

**OPINION REGARDING THE
COMPATIBILITY OF THE
FIBERCOP CO-INVESTMENT
OFFER UNDER EU LAW**

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Memorandum

Opinion Regarding the Compatibility of the FiberCop Co-investment Offer under EU Law

I. EXECUTIVE SUMMARY

1. Our analysis of the terms of the TIM/FiberCop co-investment Offer (“the TIM/FC Offer”) for participation in the FiberCop co-investment vehicle suggests that the terms of the TIM/FC Offer satisfy the terms of Article 76 and Annex IV of the European Electronic Communications Code (“the Code”), which came into effect in December 2020 and was due to be transposed into Italian national law by that date. Indeed, we believe that the parties to FiberCop have crafted a co-investment offer which not only follows closely the legal requirements set forth in the Code, but also follows the letter and the spirit of the guidance on the Code provided by BEREC, the European body which represents all National Regulatory Authorities operating in the electronic communications sector in the European Union.
2. More particularly, our analysis has not identified anything in the TIM/FC Offer which does not comply with the technical and legal requirements set forth under the following provisions: Article 76(1)(a) (the Offer is open at any time during the lifetime of the network); Article 76(1)(b) (the Offer generates sustainable competitive outcomes in downstream markets); Article 76(1)(c) (the Offer is sufficiently transparent to potential co-investors); and Article 76(1)(d) (the Offer is consistent with the maintenance of existing access options for access seekers). This conclusion would not differ irrespective of whether FiberCop is characterised as an entity offering one-way access terms to third parties or as a Joint Venture which from the outset has one co-investor (Fastweb) that has already responded to the TIM/FC Offer contemporaneous to its publication.
3. The inclusion within the scope of the TIM/FC Offer of network elements that have already been developed by TIM in conjunction with Fastweb under their FlashFiber project prior to 2018 should not, in our view, compromise this position, given the fact that, *inter alia*: (i) the existing FlashFiber network will require significant modification and upgrading to render it compatible with the FiberCop network; (ii) the access regime under the FiberCop project provides more favourable terms to access seekers than is currently the case under FlashFiber; (iii) the TIM/FC Offer envisages compliance with a number of the commitments already implemented by the FlashFiber participants to the Italian Competition Authority and which, since the merger of FlashFiber into FiberCop are being migrated into the FiberCop regime. In public policy terms, therefore, there seems to be no overriding rationale to exclude the FlashFiber network from the scope of the FiberCop project simply because this portion of the FiberCop network pre-dates the adoption of the Code.

4. To the extent that certain aspects of the TIM/FC Offer may require more specificity under the terms of the commitments procedure available under Article 79 of the Code, we believe that recourse to competition law precedents developed by the European Commission under its application of Article 101(1) & (3) TFEU provides guidance to AGCOM in its evaluation of the TIM/FC Offer under the regime that applies under Article 76 of the Code. Our analysis suggests that the TIM/FC Offer satisfies the key competition law concerns that are raised by any form of infrastructure sharing between competitors, especially when determining key issues such as the duration and reasonableness of any obligations established under the TIM/FC Offer.
5. The net gains proposed by, and likely to arise from, the FiberCop Project constitute a material improvement of the current competitive dynamic that exists in the Italian electronic communications sector, to the benefit of the Italian economy and consumers. Moreover, the governance provisions and contractual commitments of the parties in the Master Service Agreement that they have entered into, ensure that the parties are adopting all the necessary measures required to ensure that the types of anti-competitive concerns that might arise from this form of cooperation between competitors. The terms and conditions of the Master Service Agreement establish clear operational limits on the market conduct of FiberCop and diminish any incentives that an infrastructure provider in its particular market position might have to foreclose entry or to diminish competitive outcomes at the retail level.
6. We have also reviewed the competitiveness of the pricing aspects of the TIM/FC Offer. If one compares the likely competitive outcomes resulting from the TIM/FC Offer to an alternative scenario in which third parties would be relying on a regulated VULA access product scheme, almost all operators will be more advantageously placed as co-investors (or even when obtaining access from a co-investor as a wholesale customer). The economic position of a party with their own network infrastructure is even more advantageous where it would allow that party to provide its own primary network connectivity. Since co-investors have options to aggregate other clients and are free to resell capacity without incurring material transaction costs, we take the view that: (a) the pricing offered provides significant scope for market entry; and (b) a contestable wholesale market among parties seeking to increase their participation is likely to emerge.
7. While the TIM co-investment Offer ensures compatibility with the key elements of Article 76 and Annex IV of the EECC, what remains, in our view, is to ensure that the terms of the forthcoming Information Exchange Protocol envisaged between the parties fulfil the usual criteria expected under competition law practice. Insofar as it is felt that this Protocol is drafted in sufficiently detailed terms, we believe that it might be capable of even providing the sort of detailed 'ringfencing' measures that one would associate with the insulation of the secondary FiberCop network from the primary network operated by TIM and the independent retail operations of the parties. The appropriate drafting of such terms might also facilitate the possibility of potential co-investors being able to satisfy their needs in terms of both primary and secondary network elements simultaneously without infringing competition rules, should it be their independent commercial preference to do so.

8. Irrespective of any proposed modifications to the TIM/FC Offer that might be sought by National Regulatory Authority, AGCOM, under the Commitments procedures set forth in Article 79 of the Code, we take the view that AGCOM is well positioned through its residual powers of monitoring and dispute resolution established under Article 76 so ensure that the letter and spirit of Article 76 are being observed over the lifetime of the FiberCop project.

II. INTRODUCTION

KKR has asked us to review the compatibility of the TIM/FC Offer of co-investment in the FiberCop Project, as reflected in the Agreement of 29 January 2021 entitled “TIM’s co-investment offer in FiberCop’s new fibre network” and in the Master Service Agreement between FiberCop S.p.A. (“FiberCop”) and Telecom Italia S.p.A. (“TIM”), under the terms of Article 76 of the European Electronic Communications Code (“the Code”) and under EU competition rules. To this end, we have also had access to the various materials listed in Annex 1 to this Opinion.

In conducting our analysis, we understand that the TIM/FC Offer is made in relation to a “co-investment agreement” and also constitutes a network which is characterised by Very High Capacity Network (“VHCN”) elements, as those expressions are understood under Article 76 of the Code. The investment requires that the provisions of Article 76 of the Code need to be satisfied in order for the investment to go ahead, and the parties have the freedom to choose their operational model - which ranges from a full Joint Venture to one-way sharing agreements, or a combination of operational models.

Each of these operational models envisages that co-investing parties can:

- Differentiate their retail strategies and to roll out other technical solutions over their own networks, and even to shift strategy over time.
- Create no cost disadvantages for parties that are not co-investors, other than the obligation to ensure that the co-investment risk being taken is rewarded.
- Prevent opportunistic “cherry picking” or “free-riding” from late investors that would otherwise deter the co-investment being planned.
- Provide wholesale access, with smaller co-investment partners being allowed to aggregate their demand to satisfy minimum thresholds and larger co-investment partners being free to resell their capacity.

It is worth noting from the outset that there is a specific context in which the TIM/FC Offer is being made. That context is linked to the new regulatory framework for electronic communications which was adopted in December 2018 and which sets out a clear objective of achieving investment in, and take-up of, VHCN networks (FTTH/FTTB networks). The specific provisions on co-investment and associated regulatory relief need to be considered within that broader context and the overarching policy objective of helping traditional operators overcome the conflict of interest inherent in controlling a parallel copper network

and making the transition to fibre networks. From such a policy perspective, the current TIM/FC Offer achieves that target, while facilitating competition on the retail market through a flexible approach to the hosting of co-investors. In addition, any assessment of the TIM/FC Offer in the Italian market needs to take into account the fact that the FiberCop network is challenging an existing network, in the form of Open Fiber, which has a “first mover” advantage in the deployment of fibre networks competing on the wholesale access market.

Our analysis has also been conducted by reference to a number of additional considerations, including:

- (1) An acknowledgement that it is most efficient to include the network developed by TIM and Fastweb under the FlashFiber project, as approved by the Italian Competition Authority in March 2018, into the overall FiberCop project.
- (2) An understanding of the likely competitive situation that would exist in Italy as a result of the FiberCop project becoming operational, as opposed to the situation where the marketplace would develop in the absence of the Project.
- (3) A review of the various governance and structural measures which are material to the ways in which FiberCop will operate on the market and which will guide the likely commercial incentives that it will pursue in that marketplace, including measures that could address the types of “spillover” concerns that might arise from a relationship of common network development by horizontal competitors.
- (4) An identification of material collateral benefits that are likely to be realised in the Italian electronic communications sector by the FiberCop project, in addition to the clear benefits generated by the quick deployment of an advanced VHCN network.

Our compatibility analysis of the TIM/FC Offer under both regulation and competition law principles is set out in Section II immediately below, and our conclusions regarding each of these analytical steps is set forth in Section III thereafter.

II. DISCUSSION

In assessing the compatibility of TIM’s co-investment offer in FiberCop, we analyse below:

- (i) The existing competitive situation that exists today in Italy in the fixed electronic communications sector.
- (ii) The essential elements of the TIM/FC Offer.
- (iii) The governance obligations on FiberCop that are relevant to the appraisal of the TIM/FC Offer.
- (iv) The key elements of the Code against which the essential elements of TIM’s Offer need to be evaluated.
- (v) The key competition law principles which should inform a compatibility analysis made under Article 76 of the Code.

- (vi) Other co-investment scenarios that establish best practice guidance against which the TIM/FC Offer can be appraised.

A. The Italian Electronic Communications Market

The Italian electronic communications market has been characterised by a series of widely recognised structural concerns that have arisen over the past 10-15 years. These structural concerns have been widely reported in the commercial press to relate, *inter alia*, to:

- The lack of progress in the targeted phasing out of the legacy copper network so that it can be replaced by a fibre access network that covers the whole of the Italian territory.
- In parallel, the lack of any coherent strategy to migrate customers from the legacy copper network to any new fibre network.
- The belief that voluntary structural separation between the wholesale and retail units of TIM's business was not "fit for purpose".
- The chronic underfunding of 'Next Generation' broadband networks and their failure to meet any deployment targets.¹

To this list should be added another growing concern that is held in common between Italy and all other EU Member States, namely, the need to adapt all electronic communications networks so that they are in compliance with the so-called "Green Deal" agenda and satisfy the EU's commitments to the fulfilment of the Paris Agreement.²

¹ The Italian broadband penetration level is estimated will only be equal to the current average of other European Member States by 2023 at 89%, reflecting a delay of around 10 years. In this regard, it is estimated that the broadband market will grow from 17.5 million subscribers in 2019 to 21.2 million subscribers by 2025. Aside from the high level of technology migration towards FTTH from legacy technologies, it is also estimated that new retail competitors will be able to enter the market based on more wholesale competition. Refer to the Arthur D. Little Report, *Teemo Due Diligence Extract* (esp. at p. 27 and p. 69).

² For example, refer to the *Commission Recommendation (EU) 2020/1307* of 18 September 2020 on a common Union toolbox for reducing the cost of deploying very high capacity networks and ensuring timely and investment-friendly access to 5G radio spectrum, to foster connectivity in support of economic recovery from the Covid-19 crisis in the Union, L 305/33 of 21 09.2020 (esp. at para. 26). According to the European Commission in its *Communication on the Green Deal*, "digital technologies are a critical enabler for attaining the sustainability goals of the Green Deal in many different sectors", while at the same time recognising that it will also be considering "measures to improve the energy efficiency and circular economy performance of the sector itself, from broadband networks to data centres and ICT devices": COM (2019) 640 final of 11/12/2019 (Section 2.1.3). Refer also to the Commission's *Report on the Implementation of the Broadband Cost Reduction Directive* that emphasises the relative importance of VHCNs in "contributing to greening the Information and Communication Technology sector as part of the European Green Deal" (COM) 2018, 492 final of 27.06.2018 /575 final. See also the Draft Council Conclusions on Digitalisation for the benefit of the Environment of 17.09.2020 (OR.en) 13957/20, Brussels 11 December 2020 (esp. at para.29). Moreover, in a multi-institutional report entitled "*The Paris Agreement and the Regulatory Challenges Raised by the Climate Emergency*" issued in France in May 2020, the importance of achieving carbon neutrality for telecommunications networks by 2030 was considered, particularly given the significant energy consumption on fixed fibre networks, given that fibre consumes on average three times than ADSL: see

As can be seen from the terms of the TIM/FC Offer discussed immediately below, these key issues are all addressed simultaneously through the co-investment timing schedule, commitments and planning. The ability to address these issues is driven in large measure by the fact that KKR has indirectly guaranteed the up-front funding portion of the project through its 1.8 Billion Euro cash injection in return for the satisfaction of key roll-out and performance milestones being met. The meeting of those milestones provides one of the bases upon which the desired future growth of the FiberCop business model will evolve over the lifetime of the project.

A recent study indicates that, as regards FTTH, Italy represents the third largest fibre rollout opportunity in Europe, with about 19 million homes currently not having access to fibre and Italy lagging behind when compared to a broad set of benchmark jurisdictions.³ Having said that, this opportunity for growth needs to be counterbalanced by the investment challenges presented by the particular demographics, topology and archaeological constraints confronting investors. These factors combine to make the deployment in Italy of Next Generation Networks difficult and relatively expensive (and in some cases, unprofitable). The Italian population is highly dispersed, with over 50% living in small cities of less than 30,000 inhabitants, only 15% of the population living in large cities of over 250,000, and with 91% of the population living in cities with a total of less than 15,000 inhabitants. It is inevitable in these circumstances that the costs of broadband deployment are much higher in smaller cities, give the lower density of population and homes passed. Costing issues become even more complex when one adds topographical variations and archaeological concerns.⁴ Any regulatory and competition law assessment of the value of the FiberCop project needs to be seen in this light, both in terms of the challenges that need to be overcome and the benefits of the TIM/FC Offer seen in light of these investment challenges.

