Summary of Commission Decision

of 1 September 2016

declaring a concentration compatible with the internal market

(Case M.7758 — Hutchison 3G Italy/WIND/JV)

(notified under document C(2016) 5487)

(only the English version is authentic)

(2016/C 391/05)

On 1 September 2016 the Commission adopted a Decision in a merger case under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [1]*, and in particular Article 8(2) of that Regulation. A non-confidential version of the full Decision, as the case may be in the form of a provisional version, can be found in the authentic language of the case on the website of the Directorate-General for Competition, at the following address: http://ec.europa.eu/comm/competition/index_en.html*

I. THE PROCEDURE

(1) On 5 February 2016, the Commission received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which Hutchison Europe Telecommunications SARL ('HET', Luxembourg) and VimpelCom Luxembourg Holdings SARL ('VIP', Luxembourg) acquire within the meaning of Article 3(1)(b) and Article 3(4) of the Merger Regulation joint control of a newly-created joint venture (the 'JV', Luxembourg) by way of contribution to the JV of their respective business activities in Italy [2]. The Notifying Parties are referred to collectively as the 'Parties'.

(2) After the Phase I investigation, the Commission concluded that the Transaction would raise serious doubts as to its compatibility with the internal market and adopted a decision to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation on 30 March 2016 (the 'Article 6(1)(c) Decision'). On 20 April 2016, the Parties submitted a request for a five working day extension of the Phase II proceedings and they submitted their written comments on the Article 6(1)(c) Decision on 21 April 2016. On 8 June 2016, the Commission adopted a decision pursuant to the third sentence of the second subparagraph of Article 10(3) of the Merger Regulation, extending the Phase II proceedings by a further 15 working days. The Advisory Committee discussed a draft of the final decision on 17 August 2016 and issued a favourable opinion.

II. THE PARTIES AND THE CONCENTRATION

(3) HET is an indirect wholly owned subsidiary of CK Hutchison Holdings Limited ('Hutchison'), a multi-national group headquartered in Hong Kong and listed on the Hong Kong Stock Exchange Limited. In Italy, Hutchison operates through its indirect wholly owned subsidiary, H3G SpA ('H3G'), which is active as a mobile network operator ('MNO'), offering mobile telecommunications services under the '3' brand, including 2G, 3G, and 4G services.

(4) VIP is an indirect wholly owned subsidiary of VimpelCom Ltd ('VimpelCom'), an international telecommunications company headquartered in Amsterdam and traded on the NASDAQ Global Select Market. VimpelCom provides voice and data services through a range of traditional and broadband mobile and fixed technologies in 14 countries under several different brands. In Italy, VimpelCom operates through its indirect wholly-owned subsidiary WIND Telecomunicazioni SpA ('WIND'), which is active as an MNO, offering mobile telecommunications services under the 'WIND' brand, including 2G, 3G and 4G services and in addition fixed telecommunications services under the 'Infostrada' brand.

(5) On 6 August 2015, VimpelCom, VIP, Hutchison and HET entered into a Contribution and Framework Agreement and a Shareholders' Deed by which they agreed to contribute their respective Italian telecommunication businesses H3G and WIND to the JV (the 'Transaction'). Upon completion of the Transaction, H3G and WIND would be 100 % indirectly-owned subsidiaries of the JV, which, in turn, would be controlled by HET and VIP and, ultimately by Hutchison and VimpelCom.

(6) The Transaction consists of the acquisition of joint control by HET and VIP over the JV and, therefore, constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

[1] OJ L 24, 29.1.2004, p. 1.

[2] Publication in the *Official Journal of the European Union* No C 58, 13.2.2016, p. 40.

III. **EU DIMENSION**

(7) The Transaction has an EU dimension within the meaning of Article 1(2) of the Merger Regulation.

IV. **REFERRAL**

(8) On 25 February 2016, the Italian competition authority (the Autorità Garante della Concorrenza e del Mercato, 'AGCM') requested, on the basis of Article 9(2)(a) of the Merger Regulation, a referral of the Transaction from the Commission to the AGCM. However, after the Commission adopted the Article 6(1)(c) Decision on 30 March 2016, AGCM did not send a reminder pursuant to Article 9(5) of the Merger Regulation. The referral request is therefore deemed to have been withdrawn by AGCM.

V. **THE ITALIAN MOBILE TELECOMMUNICATIONS SECTOR**

(9) The Italian mobile telecommunications sector is characterised by a high mobile penetration rate, with 158 mobile SIM cards per 100 inhabitants in 2014 (compared to an EU average of 134 mobile SIM cards).

