



DEPARTMENT OF ECONOMICS AND FINANCE

Chair of IO & COMPETITION THEORY

**Antitrust discipline and restrictive agreements in the
telecommunications sector with major cases**

SUPERVISOR: Gianluigi Albano

CANDIDATE: Francesca Romana Filangieri 242321

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*Ai miei genitori
Che mi hanno indicato la mia strada nel mondo*

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1. INTRODUCTION AND IDENTIFICATION OF SOME CASES

This thesis focuses on the analysis of 3 antitrust cases of restrictive practices (violations of Article 101 TFEU) in the fixed-line telecommunications sector of a national nature (i.e., referring to the Italian market), initiated by the Italian Competition Authority (AGCM).

Specifically, the 3 cases are:

➤ *I850 Proceedings - Fibercop Arrangements*

The conduct potentially in violation of Article 101 TFEU dealt with in this case consists of the creation of the company FiberCop S.p.A. by TIM, Fastweb and the international investment fund KKR. FiberCop is a company created to build the fiber optic network in major areas of the country, in partial opposition to the plan of Open Fiber, the company founded by Enel and CDP (Enel's 50 percent stake was sold in December 2021 CDP for 10 percent and to the Macquarie fund for 40 percent). The emergence of FiberCop was seen by Open Fiber and other operators as a potential risk of strengthening the market power of TIM and Fastweb and consequent alteration of the retail and wholesale telecommunications market. The proceedings ended with the authority accepting the commitments submitted by the parties in favor of the market.

➤ *Proceedings I761 - Ancillary technical services market.*

This case concerns an alleged restrictive agreement regarding the market for the maintenance of telecommunications lines between

Telecom Italia and some of its suppliers denounced by some of TIM's competing operators, according to which the challenged conduct prevented them from directly entrusting freely chosen suppliers with the maintenance of network access components. Telecom Italia and the companies were fined by AGCM and, after a long process of about 6 years, obtained the annulment of AGCM's decision by the Council of State in XX.

➤ *Proceedings 1857 - TIM DAZN Serie A 2012/2024 Agreement.*

The case under review, which is still ongoing, concerns potential antitrust criticisms of the 2021 agreement between TIM and DAZN for the exclusive distribution of Serie A soccer rights via the internet.

The three cases were selected because they allow us to highlight the structural features of the fixed telecommunications industry by discussing their relevance from an antitrust perspective, particularly relevant to studying the cartel conduct challenged in this case.

We then proceed with a brief general overview of both the main characteristics of the fixed telecommunications sector in Italy and the antitrust case of the cartel.

1.1 Market features

In the following discussion, at least four key features of the fixed telecommunications sector in the Italian market will come to the fore as will be seen.

The first characteristic of this sector is that it typically features an operator who-historically-has a dominant position, that is, according to the established jurisprudence of the European Court of Justice (ECJ), a market position that "enables it to restrict competition in the relevant market, since it gives it the power to behave largely independently of its competitors, customers, and consumers. Such a position does not imply a total absence of competition as is the case when there is a monopoly or near-monopoly, but it does enable the firm possessing it, if not to determine, at least to have considerable influence on the conditions under which competition will take place, and in any case to behave largely independently of it, so long as such conduct does not work to its disadvantage."¹

The presence of a dominant operator has historically been linked to the second relevant feature of the industry under consideration, namely the fundamental importance of the physical infrastructure for service delivery, historically held by the dominant firm. Since 1995, the Competition and Market Authority has applied the so-called essential facilities doctrine² to the fixed telecommunications sector.

¹ See ECJ Judgment of February 13, 1979, *Hoffmann-La Roche & Co. AG v. Commission of the European Communities*, Case 85/76.

² For a discussion of the essential facilities doctrine summarized here, see most recently D'Ostuni- Beretta, "Competition Law in Italy," *Giappichelli* (2021), pp. 914-919.

The latter means that, the dominant operator (in the present case, Telecom Italia) owns a fixed network infrastructure by virtue of its former monopoly, it would not be economically viable for competitors to build their own alternative infrastructure to that of Telecom Italia, and therefore access to the infrastructure held by Telecom Italia is the only way to enter and remain active in the downstream market. In other words, the fact that Telecom Italia owns infrastructure is not only its competitive advantage, but also potentially allows it to exert control over competition in the provision of fixed network services to end consumers.

This feature of the fixed-line market is undergoing an evolution in Italy, as an alternative FTTH fiber-to-the-home network infrastructure to that of the dominant operator has been under development since 2016, and is intended to provide nationwide coverage. The investment in question is being carried out by Open Fiber S.p.A.³, an operator that differs from Telecom in its so-called wholesale only business model (i.e., active only in the upstream market of providing access to operators and not in the downstream market of providing service to end customers). Unlike other European markets, network infrastructure competition in Italy is an absolute novelty.

The need for third parties to be guaranteed access to Telecom Italia's infrastructure on fair and non-discriminatory terms determines the third relevant characteristic of the sector under consideration, namely that it is a market regulated (ex ante) by a special Authority (Autorità Garante delle Comunicazioni, AGCom).

³ For the company history and characteristics of Open Fiber's investment, see the report prepared by Wik Consult, *Benefits of the wholesale only model for fiber deployment in Italy*, November 2020, available at [Fehler 404 - Seite nicht gefunden \(wik.org\)](#)

The technical and economic conditions for access to the infrastructure in markets where Telecom Italia holds a dominant position are then set by the Regulator. Here again, it is interesting to note how the regulation of the sector proceeds in line with the evolution of infrastructure competition outlined above: in its recent Resolution 348/19/CONS, AGCom in fact ruled that Telecom Italia no longer holds a dominant position extended to the entire national territory, and in particular is no longer dominant in the geographic market of the city of Milan, due to the presence in that area of consolidated alternative physical infrastructures (first and foremost Open Fiber's FTTH network).

Finally, also in light of the recent Covid-19 pandemic, the fourth feature of the fixed telecommunications sector relevant to the present discussion became evident: the telecommunications sector is undergoing major changes in operators' strategies, particularly through extensions of the competitive arena to adjacent markets, first and foremost those of content (video, music, services) that end consumers can enjoy through infrastructure.

Having set out - albeit with the summary imposed by this paper - the relevant features of the fixed telecommunications sector, it is deemed useful to frame just as briefly the antitrust case that is the subject of this thesis, namely the anticompetitive agreement.

1.2 Brief background on the case of anticompetitive agreement

In the economic literature, it is an established notion that agreements between firms are the most obvious way through which competitive play can be distorted. Collusive agreements can take different forms (implicit or explicit, public or secret), different structures (horizontal, i.e., between

competitors, or vertical, i.e., between operators active at different levels of a given production chain), and equally different manifestations (cartels, horizontal cooperation agreements, vertical distribution agreements). However, they share one characteristic: the ability to give the firms involved market power that they would not otherwise have, bringing them closer to that which a monopolist might exercise. For this reason, such practices are generally prohibited under antitrust law.