In addition, the FiberCop project is positioning itself as a national competitive wholesale alternative to Open Fiber,⁵ while at the same time providing access seekers with more varied and flexible wholesale solutions. Unlike the Open Fiber network, FiberCop has chosen to place both primary and secondary splitters at the same street cabinet, thereby rendering the network more flexible in terms of the type of access offered. FiberCop's network structure also allows access seekers to "mix and match" in order to create a broad selection of access products which range from a national bitstream product, to a central VULA product, to a full-GPON access or a semi-GPON access product. For instance, an operator such as Fastweb or Vodafone with significant fixed assets could choose to take a semi-GPON product by taking access at the CRO (street cabinet), which would allow them

https://www.cnil.fr/sites/default/files/atoms/files/the_paris_agreement_and_the_regulatory_challenges_raised_by_the_climate_emergency_may2020.pdf. Refer also to the Commission's strategic guidance for the implementation of the Recovery and Resilience Facility in its *2021 Annual Sustainable Growth Strategy* (ASGS), COM/2020/575 final of 19.09.2020. Refer also to ETNO's *Policy Paper on Climate Targets of June 2020*, where the strong link between Digital policies and Green policies is seen to come together in the promotion of network sharing agreements.

³ Refer to Arthur D. Little Report, *op. cit.* at pp. 17, 25 and 27.

⁴ Arthur D. Little Report, *supra* at pages 53-54.

⁵ Refer to offer at www.TIM.it.

to provide their own active solution. The “mix and match” possibilities for smaller operators extend even further, as nothing in the TIM/FC Offer prevents a party from developing a strategy which harnesses the wholesale offerings of both FiberCop and Open Fiber through a process of aggregation or resale. These possibilities should, in our view, address any potential concerns that there will be smaller competitors that cannot avail themselves of the co-investment options being offered because they cannot satisfy minimum market threshold that would render the co-investment offer attractive. They should also address any potential concerns that the size of a CRO in Italy is smaller than is the case in some other Member States, or even when compared to the Open Fiber network.

As noted elsewhere, there is no prohibition on resale in the TIM/FC Offer which would allow operators or a new third party to aggregate demand to be able to achieve the minimum guarantee thresholds. Nor is the size of the FiberCop CRO a function of anything other than network design decisions taken for over a hundred years. It is noteworthy that TIM and FiberCop are not building an entire network *de novo* or overlaying another network, but are investing to upgrade an existing network with existing civil infrastructure (e.g., existing ducts, trenches and street equipment). It would be unreasonable to expect that such an upgraded network would need to be re-configured in order to create the type of larger street cabinet accumulations that Open Fiber can achieve because its telecommunications network deployment is “greenfield”. In any event, the ability of third party operators to aggregate demand should also address this network architecture issue, especially when one takes into account the fact that minimum purchase obligations are only referable to small municipality areas rather than requiring nation-wide investments.

Looking beyond the competitive environment characterised by competition between two national fixed line broadband networks, it is also the case that TIM’s current *ex ante* access obligations⁶ seek to ensure that market entrants can avail themselves of the benefits of scale economies which would otherwise be available only to a single entity in the marketplace (the fixed incumbent in a copper context). However, under the existing wholesale access regime in Italy, TIM does not recoup its capital costs, as these costs are sunk and are deemed to have been already recovered (with risks in principle being fully understood and discounted). By contrast, it is clear from the provisions of the Code that EU policymakers now want to promote new investments where that investment is not sunk and where the risks are unknown and should *not* be discounted.

This promotion of new investment is occurring at a time when, unlike other less dynamic network industries, it is becoming increasingly unclear where the line can be drawn as to where the end of a natural network monopoly lies. It is the case that, until the advent of mobile networks, the fixed local loop was considered a natural monopoly in the electronic communications sector. It is now clear that the possibility exists that there may be multiple FTTH networks deployed in the future, but their number and the rate of deployment are both unknown elements. There may be enormous demand for high end connectivity services from consumers that are willing to pay a premium for low latency or variable

⁶ For example, refer to IT/2019/2181-2182, Brussels 11.02.2019 C (2019) 5406 final, Commission Decision concerning wholesale local access provided at a fixed location and wholesale corporate access provided at a fixed location for mass-market products in Italy: Comments pursuant to Article 7(3) of *Directive 2002/21/EC*.

connectivity; again, however, there is no certainty as to the speed at which such take-up will occur. What is clear is that the current access mechanisms - where the element of risk does not constitute part of the price (or even where it is so included, capturing access pricing risk premiums is extremely difficult) - will not induce investment in new networks.

TIM has, in the past, sought to address a number of these issues through its co-investment cooperation with Fastweb, which goes back originally to 2012. This was then revamped in order to respond to the introduction of Open Fiber in 2015, which was a structure that was approved by the Italian Competition Authority in April 2018.⁷ The alliance between TIM and Fastweb is known as “FlashFiber” and corresponds to shareholdings by the respective parties of 80% and 20%. The aim of FlashFiber is to upgrade the telecommunications networks in 29 cities across Italy that were already addressed by FTTC or FTTH network architecture, subject to a series of commitments required by the Italian Competition Authority regarding, *inter alia*, the satisfaction of rollout targets, the offer of FRAND terms for access, measures allowing the amendment of co-investment decisions and measures to prevent the exchange of commercially sensitive information through the FlashFiber vehicle. The lifespan of the FlashFiber project was supposed to end in 2035. It is the intention of the parties that the FlashFiber project will be merged into the FiberCop project.⁸

Upon the deployment of the FiberCop network, Italy will have ubiquitous Fibre to the Home (FTTH) network coverage throughout the national territory, with non-commercial areas being State-funded. Moreover, the “black” areas of the country will also be characterised by head-to-head network competition between Open Fiber and FiberCop, allowing the Italian State the freedom to devote its funding to broadband projects in “white” areas, while FiberCop will have resolved many of the wholesale access shortcomings currently identified in “grey” areas of the country.⁹

B. The TIM/FC Offer

The key elements of the TIM co-investment Offer provide the basis of the compatibility assessment of that Offer under regulatory and competition law requirements. The TIM/FC Offer relates to the secondary access network of TIM, which constitutes that section of the access network running from the street cabinet (“CRO” in Italian) into the end-user premises, including the termination point.¹⁰ It extends to a total of 1,610 municipalities

⁷ Refer to www.agcm.it, Press Release of 9 April 2018 (Rome).

⁸ Under Clause 17 of the FlashFiber Bylaws (special reserved matters requiring the approval of a super-majority), Fastweb has the ability (even with only a 20% shareholding) to veto decisions to merge FlashFiber into another entity, but has determined that it is in its best interests to allow TIM to have the entity brought within the scope of FiberCop’s operations. While this type of veto clearly does not amount to a form of joint control over the commercial activities of FlashFiber, this is a classic form of minority shareholder protection designed to protect the integrity of a minority shareholder’s investment.

⁹ The colour coding approach is that which is endorsed in the EU Guidelines for the application of State Aid rules in relation to the rapid deployment of broadband networks, OJ C25, 26.01.2013.

¹⁰ In a limited number of cases where it is not possible to enter the building, the fibre will be brought to the building itself.

across¹¹ the Italian territory, excluding the city of Milan (as is the case with the FlashFiber project), which is already addressed by competitive fibre network alternatives. The implementation of the FiberCop network deployment plan is scheduled to occur by the end of 2025, namely, five years after the commencement of the project.¹²

Potential co-investors have two clear options for their co-investments:

1. **Option 1:** IRUs – in this instance, a 20-year Indefeasible Right of Use (IRU) is taken, thereby conferring upon the co-investor the right to a certain number of splitters at the “CRO” (two splitters, with possibility of gaining access to more, subject to review). The co-investor taking up this offer then pays a sliding scale of pay-per-use charges for the duration of the IRU, but has no minimum purchasing commitment.¹³
2. **Option 2:** Semi-GPON – this is a pure pay-per-use option without an associated IRU. This option does have minimum purchasing commitments associated with it (amounting to a minimum 10% of lines per municipality taken)¹⁴ and the minimum duration of such a commitment in this case is 10 years.¹⁵

In addition, the TIM/FC Offer could also provide co-investors, in the first year of its deployment, with an additional opportunity to participate in the FiberCop vehicle by means of an equity participation, upon terms which are to be negotiated in good faith to reflect the fact that a co-investor has decided to share the full risk portfolio alongside the original investors (subject to shareholder agreement and in line with the shareholder agreements already in place).¹⁶ This is described in the TIM/FC Offer as being available to those co-investors who, over the course of 2021, are willing to “accept higher risks”. By contrast, the Options 1 and 2 are available to potential co-investors over the period 2022-2025.

¹¹ See Section 4.4 of the TIM/FC Offer.

¹² See Section 1 of TIM/FC Offer.

¹³ See Sections 3 and 5.1 of the TIM/FC Offer. An IRU refers to an unconditional and exclusive right enjoyed by a purchaser to a specified amount of capacity over a particular period of time, amounting to a lease (right to use) coupled with a permanent contractual agreement. The “indefeasible” aspect of an IRU refers to the fact that the right is not capable of being annulled or undone). An IRU is usually associated with the purchase of rights in the context of undersea cable consortia (see discussion below), and is associated with the payment of a price which includes not only a portion of the construction cost but also the estimated costs of repair and maintenance.

¹⁴ See Sections 3 and 5.1 of the TIM/FC Offer. It should be noted that there are options to amalgamate smaller operators in the offer and TIM permit operators with at least 1% of units in a given municipality to join together with a co-investor (see Section 5.1.2 of the TIM/FC Offer).

¹⁵ As noted in the TIM/FC Offer document, one year prior to the expiration of such a term, the co-investors’ agreements will be re-negotiated in good faith by the parties so that the scope of the TIM/FC Offer covers the lifetime of the project. The initial 10-year period thus reflects a reasonable forecast period which offers co-investors greater flexibility than a commitment of 20 years, which might require an excessively long projection in the eyes of many investors, while allowing the possibility for renewal which can cover the full 20-year period should economic circumstances prove to be favourable for the remainder of the life of the project.

¹⁶ See Section 5.3 of the TIM/FC Offer.

Under either of Options 1 or 2, co-investors can also either buy access from TIM to the primary network or they can present their own fibre at the CRO and self-supply the backhaul product.

Under Option 2, the TIM/FC Offer imposes an entry threshold which requires that co-investors commit to at least one municipality and a minimum 10% of that municipality under the pure pay-per-use option. It should be noted that there is a 10% tolerance limit (to protect against under-estimation) and that a back-and-forward carry-over is permitted whereby, one under-achievement of the minimum requirements over a period of a year can be offset against the following year's over-achievement (again within a 10% tolerance level, namely, 90% of the minimum commitment in year 1 could be offset against 110% in year 2).¹⁷ By contrast, there is no minimum purchasing commitment in the case of the IRU approach (Option 1), although in practice a co-investor is unlikely to make such a commitment unless they have or anticipate achieving a material market share.¹⁸

Co-investors enjoy a high degree of flexibility and have the opportunity to take two splitters at the cabinet and more subject to review. These splitters are "primary side splitters" with associated secondary side splitters and lines.

The configuration of the FiberCop network means that each splitter in a cabinet will serve 16 users on the secondary side of the network while, on the primary side, the splitters are in a ratio of 1:4; this implies an effective GPON ratio of 1:64 in the overall network.¹⁹ Since a CRO can typically host 14 splitters on the primary side, this means that all customers could in theory be simultaneously supplied by more than 4 suppliers. The previous situation, in which VDSL modems deployed at street cabinets interfered with each other, and which therefore created severe constraints on competitive co-existence at the street cabinet, will not materialise under the new network scenario created by FiberCop.

The critical issues to be decided by AGCOM are whether the use of these co-investment provisions will: (a) drive investments in VHCN; and (b) allow competition to persist in the market so that consumers continue to enjoy competitive choice, prices and quality. Compared to an alternative scenario - which would be a regulated VULA access product scheme - a co-investor under the TIM/FC Offer is at least as well positioned as on the regulated VULA product, either by co-investing directly or achieving access through a third party. The larger the market share to be achieved, the greater the discount that will be obtainable in comparison to the regulated alternative. In turn, the economic position of a party with their own network infrastructure is even better where it allows that party to

¹⁷ Refer to Section 5.1.2-5.1.3 of the TIM/FC Offer.

¹⁸ Note that the standard 2 primary splitters implies that a party can have access to 128 individual units, or approximately 75% of the average number of available units.

¹⁹ The co-location of primary and secondary splitters in the CRO in the FiberCop Network means that there is considerable flexibility in re-allocating capacity and lines between primary and secondary splitters. This is different to the Open Fiber network where, once a secondary splitter is saturated and a new primary splitter is required, the creation of a new secondary splitter is required, even though it was not originally envisaged. Since the associated primary side splitters are not co-located, this requires further complex development and construction work to take place. Refer, in particular, to Section 3.1.3 of the paper from ICT Consulting '*Parere tecnico sull'architettura di rete, sul modello operativo e i servizi di FiberCop*', dated 26 January 2021.

provide its own primary network connectivity. The pricing of the offer therefore looks appropriate. We note also that the pricing offered in the period up to 2025 is static over the timeframe of the offer, *i.e.*, there is no adjustment to take account of inflation. An adjustment to take account of inflation only arises after 2030. Since any investment decision will base its IRR on the Net Present Value of money, this would represent a discount²⁰ being offered to investors in the period through to 2030, and it would be reasonable for TIM to make provision for potential inflation beyond that date, given that unknown business cycles will materialise.

A key feature of the co-investment offer of TIM is that it allows the parties to the co-investment (or, more accurately, a 'lead' co-investor) to aggregate the demand of smaller operators. In the alternative, they can make their own co-investment commitments and resell in the wholesale market. There are strong incentives in the pricing structure, therefore, for operators to maximise their wholesale market share on the new FiberCop network through the adoption of a range of commercial strategies. In the circumstances, any view that the 10% UIT threshold is exclusionary because it would imply that only a limited number of large operators could take advantage of it (*e.g.*, Fastweb, Vodafone and Wind3) or because it would mean that 100% of the customers of those operators would need to be dedicated to FiberCop, appears to us to be misplaced. On the contrary, it is clear that: (a) FiberCop must have some minimum thresholds in place, since it cannot deal with every access seeker on this basis; (b) the threshold is set at the level of each municipality, which means that co-investors can choose between alternative networks on a municipality-by-municipality basis; and (c) there is no prohibition against resale, the implication of which would be that any group or combination of operators can use all or only a portion of their demand to avail themselves of the pay-per-use option and without recourse to the IRU option. This overall approach guarantees: (a) the push for FTTH deployment and take-up; and (b) the sustainability of significant entry at the wholesale level. As a consequence, we can only envisage a competitive retail market outcome. Given the level of competitive pressure that will no doubt be exerted by Open Fiber as a nation-wide provider of wholesale capacity, concerns about market foreclosure would appear to us to be even less well founded (it being understood that the underlying logic of the Article 76 regime is the implicit acknowledgement that the co-investment scheme to be adopted by the SMP-designated operator is likely to be the *only* market option for access and capacity seekers).

