Dear Mr Cardani,

Subject: Commission Decision concerning:

Cases IT/2013/1489-1490: Details of the price control obligation in the markets for wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location and wholesale broadband access in Italy

Opening of Phase II investigation pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC

I. Procedure

On 12 July 2013, the Commission registered a notification from the Italian national regulatory authority, Autorità per le garanzie nelle comunicazioni (AGCOM), concerning the price control in the markets for wholesale (physical) network infrastructure access and wholesale broadband access in Italy.

The national consultation on the price control in the market for wholesale (physical) network infrastructure access ran from 27 March 2013 to 12 May 2013 and the national consultation on the price control in the market for wholesale broadband access ran from 11 January 2013 to 26 February 2013.

On 18 July 2013 and 23 July 2013, requests for information (RfI) were sent to AGCOM

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2 In accordance with Article 6 of the Framework Directive.

3 In accordance with Article 5(2) of the Framework Directive.
and a response was received on 24 July 2013. Additional questions were sent to AGCOM on 25 July 2013 and the respective responses were received on 29 July 2013.

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.

Pursuant to Article 7(4) of the Framework Directive, the Commission may notify the national regulatory authority (NRA) and the Body of European Regulators for Electronic Communications (BEREC) of its reasons that the draft measure would create a barrier to the internal market or its serious doubts as to its compatibility with EU law.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

The second review of the markets for wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location and wholesale broadband access in Italy were notified and assessed by the Commission in 2009, under cases IT/2009/0891 and IT/2009/0892 in two steps. First, AGCOM defined the market and designated Telecom Italia (TI) with significant market power (SMP) in both wholesale markets. The Commission issued a comments letter.

Subsequently, AGCOM notified its proposed remedies which the Commission assessed under case numbers IT/2009/0988 and IT/2009/0989. With regard to the wholesale infrastructure access market, AGCOM imposed access to the copper network (full and shared access (LLU) and sub-loop unbundling (SLU)), access to passive infrastructures (cable, ducts, etc.) and dark fibre, transparency, non-discrimination, cost accounting, accounting separation and price control (network cap for copper based access and fair and reasonable prices for access to passive infrastructure and dark fibre).

Regarding wholesale broadband access (WBA), AGCOM imposed bitstream access (including naked bitstream) over copper and fibre loops at different levels, transparency, non-discrimination, cost accounting, accounting separation and price control. The Commission issued a comments letter.

In 2010, AGCOM notified its BU-LRAIC costing methodology and set a price cap for TI's wholesale prices for LLU and WBA in the period 2010-2012, on the basis of a glide-path towards the calculated BU-LRAIC based tariff for 2012. The respective notification was assessed by the Commission under case IT/2011/11336.

AGCOM did not carry out a separate cost analysis for the WBA service but derived the prices for this service from the calculated LLU BU-LRAIC prices over a glide-path. In fact, AGCOM set a network cap and increased WBA prices by the annual percentage increase of the LLU price. AGCOM applied the same approach to the wholesale line rental (WLR) service, with the objective of preserving the existing "economic space" between the prices of LLU, WBA and WLR services, respectively. The Commission urged AGCOM to verify the validity of the maintenance and commercial costing data in its model, in line with the BU-LRAIC methodology employed. It further invited AGCOM to review the mechanism by which TI's price increases were made conditional on TI meeting certain quality criteria and to analyse whether WLR and WBA services

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4 SG-Greffe (2009) D/2188
5 SG-Greffe (2009) D/8059
6 SG-Greffe (2010) D/16578
were not priced inconsistently with the BU-LRAIC model applied.

Under cases IT/2011/1230 and IT/2011/1231\(^7\), the Commission assessed AGCOM's notifications with regard to the proposed full set of remedies for Next Generation Access (NGA) in the market for physical infrastructure access and for Next Generation Network (NGN) access in the market for wholesale broadband access. The Commission commented, \textit{inter alia}, on the need for transparency and coherence in the notification of remedies under the EU consultation procedure.

