EUROPEAN COMMISSION

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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 Where possible the information omitted has been replaced by ranges of figures or a general description.

KKR & Co. Inc.
30 Hudson Yards
New York, NY 10001
United States of America

Subject: **Case M.11386 – KKR / NETCO**
Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004[1] and Article 57 of the Agreement on the European Economic Area[2]

Dear Sir or Madam,

(1) On 19 April 2024, the Commission received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which KKR & Co. Inc. ("**KKR**" or the "**Notifying Party**", United States) acquires indirect sole control over FiberCop S.p.A ("**FiberCop**", Italy) and the network business of Telecom Italia S.p.A. ("**TIM**", Italy) consisting of certain fixed network assets and infrastructure, contracts, personnel and real estate that TIM will contribute to FiberCop ("**TIM Network Business**", together with FiberCop, "**NetCo**")[3] (the "**Transaction**").[4] KKR and NetCo are designated hereinafter as the "**Parties**".

1 OJ L 24, 29.1.2004, p. 1 (the "**Merger Regulation**"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("**TFEU**") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.
2 OJ L 1, 3.1.1994, p. 3 (the "**EEA Agreement**").
3 Form CO, paragraph 1.6.
4 OJ C, C/2024/2991, 29.4.2024.

1. THE PARTIES

(2) **KKR** is a global investment firm that offers alternative asset management as well as capital markets and insurance solutions. KKR sponsors investment funds that invest in private equity, credit and real assets and has strategic partners that manage hedge funds.

(3) **NetCo** is a newly founded company that will be comprised of FiberCop and the TIM Network Business.[5] All of NetCo's assets will be located in Italy.

(4) **FiberCop** is headquartered in Italy and is a jointly controlled joint venture between TIM and KKR, which currently hold 58% and 37.5% of the shares of FiberCop, respectively. Fastweb S.p.A. ("**Fastweb**"), an electronic communications operator active on wholesale and retail markets in Italy (paragraph (44)), currently holds the remaining 4.5% of the shares as a non-controlling shareholder. FiberCop was created by TIM in 2021 to upgrade TIM's secondary assets (see paragraphs (38) and (40) below) from copper to fibre in Italy. FiberCop owns all of formerly TIM's secondary assets and currently provides access to passive-only components of the secondary assets (paragraph (37)) on both its copper and fibre networks in Italy.

(5) The **TIM Network Business** is currently wholly owned by TIM. It is comprised of the residual copper and fibre Access Networks of TIM not within FiberCop's perimeter and related active and passive infrastructure (paragraph (37)), domestic fibre long-distance network, equipment, certain fixed wireless access ("**FWA**") equipment and infrastructure, information technology systems, and contracts, as well as 100% of the share capital in Telenergia S.r.l.

2. THE OPERATION

(6) The Transaction will eliminate the vertical wholesale-retail integration of TIM. Following the Transaction, NetCo and TIM will operate at different levels of the supply chain: NetCo as a wholesale supplier and TIM (through its subsidiary ServCo) as a retail supplier. At the same time, the Transaction entails a recombination of the TIM Network Business and FiberCop (paragraph (123)).

2.1. Acquisition of control

(7) Post-Transaction, NetCo will be operated as a combined business, and will provide, among others, wholesale fixed access services on both its copper and fibre networks in Italy.

(8) The concentration will be accomplished by way of acquisition of shares (in FiberCop) and contribution of assets (the TIM Network Business) through Optics Holdco S.r.l., a special purpose vehicle formed by investment funds, vehicles and/or accounts advised and managed by KKR for the purpose of the Transaction ("**Optics HoldCo**"). These steps will be implemented through (i) the transaction agreement signed on 6 November 2023, and (ii) an equity wrapper agreement signed on 15 October 2023 and amended and restated on 7 March 2024, which includes a substantially agreed form shareholders' agreement (the "**Agreed Form**

[5] A fixed network infrastructure from the central office or other concentration point is comprised of both primary and secondary assets (paragraphs (39), (40)), which together form an "**Access Network**": both individually are component parts, and neither can in isolation provide network access services to retail end-customers (paragraph (38) and figure 1).

SHA").[6] At closing, (i) TIM will contribute the TIM Network Business to FiberCop (thereafter, referred to as NetCo); (ii) TIM will transfer its shareholding in FiberCop (NetCo) to KKR; and (iii) the following co-investors will acquire minority participations indirectly in NetCo: the Italian Ministry of Economy and Finance ("**MEF**"), Azure Vista C 2020 S.à r.l. ("**Azure Vista**"),[7] F2i (Fondi Italiani per le Infrastrutture) SGR S.p.A. ("**F2i**"), and the Canada Pension Plan Investment Board ("**CPPIB**", together with MEF, Azure Vista and F2i the "**Co-Investors**"). Post-closing, the shareholding in NetCo's holding company, Optics Holdco, will be split as follows: KKR: [30-50]%; MEF: 16% (approximately); Azure Vista: [10-20]%; CPPIB: [10-20]%; and F2i: [5-10]%.[8]

(9) Post-Transaction, Optics Holdco will (indirectly) hold 100% of NetCo's issued capital. KKR (via special purpose vehicles)[9] will be entitled to designate a majority of the directors of the board of directors of Optics Holdco (the "**Optics Holdco Board**"), the decisions of which will be taken by a simple majority of the directors, apart from the reserved matters set forth in the Agreed Form SHA.

(a) KKR will be entitled to designate a majority of the Optics Holdco Board so long as it holds at least […]% of the equity securities in Optics Holdco.[10] The remaining directors will be appointed to the Optics Holdco Board by the Co-Investors (paragraph (8)), […].

(b) The MEF will be entitled to designate at least […] director for appointment to the Optics Holdco Board, who will be appointed as chairperson of the Optics Holdco Board but […] (the "**Optics Holdco Chairperson**"). […] The attendance of the chairperson is required for resolutions pertaining to the Strategic Matters (i.e. only matters of national strategic and security relevance), however these are not expected to influence strategic commercial behaviour of NetCo or arise in relation to the agreed business plan for NetCo.

(c) KKR will be entitled to control the majority of the voting rights so long as investment funds, vehicles and/or accounts advised and managed by KKR hold at least […]% of the equity securities in Optics Holdco, with the remaining votes being divided amongst the other Co-investors pro rata to their shareholdings.

(d) The Optics Holdco Board will take all actions except (i) certain "**Optics Holdco Reserved Matters**", which will require the affirmative vote of each Co-investor;[11] (ii) certain "**Optics Holdco Additional Reserved Matters**", which will require the affirmative vote of each Shareholder holding at least […]% of the share capital of Optics Holdco (the "**Intermediate Ownership Threshold**", and each relevant Shareholder); and (iii) certain "**Optics Holdco**

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6 The Agreed Form SHA can be amended only as regards certain thresholds within a pre-agreed range, pursuant to paragraph 3.3 of the equity wrapper agreement, or with the agreement of all parties.

7 According to the Form CO, footnote 9, Azure Vista is a special purpose company indirectly wholly owned by Abu Dhabi Investment Authority, which is a public institution established by the Government of the Emirate of Abu Dhabi who operates as an independent investment institution.

8 Form CO, paragraph 1.13 and the Notifying Party's response to RFI 8, question 6.

9 Form CO, paragraph 1.13(a).

10 Form CO, paragraph 1.17 and footnote 26. […].

11 Form CO, paragraph 1.17, footnote 27. The full list of Optics Holdco Reserved Matters is provided at paragraph 4.5 of the Agreed Form SHA and includes customary minority shareholder protections such as […].

Qualified Reserved Matters",[12] which will require the affirmative vote of each Shareholder holding at least […]% of the share capital of Optics Holdco (each relevant Shareholder, a "**Significant Shareholder**"- in practice, this threshold would only be crossed by KKR).

(10) The full list of Optics Holdco Additional Reserved Matters is provided at paragraph 4.7 of the SHA and includes: […][13] […].[14]

(11) In addition, the MEF will have rights of supervision over "Strategic Matters" through the appointment of the Optics Holdco Chairperson whose affirmative vote will be required on Strategic Matters. The Strategic Matters are defined as follows:[15]

(a) [Material decisions or transactions which compromise the integrity or security of the network or limit/eliminate technological or industrial capacities of national interest];

(b) [Material decisions or transactions which compromise the integrity or security of the network or limit/eliminate technological or industrial capacities of national interest];

(c) [Material decisions or transactions which compromise the integrity or security of the network or limit/eliminate technological or industrial capacities of national interest][16]; or

(d) [Material decisions or transactions which compromise the integrity or security of the network or limit/eliminate technological or industrial capacities of national interest][17] […].

(12) The Commission notes that recital B of the Agreed Form SHA clarifies additionally that the Strategic Matters are setting out the special rights of the MEF (*diritti particolari dei soci* pursuant to article 2468, third paragraph of the Italian Civil Code) in respect of the right of supervision over matters of national strategic, public interest and security relevance. It also clarifies that the parties to the Agreed Form SHA intend this right to solely guarantee respect for the general interest which the MEF, as a public authority, is obliged to uphold.[18]

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12 Form CO, paragraph 1.17, footnote 28. The full list of Optics Holdco Qualified Reserved Matters is provided at paragraph 4.6 of the SHA and includes, for example, […].

13 Form CO, Annex 1.1.B.6 bis: […]. The Commission notes that this decision refers to the "Open Fiber Transaction" when quoting the Transaction documents, and to the "Single Network Transaction" in the competitive assessment.

14 Form CO, paragraph 1.18.

15 Form CO, paragraph 1.36.

16 Form CO, Annex 1.1.D. The Notifying Party submits that "*This veto right is directly related to the right of supervision over matters of national strategic, public interest and security relevance as it pertains to the integrity and security of the networks. For instance, a failure by NetCo to maintain the network may trigger this right*".

17 Form CO, paragraph 1.36, footnote 36. […].

18 Form CO, Annex 1.1.B.6 bis.

2.1.1. The Notifying Party's views

(13) The Notifying Party submits that it will acquire sole control of NetCo.[19] The Co-Investors (paragraph (8)) will enjoy certain limited governance rights in Optics Holdco, as described in the Agreed Form SHA. The Notifying Party claims that none of the Co-Investors will have veto rights over strategic decisions related to NetCo within the meaning of the Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ("**Consolidated Jurisdictional Notice**"[20]).[21]

(14) In respect of the Optics Holdco Additional Reserved Matters, the Notifying Party claims the following:

(a) Business Plan: The first business plan was prepared by KKR and has a duration of […] years from its date of adoption. This first business plan has evolved through the due diligence process, concluding in November 2023, at signing of the Transaction, and will be attached to the Agreed Form SHA once adopted. This business plan pertains to NetCo as opposed to Optics Holdco (Optics Holdco being the shareholder of NetCo) but will serve as the relevant business plan for the purposes of the SHA. […].[22] Any subsequent amendments (including the adoption of a new business plan) following entry into the Agreed Form SHA will be by board or shareholder resolution of NetCo, in which Optics HoldCo will be able to exercise its majority voting rights (subject to the reserved matters outlined in the Agreed Form SHA). […].

(b) The Open Fiber Transaction: There are no relevant veto rights applicable to the Open Fiber Transaction contained in the Agreed Form SHA. [Details of veto rights and their inapplicability to the Open Fiber Transaction].

(c) MEF Veto Rights: MEF has been provided certain rights as part of its indirect shareholding in NetCo on certain limited matters irrespective of the Equity Securities it holds (unlike Azure Vista, CPPIB and F2i) because the relevant underlying matters are considered potentially of relevance from a national strategic standpoint, and none of these rights pertain to a veto power that is expected to influence the strategic commercial behaviour of NetCo or arise in the business plan for NetCo and, therefore, do not give rise to control over NetCo by MEF. Azure Vista, CPPIB and F2i have also been accorded certain rights, as part of their shareholding in NetCo, that have not been afforded to MEF, and which also do not give rise to control over NetCo by Azure Vista, CPPIB or F2i.

19 Form CO, paragraph 1.20.

20 Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16.4.2008, p. 1.

21 Form CO, paragraphs 1.17-1.20.

22 Form CO, paragraph 1.18, footnote 29. […].

(15) Regarding the Strategic Matters, the Notifying Party submits that none of them relate to strategic decisions associated with NetCo within the meaning of the Consolidated Jurisdictional Notice. Rather, MEF's veto rights in this context are strictly limited to the protection of national strategic, public interest and security matters and they have neither the aim nor the effect of enabling MEF to exercise decisive influence over NetCo. In fact, the Agreed Form SHA makes it clear that MEF will exercise supervision and control only over matters of national strategic and security relevance.[23] The Notifying Party submits that therefore, MEF's veto rights over Strategic Matters do not amount to control within the meaning of the Merger Regulation.

2.1.2. The Commission's assessment

(16) Under paragraph 54 of the Consolidated Jurisdictional Notice, sole control is acquired if one undertaking can exercise decisive influence over another undertaking. This can be the case if either the solely controlling undertaking enjoys the power to determine strategic commercial decisions of the other undertaking, or if it is the only shareholder able to veto strategic decisions in an undertaking.

(17) While the Notifying Party will not hold a majority of the shares in NetCo, it will be entitled to appoint the majority of directors on the Optics Holdco Board and control the majority of voting rights.[24] In addition, all actions will be taken by the Optics Holdco Board, with the exception of the different types of Reserved Matters foreseen in the Agreed Form SHA and described in paragraph (9)(d) above. As the Optics Holdco Board will decide by simple majority, except for the different types of Reserved Matters described in paragraph (9)(d) above), the Notifying Party will be able to determine strategic commercial decisions of NetCo. The different types of Reserved Matters do not go beyond the veto rights normally accorded to minority shareholders in order to protect their financial interests as investors in the joint venture[25]. Regarding in particular the MEF, the Optics Holdco Chairperson appointed by it will not have a casting vote and his or her attendance will not be required for an Optics Holdco Board meeting to have the required quorum[26]. Regarding the specific rights of Azure Vista, CPPIB or F2i, strategic decisions related to NetCo are not affected by any of the Reserved Matters which can be exercised by any of them. As the Reserved Matters don't relate to strategic business decisions related to NetCo they therefore do not confer joint control to any of the Co-Investors within the meaning of paragraph 62 of the Consolidated Jurisdictional Notice.

(18) With regard to the Strategic Matters that MEF will have veto rights on (see paragraph (11) above), the Commission notes that the veto rights are limited to the protection of national strategic, public interest and security matters. In particular, the rights that go beyond what is already covered by the different types of Reserved Matters revolve around decisions regarding the integrity and the security of the networks (see paragraph (11)(b) above). These rights are a complement (and precondition) to the powers that the Italian Government already has through the conditions imposed on NetCo by the Italian Presidency of the Council of Ministers through the 2024 Italian FDI Decision.[27] There are no agreements that provide for a

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23 Form CO, paragraph 1.38 and footnote 37.

24 Form CO, paragraph 1.17.

25 See also paragraph 66 of the Consolidated Jurisdictional Notice.

26 Form CO, Annex 1.1.B.6. bis. […].

27 Decision of the President of the Italian Council of Ministers of 16 January 2024 conditional clearing the Transaction under Foreign Direct Investment ("**FDI**") rules. Form CO, Annex 1.1.E.

list of instances that would qualify as regarding the integrity and the security of the networks. However, the Notifying Party clarified that any such instance would not apply to situations that could involve the strategic commercial behaviour of NetCo.[28] Indeed, any such action would also trigger the veto rights held by other Material Shareholders with regard to the business plan. Decisions concerning the deployment of NetCo's network as envisaged in the business plan would not fall within the scope of this veto right. Therefore, the MEF's veto right does not affect strategic decisions related to NetCo within the meaning of the Consolidated Jurisdictional Notice.

(19) Based on the above, the Transaction consists in the acquisition of sole control of NetCo by KKR and therefore constitutes a concentration in the sense of Article 3(1)(b) of the Merger Regulation.

2.2. Scope of the Transaction

(20) A concentration consists of the contractual arrangements and agreements establishing control within the meaning of Article 3(2) of the Merger Regulation. Thus, all agreements which carry out the main object of the concentration, such as those relating to the sale of shares or assets of an undertaking, are integral parts of the concentration.[29]

(21) Hence, the scope of the Transaction includes all agreements that establish control over the Target within the meaning of Article 3(2) of the Merger Regulation (such as those relating to the sale of shares or assets of an undertaking). Conversely, agreements that do not entail a transfer of control under Article 3(2) of the Merger Regulation fall outside the scope of the Merger Regulation review.

