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Autorità per le Garanzie nelle
Comunicazioni (AGCOM)
Via Isonzo 21/b
00198 Roma
Italy

For the attention of
Mr Angelo Marcello Cardani
President

Fax: +39 06 696 44 933

Subject: Commission Decision concerning case IT/2019/2181-2182: Wholesale local access provided at a fixed location and wholesale central access provided at a fixed location for mass-market products in Italy

Comments pursuant to Article 7(3) of Directive 2002/21/EC

Dear Mr Cardani,

1. PROCEDURE

On 11 June 2019, the Commission registered a notification from the Italian national regulatory authority, Autorità per le Garanzie nelle Comunicazioni (AGCOM)[1], concerning the markets for wholesale local access (WLA) provided at a fixed location and wholesale central access (WCA) provided at a fixed location for mass-market products[2] in Italy.

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1 Under Article 7 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

2 Corresponding to markets 3a and 3b in Commission 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 (Recommendation on Relevant Markets), OJ L 295, 11.10.2014, p. 79.

The national consultation[3] ran from 19 January 2019 to 4 March 2019.

The Commission sent AGCOM two requests for information[4] (RFI) on 19 June 2019 and 25 June 2019, and received a reply on 24 June 2019 and 28 June 2019 respectively.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

2. DESCRIPTION OF THE DRAFT MEASURE

2.1. Background

The third round review of wholesale local and central access markets was notified to and assessed by the Commission under cases IT/2015/1778-1779[5]. AGCOM defined the market for wholesale local access provided at a fixed location as including services provided over copper, optical fibre and fixed wireless access (FWA) and the market for wholesale central access (WCA) provided at a fixed location for mass-market products as comprising the demand and supply of wholesale services provided over copper, optical fibre and WLL. AGCOM also included VULA in the WCA market. TIM was notified as operator with significant market power (SMP) on both markets. As a result of the analysis AGCOM decided to impose on TIM a full set of remedies: (i) access; (ii) non-discrimination; (iii) transparency; (iv) accounting separation and (v) cost orientation. In particular, the non-discrimination remedy was proposed to be complemented with the *ex-ante* economic replicability test already imposed in the previous period of review. AGCOM set as well some details of the replicability test to be further developed in the review of the margin squeeze decision adopted in 2010.

The Commission invited AGCOM to monitor developments, particularly regarding the additional roll-out of FTTx networks by alternative operators and potential NGA supply at wholesale level. The Commission noted that a careful consideration of a different geographic market or a geographic differentiation of remedies, at least in market 3b, would be appropriate. Finally, the Commission invited AGCOM to ensure that the multi-operator vectoring (MOV) deployment process was not delayed beyond the timing necessary for effective implementation and urged AGCOM, in the event that a technically and economically viable MOV solution was not in place within a reasonable timeframe, to devise an alternative solution that would not unnecessarily delay network upgrades.

In case IT/2016/1915[6], AGCOM introduced some amendments to the ex-ante replicability test of TIM's retail offers. The Commission commented on the adequacy of the margin squeeze on a forward looking basis. The Commission considered that if AGCOM were to lift cost-orientation of NGA based wholesale access products in any given area in a future market review, AGCOM would be

3 In accordance with Article 6 of the Framework Directive.

4 In accordance with Article 5(2) of the Framework Directive.

5 C(2015) 6884.

6 C(2016) 7164.

required to further adjust the design of its replicability test and bring it fully in line with said Commission guidance.

In the reply to a Commission RFI, AGCOM clarified that since the last notification in 2016 it adopted a series of measures, which were not notified to the Commission. Those measures concern the implementation of the equivalence of input (EoI), disaggregation, the replicability test, Key Performance Indicators (KPIs), as well as reference offers for several services[7].

2.2. The notified measure

AGCOM notifies the market analysis of the wholesale local and central access markets as well as its assessment of TIM's separation project.

In March 2018, TIM notified to AGCOM[8] its project to create a legally separate wholesale company (NetCo). Therefore, AGCOM conducted a coordinated analysis under Article 13b of the Access Directive assessing the impact of the potential separation on the markets for wholesale local and central access as well as on the market for wholesale high quality access. However, AGCOM has not notified the market analysis of market 4, which will be notified separately in the shortest delay.

