EUROPEAN COMMISSION
DG Competition

***CASE M.8465 -VIVENDI / TELECOM ITALIA***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004**
**MERGER PROCEDURE**

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Decision on the implementation of the commitments - Waiver of the Commitments
Date: 04/09/2018

Brussels, 4.9.2018
C(2018) 5887 final

PUBLIC VERSION

**To the notifying party**

Dear Sir/Madam,

**Subject: Case M.8465 - VIVENDI / TELECOM ITALIA**
**Commission decision on Vivendi's request of 25 June 2018 under clause 45 of the Commitments annexed to the Commission decision of 30 May 2017 for a complete waiver of the Commitments**[1]

1. On 25 June 2018, Vivendi S.A. ("Vivendi") has requested a complete waiver of the undertakings it submitted in the above-mentioned case.[2] This Decision presents the Commission's assessment of Vivendi's request.

## 1. Background

2. By decision of 30 May 2017 ("the Clearance Decision") pursuant to Article 6(1)(b) and (2) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings[3] ("the Merger Regulation"), the Commission declared the operation by which Vivendi acquires within the meaning of Article 3(1)(b) of the Merger Regulation *de facto* control of the whole of Telecom Italia S.p.A. ("TIM") compatible with the internal market and with the EEA Agreement (the "Transaction"), subject to full compliance with the commitments submitted by Vivendi and annexed to the Clearance Decision ("the Commitments").[4]

3. The Commitments aimed at avoiding anticompetitive horizontal effects in the market for Digital Terrestrial Television ("DTT") wholesale access, stemming from the fact that post-Transaction Vivendi, through TIM, would have controlled one of the main DTT infrastructure operators, Persidera S.p.A. ("Persidera"), and, at the same time, have a

[1] All abbreviations and capitalised terms used in this decision have the same meaning as in the Commission's decision of 30.05.2017 in Case M.8465 – *Vivendi / Telecom Italia*.

[2] See paragraph 3 below.

[3] OJ L 24, 29.1.2004, p. 1-22.

[4] OJ C 220, 8.7.2017, p. 53.

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significant non-controlling shareholding in Mediaset S.p.A.,[5] which is one of Persidera's main competitors in that market. In particular, the Commission considered that Vivendi could have worsened the conditions for access to Persidera's infrastructure, benefiting either directly (from higher prices charged for access to Persidera's infrastructure) or indirectly from Mediaset's revenues (resulting from hosting additional third-party channels on its infrastructure).

4. Under clause 2 of the Commitments, Vivendi committed to procure the divestiture of TIM's 70% shareholding interest in Persidera (as detailed in section B and the schedule of the Commitments), and that TIM will find a purchaser and enter into a final binding sale and purchase agreement for the Divestment Business within six months from the date of adoption of the Clearance Decision ("the First Divestiture Period"), that is to say by 30 November 2017.

5. On 22 June 2017 Vivendi appointed Advolis S.A. ("Advolis") as the Monitoring Trustee, which was also given the mandate to act as Divestiture Trustee, should the Trustee Divestiture Period start.

6. On 20 November 2017 and 29 January 2018 the Commission issued two subsequent decisions pursuant to clause 44 of the Commitments extending the First Divestiture Period for a total period of three months. Nonetheless, Vivendi was not able to comply with the Commitments within the First Divestiture Period (as extended by the mentioned Commission's decisions).

7. On 2 March 2018, the Commission issued a decision rejecting Vivendi's request to further extend the First Divestiture Period. Accordingly, the Trustee Divestiture Period started on 01 March 2018.

8. Following the Clearance Decision, activist investor Elliott Capital Advisors LP ("Elliott") and the State owned financial institution Cassa Depositi e Prestiti S.p.A. ("CDP"), neither of which was a TIM shareholder at the time of the Clearance Decision, acquired significant stakes in TIM. In particular, Elliot gradually acquired an indirect participation of 9.9%[6] in TIM, stating that it would challenge the strategic decisions taken by the board appointed by Vivendi,[7] while CDP acquired a 4,93% participation, with a declared long term perspective in line with its institutional mission to support national strategic infrastructures[8].