(22) In addition to the agreements within the scope of the Transaction, under paragraph 10 of the Commission's Notice on Ancillary Restraints, "*the parties to the concentration may enter into other agreements which do not form an integral part of the concentration but can restrict the parties' freedom of action in the market"*. Such additional agreements are not within the scope of the Transaction, but could be covered by the Commission's clearance decision if they include "*restrictions directly related and necessary to the implementation of the concentration*" under Article 6(1)(b) of the Merger Regulation ("**ancillary restraints**").

(23) To this end, the present Section 2.2 assesses the scope of the Transaction, whereas Section 5.6. assesses whether this decision covers any additional agreements outside the scope of the Transaction as ancillary restraints under Article 6(1)(b) of the Merger Regulation.

(24) In the present case, as assessed in Section 2.1., KKR will obtain control over NetCo as a result of the Transaction through the governing rights contemplated in the Agreed Form SHA (paragraph (8)). Hence, the Agreed Form SHA falls within the definition of Article 3(2) of the Merger Regulation and thus, constitutes the scope of the Transaction.

(25) Further, post-Transaction, NetCo and TIM will enter into a Master Services Agreement with TIM (the "**MSA**"), which will govern the provision of certain services between NetCo and TIM.[30]

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28 Form CO, paragraph 1.45(a).

29 Commission Notice on restrictions directly related and necessary to concentrations, OJ C 56, 5.3.2005, p. 24 ("**Notice on Ancillary Restraints**"), paragraph 10.

30 Form CO, Annex 1.1.B.1 – recital G(iv) and Exhibit C of the Transaction Agreement refer to the obligation of NetCo and TIM to enter into the MSA. Pursuant to the MSA, TIM will (i) receive

(26) The Notifying Party submits that the MSA is not an agreement that establishes control by KKR of NetCo within the meaning of Article 3(2) of the Merger Regulation.[31]

(27) The Commission agrees with the Notifying Party's views and considers that the MSA and its provisions do not constitute part of the scope of the Transaction as it is not an agreement that establishes control by KKR of NetCo within the meaning of Article 3(2) of the Merger Regulation.

(28) Pursuant to Article 3(2) of the Merger Regulation, "*control can be established on the basis of rights, contracts or any other means which confer the possibility of exercising decisive influence on an undertaking in particular by: (a) ownership or the right to use all or part of the assets of an undertaking; and (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking*".

(29) The Commission considers that the MSA does not meet any of the means of control described under Article 3(2) of the Merger Regulation and the Consolidated Jurisdictional Notice.

(30) First, the MSA does not concern an acquisition of shares or assets.[32] The MSA governs the provision of certain services between NetCo and TIM, and does not include any acquisition of shares of assets in favour of KKR nor TIM.

(31) Second, the MSA does not confer control on a contractual basis.[33] The MSA does not confer on KKR control over the management nor resources of the assets of TIM.

(32) Third, the MSA does not confer control by other means.[34] In particular, the MSA does not create a situation of economic dependence that may lead to control on a *de facto* basis between the Parties to the present Transaction, KKR and NetCo.

(33) The MSA does not contain provisions conferring KKR the possibility of exercising decisive influence on any undertakings neither on a legal or a de facto basis. Further, the MSA will not grant TIM control over NetCo's approach, strategy to NetCo's other customers nor NetCo's future roll-out strategy or product development.

(34) For the aforementioned reasons, the Commission concludes that the MSA does not fall within the scope of the Transaction.[35]

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wholesale services from NetCo that, prior to the Transaction, were supplied internally by TIM or from FiberCop and (ii) provide a range of ancillary services to NetCo that were previously provided to FiberCop and TIM's wholesale network business.

31 Notifying Party's response to RFI 7, paragraph 29.

32 Pursuant to paragraph 17 of the Consolidated Jurisdictional Notice.

33 Pursuant to paragraph 18 of the Consolidated Jurisdictional Notice.

34 Pursuant to paragraphs 19 to 21 of the Consolidated Jurisdictional Notice.

35 In Section 5.6 of this decision, the Commission will assess whereas the MSA can be covered by this decision under Article 6(1)(b) of the Merger Regulation and the Notice on Ancillary Restraints.

3. UNION DIMENSION

(35) The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 000 million (KKR: […]; NetCo: […]) and an aggregate EU-wide turnover of more than EUR 250 million (KKR: […]; NetCo: […]). None of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover in one and the same Member State. Therefore, the Transaction has a Union dimension pursuant to Article 1(2) of the Merger Regulation.

4. RELEVANT MARKETS

(36) NetCo will operate the wholesale broadband network of TIM and FiberCop as a wholesale-only operator. It will provide access to passive components (i.e. SLU[36], LLU[37], semi-GPON[38] and full-GPON[39]), as well as to active services (i.e. WLR[40], VULA C[41], VULA H[42], Bitstream C[43] and Bitstream H[44]) (paragraph (37)).[45]

4.1. Industry overview

4.1.1. Overview of the Access Network

(37) As an overview, wholesale broadband access services (also defined as the wholesale supply of fixed internet access services) include different types of access to fixed connections that allow electronic communications service providers to offer services to end consumers. The provision of wholesale broadband access services requires access to both passive components (e.g. physical infrastructure) and active components (e.g. the data transport over such physical infrastructure), i.e. it is necessary to access the relevant (passive) infrastructure as well as the relevant (active) equipment to deliver this wholesale service to the operator. An operator can opt to:

(a) purchase access to passive components (so-called "passive services") and combine them with active components (either through self-supply or purchasing from a third party), to compose an end-to-end local data transfer service; or

(b) purchase an end-to-end active service, utilising both passive and active components (so-called "active services") to transport data across the passive infrastructure from the premise of the retail end-customer to local exchange.

(38) A fixed network infrastructure is comprised of both Primary Assets (paragraph (39)) and Secondary Assets (paragraph (40)), which together form an Access Network: both individually are component parts and neither can in isolation provide connectivity to retail end-customers. In other words, the Access Network

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36 SLU is the provision of access to Secondary Copper Assets.

37 LLU is the provision of access to Primary Copper Assets and Secondary Copper Assets.

38 Semi-GPON is the provision of access to Secondary Fibre Assets.

39 Full-GPON is the provision of access to Primary Fibre Assets and Secondary Fibre Assets.

40 Wholesale line rental.

41 Copper Virtual Unbundled Local Access.

42 Fibre Virtual Unbundled Local Access.

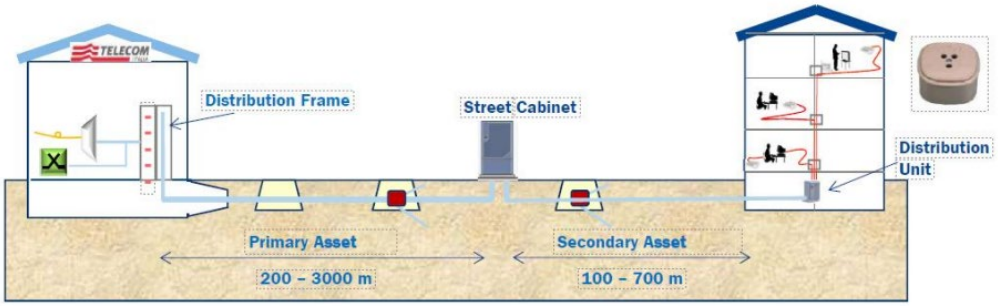
43 Wholesale central access service based on copper infrastructure. Various types of the wholesale service can be envisaged depending on transport chosen by the operator.

44 Wholesale central access service based on fibre infrastructure. Various types of the wholesale service can be envisaged depending on transport chosen by the operator.

45 Form Co, paragraph 1.99 and Table 1.3.

uses both the Primary Assets and the Secondary Assets to provide connectivity to retail end-customers and will be the core function of NetCo post-Transaction.

Figure 1: Access Network Overview



(39) Primary Assets include:

(a) the primary copper assets, which are deployed by means of aerial cables (on so-called pole installations) with piped or underground cables (so-called "in trenches") and consists of the following elements: (i) distribution cabinets (from which the copper cabling from the Secondary Assets branch off); (ii) primary copper lines (high-capacity cables underground or piling); (iii) manholes that serve as junctions or branches; (iv) connections to the central office[46] site housing the local auto switches up to the physical distribution frame (the "**Primary Copper Assets**");

(b) the primary fibre lines, which extend from the central office to the street cabinet, where the fibre of the primary cable is split into secondary cables in a ring or star architecture (the "**Primary Fibre Assets**"); and

(c) associated facilities, which refer to the laying infrastructure used for the copper and fibre networks and consist of: (a) underground infrastructure consisting of tunnels and cable ducts, also known as polyphores with the objective of providing a laying site for copper and fibre optic cables; (b) underground pipes similar to the products mentioned in the previous point; this infrastructure is prepared for the laying of cables (copper or fibre optic), is not accessible, and is made by laying pipes (usually corrugated) at the base of the excavation at the network route identified in the project (the "**Primary Infrastructure**", together with the Primary Copper Assets and the Primary Fibre Assets, the "**Primary Assets**").

(40) Secondary Assets include:

(a) (i) the copper lines connecting the sockets in the customer premises with the street cabinet (which is not part of the Secondary Assets); and (ii) in a few cases, the copper lines of retail end-customers are connected directly to the distribution frame in the central office (together, these copper lines in (i) and (ii) are named the "**Secondary Copper Assets**");

46 Central office is the local exchange which enables the link between the national network and the local distribution network.

(b) the existing fibre optic lines, which run from the network termination point ("**NTP**") in customer premises up to the optical street cabinet (the "**Secondary Fibre Assets**");

(c) the vertical segment in multi-dwelling units that runs from the NTP of the building to the sockets in each apartment; and

(d) associated facilities such as ducts and poles[47] used for the deployment of copper or fibre in the final segment of the local loop. This final (or secondary) segment runs from the NTP in the customer premises up to the street cabinet. Together with the Secondary Copper Assets and Secondary Fibre Assets and the vertical segment, these assets are named "**Secondary Assets**" hereafter.

4.1.2. Suppliers of wholesale broadband access services

(41) TIM is the formerly state-owned incumbent. TIM currently provides wholesale fixed access services through its wholesale unit and through FiberCop. These wholesale services are based on its copper (LLU, SLU and VULA-C) as well as fibre (VULA H, full-GPON (a combination of semi-GPON and access to TIM's primary network)) infrastructure. Based on data published by the Italian electronic communications regulatory authority ("**AGCOM**"), TIM is the largest provider of retail fixed internet access services in Italy.[48]

(42) FiberCop is a joint venture operating in the wholesale market for broadband access services. FiberCop provides passive wholesale access service on the secondary network, i.e. semi-GPON access services to operators such as TIM, Fastweb, Iliad Italia S.p.A. ("**Iliad**", Italy) and other operators.

(43) Open Fiber is a wholesale-only operator developing, managing and maintaining an optical fibre network, predominantly with Fibre-to-the-Home ("**FTTH**") technology across Italy. Open Fiber provides mainly passive full-GPON and active VULA FTTH services (access to both primary and secondary network, unlike TIM and FiberCop). However, due to the conditions of State aid programmes, in some parts of Italy, Open Fiber provides (or will provide once the network is deployed) passive semi-GPON access services as well.

(44) Fastweb is a wholly owned subsidiary of Swisscom AG. Fastweb is a minority shareholder of FiberCop (paragraph (4)) and provides wholesale active VULA FTTH access services to other operators based on its own primary network and passive access to the secondary network of FiberCop (mainly in the areas where the historic Flash Fiber network was rolled out i.e. belonging to the former joint venture between TIM and Fastweb). Moreover, Fastweb uses wholesale access services of FiberCop and Open Fiber to self-supply, i.e. to provide services to its retail customers.

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47 The associated facilities consist in (a) aerial infrastructure, which includes all poles, both in wood and in fibreglass, and all accessories to support the poles and allow for the laying overground of copper or fibre optic cables (tie rods, collars, fastenings, braces, hooks, carrying ropes, etc.), including the existing TIM DECT wireless infrastructure elements; and (b) the underground secondary infrastructure (ducts, conduits, mini-ducts, etc.) and servicing artifacts (manholes, access chambers, etc.) that host street cabinets with splitters, which are used only for the Secondary Copper Assets and Secondary Fibre Assets, including the "Buildings Drop Infrastructure," i.e. portions of the underground infrastructures that connect the interior of a building (excluding the buildings that host TIM's central offices).

48 AGCOM Communication Markets Monitoring System No 1/2024, data as of December 2023.

(45) There are other vertically integrated operators active mostly at a regional or local level. For example, Eolo (wholesale provider of FWA), Unidata (wholesale provider of FTTH access), Retelit and Exa Infrastructures, and other operators such as Isiline, Brainbox, Planetel, etc.

4.1.3. Regulatory framework

(46) During the assessment of the Transaction, there were two regulatory regimes in place. The first one was adopted by AGCOM in 2019 and reflected the market situation before the establishment of FiberCop ("**AGCOM 2019 Regulation**").[49] The second one was adopted by AGCOM on 30 April 2024 and assessed the market situation after establishing FiberCop in 2021, however, not assessing the Transaction and its effects ("**AGCOM 2024 Regulation**").[50]

(47) Moreover, within an antitrust investigation before the Italian competition authority ("**AGCM**"), TIM and other operators offered commitments which on 15 February 2022, AGCM accepted and made binding ("**AGCM Commitments**").[51] The AGCM Commitments concern *inter alia* conditions of passive access to semi-GPON provided by FiberCop and primary network provided by TIM within the context of TIM's co-investment offer ("**Rejected Co-investment Offer**").[52]

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49 AGCOM decision of 18 July 2019, No 348/19/CONS, *Coordinated analysis of the fixed network access service markets pursuant to Article 50 of the Code*.

50 AGCOM decision of 30 April 2024, No 114/24/CONS, *Coordinated analysis of the fixed network access service markets pursuant to Article 89 of the Code*.

51 AGCM decision of 15 February 2022, No 30002, case No I850 - *FiberCop agreements*, Bulletin No 7/2022.

52 Recital 198 of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, OJ L 321, 17.12.2018, p. 36 ("**European Electronic Communications Code**") defines co-investments in the following terms: "*co-investment agreements offer significant benefits in terms of pooling of costs and risks, enabling smaller-scale undertakings to invest on economically rational terms and thus promoting sustainable, long-term competition, including in areas where infrastructure-based competition might not be efficient. Such co-investments can take different forms, including co-ownership of network assets or long-term risk sharing through co-financing or through purchase agreements. In that context, purchase agreements which constitute co-investments entail the acquisition of specific rights to capacity of a structural character, involving a degree of co-determination and enabling co-investors to compete effectively and sustainably in the long term in downstream markets in which the undertaking designated as having significant market power is active. By contrast, commercial access agreements that are limited to the rental of capacity do not give rise to such rights and therefore should not be considered to be co-investments*". On this basis, FiberCop's co-investment offer was submitted to AGCOM in January 2021 and modified multiple times by TIM. AGCOM rejected the offer by decision of 20 December 2023, No 339/23/CONS, *Closing of the evaluation procedure of the commitment proposal presented by TIM pursuant to articles 76 and 79 [European Electronic Communications Code] concerning co-investment in very high capacity networks*. AGCOM concludes that, following the numerous modifications, the co-investment offer no longer fell within the scope of a co-investment offer within the meaning of the European Electronic Communications Code.

4.1.3.1. AGCOM 2019 Regulation

(48) TIM provides wholesale broadband access services to customers through the TIM Network Business, utilising Primary Assets and Secondary Assets (the latter of which are contributed by FiberCop, which only provides services to customers without the TIM Network Business to a limited extent).[53] The TIM Network Business is currently subject to "asymmetric" access obligations: asymmetric obligations where TIM was designated in 2019 as an operator enjoying significant market power ("**SMP**") on three wholesale markets in (certain areas) of Italy by AGCOM.

(49) AGCOM concluded in its market review that Milan is a competitive municipality, in which TIM does not have SMP and therefore it will be deregulated under the AGCOM 2019 Regulation.

(50) With regard to the market for wholesale local access provided at a fixed location ("**market 3a**")[54] and the market for wholesale central access provided at a fixed location for mass-market products ("**market 3b**") outside of the Milan area, TIM is bound by obligations of: (i) access; (ii) transparency;[55] (iii) non-discrimination; (iv) accounting separation; (v) price control and (vi) cost accounting. In terms of price control obligation, a geographical differentiation is introduced in so far as in the municipalities deemed more competitive relative to the rest of Italy (contestable municipalities). AGCOM defined the cost-oriented access prices for the period 2018-2021, based on the Bottom-up Long Run Incremental Cost ("**BU-LRIC**") model.