The economic literature (and, as we shall also see, AGCM practice) make clear how complex the assessment of such conduct can be: indeed, there is an important difference between practices that industrial economics theory identifies with collusion and conduct that falls directly under the prohibition against collusive agreements. For economic theory, collusion coincides with an outcome (a good example, price higher than the non-cooperative equilibrium) and not with the particular form through which the outcome is achieved. Collusion can thus occur either when firms act through an organized agreement (explicit collusion) or when they operate in a noncooperative manner (tacit collusion).

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In light of this brief theoretical framework, we then proceed to discuss the three cases recently dealt with by AGCM and identified in the introduction.

For each of them, the following will be provided in particular:

- a concise framing of the events and conduct investigated by AGCM, as well as the arguments put forward by the investigated companies in support of the lawfulness of their conduct;

- where necessary, the definition of the relevant market, which in the case of anti-competitive agreements coincides with the product and geographic perimeter on which the conduct under investigation is likely to produce restrictive effects on competition;
- the outcome or status of the proceedings before AGCM, as well as - in one case - its development in the subsequent levels of Administrative Justice (TAR of Lazio and Council of State)⁴ .

To better frame the discussion that follows, it is useful to keep in mind that AGCM has the power to close proceedings initiated either by determining that the unlawful conduct alleged in the opening of the case⁵ does not exist , or by establishing an infringement and thus imposing a sanction on the companies involved in the unlawful conduct⁶ , or by making mandatory the commitments proposed by the Parties to resolve the concerns expressed by the Authority itself on potential anti-competitive aspects of the investigated conduct⁷.

⁴ For an in-depth discussion of the jurisdictional and administrative process of antitrust cases, see Beretta-D'Ostuni, *Il diritto della concorrenza in Italia*, Giappichelli (2021), Chapter 23, *Tutela giurisdizionale amministrativa*.

⁵ See, for example, the recent A537 case, *PET Container Manufacturing Market*.

⁶ See, for example, Case 1761 - *Ancillary Technical Services Market* discussed here.

⁷ See for example the I850 - *Fibercop Agreements* case discussed here.

2. FIBERCOP

On Sept. 1, 2020, Telecom Italia S.p.A. ("TIM") and Teemo Bidco S.à r.l. ("Teemo Bidco"), a special purpose company held by the investment fund KKR & Co. Inc. signed an agreement aimed at creating a joint venture, called FiberCop, active in the provision of wholesale access services (i.e., operator-oriented and not retail market-oriented) via the secondary copper and fiber optic network (the network connecting street cabinets to buildings).

The agreement provided the following on the date of completion of the transaction on April 1, 2021:

1. the transfer from TIM to FiberCop of the business unit including all assets, liabilities and contracts related to its secondary passive access network, both copper and fiber, from the street cabinets to the affected buildings and its 80% interest in Flash Fiber S.r.l. ("Flash Fiber");
2. Teemo Bidco's purchase of the 37.5 percent stake in the share capital of FiberCop;
3. The signing of the Master Service Agreement ("MSA"), which defines the terms and conditions of the long-term mutual service provision relationship between TIM and FiberCop. Based on a Commitment Letter signed on September 1, 2020 by TIM, Teemo Bidco and Fastweb, the 20% share of Flash Fiber held by Fastweb was planned to be contributed to FiberCop in exchange for the 4.5% shareholding in FiberCop.

According to the Parties, the main purpose of FiberCop is to provide a decisive impetus to rapidly deploy an ultra-wideband network in Italy, through the use of optical technologies with GPON-FTTH

architecture, by 2025. FiberCop is expected to play the role of an enterprise that builds next-generation networks and operates exclusively in the wholesale markets for passive network resources (laying infrastructure, fiber links, copper links) of the secondary network only. FiberCop should also represent that vehicle capable of aggregating all potential investors who intend to build ultra-wideband networks, in the manner provided by Article 76 of Directive (EU) 2018/1972 of the European Parliament and of the Council of December 11, 2018, establishing the European Electronic Communications Code (hereinafter, "European Electronic Communications Code" or "ECCC") for co-investment. In this sense, Fastweb's participation in the transaction and the planned strategic partnership between Tiscali and FiberCop should be interpreted. Consequently, FiberCop, in addition to being a vehicle permanently open to outside investors, should also offer its passive resources to all operators, including TIM, on reasonable and non-discriminatory terms.

The antitrust investigation proceedings were initiated on December 15, 2020 to investigate whether the set of agreements entered into between the Parties, relating to the establishment of the FiberCop joint company, as well as the provision of access services to FiberCop's secondary network by TIM, Fastweb and Tiscali could reduce competition in the markets for wholesale and retail broadband and ultra-wideband telecommunications services, in violation of Article 101 of the Treaty on the Functioning of the European Union (TFEU).

Although these are industrial and commercial agreements in the public domain, the AGCM has identified potential anti-competitive risks, likely to strengthen the incumbent dominant operator holding the

access network, at a time when a new entrant (Open Fiber) with a competing infrastructure is present in the market.

The case is highly topical as FiberCop has introduced in Italy, the first European country to implement it on a large scale, the co-investment required by Article 76 of the European Communications Code for the development of new very high-capacity networks; in the face of the hypothetical competitive risks recalled in particular by Open Fiber, the main competitor having Cassa Depositi e Prestiti (CDP) as its reference shareholder, the blocking of FiberCop and its project would have repercussions on the investments the country needs to hit the targets the EU has assigned to member states for 2030 (access to networks with speeds of 1 Gbps for all citizens).

FiberCop has provided 3 forms of co-investment membership to finance network development:

- Equity entry into the company's capital, subject to agreement with current shareholders;
- Commitment to purchase over 10 years a volume of fiber access dependent on the market share of the participating operator;
- Purchase of rights of use for 20 years of portions of the optical closet that collects fiber lines to customers' homes.

The proposed model was analyzed and approved by the Italian Communications Authority (AGCOM) and submitted to the European Commission in May 2022.

2.1 Relevant Markets

The market for wholesale access services to the fixed broadband and ultra-wideband network (hereinafter also referred to as the "wholesale market"), with a national geographic dimension, is defined from a commodity perspective as the services that enable telecommunications operators to provide services to end customers through access to the fixed broadband and ultra-wideband local area network. Access to the local network that connects the end customer is a necessary productive factor for operating in the downstream market for retail telecommunications services. For operators wishing to set up a telecommunications service offering aimed at end customers, the provision of local loop access services is essential, to the extent that it is not possible to serve end customers without having local loop access.