2.3. Market definition

2.3.1. Product market definition

AGCOM defines the wholesale local access market as including the demand and supply of wholesale local access services at a fixed location by means of copper, fibre and fixed wireless technologies. Differently from the previous market analysis, AGCOM considers that VULA is a substitute to local access services (LLU/SLU) and should therefore be included in this market.

AGCOM defines the wholesale central access market as including the demand and supply of wholesale central access services provided at a fixed location by means of copper, fibre and fixed wireless technologies. All bitstream services are included in this market.

2.3.2. Geographic market definition

AGCOM observes that since the previous market review in Italy there was a significant development of alternative infrastructures affecting the competitive situation on the considered markets. AGCOM carries on an analysis of the competitive conditions on a geographic basis[9] taking into account in particular the

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7 Decision 625/16/CONS (EoI), Decision 321/17/CONS (Disaggregation), Decision 614/18/CONS (replicability test), Decision 395/18/CONS (KPI), and Reference Offers for market 3a NGA services 2015-2016 (Decision 72/17/CIR), Wholesale Line Rental (WLR) 2017 (Decision 62/18/ CIR), market 3a copper services 2017 (Decision 34/18/ CIR), market 3b copper, fibre bitstream and VULA 2017 (Decision 87/18/CIR), and market 3a NGA services 2017 (Decision 117/18/CIR).

8 Under Article 50 of the Italian Communications Code, which reflects Article 13b of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive).

9 The preliminary analysis is based on local exchanges.

number of operators, the number of alternative networks and their coverage as well as the distribution and evolution of market shares over time.

AGCOM considers that in Milan the structural competitive conditions are already significantly and durably different compared to other municipalities thus affecting the boundaries of the geographic market. In Milan, both TIM and Open Fiber[10] are present with FTTH networks, which will reach over 90% of customer premises by 2020. Fastweb is also present with a third network covering about 40% of customer premises[11]. Moreover, TIM's market shares (in both markets 3a and 3b) are significantly lower in Milan than in other municipalities and decreased significantly between 2017 and 2018[12]. Open Fiber's sales of wholesale services constitute the input for around 40% of retail active lines. As a result, AGCOM defines Milano as a separate geographic sub market.

With respect to the other Italian municipalities (Rest of Italy), notwithstanding the comparatively stronger competitive dynamic in some municipalities, in particular where there are several alternative access networks[13], AGCOM does not considers such differences sufficient to justify the definition of separate geographical markets. Thus, it proposes to recognise the observed heterogeneity in competitive conditions via the application of differentiated remedies.

2.4. Finding of significant market power

The SMP assessment is based on the following indicators:

(1) high and stable market shares,

(2) economies of scale, density and scope;

(3) control of infrastructures not easily duplicated;

(4) lack of countervailing buyer power;

[10] A wholesale only operator, Open Fiber, was created in 2015 with 50% shareholding from the main distributor of electricity in Italy, Enel, and 50% from a government owned equity fund (Cassa Depositi e Prestiti). Mainly due to state aid, Open Fiber started rolling out fibre with FTTH architecture in the main municipalities aiming to cover 271 cities by 2022 and 9.5million households. It currently offers end to end active (VULA), passive (fibre unbundling over GPON) services and bitstream FTTH services. In mid-2019, Open Fiber covered around 12.5% of 31million households.

[11] This network will be dismissed as it only allows for end user speeds from 10 to 100 Mbit/s. Fastweb however intends to maintain the ownership of the civil infrastructures and in-building sections of the network, as well as part of the fibre network in the feeder and distribution section. AGCOM considers that the fact that Fastweb is migrating its customers on Open Fiber's GPON network does not modify in any way AGCOM's conclusions on market definition, as well as current and prospective competitive conditions in Milan.

