to operate the second cellular mobile GSM in Italy. The licensee is to activate the service within 18 months, ensuring coverage of at least 40% of the territory of Italy and of all regional capitals. The licence requires that within 5 years the coverage reaches 70%. Upon the granting of the Licence, OPI has been required to make a payment of 750 billion lire, paid on 5 December 1994. The company has a fully paid up capital of Lit. 650 billion and the shareholders meeting of OPI has authorized the Board of Directors to make additional capital calls up to an aggregate of Lit. 1,450 billion. According to the business plan of OPI which has been submitted to the Ministry of Post and Telecommunications together with the bid for the

licence, the total investment for the creation and operation of the company's GSM network is estimated at approximately lit 1,800 billion.

17. OPI is therefore and will be in a position to operate the market as an autonomous participant as it will have all the assets and resources necessary to perform all the functions of an autonomous entity. It will have its own personnel and sufficient financial means to act independently of its shareholders. Its commercial independence is ensured by the safeguards set in the shareholders' agreement for what regards its entering into agreements with its shareholders. In particular OPI is allowed to enter into business agreements with its shareholders only in relation to their contribution to the GSM project and the utilization of their assets at arm's length and subject to special authorization of the board.

### Coordination

18. The purpose of Omnitel-Pronto Italia is to create and operate a GSM network in Italy and to offer GSM services to subscribers.
19. Although each GSM network is legally limited to the territory in which it is licensed, GSM systems are technically compatible throughout Europe, so that a customer who subscribed to the services offered by one network can use his phone on any other GSM network.

This possibility of using one's phone in a country different from the country of subscription is specific to GSM technology when compared to other mobile telephone technologies. However, it depends on the existence of "roaming agreements" between the different network operators, whereby the network operator who takes the subscription (the home network) pays the network operators for the calls performed on the latter's network - i.e. that one in which the customer "roams" - (the visited network). These roaming agreements are currently developing fast as it is in the interest of a GSM operator to offer to the subscribers the broadest possible service which includes the possibility to use its phone all over Europe at affordable prices.

20. Roaming agreements are concluded in the framework of a global agreement defined at European level which foresees that the visited network can not charge to the home network more than the price it charges to its own subscribers. The home network is then free to charge up to 115% of the forementioned price for the roaming call. In fact, a number of network operators charge the "roamer" exactly the same amount as they are charged by the visited network.

However, with regard to calls received through a visited network and originated from the same country, as the roamer's phone number corresponds to his home network country, a call issued from the visited country will be treated and charged as an international call, whereas it would have been treated and charged as a national call if the roamer had taken a subscription in this country. This situation is due to the obligation for mobile operators to route international calls through fixed networks and also to current limitation of the telecommunication protocols which do not allow direct local treatment of such calls.

21. It results from the above that any GSM subscription already widely allows the use of the mobile phone in any European country irrespective of the place of subscription. However, the fore mentioned pricing practices have reduced so far the degree of substitutability

between subscriptions from different countries. Nonetheless, as on average half of the cost incurred by a subscriber, is constituted by the subscription cost while the other half is constituted by phone call charges, subscribing abroad is already technically possible and, where the subscriber can take advantage of sufficient differences in the subscription price, an economically reasonable alternative to the subscription in the home country. This is all the more true as a large part of the subscribers are companies subscribing for business use and is further evidenced by the fact that network operators already market, either directly or through resellers, their own GSM service to individual customers for use outside of the territory in which this network operator is licensed.

22. In addition, the degree of substitutability between the various subscriptions is expected to increase in the middle term for the following reasons:
- the gap between international and national call prices is diminishing due to the increasingly distance-insensitive nature of telecommunication costs;
  - as GSM infrastructure is developing throughout Europe, the mobile to mobile interconnection of networks foreseen in the Commission's green book, will develop
  - ongoing improvements of the telecommunication protocols used by the operators will allow direct local treatment of roaming calls.
23. It results from the above that there is already a certain degree of substitutability amongst the various subscriptions which can be taken in the different Member States and that this substitutability is going to increase in the foreseeable future. This increasing trend toward a European market for GSM service provision is likely to be further fastened by the development of independent service providers which are not network operators in any country. These service providers purchase high volumes of air time throughout Europe and resell it to individual customers irrespective of their geographical location. The result is that network operators and independent service providers already compete with each other in the provision of a one-stop-shop service to individual customers, and will more and more do so at European level.
24. The considerable amount of investment required by the establishment of a network explains why most GSM operators in the various countries all over Europe, including those set up by public telephone operators are joint ventures in which several shareholders participate. As a result, most of the "industrial" shareholders of OPI are already involved in GSM services or are competing to be licensed in other European countries either in the same or in competing joint ventures.

