



EUROPEAN COMMISSION
DG Competition

Case M.9041 - HUTCHISON / WIND TRE

Only the English text is available and authentic.

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

Decision on the implementation of the commitments -
Waiver of the Commitments

Date: 09/09/2022



EUROPEAN COMMISSION

Brussels, 9.9.2022
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PUBLIC VERSION

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

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Dear Sir/Madam,

Subject: Case M.9041 – HUTCHISON / WIND TRE

Commission decision on Hutchison's request of 12 August 2022 under paragraph 3 of the commitments annexed to the Commission decision of 1 September 2016 in case M.7758 – Hutchison 3G Italy / Wind / JV, as reaffirmed in the Commission decision of 31 August 2018 in case M.9041 – HUTCHISON / WIND TRE for a waiver of the obligation not to reacquire Divestment Spectrum¹

- (1) On 12 August 2022, the Commission received a request from Hutchison for a partial waiver of the non-reacquisition obligation set out in the commitments annexed to the Commission decision in case M.7758 – Hutchison 3G Italy / Wind / JV not to reacquire influence over the Divestment Spectrum. This decision presents the Commission's assessment of Hutchison's request.

¹ Unless otherwise provided, all abbreviations and capitalised terms used in this decision have the same meaning as in the Commission's decision of 31 August 2018 in case M.9041 – HUTCHINSON / WIND TRE, including the annexes to such decision.

1. BACKGROUND

- (2) By decision of 1 September 2016 in case M.7758 – Hutchison 3G Italy / Wind / JV pursuant to Article 8(2) of the Merger Regulation, the Commission declared that the creation of a joint venture, Wind Tre, between the telecommunications activities of Hutchison and VEON in Italy was compatible with the internal market and with the EEA Agreement, subject to full compliance with the 2016 Commitments submitted by the Parties and annexed to that decision.
- (3) On 7 September 2018, Hutchison acquired sole control over Wind Tre. The Commission conditionally cleared this concentration by decision of 31 August 2018 pursuant to Articles 6(1)(b) in conjunction with Article 6(2) of the Merger Regulation in case M.9041 – Hutchison / Wind Tre, subject to the same 2016 Commitments, which were reaffirmed in their entirety (“**Commitments**”).²
- (4) The Commitments aimed at addressing the Commission’s findings that the Transaction would have reduced competition in the Italian market for the retail supply of mobile telecommunications services as well as hindered the ability of mobile virtual network operators (“**MVNO**”) to effectively compete on the market. The Commitments enabled Iliad S.A. (“**Iliad**”) to enter the Italian retail mobile telecommunications market as a new mobile network operator (“**MNO**”).
- (5) The Commitments consist in (i) a divestment from Wind Tre to Iliad of a certain amount of mobile radio spectrum from different frequency bands (900 MHz, 1800 MHz, 2100 MHz and 2600 MHz); (ii) the transfer/colocation by Wind Tre to Iliad of several thousand mobile base station sites; and, (iii) a transitional agreement (for access to 2G, 3G and 4G, and new technologies) allowing Iliad to use Wind Tre’s network to offer customers nationwide mobile services until Iliad has built its own mobile network.
- (6) Section B.III of the Commitments further provided for the possibility for Wind Tre and Iliad to enter into a one-way (non-reciprocal) radio access network (“**RAN**”) sharing solution in the [...] less densely populated areas of Italy (the “**RAN Sharing Option**”). The RAN Sharing Option is now expired and has not been exercised by Iliad.
- (7) On 13 June 2022, Wind Tre and Iliad entered into a 50/50 owned RAN share joint venture (“**W3 Iliad JV**”), which will provide network coverage to the Parties over a territory covering 26.8% of the Italian population in the least populated parts of Italy (“**JV Area**”).³ The W3 Iliad JV will technically manage and roll-out the spectrum of both Wind Tre and Iliad, including the Divestment Spectrum, in order to provide Wind Tre and Iliad with wholesale RAN services. Since Wind Tre will have joint control (together with Iliad) over W3 Iliad JV, it will be able to reacquire influence over the Divestment Spectrum.
- (8) Wind Tre and Iliad will continue to legally own their respective spectrum allocation. In this regard, the Divestment Spectrum will continue to be legally owned by Iliad but technically managed by W3 Iliad JV in the JV Area. For completeness, the Divestment Spectrum will not be jointly managed by the W3 Iliad JV outside the JV Area. Outside the JV Area, both Wind Tre and Iliad will continue to separately manage their respective spectrum allocation, including the Divestment Spectrum.

² The 2016 Commitments are annexed as Annex 1 to the Commitments. For simplicity, references to the Commitments in this decision shall be understood as referring to Annex 1 of the Commitments, i.e., the 2016 Commitments.

