



EUROPEAN COMMISSION
DG Competition

Case M.10450 - CDP / MACQUARIE / OPEN FIBER

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 10/11/2021

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EUROPEAN COMMISSION

Brussels, 10.11.2021
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PUBLIC VERSION

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

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**Subject: Case M.10450 – CDP/Macquarie/Open Fiber
Commission decision pursuant to Article 6(1)(b) of Council Regulation
No 139/2004¹ and Article 57 of the Agreement on the European Economic
Area²**

Dear Sir or Madam,

(1) On 4 October 2021, the Commission received notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004, by

¹ OJ L 24, 29.1.2004, p. 1 (the “**Merger Regulation**”). With effect from 1 December 2009, the Treaty on the Functioning of the European Union (“**TFEU**”) has introduced certain changes, such as the replacement of “Community” by “Union” and “common market” by “internal market”. The terminology of the TFEU will be used throughout this decision.

² OJ L 1, 3.1.1994, p. 3 (the “**EEA Agreement**”).

which Macquarie Infrastructure and Real Assets (Europe) Limited (“**MIRA**”, United Kingdom) and CDP Equity S.p.A. (“**CDPE**”, Italy, together with MIRA the “**Notifying Parties**”) acquire joint control over Open Fiber S.p.A. (“**Open Fiber**”, Italy) within the meaning of Article 3(1)(b) and 3(4) of the Merger Regulation (the “**Transaction**”).³

1. THE PARTIES

- (2) **MIRA** is an investment fund that manages infrastructure and other real assets, including real estate, energy and agriculture as well as critical infrastructure assets such as utilities and telecommunications networks, airports and ports.⁴ MIRA is ultimately controlled by Macquarie Group Limited (“**Macquarie**”, Australia) a multinational independent investment bank.
- (3) **CDPE** is a long-term investor in companies of significant national Italian interest, through direct and indirect shareholdings. CDPE is part of Cassa Depositi e Prestiti S.p.A. (“**CDP**”, Italy), ultimately controlled by the Italian Ministry for Economy and Finance.
- (4) **Open Fiber** is a wholesale-only operator developing, managing and maintaining an optical fibre network, predominantly with fibre-to-the-home (“**FTTH**”) technology, across Italy. Open Fiber is currently jointly controlled by CDPE (50% of shares) and Enel S.p.A. (“**Enel**”) (50% of shares).

2. THE CONCENTRATION

- (5) The Transaction is accomplished in two simultaneous steps. First, pursuant to a share purchase agreement signed on 29 July 2021, Fibre Networks Italy S.p.A. (“**FNI**”), a company indirectly controlled by MIRA, will acquire 40% of the share capital and voting rights in Open Fiber from Enel (“**40% Transaction**”).⁵ Second, pursuant to a share purchase agreement signed on 4 August 2021, CDPE will acquire from Enel the remaining 10% participation of the share capital and voting rights in Open Fiber (“**10% Transaction**”, together with the 40% Transaction, the “**50% Transaction**”). Following the completion of these steps, Enel will no longer be a shareholder of Open Fiber, CDPE will own 60% of the shares in Open Fiber and MIRA will own 40% of the shares in Open Fiber. Since CDPE is already jointly controlling Open Fiber pre-Transaction, the specificity of the merger consists in MIRA replacing Enel as a jointly controlling parent (as explained below).

³ Publication in the Official Journal of the European Union No C 414, 13.10.2021, p. 4.

⁴ With regard to the telecommunications sector, MIRA controls an infrastructure owner and telecommunications operator in Poland.

⁵ The transactional documents provide for the possibility of FNI to assign its full participation in Open Fiber to Fibre Network Holding S.à r.l. (“**FNH**”), a subsidiary controlled by MIRA. Any such assignment would not have any effect on the nature of control being acquired by MIRA in Open Fiber. In this decision, MIRA should be read as including FNI or FNH, as the case may be, depending on FNI’s decision to assign its participation in Open Fiber to FNH.