Air Touch, Bell Atlantic, Cellular Communications and Telia are all active in these businesses and together operate nine GSM cellular networks and 32 analog cellular networks all over the world. In the EU Telia operates a GSM network and two analog networks in Sweden. Air Touch is already active or has been awarded GSM licences in the EU in Sweden, Germany, Spain, Portugal, Netherlands and Belgium. In this respect, it should be noted that Telia operates through its 100% subsidiary Telia Mobiltel, a GSM network in Sweden while Air Touch holds a 51% interest in a competing operator

Moreover, although it does not hold a controlling interest in the joint venture, Mannesmann is already active in Germany together with Air Touch as it holds 58% shareholding in Mannesmann Mobilfunk GmbH (Air Touch 32.7%). Mannesmann also holds non controlling interests in other network operators in Europe.

Finally, "industrial" shareholders of OPI, and in particular Air Touch, do compete currently for the granting of licences in other European countries, so that it cannot be excluded that they will be controlling either jointly or solely additional network operators in the future. The same applies to Bell Atlantic and Cellular Communications which, although they are not yet active in EU countries other than Italy are already active in other European countries and do not exclude to develop GSM activities in the EU in the future.

### Conclusion

25. Where the parent companies and the joint venture are all active in the same business but in different geographic areas, the Commission assesses the likelihood of coordination between the parent companies in the light of the existing interaction between these areas as well as the foreseeable developments in the emergence of wider markets.

In the present case, a number of the parent companies of OPI are active or potentially active in the same product market as the Joint venture, while there already exist a certain degree of competition amongst the various possible subscriptions irrespective of their location. There is therefore interaction between the various areas in which network operators primarily operate. In addition, this substitutability is to increase in the foreseeable future as the market is fast integrating.

26. Two of the parents (namely Air Touch and Telia) are holding control of two competing GSM operators in Sweden which account for two-third of the GSM activity in Sweden (8% of the overall GSM activity in the EU). The GSM market is in general more mature in nordic countries, the fixed costs (mainly due to infrastructure) incurred per subscription is usually lower than in markets in a take-off phase. For this reason and due to currency moves, subscription costs are in general lower than in other areas. In the framework of the above-mentioned market interaction, subscribers located in other member states, and in particular in Italy may therefore have an interest in subscribing to Swedish operators. In this respect, both Telia and Air Touch would have an interest in not being competing with the joint venture in Italy for the marketing of subscriptions. The same applies to the activities of Mannesmann Mobilfunk GmbH, a joint venture jointly controlled by Air Touch and Mannesmann in Germany which holds around 50% of the German market (23.5% of the overall EU GSM subscribers). This is further reflected in the non compete clause contained in the agreement.

In addition, as Air Touch enjoys veto rights in OPI through PI. Therefore, it will be in a position to prevent the JV to take advantage of favourable price (due for example to currency moves) by offering subscription - inter alia - in Germany.

28. The notified operation is therefore likely to create or reinforce a cooperation amongst those of its parents that are already active (as well as those which are likely to be active in the near future) in the GSM service provision.

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For the above reasons the Commission has concluded that the notified operation does not constitute a concentration within the meaning of article 3 (2) of the Merger Regulation and consequently does not fall within the scope of this regulation. This decision is adopted in application of Article 6(1)(a) of Council Regulation No 4064/89.

The Commission will treat the notification pursuant to Article 5 of Commission Regulation No. 2367/90 as an application within the meaning of Article 2 or a notification within the meaning of Article 4 of Council Regulation 17/62 as requested by the parties in their notification.

For the Commission