C. Governance of FiberCop

In determining the compatibility of a co-investment vehicle between competitors, the question arises whether, irrespective of the compatibility of the terms of the TIM/FC Offer with the language of Article 76 of the Code, the co-investment vehicle: (1) has the ability or the economic incentive to engage in anti-competitive practices at the expense of competitors; or (2) provides a platform for the "spillover" of otherwise competitively sensitive information which can support tacit collusion between the co-investors outside

²⁰ While it is impossible to anticipate future inflation, the ECB has a target of just below 2% per annum. According to Eurostat figures, industrial goods inflation for Italy would lie at a cumulative 4% in the five years between 2015 to 2019.

the legitimate cooperation afforded to them under the co-investment vehicle. In both types of scenarios, such potential concerns are arguably best addressed by reference to the types of governance arrangements or obligations which would direct the commercial behaviour of co-investors.

The issue arises as to whether there exists a risk of the co-investment vehicle acting anti-competitively downstream by reason of TIM's dominant position in relation to wholesale access to the primary network and its strong position at the retail level (estimated to be around 43% of the retail market share). For the purposes a competition law assessment, TIM appears to have joint control over FiberCop, rather than the sort of sole control that might provide it with incentives to foreclose downstream competitors. This is because, while TIM holds 58% of FiberCop's shares, it is nevertheless the case that KKR not only has a significant 37.5% shareholding in FiberCop (when compared to the clear minority stake of Fastweb with only 4.5%), but is also in a position to direct the strategic direction of FiberCop through the accumulation of contractual rights that KKR enjoys under the terms of the Master Service Agreement between the shareholders. These rights are so comprehensive that, when combined with the relatively high shareholding also enjoyed by KKR, our view is that they dispel any possible argument that the commercial direction of FiberCop will be anything other than a stand-alone entity whose commercial interest lies in the maximisation of its effectiveness as a provider of wholesale access services on the Italian market on non-discriminatory terms. Satisfying the principle of non-discrimination does not mean that every investor is to be treated in exactly the same manner in all circumstances, but rather that they would be treated the same only in identical circumstances. In this way, earlier investors are rewarded and those willing to provide larger commitments can be favoured over those taking smaller commitments.²¹

The provisions of the Master Service Agreement between FiberCop and TIM are remarkably detailed and provide little scope for TIM to engage in actions which seek to take FiberCop in a strategic direction that departs from that Master Service Agreement and which diverges from the spirit and content of the TIM/FC Offer. As such, the obligations contained in the FiberCop/TIM Master Service Agreement to a large extent ensure that the TIM/FC Offer is seen as having been made a co-investment offer "in good faith", in the manner required under Article 76(1)(e) of the Code. Among the many obligations imposed upon TIM in the Master Service Agreement which work towards this end, the following are arguably the most noteworthy:

- FiberCop shall supply TIM services strictly on the terms set forth in the Services Agreement and its accompanying SLA. (Section 3)
- Full transparency in the fee structure that needs to be respected by TIM with regard to services provided by FiberCop. (Section 4)

²¹ See, in particular, section 2.3.1.1 of the *BEREC Guidelines*. In this regard, note that TIM will make the largest commitments and will also assume added responsibilities in terms of retiring the copper network.

- Full transparency as regards the costs of primary network services provided by TIM to FiberCop and TIM's obligation to not discriminate in the provision of those services to alternative operators. (Section 5 and Annex 5.1.1)
- Network outsourcing work to TIM for the build-out will be determined on a turnkey solution basis, while maintenance and other services will be subject to similarly strict rules. (Section 6, 12 and 13)
- TIM will be obliged to satisfy very clear roll-out targets or risk the imposition of very strict financial penalties (Sections 7-11), along with very clear migration commitments of its customers from copper to the secondary FTTH/FTTB network. (Section 14)
- The term of the Agreement runs for a period of 15 years, with the possibility of automatic renewal. (Section 15)
- Through its participation on the Technical Committee, FiberCop is not prevented from obtaining better services and quality where TIM is not in a position to satisfy the objective standards specified by the Technical Committee. (Section 16.2.(b))
- The importance attached to the promotion of co-investment. (Refer to Recital E)
- Finally, the commitments made by TIM in Section 18.2.1 make it clear that FiberCop will maintain the governance of all activities relating to its business, including dealing with regulatory and procurement obligations, and acting as an independent fixed access services provider across Italy. (See also Recitals C, E, G and L)

The combined effect of these provisions is to make it unambiguously clear, for what is tantamount to the duration of the project, that the FiberCop co-investment vehicle is structured in such a way as to ensure that the usual competition concerns associated with horizontal competitors who might otherwise have incentives to foreclose downstream competitors cannot materialise in the circumstances of the project. TIM is provided with no commercial incentives to behave in an anti-competitive manner, is obliged expressly to satisfy obligations designed to ensure that competitors are treated equally, is financially punished if it does not satisfy roll-out targets, and the relations between TIM and FiberCop are subject to the most stringent transparency obligations. The importance attached in roll-out targets being met is reflected in the reporting obligations to co-investors found in Section 5.2 of the TIM/FC Offer. In the circumstances, given these contractual obligations which TIM must satisfy, TIM has no opportunity to act inappropriately outside the spirit of its Offer. We understand that this commitment will be further strengthened through the extension in the Master Service Agreement of liability for the failure to meet the roll-out obligations to third parties. Accordingly, the existence of these institutional constraints on

TIM means that the Offer should be assessed on its merits under the requirements set forth under Article 76 of the Code.²²

Finally, the parties have referred expressly in the TIM/FC Offer (at Point 5.2) to the anticipated adoption of a specific Protocol by the co-investors and FiberCop “*for the exchange and treatment of information that might be sensitive under a competition law standpoint*”. We understand that the sorts of concerns that would be addressed by such an Information Exchange Protocol would address the risk of “spillover” in actions between competitors, while ensuring that the co-investors do not dilute their competitive behaviour outside FiberCop through the acquisition of competitively sensitive information. To this end, we recommend that such an Information Exchange Protocol be completed as soon as possible so that it is operational by the time the TIM/FC Offer becomes effective. The implications of the parties implementing such an Information Exchange Protocol should not be underestimated, as it opens up the possibility of TIM being able to benefit in parallel from the separate clearance regime available under Article 78 of the Code for voluntarily separated vertically integrated electronic communications providers.

D. Compatibility Analysis under the Code²³

Policy Context

The Code, which was adopted in December 2018 and in which should have been transposed into Italian law before December 2020, constitutes a significant departure from the regulatory paradigm set forth in the 2002 Regulatory Framework in a number of respects. One of the main policy motivations driving the new Code is the need to drive new network investment. In an accompanying Communication,²⁴ the European Commission (“Commission”) sets out a clear vision of the central role that new, very high capacity networks (“VHCNs”) should play in the fulfilment of the goals of the Gigabit Society.

As was the case with its predecessor provision under the 2002 Regulatory Framework,²⁵ Article 3 of the Code lists the specific policy objectives that should form the basis of decision to impose *ex ante* regulation. The list of policy objectives has stayed the same since the onset of liberalisation insofar as it requires: the preservation of citizens’ interests (including disabled users); the promotion of competition; and the promotion of the internal market. This list of has now grown under Article 3 of the Code through the inclusion of a

²² For example, refer to paragraph 32 of the *BEREC Guidelines*, which confirms that governance provisions can be a relevant consideration when considering the appropriateness of conditions set in the context of a one-way access model (as occurs under the TIM/FC Offer).

²³ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, O.J. L 321/36.

²⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Connectivity for a Competitive Digital Market-Towards a European Gigabit Society, Brussels, 14.9.106, COM(2016) 587 final.

²⁵ 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, O.J. L 108/33.

new policy objective which directs institutional stakeholders²⁶ to “*promote connectivity and access to, and take-up of, very high capacity networks, including fixed, mobile and wireless networks, by all Union citizens and businesses*”.

Given the enormous costs of deploying VHCNs, the Code expressly envisages that their promotion is most likely to occur through some form of co-investment vehicle, which would facilitate the sharing of the investment risks. To this end, the Code establishes a specific regime under Article 76 for the notification and clearance of such co-investment schemes. The technological and performance targets of VHCNs are identified by reference to the deployment either of “Fibre to the Home” or “Fibre to the Building” solutions, without even the traditional reference being made to a possible technological alternative or equivalent being available in a fixed line context, in accordance with the traditional policy of technology neutrality.²⁷

To this end, the Code seeks to create a number of incentives to encourage new and existing operators to invest in VHCNs, based primarily upon the understanding that regulatory obligations shall be set aside (or at least a significant diminution of those obligations shall occur) as a *quid pro quo* to significant investments being made, provided that the particular form of co-investment vehicle adopted satisfies a set of pro-competitive conditions that are set forth in Article 76 and Annex IV of the Code. The content of those conditions is inspired in large part by the practice of competition authorities in their assessment of network sharing arrangements between actual and potential competitors.

Beyond Article 76, there are also other provisions of the Code that seek to promote positive competitive outcomes by the specification of various measures that are designed to eliminate commercial incentives of the wholesale network owner from discriminating against wholesale access seekers and retail customers. This can be achieved either through the satisfaction of the requirements of Article 80 of the Code where operators that wish to confine their operations to “wholesale-only” sales, or the requirements of Article 78 of the Code for existing operators that have been designated as holding with SMP²⁸ but which have voluntarily separated their respective wholesale and retail business units. The regulatory relief offered in these respective Articles of the Code pursues the objective of either raising the returns on investment (*e.g.*, by removing strict price controls at the wholesale level) or through the lowering of the costs of investment (*e.g.*, by providing legal certainty as regards the terms to be attached to the investment over prolonged periods of time, thereby reducing risks and the cost of capital). In all circumstances, the overriding policy objective is to stimulate investment that would otherwise be unlikely to materialise

²⁶ The pursuit of this policy objective is directed towards NRAs, Member States, BEREC, the RSPG, and any other competent authority. As regards the explanation of the underlying policy drivers behind the Article 76 regime, refer also to Recitals 198-201 of the Code.

²⁷ Where VHCN networks are deployed through a co-investment vehicle that is covered by Article 76 of the Code, it is *only* fibre networks that can benefit from the regime established under that Article, without any specification that the benefits of that Article extend to a network that is ‘equivalent’ to fibre.

²⁸ Significant Market Power, which is the regulatory equivalent of “dominance” in the field of competition law.

in the short term. It is this regulatory context in which TIM has made its offer of co-investment on the Italian market.

It is proposed under the Code that third parties can share in the full economies of scale available in a large network roll-out, but only if those third parties make commitments up-front and thereby share at least some of the financial risks that are usually associated with such large scale investments. Article 76 of the Code therefore offers the possibility that, if a large operator offers to third parties the possibility to invest in a way that is both viable and attractive for other investors, that large network owner can benefit from relief from the full potential extent of regulation. The large network operator is free to establish the conditions up-front at the start of the investment cycle and to agree on those terms with the National Regulatory Authority ("NRA") upon the commencement of the investment through the commitments procedure set forth in Article 79 of the Code. The co-investment offer is made, along with any other relevant commitments, to the NRA, which must then decide whether to accept that offer (and, in doing so, weigh up its objectives consistent with the policy priorities set forth in Article 3 of the Code). Insofar as the NRA authorizes the co-investment offer under the procedures set forth in Article 76 and 79 of the Code, the regulatory obligations otherwise foreseen under Article 68 to Article 74 of the Code will not apply (Article 76(2)).

Technical Requirements

In order for an offer of co-investment to be considered valid under Article 76 of the Code, it must meet five cumulative conditions set out in the first paragraph of the Article. These can be categorised loosely as:

- (i) the offer must be available through the lifetime of the network (Article 76(1)(a));
- (ii) the terms must be commercially attractive to the co-investors in terms of their downstream operations (Article 76(1)(b));
- (iii) the offer must be advertised and be publicly available to ensure transparency (Article 76(1)(c));
- (iv) there must be some continuity in the access relationships enjoyed by existing access seekers who do not wish to participate in co-investment on the new network (Article 76(1)(d)); and
- (v) the offer must comply with the terms set forth in Annex IV of the Code (Article 76(1)(e)), which essentially repeats the first four conditions set out above with greater precision.

Irrespective of whether an offer satisfies the pre-conditions foreseen under Article 76, NRAs have both the ability to exercise monitoring powers to ensure that there is compliance with the requirements set out in Article 76(1) and the ability to exercise their residual dispute resolution powers available under Article 26(1) of the Code (Article 76(3)).

Finally, given that the Code expressly confers powers on BEREC to issue guidelines to NRAs interpreting the conditions set forth under Article 76, with a view to ensuring a consistent application of that provision throughout the EU, these *Guidelines* were delivered by the end of 2020.²⁹ While the *BEREC Guidelines* are useful in clarifying that institution's understanding of the essential elements of Article 76, they are not binding as a matter of law, with only the text of the Code having legal force.