[12] On 31/12/2018, TIM's share on market 3a was around 48% (with self-supply) and 33% (merchant), whereas on market 3b, TIM had a share of 22% (self-supply) and 49% (merchant). In market 3a (with self-supply) the shares of competitors were the following: Fastweb 12.51%, Open Fiber 38.34%, Others 0.52%. In market 3b (with self-supply) the shares of competitors were the following: Fastweb 36.7%, Open Fiber 1.5%, Wind 16.05%, Vodafone 22.7% and Others 0.48%. At retail level TIM has the 28.8% of all access lines, 21% of broadband lines and the 11.4% of NGA lines.

[13] Namely Open Fiber or Flash Fiber. Flash Fiber is a joint venture between TIM (80%) and Fastweb (20%). It operates under TIM's management and coordination, with the aim of constructing a FTTH network in 29 cities with FTTH technology by 2020.

(5) vertical integration.

AGCOM finds that both markets 3a and 3b are effectively competitive in the municipality of Milan, therefore TIM has no longer SMP in this municipality. The assessment is mainly based TIM's low market shares and on other indicators such as: i) the high level of infrastructure competition; ii) no benefits from economies of scale, given the wholesale volumes and coverage of the network operators are substantially comparable; iii) presence of a sufficient countervailing buyer power[14].

In markets for wholesale local and central access in the Rest of Italy, AGCOM confirms TIM as the SMP operator. Beside TIM's very high market share in both relevant markets[15] all additional indicators confirmed AGCOM's finding of dominance of TIM on both relevant markets. As far as vertical integration is concerned, although the TIM's project of voluntary legal separation reduces some of competitive issues related to the vertical integration, there are still elements of vertical integration in the new TIM's organizational structure.

2.5. Regulatory remedies

2.5.1. Milan

AGCOM intends to withdraw the existing obligations in the municipality of Milan as both markets 3a and 3b are effectively competitive.

2.5.2. Rest of Italy

Regarding the Rest of Italy, AGCOM proposes to differentiate its remedies geographically on the basis of variations in competitive conditions. The municipality is the geographic unit considered[16]. When drawing a distinction between different geographic areas, AGCOM takes a number of factors into account for both markets:

(1) Coverage of alternative networks: presence of (at least) two alternative access networks (FTTC or FTTH) ready to service, each of which

[14] The presence on the market of alternative offers of wholesale access services of different operators constrains the exercise of market power by any operator.

[15] On market 3a, TIM's share was 90.8% in 2018 (including self-supply), and on market 3b, TIM's share was 52.4% (including self-supply). TIM's retail market shares for broadband and ultra-broadband services market segments are still significant (above 45%).TIM's market share in the ultra-broadband market segment increased from about 30% in 2014 to 47% in 2017 (with a slight reduction in 2018), due to the fact that before 2014, in this market segment, TIM has been a follower of alternative operators

[16] AGCOM considers that municipal areas are appropriate units for the analysis of geographically segmented markets, as they have stable and clear boundaries and are small enough not to have significant differences in competition.

covers 60% of customers' premises[17]. The total coverage (of both alternative networks) must not be less than 75%[18].

(2) TIM's retail NGA market share (by connections) must be less or equal to 40%.

(3) TIM's wholesale NGA active services (VULA and bitstream) share must be less than 80%.

Based on these criteria, for the first year of application of the market analysis, AGCOM draws a list of 26 more competitive municipalities[19] in which differentiated remedies shall apply. As the competitive situation is deemed to change significantly during the regulatory period, AGCOM will update annually the list of more competitive municipalities.

(i) Obligation to provide access to network elements and associated facilities

AGCOM proposes to set in both markets the access obligations for all the municipalities irrespectively from the competitive dynamics.

Wholesale local access

AGCOM proposes to maintain the majority of wholesale access remedies imposed on TIM during the previous period of review in this market. This includes LLU and SLU over copper, and access to civil infrastructures (ducts, trenches) and dark fibre, terminating segments and VULA. Fibre unbundling is imposed if technically possible. AGCOM proposes to withdraw or to limit some access obligation previously imposed, in particular: in particular: shared access[20], WLR[21] "end-to-end access service"[22]. Moreover, in those areas where the development of alternative infrastructure based on SLU is less likely, TIM is allowed to use *vectoring.* Where

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17 Flash Fiber's network will be considered limited to the number of alternative access offers of VULA and NGA Bitstream offered by Fastweb on Flash Fiber's network. AGCOM explains that according to the commitments presented by TIM and Fastweb within the context of the antitrust proceeding I799 and accepted by the national competition authority, Fastweb is obliged to offer its own VULA and NGA bitstream services on Flash Fiber's network at non-discriminatory conditions.