(10) In terms of technological development, Italy is mostly still a 3G market, as the majority of mobile customers use 3G networks, with 4G services expected to grow in the coming years. With regard to the different mobile market segments, most customers rely on prepaid mobile services: 80 % prepaid vs 20 % postpaid as of December 2015; and most customers are private customers: 84 % of mobile lines are private, 16 % are businesses.

(11) The demand for multiple play bundles including a mobile component has to date been rather limited in the Italian market, and mobile services are mostly purchased separately by customers.

(12) In addition to the Parties, two others MNOs are active in Italy, TIM and Vodafone. TIM, Vodafone and WIND also provide fixed telecommunications services through their fixed networks, whereas H3G is a mobile only player. In Italy, all MNOs are engaged in passive sharing agreements. No MNO in Italy is currently engaged in active sharing, spectrum sharing or full network sharing.

(13) There are also 16 Mobile Virtual Network Operators ('MVNOs') active in Italy, which offer mobile telecommunications services without having ownership of a network. MVNOs have a very limited market presence in Italy, collectively having a [0-5] % market share by revenue, [5-10] % by subscribers.

VI. **RELEVANT MARKETS**

(14) The Transaction concerns the provision of retail mobile telecommunications services and wholesale services for access and call origination on public mobile telephone networks in Italy. The relevant product and geographic market for these services are defined as follows.

a. **Retail market for mobile telecommunications services**

(15) The Commission considers that, in line with its decisional practice, mobile telecommunications services constitute a separate market from fixed telecommunications services. Further, the Commission considers that mobile services and over the top services ('OTT') are not substitutable as at the very least a mobile data connection is required to access OTT instant messaging and voice services. Given the limited penetration of multiple play offers with a mobile component in Italy, for the purposes of the present case it is not necessary to define a separate product market for multiple play offers including a mobile component.

(16) As regards the market for the retail provision of mobile telecommunications services to end customers, consistent with its previous decisional practice, the Commission concludes that there is one overall product market for the provision of retail mobile telecommunications services, without it being necessary to define separate product markets on the basis of the: (1) type of technology (2G, 3G, and 4G); (2) type of service (voice, SMS, and data); (3) type of contract (pre-paid vs post-paid), and (4) type of end-customer (business vs private).

(17) Further, in this case, the Commission does not consider that mobile services sold in contracts including the purchase of a handset and pure mobile subscriptions constitute separate product markets.

(18) In line with previous Commission decisions, and in line with the view of the Parties, the Commission concludes that the relevant geographic market for the assessment of this case is national, corresponding to the territory of Italy.

b. **Wholesale market for access and call origination on public mobile networks**

(19) In line with previous cases, the Commission concludes that the relevant product market for the assessment of the present case is the market for wholesale access and call origination on public mobile telephone networks. The Commission concludes that the geographic scope of the market is the territory of Italy.

c. **Other relevant markets**

(20) In addition to the two aforementioned markets, the Transaction also concerns other relevant markets, in which the Parties' activities overlap, or are vertically linked.

(21) The Commission identified and defined relevant markets for: (1) wholesale international roaming services; (2) wholesale services for mobile call termination; and (3) wholesale services for call termination on fixed networks. The Commission identified a market for wholesale services for fixed backhaul but left the precise market definition open. The Commission has found that the Transaction does not raise competition concerns with respect to any of these markets.

VII. **COMPETITIVE ASSESSMENT**

a. **Retail market for mobile telecommunications services**

i. *Horizontal non-coordinated effects arising from the elimination of important competitive constraints*

(22) The Transaction would combine the operations of H3G and WIND, respectively the fourth and third mobile players in the retail market for the provision of mobile telecommunications services in Italy, creating the market leader by number of subscribers and revenues and significantly increasing the level of market concentration.

(23) H3G has been the most commercially aggressive and disruptive MNO in recent years, by consistently offering the cheapest mobile services which have triggered 'price wars'. H3G has competed aggressively on the market, notwithstanding its (currently) less developed 4G network. In this respect, as mentioned in paragraph (11) above, the Commission notes that in Italy 4G services are at the moment not yet well developed, with the majority of mobile customers in Italy use 3G networks. The Commission also notes that H3G's competitiveness has not been hindered by its inability to offer fixed telecommunications services, as in Italy fixed-mobile offerings are still very limited and customers tend to purchase mobile services separately. H3G's conduct on the market has forced the other MNOs to lower their prices, and to continue offering more inclusive packages of mobile services to match H3G's aggressive tariffs.

(24) Absent the Transaction, H3G is likely to continue to compete strongly. Based on the available evidence in its file, the Commission considers it unlikely that H3G's ability to compete will materially deteriorate because of its limited scale, lack of offering of fixed telecommunications services, or alleged inability to develop its 4G network. The Commission notes that H3G has been performing well on the market, gaining customers, increasing market share and positive EBITDA results for a number of years. The Commission considers that H3G is likely about to become increasingly profitable in the coming years and that it would be able to continue operating and investing in the development of its 4G network in the coming years when 4G services will become more important. Therefore, H3G's competitiveness would not deteriorate, as it would be able to develop its 4G network and fill the gap vis-à-vis TIM and Vodafone.