Threshold Issues Under Article 76

The threshold issues of how best to characterise the co-investment vehicle for the purposes of Article 76 of the Code have all been satisfied in our view:

- *First*, the FiberCop network is 'new', in the sense contemplated under Article 76 of the Code, in that not only is the network in question fibre-based,³⁰ but its deployment was also not planned before December 2018.³¹ Accordingly, a co-investment vehicle of the sort that has been established under FiberCop can benefit from an authorization decision adopted under the Article 76 regime. We do not consider that, on balance, the inclusion in the TIM/FC Offer of the network deployed previously by FlashFiber by TIM and Fastweb should undermine the essential "new" character of what is being offered by means of co-investment. Its genesis in terms of rollout only pre-dates the adoption of the Code by a matter of months in 2018, at a time when the co-investment scenario of Article 76 was already being discussed in the public domain (the roll-out was scheduled in the shadow of this regulatory change). Moreover, a major beneficiary of the FiberCop project will be Fastweb, which will exponentially increase its market presence across the whole of the Italian territory, as opposed to the geographic coverage which is currently limited to 29 cities under the FlashFiber project. In addition, we understand that significant investment would need to be made in the existing FlashFiber network in order to render it technology-compatible with the network architecture being deployed by FiberCop and to ensure it would be rendered accessible to third party co-investors in the same way.³² These two elements constitute important points of departure from the existing FlashFiber alliance. Finally, the inclusion of these network elements is voluntary, given that the areas currently covered by FlashFiber will be likely to be de-regulated or subject to less onerous access obligations under the next

²⁹ BoR (20) 232 "*BEREC Guidelines to foster the consistent application of the conditions and criteria for assessing co-investments in new very high capacity network elements (Article 76 (1) and Annex IV EECC)*", dated 11 December 2020.

³⁰ See *BEREC Guidelines*, paragraphs 10 and 14.

³¹ And also after the EECC was due to come into force into national law, namely, 20 December 2020, although it is permitted that investors could also anticipate this outcome. The late transposition of the Code into national law in Italy should not impact adversely upon the application of a provision such as Article 76 of the Code, consistent with the application of the principle of "direct effect". See paragraphs 16 and 17 of the *BEREC Guidelines*.

³² See footnotes 15 and 18 of the TIM/FC Offer and the text associated with those footnotes.

scheduled market review.³³ This means that the FiberCop network also constitutes the equivalent of a “step change” improvement on its FlashFiber predecessor from a regulatory point of view. As such, and because it will serve the purpose of completing the territorial reach of the co-investment offer and play a role in the fulfilment of very aggressive deployment timelines, the inclusion of the FlashFiber network elements will generate a climate of greater commercial certainty to co-investors who might doubt that the challenging milestones of the FiberCop project can be met. In these circumstances, the inclusion of the FlashFiber network is necessary to support the overruling public policy purpose of promoting investment in VHCN while enabling competition and the attendant benefits for end users.

- *Second*, the infrastructure of the FiberCop network concerns that portion of the network from the street cabinet (CRO) to the end user premises, with the network being constituted by point-to-point fibre. The exceptions to this deployment model are limited to those situations where there exists a technical constraint on the delivery of fibre directly into the end user premises, in which case FiberCop brings the fibre up to the building.³⁴ As such, a new sub-loop network, as opposed to a complete access network, is also explicitly acknowledged under the *BEREC Guidelines* as a qualifying network under the Article 76 regime (at paragraphs 20- 21).
- *Third*, FiberCop constitutes a co-investment scheme, insofar as Article 76 of the Code embraces a number of different legal vehicles that are able to benefit from the authorization procedure available under that provision. Thus, a non-exhaustive list of “examples” is cited in paragraph 1 of Article 76, when it refers to “*by offering co-ownership or long-term risk sharing through co-financing or through purchase agreements giving rise to specific rights of a structural character by other providers of electronic networks or services*”. BEREC also identifies different co-investment forms,³⁵ including Joint Ventures (JVs) where multiple parties invest in a vehicle, reciprocal access where two or more parties build networks and then ‘swap’ access lines, one-way access models where IRUs or long term access conditions are set out, and different combinations of the first three options. The co-investment offer from TIM is being put forward as a one-way offer, which falls squarely within the scope of Article 76 (although the voluntary separation effected by TIM in parallel also complies in large measure with Article 78). Certain aspects of the relationship between TIM and FiberCop, as reflected in their Master Service Agreement, are reminiscent of traditional JV relationships which can also benefit from the Article 76 review process (as is

³³ Refer to AGCOM Decision No. 348/19.

³⁴ See paragraphs 10 of the *BEREC Guidelines*, which specifies that only FTTH networks qualify for co-investment, and paragraph 11, which allows that technical exceptions are allowed provided the fibre is brought to the building.

³⁵ Because one of the conditions make explicit reference to reciprocal access, which is a specific form of co-investment, BEREC was obliged to attempt a taxonomy. Refer to *BEREC Guidelines*, paragraph 24 *ff*.

reflected in Point 5.3 of the Offer, which could allow equity participation over the first 12 months of the life of the co-investment project, subject to the satisfaction of shareholder agreement conditions). The core of the TIM/FC Offer, however, lies in the one-way offer to co-investors made available under two alternative options, namely: (a) IRU access, where the lines are bought for their lifetime from the CRO; or (b) a pay-per-use option with minimum guaranteed commitments. These different co-investment models all appear to fall within the modes of participation envisaged under the Code, as elaborated upon by BEREC.

- *Fourth*, Article 76(2) of the Code provides that the type of regulation to which the co-investment body will be subject is limited to the extent that the SMP-designated operator taking part in the co-investment is accompanied by at least one other co-investor. The involvement from the outset of Fastweb as a minority shareholder in FiberCop should in principle satisfy this provision of the Code. Given the fact that the formation of FiberCop was not characterised as a “full function” Joint Venture by the European Commission,³⁶ there is every suggestion that, although TIM enjoys sole control over FiberCop in law, the contractual obligations set forth in the Master Service Agreement are also consistent with KKR exercising a meaningful degree of strategic influence over the commercial and technical direction of FiberCop. To this end, Fastweb, as the minority shareholder, is more meaningfully characterised as the first co-investor in the FiberCop vehicle.³⁷

Substantive Requirements Under Article 76

(i) Lifetime of the network

The first substantive condition that needs to be satisfied under Article 76(1)(a) is that the offer remain “*open at any point during the lifetime of the network*”. The lifetime of the network is the planned commercial duration of the network – in this case, twenty (20) years. When considering how this provision should be interpreted, it needs to be taken into account that the Code expressly foresees that the specific form which the co-investment may take may vary over the lifetime of the network (see above), as may the terms and conditions that apply under that co-investment plan, insofar as that pattern of variation can be justified in terms of supporting the level of risk borne by the project.³⁸

As noted above, a direct equity participation possibility could be available for a limited period of time at the outset of the project subject to review and the existing shareholder agreement. This in part reflects the JV aspects of the project, where the JV partners are

³⁶ Refer to European Commission Letter to TIM and KKR in Case C.1806, dated 30 November 2020.

³⁷ This is irrespective of whether its permission to integrate the FlashFiber operations into FiberCop was granted to TIM under the FlashFiber Bylaws (Clause 17), given that the rights in question related, in our view, to the protection of a minority shareholder.

³⁸ Refer also to *BEREC Guidelines*, at paragraphs 41 and 50.

locked into the risk/gain profile of the JV from its earliest stages.³⁹ Thereafter, both of the one-way options are open during the lifetime of the project. The ability of parties to avail themselves of either of these one-way access options turns on the risk profile that each new participant wishes to embrace. Accordingly, participants taking the IRU option face a fixed fee that exists during the rollout period (initially up to 2025), which covers the full 20-year period. In the eyes of investors availing themselves of this option, taking this option allows them to avoid any minimum commitment, particularly if they anticipate a large but uncertain customer base. For example, if a co-investor expected that they would have 30 customers at a CRO but hoped to push that to 60 customers over one year, taking an IRU at a CRO would result in an initial cost per user of €3500/(240*30) or approximately 50 cents a month per customer. If the number of customers grows to 60, the monthly charge halves. Co-investors with less confidence of their ability to grow market share (or their ability to get other operators to coalesce around them) are more likely to avail of the pay-per-use option directly.

In turn, parties taking the access option *after* the 2025 watershed cannot avail themselves of the fixed fee option, but must bear the market price, as the initial risk of the project will have diminished significantly. As discussed above, parties taking the pay-per-use option which is subject to minimum commitments face a sliding scale of charges over the period of network rollout, namely, until the end of 2025. After that period, access continues but without the price guarantees for late participants. In parallel, it should be noted that other co-investors are free to offer wholesale access on their own terms, while it cannot be ignored that other network operators also exist on the Italian market – especially in the form of Open Fiber – which acts as an ongoing constraint on wholesale access pricing.

The approach set out in the TIM/FC Offer, by creating a coherent “tiered” system of investment rewards which reflect the different stages of risk over the lifetime of the network and by establishing reasonable standards of participation in the later tier of that participation to ensure that the level of participation in the project is high, means that the Offer *prima facie* meets the first condition of Article 76(1) of the Code, as amplified in Annex IV of the Code and as interpreted by BEREC.⁴⁰

Whether these options coming to an end by the end of 2025 is wholly consistent with existing competition law practice under the general principle of “proportionality” is a matter which is considered separately below under the discussion on competition law principles. As is demonstrated below, a period of anything from 5 years upwards has been accepted in the Commission’s competition law administrative practice as being appropriate to foster a sustainable competitive environment in circumstances where it is deemed necessary to support new market entry.

³⁹ Refer to discussion on cut-off dates in a JV scenario in the *BEREC Guidelines*, at paragraph 43.

⁴⁰ Refer to discussion in the *BEREC Guidelines* at paragraphs 72-76 regarding the flexibility afforded to the parties in formulating the rights afforded to co-investment latecomers under the one-way access model of co-investment.

(ii) Sustainable competitive positions in downstream markets

The second pre-condition under Article 76(1)(b), namely, that the co-investment offer should allow the other co-investors “*to compete effectively and sustainably in the long term in downstream markets*”, is further refined in three specific requirements set out in Annex IV of the Code (the fourth requirement is not appropriate in the circumstances, given that it refers to a specific form of co-investment, namely, reciprocal access, which falls outside the scope of the Offer). In order to satisfy those more granular requirements, the offer must be Fair, Reasonable and Non-Discriminatory (or ‘FRAND’ in the industry’s terms).⁴¹

Variations in terms are allowed under Article 76(1)(b) where justified on the understanding they reflect the different levels of investment risk being borne by the various parties in light of factors such as their level of commitment to the project. In fact, variations in pricing and other conditions may be *required* as a matter of law under Article 76 if indeed they are to better reflect the risks of investment for earlier/later stages of the project, larger and smaller investors, and so forth. In addition, access should be available to the full capacity of the network so that the network performance characteristics should *not* constrain a downstream competitor from providing its retail services. We cannot identify any such constraints in the TIM/FC Offer, or anything suggesting that co-investors’ retail positions should be limited in any way,⁴² and the behavioural commitments under the Master Service Agreement (see above) confirms the unlikelihood of any such scenario materialising.

There must also be flexibility as to the timing and the value of the co-investment to be made by the co-investors, with BEREC accepting that very small participants can be treated differently where this is justified on technical grounds or where it reflects the appropriate level of risk being borne by the network to carry such small participants.⁴³ Even if this possibility is taken into account, TIM’s Offer nevertheless allows for the aggregation of small units of demand, while also allowing for the possibility of carry-overs and the use of tolerance bands around guaranteed minimum purchases.

TIM’s Offer also provides co-investors with the ability to increase their level of participation in the future. While BEREC recognises that there may be limits on the extent of such an increase in participation,⁴⁴ given that there will be a limit on the ability to increase the number of lines (since it is necessary for another participant to relinquish them), TIM’s Offer allows IRU operators to expand their participation without prior commitments for up to 75% of the units at the average CRO, while using guaranteed minimums that allow co-investors to operate within certain bands for the back and forward ‘carry-over’ mechanism. This means that such an investor could increase its participation by 10% without the need for renegotiation. Any restrictions on the ability to increase participation must necessarily be subject to coherent limitations, as is recognised by

⁴¹ Refer to discussion at paragraphs 54, 56 and 57 of the *BEREC Guidelines*.

⁴² See *BEREC Guidelines* at paragraph 102 (*i.e.*, there must be no limits imposed on the extent of market share achieved at the retail level).

⁴³ See discussion in *BEREC Guidelines* on the scope of differentiation foreseen, at paragraphs 79-90.

⁴⁴ Refer to paragraph 101 of *BEREC Guidelines*.

BEREC,⁴⁵ since, once fully allocated, an increase in one party's participation implies a decrease in another party's participation. What must be acknowledged, however, is that these reasonable and proportionate constraints at the wholesale level do not constrain in any way an operator's ability to compete at the retail level since there is no restriction on co-investors limiting their supply to situations of self-supply.

All co-investors are offered FRAND terms relative to the time they join, including in terms of price. Not all potential co-investors are offered exactly the same terms, but differences are justified on the basis of the same objective, transparent, non-discriminatory and predictable criteria.⁴⁶ The TIM/FC Offer allows a low minimum scale of 10% in the case of commitments being taken up, and even allows very small operators with as little as 1% market share to join with another co-investor to participate on the same terms. There is, as described above, the ability to gradually increase the level of participation, while at the same time reflecting the fact that early investors accept greater risks and engage capital sooner; as a result, it is appropriate for them to enjoy better terms since the charges increase over time. In turn, those who enter as co-investors can transfer their rights (subject to maintenance of the original conditions).

Accordingly, there is nothing to suggest that the position of participants is adversely affected in any way in terms of their downstream competitiveness by the manner in which the TIM/FC Offer is framed. This should mean that the second pre-condition to the operation of Article 76 has been satisfied. The only manner in which we could envisage that the interests of such third parties in downstream markets might be adversely affected in the abstract is where wholesale access terms are not reasonable, which we address below in the consideration of the fourth pre-condition (namely, the terms of access).

(iii) Transparency of market offer

The third pre-condition that needs to be satisfied under Article 76(1)(c) is that the offer process must be transparent to the public, with the offer to co-invest needing to be made at least 6 months before the deployment of the network commences (unless it has the characteristics of a "wholesale-only" scenario). According to view of BEREC, that publication can occur pre- or post- agreement with the NRA (provided that any alterations or refinements do not amount to a substantial change in the offer made).⁴⁷

Annex IV of the Code establishes a series of transparency obligations in paragraph (b) of its text which we understand the parties to the co-investment will readily fulfil, based on the terms and publicity already attached to the Offer made on its website by TIM to interested participants on 1 February 2021.

As an alternative to 1 February 2021, the entering into a binding Shareholders' Agreement on 31 March 2021 between the parties and FastWeb might possibly be treated as the triggering event that "publishes" the TIM/FC Offer with binding legal effect to third

⁴⁵ *Ibid.*

⁴⁶ Refer to the terms listed in Annex IV of the Code and the discussion in paragraphs 54, 72 and 79 of the *BEREC Guidelines*.