In that market, TIM represents the operator providing the majority of access services. Specifically, with regard to local-type access, TIM's share is more than 90 percent of lines in 2018, with other operators such as Open Fiber and Fastweb accounting for the remainder. The latter provides wholesale local access services, predominantly the VULA service, including through the use of the Flash Fiber vehicle. With regard to wholesale central access services, TIM has a volume market share of about 50 percent in 2018, while Fastweb and Tiscali have volume market shares of about 11 percent and 2 percent of wholesale central access, respectively.

The market for fixed-line broadband and ultra-wideband retail telecommunications services (hereinafter also referred to as the "retail market"), with a national geographic dimension, is defined from a product perspective as the set of fixed-line broadband and ultra-wideband voice and data services to end users. . There is more sustained competitive

confrontation in this market than in the related upstream market for wholesale access services. Here TIM is the only vertically integrated operator possessing an access network with coverage of the entire national geographic market.

Volume market shares, as of June 2021, are shown in the table below:

Tabella 1 – Accessi al dettaglio a banda larga e ultra-larga (giugno 2020)³⁸

Operatore	Numero di accessi a banda larga e ultra-larga (mln di linee)	Quota di mercato (%)
TIM	7,78	42,3%
Vodafone	3,03	16,5%
Fastweb	2,77	15,1%
Wind Tre	2,58	14,0%
Linkem	0,66	3,6%
Eolo	0,57	3,1%
Tiscali	0,44	2,4%
Altri	0,57	3,1%
Totale	18,40	100,0%

2.2 The Telecommunications Network

The local access network (local loop) constitutes the terminal part of telecommunications networks, to which alternative operators to those who own the access network connect to reach the end customer. TIM's access network can be divided into primary access network, consisting of the section between the local exchange and the street cabinet (cabinet), and secondary network, consisting of the section between the street cabinet and the user's premises. Historically, in the copper local access network, alternative operators (OAOs - Other Authorised Operators, also called OLOs - Other Licensed Operators) have bound their

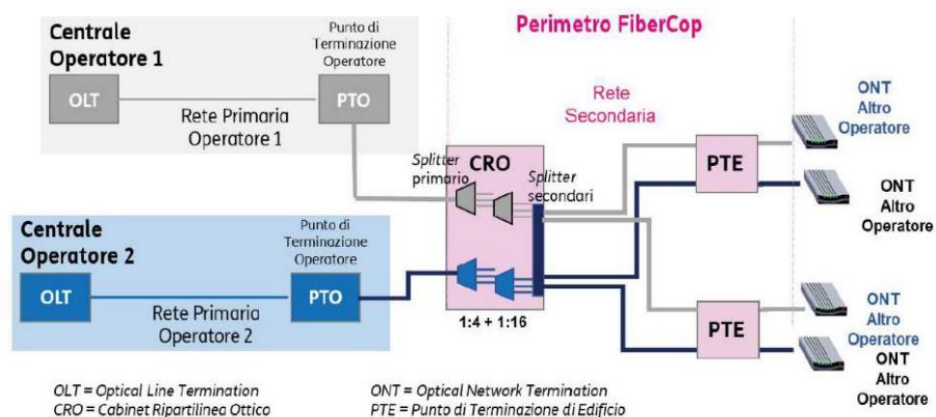
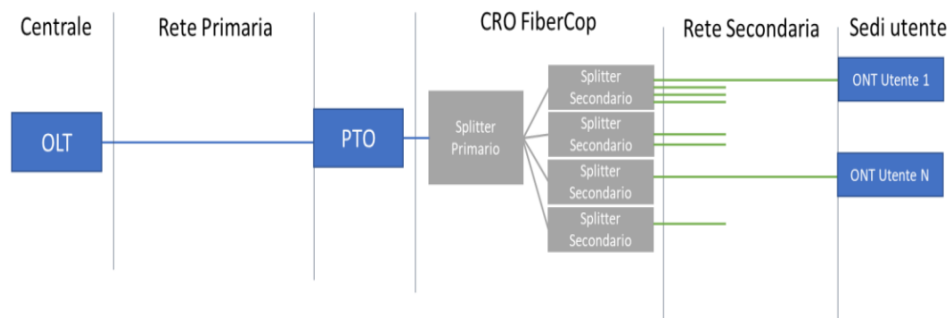
telecommunications networks up to TIM exchanges so as to connect directly to the access network and reach the customer with their ADSL services. Over the years, TIM has initiated a fiber infrastructure project, using FTTC (Fiber To The Cabinet) technology, consisting of bringing fiber to the street cabinet, which is equipped with active (electrically powered) equipment in order to offer ultra-wideband services in VDSL mode and subsequent evolutions.

With such technology, OAOs had two alternatives in order to offer ultra-wideband services:

- I. also lay a section of primary fiber optic network and build a cabinet contiguous to TIM's and access the secondary network in an unbundled manner (through the so-called SLU - Sub Loop Unbundling - access service), independently managing the connection up to the customer;
- II. have TIM manage the connection from the central office to the user's premises through the VULA FTTC service (for OAOs that did not reach the central office, there remained the option of having TIM manage the service entirely to a collection point with the Bitstream service).

Historically, therefore, it is possible to identify a scale of investment by alternative operators according to their degree of infrastructure, where the lowest level is represented by operators who connect to TIM at local (macroregional, regional or provincial) collection points, the middle level is represented by operators who have their own equipment in the central office, and then there are operators who have invested in the construction of primary networks and have reached the street cabinet level.

The access network (or local area network) can be schematized as follows:



Access to FiberCop's network by other operators is through the co-investment model provided for in Article 76 of the European Communications Code. Operators can choose to participate in co-investment by committing to purchase a guaranteed minimum volume of fiber access in 10 years or by the immediate purchase of 20-year rights of use (IRUs) of dedicated CRO infrastructure.

2.3 The plaintiffs' considerations

Open Fiber believes that the FiberCop project does not have the characteristics of a co-investment in accordance with the European Electronic Communications Code, as it would lack the minimum characteristics and pose high competitive issues in several respects.

According to Open Fiber, the FiberCop project has features that would reduce the competitive ability of alternative operators to TIM, favoring the strengthening of the latter's dominance in both wholesale and retail markets. Similar considerations are made by Vodafone and Wind Three. In addition, Open Fiber notes that the guaranteed minimums of purchase provided for access to the FiberCop network would effectively result in blocking about 16 percent of the retail market share, or almost all of the demand expressed individually by Fastweb, Vodafone and Wind Three, configuring a de facto exclusivity covering almost all of the contestable market.