(25) Therefore, based on its findings from the Phase II investigation, the Commission considers that pre-Transaction H3G constitutes an important competitive force pursuant to paragraph 37 of the Horizontal Merger Guidelines, or in any event it exerts an important competitive constraint on the retail market for the provision of mobile telecommunications services in Italy, and it is likely to continue exerting such a constraint absent the Transaction.

(26) The Phase II investigation indicated that WIND also plays an important competitive role on the market. WIND has been the second cheapest and aggressive MNO on the retail mobile market after H3G. Therefore, the Commission considers that WIND exerts an important competitive constraint on the Italian retail mobile market.

(27) The Commission considers that WIND's shareholders would have the incentive to financially support WIND if this was needed in order to maintain its competitiveness in the market and that absent the Transaction WIND would continue to have the ability and the incentive to exert an important competitive constraint on the overall mobile market and in the data centric market segment.

(28) The Commission also considers that all MNOs in the Italian retail mobile market closely compete.

(29) The Transaction would eliminate the competitive constraint that H3G and WIND exercise on each other and on the other MNOs, which would result in significantly weakened competition on the retail market. The JV would be the largest MNO with little, if any, incentive to be price aggressive.

(30) Based on the overall evidence in the Commission's file, it appears likely that the JV will compete less aggressively and would raise prices post-Transaction. TIM and Vodafone would also compete less aggressively post-Transaction and are likely to follow price increases by the JV.

(31) The Transaction's anticompetitive effects are unlikely to be offset by MVNOs. MVNOs have a very small market presence in Italy, and already exert a limited competitive constraint pre-Transaction. Given their marginal role and limited ability to compete, in particular on data, and to innovate due to their dependence on MNOs, the Commission considers that MVNOs will not be able to counteract the loss of competitive pressure resulting from the Transaction.

(32) The Commission has also undertaken an in-depth quantitative assessment of the likely price effects of the elimination of competition in the retail market. Such quantitative assessment is carried out in detail in Annex A to the Decision ([1]). Absent the additional harm resulting from coordinated effects, the Commission considers that the Parties would have significant incentives to increase prices post-Transaction. Specifically, the Commission's quantitative analysis shows that in the private segment H3G and WIND would have incentives to increase prices.

(33) The Commission considers that its quantitative analysis supports the conclusions reached by the qualitative market investigation. In the Commission's view, the Transaction is likely to generate a sizeable incentive to increase prices in the mobile market in Italy.

ii. *Horizontal coordinated effects*

(34) Based on its Phase II investigation, the Commission considers that the Transaction would likely align the <u>incentives</u> of the MNOs in the Italian mobile market to engage in coordination. The Transaction would reduce the number of players from four to three in a highly concentrated market. It would also remove H3G, which has been the maverick operator with misaligned commercial interests in the market pre-Transaction. The Transaction would also create a highly concentrated and relatively symmetric market, as the JV, TIM and Vodafone would all have similar scale and market shares post-Transaction. This would contribute to the alignment of interests of the MNOs.

(35) The Commission also considers that the Transaction would likely increase MNOs' <u>ability</u> to reach terms of coordination. The Italian retail mobile market presents certain features (such as transparency, limited degree of product differentiation and ease of comparison of mobile tariffs) that would enable reaching terms of coordination post-Transaction. Furthermore, the Commission has analysed past instances when the MNOs managed to successfully increase prices in a parallel fashion, particularly in Q4 2013 and Q1 2014. In those instances, coordination was not ultimately stable because of factors related to the pre-Transaction market structure, including the disruptive behaviour of H3G. After the Transaction, one of the most likely focal points of coordination among MNOs would be the status quo market shares of the MNOs. Such a coordination mechanism not only stands out as the most sensible in light of the symmetrical market structure post-Transaction (with each MNO controlling around [30-40] % of the retail mobile market).

(36) The Commission also finds that coordination would likely be <u>sustainable</u> after the Transaction. In particular, the MNOs would have several direct and indirect tools that would enable them to swiftly and effectively detect deviations from the terms of coordination. MNOs could punish deviations from coordination by engaging in a price war, which would constitute a credible threat that would likely deter MNOs from deviating in the first place and

([1]) The quantitative assessment performed by the Commission is also based on data collected in a customer survey (the 'Survey'). The methodology used in the Survey and the questionnaire are contained in Annex B and C to the Decision respectively.

induce them to stick to the terms of coordination. Given the negligible power of both customers, and actual and existing MVNOs as well as the lack of new MNO entrants, reactions of outsiders would be likely insufficient to jeopardise coordination between the MNOs after the Transaction.