⁴⁷ Refer to paragraph 113 of the *BEREC Guidelines*.

parties, given that any letters of intent signed in the summer of 2020 among the parties to the FiberCop project were not binding until a definitive agreement was concluded on March 31st by all the parties constituting the FiberCop project. As of that point, it is also just as appropriate to treat FastWeb as the party which first takes up the co-investment offer. This is without prejudice to its position as an investor in the FiberCop project but, given its small minority holding in FiberCop, it cannot be deemed to hold the same status as TIM and KKR which jointly control the venture. In a similar vein, in the event that KKR were to enter the telecommunications sector as an operator in its own right, one could imagine that it might be able to be a co-investor when acting as the acquirer of capacity from FiberCop.⁴⁸

By the same token, the date of publication of the co-investment offer might not coincide precisely with the commencement of the timelines set forth in the co-investment offer, for the reason that AGCOM might take the view that legal rights under the co-investment offer materialise only once a formal position of AGCOM under the Article 76 regime is reflected in a decision adopted under the commitments procedure set forth under Article 79 of the Code. It is arguably only as of that later time that the full extent of the conditions that need to be offered to future co-investors will be known so that they can take all the necessary internal steps to secure their participation in the project.⁴⁹

This possibility will push the originally scheduled project timetable back, and the parties need to consider extending all the timeframes envisaged under their tiered approach so that they comply with this potential extension in time of the deemed “publication” date. In other words, the envisaged date of 2025, for example, might need to be extended to a period in 2026 (without prejudice to whether this period would be extended further in the event that AGCOM took the view that co-investors should be afforded a longer period in which to determine if they are to co-invest).

(iv) Continuity for access seekers

The final pre-condition under Article 76(1)(d) that the TIM/FC Offer must satisfy is that the co-investment regime must ensure continuity in the access relationships currently enjoyed by market operators who do not wish to co-invest.

Those access seekers must, at a minimum, be able to enjoy access of the same quality, at the same speed, and end-user reach under comparable conditions, so that they can reach end-users at the level they reached them prior to deployment of the co-invested network (*i.e.*, their access experience must be at least as good as what was available to them over the old copper network), subject to a mechanism that allows them to adapt incrementally to the de-commissioning of the copper network, so that they can continue to make credible offers in the retail market for a reasonable period of time. Timing, pricing and quality (mainly the issue of speed) are likely to be the most important parameters when an NRA

⁴⁸ It being understood that AGCOM might avail itself of the procedure to seek the views of stakeholders in the context of commitments offered under Article 79 of the Code if there are elements of the Offer that AGCOM considers require greater clarity.

⁴⁹ See paragraphs 107 and 113 of the *BEREC Guidelines*.

considers whether the essence of an existing access relationship is being preserved under the adaptation mechanism adopted under a co-investment offer.⁵⁰

The terms of the TIM/FC Offer require FiberCop to make available to third parties access on terms that allow participation in the retail market, while at the same time being sufficiently distinct from the terms enjoyed by co-investors in order to render co-investment a more commercially attractive for them. In doing so, Article 76(1)(d) anticipates that TIM needs to calibrate its access terms in such a way that it should avoid the two commercial extremes of, on the one hand, an access price that so high that it leaves no margin to access seekers to compete at the retail level, and on the other level, an access price that is so low that co-investors find themselves at a disadvantage despite taking on additional risks. To this end, the only material legal standard established under the Code can be found in Annex IV of the Code (at paragraph 5 of part (c)), where it is stated that a co-investment vehicle “*shall provide access to the network to all co-investors, whether directly or indirectly, on an equivalence of inputs basis and in accordance with fair and reasonable terms and conditions, including financial conditions that reflect the different levels of risk accepted by the individual co-investors*”.

Given that TIM has asserted in Point 7 of its Offer that it will comply with the pre-condition set forth in Article 76(1)(d) of the Code, we anticipate that the issue of whether or not the TIM/FC Offer should be more detailed to satisfy the terms of Article 76(1)(d) as regards access terms and conditions is something that will be elaborated upon in the course of the commitments procedure conducted under Article 79 of the Code. In this regard, however, it also needs to be emphasised that AGCOM not only has the power to monitor compliance with the conditions set out in paragraph (1) of Article 76, but also the power to exercise its dispute settlement powers (Article 76(3)); the exercise of these residual powers will in all likelihood be sufficient to ensure ongoing compliance with Article 76(1)(d) of the Code.

It is particularly instructive in this regard to take into account that, by incorporating FlashFiber into FiberCop, our understanding is that access seekers would be able to benefit from existing access conditions under the Article 76 regime, even though they might have otherwise been removed under a subsequent market review when AGCOM will be required to assess whether or not an SMP designation can be made in relation to the 29 cities currently covered by FlashFiber.

E. Competition Law Analysis

Although the conditions of Article 76 and Annex IV of the Code and the accompanying commitments procedure set out in Article 79 of the Code are fundamentally based on a competition law analyses, we consider that the determination of the fundamental elements of the co-investment Offer can be assessed favourably in light of prevailing competition law principles explored by the Commission which may be relevant in determining whether certain elements of the Offer are proportionate in light of their likely impact on the market. Competition precedents are particularly instructive in assisting regulators in the determination of whether or not certain types of obligations are reasonable and

⁵⁰ Refer to paragraphs 125-135 of the *BEREC Guidelines*.

proportionate in the circumstances, given the range of concerns expressed by competition law authorities in light of “unilateral” or “coordinated effects” theories of harm relating to potential restrictions of competition.

First, it is possible to determine the reasonableness of the duration of certain conditions established under the co-investment vehicle by reference to commitments decisions already adopted by the Commission in connection with its desire to open up market entry possibilities in the face of market concentration caused by the merger of electronic communications providers (under the *EU Merger Regulation*),⁵¹ or through the sharing of infrastructure by providers of electronic communications networks and services (either under the *EU Merger Regulation* or Article 101 TFEU). Thus, the Commission has usually seen fit to negotiate with merging parties to obtain access commitments or capacity allotments to new entrants for periods from 5 years onwards,⁵² irrespective of whether the anticipated impact on the market of the cooperation or merger is of much longer duration.⁵³ Even in the energy sector, the Commission has generally sought to restrict the duration of certain access-based commitments to a period of ten years,⁵⁴ despite the fact that energy sector investment cycles are much longer than their telecommunications counterparts.

What is particularly notable about these commitments is that their duration is comparable to the periods specified in the TIM/FC Offer as governing the different tiers of co-investment. Indeed, given that the TIM/FC Offer is designed to generate new forms of competition, rather than remedying situations where a restriction of competition is being addressed (*i.e.*, as a result of the merger or Joint Venture), it is reasonable to anticipate that the periods specified under the TIM/FC Offer are proportionate in light of the investment risks being borne. The life-cycle of active equipment in telecommunications networks tends to be based on 5 year periods, with the TIM/FC Offer assuming by its terms that access seekers who deploy their own network up to the CRO will be accommodated

⁵¹ Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings, O.J. L 24/1.

⁵² For example, refer to Case M.9674 – *Vodafone Italia/TIM/Inwit JV*, Commission Decision of March 2020 (8 years), providing free space on a minimum number of towers. See also Case M.9064 – *Telia/Bonnier Broadcasting*, Commission Decision of November 2019 (period of 1-5 years), for the licensing of “stand alone” OTT rights. Refer also to Case M.7612 – *Hutchison 3G UK/Telefonica UK*, Commission Decision of May 2016 (5-10 years), offering capacity-based wholesale agreement on mobile communications RAN. Refer also to Case M.6992 – *Hutchison 3G UK/Telefonica Ireland*, Commission Decision of May 2014 (5 years, with a possibility of extension by another 5 years), offering capacity, including an incremental fee by reference to any increase in operating costs during second 5-year term. The offer to acquire divestment spectrum was valid for 10 years. In France, the Competition Authority decided in March 2013 (Opinion 13-A-08) that a national roaming agreement for 2G and 3G services to the benefit of a new entrant would last for 10 years between 2012 and 2022.

⁵³ In Italy – *Telecom - Fastweb Fibre Deployment*, AGCM Decision of March 2018, a period of 17 years was provided for prior to the winding down of a cooperation arrangement, on the basis that this period was deemed necessary in order for the parties to recoup their investment.

⁵⁴ See Case M.5467 – *RWE/Essent*, Commission Decision of June 2009; *cf.* Case M.5978 – *GDF Suez/International Power*, Commission Decision of January 2011 (in both cases, the parties committed not to acquire any direct or indirect interest in the divested business). See also Case M.3696 – *E.ON/MOL*, Commission Decision of December 2005 (10 year commitment not to buy shares in specified companies and 8 years to implement a gas release programme).

through those life-cycles.⁵⁵ In these circumstances, the offer of IRUs for the first five years of the FiberCop project appear to be proportionate and reasonable, with a period of 7 years serving as a relevant benchmark in the mobile infrastructure sharing arrangements approved recently by the Commission in the *Vodafone Italia/TIM/Inwit JV*, which did not have recourse to the more favourable VHCN-specific treatment afforded under the Article 76 procedure.

Second, the Commission's commitments practice in competition cases, when determining the capacity volumes that are necessary to promote competition, has consistently required that parties set aside a reasonable amount of capacity (ranging from 5% to 10% of available capacity, 10-20% and 20-30% in more extreme cases)⁵⁶ which will not adversely impact on their own operations,⁵⁷ commit to upgrading a specified minimum number of connections,⁵⁸ remove clauses that would limit the amount of available capacity for third party operators,⁵⁹ and guarantee a certain number of fibres for third party operators will be deployed.⁶⁰ TIM's offer sees 2 splitters being made available (each implying access to a potential 64 units), so that 75% of available units can in principle be reached with those two splitters. The fact that there is no explicit or implicit correlation between the wholesale and retail layers of the market is also important; a co-investor with any given number of wholesale access lines can achieve a higher (or lower) retail market share by buying from (or selling to) other co-investors. The advantages offered in terms of scale to co-investors suggests that an active wholesale market is likely to emerge.

Third, when considering the extent which parties can be legitimately excluded from a particular "platform" without restricting competition, the standards usually adopted vary depending on whether the platform in question is deemed to be essential for third parties to be able to sustain their competitiveness or whether access to the platform is merely desirable. The highest competition law standard that is set is that of FRAND access terms⁶¹ or, where capacity is severely restricted, "first come first served".⁶² In a number of cases, the dominant firm is obliged to offer access whenever requested and also to migrate access

⁵⁵ Notice of change or technology transitions in an *ex ante* context follow these norms, see for example the *NGA Recommendation* (2010/572/EU).

⁵⁶ See Case M.7612 – *Hutchison 3G UK/Telefonica UK*, Decision of May 2016; see also Case M.6992 – *Hutchison 3G UK/Telefonica Ireland*, Decision of May 2014. See also Case M.9064 – *Telia/Bonner Broadcasting*, Decision of November 2019.

⁵⁷ In a number of cases in the energy sector, given the overarching policy desire to forge a truly pan-European energy market, suppliers have in certain limited circumstances been compelled to increase their existing capacity where it was felt that they were purposefully restricting capacity as a means of restricting competition. That type of scenario has never been considered to be appropriate in the telecommunications context, where networks are fundamentally national (or sub-national) in scope.

⁵⁸ See *Germany - Telekom Deutschland – EWE Fibre Deployment*, Decision of December 2019.

⁵⁹ For example, *Italy – Telecom - Fastweb Fibre Deployment*, AGCM Decision of March 2018.

⁶⁰ *Ibid.*

⁶¹ See Case M.9064 – *Telia/Bonner Broadcasting*, Decision of November 2019. See also Case M.7612 – *Hutchison 3G UK/Telefonica UK*, Decision of May 2016.

⁶² See Case M.9674 – *Vodafone Italia/TIM/Inwit JV*, Commission Decision of March 2020.

conditions so that they embrace next generation technologies, as they develop,⁶³ while also often being obliged to supply access on prescribed regulatory terms.⁶⁴

In the circumstances of the FiberCop project, the parties clearly foresee that access will be available to third parties on FRAND terms and there is nothing to suggest that this aim cannot be fulfilled in light of the parties' understanding of the likely take-up in demand.

Fourth, competition precedents in merger control proceedings consistently address concerns regarding the potential "spillover" of competitive information between competitors beyond what is strictly necessary for them to complete their pro-competitive purpose. They do so principally through the erection of information barriers or other forms of information "ring-fencing"⁶⁵ between the parties so as to ensure that competitively sensitive information is not exchanged which would adversely impact upon their incentives to compete at the retail level or to foreclose competitors at that functional level of the market. Although KKR is arguably not affected by these types of concerns, given its role as a strategic investor rather than as a competing telecommunications operator, these types of restrictions would need to be considered as between co-investors which compete with one another outside the confines of the FiberCop vehicle (e.g., TIM and Fastweb).

To this end, we understand that the Information Exchange Protocol foreseen in Point 5.2 of the TIM/FC Offer envisages the crafting of a similar mechanism to address the potential concerns around spillover which might lead to tacit collusion outside the scope of FiberCop. In this regard, the practices endorsed by trade associations to anonymise the commercially sensitive information of their members also provide a basis upon which such a protocol can function.⁶⁶

Finally, given that many of the elements of the Article 76 regime are based on competition law principles, it is only reasonable to take due account of the manner in which the Commission subjects *prima facie* competitive restrictions contrary to Article 101(1) TFEU to the balancing exercise conducted under Article 101(3) TFEU in determining whether the efficiencies generated by the FiberCop arrangements override the impact of any technical infringement identified in the cooperation of actual and potential competitors. In this regard, the broader welfare benefits generated by the deployment of VHCNs, the migration of customers from copper to fibre, the decommissioning of the copper network, and the satisfaction of environmental targets, are all factors which can be taken into account in an Article 101(3) analysis.

⁶³ For example, refer to Germany - *Telekom Deutschland – EWE Fibre Deployment*, Decision of December 2019. See also Case M.7612 – *Hutchison 3G UK/Telefonica UK*, Decision of May 2016.

⁶⁴ Refer to Case M.7612 – *Hutchison 3G UK/Telefonica UK*, Decision of May 2016; Case M.3696 – *E.ON/MOL*, Commission Decision of December 2005.