Similarly, Vodafone believes that the forecasts under consideration significantly reduce the contestability of customers that can be acquired by Open Fiber - FiberCop's infrastructure project being in total overlap with Open Fiber for the first 57 cities - and reducing Fastweb's infrastructure incentives, also having a slowing effect on fiber construction.

In addition, Open Fiber notes that FiberCop's perimeter, limited to the secondary network portion, is a complement to TIM's primary network, and in light of the limited primary network presence of other operators, a bottleneck will be created for access to the portion of the network earmarked for co-investment.

2.4 The commitments made by the parties

TIM, Teemo, FiberCop and Fastweb have made a series of commitments before the AGCM to eliminate the competitive risks highlighted in the order, namely that the co-investment contracts would lead to a reduction in demand contestability, not allowing for real infrastructure by

alternative operators to TIM, instead favoring the use of active services provided by TIM.

The commitments can be summarized as follows:

- ❖ Ensure certain time frame for FiberCop network deployment and readiness for commercialization.
- ❖ Providing the primary network at subsidized prices to operators who join the co-investment.
- ❖ Provide an "entry-level" profile for the purchase of IRUs at the CRO (16 accesses instead of 64).
- ❖ Allow co-investors to install their own optical termination at the end customer's premises.
- ❖ Establish a committee between FiberCop and the co-investors where they will share with the co-investors the lines of development and any changes in the roll out plan that is the subject of the co-investment, a six-month plan that will indicate the municipalities in which the implementations are planned in the next six months. Co-investors will submit their proposals to FiberCop for joint evaluation, and may indicate specific municipalities in which to develop said plan as a priority, which will be taken into account by FiberCop.
- ❖ Segregation of business information between FiberCop and its shareholders.

The AGCM found that the commitments submitted by the Parties were suitable to remedy the competitive concerns raised at the initiation of the preliminary investigation procedure, which was therefore closed by initiating monitoring activities on the implementation of the commitments.

The main reasons why the commitments were considered suitable for avoiding competitive risks are as follows:

- The ex-ante definition of a development plan for the new network as well as the establishment of a committee of co-investors that can direct implementation priorities eliminate the risk of TIM exerting a dominant influence on the project;
- Operators using FiberCop's network can choose to install their own optical termination at the customer's premises and independently manage the end customer's line installation and repair activities;
- The segregation of information held by FiberCop does not grant TIM any informational advantages over its competitors.

2.5 Concluding remarks on the case discussed

In light of what has just been discussed, it is clear that the FiberCop Agreement does not constitute a classic case of a cartel aimed at raising prices, but rather falls into a particular type of potential violation of Article 101 TFEU: a horizontal cooperation agreement apparently capable of producing exclusionary effects on parties not participating in the agreement itself (Open Fiber), and thus affecting competition especially in the medium to long term, strengthening the market position of a single operator (Telecom Italia). The nature of this project, however, makes it clear that it is suitable for contributing to improving technical and economic progress in the provision of fixed-line telecommunications services by reserving a fair share of the benefits of the agreement for Italian consumers.

For example, an analysis conducted by the Brattle Study (2020) shows that the FiberCop project has significant pro-competitive effects, as it incentivizes the participation of operators in co-investing in the creation of ultra-wideband infrastructure through mechanisms that avoid friction among participating operators, accelerating the deployment of fiber optics in Italy. As of April 2022, FiberCop's network has reached coverage of 7.8 million Real Estate Units, and 7 operators, in addition to shareholders TIM and Fastweb, have signed co-investment agreements.

AGCM's decision to close the proceeding without finding a violation of the rules protecting competition, but rather accepting the commitments proposed by the investigated parties to remove potential anticompetitive criticalities of the Agreement was therefore intended to weigh the protection of competition against the need to guarantee the country an adequate infrastructure endowment, as specified in the foreword essential for service delivery, through a solution (co-investment) considered by the operators themselves to be optimal.

In fact, examining the commitments, it emerges that they are unanimously aimed at downplaying the advantages that the incumbent operator Telecom Italia would obtain from the project of which it is the promoter and protagonist (non-access to commercial information, constraints on timeframes and development plans), and at protecting the other participating operators (active participation in the development of the plan, optimal economic conditions). AGCM thus intended that-through these commitments-competition between the Fibercop project and other infrastructure projects active in the domestic market (chief among them, Open Fiber's FTTH network investment) will be able to take place on the merits. Nevertheless, in May 2022 Open Fiber appealed to the Regional Administrative Court requesting the cancellation of the commitments and the reopening of the proceedings.

3. THE CASE OF MAINTENANCE

In July 2012, the operator Wind Telecomunicazioni S.p.A. reported an alleged agreement restricting competition put in place by the companies Alpitel S.p.A., Ceit Impianti S.r.l., Sielte S.p.A., Sirti S.p.A., Site S.p.A. and Valtellina S.p.A., which are currently active in offering line maintenance and activation services on the telecommunications networks of Telecom Italia S.p.A. and competing operators (OLOs). The reporter reported to the Authority that she had received some quotes from the aforementioned companies for the maintenance service of lines in access and saw some elements symptomatic of the presence of a restrictive agreement of competition, including a particular homogeneity in the economic quotes and responses sent.

After approximately 2 years of investigation and gathering evidence, the Antitrust Authority (AGCM), in June 2014, expanded its investigation to include the investigation of possible violations of Article 102 TFEU by Telecom Italia, given its dominant position in the markets for wholesale access services and ownership of the copper communications network, as well as its role in relation to services provided by maintenance companies.

Specifically, Wind reported that it has initiated an activity aimed at researching and evaluating possible providers of line maintenance service in order to stop paying Telecom Italia for it. In April 2012, although the technical terms of the services had not been defined in detail, the company approached Sielte, Sirti and Site requesting an outline quotation based on a monthly fee per line. The three companies provided an initial assessment, specifying that these quotations would be subject to change as the technical and economic characteristics of

the service, as well as the regulatory system, were defined. Following this, in July 2012, Wind requested another listing by extending the number of target companies and obtained the following results:

Tabella 2 – Offerte delle Imprese di Manutenzione (luglio 2012)

Società	Canone linea/mese (€)	Data e ora di presentazione⁶
Alpitel	1,390	13 luglio 2012; 14:52
Ceit Impianti	1,410	13 luglio 2012; 15:10
Sielte	1,390	13 luglio 2012; 10:47
Sirti	1,380	13 luglio 2012; 18:12
Site	1,370	13 luglio 2012; 16:32
Valtellina	1,385	16 luglio 2012; 16:22

Subsequently, Wind requested the Maintenance Firms to review the submitted bids and provide information on the higher costs brought about by the RDO compared to the conditions then in place with Telecom Italia and to unbundle the higher costs resulting from the new technical specifications so that the fairness of the price and consistency with the preliminary bids could be assessed. Following Wind's request for an improved bid, the Maintenance Firms submitted a new bid on August 30, 2012, in which some firms revised their service prices slightly downward.