(37) Finally, the Commission considers that post-Transaction, the MNOs could implement various possible practices that could likely facilitate coordination. Although none of these practices would be strictly necessary for coordination to arise and to be sustainable post-Transaction, they could make it easier to reach terms of coordination and contribute to its sustainability. These practices, to which the MNOs already resort today, include the use of public statements by MNO senior executives as a tool to 'signal' to competitors, the exchange of information via investment banks and the frequent high level contacts that take place between MNOs' top executives.

(38) The Commission therefore concludes that the Transaction would give rise to coordinated anticompetitive effects in the Italian retail market for mobile telecommunications services. The Transaction would increase the likelihood that the three remaining MNOs would be able to coordinate their behaviour and raise prices in a sustainable way, even without entering into an agreement or resorting to a concerted practice within the meaning of Article 101 TFEU.

iii. *Countervailing factors*

(39) On the basis of its market investigation, the Commission considers, that there are no countervailing factors, such as entry or buyer power, that would offset the possible anticompetitive effects of the Transaction.

iv. *Conclusion*

(40) Since the anticompetitive effects described above cannot be offset by efficiencies (see Section VII.c below), on the basis of the above the Commission concludes that the Transaction would lead to a significant impediment of effective competition in the retail market for mobile telecommunications services in Italy due to horizontal non-coordinated and coordinated effects.

b. **Wholesale market for access and call origination on public mobile networks**

i. *Horizontal non-coordinated effects arising from the elimination of important competitive constraints*

(41) In addition to the retail market, the Parties are active on the wholesale market for network access and call origination on public mobile networks. On this market, MNOs provide hosting services to MVNOs, which in turn offer retail services to end customers.

(42) Currently all four MNOs offer wholesale access to MVNOs in Italy. The largest wholesale host currently is Vodafone, followed closely by TIM. WIND is the third largest host. H3G is the smallest wholesale access host and its market share is expected to decline over the next years due to the migration of its only MVNO customers (DIGI and Fastweb) to TIM.

(43) In relation to WIND, the Commission considers, on the basis of the phase II investigation, that WIND exercises an important competitive constraint on the other MNOs pre-Transaction and that this would continue absent the Transaction.

(44) On the basis of the Phase II investigation, the Commission considers that, despite its declining market share, H3G also exercises an important competitive constraint on the other MNOs pre-Transaction and that this would continue absent the Transaction.

(45) The Commission considers that the reduction in the number of wholesale hosts post-Transaction would reduce the competitive position of MVNOs. The JV is likely to have decreased incentives to host MVNOs on commercially attractive terms compared to WIND and H3G acting independently on the market. Finally, the reduction in competition on the wholesale market is unlikely to be offset by the remaining competitors on the market, TIM and Vodafone. The Commission notes that the reduction of competition in the market would not affect the most successful MVNO in the market, PosteMobile (which accounts for half of the MVNOs' market share in Italy) for a number of years. PosteMobile has a wholesale access agreement with WIND for several years. Fastweb, the second largest

MVNO on the market, has recently entered into an MVNO agreement with TIM. The Transaction would mainly affect those MVNOs which are not contractually bound to an MNO in the short term. The Commission also found that the Transaction would affect potential MVNO entrants. However, the Commission notes that there are no indications of concrete entry plans by MVNOs in the near future.

ii. *Countervailing factors*

(46) The Commission considers, on the basis of its market investigation, that there are no countervailing factors, such as buyer power or entry that would offset the possible anticompetitive effects of the Transaction.

iii. *Conclusion*

(47) Since the horizontal non-coordinated effects described above cannot be offset by efficiencies (see Section VII.c below), on the basis of the above, the Commission concludes that the Transaction would lead to a significant impediment of effective competition in the wholesale services for access and call origination on public mobile telephone networks in Italy.

c. **Efficiencies**

(48) The Parties submit that the Transaction would lead to two types of efficiencies: (1) cost and revenue synergies, with variable and fixed components; and (2) the creation of a third high-quality network, comparable to those of TIM and Vodafone, given that the JV would enable a faster LTE roll out achieving a higher population coverage than absent the Transaction.

(49) The Parties submit that the variable savings are likely to generate a direct incentive to provide benefits to customers in the form of lower prices and advantageous tariff plans. The Parties also submit that fixed cost savings will lead to benefits to consumers as they will ease the investment constraints currently faced by the Parties and would allow the JV to fund investments to build a state of the art network. Consequently, this would deliver better quality to consumers and enable the JV to compete on quality with TIM and Vodafone, competition that would not be possible absent the Transaction.