⁶⁵ See, for example: Case M.9064 – *Telia/Bonner Broadcasting*, Decision of November 2019; Case M.7612 – *Hutchison 3G UK/Telefonica UK*, Decision of May 2016; Case M.4035 - *Telefonica/02*, Commission Decision of January 2006; Case M.5467 – *RWE/Essent*, Commission Decision of June 2009; Case M.5978 – *GDF Suez/International Power*, Commission Decision of January 2011.

⁶⁶ In this regard, refer to the approach of the European Commission in its so-called *Horizontal Guidelines*, OJ C11 of 14.01.2011.

Beyond the context of Article 101(3) TFEU, these sorts of benefits are considered in the context of merger control as “efficiencies” which might otherwise justify a merger which results in a concentration of market power in the hands of the merged entity. In a recent Judgment relating to the *Three/O2* merger, the General Court of the European Union referred to the Commission’s decision-making practice, according to which, while network-sharing agreements might present competitive risks, they may also “*produce substantial economic benefits in terms of costs savings, improved coverage, and faster network roll-out*”.⁶⁷ The General Court annulled the Commission’s Decision blocking the merger *inter alia* on the ground that the Commission had not adequately taken into account the benefits of greater and speedier network upgrading by reason of merger.

In addition, the fulfilment of the environmental targets set under the Commission’s Green Deal initiative (see discussion above) in an Article 101(3) context also has a particular resonance when considered in the context of the Code. These environmental targets provide an important additional context for the FiberCop co-investment offer since it permits TIM to address the inherent conflict derived from its ownership of the copper network which creates a ‘replacement cost’ from making the transition to fibre. By enabling that transition to fibre, there is a significant environmental dividend since there are two important environmental impacts, namely: (i) a direct effect deriving from the fact that fibre networks use vastly less energy than copper networks; and (ii) the ability to move more economic and social activity online (including remote medicine and home education), while also allowing more efficient production mechanisms and closer monitoring of those mechanisms, each of which has a positive environmental impact. As the FiberCop network plan sees copper networks being retired in the period between 2027 and 2030, the realization of these ancillary Green Deal targets become more credible.

Although the regime prescribed under Article 76 of the Code arguably “covers the field” under which a co-investment vehicle in the sector should be assessed, it is nevertheless instructive to turn to competition law principles as a yardstick by which the proportionality of certain restrictions can be measured. In our view, subject to the potential small variations in terms of duration and the level of specificity of certain obligations, we consider that the TIM/FC Offer sits comfortably with the competition law principles developed by the Commission in its administrative practice.⁶⁸

⁶⁷ Judgment of the General Court in Case T-399/16, *CK Telecoms UK Investments v. Commission*, 28 May 2020, paragraph 339. See also Commission Decision 2003/570/EC of 30 April 2003 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement — Case COMP/38.370 — *O2 UK Limited/T-Mobile UK Limited*, O.J. 2003 L 200, p. 59; Commission Decision 2004/207/EC of 16 July 2003 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement — Case COMP/38.369 — *T-Mobile Deutschland and O2 Germany: Network Sharing Rahmenvertrag*, O.J. 2004 L 75 p. 32.

⁶⁸ And also consistent with the precedents developed by National Competition Authorities in relation to network sharing or co-investment vehicles in the telecommunications sector. See the overview of national case studies in the CERRE Report on “*Implementing Co-investment and Network Sharing*”, (Marc Bourreau, Steffen Hoernig & Winston Maxwell), May 2020, Chapter 6.

F. Best Practices Derived from Other Co-investment Regimes

In conducting an analysis under both the terms of the Code and under competition rules, we have taken note of common practices used to share risk in large investment projects. The types of projects which are most instructive in understanding how the sharing of risk can be managed without harming competition are in our view derived from the regimes that usually apply respectively in relation to energy pipeline and undersea cable consortia, both of which involve significant levels of risk and capital investment outlays, in addition to affecting trans-national markets.

Submarine cables

Consortia investing in submarine cable provide some inspiration for the co-investment vehicles that should be adopted under Article 76 of the Code. The history of investment in such cables occurred over the course of the twentieth century through a “club” of operators – invariably local monopoly telecommunications providers – raising the necessary capital to build the cable and to commit to its long term maintenance. The recovery of their investment was ensured by the monopoly providers having rights to use the available capacity in their home market on an exclusive basis.⁶⁹ Modern submarine communications cables consist of a set of 6 to 24 glass fibres, designated to withstand harsh environmental conditions for a period of around 20-25 years. After construction, other operators were permitted to purchase an exclusive and irrevocable right to use a specified amount of capacity, usually in the form of an IRU, for a period of usually between 20-25 years (depending on the undersea cable in question).

Those parties taking IRUs obtained them at prices higher than those carrying the up-front risks of deployment, and the IRUs did not convey any management rights in relation to the cable. A lower tier of investment was comprised of participating operators taking international private leased circuits (IPLCs) for shorter terms, but at higher prices. The “club” members could control the availability and prices of both IRUs and IPLCs, with available capacities being often limited. Whatever access terms were available were either negotiated freely or, insofar as the submarine cable touched the territory of a given State, subject to specific regulation or competition rules. In addition, a series of international

⁶⁹ For an overview of the history of the commercial conditions associated with the laying of submarine cables, refer to: HIPSSA Guidelines, “Access to Submarine Cables”, ITU 2013, https://www.itu.int/en/ITU-D/Projects/ITU-EC-ACP/HIPSSA/Documents/FINAL%20DOCUMENTS/FINAL%20DOCS%20ENGLISH/submarine_cables_ecowas_regulation.pdf; see also OECD, “International Cables, Gateways, Backhaul and International Exchange Points”, Working Party on Communication Infrastructures and Services Policy, OECD Digital Economy Papers No. 232, 18 February 2014, <https://www.oecd-ilibrary.org/docserver/5jz8m9jf3wkl-en.pdf?expires=1616584585&id=id&accname=guest&checksum=4AE18850F1DB311889C79DC024549D7E>; AS Subseamarine, “Assessing the rights of IRU holders in uncertain times”, Columbia Law Review 103 (2003), pp. 2094-2123, <https://www.jstor.org/stable/3593384?seq=1>; Tara Davenport, “Submarine Cables, Cybersecurity & International Law: An International Analysis”, Cath U.J.L. & Tech (2015), <https://scholarship.law.edu:jlt/vol24/iss1/4>.

bodies plays an important role in addressing a range of issues that arise in areas outside the territorial waters of individual States.⁷⁰

As liberalisation measures became more prevalent from the late 1980s onwards, the more general regulation of access conditions began to apply to market relationships with undersea cables, especially insofar as the cable interconnected to a cable landing station controlled by the club members on the territory of a given States, international gateways and the right to backhaul services⁷¹ was affected. The more liberal regimes extended non-discriminatory access provisions to such relationships, and reference Interconnection Offers have often been adopted. The first non-club funded undersea cable became operational in 2004, having been initially laid in 1989. This resulted in many more competitive alternatives for landing sites and a growing number of alternatives available through satellite communications. Currently, undersea cables are operating all over the globe and are subject increasingly either to complex public-private ownership structures or deployed by technical specialist providers, with the IRU participation model being used in a majority of cases under both scenarios, although not exclusively.⁷² Indeed, as greater competition in the provision of submarine cables has taken place, the use of the IRU approach to participation has arguably tended to become less widespread.

Energy pipeline projects

The financing and risk associated with larger transnational energy pipeline projects (gas and oil) is rendered more complex because sovereign States often play a very active role in their financing, with States at the originating, terminating and transit territories inevitably involved in the deployment of a pipeline. Given the variation in the types of stakeholders involved in an energy pipeline project, cooperation between the participating States involved is usually unavoidable. Thus, detailed transit rules for energy apply to 52 member countries around the world under the Energy Charter of 1994, with cross-border pipelines being generally governed by bilateral or multilateral inter-governmental agreements (IGAs) signed between the States involved.⁷³ Given the concerns usually associated with

⁷⁰ In this regard, refer to the workings of the International Cable Protection Committee (ICPC), established in 1958, which is an industry-based organisation that includes submarine cable owners, operators, suppliers and, as from 2010, governments. Note that submarine cables are not registered in any particular nationality, but belong to private companies; see Convention of the High Seas, Article 2 (April 29, 1958, 450 U.N.T.S. 82).

⁷¹ Backhaul services are regulated in some Member States where it be demonstrated that they can satisfy the so-called “three-criteria” test or where they fall within another recommended market such as leased lines or are ancillary to other defined broadband markets set forth under the various *Relevant Market Recommendations* issued periodically by the Commission.

⁷² The Commission has had cause to assess the competitive options available in the construction of undersea cable in a number of cases, including: Case No. COMP/M.1926 – *Tyco/Telefonica/JV*; Case AT.39610 – *Power Cables*.

⁷³ For an overview of the various commercial relationships and legal issues involved in energy pipeline projects, refer to Directorate-General for Internal Policies, “*An Assessment of the Gas and Oil Pipelines in Europe: An Extensive Briefing Note*”, November 2009, PE 416 239, [https://www.europarl.europa.eu/RegData/etudes/note/join/2009/416239/IPOL-ITRE_NT\(2009\)416239_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/note/join/2009/416239/IPOL-ITRE_NT(2009)416239_EN.pdf). Refer also to Energy Charter Secretariat, “*Intergovernmental and Host*

achieving security of supply, it was not uncommon for very large energy pipeline projects to have a duration as high as 50 or 60 years, with more recent projects having a duration of 25-30 years where investment risks are less pronounced and in order to accommodate competition concerns (although for certain smaller projects, the duration of the arrangement might be as low as 20 years).

Investments are usually made with the involvement of multiple shareholders, using with the originating destination shareholder (*i.e.*, the producing State or its national monopoly operator) bearing a major portion of the overall investment risk. The involvement of national governments or large government-controlled operators is designed to ensure that a sufficient supply of gas can be ensured. The investment regimes do not usually take the form of closed investor clubs, having some mechanism that allows new investors to join the pipeline consortium. Those new investors would receive a certain equity option of a fixed percentage to participate as new shareholders in the consortium. That would typically be regulated in what is known as an Equity Option and Funding Agreement between the consortium members (shareholders) and the new investors.

Within the EU, the entities investing in pipeline transmission capacity are usually Transmission System Operators (TSOs). By contrast, investors in pipelines from third countries are primarily those entities that are purchasing and supplying the natural gas, in cooperation with the State-owned or private entities in the selling country. Ownership and capacity are usually shared between the members of the consortium in defined proportions. The cost of any pipeline capacity depends on the volumes taken and the transportation distance or, where storage capacity is concerned, the cost depends on the amounts, time and speed of withdrawal from storage. In turn, pipeline tariff regulation is based on actually incurred costs, with detailed regulation governing the derivation of the tariff and full transparency of the tariffs being available on TSO websites. The marketing and use of the capacity of a pipeline remains substantially within the individual co-investor's control, with each co-investor being free to use or dispose of its capacity rights to third parties.

A common type of arrangement in the energy sector takes the form of a Joint Operating Agreement, or "JOA" (usually in the petroleum industry), whose duration extends to the full period in which the rights of extraction for a given field are granted. Any JOA requires an operator to conduct the operations on behalf of the consortium. A common approach adopted is for the parties involved to elect one member of the consortium to be the Operator, whose task it is to conduct the operations of the consortium by: (i) hiring the services required to perform the joint operations; (ii) proposing the work that needs to be performed internally, subject to the approval of the other consortium members through appropriate committees or other mechanisms; (iii) representing the consortium *vis a vis* government bodies and third parties; and (iv) requesting the financial cooperation from other consortium members. This is understood to be efficient because it allows a single entity to conduct and manage operations on behalf of the consortium. Another form of cooperation can be found in the form of Production Sharing Agreements, or "PSAs"; in this case, however, it is the State – as the ultimate owner of the mineral resources in

question – that often engages a foreign company as a contractor to provide technical and financial services for exploration and development operations.

Typical provisions that can be found in long term energy contracts for the supply of gas are so-called “take-or-pay” provisions and “ship-or-pay” provisions. Under the former regime, the seller has an assured revenue stream which ensures an adequate return on the significant capital investment project that has been made in light of the risks to which it is exposed. This requires a typical buyer to pay the price which corresponds to certain pre-determined quantities and off-take or to pay for such quantities irrespective of whether it actually uses such quantities. In return, the seller commits to supplying a pre-agreed quantity. Under the latter regime, it is the shipper of gas that is required to pay for booked transportation capacity, irrespective of the level of actual use.⁷⁴

In summary, the variety of investment models which are characteristic of investment consortia in the field of submarine cables and for energy sector pipelines provide some analogies upon which NRAs can draw parallels as to the manner in which the TIM/FC Offer seeks to balance investment risks among its co-investors which wish to contribute to the deployment plans of FiberCop.

The analogies which can be drawn with submarine cable consortia are consistent with the view that the co-investment regime foreseen in the TIM/FC Offer is reasonable and proportionate, both in terms of the nature of the co-investment options offered and with respect to their duration. Moreover, the offer of an IRU-based option appears to accord a high level of protection and security to co-investors seeking to expand their business in Italy. Further, in the one-way access model envisaged under the *BEREC Guidelines*, the offer of IRUs is a well established co-investment legal mechanism from the viewpoint of balanced regulatory policymaking. Accordingly, the TIM/FC Offer under the FiberCop project appears to us to strike the appropriate balance by making the IRU option realisable within a period of 5 years from the outset of the project (subject to the possible incremental extension of that period by AGCOM, as discussed above), especially given BEREC’s express approval of other types of commitments under a one-way access model.

The investment models that usually prevail in the energy sector for transnational pipelines offer even more varied approaches as to how risk sharing can be accommodated. This arguably reflects *inter alia* the greater size and duration of the investments, the number and types of geographic territories traversed by energy pipelines, and the level of involvement of sovereign States in the investment process and in the governance of projects.⁷⁵

⁷⁴ For example, refer to Anne Creti & Bertrand Villeneuve, “Long term contracts and take-or-pay clauses in natural gas markets”, http://www.crest.fr/ckfinder/userfiles/files/pageperso/bvilleneuve/Take_Or_Pay_Natural_Gas_2004.pdf. See also Kirsten Bindemann, “Production sharing agreements: An economic analysis”, Oxford Institute for Energy Studies, WPM 25 October 1999, <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2010/11/WPM25-ProductionSharingAgreementsAnEconomicAnalysis-KBindemann-1999.pdf>. Refer also to Eduardo G. Pereira & Keith Hall, “Joint operating agreements: Operatorship role, options and concerns”, <https://www.duo.uio.no/bitstream/handle/10852/61604/Eduardo-KBH-6-Aug-2017-Final.pdf?sequence=4&isAllowed=y>.