Finally, AGCOM notified its proposal to set cost oriented WLR prices from 1 June 2012 to 31 December 2012, thereby removing the network cap. AGCOM calculated the network costs of the WLR service on the basis of the BU-LRAIC model applied for setting the LLU price. This notification was assessed by the Commission under case IT/2012/1384\(^8\). The Commission asked AGCOM to assess the consistency between the WLR, LLU and WBA prices, respectively, and revise them at the latest in the context of the next review of the corresponding relevant markets, as long as the price control obligation was considered appropriate and justified. In this regard, the Commission stressed that the proposed modification of WLR prices affected the consistency between LLU, WBA and WLR prices during the second half of 2012, since the "economic space" between the now cost oriented WLR product and the WBA products (still subject to the old regulatory regime) was likely to change. The Commission also invited AGCOM to consider whether setting new WLR prices with retroactive effect might lead to legal uncertainty for market players.

\textbf{II.2. Current proposals}

The notified draft measures concern the price control obligation imposed on TI in the markets for wholesale (physical) network infrastructure access (market 4) and wholesale broadband access (market 5). In particular, AGCOM proposes to set the regulated prices for full and shared LLU, SLU and the related collocation services, as well as for WBA for 2013, in the context of the assessment of the Reference Offer proposed by TI for 2013. This Reference Offer was published by TI on 31 October 2012\(^9\). Any final decision by AGCOM following its current notification would have retroactive effect, starting as from 1 January 2013.

In its notification and information submitted in relation to case IT/2012/1384, AGCOM explained that it was carrying out an overall assessment of the competitive conditions in the provision of WLR, LLU and WBA services in the context of the third round market review of the corresponding relevant markets. It expected to notify such review to the Commission by the second quarter of 2013.

In September 2012, AGCOM started the procedure concerning the third market review of the retail market for the access to the public telephone network at the fixed location (market 1) and markets 4 and 5. On 4 April 2013, it launched the national consultation on the review of these markets, which ended on 31 May 2013.

Moreover, on 18 October 2012 AGCOM adopted a decision setting an interim measure according to which the wholesale access prices in 2012 would also be extended to 2013, until the above mentioned market reviews were finalised and the new remedies imposed.

\begin{footnotesize}
\begin{itemize}
\item \(^7\) SG-Greffe (2011) D/10336
\item \(^8\) C(2012) 9112
\item \(^9\) At the end of October of each year TI must publish its Reference Offer for the following year.
\end{itemize}
\end{footnotesize}
In response to the Commission's request for information, AGCOM put forward the following arguments for why it has not proposed to set the above mentioned wholesale access prices for 2013 on the basis of the market review that was subject to public consultation on 4 April 2013:

- At the beginning of 2013, AGCOM observed that the higher complexity of the required evaluation and the longer formal consultation procedure could not allow it to set prices as a result of a market review before the end of 2013.
- AGCOM decided to apply urgently cost orientated WBA prices, as suggested by the Commission in its comments in case IT/2012/1384, in order to ensure consistency as to the cost standards and the cost basis adopted for LLU, WBA and WLR services.
- AGCOM decided to finalise the assessment of the reference offer for LLU prices in the first half of 2013, (i) in light of the evidence showing a significant reduction of maintenance and commercial costs for the provision of the LLU service and (ii) due to the requests made by many alternative operators since the end of 2012 asking for a timely revaluation of WBA and LLU prices for 2013 reflecting such cost reduction.

**Market 4**

**Full LLU monthly fee**

AGCOM proposes to set the LLU prices for 2013 on the basis of the BU-LRAIC model applied for setting the LLU prices during the period 2010-2012. The price modifications that AGCOM envisages result from updating the following parameters: (i) the volume of lines which affects the network unit costs\(^\text{10}\), (ii) the mark-up applied for calculating the commercialisation costs\(^\text{11}\) and (iii) the cost of manpower, the line failure rate and the intervention rate, which are key factors in the calculation of repair maintenance costs\(^\text{12,13}\).