2.1. Joint control

- (6) At completion of the 50% Transaction, the Notifying Parties will enter into a Shareholders' Agreement, according to which the board of directors of Open Fiber will be composed of 7 directors, 4 appointed by CDPE and 3 by MIRA.⁶ The resolutions on some strategic matters, such as the approval and amendment of Open Fiber's business plan, the approval of major contracts, acquisitions, transfer of shares, mergers and amalgamations and the approval of major disposals, will only be adopted with the attendance and favourable vote of at least 6 out of the 7 directors. Therefore, both CDPE and MIRA's approval is necessary for these strategic matters. MIRA will be entitled to appoint the Chief Financial Officer of Open Fiber and will be involved in the appointment of the Chief Executive Officer (through the possibility to veto the first two candidates put forward by CDPE).
- (7) Therefore, Open Fiber will be jointly controlled by CDPE and MIRA.

2.2. Full functionality

- (8) Open Fiber is currently a full-function joint venture. This will not change as a result of the Transaction. Indeed, Open Fiber has sufficient own staff (over [NUMBER OF OPEN FIBER'S EMPLOYEES] employees), financial resources and dedicated management for its operations and for the management of its portfolio and business interests.
- (9) Open Fiber will have a market presence. In this regard, Open Fiber has exclusivity agreements in place with [OPEN FIBER'S CUSTOMERS] concerning the implementation of a FTTH optical fibre network and the subsequent provision of end-to-end connection for the access to such optical fiber network. No transactional agreement provides for the possibility of termination of these exclusivity agreements and the Notifying Parties further submit there is no intention to do so.⁷
- (10) Finally, Open Fiber (i) will not take over any specific function of CDPE or MIRA's business activities; (ii) will not have sale or purchase relations with its parent companies; and, (iii) will operate on a lasting basis as Open Fiber has been set up for an indefinite duration.⁸
- (11) Therefore, Open Fiber is a full-function joint venture.

2.3. Assessment of whether the Transaction and the Single Network Transaction should be treated as a single concentration

2.3.1. Introduction

- (12) Through a non-binding letter of intent dated 31 August 2020 ("**LOI**"), CDP and TIM S.p.A. ("**TIM**") announced the possible creation of a single fixed network in Italy, commonly referred to as "La Rete Unica" (the "**Single Network**"), whereby CDP and TIM would acquire joint control of AccessCo, a newly established joint

⁶ Each director will have one vote. No board member will have a casting vote.

⁷ Form CO, paragraph 87.

⁸ Form CO, paragraph 88.

venture.⁹ Pursuant to the LOI, AccessCo would be established by combining the primary and secondary access networks of Open Fiber and of FiberCop S.p.A. (“**FiberCop**”), a company established by TIM in partnership with KKR & Co Inc., to which TIM transferred its secondary passive access network.¹⁰ The creation of the Single Network will be referred to hereinafter as the **Single Network Transaction**.

- (13) Under the terms of the LOI, AccessCo would be tasked with developing and managing the national single network that would result from the integration of the networks of Open Fiber and TIM, with the aim of speeding up digital development and the diffusion of high-speed internet in Italy. To date, AccessCo has not been established.
- (14) Article 21 of the Shareholders’ Agreement submitted to the Commission at the time of notification of the Transaction (“**Original SHA**”) provides that “[NOTIFYING PARTIES’ POST CLOSING POSSIBLE BEHAVIOURS]”. In addition, Article 21 of the Original SHA further provides that, [NOTIFYING PARTIES’ POST CLOSING POSSIBLE BEHAVIOURS].
- (15) Section 6.2 of the 40% Transaction agreement provides for an earn-out payment due by MIRA to Enel in the event that the Single Network Transaction materializes, regardless of the modality in which it may be achieved (the “**Single Network Earn-Out**”), capped at EUR 400 million.
- (16) In the following sections, the Commission assesses whether the Transaction and the Single Network Transaction should be treated as a single concentration or as independent transactions.

2.3.2. *Legal context*

- (17) Recital 20 of the Merger Regulation provides that it is “*appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time*”.
- (18) The question of whether legally distinct transactions form a single concentration within the meaning of Article 3 of the Merger Regulation has been further clarified by the General Court in the *Cementbow* judgment,¹¹ which underlines that, for that purpose, the Commission should consider all the specific circumstances “*with a concern to ascertain the economic reality underlying the transactions*”.¹²
- (19) In particular, the General Court clarified that, “*when faced with a number of legally distinct transaction*”, the Commission should identify “*the economic aim pursued by the parties, by examining [...] whether the undertakings concerned would have been inclined to conclude each transaction taken in isolation or whether, on the contrary,*

⁹ See CDP’s press release of 31 August 2020 at the following link: [CDP: via libera alla società della rete unica nazionale](#).