The final bids are shown in the table below:

Tabella 3 – Offerte delle Imprese di Manutenzione (agosto 2012)⁹

Società	Canone linea/mese (€)	Sconto applicato rispetto a luglio 2012	Data e ora di presentazione
Alpitel	1,330	4,32%	30 agosto 2012; 10:46
Ceit Impianti	1,390	1,42%	30 agosto 2012; 11:24
Sielte*	1,390	0,00%	30 agosto 2012; 11:54
Sirti*	1,380	0,00%	30 agosto 2012; 13:17
Site	1,340	2,19%	30 agosto 2012; 11:45
Valtellina	1,358	1,95%	30 agosto 2012; 11:24

**offerta non modificata rispetto al luglio 2012.*

Wind - not deeming the prices congruent with the costs of carrying out the activity - forwarded the RDO to Imet S.p.A., ADS Assembly Data Systems S.p.A. and the Aurora Telecomunicazioni Consortium (hereafter, Imet, ADS and Aurora Telecomunicazioni, respectively), which provide maintenance services on telephone lines but do not carry out the specific activity requested (System Unico). The quotations submitted by the latter entities in September 2012 were lower, with an average discount of 53 percent compared to the August 2012 quotations submitted by Maintenance Firms.

In addition to the above companies, Wind requested a listing in September 2012 from two other companies active as Telecom Italia network companies and qualified as System Unico companies: Cogepa Telecommunication S.p.A. and Icot Tec S.p.A. According to findings in the preliminary investigation, the prices charged by Cogepa and Icot averaged €1.365/line/month.

In fact, the Authority found that the August 2012 bids of Maintenance Companies appear to be extremely homogeneous with a spread between the maximum and minimum value of €0.06/line/month and a coefficient of variation¹² equal to 0.017. In contrast, the bids of Aurora Telecommunications, Imet and ADS, in addition to being significantly lower (with an average discount of 53 percent), had a

spread between minimum and maximum value of €0.17 and a significantly higher coefficient of variation of 0.115. In addition to this, the bids submitted by the Maintenance Firms were extremely different from the preliminary quotations submitted by the Sielte, Sirti and Site Maintenance Firms (the only ones surveyed in April 2012), although the latter were not based on a sufficiently detailed request for proposal and therefore not perfectly comparable.

In the Authority's view, moreover, the characteristics of the market, such as the presence of a small number of companies currently offering such services to Telecom Italia, *could have facilitated the attainment and maintenance of an understanding*, facilitating communication between companies, *leading to coordination of prices and facilitating the monitoring of behavior*.

In the same order initiating the Proceedings, it was not ruled out that the Maintenance Firms also engaged in broader coordination with reference to the overall market for ancillary technical services aimed at the generality of telephone operators.

At the same time that the proceedings were initiated, the Authority decided to authorize inspection activities against the above companies and, in addition, against Telecom Italia. Inspection activities were carried out at eleven corporate offices of the Maintenance Companies and Telecom Italia on April 4, 2013.

At its meeting on December 19, 2014, the Authority resolved to publish Telecom Italia's commitments, which were submitted in their final version on November 21, 2014, in order to receive comments from the market on their ability to resolve the critical competition issues highlighted in the objective extension of the proceedings. Following the comments made by the operators Wind

Telecomunicazioni S.p.A., Vodafone Omnitel N.V., Fastweb S.p.A., MC-link S.p.A., TWT S.p.A. and the AIIP -Associazione Italiana Internet Provider in the terms of the market test, as well as the replies to them submitted by Telecom Italia along with some amendments to the commitments themselves, the Authority, on March 25, 2015, resolved to reject them.

In fact, the Authority found that the set of commitments proposed by Telecom Italia was inadequate to remove the anticompetitive profiles under investigation described in the measure adopted on June 19, 2014, which objectively expanded the investigation to Telecom Italia S.p.A. for the purposes of establishing a possible abuse of a dominant position in violation of Article 102 TFEU, and that these were also inadmissible with regard to the anticompetitive profiles set out in the order of July 10, 2013, by which the proceedings to establish the existence of a restrictive agreement of competition under Article 101 TFEU, consisting of a possible coordination aimed at establishing prices for maintenance services, had been extended to Telecom Italia S.p.A.

The investigative activity allowed the collection of numerous evidences related to the coordination between the Parties aimed at jointly setting the prices offered for unbundled corrective maintenance services. The Parties, according to the findings of the investigation, exchanged information having both technical and economic content related to the bid. Moreover, the preliminary activity made it possible to ascertain the active involvement of Telecom Italia, which played a liaison and coordination role among the maintenance companies at various times, including at the stage of preparing the economic offer and during the hearings at AGCOM. Inspection documents make it possible to verify the existence of an exchange of information

concerning the economic content of the offer, and not limited to technical conditions regarding the answers to be provided to Wind. Numerous e-mail exchanges pertaining to the topic encountered among Enterprises and between Enterprises and TI.

Coordination between the companies, according to the findings of the investigation, also took place in the period after the submission of bids in July 2012. In fact, on August 23, 2012, Wind sent the Maintenance Companies an e-mail in which it informed them that it considered the price offered "excessive and incongruous with respect to the conditions and technical characteristics of the service," and therefore asked them to send an economic proposal that was better than those previously submitted. According to documents found at various inspection sites, there are several meetings and contacts between companies related to the request for revision of economic conditions.

3.1 The defense of the Parties

The Enterprises and TI pointed out that, following the approval of the rule that gave the possibility for Operators to carry out their own maintenance of lines leased to customers, an EU infringement procedure was opened and, therefore, given the current legislative-regulatory references, even today the sector cannot be considered liberalized. The conduct alleged against the companies, therefore, would have no competitive significance because there is no configurable market for ancillary technical services. In Telecom Italia's view, "the impossibility of postulating the competitive opening of the services in question, moreover, is also expressly recognized by the Communications Guarantee Authority."

In addition, according to Sirti, the AGCM Authority has allegedly encroached on the sphere of AGCOM's attributions by championing the liberalizing demands of the Operators.

All Maintenance Firms pointed out the presence of innumerable technical difficulties related to Wind's RDO and, in particular, regarding the scope of work required to deliver the unbundled corrective maintenance service. According to the Maintenance Firms, the RDO did not present adequate detail in the description of the technical aspects of the service, such as processes and information regarding the databases exclusively available to Telecom Italia, and activities were expected to depend on Telecom's own intervention.