AGCOM also assesses the Weighted Average Cost of Capital (WACC) and proposes to maintain it at the level which was calculated in 2010 (i.e. 9.36%)\(^\text{14}\). Previously, within

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\(^{10}\) The network costs increase because the number of lines in 2012 is almost 500,000 lines less than initially expected in 2010. Based on its BU-LRAIC model, AGCOM estimates that such reduction of lines results in an increase of the unit cost of 11 €cents per month.

\(^{11}\) The commercial costs are calculated as a mark-up over the proposed LLU price of €8.68. In its reply to the RfI, AGCOM explains that it lowers this mark-up from 6.52% to 4% to be in line with the downward trend observed in the commercial costs, reported in the regulatory accounts corresponding to the last three years. AGCOM further stresses that a bottom-up calculation of the commercial cost would lead to a lower value as compared to those stemming from the regulatory accounts of 2010 and 2011.

\(^{12}\) In its reply to the RfI, AGCOM clarifies that the repair maintenance covers all interventions for repair requested by both Telecom Italia and alternative operators.

\(^{13}\) According to AGCOM's reply to the RfI, the proposed reduction from €1.94 to 1.48 per month/line is mainly due to the improvement made in the repair intervention ratio since 2009.

\(^{14}\) In its reply to the request for information, AGCOM explains that it has analysed in depth the risk free rate (rf), the cost of debt (Cd) and the equity risk premium (ERP) when assessing the update of the WACC. As to rf, AGCOM observes an oscillating trend around an average value of 3.96% (for the 10 years bond) that is very close to the rf set in 2010 (equal to 3.9%). As to Cd, the spread with respect to the previous rf observed for a reasonable time period does not exceed 1.88%, which does not differ from the spread value set in 2010 (equal to 1.71%). As to the equity risk premium, AGCOM gathers
the national consultations on the LLU prices for 2013 and the review of markets 1, 4 and 5, AGCOM proposed to set the WACC at 9.83% and 10.40%, respectively.

The resulting monthly fee for full LLU (in €) would be the following:

<table>
<thead>
<tr>
<th></th>
<th>2012</th>
<th>Proposal for 2013</th>
<th>Proposed variation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Network costs</td>
<td>6.74</td>
<td>6.85</td>
<td>1.6%</td>
</tr>
<tr>
<td>Commercial costs</td>
<td>0.6</td>
<td>0.35</td>
<td>-41.7%</td>
</tr>
<tr>
<td>Repair maintenance costs</td>
<td>1.94</td>
<td>1.48</td>
<td>-23.7%</td>
</tr>
<tr>
<td>Total cost (monthly fee)</td>
<td>9.28</td>
<td>8.68</td>
<td>-6.5%</td>
</tr>
</tbody>
</table>

**Shared LLU monthly fee**

AGCOM proposes to set the monthly fee for shared LLU at €0.86 per month, which would only comprise commercial costs and maintenance costs. According to AGCOM's reply to the Commission's request for information, the network costs are not considered, as the shared LLU monthly fee must only recover those incremental costs, which are incurred by the SMP operator (when granting access to the higher part of the copper line frequency spectrum for the provision of ADSL) with respect to customers that only buy Plain Old Telephone Service (POTS) based services.

AGCOM explains that such incremental costs would be the additional maintenance repair costs, incurred by the incumbent due to the use of the same POTS copper line for ADSL, and the commercialisation of LLU shared access. The network cost would therefore be recovered via the retail monthly fee.

**SLU monthly fee**

AGCOM proposes to set the monthly fee for SLU at €5.79. AGCOM explains in the reply to the Commission's request for information that this monthly fee is not based on a BU-LRAIC model, since such model was not developed in 2010, but on TI's proposal in the Reference Offer for 2013 (considering such monthly fee equal to 2/3 of the monthly LLU fee). AGCOM points out that that it is developing a specific BU-LRAIC cost model for SLU in the context of its current full market review.