¹⁰ The purpose of FiberCop is to rollout and to provide passive access services to the secondary network. FiberCop is operational since April 2021.

¹¹ Judgment of 23 February 2006, *Cementbouw Handel & Industrie v Commission*, T-282/02, EU:T:2006:64.

¹² *Cementbouw* judgment, paragraph 106.

*each transaction constitutes only an element of a more complex operation, without which it would not have been concluded by the parties. In other words, in order to determine the unitary nature of the transactions in question, it is necessary, in each individual case, to ascertain whether those transactions are interdependent, in such a way that one transaction would not have been carried out without the other.”*¹³

- (20) Those criteria have been codified by the Commission in the Consolidated Jurisdictional Notice (“CJN”), which notes in particular that the conditionality referred to in recital 20 of the Merger Regulation can be *de jure* or *de facto*.¹⁴ The CJN notes that *de jure* conditionality is achieved when “*the agreements themselves are linked by mutual conditionality.*”¹⁵ *De facto* conditionality “*requires an economic assessment of whether each of the transactions necessarily depends on the conclusion of the others. Further indications of the interdependence of several transactions may be the statements of the parties themselves or the simultaneous conclusion of the relevant agreements. A conclusion of de facto interconditionality of several transactions will be difficult to reach in the absence of their simultaneity.*”¹⁶
- (21) Finally, paragraph 41 of the CJN states that “*several transactions, even if linked by condition upon each other, can only be treated as a single concentration, if control is acquired ultimately by the same undertaking(s).*”

2.3.3. Notifying Parties’ views

- (22) The Notifying Parties submit that the Transaction and the Single Network Transaction are not linked by a condition for the following reasons.
- (23) First, the Notifying Parties argue that Article 21 of the Original SHA does not constitute an implicit approval of the Single Network Transaction by MIRA. In this regard, the Notifying Parties note that any potential transactions related to the Single Network Transaction [DETAILS ON MIRA’S RIGHTS SET FORTH IN THE ORIGINAL SHA].¹⁷ The Notifying Parties note that this is supported by the language of Article 21 of the SHA, where it provides that the Notifying Parties [NOTIFYING PARTIES’ POST CLOSING POSSIBLE BEHAVIOURS].¹⁸ In any case, the Notifying Parties clarify that the LOI [LOI DURATION].¹⁹
- (24) Second, the Notifying Parties submit that the Single Network Earn-Out payment foreseen in the 40% Transaction agreement is customary in transactions of this nature and is not able to materially affect any possible future decision of MIRA to proceed or not with the Single Network Transaction, [FINANCIAL AGREEMENT BETWEEN MIRA AND ENEL].²⁰
- (25) Third, the Notifying Parties point out that the transactional documents provide for a minimum lock-up period of [LOCK-UP PERIOD DURATION]. Although, for

¹³ *Cementbouw* judgment, paragraphs 106-107.

¹⁴ CJN, paragraph 43.

¹⁵ CJN, paragraph 43.

¹⁶ CJN, paragraph 43.

¹⁷ Form CO, Annex 10, page 7.

¹⁸ Form CO, Annex 10, page 3.

¹⁹ Form CO, footnote 9. [LOI DURATION].

²⁰ Form CO, Annex 10, page 11.

completeness, [EXCEPTIONS TO THE LOCK-UP PERIOD], the Notifying Parties submit that MIRA will act as a long-term investor in Open Fiber.²¹

- (26) Fourth, the Notifying Parties submit that the Transaction and the Single Network Transaction are not *de jure* or *de facto* inter-related within the meaning of the CJN. In particular, the Notifying Parties submit that: (i) the Transaction is not conditional upon the Single Network Transaction and would take place anyway; (ii) both transactions would not occur at the same time; and, (iii) the execution of Single Network Transaction is hypothetical,²² uncertain and subject to further negotiations and agreements.²³