18 AGCOM explains that this indicator has been reinforced compared to what was proposed in the national consultation following the comment received by alternative operators and the National Competition Authority, which underlined the need to have the presence of minimum two alternative networks with a considerable overall coverage in order to assure a significant competitive pressure by alternative operators.

19 The municipalities included in the list constitute roughly the 5% of the population.

20 AGCOM observes that the demand for shared access is decreasing constantly, as the access seeker prefers not to share access. TIM will be obliged to maintain the existing shared access for at least 12 months which is the overall migration period granted by AGCOM.

21 Currently WLR is required as an ancillary remedy to LLU services in regions where the latter are not available. AGCOM explains that WLR service will not be offered any more in the areas where there is an alternative access network with coverage of at least 90%.

22 This service allows the provision of retail services by connecting dark fibre from the Optical Distribution Frame (ODF) to the Customer Premise Equipment (CPE). It has never been used by access seekers and now its functionality has been replaced by VULA services.

there are operators co-located at SLU an agreement should be found for the use of a Multi Operator Vectoring (MOV) architecture[23].
Within the access obligation, AGCOM also proposes to confirm the obligation for TIM to give access to its access network to third-party technicians certified by TIM for provisioning and assurance services (the so-called "Sistema unico"). AGCOM considers justified extending this obligation to VULA services[24].

Wholesale central access

AGCOM proposes to maintain the obligation to provide central access services (bitstream) with Ethernet technology, even *naked*, provided over copper or fibre independently from network architecture. The bitstream over Asynchronous Transfer Mode (ATM) technology will be provided only where Ethernet is not available. TIM is obliged as well to provide FWA bitstream limited to the areas where the decommissioning of the legacy infrastructure takes place.

(i) Price control and regulatory accounting obligations

AGCOM proposes to set a differentiated cost orientation obligation for the more competitive municipalities.

Wholesale local access

AGCOM confirms the cost orientation obligation. The prices will be set according to a reviewed BU-LRIC model for the entire regulatory period[25].

In the more competitive municipalities, AGCOM proposes to allow TIM to apply more flexibility when setting VULA prices. In particular, notwithstanding the obligation to apply non-discriminatory prices, TIM can differentiate VULA prices (reducing or increasing VULA prices compared to the BULRIC price) provided that

[23] AGCOM underlines that MOV has been implemented by operators, even if there is no take-up of services at present since current VDSL technologies at the cabinet allow for speed up to 200 Mbit/s in a multi-operator environment even without MOV.

[24] Currently is provided only for LLU and SLU.

[25] The prices for the main services are set as follows:

Service (euro/month/line)	**2019**	**2020**	**2021**
LLU	€ 8,61	€ 8,76	€ 8,90
SLU	€ 5,3	€ 5,3	€ 5,3
Copper terminating segment	€ 0,47	€ 0,47	€ 0,47
Fiber terminating segment	€ 2,80	€ 2,80	€ 2,80
VULA FTTC	€ 13,59	€ 12,98	€ 12,50
VULA FTTH (res)	€ 15,66	€ 15,46	€ 15,20
VULA FTTH (business)	€ 48,.01	€ 47,40	€ 46,61
Ducts (first 2 mini-pipes) (IRU 15 years for meter)	€ 7,11	€ 7,11	€ 7,11

the variations in prices are justified[26]. This flexibility will be applied as from 2021 if the take up of accesses via Very High Capacity (VHC) networks will reach [redacted] at national level[27]. [redacted] with a view of accelerating the uptake of VHC networks before allowing reasonable and cost-oriented price reductions in the most competitive areas.