**Technical conditions for the access to the street cabinets**

AGCOM provides additional technical implementation details as to the provision of the collocation service at TI's street cabinets, in light of recent plans of TI and other operators to deploy an NGA network based on the Fibre to the Cabinet (FttC) technology and the potential request for access to the same distribution cabinet by multiple operators.

In its reply to the Commission's request for information, AGCOM clarifies that (i) it has defined technical and procedural guidelines to make the collocation at the street cabinet more technically and cost effective and (ii) these guidelines are developed on the basis of the existing obligations, which were imposed in 2009 (under IT/2009/0891 and IT/2009/0892) and were confirmed when setting the full set remedies for NGA access (IT/2011/1230 and IT/2011/1231). Therefore, AGCOM does not consider these measures evidence of divergent values (ranging from 3.4% to 5.8%), which are around the value set in 2010 (equal to 4.5%) and thus proposes to maintain the previous value of 4.5%.
to be a new remedy but technical specifications of an existing obligation.\textsuperscript{15}

\textit{Market 5}

Instead of increasing the WBA prices by the annual percentage increase of the LLU price, as in the past, AGCOM proposes to set the monthly fee for WBA on the basis of the BU-LRAIC model that is also applied to set the prices for LLU and WLR. AGCOM also adds a mark-up of 3\% to the BU-LRAIC based WBA cost, in line with the ladder of investment principle, and with the aim of promoting the deployment of infrastructures. AGCOM considers that this mark-up secures an adequate "economic space" between the different wholesale access products\textsuperscript{16}.

The resulting monthly fees for the shared and naked WBA services prices (in \(\text{€}\)) would be the following:

<table>
<thead>
<tr>
<th></th>
<th>2012</th>
<th>Proposal for 2013</th>
<th>Variation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shared WBA</td>
<td>7.79</td>
<td>6.74</td>
<td>-13.5%</td>
</tr>
<tr>
<td>Naked WBA</td>
<td>19.50</td>
<td>15.14</td>
<td>-22.3%</td>
</tr>
</tbody>
</table>

\textbf{Next price cap for the period 2014-2016}

AGCOM states that the wholesale access prices proposed for 2013 constitute the reference prices of the new glide path to be applied in the period 2014-2016. In its reply to the Commission's request for information, AGCOM explains that the 2016 target access prices will be based on the new BU-LRAIC model. Such target value will be reached by taking the 2013 rates as the starting point and, following a glide path in the years 2014 and 2015, moved towards the 2016 target rate.

AGCOM further explains that the target prices for 2016 will consider the evaluation of the maintenance and commercial costs carried out in the current notification, in order to ensure the predictability and the stability of the wholesale access prices proposed for

\textsuperscript{15} AGCOM further explains that TI will have to implement these procedural guidelines according to the technical choice that it considers appropriate. In particular, AGCOM proposes that where TI intends to deploy new access infrastructures (street cabinets) or implemented changes for adapting the street cabinet, TI must invite stakeholders to express in advance their willingness and commitment to request access to the cabinet, indicating the ancillary services required for operation, by means of a notification. Furthermore, TI must publish its own plans to modify the existing cabinets or to implement new FttC cabinets at least three months before the start date of the works. In the case of vectoring, AGCOM proposes the multi-operator vectoring (MOV) approach where the access lines are processed synchronously for interference cancellation and TI would be the single vectoring processor in charge of cancelling out the noise of all the lines, while the other functions of the node would be managed by other operators through their own lines to the extent possible.

\textsuperscript{16} In its reply to questions additional to the Commission's request for information, AGCOM explains that it has considered the higher investment risk (as compared to WBA) that an alternative operator faces when collocating its DSLAM at TI's local exchange. According to AGCOM the non recurrent costs (i.e. set up costs) and costs for DSLAMs are considered to be riskier investments, because they cannot be recovered in case of business failure. AGCOM has quantified this through a risk premium of 4\% to be added to the WACC (i.e. 9.36\%). The application of such premium, in the BU-LRAIC model, provides a mark-up of about 0.5 euro/month, which would correspond to 3\% of the proposed access monthly fee of €15.14.
2013. For example, AGCOM indicates that LLU repair maintenance costs will start from the value obtained in 2013, which results from a lower fault rate observed in the access network.