9. On 4 May 2018, a shareholders' meeting of TIM was held to discuss and resolve on the appointment of a new Board of Directors. For this purpose, two shareholders, Vivendi[9] and Elliott presented a slate of candidates, while Assogestioni (the Italian association of institutional investors) decided to support Elliott by not presenting its own slate. Approximately 49.84% of the shareholders present at the meeting, including CDP, voted in favour of the Elliott list, while 47.18% voted in favour of Vivendi's. Therefore, pursuant to

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5 Vivendi holds 28.80% of the share capital and 29.94% of the voting rights in Mediaset.

6 At the time of the shareholders' meeting of 24 April 2018, Elliott indirectly held a participation of 9.9%. At the shareholders' meeting of 4 May 2018, Elliott participated with a number of shares corresponding to 8.27 of the ordinary capital of TIM (see TIM's website: http://www.telecomitalia.com/tit/it/investors/shareholders/significant_shareholdings.html).

7 See in particular a letter sent by Elliott to TIM's shareholders in April 2018 ahead of the 4 May 2018's shareholders' meeting (see https://www.reuters.com/article/us-telecomitalia-elliott-agm/elliott-calls-on-telecom-italia-shareholders-to-back-new-board-idUSKBN1HY0P2).

8 See CDP's press release of 5 April 2018 (https://www.cdp.it/media/comunicati-stampa/cdp-il-cda-delibera-lingresso--con-una-prospettiva-di-lungo-periodo--nel-capitale-di-telecom-italia-s-p-a--tim kl).

9 Vivendi has a participation of 23.93% in TIM.

the applicable TIM governance rules, the slate presented by Elliott secured two-thirds of TIM's Board seats, *i.e.* all 10 Board candidates presented by Elliott were appointed, whereas only 5 of the 10 Board candidates presented by Vivendi were appointed.

10. On 30 May 2018, following a request sent by the Divestiture Trustee on 30 April 2018, the Commission issued, pursuant to clause 44 of the Commitments, a decision extending the Trustee Divestiture Period. The Trustee Divestiture Period was thus extended to 31 July 2018.

11. On 25 June 2018, the Board of TIM, where Vivendi no longer controlled the majority of the votes, revoked the powers that it had originally granted to the Monitoring Trustee (and the Divestiture Trustee) pursuant to the Commitments, including the powers to represent TIM in the Persidera's Board and the powers to sell Persidera on behalf of TIM.

## 2. VIVENDI'S REQUEST FOR A COMPLETE WAIVER OF THE COMMITMENTS

12. On 26 June 2018, Vivendi requested, pursuant to clause 45 of the Commitments, to "*have all of the undertakings in the commitments merely waived*" since, as a result of TIM shareholders' meeting of 4 May 2018, it is no longer in a position to ensure a full compliance of the Commitments.

## 3. OPINION OF THE MONITORING TRUSTEE

13. On 23 August 2018 the Monitoring Trustee submitted its opinion on Vivendi's request. In the opinion, the Monitoring Trustee stated that, following Vivendi's loss of de facto control over TIM on 4 May, Vivendi has not been in a position to comply with the Commitments. In the Monitoring Trustee's view, this qualifies as exceptional circumstances warranting the waiver of the Commitments.

## 4. ASSESSMENT OF THE REQUEST FOR A COMPLETE WAIVER OF THE COMMITMENTS

14. For the reasons explained below, the Commission considers that the arguments and evidence provided by Vivendi in its request for the complete waiver of the Commitments meet the conditions set out in paragraph 45 of the Commitments and therefore justify granting the requested complete waiver of the Commitments.

### 4.1. Legal Test

15. As regards the conditions under which such a waiver may be granted, under clause 45 of the Commitments (the "review clause"), the Commission may, "*in response to a reasoned request from the Notifying Party showing good cause, waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in [the] Commitments*."

16. Thus, unlike extensions of divestment periods, which, pursuant to clause 44 of the Commitments, can be granted on the basis of the mere "good cause" shown by Vivendi, a waiver of Commitments under the review clause can only be granted in cases where there are also "exceptional circumstances".

17. In this respect, paragraph 73 of the Remedies Notice states the following specifically as regards divestiture commitments: "*[t]he Commission may grant waivers or accept modifications or substitutions of the commitments only in exceptional circumstances. This will very rarely be relevant for divestiture commitments. As divestiture commitments have to be implemented within a short time-frame after the decision, it is very unlikely that changes*

*of market circumstances will have occurred in such a short time-frame and the Commission will normally not accept any modifications under the general review clause.*"

18. Within this framework, a waiver of the commitments can be justified when the requesting party demonstrates that the changes in the market (i) are significant, stable, not foreseeable, and (ii) the competition concerns laid out in the clearance decision no longer arise.