As regards prices for 2018, AGCOM acknowledges that the volumes for VULA services are significantly changed compared to the estimations made in the previous market analysis. AGCOM therefore proposes to maintain for 2018 the same average price set for 2017[28] in the previous market analysis for 2017 (i.e. 14.32 euro/month), but to split this value between the two profiles (up to 30 Mbps, and ≥ 50 Mbps) according to the percentage of volumes effectively sold in the year 2018.introducing a differentiation in prices according to speeds while leaving the average price as set for 2017 in the previous market analysis[29].

AGCOM confirms the possibility for TIM to offer volume discounts and long-term contracts for NGA services in order to favour migration to NGA access services. The offers related to volume discounts are subject to a case-by-case analysis by AGCOM based on costs and competition impact. Should AGCOM approve TIM's proposed discounts, only the incremental volumes will be eligible to benefit from such discounts[30].

Wholesale central access

AGCOM confirms the cost orientation obligation. The prices will be set according to a reviewed BU-LRIC model for the entire regulatory period.

In the more competitive municipalities, AGCOM proposes to withdraw the current cost orientation obligation. TIM will not be subject to cost oriented prices for monthly rental and one-off fees for wholesale central access services (bitstream) sold on any technology (FTTE[31], FTTH and FTTC / FTTB mixed network). A more general obligation of fair and reasonable prices will apply. For the bitstream lines already activated at the date of adoption of this market analysis, AGCOM proposes a transitory period of twelve months.

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26 AGCOM underlines that there is a relevant competition case ongoing involving an alleged exclusionary conduct by TIM, put in place through selective price reductions. Therefore, it considers that any price reduction should be strictly based on the costs in the more competitive areas. Thus, TIM will have to provide justification for lower VULA prices as for example lower costs or lower prices of the offers from alternative operators.

27 [redacted] on the basis of the National and European policy objectives.

28 The price for VULA services set for 2017 was 14.32 euro/month independently from the speed.

29 VULA FTTC fee for 2018 is set by considering the volumes of speeds 30 Mbps (23% of the total) and ≥ 50 Mbps (77% of the total) effectively sold in 2018. Based on this methodology, AGCOM proposes to set prices for 2018 as follows: 13.27 euro/month for accesses at 30 Mbps, and 15.02 euro/month for accesses with speeds at ≥ 50 Mbps

30 In the answer to the RFI, AGCOM specifies that discount offers should be considered a way to reduce unit access costs and allocate investment risks with the objective of increasing market incentives (SMP and alternative operators) to roll-out fibre networks without affecting investments and competitive behaviour by the wholesale only operator.

31 An FTTE access network employs only copper transmissions from the local exchange to the home.

A new WACC is calculated at 8.64% as well as a risk premium for FTTH at 3.2%.

(ii) Obligation of non-discrimination

AGCOM proposes to set in both markets the non-discrimination obligation for all the municipalities irrespectively from the competitive dynamics. AGCOM in particular confirms the application of the EOI, implemented during the previous regulatory period for LLU, SLU and FTTH services.

As regards the economic replicability test, AGCOM proposes some changes to the currently applied test. These changes concern in particular: i) the alignment of the relevant time period for the offers over copper networks and for the offers over fibre networks at 36 months; ii) the possibility to differentiate in the local offers the productive mix according to the presence of infrastructures and their actual take up by alternative operators[32]; iii) the use of real volume data for the evaluation of the ultra-broadband offers[33]. Moreover, the obligation to notify the offers in advance is excluded for the repetitive offers, for the offers where the margin does not change compared to an offer already approved, for the bundles including not regulated services[34] and for flagship offers[35].

(iii) Obligation of transparency, including the publication of a Reference Offer

AGCOM proposes to set a differentiated transparency obligation for the more competitive municipalities.

TIM is obliged to publish annually a reference offer for all the services in both markets. In the more competitive municipalities, this reference offer does not include prices that are in any case communicated to AGCOM.

(iv) Accounting separation

AGCOM proposes to set in both markets the accounting separation obligations for all the municipalities irrespectively from the competitive dynamics.