2.3.4. Commission's assessment

- (27) The Commission considers that the Transaction and the Single Network Transaction constitute independent transactions.
- (28) First, the Commission notes that the agreements underpinning the Transaction do not provide that the Transaction is conditional upon the Single Network Transaction (nor vice versa). In addition, the conclusion of the Single Network Transaction is uncertain and the respective transaction agreements have not been entered into.
- (29) The Commission notes that Article 21 of the Original SHA [NOTIFYING PARTIES' POST CLOSING POSSIBLE BEHAVIOURS], but does not contain an express obligation on the part of MIRA to unconditionally agree to the completion of the Single Network Transaction. In this regard, the Commission notes that, under the SHA,²⁴ MIRA formally retains the right to [DETAILS ON MIRA'S RIGHTS SET FORTH IN THE SHA]. Accordingly, the Commission concludes that the agreements do not give rise to any *de jure* conditionality between the Transaction and the Single Network Transaction.
- (30) In any case, on 8 November 2021, the Notifying Parties signed an agreement laying down an amended version of the Shareholders' Agreement ("**Amended SHA**"). The Amended SHA no longer contains the provisions referred to in paragraph (14) above, including any references to [NOTIFYING PARTIES' POST CLOSING POSSIBLE BEHAVIOURS].
- (31) Second, on the assessment of a possible *de facto* conditionality, the Commission notes that the Transaction and the Single Network Transaction will not take place simultaneously. Notably, the Single Network Transaction remains hypothetical, as confirmed by the Notifying Parties,²⁵ and its main terms and conditions have not yet been agreed upon. Furthermore, the Commission also understands that the terms for the Single Network Transaction set out in the LOI [LOI DURATION] and that in any case they would have been subject to further negotiations.²⁶ Therefore, there is

²¹ Form CO, Annex 10, page 10.

²² Form CO, Annex 10, page 7.

²³ Form CO, paragraphs 18 – 19.

²⁴ As also confirmed by the Notifying Parties, [DETAILS ON MIRA'S RIGHTS SET FORTH IN THE SHA].

²⁵ Among others, Form CO, Annex 10, page 7: "[The Single Network Transaction] is a separate and hypothetical deal...".

²⁶ Form CO, paragraph 19 and footnote 9.

currently no agreement or draft agreement which summarises the key terms and conditions under which the Single Network Transaction could be achieved. Indeed, [DETAILS ON MIRA'S RIGHTS SET FORTH IN THE SHA], as MIRA is currently unaware of the main terms at which the Single Network Transaction could occur. Furthermore, the Commission notes that the existence of the Single Network Earn-Out in itself will not reduce the possible incentive for MIRA [DETAILS ON MIRA'S RIGHTS SET FORTH IN THE SHA]. If anything, the Single Network Earn-Out may increase such incentive as it would make it more expensive for MIRA [STRATEGIC DECISIONS].

- (32) The Commission therefore concludes that there is no evidence to support that the Transaction and the Single Network Transaction could be *de facto* conditional upon each other.
- (33) Finally, and in any event, the Commission notes that, on the basis of the [LOI DURATION] LOI, the Single Network Transaction would lead to joint control over AccessCo by CDPE and TIM. However, as is evident from paragraph 41 of the CJN, two transactions can only be treated as a single concentration if the ultimate undertakings acquiring control in the two cases are the same. Accordingly, since there is no evidence suggesting that, should the Single Network Transaction ever occur, the target would be controlled by CDPE and MIRA, the Transaction and the Single Network Transaction cannot in any event be considered to constitute a single concentration.

2.3.5. Conclusion

- (34) In light of the assessment above, the Commission considers that the Transaction and the Single Network Transaction constitute independent transactions.
- (35) Therefore, the Commission concludes that it only has jurisdiction to review the Transaction as notified by the Notifying Parties under the Merger Regulation.
- (36) At the same time, the Commission notes that, should the Single Network Transaction materialise, in whichever form, it may be reviewed by the relevant competition authority under the applicable competition law framework.

3. UNION DIMENSION

- (37) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million²⁷ (Macquarie: EUR [FINANCIAL INFORMATION] million; CDP: EUR [FINANCIAL INFORMATION] million; Open Fiber: EUR [FINANCIAL INFORMATION] million). Each of them has a Union-wide turnover in excess of EUR 250 million (Macquarie: EUR [FINANCIAL INFORMATION] million; CDP: EUR [FINANCIAL INFORMATION] million; Open Fiber: EUR [FINANCIAL INFORMATION] million) but they do not achieve more than two-thirds of their aggregate Union-wide turnover within one and the same Member State. The notified operation therefore has a Union dimension.

²⁷ Turnover calculated in accordance with Article 5 of the Merger Regulation.