(51) For the market for wholesale high-quality access provided at a fixed location ("**market 4**" according to EC Recommendation 2014/710/EU), TIM is bound by similar obligations. A geographical differentiation, in terms of price control obligation, is introduced, in so far as the cost orientation criterion is removed in the municipalities deemed more competitive relative to the rest of Italy (contestable municipalities).[56]

(52) In addition, under the AGCOM 2019 Regulation, TIM is also subject to regulatory rules pertaining to the migration from copper to fibre networks.[57] TIM must announce, in advance, the phase-out of any copper main distribution frame (which corresponds to a central office), with a minimum notice period. TIM is also not

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53 Circa [90-100]% of FiberCop revenues from third parties are generated in combination with complementary TIM sales (predominately in combination with Primary Assets and active services such as semi-VULA). FiberCop's Secondary Assets are mostly used by the TIM Network Business, as an input for end-to-end local access services (in combination with the Primary Assets of the TIM Network Business).

54 By reference to EC Recommendation 2014/710/EU of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, ("**EC Recommendation 2014/710/EU**").

55 Under this regulatory obligation, an operator having SMP has to publish a regulated reference offer on its website.

56 AGCOM decision of 22 July 2020, No 333/20/CONS, Identification and analysis of the market for high-quality wholesale access at a fixed location (market No 4 of the European Commission recommendation No 2014/710/EU).

57 These rules only apply once the operator has taken the decision to proceed with the migration in question, at which point in time the operator must adhere to the rules. Prior to this decision, the rules do not apply (which differentiates them from obligations, which apply directly to the operator regardless of their decision-making process).

permitted to switch-off its copper exchanges before it reaches: (i) 100% NGA coverage, including FWA access if necessary; and (ii) 60% NGA retail take-up.

4.1.3.2. AGCOM 2024 Regulation

(53) On 14 March 2024, AGCOM sent a notification to the Commission concerning the following wholesale fixed access markets: i) wholesale local access provided at a fixed location (market 3a, newly "**market 1**"[58]); ii) wholesale central access provided at a fixed location for mass-market products (market 3b); and iii) wholesale dedicated capacity market ("**market 2**" according to EC Recommendation 2020/2245).[59]

(54) The Commission assessed the notification and submitted comments to AGCOM on 15 April 2024. Among the comments, the Commission stated that the National Regulatory Authorities should carefully consider existing commercial agreements and that "*These agreements should be assessed on a case-by-case basis, considering the different factors, including those impacting on the risk of investment. This should be done, regardless of co-investment commitments falling under Article 76 of the Code*".[60] Moreover, the Commission acknowledged "*AGCOM's flexible approach to existing access contracts for passive products, which allow access seekers to share some of the investment risk through differentiated wholesale access prices based on their chosen level of commitment. However, this must take into account the timing and processes already undertaken regarding TIM's co-investment scheme, from which those contracts arise*". The Commission observed in its letter that investments in passive access by alternative operators (i.e. operators other than the owner of the infrastructure, usually the incumbent) ensure a more stable and diversified competitive environment and therefore should be promoted. The Commission invited "*AGCOM to establish a clear timing for the assessment of the fair and reasonable conditions of the access contracts in order to give market players more certainty, predictability and transparency*".

(55) On 30 April 2024, AGCOM adopted the AGCOM 2024 Regulation. With regard to the wholesale local access market and its product market definition, AGCOM included: physical (unbundling) and virtual (VULA) products and services based on copper, fibre and FWA. Similarly, in case of the wholesale central access market, the product market definition includes access services based on copper and/or fibre or FWA. Regarding wholesale dedicated capacity, AGCOM included leased lines based on PDH, SDH[61] and Ethernet.

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58 By reference to EC Recommendation 2020/2245 of 18 December 2020 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council establishing the European Electronic Communications Code, ("**EC Recommendation 2020/2245**").

59 Case File ref. IT/2024/2497.

60 Cases IT/2024/2497: Markets for wholesale local access provided at a fixed location, for wholesale dedicated capacity and wholesale central access provided at a fixed location for mass-market products in Italy; Commission Comments pursuant to Article 32(3) of Directive (EU) 2018/1972 of 15 April 2024.

61 Plesiochronous and Synchronous Digital Hierarchy.

(56) Based on the competition analysis of the Italian markets taking into account several criteria (e.g. TIM's wholesale and/or retail market share, coverage of the municipality by the wholesale-only operator's network), AGCOM divided Italy into three categories:

(a) competitive municipalities: 14 for the wholesale local access market (from only one, Milan, in 2019, see paragraph (49) above), 4 for the wholesale dedicated capacity market, and 66 for the wholesale central access market;

(b) regulated "more competitive"/contestable municipalities (95 for the wholesale local access market and 67 for the wholesale dedicated capacity market); and

(c) non-competitive/non-contestable municipalities.

(57) In its analysis, AGCOM concluded that the wholesale central access market is not susceptible to *ex ante* regulation and will be deregulated. Moreover, the competitive municipalities in case of the wholesale local access and dedicated capacity markets will be deregulated as well as there is no SMP.

(58) For the rest of Italy, TIM/FiberCop has been found to have SMP and will be subject to regulatory remedies, including: (i) access to civil infrastructure; (ii) access to, and use of, network elements and associated facilities, including a range of passive services (full-GPON, semi-GPON, point-to-point in the secondary network, and end-to-end service and active services (VULA); (iii) transparency; (iv) non-discrimination; (v) accounting separation; (vi) price control; and (vii) cost accounting.

(59) With regard to price control in the wholesale local access market, AGCOM imposes cost-oriented prices based on BU-LRIC methodology for wholesale access services based on TIM's copper network and for VULA and semi-VULA FTTH services. Furthermore, semi-GPON, full-GPON and point-to-point services have a lighter pricing remedy as the obligation on TIM/FiberCop is to provide them under fair and reasonable pricing.

(60) Following the completion of the Transaction, AGCOM will have to analyse the competition conditions in Italy and notify new market review(s), including assessing the product and geographic market definition, finding of SMP, and defining regulatory obligations, taking into account the changes brought about by the Transaction. In the meantime, according to AGCOM,[62] the obligations stemming from the AGCOM 2024 Regulation will be attributed to NetCo as the new owner of the SMP infrastructure, as opposed to the current holder of SMP, TIM/FiberCop.

4.2. Wholesale supply of broadband access services

(61) Wholesale broadband access services include different types of access to fixed connections that allow electronic communications service providers to offer services to end consumers. It comprises: (i) physical access at a fixed location (such as local loop unbundling ("**LLU**")); (ii) non-physical or virtual network access at a fixed location (such as "**bitstream**" access); and (iii) resale of a fixed provider's internet access services ("**wholesale resale broadband access**").

62 AGCOM 2024 Regulation, paragraph 188 and Article 59(4).

4.2.1. Product market definition

4.2.1.1. The Commission's previous practice

(62) The Commission has previously defined a separate market for wholesale supply of broadband access services.[63] The Commission considered, but ultimately left the question open, whether this market should be subdivided according to: (i) the level where the point of interconnection – which connects the infrastructure of the wholesale provider and that of the customer (i.e. the operator seeking access) – is situated (i.e. wholesale local or central broadband access); (ii) the type of access to fixed connections (i.e. wholesale LLU, bitstream or resale broadband access); or (iii) the type of technology (i.e. cable, copper, fibre or FWA).

4.2.1.2. The Notifying Party's views

(63) The Notifying Party does not consider it relevant to segment the market for the wholesale supply of broadband access any further.[64] In particular, the Notifying Party submitted that the market should not be segmented between active and passive services, as this would not reflect the competitive dynamics in the market.[65] While the Notifying Party submits that the most suitable relevant market would be that of ultra-broadband (comprising FTTC, FTTH and FWA), it submits that the market definition can ultimately be left open.[66]

4.2.1.3. The Commission's assessment

(64) As a preliminary remark, the Commission notes that the Italian wholesale supply of broadband access services market is characterized by certain specificities compared to other Member States. In particular, there is no cable network and the primary and the secondary network is split between different companies (notably TIM and FiberCop). However, both parts of the network are necessary in order to be able to offer wholesale broadband access services to customers such as suppliers of fixed internet access services.

(65) The majority of respondents to the market investigation confirmed the previous Commission decisions such that the market for the wholesale supply of broadband access services includes all different types of technology (in the case of Italy, excluding cable).[67] However, from a demand-side perspective, some respondents considered that there is only one-way substitutability between copper and fibre (fibre access may substitute copper but not the other way around) and in the future, copper and FWA will become redundant.[68] While agreeing with the broader market definition, some market participants highlighted that there is no cable network in Italy, and one considered that FWA should be included in the market definition as well.[69]

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63 Commission decision of 30 of May 2023 in case M.10994 – *Liberty Global/Fluvius/Netco*, paragraph 15; Commission decision of 28 of July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraph 124; Commission decision of 6 of March 2020 in case M.9674 – *Vodafone Italia/Tim/Inwit JV*, paragraph 115; Commission decision of 20 September 2013 in Case M.6990 - *Vodafone/Kabel Deutschland*, paragraph 161; Commission decision of 9 of July 2018 in case M.8808 – *T-Mobile Austria/UPC Austria*, paragraph 73; Commission decision of 29 June 2009 in Case M.5532 - *Carphone Warehouse/Tiscali UK*, paragraphs 28-34.

64 Form CO, paragraphs 6.69 et seqq.

65 Form CO, paragraph 6.117.

66 Form CO, paragraph 6.117.

67 Replies to questionnaire Q1 – Phase I market investigation, question C.A.A.1.

68 Replies to questionnaire Q1 – Phase I market investigation, question C.A.A.2.

69 Replies to questionnaire Q1 – Phase I market investigation, question C.A.A.2.

(66) With regard to the question whether the market should be segmented further between active and passive services, the majority of respondents suggested that there is limited demand substitutability between active and passive services.[70] Indeed, the majority of respondents considered that is not economically rational to switch from active to passive services[71] or from passive to active[72]. The respondents set out that it could only be viable if the operator has its own passive network close to the area where it uses active services and at the same time, it could serve/reach a certain level of customer density and access to passive services would be available. Moreover, some participants mentioned high switching costs, especially in case of migrating between wholesale service providers (e.g. de-activation and activation fees) and time needed for network deployment on the part of the access seeker (indicated to be from several months to more than a year). Hence, most participants signalled that in most cases, it is very difficult to replicate the active services by purchasing passive ones.[73]

(67) Reciprocally, the majority of respondents thinks that even if in theory, the wholesale passive broadband access services could be substituted with active ones, it is neither economically rational nor desirable.[74] The respondents highlight that operators would lose their investment (capex) in own active equipment as the sunk costs would not be recovered when using wholesale active access services instead. Furthermore, in such a case, the operators would face higher operational costs (opex) of active services as well as losing a possibility to differentiate more their services from that of the wholesale service provider as in case of using passive access services with own active equipment. In essence, it would go against the principle of the "ladder of investment".[75] In addition, most market participants suggest there are regulatory differences between access to active and passive services. For example, the respondents state that at the time of their reply, there was no access obligation for TIM to provide FTTH passive wholesale access products (except in PNRR areas[76]), while there was an access obligation to provide active services and those services were subject to cost orientation regulation.[77]

(68) Nothing on the Commission case file indicates any reason to depart from previous Commission decisions with regard to possible segmentation based on the level where the point of interconnection is situated (i.e. wholesale local (e.g. LLU, semi- and full-GPON) or central (e.g. bitstream) broadband access) or the type of access to fixed connections (i.e. wholesale LLU, bitstream or resale broadband access).

(69) In light of the above and for the purpose of this decision, the Commission concludes that the exact product market definition for the market for wholesale supply of broadband access services can be left open, as the Transaction does not raise serious doubts as to its compatibility with the internal market irrespective of a further segmentation by (i) the level where the point of interconnection is situated;

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70 Replies to questionnaire Q1 – Phase I market investigation, questions C.A.A.5 to C.A.A.7.

71 Replies to questionnaire Q1 – Phase I market investigation, question C.A.A.5.

72 Replies to questionnaire Q1 – Phase I market investigation, question C.A.A.6.

73 Replies to questionnaire Q1 – Phase I market investigation, question C.A.A.5.

74 Replies to questionnaire Q1 – Phase I market investigation, question C.A.A.6.

75 Replies to questionnaire Q1 – Phase I market investigation, question C.A.A.6.

76 PNRR is Italy's national recovery and resilience plan that aims to modernise and improve the Italian economy, making it more sustainable, innovative, and competitive. PNRR areas are areas in which no operator would build due to the high cost of network deployment resulting from a relatively low population density. These areas therefore require subsidies for such investment.

77 Replies to questionnaire Q1 – Phase I market investigation, question C.A.A.7.

(ii) the type of access; (iii) the type of technology (between copper, fibre and FWA); and (iv) the type of service (between active and passive).

4.2.2. Geographic market definition

4.2.2.1. The Commission's previous practice

(70) In previous decisions, the Commission considered whether the geographic market for wholesale supply of broadband access services was national or limited to the coverage area of each network operator but left the definition open.[78] In recent decisions concerning cable, the Commission concluded that the geographical scope was each cable operator's coverage area.[79] In respect of the Italian market, in *Vodafone Italia/TIM/Inwit JV*, the Commission left the exact geographic market definition open absent any competition concerns, but based its competitive assessment on the national level.[80] In *Marbles/Irideos*,[81] AGCM defined the market for wholesale access services to fixed broadband and ultra-broadband as national in scope.

4.2.2.2. The Notifying Party's views

(71) The Notifying Party indicates that the relevant geographic market for the market for the wholesale supply of broadband access services corresponds to portions and/or the entirety of the territory of Italy as the Transaction will create in NetCo an entity that will be active throughout Italy and will ensure the roll-out of fibre infrastructure across Italy, harmonising the access to wholesale broadband access services across the country. In any event, the Notifying Party considers that the exact scope of the market can be left open, given that no plausible substantive competition concerns arise because of the Transaction.

4.2.2.3. The Commission's assessment.

(72) The vast majority of the respondents to the market investigation submitted that the relevant geographic scope of the market for wholesale supply of broadband access services is national.[82]

(73) The Commission notes that NetCo will be active in the whole territory of Italy. Moreover, prices are set at a national level. In light of the above and for the purpose of this decision, the Commission considers that the relevant geographic market is national, i.e. Italy.

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78 Commission decision of 30 of May 2023 in case M.10994 – *Liberty Global/Fluvius/Netco*, paragraphs 28-33; Commission decision of 28 of July 2021 in case M.10153 – *Orange/Telekom Romania Communications*, paragraphs 129-132; Commission decision of 9 of July 2018 in M.8808 – *T-Mobile Austria/UPC Austria*, paragraph 79; Commission decision 29 of June 2009 in case M.5532 – Carphone Warehouse/Tiscali UK, paragraph 53.

79 Commission decision of 30 of May 2023 in case M.10994 – *Liberty Global/Fluvius/Netco*, paragraphs 28-32; Commission decision of 24 of March 2021 in case M.10087 – *Proximus/Nexus/Infrastructure JV*, paragraph 32; Commission decision of 26 of July 2021 in case M.10070 – *Eurofiber/Proximus/JV*, paragraph 30.

80 Commission decision of 6 of March 2020 in case M.9674 – *Vodafone Italia/TIM/Inwit JV*, paragraph 122.

81 AGCM decision of 22 November 2022, No 30382, case No C12476 – *Marbles/Irideos*, Bulletin 44/2022, page 5.

82 Replies to questionnaire Q1 – Phase I market investigation, question C.A.B.1.

5. COMPETITIVE ASSESSMENT

5.1. Identification of affected markets

(74) Depending on the exact market definition considered in its assessment as well as the activities of the Parties, the Transaction gives rise to the following vertically affected link and horizontally affected markets:

(a) The vertically affected link between the market for the wholesale supply of passive broadband access services in Italy (upstream) and the market for the wholesale supply of active broadband access services in Italy (downstream); and,

(b) The horizontally affected market for the wholesale supply of passive broadband access services in Italy; and,

(c) The horizontally affected market for the wholesale supply of broadband access services in Italy.[83]

(75) The Commission notes that assessing the vertically affected link between the market for the wholesale supply of passive broadband access services in Italy and the market for the wholesale supply of active broadband access services in Italy is akin to assessing possible (partial or total) output restrictions on the narrower market for the wholesale supply of passive broadband access services in Italy arising from the Transaction. Accordingly, even if the Commission will assess the effects of the Transaction on the basis of the framework applicable to non-horizontally affected links, the conclusions drawn from such analysis apply *mutatis mutandis* to a horizontal non-coordinated effects assessment based on a possible output restriction theory of harm. Furthermore, in light of the absence of structural changes on the market for the wholesale supply of active broadband access services in Italy (see Section 5.3 below), the Commission's assessment also addresses any possible horizontal effects on the wider market for the wholesale supply of broadband (active and passive) access services in Italy.