2.6. Decommissioning

AGCOM proposes to approve the decommissioning plan proposed by Telecom Italia with some modifications. There are two conditions to be met before announcing the decommissioning of a given local exchange: i) the coverage to be reached and ii) the percentage of accesses already migrated to NGA from the given local exchange. As regards the coverage, 100% of NGA coverage needs to be

[32] AGCOM implemented a comment by the Commission in the case IT/2016/1915.

[33] Currently for the evaluation of the ultra-broadband offers provisional data volumes are used, while the ADSL offers use real volume data.

[34] Those bundles include non-regulated components associated with services for which the offer already passed the replicability test.

[35] The flagship products include all the offers based on FTTC and FTTH network with maximum speeds of at least 100Mbit.

reached[36]. To this purpose, also Fixed Wireless Networks are included in the coverage until approximately 5%[37]. As regards the take up of NGA it has to be at least the 60% of activated accesses on the given local exchange, both by TIM and alternative operators.

Once that those conditions are met, the migration can start according to different timing:

(1) 12 months for the local exchanges where bitstream or WLR is provided;

(2) 18 for the local exchanges where LLU is provided;

(3) 24 months for the local exchanges in the areas where an NGA network has been deployed according to the State aid rules[38].

The actual migration process lasts 12 months, and measures *ad hoc* are foreseen for specific cases.

AGCOM proposal includes penalties for TIM in case of changes in the announcement and some incentives for the migration.

2.7. Assessment of TIM's separation project

AGCOM has analysed the impact of the separation project presented by TIM in March 2018 on the access markets. According to the project, if it will be implemented – which AGCOM cannot assure at this stage – NetCo will be 100% owned by TIM, and TIM's resources and activities not conferred on NetCo will stay with a separate TIM owned company, ServCo[39].

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[36] In case the coverage includes network others that the one of TIM, this latter should communicate to AGCOM its contracts' conditions for the use of alternative networks.

[37] AGCOM will start, after the approval of the market analysis, a technical forum involving all the interested parties, in order to define technical, operational and quality specifications of the FWA Reference Offer. FWA will be priced according to a retail minus methodology.

[38] This timing applies when the beneficiary of the funds is not TIM.

[39] According to TIM's separation project, NetCo:

– is managed by a separate governing body with full executive powers;

– NetCo's perimeter includes all tangible assets of access network (including trenches, ducts, copper and fibre cables, street cabinets, MDFs, DSLAMs, optical interfaces, real estate properties) and intangible assets (e.g. intellectual property), as well as human resources necessary for the functioning of the access network;

– NetCo will be active as a wholesale operator and will offer the wholesale services (included the ones not related to the access), both regulated and unregulated, to Other Authorized Operators and ServCo (one-stop-shop);

– NetCo's mission will be to ensure a sustainable level of investments in NGA infrastructure.

According to the project, ServCo:

– will offer retail services to end users through its business units;

AGCOM considers that the separation will not affect the market definition of the analysed markets. As regards the assessment of significant market power, AGCOM underlines that even with the implementation of the legal separation TIM will still benefit from the vertical integration. This could give it, in the Rest of Italy where its markets shares are still high, a competitive advantage compared to alternative operators, in particular the wholesale-only operator, which do not benefit at all of the advantages of vertical integration. With respect to the remedies, AGCOM proposes to confirm the non-discrimination obligation on TIM, and in particular, the EoI will be extended to FTTC (without legal separation the EoI will concern only LLU, access to DSLAM, VULA FTTH). The current KPIs will be adjusted to take into account TIM's new organisational set-up. Regarding the price test, AGCOM intends to withdraw the ex post replicability tests in the context of tender procedures. Finally, the obligation of accounting separation will concern the external contracts between the two separated companies NetCo and ServCo with real prices (invoices) instead of internal transfer charges.

Regarding the market for wholesale high quality access provided at a fixed location, AGCOM considers that the legal separation of TIM would not affect the market definition or the SMP assessment. Regarding the remedies, as for markets 3a and 3b, AGCOM considers that only the non-discrimination and the accounting separation remedies will be impacted.