³ The JV Area includes corresponds to all municipalities with less than [50 000-150 000] inhabitants as well as four municipalities with more than [100 000-200 000] inhabitants, namely [...].

2. HUTCHISON'S REQUEST FOR A WAIVER OF THE COMMITMENTS

- (9) On 12 August 2022, Hutchison requested, pursuant to paragraph 3 of the Commitments, a waiver from the obligation not to reacquire influence over the Divestment Spectrum, to allow “*Iliad to grant the W3 Iliad JV the right to technically manage the Divestment Spectrum*” in the JV Area. According to Hutchison, the effectiveness of the Commitments is not undermined, but rather enhanced through the creation of W3 Iliad JV.
- (10) First, Hutchison argues that the W3 Iliad JV does not undermine Iliad as an effective competitor in the Italian market and, therefore, does not undermine the effectiveness of the Commitments. Rather, the W3 Iliad JV strengthens Iliad’s ability to compete on the Italian mobile market, since: (i) the Commitments already provided for the RAN Sharing Option; (ii) a reciprocal access by Wind Tre and Iliad to each other’s spectrum (unforeseen in the Commitments) provides Iliad with immediate access to the full spectrum portfolio of Wind Tre in the JV Area; and, (iii) the W3 Iliad JV will enable Iliad to increase its 5G coverage.
- (11) Second, Hutchison considers that setting up of the W3 Iliad JV will increase Iliad’s competitiveness on the Italian market, notably by: (i) reducing Iliad’s costs of deployment in the JV Area; (ii) allowing Iliad to control the deployment of the joint network in the JV Area, as opposed the RAN Sharing Option; (iii) allowing for an efficient allocation of electromagnetic space; (iv) reducing the cost of electricity and additional software licenses; and, (v) eliminating the costs of changing Wind Tre’s sites in the JV Area from a multi operator core network technology (“**MOCN**”) to a multi operator RAN technology (“**MORAN**”).
- (12) Third, Hutchison considers that the W3 Iliad JV will not affect Iliad’s ability and incentives to compete in Italy. In particular, (i) Iliad will retain access to sufficient capacity which gives it the ability to compete effectively in Italy; (ii) Iliad will have a strong incentive to win new customers in order to amortise its initial investment of EUR 301 million or EUR 319 million (depending on the payment structure); and, (iii) Iliad and Wind Tre will continue to compete independently, in particular outside the JV Area which corresponds to the most densely populated areas of Italy.
- (13) Finally, Hutchison notes that the W3 Iliad JV has obtained all relevant regulatory clearance decisions in Italy.

3. OPINION OF THE MONITORING TRUSTEE

- (14) On 12 August 2022, the Monitoring Trustee submitted its opinion on Hutchison’s request (the “**Opinion**”). In the Opinion, the Monitoring Trustee stated that, in light of the objectives of the Commitments and the RAN Sharing Option in particular, the creation of the W3 Iliad JV does not affect the effectiveness of the Commitments. This includes the incentives of Iliad to continue rolling out its mobile network outside the JV Area.
- (15) First, the Opinion notes that under the W3 Iliad JV, the JV Area will be 26.8% whereas the RAN Sharing Option was to cover the [...] least populated areas of Italy. Although the Commitments are silent on whether the RAN Sharing area could be enlarged beyond the [least densely populated areas of Italy], the Monitoring Trustee’s understanding of the Parties’ position was that in the event the RAN Sharing Option would have been exercised, it would have needed to cover a contiguous area so to avoid operational complexities. Accordingly, the Monitoring Trustee considers that the W3 Iliad JV is considered consistent with what would have resulted had the RAN Sharing Option been exercised.

- (16) Second, the Monitoring Trustee explains that the W3 Iliad JV will make Iliad an active participant rather than a passive recipient of services from Wind Tre and that, on the basis of its discussions with Wind Tre and Iliad, Iliad will maintain the incentives to roll-out its own network.

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

4.1. Legal Test

- (17) Paragraph 3 of the Commitments, provides that: *“Subject to paragraph 8 below, in order to maintain the structural effect of the Commitments, the Parties shall, for a period of 10 years after Closing, not acquire, whether directly or indirectly, the possibility of exercising influence (as defined in paragraph 43 of the Remedies Notice, footnote 3) over the whole or part of the New MNO’s activities in the mobile telephony sector in Italy and/or otherwise acquire the Divestment Spectrum or the Sites unless, following the submission of a reasoned request from the Parties showing good cause and accompanied by a report from the Monitoring Trustee, the Commission finds that the re-acquisition of some or all of the Sites or the Divestment Spectrum does not undermine the effectiveness of the Commitments.”*
- (18) Thus, pursuant to paragraph 3 of the Commitments, any reacquisition of influence by Wind Tre over the Divestment Spectrum may only be granted if, in addition to showing good cause, the Parties demonstrate such reacquisition does not undermine the effectiveness of the Commitments.
- (19) Within this framework, in the following subsection, the Commission will assess Hutchison’s waiver request against the criteria mentioned above, notably whether the contribution by Iliad of Divestment Spectrum to the W3 Iliad JV is liable to undermine the effectiveness of the Commitments.