(76) All other plausible (sub-)segments of the wholesale supply of broadband services do not result in horizontally affected markets, because only one of the two businesses constituting NetCo is active in such (sub-)segment pre-Transaction (i.e. either the TIM Network Business or FiberCop). There are also no additional vertical links, because FiberCop only offers passive access based on its secondary fibre network (*i.e.*, semi-GPON).[84]

5.2. Analytical framework

(77) Under Article 2(2) and (3) of the Merger Regulation, the Commission must assess whether a proposed concentration would significantly impede effective competition in the internal market or in a substantial part of it, in particular through the creation or strengthening of a dominant position.

(78) In this respect, a merger may entail horizontal and/or non-horizontal (namely, vertical or conglomerate) effects. Horizontal effects are those deriving from a concentration where the undertakings concerned are actual or potential competitors

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[83] For simplicity, the Commission will assess the coordinated effects that may result from the Transaction on the market for the wholesale supply of broadband access services in Italy and the market for the wholesale supply of passive broadband access services in Italy together, given that the Transaction does not give rise to any merger-specific change in relation to the market for the wholesale supply of active broadband access services.

[84] In any event, the Commission considers that the assessment in Sections 5.4 and 5.5 below dispels any serious doubts on the compatibility of the Transaction with the internal market.

of each other in one or more of the relevant markets concerned. Vertical effects are those deriving from a concentration where the undertakings concerned are active on different or multiple levels of the supply chain. Conglomerate effects are those deriving from a concentration where the undertakings concerned are in a relationship which is neither horizontal nor vertical. A concentration may involve all three types of effects. In such a case, the Commission will appraise horizontal and non-horizontal effects in accordance with the guidance set out in the relevant notices, that is to say the Horizontal Merger Guidelines[85] and the Non-Horizontal Merger Guidelines.[86]

(79) In assessing the competitive effects of a merger, the Commission compares the competitive conditions that would result from the notified merger with the conditions that would have prevailed without the merger. In most cases, the competitive conditions existing at the time of the merger constitute the relevant comparison for evaluating the effects of a merger. However, in some circumstances, the Commission may take into account future changes to the market that can reasonably be predicted.[87]

5.3. Market shares[88]

(80) According to the Horizontal Merger Guidelines and the Non-Horizontal Merger Guidelines,[89] in the assessment of the effects of a merger, market shares constitute a useful first indication of the structure of the markets at stake and of the competitive importance of the relevant market players.

(81) In the following paragraphs, the Commission presents the market shares of the Parties to the Transaction and their competitors, in all horizontally affected markets where the Parties have combined market shares above 20%, and all non-horizontally affected markets where the Parties have an individual or combined market share above 30%.

(82) The following table provides the market shares of the Parties and its competitors on the market for the wholesale supply of passive broadband access services in Italy by volume:[90]

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85 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("**Horizontal Merger Guidelines**"), OJ C 31, 5.2.2004, p. 5.

86 Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("**Non-Horizontal Merger Guidelines**"), OJ C 265, 18.10.2008, p. 6.

87 Horizontal Merger Guidelines, paragraph 9; Non-Horizontal Merger Guidelines, paragraph 20.

88 In response to RFI 8, question 5, the Notifying Party submitted that based on the definition of the market determined by AGCOM, all the market shares for active and passive services provided in response to RFI 8 and in the Form CO consider overall retail access lines as the total market. On this basis, the Commission has not been able to obtain from the Notifying Party market shares on the overall market for the wholesale supply of broadband access services in Italy. For the purpose of this decision, the Commission will rely on the market shares provided by the Notifying Party in the market for the wholesale supply of passive broadband access services as a proxy to conservatively estimate the market share of the Parties and their competitors on the overall market for the wholesale supply of broadband access services in Italy. In any event, the Commission considers that having the exact market shares of the Parties and their competitors on the market for the wholesale supply of broadband access services in Italy would not affect the Commission's assessment of the Transaction.

89 Horizontal Merger Guidelines, paragraph 14; Non-Horizontal Merger Guidelines, paragraph 24.

90 The Notifying Party submits that it is unable to calculate these market shares by value, as it is unable to gather data on wholesale access prices of third parties.

Table 1: Market shares of the Parties and their competitors on the market for the wholesale supply of passive broadband access services in Italy by volume (2021-2023)

Operator	2021 (%)	2022 (%)	2023[91] (%)
TIM Network Business, divided by:	[70-80]	[70-80]	[70-80]
Captive sales	*[60-70]*	*[60-70]*	*[60-70]*
Non-captive sales	*[10-20]*	*[5-10]*	*[5-10]*
FiberCop, divided by:	[0-5]	[5-10]	[5-10]
Captive sales to TIM	*[0-5]*	*[0-5]*	*[5-10]*
Non-captive sales	*[0-5]*	*[0-5]*	*[0-5]*
Combined (overall)	**[80-90]**	**[70-80]**	**[70-80]**
Open Fiber	[5-10]	[10-20]	[10-20]
Fastweb[92]	[0-5]	[0-5]	[0-5]
FWA operators	[5-10]	[5-10]	[5-10]
Total	100	100	100

Source: Notifying Party's response to RFI 8, table 8.1(a)

(83) Based on the table above, it appears that since 2021, Open Fiber has been the largest supplier of non-captive wholesale passive broadband access services. However, TIM Network Business remains the largest wholesale passive broadband access services provider in Italy, whereas FiberCop is the third one. The Transaction leads to the recombination of TIM Network Business with FiberCop, leading to NetCo becoming, by far, the largest provider of wholesale passive broadband access services in Italy. In addition, since post-Transaction TIM will no longer own its fixed network, all captive sales will become the Notifying Party's sales to third parties.

(84) The following table provides the market shares of the Parties and its competitors on the market for the wholesale supply of active broadband access services in Italy by volume:[93]

Table 2: Market shares of the Parties and their competitors on the market for the wholesale supply of active broadband access services in Italy by volume (2021-2023)

Operator	2021 (%)	2022 (%)	2023[94] (%)
TIM Network Business, divided by:	**[70-80]**	**[60-70]**	**[60-70]**
Captive sales	*[40-50]*	*[40-50]*	*[40-50]*
Non-captive sales	*[20-30]*	*[20-30]*	*[20-30]*
Fastweb	[5-10]	[5-10]	[5-10]
Captive sales	*[5-10]*	*[5-10]*	*[5-10]*
Non-captive sales	*[0-5]*	*[0-5]*	*[0-5]*
Open Fiber	[0-5]	[0-5]	[0-5]
Other operators offering FTTC/FTTH	[10-20]	[10-20]	[10-20]
FWA operators	[5-10]	[5-10]	[5-10]
Total	100	100	100

Source: Notifying Party's response to RFI 8, table 8.3(a)

(85) Based on the table above, TIM Network Business has been, since 2021, the largest supplier of wholesale active broadband access services in Italy, whether captive or non-captive. As FiberCop does not offer wholesale active broadband access

91 The latest data available pertains to the second quarter of 2023.

92 Over time, Fastweb is migrating to other operators' networks. Fastweb's share is all captive as the operator is not active in the sale of passive services to third parties.

93 The Notifying Party submits that it is unable to calculate these market shares by value, as it is unable to gather data on wholesale access prices of third parties.

94 The latest data available pertains to the second quarter of 2023.

services, the Transaction does not lead to any increment on this market. At the same time, the Commission notes that since post-Transaction TIM will no longer own TIM Network Business, all captive sales will become sales to third parties.

(86) As set out in paragraphs (123) to (125) below, the Transaction does not lead to a change in the number of either primary or secondary networks or in the number of providers offering any individual wholesale access product. Therefore, the Transaction does not lead to a material change in the market power of NetCo as compared to the situation of either TIM or FiberCop before the Transaction. Furthermore, the Commission notes that the competitive restraints imposed by TIM Network Business on FiberCop or by FiberCop on TIM Network Business have been very limited. Indeed, respondents to the market investigation stated that the substitutability of semi-GPON services with full-GPON services and *vice versa* is limited.[95] Also taking into account that the present as well as the future market conditions will to a significant extent be defined by regulation, the Commission considers that Transaction does not give rise to serious doubts as to its compatibility with the internal market as a consequence of unilateral horizontal effects on the market for wholesale broadband access.

5.4. Non-horizontal effects

5.4.1. Legal framework

(87) A merger is said to result in foreclosure where actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the Transaction, thereby reducing these companies' ability and/or incentive to compete.[96]

(88) Two forms of foreclosure can be distinguished. The first is where the merger is likely to raise the costs of downstream rivals by restricting their access to an important input (input foreclosure). The second is where the merger is likely to result in foreclosure of upstream rivals by restricting their access to a sufficiently large customer base (customer foreclosure).

(89) Input foreclosure arises where, post-merger, the new entity would be likely to restrict access to the products or services that it would have otherwise supplied absent the merger, thereby raising its downstream rivals' costs by making it harder for them to obtain supplies of the input under similar prices and conditions as absent the merger.[97]

(90) In assessing the likelihood of an anticompetitive input foreclosure scenario, the Commission examines, first, whether the merged entity would have, post-merger, the ability to substantially foreclose access to inputs; second, whether it would have the incentive to do so; and third, whether a foreclosure strategy would have a significant detrimental effect on competition downstream. In practice, these factors are often examined together since they are closely intertwined.[98]

(91) Customer foreclosure may occur when a supplier integrates with an important customer in the downstream market. Because of this downstream presence, the merged entity may foreclose access to a sufficient customer base to its actual or potential rivals in the upstream market (the input market) and reduce their ability or incentive to compete.[99]

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95 Replies to questionnaire Q1 – Phase I market investigation, questions C.A.A.8 and C.A.A.9.

96 Non-Horizontal Merger Guidelines, paragraph 29.

97 Non-Horizontal Merger Guidelines, paragraph 31.

98 Non-Horizontal Merger Guidelines, paragraph 32.

99 Non-Horizontal Merger Guidelines, paragraph 58.

(92) In assessing the likelihood of an anticompetitive customer foreclosure scenario, the Commission examines the three following cumulative elements: first, whether the merged entity would have the ability to foreclose access to downstream markets by reducing its purchases from its upstream rivals; second, whether it would have the incentive to reduce its purchases upstream; and third, whether a foreclosure strategy would have a significant detrimental effect on consumers in the downstream market intertwined.[100]

5.4.2. Foreclosure effects in the market for the wholesale supply of broadband access services in Italy

(93) The Transaction entails the recombination, under common sole control, of TIM Network Business and FiberCop. As part of its investigation into the Transaction, the Commission assessed whether such structural change would adversely affect competition on the market for the wholesale supply of broadband access services in Italy.

(94) The results of the Commission's market investigation show that more than 85% of the respondents to the market investigation, who expressed a view, consider that the Transaction will negatively impact the market for the wholesale supply of broadband services, or potential segments of such market.[101]

(95) As explained by one market participant, "[i]*t is well known that TIM already expressed the intention for NetCo not to provide anymore passive services and that this intention has been presumably agreed with KKR that is already an important shareholder in FiberCop.*"[102] Another market participant explains that: "[a]*fter* [the] [T]*ransaction Netco has the ability and incentive to push OAOs* [Other Authorized Operators] *to active services to increase its recurrent revenues.*"[103] More concretely even, one market participant explained that, following the Transaction, "*we will not* [be] *allowed fib*[re] *to* [sic] *access to secondary network*" while another one clarifies that "[i]*f coinvestment agreement will be cancelled (by* [N]*et*[C]*o) we will not* [be] *allowed to access* [the] *secondary network.*"[104]

(96) On this basis, this section focuses on the possible foreclosure effects of the Transaction on the market for the wholesale supply of broadband access services in Italy by directly or indirectly blocking passive access to FiberCop's fibre network, i.e. so-called semi-GPON wholesale passive broadband access services.

5.4.2.1. Notifying Party's view

(97) In the Form CO, the Notifying Party submits that the Transaction will not give rise to anticompetitive effects on the market for the wholesale supply of broadband access service for the following reasons.

(98) First, the Notifying Party submits that the Transaction does not give rise to any horizontal overlaps or vertical links, whether between the activities of TIM Network Business and of FiberCop[105] or between the activities of NetCo and of other portfolio companies of the Notifying Party.[106]

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100 Non-Horizontal Merger Guidelines, paragraph 59.

101 Replies to questionnaire Q1 – Phase I market investigation, question E.3.

102 Replies to questionnaire Q1 – Phase I market investigation, question D.1-4.

103 Replies to questionnaire Q1 – Phase I market investigation, question D.1-4.

104 Replies to questionnaire Q1 – Phase I market investigation, question D.1-4.

105 This is due to the fact that the Notifying Party submits that FiberCop is not a full function joint venture, which, accordingly, has no market presence.

106 Form CO, paragraph 6.146.

(99) Second, the Notifying Party submits that the Transaction will have pro-competitive effects as the Transaction will separate the retail, customer-facing activities of TIM from TIM's wholesale activities. In addition, the Notifying Party will, contrary to TIM, have sufficient financing to support the roll-out of a fibre network in a move away from the current copper network.[107]

(100) Third, the Notifying Party submits that the Notifying Party will not have any incentive to modify the current wholesale commercial agreements of NetCo after the Transaction. The Notifying Party explains that following the Transaction, it will have the overriding incentive to fill NetCo's network and to maximize access from TIM as well as from other players (on non-discriminatory terms and conditions).[108]

(101) Fourth, on 2 May 2024, the Notifying Party submitted to the Commission its note titled "*The new Regulatory Framework (AGCOM 2024 Regulation) and NetCo's lack of ability to preclude third parties' access to Semi-GPON*" ("**White Paper**"). In the White Paper, the Notifying Party explains that following the AGCOM 2024 Regulation, which sets up an access and *ex ante* pricing obligation on NetCo's semi-GPON in areas where TIM and FiberCop currently enjoy SMP, NetCo will not have the ability to stop supplying access to semi-GPON, or price semi-GPON at non-competitive terms.[109]

(102) Finally, the Notifying Party argues that the letters it has sent to the current wholesale access partners have clarified that the existing wholesale access agreements with FiberCop will stay in place and […] as compared to the situation before the Transaction.[110]

5.4.2.2. The Commission's assessment

(103) For the reasons set out below, the Commission considers that the Transaction will not lead to foreclosure on the market for the wholesale supply of broadband access services in Italy by directly or indirectly blocking access to the semi-GPON services provided currently by FiberCop.

5.4.2.2.1. Ability for the merged entity to engage in input foreclosure in the market for the wholesale supply of broadband access services in Italy

5.4.2.2.1.1. Scope of the Commission's assessment under the Merger Regulation

(104) As explained above in Section 2.1., the Transaction entails the recombination, under common sole control, of TIM Network Business and FiberCop. Prior to the Transaction, the TIM Network Business is solely controlled by TIM, whereas FiberCop is jointly controlled by TIM and the Notifying Party.

(105) Prior to the Transaction, FiberCop can only supply, from a technical perspective, (passive) semi-GPON services. Following the Transaction, due to FiberCop's integration with TIM Network Business, NetCo will have the option to offer both (passive) semi- and full-GPON services, alongside active services.

(106) On this basis, the recombination of TIM Network Business and FiberCop in NetCo constitutes a structural change in the market that is appropriate to review on the basis of the Merger Regulation.[111]

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107 Form CO, paragraphs 6.147-6.150.

108 Form CO, paragraphs 6.151-6.152.

109 Notifying Party's White Paper, paragraphs 34-42.

110 Notifying Party's response to RFI 8.

111 The Commission notes that the Notifying Party argues that, before the Transaction, TIM had full operational control over FiberCop. The veto rights of KKR in FiberCop would confer control under

(107) The Commission therefore considers that, contrary to the claim of the Notifying Party, the Transaction leads to a non-horizontal link between the wholesale supply of active broadband services and the wholesale supply of passive broadband services.

(108) However, the Commission considers that the exact scope of the present assessment should take into account the specific pre-Transaction arrangements to focus its assessment on merger-specific changes brought about by the Transaction.

(109) In this regard, the Notifying Party explains that FiberCop is unable to market access to its copper (whether passive or active) assets independently from TIM as at the time of the creation of FiberCop, all copper cabinets remained with TIM.[112] Accordingly, the Commission notes that since TIM currently already offers both wholesale active and passive copper services both on the primary and secondary network, the Transaction will not alter the incentives for NetCo to provide access to wholesale active and/or passive, primary and/or secondary, copper services, as TIM does pre-Transaction. Therefore, the Commission will not further assess wholesale broadband access services on copper networks.