3. COMMENTS

The Commission has examined the notification and the additional information provided by the AGCOM and has the following comments:[40]

3.1. Consultation and transparency mechanism

Under the regulatory framework for electronic communications, national regulatory authorities are obliged to contribute to the development of the internal market by cooperating with each other and with the Commission in a transparent manner in order to ensure the development of consistent regulatory practice and the consistent application of the regulatory framework. Decisions taken at national level could have an adverse effect on the single market or on the objectives pursued by the regulatory framework, therefore such decisions should be notified to the Commission and other national regulatory authorities under the consultation mechanism set out in Article 7 of the Framework Directive. The transparency mechanism is crucial when the notified measures aim at imposing, modifying or implementing obligations on undertakings with SMP in conjunction with Articles 9 to 13 of the Access Directive in order to ensure the consistent application of remedies. The Commission notes that AGCOM's practice is inconsistent when it comes to the notification under the Article 7 consultation mechanism, as many measures implementing or significantly modifying the remedies imposed in the decision concerning market analysis were not notified to the Commission.

– will also provide NetCo with wholesale network inputs (outside the NetCo perimeter), such as backhauling and interconnection, in order to allow NetCo to offer the full range of wholesale services to third, parties.

40 In accordance with Article 7(3) of the Framework Directive.

In this respect, the Commission reminds AGCOM of its obligation under the regulatory framework to notify draft measures under Article 7/7a of the Framework Directive. The objective of this obligation is to analyse if such measures comply with Union law, including with the objectives foreseen in Article 8 of the Framework Directive, or if they create barriers for the internal market. The timely assessment of proposed measures by the Commission, BEREC and other national regulators under Article 7 of the Framework Directive is paramount to ensure regulatory predictability and certainty under Article 8(5)(a) of the Framework Directive and the consistent regulatory practice and application of the Regulatory Framework in the internal market according to Article 8(3)(d) Framework Directive. Moreover, as provided by the case-law, according to Article 7(3) of the Framework Directive, an NRA is required to make draft measures accessible to the Commission and other NRAs, if, first, that measure falls within the scope of Articles 15 or 16 of the Framework Directive, Articles 5 or 8 of the Access Directive or Article 16 of the Universal Service Directive and, secondly, that measure may affect trade between Member States. As stated by the case –law, such obligations may be imposed only following consultation in accordance with Articles 6 and 7 of the Framework Directive and the national courts have to determine if such procedures were followed when such a matter is brought before them.

The Commission therefore urges AGCOM to notify in the future any relevant measure modifying or implementing remedies, in order to ensure the compliance with Article 7 of the Framework Directive.

With regard to AGCOM's failure to notify, under Article 7, its decisions adopted in the past and which are currently in place, the Commission reserves its right to take the necessary and appropriate action to ensure compliance with the EU regulatory framework.

As regards this specific draft measure, the Commission notes that AGCOM has included, according to article 13b of Access Directive, the assessment of the impact of the separation project presented by TIM within the market analysis for the wholesale of local and central access markets. However, the Commission notes that in order to assess AGCOM's conclusions on the proposed assessment, the coordinated market analysis should also include market for wholesale high quality access provided at fixed location. The Commission therefore invites AGCOM to notify this market analysis in the shortest delay.

3.2. Geographic variation of remedies within the notified geographic market - Effectiveness and proportionality of the proposed remedies

The Commission notes that AGCOM is taking into account the existence of sufficiently established and stable differences in competitive conditions across the country both at the level of geographic market definition and remedies.

The Commission understands AGCOM's concerns that deregulation at this stage, in particular for market 3a, could hamper the development of the competition in this market. The Commission also acknowledges that Italy is indeed experiencing an unusual scenario in the wholesale market, where a new entrant is a wholesale-only operator investing at national level. This would require a regulatory approach different from the one used to create a level playing field for alternative operators vertically integrated. In addition, the Italian market is characterised by TIM's very high market shares in Market 3a, significant uncertainty concerning future market developments due to the formal announcement of negotiations between OpenFiber and TIM on possible forms of integrations of their fibre networks as well as ongoing antitrust investigations. The Commission therefore acknowledges the impact of this uncertainty when assessing the proportionality and effectiveness of a regulatory measure to be imposed, in particular when considering flexibility on VULA prices.