4.2. The contribution of the Divestment Spectrum to the W3 Iliad JV does not undermine the effectiveness of the Commitments

- (20) At the outset, the Commission notes, as mentioned above, that the purpose of the Commitments reaffirmed in case M.9041 – Hutchison / Wind Tre was to make sure that a new MNO, namely Iliad, could enter the Italian retail telecommunications market by providing it with all the necessary inputs and assets to roll out its mobile network and compete effectively. The Commission has therefore assessed whether the reacquisition of influence by Wind Tre over the Divestment Spectrum affects Iliad’s ability and incentive to compete as an MNO, as envisaged by the Commitments. The Commission finds that such reacquisition does not undermine the effectiveness of the Commitments.
- (21) First, the Commission considers that, in the JV Area, Iliad will continue to have effective access to the Divestment Spectrum for the purpose of rolling out its network. More specifically, Iliad will have access to [>90%] spectrum bands operated by the W3 Iliad JV, which include not only the Divestment Spectrum but also [>90% of the] spectrum portfolio of Wind Tre, with sufficient capacity to provide retail mobile telecommunication services to its customers.⁴ In this regard, the Commission notes that the concerns the Commitments sought to address were unrelated to an excessive accumulation of spectrum by Wind Tre. Rather, the need to divest the Divestment Spectrum was necessary to allow Iliad to become an MNO in Italy. The Commission considers that the creation of the W3 Iliad JV does not affect this outcome.

⁴ The W3 Iliad JV agreements provide for a mechanism to make sure that both Iliad and Wind Tre have access to sufficient capacity to manage their traffic, including the possibility to [address] congestion.

- (22) Second, the JV Area corresponds to rural parts of the Italian territory, where network deployment is less economically viable for MNOs due to the smaller customer base. By allowing for the sharing of costs related to the deployment of the network, the W3 Iliad JV will reduce the time and investments that Iliad would need to bear to roll-out its spectrum and provide mobile telecommunication services in the JV Area. In this regard, the Commitments already provided for a long-term RAN sharing solution to help Iliad deploy its network in rural areas, recognising that an independent network roll-out would be challenging.
- (23) Furthermore, the Commission notes that it is common market practice to have some form of active sharing agreement in less densely populated areas in Italy. Indeed, other MNOs (namely Vodafone Italia S.p.A. and Telecom Italia S.p.A.) already have an active sharing agreement in an area similar to the JV Area.
- (24) Third, Iliad and Wind Tre will continue to compete in the provision of retail telecommunication services. In particular, they will continue to take independent decisions on their operations, including as regards the setting of prices and the differentiation of their products and services, in particular outside the JV Area, where almost 75% of the Italian population lives. In addition, Iliad and Wind Tre will continue to bid separately for new spectrum bands in the future.
- (25) Therefore, for the reasons set out above, the Commission concludes that the contribution of the Divestment Spectrum to the W3 Iliad JV does not undermine Iliad's ability to compete as an MNO in Italy.

5. CONCLUSION

- (26) In light of the assessment set out in paragraphs (20) to (25) above, the Commission considers that Hutchison has shown that the contribution by Iliad of part of the Divestment Spectrum to W3 Iliad JV in the JV Area will not impact the effectiveness of the Commitments annexed to the Commission decision of 1 September 2016 in case M.7758 – Hutchison 3G Italy / Wind / JV, as reaffirmed in the Commission decision of 31 August 2018 in case M.9041 – Hutchison / Wind Tre.
- (27) The Commission concludes that such reacquisition, within the conditions described in paragraph (8) above, satisfies the conditions laid down in paragraph 3 of the Commitments. The Commission therefore accepts Hutchison's request to grant a partial waiver from the obligation not to reacquire Divestment Spectrum with regards to the creation of W3 Iliad JV, as long as the conditions described in paragraph (8) of this decision remain applicable.
- (28) Nothing in this decision should be interpreted as affecting the assessment of competition concerns contained in the Commission decision of 1 September 2016 in case M.7758 – Hutchison 3G Italy / Wind / JV and in the Commission decision of 31 August 2018 in case M.9041 – Hutchison / Wind Tre.

- (29) Furthermore, this decision should not be interpreted as a decision clearing the creation of W3 Iliad JV under the Merger Regulation or otherwise declaring the compatibility of the creation of W3 Iliad JV (and any underlying agreements) with Articles 101 or 102 of the Treaty on the Functioning of the European Union (or equivalent national provisions).

For the Commission

(Signed)
Margrethe VESTAGER
Executive Vice-President