These critical issues, in some cases have been raised by Maintenance Companies but Wind has failed to respond to them in a comprehensive manner, instead merely soliciting an improved bid. In the opinion of the Maintenance Companies, it would have been preferable not to submit a bid at all, but Wind's strong bargaining power was such that it did not allow this option. According to the Parties, in fact, due consideration must be given to the need for technical-operational coordination with Telecom Italia, which was necessary for the purpose of preparing the offer that was contingent on the availability of network information. The Maintenance and Telecom Companies then stressed the need for technical coordination for the purpose of service definition.

3.2 The Antitrust Authority's assessments.

The AGCM believes that Alpitel, Ceit Impianti, Sielte, Sirti, Site, Valtellina and Telecom Italia companies have put in place a unique

and complex restrictive agreement of competition, in violation of Article 101 of the Treaty on the Functioning of the European Union, through the coordination of economic offers and other related contractual conditions (such as quality levels, possibility of subcontracting) within the procedures for the selection of suppliers prepared by Wind and the coordination having to do with information, transmitted to the regulator, related to the provision of maintenance services. Such conducts were aimed at limiting competitive confrontation and preventing the evolution of unbundled forms of delivery of ancillary technical services.

Telecom Italia and Maintenance Companies have common interests in pursuing these goals. First, in fact, Telecom Italia is a vertically integrated entity that operates at different levels of the supply chain, is the owner of the network but also maintains it. In this sense, the Parties all have the same aspiration that such services should be remunerated as much as possible. Second, and related to the previous aspect, it should be considered that the Parties tend to preserve the status quo in the provision of maintenance services.

With regard to the alleged instrumentality and vagueness of Wind's RDO, which would configure it as a mere market survey, the Parties' considerations are not considered to be agreeable. First, it should be mentioned that the challenged behaviors are in a broader context than the offer submitted to Wind. In fact, they also invest a listing request by Fastweb and regulatory affairs related to corrective maintenance. Moreover, even if Wind's request had been instrumental, the Parties should have reacted independently and not sought coordination for the purpose of response by jointly defining the economic-commercial terms of such responses, as is evident from the numerous evidences in the record.

In calculating the penalty to be imposed, the AGCM determines the value of sales related to the activity that is the subject of the restrictive agreement on competition based on the following table:

Tab. 8 – Valore delle vendite rilevante ai fini del calcolo dell'importo base sanzionatorio e Fatturato totale

		Valore delle vendite (anno 2012) ³³⁸		Fatturato totale a livello mondiale (anno 2014) ³³⁹
Telecom Italia	€	63.327.388	€	21.974.000.000
Alpitel		<i>[inferiore a 1 milione di] euro</i>	€	88.429.666
Ceit Impianti		<i>[1-10] milioni di euro</i>	€	130.979.388
Sielte		<i>[1-10] milioni di euro</i>	€	289.735.688
Sirti		<i>[1-10] milioni di euro</i>	€	608.700.073
Site		<i>[1-10] milioni di euro</i>	€	176.570.413
Valtellina		<i>[1-10] milioni di euro</i>	€	135.201.455

Ultimately determining the following sanction for the Parties:

	% del Valore delle vendite	Entry fee	Aggravanti	Incremento sanzione per "proporzionalità e deterrenza"	Sanzione finale
Telecom Italia	15%	15%	15%	25%	€ 21.506.574,66
Alpitel	15%	15%	no	no	€ 133.796,17
Ceit Impianti	15%	15%	no	no	€ 782.026,01
Sielte	15%	15%	15%	no	€ 2.383.304,15
Sirti	15%	15%	no	no	€ 1.904.213,04
Site	15%	15%	no	no	€ 1.050.030,14
Valtellina	15%	15%	no	no	€ 339.912,72

The companies affected by the sanction appealed first to the Lazio Regional Administrative Court, which upheld the AGCM's ruling, and then to the Council of State, which, in December 2019, overturned the ruling, holding that at the time of the disputed facts, but also subsequently (as shown by the long and complex investigation conducted by AGCOM), it was neither technically nor legally possible to unbundle the provision of maintenance services regardless of the

necessary intermediation of Telecom, owner of the line section concerned, so that Wind's requests for quotations would have been ab origine invalid due to legal and technical impropriety, since they claimed to obtain from the network companies an outsourced supply of corrective maintenance services through a direct agreement with the OLOs that did not provide for any intermediation or involvement of Telecom, neither from the contractual nor from the technical point of view.

These were, therefore, in essence, on the civil law level, contractual proposals (assuming they were such and not mere exploratory requests for acquisition of information, but that is of little relevance) with impossible subject matter and therefore inadmissible. And this fact was cognizable both at the time of the initiation of the procedure and at the time of its conclusion and the adoption of the contested measure, but it was not grasped at all, nor enhanced in the assessment of the Antitrust Authority, which instead intended to sanction the conducts per se considered, as responding to an abstract model of anti-competitive practice (according to the presumptive logic of the "cartel by object"). The CoS also notes that not considered by the Authority is the fact that on the Telecom-owned line it was not possible (and, perhaps, not even useful and manageable) to intervene directly without anything agreed upon first with Telecom itself.

The Council of State's assessment was influenced, among other things, by the ex post observation of the complex course and outcomes - essentially confirmatory of the original set-up - of the regulatory function finally performed by AGCOM and concluded with a 2017 regulatory act, the application of which would not allow even today the technical and legal practicability of Wind and Fastweb's request for quotes.

It is not without significance that the offers - far more advantageous - of third-party maintenance companies (companies ADS, Aurora Telecomunicazioni and Imet), acquired by Wind after the unsatisfactory responses received from the maintenance companies of today's appellants and submitted to the Authority as further proof of the anti-competitive practices complained of, then remained without follow-up and without any effect; if the Authority's thesis were true, i.e., the immediate and already current viability (in 2012) of unbundled access to the Telecom network, it is unclear why Wind certainly did not accept those quotes and enter into the resulting contracts. Those offers remained unfulfilled evidently because of the objective impossibility of fulfilling them and bringing them to concrete effect. Finally, the Council of State suggested to AGCM the possibility of reopening the investigation limited to the assessment of information exchanges between maintenance companies and TIM.

3.3 Concluding remarks on the case discussed

The understanding sanctioned by AGCM and then differently assessed by the Council of State is based on the fact that access to the fixed network held by TIM is as mentioned in the introduction subject to ex ante regulation: sector authority (AGCom) sets the technical, qualitative and economic conditions that Telecom Italia must charge operators to access its physical network.