(50) The claimed efficiencies related to the better network, according to the Parties, are due to the faster roll-out of a third high quality network, characterized by higher LTE coverage and LTE speed than the networks that either of the Parties would roll-out absent the Transaction. To quantify the benefits to consumers related to this efficiency, the Parties submitted a merger simulation study which concludes that the pro-competitive effects of the Transaction outweigh its anti-competitive effects, and that the Transaction would overall increase consumer welfare in the Italian mobile telecom market.

(51) According to the Parties, all the claimed efficiencies are verifiable to the required standards, are not attainable in a comparable manner under less anticompetitive alternatives, and benefit consumers.

(52) On the variable cost efficiency claim, the Commission concludes that the size of the efficiencies that meet the three limbed test of the Horizontal Merger Guidelines is limited and unlikely to outweigh the harm caused by the JV. It reaches this conclusion without even factoring in that the JV may reduce the competitive pressure to such an extent that it is unlikely that variable cost savings would be passed to consumers such as to outweigh the harm (given the coordinated effects and the market expectations of the competitors on likely market repair).

(53) Further, the Commission considers that fixed cost savings will not benefit consumers as these savings will likely be used to repay the JV's debt (brought by WIND) and channel cash upstream to the shareholders rather than finance a higher overall level of investments, that in aggregate would decrease in comparison to the sum of the Parties' standalone investments. Moreover, the Commission notes that the benefits to consumers from the network quality improvement related to fixed cost savings are already part of a separate claim and, as to avoid double counting, will only be accounted once.

(54) Finally, on the higher network quality claim, the Commission's assessment finds that network sharing agreements are relevant for the assessment of the Transaction as they likely constitute a less anti-competitive alternative to the current Transaction and could achieve similar efficiencies. The Commission's analysis shows that: (1) network sharing agreements are realistic and established alternatives; (2) the Parties belong to groups that have entered into

numerous network sharing agreements in other geographic mobile markets; (3) […]; (4) the Parties would have an incentive to enter into such an alternative network sharing agreements and this agreement would bring the same or similar benefits to consumers that the Parties have claimed for the JV, this on the basis of the Parties' own efficiency claims; and (5) the model the Parties used to analyse the competitive scenario post-JV is not consistent with the market repair and coordinated effect evidence, hence it under estimates the anti-competitive effects of the Transaction. For the above reasons the Commission concludes that the claimed efficiencies related to network quality improvements are not merger specific. Further, the submitted merger simulation study suffers from some drawbacks that question the verifiability of its estimates.

(55) Overall, the Commission concludes that the Parties have failed to demonstrate, based on the framework of the Horizontal Merger Guidelines, that the submitted fixed cost savings and improvements related to the network are merger specific, likely to materialise, and able to counter the anti-competitive effects on competition that the Commission considers might otherwise result from the Transaction. The only part of the claimed efficiencies that would meet the three conditions test of the Horizontal Merger Guidelines (a subset of the variable cost claim) are also considered too limited to outbalance the likely anti-competitive effect of the JV.

VIII. **COMMITMENTS**

a. **Procedure and timing**

(56) In order to address the competition concerns identified by the Commission on the retail and wholesale markets for mobile telecommunications services, the Parties submitted commitments on 6 June 2016 (the 'MNO Commitment'). The Commission launched a market test of the MNO Commitment on 8 June 2016 (the 'Market Test'). Questionnaires were sent to: (1) current and potential future providers of mobile telecommunications services in Italy, as well as the MVNO association MVNO Europe; and (2) national telecommunications regulators, including the Italian telecoms regulator AGCOM. In addition, AGCM as well as the national competition authorities of the United Kingdom, Netherlands and Germany provided their views on the MNO Commitment.

(57) In light of the outcome of the Market Test and of the Commission's feedback, on 5 July 2016 the Parties submitted revised commitments (the 'Revised MNO Commitment'). On 18 July 2016, the Parties submitted a further set of commitments (the 'Final MNO Commitment'), which is in all material respects identical to the Revised MNO Commitment ([1]).

(58) The Parties also informed the Commission that they had entered into binding long form agreements on 1 July 2016 comprising: (1) a framework and transfer agreement; (2) a national roaming services agreement; (3) a RAN sharing agreement; and (4) a co-location agreement (together the 'New MNO Agreements') with Iliad SA ('Iliad') which they presented as the potential purchaser of the remedy package. The MNO Agreements were subsequently amended and re-executed on 18 July 2016.

b. **Description of the MNO Commitment**

(59) The MNO Commitment consists of a number of elements designed to allow the entry of a fourth MNO (the 'New MNO') into the Italian market: (1) spectrum; (2) the option to acquire/co-locate on macro access sites; (3) the option of a RAN sharing agreement; (4) a national roaming agreement; and (5) […]. These are described in turn below.