(110) Furthermore, with regards to FiberCop's fibre network, it appears that FiberCop can only sell passive products on its secondary network (i.e. semi-GPON).[113] Indeed, as explained by the Notifying Party, "*a fixed network infrastructure is comprised of both Primary Assets and Secondary Assets. Both Primary Assets and Secondary Assets together form an "Access Network:" both individually are simply component parts and neither can in isolation provide network access services to retail end-customers*."[114,115]

(111) Accordingly, prior to the Transaction, active services using FiberCop's fibre assets are marketed by TIM (and other competitors). On this basis, the Transaction is only liable to alter the possibility for third-party customers of FiberCop to maintain their access to semi-GPON, as all other (passive and active) services are already offered only by TIM prior to the Transaction and not by FiberCop.[116]

(112) On this basis, the scope of this section will be limited to assessing whether it is likely that the Transaction will lead to the foreclosure of access seekers relying on semi-GPON services in Italy.

5.4.2.2.1.2. Relevance of *ex ante* sectorial regulation in the Commission's assessment

(113) As a preliminary remark, the Commission notes that, at the date of notification, access to semi-GPON was not regulated by AGCOM. Accordingly, and for the reasons set out below, the current regulatory framework in Italy is not sufficiently

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the Merger Regulation but it would leave TIM very broad discretion to enter or terminate the agreements of FiberCop. Since TIM also currently owns the primary network that will be transferred to NetCo by the Transaction, the incentives for KKR to provide semi-GPON would not be lower than the ones of TIM. However, the Commission considers that even though KKR might not have been able to interfere in the day-to-day business for as long as FiberCop stays within its Business Plan, the obligation to comply with the Business Plan and the veto powers of KKR on various important decisions disciplined TIM in how FiberCop granted access to semi-GPON.

112 Form CO, paragraph 6.61(a). On this basis, the Commission notes that the explanation provided in footnote 111 is not relevant to copper products.

113 Form CO, paragraph 8.8(e).

114 Form CO, footnote 7.

115 Currently, third party customers of FiberCop for semi-GPON can connect their proprietary primary network to FiberCop's secondary network, or otherwise obtain wholesale access to passive or active primary services from TIM.

116 Form CO, paragraph 8.8(e).

predictable to be taken into account by the Commission in its assessment of the effects of the Transaction.

(114) Recital 29 of the European Electronic Communications Code states that: "*Considering that the markets for electronic communications have shown strong competitive dynamics in recent years, it is essential that ex ante regulatory obligations are imposed only where there is no effective and sustainable competition on the markets concerned. The objective of ex ante regulatory intervention is to produce benefits for end-users by making retail markets effectively competitive on a sustainable basis. Obligations at wholesale level should be imposed where otherwise one or more retail markets are not likely to become effectively competitive in the absence of those obligations.*"[117]

(115) The Commission's *Guidelines on market analysis and the assessment of significant market power* indicates that the national regulatory authority shall carry out its assessment taking into account "*existing market conditions as well as expected or foreseeable market developments over the course of the next review period in the absence of regulation*."[118]

(116) The Commission, on the other hand, evaluates mergers in the market context within which they arise, which includes the regulatory environment. Anticipated changes to the regulatory environment within the timeframe of the prospective merger analysis can only be taken into account if future changes can be reasonably predicted.[119]

(117) As described above, the regulatory framework changed on 30 April 2024. The AGCOM 2024 Regulation contains a number of statements suggesting that the AGCOM 2024 Regulation is transitory in nature:

> "*WHEREAS the market environment is significantly evolving in view, in particular, of the announced changes in TIM's corporate structure which, together with the assessment of the co-investment offer under Article 76 of the EEC Code (Article 87 of the Code), led the regulator to postpone the launch of a public consultation on updating the current regulatory framework for the markets for wholesale access to the fixed network, without prejudice to the definition of new prices for the years 2022 and 2023 to protect the market*;"[120]
>
> "*HAVING REGARD TO the notification under Article 89 of the Code of the new draft structural separation of TIM's access network (TIM document of 19 January 2024, ref. 0000132 – TI) acquired by the Authority under Protocol No 19026 of 19 January 2024; WHEREAS, pursuant to*

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117 European Electronic Communications Code, recital 29.

118 Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications and services, C(2018)2374, OJ C 159, 7.5.2018, p. 1, paragraphs 17 and following.

119 According to paragraph 9 of the Horizontal Merger Guidelines, generally, the conditions existing at the time of the merger constitute the relevant comparison for evaluation the effects of a merger. In some circumstances, the Commission may take into account future changes to the market that can reasonably be predicted.

120 AGCOM 2024 Regulation (footnote 50), page 6, courtesy translation of: "*CONSIDERATO che il contesto di mercato è in significativa evoluzione visti soprattutto gli annunciati cambiamenti dell'assetto societario di TIM in corso di definizione che, unitamente alla valutazione dell'offerta di coinvestimento ex art. 76 CCEE (art. 87 del Codice), hanno fatto propendere il regolatore a rimandare l'avvio di una consultazione pubblica sull'aggiornamento del vigente quadro regolamentare dei mercati dei servizi di accesso all'ingrosso alla rete fissa, salvo comunque definire i nuovi prezzi per gli anni 2022 e 2023 a tutela del mercato*."

Article 89(2), the Authority is required to assess the effect of the envisaged transaction on existing regulatory requirements and, to that end, to conduct a new analysis of the markets connected to the access network in accordance with the procedure laid down in Article 78 of the Code;"[121]

"*CONSIDERING THAT, as per BEREC's practice and advice, before assessing the regulatory impact of the announced structural separation on the markets concerned, the Authority intends to carry out a preliminary analysis of the project in order to verify its completeness and reliability; Given that a first examination of the separation project notified by TIM appears incomplete because it appears to be missing or lacking the necessary level of detail or stability, a number of information essential for its examination in the context of an analysis of the markets connected to the access network; … ALSO CONSIDERING the roadmap communicated by TIM, as part of the notified project, for the implementation of the transaction, including the planned notifications to the competent European authority; HAVING REGARD TO the timeline required – unpredictable at this point in time – for the conclusion of the assessment of the new project for the structural separation of TIM, in accordance with Article 89 of the Code; HAVING REGARD, therefore, to the need to conclude the ongoing market analysis initiated by Resolution No 637/20/CONS, which is based on TIM's current organisational set-up (TIM-FiberCop legal separation) in order to ensure regulatory certainty for the market and not create regulatory gaps until the future regulatory framework is defined that will take into account the new separation project notified on 19 January 2024 (NetCo project).*"[122]

(118) The transitory nature of the AGCOM 2024 Regulation is further confirmed by the Notifying Party in its White Paper, in which the Notifying Party explains that: "*The AGCOM 2024 Regulation is expected to be replaced within the coming 12 months by an updated AGCOM* [R]*egulation that would conclude the additional AGCOM*

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121 AGCOM 2024 Regulation (footnote 50), page 7, courtesy translation of: "*VISTA la notifica ai sensi dell'articolo 89 del Codice del nuovo progetto di separazione strutturale della rete di accesso di TIM (documento di TIM del 19 gennaio 2024, prot. 0000132 - TI) acquisita dall'Autorità al protocollo n. 19026 del 19 gennaio 2024; CONSIDERATO che, ai sensi dell'articolo 89, comma 2, l'Autorità è tenuta a valutare l'effetto della transazione prevista sugli obblighi normativi esistenti e, a tal fine, a condurre una nuova analisi dei mercati collegati alla rete d'accesso secondo la procedura di cui all'articolo 78 del Codice.*"

122 AGCOM 2024 Regulation (footnote 50), page 8, courtesy translation of: "*CONSIDERATO che, come da prassi e in base alle indicazioni del BEREC, prima di valutare l'impatto regolamentare dell'annunciata separazione strutturale sui mercati interessati, l'Autorità intende svolgere un'analisi preliminare del Progetto volta a verificarne la completezza e l'affidabilità; CONSIDERATO che da un primo esame del Progetto di separazione notificato da TIM, lo stesso appare incompleto in quanto risultano mancanti o prive del necessario livello di dettaglio o di stabilità, diverse informazioni essenziali per il suo esame nell'ambito di un'analisi dei mercati collegati alla rete di accesso; … CONSIDERATA altresì la roadmap comunicata da TIM, nell'ambito del progetto notificato, per l'implementazione della transazione, incluse le previste notifiche all'Autorità europea competente; CONSIDERATI i tempi necessari – allo stato non preventivabili – per la conclusione della valutazione del nuovo progetto di separazione strutturale di TIM, ai sensi dell'articolo 89 del Codice; CONSIDERATA, pertanto, la necessità di concludere l'analisi di mercato in corso avviata con delibera n. 637/20/CONS, che si basa sull'attuale assetto organizzativo di TIM (separazione legale TIM-FiberCop) al fine di assicurare al mercato certezza regolamentare e non creare vuoti normativi fino alla definizione del futuro quadro regolamentare che terrà conto del nuovo progetto di separazione notificato il 19 gennaio 2024 (progetto NetCo).*"

market analysis triggered by TIM's notification on 19 January 2024 [related to the Transaction]."[123]

(119) Even though the Notifying Party submits that "*The Parties see no reason why the* [subsequent] *AGCOM* [r]*egulation would not maintain the obligations pertaining to semi-GPON given the recently concluded market analysis for the AGCOM 2024 Regulation*,"[124] the Commission considers that while the Notifying Party may be correct, the Commission currently lacks sufficient clarity as to the most likely outcome of TIM's notification of 19 January 2024 and the timing of AGCOM's decision on the matter.[125] In addition, the Commission notes that there is no fixed timeframe in which AGCOM will adopt an updated regulation and therefore there is uncertainty also as of when the regulatory regime under the current AGCOM 2024 Regulation will be replaced.[126] In addition, the Commission recalls that semi-GPON was not regulated by any AGCOM regulation up to 30 April 2024, that is 11 days after the notification of the Transaction. As such, the development seems too novel and transitory in nature, to reasonably predict the future of semi-GPON access and price regulation. Such lack of predictability is further stressed by the Notifying Party's stated intention that "*NetCo will be operating a Wholesale-Only Model in line with Article 91 of the* [Italian Code of Electronic Communications] *and Article 80 of the* [European Electronic Communications Code]"[127] as this might influence the outcome of the market review of AGCOM, for example in terms of the obligations imposed on NetCo.

(120) Based on the results of the market investigation, some respondents mentioned that even for commercial offers, regulated prices may act as a benchmark.[128] A vast majority of the respondents stated that following the Transaction and NetCo being possibly considered as wholesale-only within the meaning of the European Electronic Communications Code they will be able to contract with NetCo, however, on worse terms (i.e. higher prices).[129] Many respondents also consider that the market review notified to the Commission and adopted by AGCOM on 30 April 2024 (AGCOM 2024 Regulation) leaves a sufficient margin of discretion to NetCo to deny or limit access to its passive infrastructure due to the lack of clear and strict access and price obligations on TIM/FiberCop to deliver wholesale passive access products.[130]

(121) On this basis, the Commission considers that while the regulatory framework could dispel the concerns regarding NetCo ceasing or degrading its supply of semi-GPON in Italy, the lack of clarity as to the most likely evolution of the regulatory

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123 Notifying Party's White Paper, footnote 2.

124 Notifying Party's White Paper, footnote 2.

125 TIM's notification of 19 January 2024 constitutes a notification pursuant to Article 89 of the Italian Code of Electronic Communications (implementing Article 78 of the European Electronic Communications Code) which determines that: "*Undertakings which have been designated as having significant market power in one or several relevant markets in accordance with Article 67 shall inform the national regulatory authority at least three months before any intended transfer of their local access network assets or a substantial part thereof to a separate legal entity under different ownership, or establishment of a separate business entity in order to provide all retail providers, including its own retail divisions, with fully equivalent access products*" (Article 78(1) of the European Electronic Communications Code).

126 While a timely decision by AGCOM would provide clarity as to the content and timing of a new regulation, the Commission notes that as of the date of this decision, both are uncertain.

127 Form CO, paragraph 1.62.

128 Replies to questionnaire Q1 – Phase I market investigation, question D.A.1.

129 Replies to questionnaire Q1 – Phase I market investigation, question D.1-3.

130 Replies to questionnaire Q1 – Phase I market investigation, question D.A.4.

framework after the review of the AGCOM 2024 Regulation and its timing implies that the Commission is unable to take it into account in its assessment.[131]

5.4.2.2.1.3. Commission's assessment

(122) The Commission considers that the Transaction will not affect the ability of NetCo to foreclose access seekers of semi-GPON services in Italy.

(123) First, the Commission notes that the Transaction will not materially change the overall structure of the market for wholesale supply of broadband access in Italy. In particular, the Transaction will not reduce the number of secondary networks in Italy. Therefore, there will be no change in infrastructure-based competition for access to semi-GPON services following from the Transaction, as the FiberCop secondary network and TIM's primary network do not overlap. This is because they had been part of the same network under the control of TIM before the creation of FiberCop in 2021. The current Transaction (re-)combines the networks currently owned by TIM and FiberCop, but these were not competing for semi-GPON customers before the Transaction, as they offered complementary services.

(124) Similarly, the Transaction will not reduce the number of providers of semi-GPON services in Italy either. NetCo will be the only provider to offer semi-GPON services in Italy in the same way as FiberCop is the only provider at the time of this decision. Indeed, while the Transaction recombines TIM Network Business and FiberCop into NetCo, TIM did not provide semi-GPON services prior to the Transaction, nor would it have been able to provide semi-GPON services, from a technical perspective. On this basis, the Transaction does not remove a wholesale provider of semi-GPON services in Italy.[132]

(125) Second, the Commission further notes that due to the lack of reduction in the number of wholesale providers of semi-GPON services in Italy, the Transaction does not materially increase the market power that NetCo will be able to exercise vis-à-vis access seekers. Before and after the Transaction, FiberCop (and NetCo post-Transaction) will be the only provider able to offer semi-GPON services.[133]

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131 In addition, the Commission considers, without prejudice to any assessment that may be made by any relevant authority on any relevant legal basis, that the Transaction's impact on the AGCM Commitments regarding access to semi-GPON is too uncertain to be taken into account in the present assessment. In particular, the Notifying Party submits that the AGCM Commitments provide, *inter alia*, for the provision of semi-GPON services to Fastweb and Iliad (as undertakings that had signed a co-investment agreement with FiberCop at the date of the AGCM Commitments) and to any interested third parties as of 2026 (Form CO, paragraph 6.91). However, the Commission also notes that the Notifying Party submits that: "*The termination of the co-investment agreements which were subject to this investigation, as a result of AGCOM's refusal to approve the amendments proposed by TIM, results in a material change to the factual and legal situation on which the AGCM based its investigation. Since the co-investment model is no longer viable, the principal object of the AGCM's concerns is no longer present. As such, the legal and factual basis underlying the decision made by the AGCM when accepting these commitments is no longer valid and should be reviewed, also taking into account the material change in competitive dynamics arising from the Transaction. Moreover, in relation to the relevant commitments of case I850, the undertakings related to the primary fib*[re] *are superseded by AGCOM resolution 45/23/CONS, and the undertaking allowing non-co-investors to purchase semi-GPON starting from 2026 is superseded by the AGCOM 2024 Regulation*" (Form CO, footnote 164). The Commission considers that such statements do not apply to other portions of the AGCM Commitments, including the roll-out obligations.

132 In the same way, the Transaction does neither affect the number of wholesale providers of other wholesale products involving TIM's primary network (e.g. active services). Before the Transaction, only TIM offered these products to access seekers but not FiberCop. After the Transaction, only KKR will be able to offer these products.

133 This consideration excludes State aided areas that may have specific access conditions, in which concerns are unlikely to arise.

The Commission considers that, post-Transaction, it is likely that the main constrains for the pricing of such offer will come from (current or future) regulation and, to a limited extent, from wholesale offers for other services (e.g. full-GPON services or active services). As to potential constraints from TIM Network Business' other wholesale offers (i.e. which do not include semi-GPON) for the pricing of semi-GPON by FiberCop before the Transaction, the Commission notes that no market participant argued that FiberCop was constrained by TIM Network Business. Therefore, it does not appear that the market power of NetCo for the provision of semi-GPON services after the Transaction will be materially different from the market power of FiberCop before the Transaction.