**WLR prices for 2013**

In its reply to the Commission's request for information, AGCOM explains that, on 11 July 2013, it also adopted a decision updating and setting the WLR prices for 2013. AGCOM stresses that the LLU price is the basis for calculating the cost oriented WLR price and clarifies that WLR prices for 2013 would reflect the changes resulting from the currently proposed updates of prices for LLU and collocation services. In particular, AGCOM would set the POTS and BRA\(^\text{17}\) WLR monthly fees at €11.14 and €13.78, respectively. The resulting price reduction with respect to 2012 prices would be of 4.9% and 4.0%, respectively.

As no change is proposed as regards the pricing model applied for setting the 2012 WLR prices, AGCOM considers that it is not necessary to notify such measures. Nonetheless, AGCOM points out that it could notify them promptly, in case the Commission considered that such notification is required.

**III. ASSESSMENT**

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

**Need for transparency and coherence in the notification of remedies under the EU consultation procedure**

The Commission notes that AGCOM has not notified its decision setting WLR prices for 2013. AGCOM argues that the applied pricing methodology is the same as the one notified in Case IT/2013/1284 and only modified on the basis of the proposed update of the LLU price and collocation costs. According to AGCOM, this decision would be effective once the currently notified measures concerning the LLU prices are finally adopted by AGCOM.

In this regard, the Commission stresses that AGCOM's modification of the WLR prices for 2013 need to be subject to an EU consultation under Article 7 of the Framework Directive, as any material changes to remedies constitute an amendment of regulatory obligations referred to in Article 16(4) of the same Directive and could have an effect on trade between Member States. The Commission further reiterates that, as indicated in the Commission Recommendation on notifications, time limits and consultations provided for in Article 7 of the Framework Directive, price levels and methodologies used to calculate costs or prices are considered to be material changes to the nature or scope of a remedy that have an appreciable impact on the market and should therefore be notified under Article 7(3) of the Framework Directive\(^\text{18}\). The Commission, therefore, reminds AGCOM of the requirement to notify its WLR prices for 2013 to the Commission, BEREC and the other NRAs.

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\(^{17}\) Basic rate access.

The Commission further considers that AGCOM's draft measure concerning the price control in the markets for wholesale (physical) network infrastructure access and wholesale broadband access falls within Article 7a of the Framework Directive. The Commission has serious doubts as to the compatibility of AGCOM's draft measures with EU law and considers that they create barriers to the single market. On the basis of the notification and the additional information provided by AGCOM, the Commission expresses serious doubts in this regard for the following principal reasons:

**Lack of sufficient evidence to update the price control obligations on the markets for wholesale (physical) network infrastructure access at a fixed location and wholesale broadband access outside of the current market review**

The Commission refers to Articles 8(4), 13(1) and 13(2) of the Access Directive\(^\text{19}\), which require NRAs to: (i) impose remedies, which are based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive, (ii) encourage investments, including in next generation networks, and (iii) ensure that the chosen cost recovery mechanism serves to promote efficiency and sustainable competition and maximises consumer benefits.

While the Commission recognises that NRAs have a margin of discretion in updating and modifying the price control remedy to regulate access rates, the Commission underlines that any methodology has to be duly justified in order to show that it fully complies with the policy objectives and regulatory principles of the Regulatory Framework, in particular Article 8 of the Framework Directive.

Against this background, the Commission is greatly concerned at the element of arbitrariness in AGCOM's approach for setting prices in markets 4 and 5, in particular with respect to AGCOM's departure from its course of action initially envisaged and communicated to stakeholders only some nine months ago. This lack of consistency of AGCOM's regulatory action over time unnecessarily generates additional regulatory risks and undermines the principle of regulatory predictability enshrined in the EU Regulatory Framework, which is of particular importance for investments in Next Generation Access (NGA) networks for which Italy is lagging behind compared to other Member States.