⁷⁵ This international dimension can often extend to the involvement of multiple National Regulatory Authorities in the examination of a project undertaken by an international consortium which traverses

III. CONCLUSIONS

A. The Investment Counterfactual

The FiberCop project will generate network investment in Italy which will result in greater and faster network VHCN rollout than would otherwise be the case in the counterfactual situation if the Project were not to materialise. The business model that will be followed by FiberCop project provides the potential for vastly superior competitive outcomes than other “wholesale-only” alternatives currently available in Europe, including Italy’s Open Fiber model, France’s Covage/Lovage networks, SIRO in Ireland, and so on. It does so in a number of ways:

First, by satisfying a deployment plan which covers over 1,610 municipalities in Italy, the FiberCop project goes much further than the 271 municipalities initially covered by the Open Fiber network deployment and the existing FlashFiber coverage of 29 cities (which accounts potentially for around a third of all homes passed in Italy, and which we understand requires significant upgrading to conform with the technological solution provided by FiberCop) which will be merged into FiberCop. Unlike Open Fiber or other “wholesale-only” operations, the TIM/FC Offer provides a wide variety of investment options to potential co-investors. Each of these investment options in turn provides a range of price outcomes that are valid for the entire period of the project. The high level pricing options involved are considerably below the prevailing retail rates in the market, which is consistent with likely competitive outcomes. There is also considerable flexibility on forecasting as regards the minimum revenue commitments to which co-investors would need to satisfy.

Second, the realization of the FiberCop business plan falls squarely within the Commission’s ambitious timetable for the full deployment of VHCN networks (namely, 2025, according to the Commission’s *Gigabit Society Communication*). This timetable reflects a “step change” in what has currently been rolled out under the FlashFiber arrangements.

Third, it will effectively unlock the “last mile” of network access to the Italian consumer while at the same time facilitating competition in every other respect. The structure of the FiberCop network deployment is that access seekers have a range of wholesale access products which are delivered in modular form, allowing a high degree of flexibility in the solution chosen.

Fourth, by not having recourse to any external State funding, it is not in a position to skew other private investment decisions in network deployment. By covering the black and “grey1” areas, the FiberCop network ensures that private investment reaches its maximum geographic scope. Because it does not extend to underserved “white” areas of Italy, it also allows the Italian State to target funding to those geographic areas deemed to be “grey2”

multiple jurisdictions. For example, refer to Joint Opinion of the Energy Regulators of Italy, Albania and Greece on the TAP AG Exemption Application, <https://www.autorita.energia.it/allegati/docs/13/249-13all.pdf>.

and which require State funding under the *EU Broadband State Aid Guidelines*. Again, this is a step change when compared to the existing situation under the FlashFiber arrangements, which primarily target "black" areas.

Fifth, the FiberCop project has a number of in-built incentive mechanisms which seek to ensure that roll-out targets will be expedited, especially in the obligations set forth in the Master Service Agreement entered into between TIM and FiberCop. Not only are these targets binding between the shareholders to the FiberCop project, but we understand that the parties are in the processing of extending these obligations in a revised Master Service Agreement so that they are binding *vis a vis* third parties.

Sixth, the Project has no 'first mover' advantage in terms of network deployment, as might otherwise be presumed to be the case for those operators expected to rely on the procedure set forth in Article 76 of the Code, given that Open Fiber's FTTH network has been in operation since December 2015 and has already struck wholesale access relationships with the majority of alternative operators in Italy. By contrast to Open Fiber, the existing FlashFiber arrangements which will be merged into the FiberCop project extend to only 29 cities, require upgrading in keeping with the standards expected of the FiberCop project and cover predominantly "black" areas of the Italian territory. The existence in the near future of two head-to-head competitors in the provision of virtually ubiquitous wholesale broadband access services across Italy will place Italy in a unique competitive position *vis a vis* most EU Member States.

Seventh, it is widely acknowledged that the restriction of cooperation between parties to the passive use of infrastructure is far less problematic than cooperation between competitors in relation to its active elements.⁷⁶ When one also takes into account the improved competitive possibilities available to a smaller infrastructure actor such as Fastweb, coupled with the contractual incentives in place for FiberCop to make available as much capacity as possible on FRAND terms, in our view the FiberCop project clearly improves competitive wholesale conditions in the marketplace.

Finally, the access regime which will prevail in relation to the entirety of the FiberCop network provides terms which are more attractive to access seekers across the whole of the Italian territory than those that would be available from FlashFiber, given the fact that the Article 76 regime preserves pre co-investment terms and conditions (see especially Annex IV of the Code). By contrast, AGCOM Decision 348/19 suggests that the FlashFiber JV would be afforded a greater degree of regulatory flexibility in access pricing for its VULA product in 26 cities across Italy (assuming that certain conditions are satisfied) than the pricing commitments being made to AGCOM under the Article 79 procedure by FiberCop (which will merge FlashFiber's network into its own network that is being deployed) throughout Italy. Beyond those regions, TIM, as an undertaking designated with SMP on

⁷⁶ See, for example: *BEREC Report on Infrastructure Sharing*, BoR (18) 116, June 2018; *BEREC Common Position on Mobile Infrastructure Sharing*, BoR (19) 110, June 2019; *OECD Report on Wireless Market Structures and Network Sharing* (2014); CERRE Report by Marc Bourreau, Steffen Hoernig & Winston Maxwell, "Implementing Co-investment and Network Sharing", May 2020.

its primary network, would in any event be required to supply access seekers with access products on regulated terms to its primary network.

B. Governance & Structure

The manner in which FiberCop is structured facilitates the emergence of a pan-Italian broadband network operator with no distorted market incentives that would lead to the foreclosure of downstream rivals. There are four key structural characteristics of FiberCop which support the conclusion that the FiberCop project is designed to produce competitive outcomes:

First, the Project goes beyond the minimum of one additional non-SMP investor being part of the co-investment agreement (Article 76(2) of the Code), as it involves from the outset a minority shareholder in the form of Fastweb, with the invitation being open for more co-investors to join.

Second, it involves the participation of a key independent financial shareholder in the form of KKR, which has a 37.5% shareholding in FiberCop, coupled with the exercise of significant contractual rights in relation to the governance and the monitoring of the investment schedule of FiberCop, thereby ensuring that the strategic direction of FiberCop and its commercial incentives align with a “wholesale-only” business model which is designed to maximise the attractiveness of the FiberCop network to co-investors and access seekers alike.

Third, the agreed market function of FiberCop is to enable use of the new VHCN network through a variety of access products which are available to ensure the maximum utilisation of the FiberCop network. Unlike the usual scenario foreseen under Article 76 of an SMP-designated operator unilaterally setting co-investment terms, FiberCop is jointly controlled (with one of the jointly controlling parties being a private investor) and is subject to an independent governance structure which automatically guarantees non-discriminatory behaviour in the treatment of third parties. This is ensured through the provisions of the Master Service Agreement entered into between the founding shareholders on 31 March 2021. As structured, it is arguable that FiberCop could in its own terms benefit from the regime available under the Code to “wholesale-only” operators, as that expression is understood under Article 78 of the Code, given its ownership structures and associated incentives. FiberCop certainly has the essential characteristics of a “wholesale-only” operator because of its effective elimination of the incentive to discriminate in the favour of any specific retail operator.

Fourth, with the imminent introduction of appropriate ‘ringfencing’ measures through the completion of an Information Exchange Protocol for the exchange of sensitive business information between the parties, the project could also arguably even satisfy the conditions of Article 78 of the Code, insofar as it could conceivably conform with the requirements set forth in that provision terms of creating a regime of voluntary separation from its otherwise vertically integrated main shareholder, TIM. This type of ringfencing is important in ensuring both the independent market presence of FiberCop and as a mechanism which ensures that cooperation between competitors does not extend beyond what is necessary to pursue a legitimate competitive role at the wholesale level, as has been

highlighted by the competition law practice of the Commission. Such ringfencing measures could in principle also provide the basis upon which third parties could obtain access to both primary and secondary networks (should they so desire) through integrated IT systems without raising “spillover” concerns that would undermine the policy goal of functional separation.

These cumulative characteristics ensure that any hypothetical market concerns that might otherwise flow from cooperation between competitors are unlikely to materialise, given the fact that there are no marketplace incentives for the FiberCop project to engage in exclusionary practices to the detriment of downstream competitors. As noted earlier, whether or not AGCOM requires greater specificity in terms of the access conditions that would apply for third party access seekers is something that will no doubt be resolved through the operation of the commitments procedure found in Article 79 of the Code.

C. Co-investment Entry Criteria

In our view, subject to the recommendations made immediately above, the pre-conditions for entry into the co-investment regime by alternative operators are reasonable, proportionate and transparent, allowing potential investors to co-invest in FiberCop or those operators that would prefer to base their investment decisions on an access-based market model to participate in the project. The conditions of entry provide a pro-competitive balance between the risks borne by FiberCop at the outset of the investment cycle, especially in light of the existence of Open Fiber, and seek to avoid the wrong investment signals that would be given if potential investors were to be allowed to co-invest beyond the deployment period established by the project. This balance is struck under the FiberCop project in the following ways:

First, potential co-investors are offered the unique opportunity to invest, at their choice, at national, regional and local levels in whichever of the 1,610 communes (excluding Milan) in which they choose to invest in FiberCop. This very broadly drawn ability of operators to focus on their geographic preferences means that even small potential co-investors will have ample opportunity to a wide range of possibilities to participate in the project from its inception. The level of flexibility is reflected in the fact that nothing in the TIM/FC Offer restricts a potential co-investor from utilising both the offers of FiberCop and a competitor such as Open Fiber if it wishes to pursue a “mix and match” policy for its wholesale broadband strategy. Moreover, potential co-investors are also afforded additional flexibility in being allowed to make adjustments to their capacity requirement estimates where it is felt that circumstances have changed significantly at the time when they made their longer term capacity projections.⁷⁷ This range of options not only broadens the attractiveness of the FiberCop project to a larger group of potential co-investors, but also insulates the project from the potential for any tacit collusion among co-investors in their broader commercial relationships, given the fact that they will have different focal points for their investments in terms of geographic focus.

⁷⁷ Refer to TIM/FC Offer, at Sections 5.1.3 and 6.1-6.2.

Second, the obligation of potential co-investors to commit to a given commitment is based, depending on the option chosen, on either ensuring a minimum size in a municipality (for instance, 10% of the municipality where they do not seek physical access) or on the ability of even smaller operators to come together as aggregators in order to meet that threshold. This ability to aggregate demand and to resell capacity suggests that a vibrant wholesale market is likely to emerge. In the case of IRUs and physical access, there is no minimum commitment. Although the number of splitters is limited to two, a review mechanism exists to consider requests occurring where more splitters are requested (at least 14 splitters can be accommodated, implying that more than four entities could, on average, supply all customers connected to the CRO). Unlike the case with cabinet access, there are few technical constraints on multiple participants being hosted at a CRO. Given the fact that CROs can host 14 separate splitters, the availability of splitters is unlikely to serve as a constraint on any party seeking to co-invest.⁷⁸ Accordingly, entry criteria do not appear to impose unreasonable conditions that would deny the participation of smaller market actors in the FiberCop co-investment project.

Third, potential co-investors are offered clear entry terms for their co-investment in the FiberCop network over the entirety of the period of network deployment, which can then vary depending on the timing of the investment. Later co-investors face a sliding scale of higher costs to earlier investors which act as an investment premium to take due account of the lower risk which they are likely to bear as a result of their delayed investment decision. As such, early investors are afforded a privileged position for co-investing over that full deployment period, only being designated as access seekers for the period starting after 2025 (or possibly some reasonable period of time thereafter, pending approval of the relevant period from AGCOM). As such, the acquisition structure to be adopted front-ends advantageous co-investment participation terms as the *quid pro quo* for later participation being driven by FRAND access terms.

The structure intended to be deployed should satisfy the terms of Article 76(1)(b)(ii) of the Code in terms of the “*flexibility in terms of the value and timing of the participation of each co-investor*” encompassing a model of “*co-ownership or long-term risk sharing*” through the grant of “*specific rights of a structural character*”. Given the complex structure of Article 76 of the Code, the requirement that the offer to co-invest “*is open at any time during the lifetime of the network*” (Article 76(1)(a)) should be considered to be captured by the proposed structure of FiberCop as a particular example of “*long term risk sharing*”. While the co-investment offer under review in this case is described as a ‘one-way’ offer, the medium of FiberCop is itself a joint venture involving Telecom Italia and KKR (with Fastweb being a minority shareholder and the first beneficiary of co-investment offers), given the binding operational commitments in the Master Service Agreement. As such, the current co-investment offer should be viewed in that context – where an existing JV model (in this case, deemed to be a non-full function JV by the European Commission) is in place with independent and autonomous governance which guarantees commercial behaviour associated with the type of “wholesale-only” operations falling within the scope of Article

⁷⁸ The average CRO hosts 170 units with each splitter capable of addressing a maximum of 64 units.

78 of the Code.⁷⁹ This is the type of operational model foreseen at paragraph 43 of the *BEREC Guidelines*, where it is recognised that there is a need for cut-off dates in co-investment models. Furthermore, while there are access prices that are prescribed for the period up to 2025, appropriate access pricing will continue to be available after that date, as the access conditions will need to satisfy the standard of “fair, reasonable and non-discriminatory” (FRAND).

For the sake of completeness, we note that it might be open to AGCOM to seek to extend the initial cut-off period beyond 2025, not only to accommodate the 6-month publication requirement starting later than scheduled (see discussion above), but also to take into account slightly longer mandated access periods provided under commitments in competition law cases in the field of merger control.