(60) The Parties committed to transfer a total of 2 × 30 MHz of spectrum (the 'Divestment Spectrum'), belonging to different frequency bands, namely:

(a) the 2 × 5 MHz spectrum block on the 900 MHz frequency used for 3G technology;

(b) the 2 × 10 MHz spectrum block on the 1 800 MHz frequency used for 2G technology;

(c) the 2 × 5 MHz spectrum block on the 2 100 MHz frequency used for 3G technology; and

(d) the two 2 × 5 MHz spectrum blocks on the 2 600 MHz frequency used for 4G technology.

([1]) There were three amendments between the Revised MNO Commitment and the Final MNO Commitment; one was substantive, relating to the addition of Commission oversight of the Final MNO Commitment.

(61) The Parties committed to make available to the New MNO up to […] macro network sites (the 'Divestment Sites'), of which:

(a) […] available for transfer; and

(b) […] available for co-location under standard inter-operator colocation conditions.

(62) The Parties committed to release the Divestment Spectrum and the Divestment Sites in accordance with the release plan attached to the MNO Commitment, completing the release of spectrum and sites by […].

(63) At the option of the New MNO, the Parties committed to increase the number of Divestment Sites to include up to an additional […] divested sites and […] sites for co-location, both in the least populated areas of Italy (the 'Extended Sites').

(64) The Parties also committed to offer an option to enter into a one-way (non-reciprocal) RAN sharing solution covering the less densely populated areas of Italy (the 'RAN Sharing Option'). The RAN Sharing Option would have covered 3G and 4G technology and would be have been deployed on up to […] sites. The RAN Sharing Option would be made available for up to […] at commercial conditions to be agreed between the Parties and the New MNO.

(65) The Parties committed to enter into a national roaming agreement for a transitional period on the network of H3G and WIND, across 2G, 3G, 4G, and 5G technologies (if and when commercially launched) (the 'National Roaming Agreement'), for an initial term of […], with an optional extension of […]. The fee structure for both terms was to be agreed between the Parties and the New MNO.

(66) For an initial term of the National Roaming Agreement, the New MNO would not have been permitted to provide wholesale services to third parties. After this term, providing wholesale services to third parties would have been permitted but up to a predetermined maximum percentage of the total roaming capacity used by the New MNO.

c. **Assessment of the MNO Commitment**

(67) The results of the Market Test were broadly positive on the concept of the MNO Commitment; market participants as well as AGCM, AGCOM and other NCAs considered that in principle the MNO Commitment constituted a structural solution for the competition concerns identified by the Commission with respect to the retail and, subject to the removal of the wholesale ban included therein, the wholesale market. However, respondents identified a number of shortcomings in each of the elements of the MNO Commitment which needed to be addressed for the MNO Commitment to effectively remove those concerns.

(68) The Commission considered that the MNO Commitment would not be sufficient with regard to either the quantity or composition of the spectrum. The Commission noted that H3G currently has 45 MHz of spectrum compared the 30 MHz included in the MNO Commitment, of which only one block is sub-1 GHz and only two blocks are licenced for 4G technology. Moreover, there was significant uncertainty regarding the Divestment Spectrum. First, under the terms of the MNO Commitment, the Parties were deemed to have complied with the commitment upon entering into agreements for the transfer of the spectrum, where transfer is conditional on MiSe approval. Second, the expiration date of the licences for some of the blocks of spectrum (notably the 1 800 MHz block) is as early as […] and any extension of the duration of the licence requires MiSe approval. Third, any refarming of the Divestment Spectrum for 4G usage would again require MiSe approval.

(69) With regard to the Divestment Sites, the MNO Commitment merely includes a commitment to 'make available' a certain number of sites to the New MNO thereby providing no certainty as to whether the New MNO would take any/all of the Divestment Sites. The Commission notes that H3G currently has around […] sites in the whole of the Italian territory. The results of the Market Test suggested that a competitive national network needs between 10 000-15 000 sites. However, unless the option for the Extended Sites or the RAN Sharing Option are exercised, the Divestment Agreement would have included only up to […] sites. On the other hand, the Market Test revealed that the gap between the sites offered in the MNO Commitment and the number of sites needed for a competitive national network could be filled with assets available from tower companies.

(70) With regard to the RAN Sharing Option, the Commission considers that the RAN Sharing Option could constitute a cost-effective measure for the New MNO to extend its coverage in the least populated areas of Italy. However, as both possibilities for the New MNO to obtain coverage of the least densely populated areas of Italy were optional, there was insufficient certainty that the New MNO would roll out a full national network. Moreover, there was insufficient detail regarding the commercial terms of the RAN Sharing Option. Finally, as the RAN sharing covers only 3G and 4G technologies, there was a risk that the New MNO would have been unable to offer 2G services in the RAN sharing areas as roaming was turned off.