AGCOM's notified measures raise serious doubts as to its compatibility with EU law regarding the following legal provisions under Union law:

\(a\) **Compliance with Article 8(5)\(a\) of the Framework Directive**

According to Article 8(5)\(a\) of the Framework Directive, NRAs shall promote regulatory predictability by ensuring a consistent regulatory approach over appropriate review periods. The Commission notes that, contrary to what it had notified the Commission of on 31 October 2012 (under Case IT/2012/1384), AGCOM does not notify any wholesale access price (either for LLU, WBA or WLR) for 2013 which would follow a market review of the corresponding relevant markets. Still last October, AGCOM had however indicated that it

expected to notify market review-based access prices by the second quarter of 2013.

The Commission further notes that AGCOM started in September 2012 to carry out full reviews of markets 1, 4 and 5 and adopted in October 2012 a decision setting an interim measure according to which the wholesale access prices in 2012 would be extended to 2013 until the market review (launched, at the time, just one month ago) was finalised. As part of the market review, AGCOM launched in April 2013 the required national consultation, which ended on 31 May 2013.

Instead of using its well progressed market review, and contrary to its own decision of last October, AGCOM, by way of the present notifications, proposes the above mentioned access prices in the context of a separate proceeding (i.e. the assessment of the Reference Offer proposed by TI for 2013). In that proceeding, AGCOM updates the BU-LRAIC model that it applied in 2010 to set the LLU prices for the period 2010-2012 and proposes to apply the same (updated) BU-LRAIC model for setting WBA prices. The national consultation relating to the separate proceeding on the 2013 LLU prices was launched about one week prior to the national consultation on the reviews of markets 1, 4 and 5 (i.e. on 27 March 2013).

This means that AGCOM ran de facto two national consultations for likely different regulatory interventions in the same market in parallel. First, on the basis of the outdated market review of 2009, AGCOM consulted on an update of the price control obligation imposed in market 4 to set the corresponding wholesale access prices for 2013. Secondly, AGCOM consulted, as previously announced and notified to the Commission, on a full market review of the relevant wholesale access markets, in light of current competitive conditions and with a view to adopt the appropriate remedies to redress the competition situation observed in (and projected beyond) 2013.

The Commission has serious doubts that such regulatory approach can ensure regulatory predictability and stable planning conditions for market players. The latter must have had legitimate expectations that any modifications in the wholesale access prices for 2013 would only follow full market reviews, given that (i) AGCOM started such reviews in September 2012, (ii) it decided in October 2012 to maintain the existing access prices until the reviews were finalised and the market data from the last review (of 2009) must have been considered outdated. Moreover, AGCOM finalised the national consultation on the full market reviews, likely with up-to-date market data, only two weeks later than the end of the national consultation on the separate proceeding on the 2013 LLU prices.

The Commission trusts that AGCOM could have notified without much delay the LLU, WBA and WLR prices for the next regulatory period on the basis of valid and up-to-date market reviews and once the Commission Recommendation on consistent non-discrimination obligations and costing methodologies was adopted in early September 2013, a date on which all NRAs were debriefed at the time of AGCOM's present notification. It is in this context important to underline that AGCOM does not detail the specific causes for higher complexities with regard to its ongoing market reviews which could have caused a longer formal consultation procedure.
The Commission has nevertheless taken due account of AGCOM's argument that its present notification would need to be assessed in light of the fact that it had to implement the comments made by the Commission, originally in 2010 and, by way of reiteration, in 2012, concerning the calculation of the maintenance and commercial costs and the consistency between the WLR, LLU and WBA prices. AGCOM's justification is however flawed. AGCOM was required to take utmost account of the Commission's comments already in 2010, and in any event well before 2012. AGCOM should have also adopted much earlier a final measure revising not only the WLR prices but also the WBA prices, in order to ensure the necessary consistency between all relevant wholesales access prices. Even more importantly, AGCOM is not impeded at all to follow the Commission's comments in their on-going market reviews (including the more recent estimates as to maintenance and commercial costs), and in particular when proposing the proportionate price control remedies.