Specifically, the costs of maintaining this physical network (evidently indispensable for resolving inefficiencies and failures in service delivery) were (and are) included in the monthly fee that operators have to pay to Telecom Italia for each of their customers (or lines) active on Telecom's own physical network. The maintenance service

is provided either by Telecom Italia itself, or by maintenance companies authorized for that purpose, in a context that - it bears repeating - is subject to ex ante regulation because the network constitutes a unique asset, which also requires orderly and consistent maintenance management.

The strategies implemented by the whistleblowers Wind and Fastweb were basically aimed at bringing out that there was an illicit coordination between maintenance companies and TIM, aimed at artificially keeping the prices of maintenance services high and - as far as TIM is concerned - at preventing their outsourcing (i.e., preventing Telecom Italia's competing operators from assigning the maintenance of their customers' lines to independently chosen companies at prices freely negotiated with them, thus ceasing to pay the fixed monthly fee to Telecom itself).

In fact, both reporters represented that the coordinating firms communicated that in the event of service outsourcing they would charge relatively high prices (or at least such that it would not be convenient to contract independently with the two operators, disintermediating Telecom). AGCM had concluded that such conduct would have prevented the emergence of a new market dedicated precisely to the provision of such services, to the detriment of Telecom's competing operators, with the possibility that the latter would have incurred higher costs than they would otherwise have done under free competition.

The Council of State's ruling, however, has brought the focus back to a fact neglected in the proceedings before AGCM, namely that the emergence of this 'new' market could not have occurred spontaneously

as early as 2012, but would have required the intervention of the regulator AGCom⁸ from the outset.

The case discussed here appears interesting primarily because it highlights an issue that is often problematic in the protection of competition in the telecommunications sector, namely the sometimes conflicting relationship between regulating competitive dynamics so as to ensure ex ante compliance with regulations (assigned to AGCom) and intervening ex post in concrete cases of apparent violation of those regulations (AGCM's typical role).

In light of the case examined, it can be concluded that in the antitrust practice applied to this sector, the notion of a regulated market, as well as the timing and methods of regulatory action, are crucial.

4. TIM-DAZN AGREEMENT

TIM and DAZN sign a major partnership agreement in 2021 that allows DAZN to win exclusive broadcasting rights to Serie A soccer. For the first time in Italy, all matches will be broadcast via the Internet after a monopoly of more than 10 years by Sky's satellite platform.

The agreement, followed by much controversy, including political controversy, marks a turning point in the country that has the lowest internet usage indicators in Europe; the transmission of sports content via internet streaming could induce many hitherto reluctant people to purchase a fiber line.

⁸ *This intervention by AGCom was then materialized years later in Del. 312/17/CONS.*

The rationale behind the agreement between the 2 companies is financial and technical. TIM is a telecommunications operator and an audiovisual service provider, with its service called TIM Vision, in which it integrates its own editorial content and third-party audiovisual services (e.g., Netflix, Disney+, DAZN) and has a high level of technical and distribution expertise. For its part, DAZN would be able to reduce its financial exposure, optimizing its investment. DAZN was thus able to bid for the two main Packages and secure the most effective distribution channel on the Internet platform, consistent with its OTT offering model.

As of Feb. 21, 2021, several TLC operators such as Vodafone Italia S.p.A., Wind Tre S.p.A., Fastweb S.p.A. and most recently, on June 22, 2021, Sky Italia S.r.l., active both as a telecommunications operator and as an audiovisual media services provider (with an offering present on digital satellite, digital terrestrial and Internet, under the Sky Q and eNow brands; licensee of most of the rights to view Serie A championship matches in the previous distribution rounds called by the LNPA), filed memoranda highlighting possible restrictive effects on competition attributable to the agreement between TIM and DAZN, developing essentially similar considerations among themselves.

The reports cited above address two main critical issues that would affect competition in the wholesale and retail telecommunications services markets, as well as the pay TV market. In particular, the first critical issue is the centralization of a non-replicable editorial content with high consumer value, such as the Serie A soccer championship, on the Internet Platform alone and its exclusive marketing by TIM alone. This would further strengthen the latter's position in the broadband and ultra broadband market, given that it would be the only

telco that would be able to include such content in its triple-play offerings and the only entity that can offer discounts to consumers and can have DAZN's app installed on its devices, such as the TIM Box in particular.

As a result of the agreement with TIM, DAZN would then discontinue its existing negotiations with telecom operators. DAZN also allegedly attempted to limit rights in existing and existing contracts with telecommunications operators, even speciously demanding their early termination. According to the documentation provided, DAZN has justified the termination of any present and currently negotiating relationships with telecom operators because of past agreements that absolutely preclude it from negotiating agreements regarding residential customers.

Regarding the second type of critical issues, the reporting operators complained about TIM's implementation of technological improvements in its network and the adoption of discriminatory technical solutions, which are currently being developed only for its internal retail division and would tend to make alternative telecom operators more dependent on TIM's network by debasing their investments in telecom networks. Contextually, as a result of the agreement, DAZN would have lost any incentive to work with telecom operators to identify more appropriate technical solutions suitable for avoiding network congestion due to the expected increase in demand for DAZN services. Specifically, in the face of outline technical solutions already defined with operators, DAZN would have reduced the technical solutions for interconnection and traffic management, as well as the investments required for interconnection with operators, discriminating against them compared to TIM.

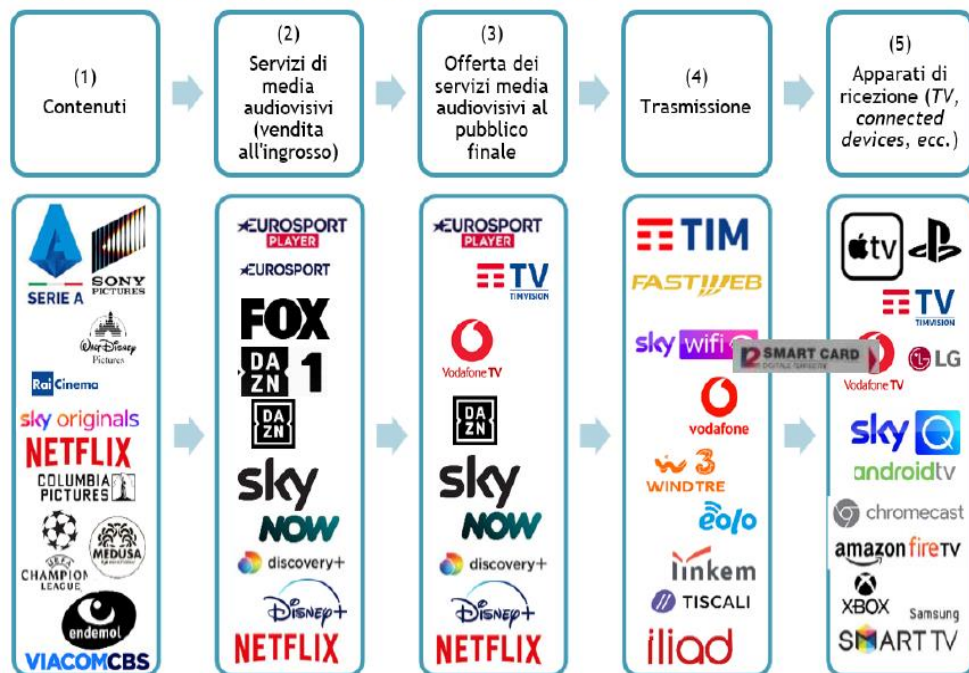
4.1 The relevant markets of the TIM-DAZN agreement

The clauses contained in the agreement between TIM and DAZN constitute an agreement between undertakings, which is liable to be assessed under Article 101 TFEU.