19. Thus, in the following the Commission assesses Vivendi's waiver request against the above criteria in order to determine whether exceptional circumstances exist, *i.e.* it assesses (i) whether the circumstances put forward by Vivendi constitute a significant, stable and unforeseeable change in market circumstances and (ii) whether those circumstances ensure that the competition concerns laid out in the Clearance Decision no longer arise.

### 4.2. Significant, stable and unforeseeable change in the market

20. The Commission considers that the circumstances put forward by Vivendi in the present case could be qualified as a significant and unforeseeable change in market circumstances leading to Vivendi's inability to procure the implementation of the Commitments by TIM.

21. First, in the Clearance Decision the Commission found that at the very latest Vivendi acquired *de facto* sole control over TIM at the shareholders' meeting of 4 May 2017, where it was in a position to appoint the majority of TIM's Board of Directors.[10] The term of TIM's Board of Directors is three years. At the time of the Clearance Decision, it could not be foreseen that Vivendi would have lost the majority in the Board of Directors before the end of that term, since (i) the Board of Directors had been replaced only at the end of its term in the past six years; and (ii) there were no other significant shareholders. Following the Clearance Decision, activist Elliot and CDP, neither of which was a TIM shareholder at the time of the Clearance Decision, acquired significant stakes in TIM and Elliot decided to propose a new vote for the Board of Directors and to challenge Vivendi's slate at the shareholders' meeting of 4 May 2018, which ultimately led to Vivendi's inability to appoint the majority of TIM's Board of Directors. These changes in TIM's shareholding structure and in the composition of the Board of Directors were not foreseeable at the time of the adoption of the Clearance Decision.

22. Second, the fact that at the shareholders' meeting of 4 May 2018 Vivendi only appointed a minority of the members to the TIM's Board of Directors should be considered as a significant change in market conditions, as it prevents Vivendi from exercising decisive influence on TIM (and therefore on Persidera). Such unforeseeable significant change therefore determines Vivendi's inability to procure the implementation of the Commitments by TIM.

23. Third, as regards the stable nature of the developments, the Commission notes that the situation of control over TIM is in flux. At this stage and under the current shareholding structure of TIM, it is clear that Vivendi has lost the ability to exercise a decisive influence on TIM's strategic decisions. Moreover, it appears that, in the absence of new unforeseeable changes of the market conditions, the loss of Vivendi's ability to influence TIM's strategic decisions is stable, and not merely temporary.

[10] Clearance Decision, paragraph 9.

### 4.3. The competition concerns laid out in the Clearance Decision are no longer likely to arise

24. The Commission considers that the competition concerns laid out in the Clearance Decision are no longer likely to arise.

25. Indeed, as explained in paragraph 22, Vivendi is no longer able to exercise decisive influence on Persidera (through TIM) since the conditions under which the Commission considered Vivendi to have acquired *de facto* sole control of TIM are no longer existent.[11] In particular, Vivendi was not able to appoint the majority of the Board of Directors at the last shareholders' meeting and it would not be able of exercise a decisive influence on TIM’s strategic decisions.

## 5. CONCLUSION

26. In the light of the foregoing, the Commission considers that Vivendi has shown that the market conditions since the adoption of the Clearance Decision are significantly changed, in a way which was not reasonably foreseeable at the time of the adoption of such Decision, leading to Vivendi’s inability to procure the implementation of the Commitments.

27. The Commission also considers that these changes imply that the competition concerns outlined in the Clearance Decision no longer arise during the period when the Commitments should remain in place, in the absence of new unforeseeable changes.

28. The Commission concludes that Vivendi's arguments satisfy the requirements of "exceptional circumstances" laid down in clause 45 of the Commitments. The Commission therefore accepts Vivendi's request to grant a complete waiver from its obligation to comply with the Commitments.

*For the Commission*

*(Signed)*
*Margrethe VESTAGER*
*Member of the Commission*

[11] The Commission considered that Vivendi acquired *de facto* sole control of TIM due to the specific rules for the appointment of the board, TIM's widely dispersed shareholding structure and the absence of other industrial shareholder(s) having a significant stake in TIM. See M.8465 – Vivendi / Telecom Italia, paragraphs 5-9.