In summarising, AGCOM should have addressed the Commission's comments of 2010 and 2012 earlier, already with respect to the prices adopted between 2010 and 2012, but in any event not by way of a separate proceeding on 2013 LLU access prices. The latter fails to incorporate in the BU-LRAIC model the more recent data for commercial and maintenance costs as well as data resulting from the on-going market review in a way that does not run counter to the legitimate expectations generated by AGCOM's own decision to use interim measures to extend the 2012 wholesale access prices to 2013 and to modify the latter only following a full review of the corresponding relevant markets.

The Commission has also taken due account of AGCOM's argument that it needs to address TI's current proposal for voluntary separation, and that this would prolong the time necessary for a full market review. In this regard, the Commission insists on the fact that any voluntary separation will most likely have an impact on the regulatory and competitive conditions of a large number of markets, i.e. not only markets 1, 4 and 5, for example the wholesale markets for terminating segments of leased lines. In fact, Article 13(b) of the Access Directive requires the NRA to, amongst other things, conduct a coordinated analysis of the different markets related to the access network. In light of this, the assessment of the impact of TI's voluntary separation may require a relatively long period of time, and AGCOM may not finalise such coordinated review before 2015. For this reason, the Commission considers that TI's planned voluntary functional separation cannot be used as an argument for adopting the notified measures, instead of notifying without undue delay the results of the on-going full market review. Rather AGCOM should, in addition, start conducting a separate coordinated review in relation to TI's voluntary separation, if considered appropriate and timely, given the requirements resulting from Article 13(b).

b) Compliance with Article 8(5)d of the Framework Directive

Article 8(5) d) of the Framework Directive stipulates that NRAs shall promote efficient investment and innovation, whilst ensuring that competition in the market is preserved.

In this respect, the Commission has serious doubts that the notified WACC would actually reflect the currently prevailing competitive conditions, in both the relevant and the capital markets in Italy, and contribute to the required transparency and robustness regarding this relevant parameter. Indeed, the WACC can have an important impact on the actual access price level and should
therefore be selected on the basis of the same overall economic conditions and time period as the other parameters used in the price calculation.

Specifically, the Commission notes that in a short interval of time (i.e. two weeks) between the launch of the public consultation with regard to the separate proceeding on the 2013 LLU prices and the public consultation on the market reviews, AGCOM proposed two different values for the WACC which differed considerably (i.e. 9.83% and 10.40%, respectively). In light of this, the Commission is concerned at why the available data for calculating the same parameter vary so significantly and to what extent the differences presented could be justified by underlying evidence.

In its present notification, AGCOM elected to maintain the WACC that was calculated in 2010, i.e. 9.36%, rather than any of the values consulted upon, and calculate the 2013 LLU access price on that basis. Given (i) the number of parameters to be considered when calculating the WACC, (ii) the changes that have occurred in the Italian economy over the past three years and, in particular, in the financial markets and (iii) the previous higher estimates of the WACC, the Commission has serious doubts as to the validity of the value chosen for the parameter in question.

The Commission is particularly concerned in this respect, as a comparison with other Member States currently facing similar financial difficulties, such as Spain and Portugal, reveals that the WACCs used in those countries for calculating wholesale access prices considerably differ from AGCOM's approach. The latest WACCs calculated by the respective NRAs are set at 10.48% (for 2012) and 11% (for 2011), respectively. These values would be significantly closer to the higher values proposed by AGCOM during its two (parallel) national consultations than to the value presently notified.20

To conclude, the Commission has serious doubts that the WACC value, being a subject of frequent changes by AGCOM promotes efficient investment (by both dominant and alternative operators) and innovation, whilst ensuring that competition in the market is preserved.

c) Compliance with Article 8(5)c of the Framework Directive and Article 13(2) of the Access Directive

According to Article 8(5)c of the Framework Directive and Article 13(2) of the Access Directive, NRAs shall safeguard competition to the benefit of consumers, and promote efficiency and sustainable competition.