However, the Commission would like to point out that, the current regulation in Italy could already at this stage fulfil almost all the conditions set out in the Commission Recommendation on consistent non-discrimination obligations and costing methodologies[41], for lifting the cost orientation on fibre access products nationally.

A fortiori, in the more competitive municipalities, which have been identified on the basis of rigorous filter criteria to capture the competitive pressure in a given municipality, it would appear appropriate to lift cost orientation based on the national BU-LRIC model in the short term. However, even in these areas, AGCOM proposes to allow flexibility on VULA access product only when [redacted] take up of VHC networks (irrespective of ownership or control) will be reached at national level. The Commission observes that a parameter set at national level is not necessarily appropriate to assess the competitive conditions in the more competitive municipalities. In addition, it seems not to be justified, as the set of criteria identified by AGCOM are already sufficient to ensure that alternative VHC networks have a degree of market traction in those municipalities. As it is proposed by AGCOM, this additional threshold risks only to delay the application of flexibility on VULA products even beyond 2021.

Against this background, the Commission would like to stress that the differences in competitive dynamics among the municipalities are based on sufficiently coherent and cogent evidence, and therefore would like to invite AGCOM not to postpone the implementation of flexibility on VULA prices, and in any case not beyond 2021.

Finally, the Commission recalls that the European Electronic Communications Code ('the Code')[42] will introduce a number of significant changes in the regulatory framework, as regards *inter alia* the additional regulatory objective of promoting connectivity and access to, and take-up of, very high capacity networks by all Union citizens and businesses; and the provisions regarding price controls, and establishing the possibility for SMP operators to make regulatory commitments in respect of cooperative arrangements, that can be made binding by national regulatory authorities and taken into account in assessing the need for remedies. Therefore, besides the dynamic application of the criteria to assess the geographic differentiation of remedies, the Commission invites AGCOM, to closely monitor market developments specifically with regard to possible commitments regarding future cooperative arrangements or co-investment and their impact on investment levels as well as prices and competitive intensity at retail level, and to consider an

[41] Please see in particular point 48 of the Commission Recommendation 2013/466/EU of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment, OJ L251, 21/09/2013, pag.13.

[42] Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast), Official Journal, 17.12.2018 L 321, pag. 36.

early review of its market analysis and/or remedies after the transposition deadline of the Code in national law.

Retroactive effect and timely implementation of proposed regulation

The Commission reiterates its previous comment expressed, among others, in case IT/2014/1586 and requests AGCOM to set its regulatory measures sufficiently in advance to ensure adequate stability and predictability for market players. Any setting of new prices with retroactive effect, leads to legal uncertainty for market players and has a negative impact on operators' incentives to invest in NGA networks deployment in Italy. In this respect, the Commission would like to stress that the negative impact of retroactive measures on legal certainty is stronger when there are instances of unexpected tariff changes, which is the case of the present proposal to adjust the VULA price for 2018. In this respect, and also in view of Commission's repetitive comments addressed to AGCOM on the same issue (e.g. IT/2014/1650, IT/2014/1586, IT/2012/1384), the Commission urges AGCOM to set all it regulatory measures, and in this particular case the VULA access prices, in a forward-looking manner.

Finally, the Commission would like to underline that the timely implementation of the remedies imposed in the market analysis is crucial for the effectiveness of the regulatory measures. In particular, for measures requiring further decisions or the coordination with already existing provisions (like for example the economic replicability test, the provisioning and assurance for VULA, the conditions for FWA products), the Commission would like to invite AGCOM to implement the changes in its regulatory practice as soon as possible.

Pursuant to Article 7(7) of the Framework Directive, AGCOM shall take the utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure; where it does so, shall communicate it to the Commission.

The Commission’s position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC[43] the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission[44] within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.[45] You should give reasons for any such request.

Yours sincerely,

For the Commission,
Roberto Viola
Director-General

[43] Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

[44] Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

[45] The Commission may inform the public of the result of its assessment before the end of this three-day period.