(71) With regard to the National Roaming Agreement, the Commission had material concerns regarding the commercial terms of the agreement as very little detail was included in the MNO Commitment. During the transitional period from commercial launch of the New MNO until the time that it rolls out its own commercial network (which may require several years after completion of the transfer of sites and spectrum) the New MNO's operations would have been based on the National Roaming Agreement. The terms of this agreement are therefore fundamental to whether New MNO has the ability and incentive to compete effectively. On the other hand, it is of paramount importance that a balance is found to ensure that the New MNO is sufficiently incentivised to roll out its own network rather than relying on the National Roaming Agreement in the medium to long term. Without any details of the cost structure of the National Roaming Agreement in the MNO Commitment, the Commission cannot conclude that either of these objectives could have been met, and therefore considers that the MNO Commitment was insufficient to address its concerns.

(72) Finally, the Commission considers that the prohibition on the New MNO providing wholesale services for the initial term of the National Roaming Agreement (and then subject to a capacity cap) prevented the MNO Commitment from resolving the concerns raised in the wholesale market.

d. **Description of the Final MNO Commitment**

(73) The Final MNO Commitment shares the same overall composition and structural nature as MNO Commitment described above but with material improvements, and additional detail.

(74) The Parties commit to divest 2 × 35 MHz of spectrum to the New MNO (the 'Revised Divestment Spectrum'):

(a) 2 × 5 MHz spectrum block on the 900 MHz frequency currently used for 3G technology;

(b) the 2 × 10 MHz spectrum block on the 1 800 MHz frequency currently used for 2G;

(c) the 2 × 10 MHz spectrum block on the 2 100 MHz frequency currently used for 3G technology; and

(d) the two 2 × 5 MHz spectrum blocks on the 2 600 MHz frequency currently used for 4G technology.

(75) In the densely populated areas, the Parties commit to divest/co-locate with the New MNO on […] macro network sites (the 'Revised Divestment Sites').

(76) In the least densely populated areas, the Parties commit to either:

(a) Divest and/or co-locate with the New MNO on […] macro access sites (the 'Revised Extended Sites') [1]; or

(b) Activate a RAN sharing option deployed on a minimum of […] sites the 'Revised RAN Sharing Option').

[1] The Revised Extended Sites correspond to the Further Sites and Extended Sites referred to in the Final MNO Commitment. These sites are treated the same under the Final MNO Commitment but are distinguished here to reflect the MNO Agreements. The Initial Sites and the Further Sites together total […] which is the number of sites that were 'offered' to the New MNO in the MNO Commitment.

(77) The Parties commit that Revised Divestment Sites with either the Revised Extended Sites or the RAN sharing sites, will be capable of enabling the New MNO to provide outdoor coverage on the 900 MHz spectrum for […] % of the Italian population ([…] % for indoor) ([1]). The MNO Commitment and the Final MNO Commitment remain unchanged regarding the phased release of the Divestment spectrum and Divestment Sites.

(78) For a transitional period, the Parties commit to enter into an agreement to: (1) provide of 2G National Roaming Services ('2G Roaming Services'); and (2) implement and operate 3G/4G MOCN Services ([2]), ('3G/4G MOCN Services') (under the 'Revised National Roaming Agreement'). The 2G National Roaming Services and 3G/4G MOCN Services will be provided for an initial term of […], extendable by […]. The coverage of the 2G National Roaming Services and 3G/4G MOCN Services will be national but with the 3G/4G MOCN Services reducing over time in accordance with the spectrum and site release plan and activation of the RAN Sharing Option, if exercised.

(79) The Final MNO Commitment includes a fast track dispute resolution procedure and also specifies that during the Monitoring Trustee's mandate, it shall be entitled to seek the expert advisory opinion of the AGCOM on certain issues.

e. **Assessment of the Final MNO Commitment**

(80) With regard to Revised Divestment Spectrum, the Final MNO Commitment includes 2 × 5 MHz more spectrum than the initial MNO Commitment, in the 2 100 MHz band. This corresponds to an amount of spectrum that multiple respondents to the Market Test considered would be acceptable to allow the New MNO to compete on a nationwide basis. With regard to the amount of sub-1 GHz spectrum in the Final MNO Commitment, the Commission considers that with: (1) the 3G/4G MOCN solution utilising the Parties 800 MHz spectrum; (2) the possibility to purchase additional spectrum in the up-coming auction; and (3) […], the New MNO will be able to compete sufficiently with regard to the quantity and composition of the Revised Divestment Spectrum.