(126) Third, despite the fact that prior to the AGCOM 2024 Regulation the applicable regulatory framework in Italy did not provide for regulated access to semi-GPON,[134] the Commission considers that access to semi-GPON is, and will continue to be, granted on the basis of long-term commercial agreements with FiberCop which ensure access to semi-GPON ("**Semi-GPON Agreements**"). Accordingly, since access to semi-GPON will continue to exist on the basis of these existing Semi-GPON Agreements, it is unlikely that NetCo will stop supplying semi-GPON services post-Transaction.

(127) As of the date of this decision, the following Semi-GPON Agreements are in place:[135]

(a) Semi-GPON Agreement with […], entered into on 31 March 2021 for a duration of [10-20] years, with […];[136]

(b) Semi-GPON Agreement with […], entered into on 6 August 2021, valid until […] with an […]. However, the duration of the access to semi-GPON services will continue past the expiration of the Semi-GPON Agreement with […], as clause 9.2 of the Semi-GPON Agreement with […][137] provides that access is granted for a period of [10-20] years from when access is granted, which can be unilaterally renewed by […] for another term of […];

(c) Semi-GPON Agreement with […], entered into on 26 November 2021 for a duration of [10-20] years;

(d) Semi-GPON Agreement with […], entered into on 12 September 2022, valid until […].[138] However, the duration of the access to semi-GPON services will continue past the expiration of the Semi-GPON Agreement with […], as clause 9.2 of the Semi-GPON Agreement with […][139] provides that access is granted for a period of [10-20] years from when access is granted, which can be unilaterally renewed by […] for another term of […];

(e) Semi-GPON Agreement with […], entered into on 12 November 2021, valid until […] with an […]. However, the duration of the access to semi-GPON services will continue past the expiration of the Semi-GPON Agreement with

134 Notifying Party's White Paper, paragraph 8.

135 Notifying Party's response to RFI 7, Table 1.

136 The Notifying Party explains that the relationship between TIM and Fastweb commenced in 2017, when the two companies decided to establish Flash Fiber (paragraph (44)), to create a FTTH network in 29 Italian municipalities, pursuant to a closed co-investment model, i.e. not based on a co-investment within the meaning of the European Electronic Communications Code (Form CO, paragraph 6.41).

137 Notifying Party's response to RFI 8, Annex 1.1.a-2.

138 Notifying Party's response to RFI 8, Annex 1.1.a-4, clause 3.8.

139 Notifying Party's response to RFI 8, Annex 1.1.a-4.

[…], as clause 9.2 of the Semi-GPON Agreement with […][140] provides that access is granted for a period of [10-20] years from when access is granted, which can be unilaterally renewed by […] for another term of […];

(f) Semi-GPON Agreement with […], entered into on 22 December 2022 for a duration of [10-20] years; and,

(g) Semi-GPON Agreement with […], entered into on 15 March 2022 for a duration of [10-20] years.

(128) As evidenced by the signing date of each Semi-GPON Agreement, as well as the duration of the Semi-GPON Agreement, these Semi-GPON Agreements were entered into before the Transaction and will continue after the closing of the Transaction.[141]

(129) Fourth, FiberCop has not started formal negotiations with any third party to […], nor has FiberCop entered into any negotiations pertaining to […].[142] While informal contacts appear to have taken place in the course of […],[143] the Commission notes that, in their latest letter to […], TIM and FiberCop explained that: […].[144] Thus, the quote clarifies that the Rejected Co-investment Offer (see footnote 52) is the cause of a change in circumstances that explains why a Semi-GPON Agreement with […] was never concluded. The Commission has no evidence suggesting that the same would not hold true for all potential access seekers who had not concluded a Semi-GPON Agreement on the date of the Rejected Co-investment Offer. On this basis, the likelihood that NetCo will conclude new Semi-GPON Agreements with potential access seekers is not affected by the Transaction, but rather by the determination of AGCOM on the Rejected Co-investment Offer.

(130) Fifth, the Commission considers that the validity of the existing Semi-GPON Agreements has not been impacted by AGCOM's decision of 20 December 2023 regarding the Rejected Co-investment Offer (see footnote 52). Indeed, […], the Notifying Party confirmed that, in its view, the Semi-GPON Agreements are valid and remain in force following the decision of AGCOM of 20 December 2023 regarding the Rejected Co-investment Offer.[145]

(131) Sixth, the Commission's understanding of the continued validity of the Semi-GPON Agreements was confirmed by the Notifying Party in letters sent to the

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140 Notifying Party's response to RFI 8, Annex 1.1.a-5.

141 In this regard, the Commission notes that the duration of the Semi-GPON Agreements was agreed between FiberCop and the counterparty to each Semi-GPON Agreement prior to the Transaction. In this context, the exact outstanding validity of the Semi-GPON Agreements is neither linked nor affected by the Transaction.

142 Notifying Party's response to RFI 7, paragraph 18. At the same time, the Notifying Party provided information on informal contacts for semi-GPON access with, at least, […] (see Notifying Party's response to RFI 7, Annex 2.3). In particular in relation to Vodafone and WindTre, the Commission notes that based on the latest data presented by AGCOM, these market participants have a respective market share of 16.4% and 14.2% (i.e. the second and third largest market participant) on the market for the retail supply of fixed internet access services in Italy without having an existing Semi-GPON Agreement.

143 Notifying Party's response to RFI 7, Annex 2.3. The Commission notes that exchanges with […] continued until, at least, […] (see Notifying Party's response to RFI 7, Annex 2.2).

144 Notifying Party's response to RFI 7, Annex 2.2, courtesy translation of the following: […].

145 Notifying Party's response to RFI 7, paragraph 3.

counterparty of each Semi-GPON Agreement on […].[146] While the Commission did not consider these letters as necessary to preserve the validity of the Semi-GPON Agreements, in those letters, the Notifying Party made a written statement that each Semi-GPON Agreement remains in force and valid and will continue to be implemented on the same terms as those in force on […]. As such, the terms negotiated between the contractual counterparties to each Semi-GPON Agreement that existed prior to the Transaction will continue to be in place and enforceable by the counterparties after the Transaction.

(132) Seventh, in addition to confirming that the Semi-GPON Agreements remain valid, the Notifying Party clarified that FiberCop will not invoke the right to terminate the respective agreement under a contractual clause that provides for such right.[147] The Commission notes that there has been a dispute between TIM, on behalf of FiberCop, and the access seekers as to whether this clause has been triggered. Even though this dispute pre-dates the notification of the current Transaction, the Commission considers that the letters have clarified that the different views as to the conditions under which the termination right cannot be triggered will not lead to a unilateral termination of the agreements by KKR.

(133) Eight, the contractual counterparties to each Semi-GPON Agreement that have commented to the Commission on the letters sent by the Notifying Party on 23 May 2024 submitted that the letters confirming the validity and enforceability of the Semi-GPON Agreements dispel commercial disagreements the counterparties to each Semi-GPON Agreement have had with TIM prior to the Transaction. One access seeker wrote that the confirmation regarding the validity of the Semi-GPON Agreements "*appear*[s] *suitable to address the competition concerns raised in previous submissions and discussions with the Case Team.*"[148]

(134) Ninth, in the case of Fastweb that has pursued an infrastructure-based strategy through the ownership of a fibre primary network, Fastweb's Semi-GPON Agreement will also have the effect of allowing investment in the primary network in line with its current Semi-GPON Agreement with FiberCop.

(135) Finally, on the fibre network rollout, KKR is bound by the AGCM Commitments (paragraph (47)).[149] Thus, KKR would only be able to decrease its roll-out if AGCM were to agree to modify or terminate the AGCM Commitments. The Commission considers that such requirement sufficiently safeguards the roll-out obligations under the AGCM Commitments. The Commission further takes note that the KKR business plan[150] would involve an […] as compared to the trajectory of the current TIM roll-out by 2026. By 2026, the final year of the AGCM Commitments, the roll-out will be […] under KKR's business plan than that envisaged in the AGCM Commitments.[151]

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146 […]. The letters constitute unilateral and irrevocable offers, under Article 1381 of the Italian Civil Code (titled 'Promise of the obligation or fact of the third party') and are therefore binding on the Notifying Party.

147 These include, amongst others, clause 5.8.1 of the Semi-GPON Agreement with […], clause 8.2 of each Semi-GPON Agreement with […], […] and […] and clause 11.2 of each Semi-GPON Agreement with […], […] and […].

148 Email from a market participant of 24 May 2024.

149 Notifying Party's response to RFI 8, Annex 1.

150 As described in Section 2.1 above.

151 While this seems to indicate that KKR does not intend to reduce FibreCop's/ NetCo's rollout following the Transaction, the Commission is aware that, if AGCM would modify or revoke the AGCM Commitments, KKR could change NetCo's business plan.

(136) In light of the above, the Commission considers that it is unlikely that NetCo will have the ability to foreclose the market for the wholesale supply of broadband access services in Italy by directly or indirectly blocking semi-GPON services. While the Commission notes that there have been different views as to whether an obligation to renegotiate the Semi-GPON Agreements has been triggered, the Notifying Party confirmed that the Semi-GPON Agreements "*maintain their validity and effect until a new agreement is found with the relevant access seekers to align conditions with the AGCOM 2024 Regulation*".[152] According to the Notifying Party, each existing counterparty would have "*certainty as to the approach that NetCo will take with the Existing Agreements following completion of the Transaction*".[153] Against this background, in light of the clarifications set out in the letters, the explanation by the Notifying Party and the Commission's assessment of these existing agreements, the Commission considers that there is certainty that the Semi-GPON Agreements will stay in place until there is a mutual agreement between the respective contractual parties to amend them, without a threat of termination of such Semi-GPON Agreements, and that absent any mutual agreement on re-negotiated terms, the current terms of the Semi-GPON Agreements will continue to apply.

(137) Accordingly, given the lack of ability for NetCo to foreclose access seekers of semi-GPON services, the Commission considers that there is no need to assess whether NetCo would have the incentive to engage in such foreclosure strategy, or the effects that such foreclosure strategy may have on the market for the wholesale supply of broadband (passive and/or active) access services in Italy.

5.4.2.2.2. Conclusion on foreclosure effects in the market for the wholesale supply of broadband access services in Italy

(138) In view of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market in relation to potential input foreclosure of access seekers of semi-GPON services in Italy.[154]

5.5. Horizontal coordinated effects

5.5.1. Legal framework

(139) A merger in a concentrated market may significantly impede effective competition due to horizontal[155] coordinated effects where, through the creation or the strengthening of a collective dominant position, it increases the likelihood that firms are able to coordinate their behaviour and raise prices,[156] even without entering into an agreement or resorting to a concerted practice within the meaning of Article 101 TFEU. A merger may also make coordination easier, more stable or

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152 Notifying Party's response to RFI 8, Annex 1, paragraph 7.1.

153 Notifying Party's response to RFI 8, Annex 1, paragraph 7.2.

154 The Commission notes that prior to the Transaction, FiberCop did not sell any wholesale broadband active services in Italy. Since all sales of those services were made by TIM, the Commission notes that TIM did not procure input for semi-GPON (to resell active services to retail providers of fixed internet access services) from rivals of FiberCop. On this basis, the Commission considers that the Transaction will not give NetCo the ability to foreclose competing providers of semi-GPON services in Italy by solely supplying semi-GPON services from FiberCop.

155 Even if the Commission will assess the effects of the Transaction on the basis of the framework applicable to horizontal coordinated effects (Horizontal Merger Guidelines, paragraphs 39-57), the conclusions drawn from such analysis would apply *mutatis mutandis* to non-horizontal coordinated effects assessment (Non-horizontal Merger Guidelines, paragraphs 79-90).

156 The expression "raise prices" should be understood to also cover situations where, for instance, the firms may reduce output, choice or quality of goods and services, diminish innovation, or otherwise influence parameters of competition. Horizontal Merger Guidelines, paragraph 8.

more effective for firms that were already coordinating before the merger, either by making the coordination more robust or by permitting firms to coordinate on even higher prices.[157]

(140) To assess whether a merger gives rise to horizontal coordinated effects, the Commission should examine, first, whether it would be possible to reach terms of coordination and, second, whether the coordination would be likely to be sustainable.[158]

(141) As regards the possibility of reaching terms of coordination, coordination is more likely to emerge in markets where it is relatively simple to reach a common understanding on the terms of coordination.[159] Coordination may take various forms, including keeping prices above the competitive level, or dividing the market, for instance by customer characteristics or by allocating contracts in bidding markets.[160]

(142) As regards the sustainability of coordination, three conditions are necessary for coordination to be sustainable.[161] First, the coordinating firms must be able to monitor to a sufficient degree whether the terms of coordination are being adhered to.[162] Second, discipline requires that there is a credible deterrent mechanism that can be activated if deviation is detected.[163] Third, the reactions of outsiders, such as current and future competitors not participating in the coordination, as well as customers, should not be able to jeopardise the results expected from the coordination.[164]

(143) Moreover, in examining the possibility and sustainability of coordination, the Commission should specifically consider the changes that the Transaction brings about. The reduction in the number of firms in a market may therefore, in itself, be a factor that facilitates coordination.[165]

5.5.2. Wholesale supply of broadband access services in Italy

(144) The majority of respondents to the market investigation considers that the Transaction will facilitate coordination between NetCo and Open Fiber by weakening the competitive constraints between these two firms in the market for the wholesale supply of broadband access services in Italy.[166] Such concern is based on the following arguments. First, some respondents[167] consider that the decrease from two separate wholesale offers (FiberCop offering passive services such as semi-GPON, and TIM focused on the provision of active VULA FTTC/FTTH services) to one (NetCo), will allow NetCo to discontinue (or make economically unattractive) the provision of passive services (which are not as remunerative as active services, paragraph (37)), and that Open Fiber would follow such behaviour of NetCo. These market respondents argue that NetCo has the incentive to increase prices (because NetCo's main shareholder KKR, as a financial investor, would be looking to obtain high returns to maximize its investment) and

157 Horizontal Merger Guidelines, paragraph 39.
158 Horizontal Merger Guidelines, paragraph 42.
159 Horizontal Merger Guidelines, paragraph 41.
160 Horizontal Merger Guidelines, paragraph 40. See footnote 156.
161 Horizontal Merger Guidelines, paragraph 41.
162 Horizontal Merger Guidelines, paragraphs 49-51.
163 Horizontal Merger Guidelines, paragraphs 52-55.
164 Horizontal Merger Guidelines, paragraphs 56-57.
165 Horizontal Merger Guidelines, paragraph 42.
166 Replies to questionnaire Q1 – Phase I market investigation, question D.E.1.
167 Replies to questionnaire Q1 – Phase I market investigation, question D.E.2.

that Open Fiber has the incentive to follow NetCo (as Open Fiber is currently indebted and would be following any Netco's price increases).[168] Such concern is based on the feared elimination of Fastweb as a national wholesale provider and an alleged reduction of the number of providers and wholesale offers in the market, thus resulting in a creation of a national duopoly.

(145) Second, some respondents[169] stress that the Italian State will hold: (i) a non-controlling 16% shareholding (approximately) in NetCo directly via the MEF (paragraph (8)); as well as (ii) a jointly-controlling 60% shareholding in Open Fiber indirectly via Cassa Depositi e Prestiti S.p.A. ("**CDP**"), which is ultimately controlled by the MEF.[170]

(146) Third, a few respondents[171] refer to a risk of coordination at vertical level between NetCo and TIM since after the Transaction the Italian State will still have a shareholding of approximately 8.5% of the share capital of TIM and approximately 16% of the share capital of NetCo, possibly favouring coordination where the supplier (NetCo) would favour the buyer (TIM) discriminating the competing other authorized operators.

(147) Fourth, a few respondents[172] refer to the hypothetical creation of a single fixed network in Italy (commonly referred to as "La Rete Unica" or the "**Single Network**"), whereby TIM and the Italian State (through CDP) would acquire joint control of a newly established joint venture that would combine the primary and secondary access networks of FiberCop and Open Fiber (the "**Single Network Transaction**").[173] In particular, they refer to an earn-out clause that is linked to the completion of the Single Network: KKR will have to pay a certain amount to TIM, up to EUR 2.5 billion, if the mentioned earn-out event were to occur.[174]

(148) Fifth, the majority of respondents does not consider that retail operators seeking access to fibre networks have significant bargaining power to offset any potential risk of coordination in the market for the wholesale supply of broadband access services.[175] Several respondents refer, however, to Fastweb as a possible exception.[176]

(149) Therefore, the Commission will assess whether the proposed Transaction makes coordination possible and/or easier in the horizontally affected markets for the wholesale supply of broadband access services in Italy and for the wholesale supply of *passive* broadband access services in Italy (paragraph (74)).[177] Such assessment

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168 A part of those respondents also succinctly refer to decreased fibre roll-out and innovation due to less regulation due to the status of NetCo as a wholesale-only operator under the applicable regulation (paragraph (180)).