4. COMPETITIVE ASSESSMENT

- (38) The specific change brought by the Transaction in Open Fiber consists in the replacement of Enel by MIRA as a jointly controlling parent and in the increase of CDPE's stake from 50% to 60%, even though CDPE already jointly controlled Open Fiber prior to the Transaction.
- (39) Open Fiber is active in the market for the wholesale supply of fixed internet access services in Italy²⁸ and in the market for the wholesale supply of fixed backhaul services in Italy.²⁹
- (40) None of MIRA's (or Macquarie's) portfolio companies is active in market for the wholesale supply of fixed internet access services in Italy or in the market for the wholesale supply of fixed backhaul services in Italy, or in a product market which is upstream or downstream from those markets.
- (41) Beyond the activities of Open Fiber, CDPE and CDP are not active in the market for the wholesale supply of fixed internet access services in Italy or in the market for the wholesale supply of fixed backhaul services in Italy, or in a product market which is upstream or downstream from those markets. CDP only has a non-controlling minority shareholding in TIM (since 2018). Through FiberCop, TIM is Open Fiber's main competitor on the market for the wholesale supply of fixed internet access services in Italy and on the market for the wholesale supply of fixed backhaul services in Italy. Moreover, since 31 March 2021, the chairman of the board of directors of CDP and CDPE ("**CDP's Chairman**") also sits on TIM's board of directors ("**TIM's Board**") as a non-independent director ("**CDP's Entry in TIM's Board**").

4.1. Feedback from market participants and the AGCM

- (42) The Commission has reached out to a number of market participants to seek their views on the Transaction. The Commission has also received a submission from the Italian Competition Authority ("**AGCM**").
- (43) Some market participants as well as the AGCM expressed a concern that the Transaction would facilitate coordination between Open Fiber and TIM by weakening the competitive constraints between Open Fiber and TIM in the markets for the wholesale supply of fixed internet access services and the supply of fixed backhaul services in Italy. Such concern is based on the following arguments.
- (44) First, market participants and the AGCM consider that the Transaction will increase CDP's "*strategic and operational control over Open Fiber*" by virtue of the increase from 50% to 60% of CDP's stake in Open Fiber.

²⁸ Commission decisions of 6 March 2020 in Case M.9674 – *Vodafone Italia/TIM/Inwit JV*, paragraphs 123-133; Commission decision of 20 September 2013 in Case M.6996 – *Vodafone/Kabel Deutschland*, paragraphs 157-164; Commission decision of 29 June 2009 in Case M.5532 – *Carphone Warehouse/Tiscali UK*, paragraphs 28-34 and 48-53.

²⁹ Commission decisions of 6 March 2020 in Case M.9674 – *Vodafone Italia/TIM/Inwit JV*, paragraphs 115-122; Commission decision of 1 September 2016 in Case M.7758 – *Hutchinson 3G Italy/Wind/JV*, recitals 206-211.

- (45) Second, the AGCM considers that Article 21 of the Original SHA limits MIRA's ability to oppose the Single Network Transaction, whatever its form, and would determine an increased convergence between Open Fiber and TIM. Market participants also stressed that the provision at hand further undermines MIRA's ability to effectively replace Enel's driving force in Open Fiber.
- (46) Third, market participants and the AGCM stress that CDP's Entry in TIM's Board – an event which occurred after the announcement of the Transaction – consolidates CDP's commitment and involvement in TIM.³⁰ Market participants and the AGCM also pointed to CDP's pre-existing shareholding in TIM.
- (47) In light of this market feedback, the Commission will assess whether the Transaction (on its own, without considering possible independent developments unrelated to it, such as those that might occur in connection with the Single Network Transaction) is likely to increase the likelihood of coordination between Open Fiber and TIM as compared to the situation pre-Transaction.

4.2. Assessment of the feedback from market participants and the AGCM

4.2.1. Legal framework

- (48) Under the Merger Regulation, the Commission assesses whether a concentration would significantly impede effective competition in the internal market or in a substantial part of it. A merger in a concentrated market may significantly impede effective competition due to horizontal coordinated effects where, through the creation or the strengthening of a collective dominant position, it increases the likelihood that firms are able to coordinate their behaviour and raise prices, even without entering into an agreement or resorting to a concerted practice within the meaning of Article 101 TFEU. A merger may also make pre-existing coordination easier or more stable, either by making the coordination more robust or by permitting firms to coordinate on even higher prices.³¹
- (49) To assess whether a merger gives rise to horizontal coordinated effects, the Commission should examine whether, as a consequence of the merger, first, it would be possible to reach terms of coordination and, second, such coordination would be sustainable.³²
- (50) In examining the possibility and sustainability of coordination, the Commission should specifically consider the changes that the Transaction brings about.³³ The reduction in the number of firms in a market may in itself be a factor that facilitates coordination.