Fourth, the co-investment offer made by TIM allows the parties to increase participation in FiberCop in the future consistent with the provisions of Article 76(1)(b)(iii) of the Code. As noted by BEREC at paragraph 101 of its *Guidelines*, once networks are deployed and fully allocated, the increase in one party’s position must logically result from a decrease in another party’s share. The ability to transfer rights of use are set out in Point 5.5 of the TIM/FC Offer, with any constraint on participation in this context only referring to network ownership and operation which is independent of what occurs at the retail level (where it is the retail offers and consumer choice that will dictate competitive outcomes).

Fifth, the availability of co-investment rights under the minimum commitment conditions prescribed and over the entirety of the period of network deployment, compares favourably to the nature and duration of structural remedies mandating access to fixed amounts of capacity that have been accepted regularly by the Commission in the context of EU merger review proceedings in the telecommunications sector. EU administrative case precedents are consistent with the view that, in order to revert to a comparable competitive market structure in the wake of a proposed merger, access should be guaranteed for network capacity of around 10-20% of the combined network’s capacity. These commitments are generally made available for periods ranging from 5 years upwards, depending on the particular circumstances of the case. Given that these EU competition law precedents are designed to restore competitiveness to the sector post-merger, while the FiberCop project seeks to *expand* the existing available competitive options, both the capacity and timing obligations set forth under the Project appear to be *prima facie* proportionate in achieving the pro-competitive aims of the Project, although it cannot be excluded that AGCOM may seek to align capacity availability and its duration with existing competition precedents in the sector.

Sixth, the manner in which the sharing of risk is proposed under the Project is compatible with the IRU legal mechanism utilized in the context of co-investment vehicles in large

⁷⁹ 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 this context, purchase agreements which constitute co-investments entail the acquisition of specific rights to capacity which are of a structural character, involving a degree of co-determination by reason of the fact that existing capacity is apportioned among co-investors and enabling them to compete effectively and sustainably in the long term in downstream markets in which the undertaking designated with Significant Market Power is active.

international undersea cable consortia informs our approach in the analysis of the FiberCop project under the requirements of Article 76 of the Code. The parallels with co-investment risk sharing in international energy pipeline consortia are less compelling, given that the legal structures used involve significantly greater investment levels, to be delivered over usually longer timeframes, affecting multiple jurisdictions, and often requiring the involvement of sovereign States in order to be effective.

D. Elements Not Compatible with Tacit Collusion and Foreclosure at the Retail Level

At the heart of any assessment co-investment arrangements is the question of whether cooperation between competitors is likely to lead in practice to anti-competitive outcomes at the expense of competitors, given the dynamics of the industry in question. The manner in which the parties envisage their cooperation runs counter to any such anti-competitive outcomes developing in the future through the “spill-over” of their cooperation beyond the confines of FiberCop. Critical elements in any such conclusion rest in the following observations:

First, the focal point of the co-investment model will be on the roll-out of a fibre secondary network, with the preferred conditions described in the TIM/FC Offer being limited to the take-up of passive services and no nexus being provided between the acquisition of passive and active net services. While GPON passive services can serve as a building block for a more articulated offer, the choice of the active network elements lies exclusively in the hands of the operator in question without any linkage to the co-investment offer (refer to Section 5.1.3 of the TIM/FC Offer).

As acknowledged under the competition law practice of the Commission and in the guidance provided by BEREC, the likelihood of anti-competitive outcomes is significantly diminished where the scope of the network cooperation is limited to the passive network elements.⁸⁰ In this particular case, co-investors have numerous options available to them: (i) they can access the network elements in a modular format and can choose those elements that suit them best; (ii) they have the possibility to take IRUs and physical splitters at the level of the street cabinet and maintain their own end-to-end physical network; and (iii) co-investors have the choice of taking a virtual access product locally, regionally or nationally, driven by the scope of their existing network and business strategy. In short, a wide variety of participation models can be expected to emerge over time in response to what is being offered through FiberCop.

Second, the range of parties that can participate as co-investors will be of varying sizes and with different infrastructures. At least one co-investor has infrastructure widely deployed at the CRO and FiberCop can provide access to splitters to deploy their own end-to-end solutions. Others are likely to use a variety of GPON-based products, delivered locally, regionally or nationally, depending on the scope of their own networks, the scale of their businesses and so on. With such heterogeneous market conditions, cost structures and business models, any scope for co-ordinated effects must be considered in the circumstances to be minimal.

Third, the terms of wholesale access to third parties in effect subjects the FiberCop project to a form of self-regulation regime which complements its “wholesale-only” character⁸¹ resulting from the network separation. Any residual risks of downstream foreclosure are addressed by the grant of FRAND-based wholesale terms to all access seekers, thereby obviating the need for any *ex ante* regulatory obligations being imposed in this regard. Whereas the regime envisaged in the Code sees the benefits of co-investing in VHCNs being set-off against the imposition of access remedies that would otherwise normally be imposed, the parties have already incorporated certain wholesale access remedy safeguards into the FiberCop operational structure (especially as evidenced in the terms of the Service Agreement), driven by the fact that FiberCop can only seek to ensure maximum usage of its network for the benefit of its shareholders. As we have proposed earlier, these commitments can be further improved through the introduction of greater detail in the mechanisms used to determine access terms and conditions.

Fourth, the potential for any information exchange leading to a limiting of downstream retail competition is minimised by the existence of an Information Exchange Protocol (to be negotiated) which will limit the exchange of information between co-investors to what is absolutely necessary for the fulfilment of the pro-competitive goals of the FiberCop project. Insofar as the ringfencing achieved by such a Protocol is deemed sufficient in the eyes of AGCOM, there also remains the possibility that the TIM might benefit from a favourable decision from AGCOM which includes a parallel clearance under Article 78 of the Code (voluntary separation).

E. Collateral Welfare Benefits

Finally, the FiberCop project, insofar as it satisfies its commercial targets, is capable of realizing a range of additional benefits beyond the direct gains generated by new broadband infrastructure deployment (in terms of a greater range of potential wholesale access relationships leading to greater competition at retail level) which are of particular relevance in the context of Italian market realities. These additional benefits, which would constitute material considerations in any compatibility assessment that would be weighed in any balancing exercise conducted under Article 101(3) TFEU, and which are brought about directly as a result of the adoption of the Project, include:

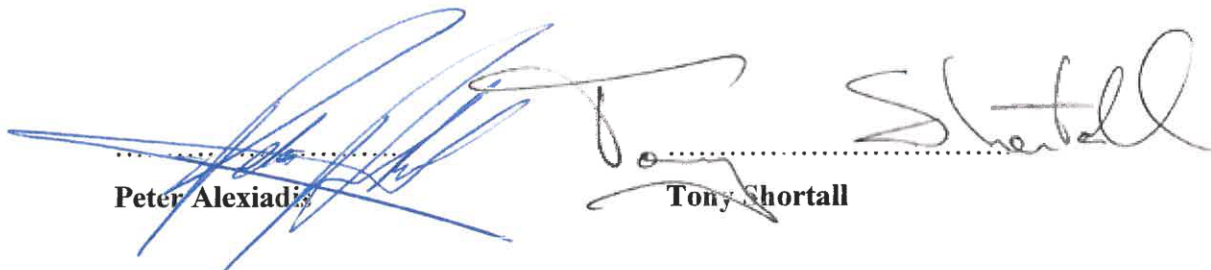
First, the structure of the investment plan foreseen under the FiberCop project, including the imposition of financial penalties in the event that FiberCop does not fulfil its rollout targets, creates a unique situation in Italy insofar as it seeks to avoid the usual level of risk associated with an investment project. By being OMISSIS funded from the outset and with a Business Plan valued at OMISSIS Euros, this self-standing project is insulated from the usual range of external factors that has undermined large telecommunications sector investment projects in Italy in the recent past.

⁸¹ By virtue of its structure, whereby it is only active on the wholesale market, and further strengthened by its Shareholder Agreement, FiberCop as an entity has neither the ability nor the incentive to discriminate in favour of one party of another. In this way, FiberCop has a wholesale-only character.

Second, the culmination of the FiberCop project will result in the full de-commissioning of copper to coincide with the five-year rollout period set forth under the terms agreed by the parties. This addresses a major historical failing in the Italian telecommunications sector, despite the goal of copper switch-off having been an avowed policy aim at EU and national level for well over a decade.

Third, the manner in which the project creates incentives for operators ensures that customer migration will occur from the traditional copper network to a state-of-the-art VHCN, in accordance with the stated policy aims of EU and Italian policymakers, and in the face of a number of previous failed attempts to realise such a policy goal.

Fourth, the environmental benefits inherent in the switch to fibre in such a short timeframe are clear and serve as an important element in the Commission's pursuit of 'Green Deal' objectives and in the desire of the European Union to comply with the environmental targets set forth in the Paris Accord.



The image shows two handwritten signatures in blue ink. The signature on the left is for Peter Alexiadis, and the signature on the right is for Tony Shortall. Below each signature is a dotted line and the name of the signatory in black text.

Peter Alexiadis

Tony Shortall

Brussels, 22 April 2020

ANNEX A – LIST OF DOCUMENTS REVIEWED

1. Master Service Agreement between FiberCop S.p.A. & Telecom Italia S.p.A. (executed 31 March 2021).
2. FiberCop/Fastweb Commitment Letter (dated 1 September 2020).
3. Document entitled “Separazione legale volontaria della rete fisica di accesso di TIM: Notifica ex art. 50 ter del Codice delle Comunicazioni Elettroniche” (dated 25 November 2020).
4. TIM’s Co-investment Offer in FiberCop’s new fiber network (dated 28 January 2021).
5. Teemo Due Diligence Extract, Arthur D. Little, Available Market Data (Confidential, dated June 2020).
6. ICT Consulting, document entitled “Parere tecnico sull’architettura di rete, sul modello operativo e i servizi di FiberCop” (dated 26 January 2021).
7. Document entitled “Materiale di discussione, Febbraio 2021”, Kohlberg Kravis Roberts. (Submission to AGCM/AGCOM).
8. Fairness Opinion on TIM Co-investment Offer – costing model debrief, 17 March 2021, KKR, Tabella componenti_operation_invio1703.xlsx.
9. Letter of the European Commission dated 30 November 2020 to Telecom Italia in Case C.1806 – Telecom Italia/KKR/FiberCop.
10. Italian Competition Authority Decision opening an investigation with respect to Telecom Italia S.p.A., Fastweb S.p. A., Teemo Bidco S.a.r.l., FiberCop S.p.A., Tiscali Italia S.p.A. and KKR & Co. Inc. under Article 101 TFEU of 15 December 2020.
11. Flash Fiber Bylaws (established 28 July 2016, as amended; latest amendment of 21 March 2019).

ANNEX 2 – BIOGRAPHIES**Peter Alexiadis**

Visiting Professor, King's College/London

Peter Alexiadis has practised European Union law in Brussels since 1989, holding postgraduate qualifications from the Universities of London, Thessaloniki and Sydney. He is a Member of the Brussels Bar (A List) and is a Solicitor before the Courts of England & Wales. He was the Partner-in-Charge of the Brussels office of Gibson, Dunn & Crutcher LLP until his retirement from the Firm on 1 January 2021. Peter is a Visiting Professor at Kings College, London, where he teaches the LLM course “Competition Law & Regulated Network Sectors”. He frequently teaches and publishes papers with the Florence School of Regulation and is a Guest Lecturer at The College of Europe in Bruges and the University of Tilburg in The Netherlands.

His competition practice has a particular focus on merger control and joint ventures and on the abuse of dominance and antitrust litigation, especially in the telecommunications sector where he has acted as senior competition counsel to some of Europe's largest mergers in the sector and most important actions brought under Article 102 TFEU. His telecommunications regulatory practice embraces both public sector bodies around the world (especially National Regulatory Authorities in the EU in Ireland, Portugal, Romania, Greece, Cyprus and San Marino) and a range of private sector market actors. He has been a project leader in a number of landmark projects for the European Commission, including that which established the current EU regulatory framework, and has also acted as external counsel to the European Commission's Telecommunications Unit within DG Competition. He also works with the OECD and the Centre on European Policy Studies (CEPS) on a range of competition law and regulatory policy matters.

Peter is widely recognised as a leading practitioner in both Telecommunications Regulation and Competition Law by all international peer review publications for the past three decades, including being listed as “2014-2015 Brussels Media Lawyer of the Year” by the publication *Best Lawyers' International*, the “2018 Brussels Telecommunications Lawyer of the Year” in *Best Lawyers' International*, as a “Thought Leader” by *Who's Who Legal* in 2017 and 2018 in both Competition Law and TMT practice areas, and one of *The American Lawyer's* “Star Laterals of the Year” for 2003 when he joined Gibson Dunn.

Most recently, he has acted as external Legal Advisor (supporting WIK Consult of Germany) to the European Commission on three separate empirical studies informing the European Commission on the revision of its *SMP Guidelines*, its *Relevant Markets Recommendation* and its *Broadband State Aid Guidelines*. He is a prolific author on competition law and regulatory policy matters, and has been short-listed for five consecutive years in the Concurrences Annual Antitrust Writing Awards for his contributions. He is also the co-author (with Tony Shortall) of a major new textbook which will be published by Oxford University Press on the new regulatory framework in electronic communications that came into effect in December 2020.

**Tony Shortall**

Telage

Tony Shortall is the Director of Telage, a consultancy in the field of telecommunications economics and regulation. He is an economist specialising in the regulation of network industries and is acknowledged expert in the area of telecommunications policy and regulation.

He has written extensively on these matters and has advised governments, regulators and firms. Tony previously worked as an economist at the European Commission (2001-2008), working on developing the 2002 eCommunications Regulatory Framework and the subsequent Reform adopted in 2009.

He also worked as the senior network economist with the Irish Competition Authority before working in industry with Vodafone and others. After leaving the European Commission, Tony established Telage in Brussels and has worked extensively with private firms, governments and international organisations such as the OECD in Paris. There, he worked on pivotal projects in the telecommunications sector such as the major report on reform of the Mexico telecommunication sector in 2012, initiated a case that led to one of the largest competition law fines in the European telecom sector (2018) and marshalled a significant redirection of European telecom policy.

Tony continues to be involved in leading policy initiatives and has participated in the 5G Working Group established by the European Commission in recent years.

He is also the co-author (with Peter Alexiadis) of a major new textbook on the new regulatory framework in electronic communications which came into effect in December 2020.