169 Replies to questionnaire Q1 – Phase I market investigation, question D.E.2.

170 Commission decision of 10 November 2021, case No M.10450 - *CDP / Macquarie / Open Fiber*, paragraph 38.

171 Replies to questionnaire Q1 – Phase I market investigation, question D.E.2.

172 Replies to questionnaire Q1 – Phase I market investigation, question D.E.2. A market participant submitted that "*the final objective* [of the Transaction is] *to re-create a nationwide monopoly through the subsequent acquisition of Open Fibre*", also referring to press statements of the CEOs of TIM and CDP, and anticipates a future "*collapse of Open Fiber valuation [and] fire sale acquisition by Netco*" (submissions of 22 and 24 May 2024).

173 See footnote 13 (last phrase).

174 Transaction Agreement, sections 6.2 and 1.1 […].

175 Replies to questionnaire Q1 – Phase I market investigation, question D.E.5.

176 Replies to questionnaire Q1 – Phase I market investigation, question D.E.5.

177 As for the vertically affected link (paragraph (74)(a)), see footnote 155 and paragraph (160).

does not change depending on a possible segmentation of the market[178] based on the type of service (between active and passive). While NetCo will operate the wholesale broadband network as a wholesale-only player (paragraph (36)), the Transaction will not entail any structural changes in the market for the wholesale supply of *active* broadband access services (pre-Transaction TIM offers active services and FiberCop passive services; see also paragraph (75)). The Transaction thus leads to a de-coupling of TIM's retail business and wholesale business, the latter being transferred to NetCo together with FiberCop's activities (paragraph (6)). Therefore, in none of the possible (sub-)segments of the overall wholesale broadband access market the assessment would be materially different than for the overall market as set out in Section 5.5.2.2. For the reasons set out in that section, the Commission considers that the Transaction is unlikely to increase the risk of coordination in any possible (sub-)segment.

5.5.2.1. The Notifying Party's view

(150) According to the Notifying Party, the Transaction will not increase the likelihood of coordination either between NetCo and TIM or between NetCo and Open Fiber for the following reasons.

(151) First, according to the Notifying Party, there is no risk of coordination between TIM and NetCo, because nothing in the Transaction causes NetCo and TIM to align their respective interests, which are substantially different, as the two companies will operate on different markets. Since the Transaction eliminates the vertical wholesale-retail integration of TIM, NetCo will operate as a wholesale-only operator (with the incentive to fill its network capacity and roll out its network) while TIM, post-Transaction, will be active at the downstream retail level only (acquiring services from NetCo as another interested third party might do).

(152) Second, according to the Notifying Party, there is also no risk of coordination between NetCo and Open Fiber. NetCo will be indirectly solely controlled by KKR and MEF's rights in NetCo would not apply to situations that would be expected to involve the strategic commercial behaviour of NetCo. Conversely, Open Fiber is jointly controlled by Macquarie Infrastructure and Real Assets (Europe) Limited ("**Macquarie**") and CDP, which, according to the Notifying Party, would be separate from the MEF.

(153) Third, according to the Notifying Party, the Transaction will also not bring about any changes to the structure of the wholesale market that would increase the incentive of NetCo and Open Fiber to coordinate their behaviour. The two wholesale operators will, in fact, have sizeable differences in terms of network footprint on the Italian territory and technical architecture.

(154) Fourth, the Notifying Party also notes that the retail operators representing the majority of customer demand seeking access to the fibre networks of NetCo and Open Fiber are large, sophisticated and vertically integrated mobile operators, having significant bargaining power to offset any potential risk of coordination.

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178 The Commission has left open the product market definition concerning the following segments: (i) the level where the point of interconnection is situated; (ii) the type of access; (iii) the type of technology (between copper, fibre and FWA); and (iv) the type of service (between active and passive) (paragraph (69)).

5.5.2.2. The Commission's assessment

(155) For the reasons set out below, the Commission concludes that the Transaction is unlikely to increase any risk of coordinated effects on the market for the wholesale supply of broadband access services.

(156) First of all, the Commission considers that two concerns from the market feedback (paragraphs (146), (147)) are not related to this Transaction, either because the concern is not merger-specific (i.e. not caused by the Transaction when comparing the competitive conditions that would result from the Transaction with the conditions that would have prevailed without the Transaction) and/or because the concern is outside of the scope of the Transaction altogether (see the following paragraphs (157) to (160)).[179]

(157) In respect of the hypothetical creation of the Single Network (paragraph (147)), the Commission notes that the Single Network Transaction is not what is being achieved by the Transaction assessed in this decision. As discussed above (paragraph (18)), the Italian State will not gain control over NetCo. As discussed below (paragraph (166)), NetCo and Open Fiber will remain independent from each other. Any change to this situation might constitute a new concentration and as such would be reviewable under either Union or national merger control rules.

(158) This assessment is not changed by the earn-out clause to the benefit of TIM described above that would be triggered by a completion of the Single Network (paragraph (147)). This clause does not oblige either TIM or KKR to pursue such potential future transaction. If anything, the clause decreases the incentive for KKR to pursue the Single Network Transaction as compared to a scenario in which TIM and KKR would not have added such clause to their agreement, because KKR is incentivized to not pay up to EUR 2.5 billion to TIM as earn-out.

(159) This conclusion is similar to the Commission's previous conclusion that the acquisition by Macquarie and CDP of joint control over Open Fiber constitutes a transaction that is independent from the Single Network Transaction.[180] One or more competition authorities would have to review the Single Network Transaction as an independent transaction, should it occur at a later stage.[181]

(160) In respect of a hypothetical risk of vertical coordination between TIM and NetCo (paragraph (146)), as noted above, the Transaction eliminates the vertical wholesale-retail integration of TIM and therefore TIM and NetCo will operate on different markets (paragraph (6)). The Commission considers that the Italian State does not control TIM,[182] and will not control NetCo (paragraphs (13) to (18) and, *mutatis mutandis*, (166)) and in particular the Italian State could not affect the strategic commercial behaviour of NetCo (paragraph (18)). Second, the vertical

179 Horizontal Merger Guidelines, paragraph 9.

180 Commission decision of 10 November 2021, case No M.10450 - *CDP / Macquarie / Open Fiber*, paragraph 34.

181 The Commission, in its competitive assessment, cannot take into account possible future difficulties of a financial nature of a third party competitor, Open Fiber, such as those invoked by market respondents (footnote 172), because: first, the competitive conditions existing at the time of the Transaction constitute the relevant comparison for evaluating the effects of the Transaction, as the Commission cannot reasonably predict the Single Network Transaction (Horizontal Merger Guidelines, paragraph 9); and second, in any case, the Single Network Transaction is not related to the Transaction (paragraph (159)).

182 Telecom Italia's shareholders on 30 September 2023 include the Italian State via CDP, which is ultimately controlled by the MEF, at 9.81%, see https://www.gruppotim.it/en/investors/shares/shareholders.html.

relations between TIM and NetCo will be governed by the MSA (paragraph (25)), which the Commission has considered as being outside the scope of the Transaction (paragraph (34)), and still subject to potential review under Articles 101 or 102 TFEU (or equivalent national provisions) (paragraph (205)).

(161) In respect of the other coordination-related concerns from the market feedback (paragraphs (144), (145) and (148)), the Commission will assess in the following sub-sections: first, whether reaching terms of coordination between NetCo and Open Fiber would be possible; and, second, whether such coordination would likely be sustainable after the Transaction (paragraph (140)).

5.5.2.2.1. Reaching terms of coordination between NetCo and Open Fiber

(162) First, coordinated effects are more likely to arise in a concentrated market with a small number of players (paragraph (143)). Reaching terms of coordination is easier among fewer players:[183] *inter alia* because it is easier to identify a common pricing point. With fewer players, reaching terms of coordination is also more profitable as, given that the overall profits arising from coordination are to be shared between the coordinating firms, the lower the number of firms, the larger share of the overall profit each firm will get.

(163) Even though certain market respondents have argued that the Transaction will reduce the number of players in the wholesale access services (from TIM, FiberCop, Open Fiber and Fastweb to NetCo, Open Fiber and Fastweb) (paragraph (144)), the Commission considers that the Transaction will not materially change the overall structure of the market for wholesale supply of broadband access in Italy (paragraph (123)). Similarly, the Transaction does not remove a wholesale provider of semi-GPON services in Italy (paragraph (124)). Pre-Transaction, FiberCop provides access to passive-only components of the secondary assets (paragraph (4)), whereas both primary and secondary assets are needed to provide connectivity to retail end-customers (paragraph (38)). As noted above (paragraph (6)), the Transaction leads to a de-coupling of TIM's retail business and wholesale business, the latter being transferred to NetCo together with FiberCop's activities.

(164) Furthermore, Fastweb will be able to remain active on the market for the wholesale supply of broadband access services as a third party that may prevent or disrupt coordination, also pursuant to the Semi-GPON Agreement of Fastweb that will post-Transaction maintain Fastweb's access to the semi-GPON passive service (paragraphs (122) and (127)(a)) and allow to invest in the primary network (paragraph (134)). Fastweb has pursued an infrastructure-based strategy through the ownership of fibre primary network (approximately 40% of the full end-to-end fibre delivery or FTTH). Three respondents to the market investigation refer to Fastweb as a "*maverick operator in the national wholesale market*".[184] Fastweb's wholesale business has been constantly growing revenues and volumes.[185] Fastweb itself has excluded any "*actual risk of coordination considering, among other*

183 Horizontal Merger Guidelines, paragraph 45.

184 Replies to questionnaire Q1 – Phase I market investigation, question D.E.2.

185 Fastweb, Financial report, 2 May 2024, available at: https://www.fastweb.it/corporate/media/comunicati-stampa/fastweb-risultati-del-primo-trimestre-crescita-guidata-da-infrastrutture-e-innovazione/?lng=EN: "*The Wholesale Business Unit, which is increasingly central to the company's strategy, marked an extraordinary growth with revenues totalling 86 million euros in the first quarter of 2024, an increase of 18% compared to the first quarter of 2023. The number of ultra-broadband lines provided to other national operators has reached 720,000, marking a 45% increase compared to the same period of 2023*".

things the competitive pressure exerted by Fastweb".[186] Finally, Fastweb will be a fully independent player on the relevant market as it will not maintain the pre-Transaction shareholding in FiberCop (paragraph (4)).

(165) Second, firms may find it easier to reach a common understanding on the terms of coordination if they are relatively symmetrical, including in terms of cost structures, market shares, capacity levels and levels of vertical integration.[187] In the present case, NetCo and Open Fiber will be both wholesale-only operators offering the same type of wholesale services, in particular access to the primary and secondary network together. However, NetCo and Open Fiber have very different market shares (Tables 1 and 2). In addition, the Notifying Party has stressed that as a result of the creation of FiberCop in 2021, the NetCo network architecture includes a technical architectural segmentation between the Primary Assets and the Secondary Assets, whereas the Open Fiber network architecture does not include such a segmentation (paragraph (43)). Therefore, reaching terms of coordination would be more difficult as the possible products that would be subject to the possible coordination would be heterogenous. Finally, the two networks of NetCo and Open Fiber only partially overlap: TIM/FiberCop and Open Fiber networks only overlap in approximately […]% of all municipalities in Italy.[188] For that reason as well, reaching terms of coordination would be more difficult as the possible products that would be subject to the possible coordination would be limited.

(166) Third, structural links may also help in aligning incentives among the coordinating firms.[189] In the present case, the Italian State will hold (i) a non-controlling 16% shareholding (approximately) in NetCo directly via the MEF (paragraph (145)); as well as (ii) a jointly-controlling 60% shareholding in Open Fiber indirectly via CDP, which is ultimately controlled by the MEF.[190] However, the role of the Italian state in these two firms will not facilitate coordination. First, the Italian State will be controlling only one of the two firms, Open Fiber,[191] not NetCo (paragraph (18)). In addition, this is not a cross-shareholding because Open Fiber is jointly controlled by CDP, not by the MEF: while CDP has the MEF as its majority shareholder, the MEF has no involvement with CDP as regards Open Fiber, as CDP participates in Open Fiber with its ordinary accounts.[192] The absence of such influence by the MEF over activities under CDP's ordinary accounts has been

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186 Reply by Fastweb to questionnaire Q1 – Phase I market investigation, question D.E.2. Other respondents have confirmed that the Transaction will not have coordinated effects provided that NetCo merely takes over TIM's position in the relationship with access seekers on the market for the wholesale supply of broadband access services in Italy (e.g. Replies to questionnaire Q1 – Phase I market investigation, questions D.E.2 and D.E.5), which is the case in point regarding the scope of the Transaction.

187 Horizontal Merger Guidelines, paragraph 48.

188 Notifying Party's response to RFI 8, paragraph 25; Form CO, Table 5.1. The Commission considers that the fibre deployment so far is relatively limited and concentrated to a large degree to the same competitive municipalities (paragraphs (49) and (56)(a)).

189 Horizontal Merger Guidelines, paragraph 48.

190 Commission decision of 10 November 2021, case No M.10450 - *CDP / Macquarie / Open Fiber*, paragraph 38.

191 Open Fiber is jointly controlled by CDP and Macquarie. Commission decision of 10 November 2021, case No M.10450 - *CDP / Macquarie / Open Fiber*, paragraph 7.

192 The Notifying Party refers to CDP's by-laws (law decree No 269 of 2003, Article 5 'Transformation of Cassa Depositi e Prestiti into a joint stock company', paragraphs 8 and 8-bis) that establish a system of organisational and accounting separation between the activities of general economic interest (separate account) and the other activities performed by CDP (ordinary account) that are potentially characterised by profit-generating prospects. Form CO, 1.47(b).

confirmed by the Commission[193] and AGCM[194] in the past. Finally, the Commission takes into account that the MEF does not have the right to suggest a board member for Open Fiber as the MEF does for its other participations.[195]

(167) Fourth, it is easier to coordinate when demand and supply conditions are relatively stable than when they are continuously evolving.[196] In the present case, the market for the wholesale supply of broadband access services appears to be evolving. For instance, while the deployment was mainly focused on FTTC, the new deployments are mainly focused on FTTH,[197] therefore the demand and supply conditions will depend on ownership and access to the primary and/or secondary networks. For such evolution of demand and supply conditions (and other reasons), the national regulator has to review the relevant market regularly.[198]

(168) Fifth, coordination is easier if customers have simple characteristics that allow the coordinating firms to readily allocate them.[199] In the present case, however, NetCo's customers are expected to be primarily heterogenous retail electronic communications operators such as Fastweb, Iliad, Vodafone and Wind Tre (among others).

(169) The Commission has assessed whether NetCo and Open Fiber could reach terms of coordination, weighting the factors for (for instance, the technical reduction of players, both parties being wholesale-only operators, the Italian State having a shareholding in both parties) and against (for instance, there is no actual reduction of players, the presence of Fastweb as a maverick operator, the limited overlap of the two networks, the absence of actual cross-shareholding of the Italian State, the evolving market context, the heterogenous customers). The Commission concludes that it is very unlikely that NetCo and Open Fiber could reach terms of coordination based on the above considerations, as a result of the Transaction.

5.5.2.2.2. Sustainability of coordination between NetCo and Open Fiber

(170) The paragraphs below examine the relevant factors for assessing the sustainability of coordination, including: (i) whether the degree of transparency would be sufficient to enable monitoring adherence to the terms of coordination; (ii) whether

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193 Commission decision of 29 September 2010, Case No COMP/AT.39.315 - *ENI*, recitals 81 and 96-112.

194 AGCM decision of 18 October 2017, No 26808, Case No C12107 - *Ministero dell'economia e delle Finanze/Banca Monte dei Paschi di Siena*, Bulletin 18/2008, paragraph 1: "*Even when MEF controls the subsidiaries, when the management bodies of these undertakings are autonomous in the strategic and operational decisions, it is not possible to consider the subsidiaries of MEF as belonging to the same corporate group, subject to the same coordination function*" (courtesy translation).

195 The Notifying Party maintains that MEF does not exercise direction and coordination over Open Fiber and therefore it does not influence the management and does not have the power to appoint any director. For example, it refers to CDP's by-laws, Article 5, paragraph 9. For the avoidance of doubt, such assessment is case specific and does not concern the general relations between the Italian State and CDP.

196 Horizontal Merger Guidelines, paragraph 45.

197 Commission Comments pursuant to Article 32(3) of Directive (EU) 2018/1972 of 15 April 2024 (footnote 60), section 2.2 'Markets evolution' at pages 4 and following.