³⁰ The Transaction was announced on 17 December 2020, see Enel's communication at the following link: <https://www.enel.com/media/explore/search-press-releases/press/2020/12/enel-board-of-directors-resolves-to-sell-40---50-of-open-fiber-to-macquarie>.

³¹ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("**Horizontal Merger Guidelines**"), OJ C 31, 05.02.2004, paragraph 39.

³² Horizontal Merger Guidelines, paragraph 42.

³³ Horizontal Merger Guidelines, paragraph 42.

4.2.2. *The Commission's assessment*

(51) As described above in paragraph (38), the Transaction under review mainly consists in the replacement of Enel by MIRA as a jointly controlling shareholder in Open Fiber alongside CDP. The Commission will assess the main arguments submitted by market participants and the AGCM (as set out in section 4.1 above) in support of their view that the Transaction would increase the likelihood of coordination between Open Fiber and TIM compared to the situation pre-Transaction. The Commission concludes that the Transaction is unlikely to give rise to coordinated effects on the market for the wholesale supply of fixed internet access services in Italy and in the market for the wholesale supply of fixed backhaul services in Italy.³⁴

4.2.2.1. The 10% increase of CDPE's shareholding in Open Fiber

(52) In relation to CDPE's increased shareholding in Open Fiber as a result of the Transaction, the Commission notes that prior to the Transaction, CDPE already jointly controlled Open Fiber.³⁵ As explained in section 2.1 and paragraph (38) above, the Transaction does not affect the nature of the control exercised by CDPE over Open Fiber within the meaning of the CJN. Therefore, as the Transaction does not bring about a change in the quality of CDPE's control over Open Fiber, it will not increase the ability of CDP to determine the strategic competitive behaviour of Open Fiber.

(53) At the same time, as explained in section 2.1 above, MIRA will obtain a veto right over all strategic matters relating to Open Fiber's business. Notably, Article 21 of the Amended SHA confirms that such strategic matters include decisions on [DETAILS ON MIRA'S VETO RIGHTS SET FORTH IN THE SHA].

(54) Therefore, any hypothetical coordination of Open Fiber and TIM's behaviour in the roll-out of Open Fiber and FiberCop's networks respectively would require both CDPE and MIRA's approval. However, MIRA is unlikely to have the incentive to approve such coordination. Indeed, any revenues foregone by Open Fiber to the benefit of TIM would only profit CDP since MIRA does not have a participation in TIM or FiberCop. Rather, MIRA is more likely to have an incentive to ensure that Open Fiber will maximise its profits.

(55) Moreover, already pre-Transaction CDP had a significant (50%) participation in Open Fiber (granting it joint control over that company) and a minority participation in TIM. Even assuming that such a pre-existing situation might have given CDP an incentive to favour a possible coordination between Open Fiber and TIM, the observations received by the Commission did not provide any element suggesting that CDP's increased participation in Open Fiber as a result of the Transaction would appreciably increase such an alleged pre-merger incentive. If anything, CDP's increased participation in Open Fiber would appear to make any possible coordinated outcome favouring TIM more than Open Fiber slightly less attractive for CDP.

³⁴ For the sake of clarity, antitrust rules, in particular Article 101 TFEU, will continue to apply to possible anticompetitive effects not stemming directly from the Transaction.

³⁵ Commission decision of 15 December 2016 in Case M.8234 – *Enel/CDP Equity/Cassa Depositi e Prestiti/Enel Open Fiber/Metroweb Italia*, paragraph 13.

- (56) In light of the above, the Commission considers that CDPE's increased shareholding in Open Fiber will not affect CDP's ability and incentive to coordinate Open Fiber and FiberCop. The Commission further considers that MIRA will maintain an incentive to ensure that Open Fiber will maximise its profits. Therefore, the Commission concludes that the 10% increase in CDP's shareholding in Open Fiber is unlikely to increase the likelihood of coordination on the market for the wholesale supply of fixed internet access services in Italy and on the market for the wholesale supply of fixed backhaul services in Italy.