(81) The Commission also considers that the Final MNO Commitment deals with the previous uncertainties regarding the Divestment Spectrum. First, the Final MNO Commitment will now not be satisfied unless and until MiSe has given its approval for the transfer of the Revised Divestment Spectrum to the New MNO. Second, the Commission has obtained sufficient comfort from the Parties and MiSe.

(82) With regard to Revised Divestment Sites in the densely populated areas, the Parties commit to divest/co-locate with the New MNO for a specified minimum number of sites which provides certainty that the New MNO will roll out a national network. With regard the least densely populated areas, the Parties commit to divest/co-locate for the Revised Extended Sites unless the RAN Sharing Option is exercised. This provides certainty that the New MNO will gain coverage of the least densely populated areas. Moreover, the Final MNO Commitment provides additional detail regarding the site release and site selection procedures. The Commission therefore considers that the Final MNO Commitment would allow the New MNO to compete effectively with regard to the Revised Divestment Sites.

(83) With regard to the Revised RAN Sharing Option, the Commission considers that obligation to activate the RAN Sharing option over a committed minimum number of sites in the event that the Revised Extended Sites are not divested provides sufficient certainty. The Final MNO Commitment also includes significant additional details regarding the implementation and cost structure of the RAN Sharing Option. The Parties have committed to maintain the 2G Roaming National Services throughout the RAN sharing areas to ensure the New MNO can compete for 2G customers. As a result of these revisions, the reduction in uncertainty and additional details, the Commission considers that the Final MNO Commitment would allow the New MNO to compete effectively vis-à-vis the Revised RAN Sharing Option.

([1]) Provided the New MNO installs the appropriate equipment and takes the requisite steps needed to do so

([2]) 3G/4G MOCN Services shall cover 3G and 4G technology and, following commercial launch by the JV, all future technologies (including 5G) as agreed between the Parties and the New MNO and subject to technical feasibility.

(84) With regard to the National Roaming Agreement, the Parties have included extensive details of the commercial terms in the Final MNO Commitment. The Commission considers that the commercial terms provided for in the Revised National Agreement will ensure that the New MNO has the ability and incentive to compete aggressively, and eliminates risks during the term of the Revised National Roaming Agreement. On the other hand, the Commission considers that these commercial terms provide an appropriate incentive for the New MNO to roll out its network.

(85) The Final MNO Commitment contains no restrictions on the ability of the New MNO to offer wholesale access to MVNOs and therefore addresses the concerns the Commission identified in the wholesale market. The New MNO will constitute a viable alternative host MNO for those MVNOs seeking wholesale access. Therefore, the Commission considers that no additional remedial measure is required to address the competition concerns raised by the Transaction.

f. **Assessment of Iliad as the New MNO**

(86) The Commission considers that Iliad complies with the standard purchaser requirements detailed in the Remedies Notice in terms of independence, financial resources and the absence of prima facie competition concerns.

(87) First, the Commission finds that there is no control relationship between Iliad and the Parties. Iliad can therefore be considered as independent and unconnected to the Parties.

(88) Second, the Commission considers that Iliad possesses the financial resources, proven relevant expertise and has the incentive and ability to enter the Italian market as the New MNO acting as a viable and active competitive force in competition with the Parties and other competitors. In particular, the Commission considers that Iliad's business plan is sufficiently realistic and aggressive as to viably allow Iliad to exercise a significant competitive constraint on the retail and wholesale mobile telecom markets in Italy. The cost structure of the Revised National Roaming Agreement allows and incentivizes Iliad to be competitive from the beginning of its operations. Additionally, the substantial investment envisaged in Iliad's business plan represents a very credible commitment to roll-out its network and to operate as an MNO. Furthermore, the initial investment in acquiring the Revised Divestment Spectrum and Revised Divestment Sites gives Iliad the incentive to: (1) acquire a substantial customer base in the short-term; and (2) quickly move traffic from the Parties' network under the Revised National Roaming Agreement to its network so as to recover its fixed costs and turn to profitability.

(89) Third, the Commission considers that entry into the New MNO Agreements is neither likely to create new competition problems, nor give rise to the risk that the implementation of the Final MNO Commitment will be delayed. While certain regulatory approvals would be required in order to fully implement the Final MNO Commitment, the Commission considers that Iliad can be expected to obtain all necessary approvals from the relevant regulatory authorities.

(90) The Commission also reviewed the New MNO Agreements between the Parties and Iliad, and concluded that the terms comply with the requirements of the Final MNO Commitment.

IX. **CONCLUSION AND PROPOSAL**

(91) The Decision concludes that, subject to compliance with the commitments given by the Parties, the proposed concentration would not significantly impede effective competition in the internal market or in a substantial part of it. Consequently, the concentration is declared compatible with the internal market, in accordance with Articles 2(2) and Article 8(2) of the Merger Regulation.