The Commission has serious doubts that, by adding a mark-up of 3% when setting the WBA prices and by setting the SLU price at 2/3 of the LLU price, AGCOM is effectively setting cost oriented wholesale access prices and therefore safeguarding and promoting competition in the Italian broadband markets.

Indeed, the Commission observes in this regard that the mark-up of 3% results from applying a risk premium of 4% to the WACC for certain assets (e.g. DSLAM) in which an LLU-based alternative operator has to invest (as compared to a situation where the alternative operator competes on the basis of WBA

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20 Also, the WACC calculated in Spain varied in the years 2009, 2010 and 2011, at the values of 10.94%, 9.74% and 10.57%, respectively. Similarly in Portugal, the WACC varied from 10.3% in 2010 to 11.7% in 2011.
services). AGCOM does not explain how it calculates such risk premium or how TI calculates the ratio of 2/3 to derive the SLU price. On the basis of the information available to the Commission it cannot be excluded that the above parameters were found in a rather arbitrary way. In light of this, the Commission outlines that setting consistently the prices of the wholesale access products along the same value chain is key to ensure sending the correct build or buy signals and, thus, to incentivise sustainable competition without distorting the business decisions made by all market players.

The Commission reiterates that the fact that AGCOM (i) is developing a cost model for calculating the SLU price and (ii) foresees to apply it when imposing remedies in the context of the full market reviews does clearly call for not implementing the modifications notified, for SLU and the setting of the corresponding prices, prior to the full market review.

d) **Compliance with Article 3(3) of the Framework Directive: principle of transparency**

According to Article 3(3) of the Framework Directive, national regulatory authorities should exercise their powers impartially, transparently and in a timely manner.

In relation to this, the Commission has serious doubts that the draft measures would contain a clear indication of the methodology which AGCOM followed for setting parameters such as (i) the WACC when setting the LLU prices, (ii) the mark-up over the BU-LRAIC based WBA cost when setting the WBA prices and (iii) the ratio between LLU and SLU prices when setting the SLU price in the absence of a cost model. Prices seem to have been set rather arbitrarily and, in any event, without the necessary methodological rigour. Such approach does not appear to comply with the principle of transparency.

**Creation of barriers to the internal market**

The above-mentioned negative effects of the notified measures on competition and investment may have, at the same time, a considerable detrimental effect on the development of the internal market, i.e. create a considerable barrier to the single market.

The Commission has serious doubts that the lack of regulatory predictability and transparency of the approach followed by AGCOM is furthering the establishment and development of trans-European networks, thus creating barriers to further market integration. Specifically, multi-national operators would be deterred from deploying their own infrastructures and/or buying wholesale broadband access in Italy, when the procedure, in this particular case, to set wholesale access prices appear to result in unstable and unpredictable prices.

**Conclusion**

At the current stage of the procedure and on the basis of the information available, the Commission has serious doubts as to the compatibility with EU law of the approach followed by AGCOM in the implementation of the price control obligation and the setting of the wholesale access prices for 2013 in the market for wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location and the wholesale broadband access market, as notified. Furthermore, the Commission considers that the proposed measure would create a barrier to the single market in light of the unstable and
unpredictable approach to impose wholesale access prices on TI.

The above assessment reflects the Commission's preliminary position on this particular notification, and is without prejudice to any position it may take vis-à-vis other notified draft measures.

The Commission points out that, in accordance with Article 7a of the Framework Directive, the draft measures on the market for wholesale broadband access in Portugal shall not be adopted for a further three months.

Pursuant to Recital 17 of Recommendation 2008/850/EC\textsuperscript{21}, the Commission will publish this document on its website, together with a notice inviting third parties to submit observations on this serious doubts letter within ten working days. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission\textsuperscript{22} within three working days following receipt whether you consider that, in accordance with European Union and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication. You should give reasons for such request.

Yours sincerely,

For the Commission

Johannes HAHN
Member of the Commission


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