4.2.2.2. MIRA's obligation [NOTIFYING PARTIES' POST CLOSING POSSIBLE BEHAVIOURS] under Article 21 of the Original SHA

- (57) On the relevance of Article 21 of the Original SHA, the Commission notes, as explained in paragraph (30), that the Amended SHA no longer contains the provisions referred to in paragraph (14) above, including any references to [NOTIFYING PARTIES' POST CLOSING POSSIBLE BEHAVIOURS]. Article 21 of the Amended SHA now contains a wider commitment by both Notifying Parties to develop Open Fiber's network, [DETAILS ON THE PROVISIONS OF THE AMENDED SHA]. Therefore, the grounds on the basis of which the AGCM submitted its concern on this point are no longer existing.

4.2.2.3. CDP's presence in TIM

- (58) Regarding CDP's presence in TIM, the Commission notes that CDP's current minority shareholding in TIM dates back to 2018 and as such pre-dates the Transaction. CDP's Chairman was appointed as director in TIM on 31 March 2021, whereas the Transaction was notified to the Commission later, on 4 October 2021. Thus, the Commission notes that CDP's Entry in TIM's Board also pre-dates the notification of the Transaction. As such, it cannot be considered that the appointment of CDP's Chairman in TIM's board stems from the Transaction itself.
- (59) Moreover, as regards CDP's Entry in TIM's Board, the Notifying Parties submitted the following information to the Commission. TIM's Board is composed of 15 directors. Only one member of TIM's Board is a representative of CDP. In this regard, the Notifying Parties explain that CDP's Chairman does not have any executive role in TIM,³⁶ and that CDP is not part of any shareholders agreement with other TIM shareholders.³⁷ In addition, CDP holds a purely minority stake in TIM, which does not confer on CDP any specific governance rights. As a result, both before and after the Transaction, CDP will not be able to exercise any decisive form of influence over TIM's Board.
- (60) The Notifying Parties point to a number of legal, regulatory and contractual safeguards already in place pre-Transaction, aimed at preventing any exchange of sensitive information or coordination between CDP and TIM through the common board member.³⁸

³⁶ Notifying Parties response to RFI 3 of 26 October 2021, page 2.

³⁷ Notifying Parties response to RFI 3 of 26 October 2021, pages 1 – 2.

³⁸ Notifying Parties response to RFI 3 of 20 October 2021, pages 2 – 6. For instance, from a legal and regulatory perspective, the Notifying Parties refer to (i) Article 2391(5) of the Italian Civil Code, which provides that each member of the board shall be responsible for any damage suffered by the company as a

- (61) In addition, the Notifying Parties submit that CDP's shareholding in TIM has a lesser value than the one in Open Fiber. On the basis of TIM's stock price at the date of notification, CDP's interest in TIM can be valued at approximately EUR 513 million.³⁹ In comparison, CDP's shareholding in Open Fiber will be worth EUR [OPEN FIBER'S SHARE VALUE] after the Transaction.⁴⁰ Therefore, CDP submits that it would have the economic incentive to grow Open Fiber's business to maximize the returns of its significant investment in Open Fiber.
- (62) The Commission considers that the Transaction does not increase the risks of coordination by virtue of CDP's position in TIM because CDP's shareholding in TIM and CDP's Entry in TIM's Board pre-date the Transaction. As such, possible anticompetitive effects stemming from CDP's position in TIM do not arise as a result of the Transaction.

4.2.3. Conclusion

- (63) For the reasons set out above, the Commission concludes that the Transaction as such would not increase the risk of coordination of conduct between Open Fiber and TIM on the markets for the wholesale supply of fixed internet access services in Italy and for the wholesale supply of fixed backhaul services in Italy. Therefore, the Commission considers that the Transaction does not give rise to serious doubts as to its compatibility with the internal market.

5. CONCLUSION

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

For the Commission

(Signed)
Margrethe VESTAGER
Executive Vice-President

result of the use of the information received by virtue of its role; and, (ii) Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse and the respective implementing procedures adopted by TIM, which provide that the confidentiality of information acquired as a result of being a member on TIM's board shall be ensured. From a contractual perspective, the Notifying Parties refer to (i) CDP's antitrust compliance policy which prevents the exchange of sensitive information with competitors; and, (ii) Regulation of CDP's board of directors which provides for an obligation on the members of the board of directors to keep confidential all the information received by virtue of their role.

³⁹ Notifying Parties' response to RFI 4, question 1(a).

⁴⁰ Notifying Parties' response to RFI 4, question 1(b).