198 AGCOM decision of 30 April 2024, No 114/24/CONS, Coordinated analysis of the fixed network access service markets pursuant to Article 89 of the Code: "*Considering that the market context is evolving significantly, especially given the announced changes to TIM's corporate structure currently being defined which, together with the evaluation of the co-investment offer pursuant to art. 76 CCEE (art. 87 of the Code), have led the regulator to postpone the start of a public consultation on the update of the current regulatory framework of the markets for wholesale access services to the fixed network*" (courtesy translation).

199 Horizontal Merger Guidelines, paragraph 46.

there would be credible mechanisms that would deter the rivals from deviating, and (iii) to what extent the reactions of outsiders, including customers and actual or potential competitors, would be such as to jeopardise coordination between the wholesale providers of broadband access services (paragraph (142)).

(171) First, when assessing the possibility to monitor any deviations, the key element is to identify what firms can infer about the actions of other firms from the available information.[200]

(172) In the present case, the transparency of the market for the wholesale supply of broadband access services is limited, since a large share of customers purchasing wholesale broadband access services rely on a combination of regulated and commercial access terms,[201] the latter not being made publicly available. The Notifying Party has confirmed that NetCo and Open Fiber will purchase from each other very limited services, pertaining to the provision of access to relevant infrastructure, which however do not provide any relevant pricing or capacity information that could increase transparency in the wholesale broadband market.[202] As concerns the regulated elements, those are frequently updated based on the market context (paragraph (167)).

(173) Second, the threat of future retaliation by the non-deviating firms must be sufficiently severe and timely to convince coordinating firms that it is in their best interest to adhere to the terms of coordination.[203] Retaliation needs not necessarily take place in the same market as the deviation: if the coordinating firms have commercial interaction in other markets, these may offer various methods of retaliation.[204]

(174) In the present case, the Commission's investigation has found no evidence that the Transaction would enhance the availability or efficiency of a deterrent mechanism.

(175) Third, for coordination to be sustainable, the foreseeable reaction of non-coordinating firms (including actual and potential competitors), as well as customers, should not jeopardise the outcome expected from coordination.[205] The market investigation has confirmed that retail operators seeking access to fibre networks have no bargaining power (paragraph (148)). In the present case, however, these wholesale broadband access seekers post-Transaction maintain their already existing long-term contracts (paragraph (126)) unless they mutually agree to amend the contract. Thus, they will continue to have a pre-existing framework, including on price elements, that will allow these access seekers to respond to any possible coordination between NetCo and Open Fiber, including price coordination. [206]

(176) Finally, by concentrating a large amount of its requirements with one supplier or by offering long-term contracts, a large buyer may make coordination unstable by successfully tempting one of the coordinating firms to deviate in order to gain substantial new business.[207] In the present case, Fastweb will continue maintaining

200 Horizontal Merger Guidelines, paragraph 52.

201 Replies to questionnaire Q1 – Phase I market investigation, question D.A.1. Some respondents add that regulated terms may act as a benchmark for commercial terms (paragraph (120).

202 Notifying Party's response to RFI 8, question 10.

203 Horizontal Merger Guidelines, paragraphs 52-53.

204 Horizontal Merger Guidelines, paragraph 55.

205 Horizontal Merger Guidelines, paragraph 56.

206 For this reason, the Commission considers that the Transaction is unlikely to give rise to coordinated effects on the narrower market for the wholesale supply of passive broadband access services.

207 Horizontal Merger Guidelines, paragraph 57.

access to the wholesale access market (as a customer)[208] (paragraphs (127)(a), (128), (131), (164)) and acting as a maverick wholesale[209] operator (paragraphs (134), (164)). As noted above (paragraph (148)), the market feedback refers to Fastweb as a possible exception to operators not having significant bargaining power.

(177) On the sustainability of coordination, the Commission has weighted the factors for (for instance, the market feedback pointing to limited bargaining power of retail operators seeking access to fibre networks) and against (for instance, the limited market transparency, the lack of evidence of a deterrent mechanism, the foreseeable reaction of Fastweb as a customer and as a competitor). The Commission concludes that any possible coordination between NetCo and Open Fiber (which is very unlikely, as explained in paragraph (169)) in any case would not be sustainable.

5.5.2.2.3. Conclusion on horizontal coordinated effects on the market for the wholesale supply of broadband access services

(178) In view of the above, the Commission considers that going forward, it is likely that NetCo and Open Fiber will continue to compete, both to attract new customers and roll-out into new areas, or into each other's areas.

(179) The Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market in relation to horizontal coordinated effects in the market for the wholesale supply of broadband access services in Italy.

5.6. Concerns raised by provisions in the MSA

5.6.1. The provisions of the MSA

(180) Post-Transaction, NetCo will enter into an MSA with TIM, to govern the provision of certain services between NetCo and TIM and to ensure that TIM commits itself to source access services only from NetCo (paragraph (25)). In addition, the agreement commits NetCo to operate on the basis of a wholesale-only business model in line with Article 80 of the European Electronic Communications Code and Article 91 of the Italian Code of Electronic Communications (the wholesale-only model).[210]

(181) Pursuant to the MSA, TIM will (i) receive wholesale services that, prior to the Transaction, were supplied internally by TIM or from FiberCop and (ii) provide a range of ancillary services to NetCo that were previously provided to FiberCop and TIM's wholesale network business.[211]

(182) The MSA will have an initial duration of 15 years from the closing of the Transaction. At the end of such initial term, the Parties have an obligation to negotiate based on pre-agreed principles the potential amendments to the MSA for a second 15-year term.[212]

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208 Fastweb uses wholesale access services of FiberCop and Open Fiber to self-supply, i.e. to provide services to its retail customers (paragraph (44)).

209 Fastweb provides wholesale active VULA FTTH access services to other operators based on its own primary network and passive access to the secondary network of FiberCop (paragraph (44)).

210 Form CO, paragraph 1.48.

211 Form CO, paragraph 1.49.

212 See Clause 21.1.1 of the MSA (Annex C of Annex 1.1.B.1 to the Form CO).

(183) Under the MSA, TIM would undertake certain exclusivity obligations. In particular, TIM commits to purchase access services and FTTH wholesale services exclusively from NetCo for the entire period of the agreement.[213]

(184) Furthermore, NetCo would offer TIM two discount mechanisms applicable on the VULA H price. The first discount mechanism will be applicable in the event that all of TIM new retail customers (after completion of the Transaction) are connected through the NetCo network. The second discount mechanism is a volume discount (which will vary by area of Italy) linked to the total number of retail customers that TIM has connected via the NetCo network out of the total sellable units of NetCo (i.e. homes passed by the NetCo network), the top discount rate of which is triggered at 12% take-up. According to the Notifying Party, these discount mechanisms need to be offered by NetCo to other operators on non-discriminatory prices and terms.[214]

(185) The MSA further includes a Most Favoured Clause ("**MFC**") in benefit of TIM, by which TIM shall benefit from the best prices and conditions for services offered by NetCo in the relevant footprint, all things being equal, pursuant to a most favoured client approach.[215]

(186) Finally, the MSA also contains provisions granting an indefeasible right of use ("**IRU**") to TIM and annual commercial contributions that are provided to TIM.[216] At the completion of the Transaction, NetCo will grant to TIM a […]-year IRU over the […] connections (corresponding to approximately […] km of fibre) that were laid and used for connecting NetCo's central offices as of 30 September 2023, as well as the additional connections that were planned to be laid and used to such end between 1 October 2023 and the above-mentioned completion (corresponding to approximately […] connections or approximately […] km of fibre).[217]

(187) During the market investigation, market participants have raised concerns about the potential anticompetitive effects of the MSA in the retail and wholesale electronic communications markets in Italy.[218] In particular, market participants have raised competition concerns about the following issues:

(188) First, the long-term duration of the agreement (paragraph (182)): The duration of the MSA will commit TIM to acquire from NetCo during a period of 15 years, renewable for another 30 years. Thus, NetCo competitors will be excluded from providing any wholesale services to TIM during this period of time.[219]

(189) Second, the presence of exclusivity clauses (paragraph (183)): Market participants express that the exclusivity clause would limit fixed wholesale competition by preventing TIM (the largest buyer of wholesale access services in Italy) to acquire wholesale services from operators competing with NetCo for a duration of fifteen to thirty years. Many market participants have expressed that this would not only harm Open Fibre as a wholesale operator, but also other wholesale operators as Fastweb and smaller operators such as Fibreconnect, Isiline and Planetel.[220]

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213 Form CO, paragraphs 1.65 and 1.66.
214 Form CO, paragraphs 1.77 and 1.78.
215 Annex 1.1.B.4 – bis of the Form CO., Summary of the MSA, page 3.
216 Clause 11.1.1(c) of the MSA (Annex C of Annex 1.1.B.1 to the Form CO).
217 Form CO, footnote 73.
218 Replies to questionnaire Q1 – Phase I market investigation, Section D.D.
219 Replies to questionnaire Q1 – Phase I market investigation, questions D.D.3 and D.D.4.
220 Replies to questionnaire Q1 – Phase I market investigation, questions D.D.5 and D.D.6.

(190) Third, the discount mechanisms provided by NetCo to TIM (paragraph (184)): Market participants submit that the discounts mechanisms provided in the MSA would provide an unduly competitive advantage to TIM. The market signals that, even if technically the volume discounts would be available to all operators in the market, de facto such volume discounts would only be reachable by TIM, the largest buyer of access services in Italy. According to the market respondents, the discount mechanisms provided in the MSA would ultimately entail a negative impact on retail competition, by providing an undue cost advantage to TIM non-replicable by its retail competitors and a negative impact on wholesale competition as OAOs would shift to NetCo in competitive areas in order to benefit from the volume discount offered by NetCo, which would squeeze out of the market NetCo's wholesale competitors.[221]

(191) Fourth, the MFC clause (paragraph (185)): Market participants have indicated that such clause taken together with the exclusivity clause and the volume discounts in favour of TIM, would provide TIM with an unfair competitive advantage in the retail market.[222]

(192) Fifth, several market participants have raised concerns about the IRU granted by NetCo free-of-charge to ServCo (paragraph (186)). They are concerned that these clauses would distort competition in the business connectivity market (and in the related wholesale market) for all new private and public tenders.

(193) In particular, some market participants have expressed concerns as the IRU clauses could potentially allow ServCo to benefit from an undue competitive advantage by maintaining a "subtle" vertical integration between ServCo and NetCo and thus providing them with the ability to favour each other.

(194) Some market participants consider that the IRU clauses could affect the wholesale leased lines market as it would allow ServCo to foreclose contestable demand and distorting competition on the merits, thus, decreasing ServCo's competitors' incentive to extend their network to the benefit of consumers.

(195) On the retail electronic communications market in Italy, some market participants have signalled that the IRU clauses will grant ServCo the ability to offer their services at zero marginal cost, a price structure that would not be replicable by competitors. Therefore, according to some market participants, the IRU clauses could lead to the foreclosure and exclusion of ServCo's competitors from the market.[223]

5.6.2. Notifying Party's views

(196) The Notifying Party submits that the MSA, and the provisions therein, does not constitute an ancillary restraint related to the Transaction as the terms of the agreement are not restrictions directly related to, and necessary for, the implementation of the concentration within the meaning of Recital 21 and Article 6(1)(b) of the Merger Regulation.[224]

(197) As regards the IRUs, the Notifying Party argues that these provisions were taken into account by the Parties when negotiating the consideration to be paid to TIM for the Transaction (i.e. pre-paid by TIM) and therefore, do not themselves provide

221 Replies to questionnaire Q1 – Phase I market investigation, questions D.D.9 and D.D.10.

222 Replies to questionnaire Q1 – Phase I market investigation, questions D.D.11 and D.D.12.

223 Replies to questionnaire Q1 – Phase I market investigation, questions D.A.4., D.A.5., D.D.2., E.6. and E.11.

224 Form CO, footnote 57.

financial advantages to TIM. The Notifying Party further points out that the IRUs are contained in the MSA, which is not an agreement that establishes control within the meaning of Article 3(2) of the Merger Regulation, and does not claim that the MSA or its clauses contain restrictions that are directly related and necessary to the implementation of the Transaction.[225]

5.6.3. The Commission's assessment

(198) As explained in Section 2.2, the Commission considers that the MSA does not fall within the scope of the Transaction as it does not contribute to the acquisition of control by KKR over NetCo.

(199) Further, the Commission neither considers the MSA as an ancillary restriction directly related and necessary to the concentration under Article 6(1)(b). Thus, the present decision declaring the Transaction compatible shall not be deemed to cover the MSA.

(200) Regarding the provisions of the MSA, as established by the Commission Notice on restrictions directly related and necessary to concentrations, the Merger Regulation "*introduces a principle of self-assessment of such restrictions. This reflects the intention of the legislature not to oblige the Commission to assess and individually address ancillary restraints*". In other words, it is "*the task of the undertakings concerned to assess for themselves whether and to what extent their agreements can be regarded as ancillary to a Transaction*". Thus, the Commission Notice on restrictions directly related and necessary to concentrations limits the Commission's role to undertake an assessment of the ancillary character of restrictions a "*residual function*": solely at the request of the undertakings concerned and if a case presents "*novel and unresolved questions giving rise to genuine uncertainty*".

(201) The Notifying Party submits that: "*While the … MSA has been attached to the Transaction Agreement as one of the contracts to be executed on the Closing Date, for the avoidance of doubt the Parties do not wish to claim that the … MSA or any of its provisions be treated as restrictions directly related to, and necessary for, the implementation of the concentration for the purpose of Recital 21 and Article 6(1)(b) EUMR.*"[226] Thus, according to the Notifying Party, the MSA does not constitute an ancillary restraint to the Transaction.

(202) Further, the Commission's residual function addressed in recital 21 of the Merger Regulation is not triggered in the present case, as it is for the undertakings concerned to request the Commission to undertake such assessment, which has not been requested by the Notifying Party.

(203) Finally, the Commission notes that the clauses in the MSA regarding which market participants have raised concerns are in any case not necessary for the implementation of the Transaction. For example, as stated in paragraph 34 of the Commission Notice on restrictions directly related and necessary to concentrations, "*exclusivity or conferring preferred-supplier or preferred-purchaser status, are not necessary to the implementation of the concentration*". More generally, as regards all clauses benefitting TIM, the Commission notes that paragraph 17 of the Commission Notice on restrictions directly related and necessary to concentrations states that "*as a general rule, restrictions which benefit the vendor are either not directly related and necessary to the implementation of the concentration at all, or*

225 Notifying Party's response to RFI 8, question 2.

226 Form CO, footnote 57.

their scope and/or duration need to be more limited than that of clauses which benefit the purchaser".

(204) For the aforementioned reasons, the Commission will not assess in the present decision whether the MSA contains restrictions directly related and necessary to the Transaction. Thus, the clearance provided by this decision shall not be deemed to cover the MSA nor any of its clauses.

(205) The Commission notes that the MSA can be reviewed under Articles 101 or 102 TFEU (or equivalent national law provisions) by the Commission or a national competition authority.[227] On 8 May 2024, the AGCM sent a letter to the Commission explaining that, in its view, the MSA should be reviewed under Article 101 TFEU (or equivalent national law provisions) and underlined that the AGCM would have the power to undertake such evaluation of the MSA under Article 101 TFEU (or equivalent national law provision).[228]

(206) For the avoidance of doubt, the Commission stresses that nothing in this decision should be understood as assessing, in any way, the MSA under Articles 101 or 102 TFEU (or equivalent national law provisions).

5.6.4. Conclusion on the MSA

(207) Based on the above and in light of the considerations expressed in Section 2.2 above, the Commission concludes that the possible anticompetitive effects resulting from the implementation of one or more provisions of the MSA, including the IRUs granted to TIM, falls beyond the scope of the Transaction and are not deemed to constitute ancillary restraints. Therefore, the MSA cannot, as such, be assessed under the Merger Regulation.

6. CONCLUSION

(208) For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission

(Signed)
Margrethe VESTAGER
Executive Vice-President

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227 The Commission notes that most of the concerns raised during the market investigation about the MSA, e.g. exclusivity, discount mechanisms and the MFC clause, are not based on a comparison with the situation before the Transaction. Before the Transaction, TIM is vertically integrated. TIM owned the primary network and co-owned and co-controlled the secondary network of FiberCop. As such, the concerns are not based on merger-specific changes brought about by the Transaction but on possible restrictions or distortions of competition by the MSA after the Transaction.

228 Letter from AGCM to the Commission dated 8 May 2024.