That being said, it should be recalled that in cases involving restrictive agreements, the definition of the relevant market is essentially aimed at identifying the characteristics of the economic and legal environment in which the coordination between enterprises takes place. In fact, for the purposes of assessing a cartel, the identification of the relevant market, although useful for precisely circumscribing and focusing the analysis of the behavior of the enterprises involved, is functional in identifying the product and territorial scope in which coordination between enterprises is manifested and the effects resulting from the competitive offense are realized.

In order to fully understand the context in which the conduct under scrutiny is embedded, it is deemed useful to examine the production chain that connotes television services, with particular reference to pay-TV services. The value chain of the television medium can be divided into several vertically interrelated stages, each of which can be carried out in-house, or outsourced. They are summarized in Figure 1.

Figura 1 – Struttura verticale dei servizi televisivi²³



Content is an input for the provision of audiovisual media services to end customers. This can be done by self-production or by purchasing on the market broadcasting rights to products in the ownership of third parties. From the point of view of horizontal differentiation of audiovisual content, it can be classified, depending on its objective characteristics and target audience, into different thematic genres. In relation to the vertical differentiation of audiovisual content, this is traditionally divided into two groups, namely "premium" and "non-premium." The first type is characterized by a high level of quality perceived by end users, so they are marked by a high willingness to pay on the part of the audience and are able to generate relevant ratings. In antitrust decision-making practice, these are essentially first-run movies and particularly popular live sporting events (e.g., Serie A national championship). In particular, Serie A league content appears to be an important driver of users' consumption choices; in fact, it has been found in the past that more than half of the users who

include such content in their subscription (namely 56.9%) would proceed to cancel their entire subscription if Series A was no longer available.

Audiovisual media service providers are responsible for the editorial activity of packaging individual programs, and audiovisual content in general, into schedules and catalogs. In this context, it is possible to distinguish the activity of packaging linear media services ("linear channels" according to a predetermined order), from the activity of defining an on-demand audiovisual media service ("on-demand" mode with a catalog of content that can be chosen by end users). The stage of the audiovisual supply chain just described represents the wholesale side, which consists of the preparation of a complete publishing product that can be sold in order to define a retail-type offering to the final audience. The third stage in the industrial supply chain shown in Figure 1, on the other hand, concerns how channels and catalogs are offered to end customers.

In commercial pay-TV platforms, operators prepare a retail offering of a bouquet of channels, third-party and self-produced. The pay-TV operator, therefore, acquires the wholesale channel and includes it in its commercial offer to customers. Moreover, even when considering nonlinear services (VOD catalogs), the distinction between the present stage of the vertical chain [offering to the public] and the previous stage [media service providers] of the chain becomes particularly blurred. This is because publishing activities consist of defining the catalog of on-demand content present in the public offering, and these activities do not involve the acquisition of linear channels.

The content must then be transmitted to the viewer, through the use of one of the technologies currently available. In recent years, in addition

to the modes traditionally used for television broadcasting in Italy—namely digital terrestrial (DTT) and digital satellite (DTH)—the penetration of the Internet for the supply and consumption of audiovisual content has increased.

In particular, audiovisual media services on the Internet are based almost exclusively on an OTT-TV -Over The Top TV model, are broadcast on the public Internet network without distinction of operators, do not use closed Internet networks and, therefore, are available to all users with broadband Internet access. There are no minimum levels of service quality, which is provided on a best effort basis, although pay services use technologies that can limit the occurrences of delay and interruption of the audiovisual stream. In order to improve the performance of the network where data traffic is treated indiscriminately, several technologies have been developed to ensure quality levels in a best-effort framework.

These include content delivery network (hereinafter also "CDN") services, which consist of additional transmission networks and servers, placed at the stretches of the Internet network most likely to experience congestion, that enable them to benefit from dedicated transmission capacity and space to copy and store the information on the original servers. In this way, the request for a particular content is fulfilled by the nearest server and more quickly than if it were to be handled by the audiovisual service provider's headquarters.

Such services can only speed up data transmission, reducing any intermediate bottlenecks at some network nodes, without being able to affect the conditions of the communication network reaching the end customer (access network), which may not guarantee an adequate level of service.

Additional ways of managing traffic may consist of identifying, with telecommunications operators, interconnection points (peering) with networks, so as to geographically define and size the communication "pathways" between the media service provider's servers, which generate the content, and the operators' network needed to reach users.

Internet transmission modes can be distinguished into "unicast" and "multicast." A unicast transmission consists of a point-to-point transmission in which each user establishes a single connection with the server: this means that if N users use the audiovisual service at the same time (even the same content), there will be N data streams at the same time, which will then add up in the occupation of available network resources.

Multicast technologies, which can be used in the case of simultaneous viewing of the same content (such as linear channels or live events), allow a single stream of data to be sent to N users, albeit with a delay dependent on the technology implemented. In this case, network resource utilization is lower because of the presence of a single audio-video stream.

In terms of receiving devices, technological evolution has enabled the introduction of a number of devices, other than the traditional television set, that are capable of accessing audiovisual content, even on the move. Thus, on the one hand, we see the introduction of new devices such as tablets, smartphones, and computers, and on the other hand, we see the convergence of traditional television and the Internet (smart TVs, set top boxes, or connected set-top boxes). Such devices usually allow the apps of audiovisual media service providers to be installed in OTT mode.

The agreement between TIM and DAZN, in the opinion of the antitrust authority, affects several levels of the supply chain and, in particular:

- On the possibility of wholesaling the DAZN service;
- On the technical and economic conditions for the sale of services to the public and limitations on marketing by certain parties;
- On how electronic communications operators transmit and bill for service;
- On devices (decoders, set top boxes) on which DAZN's OTT services can be installed.

In view of the scope of the agreements under consideration and the activities of the enterprises involved, they also note:

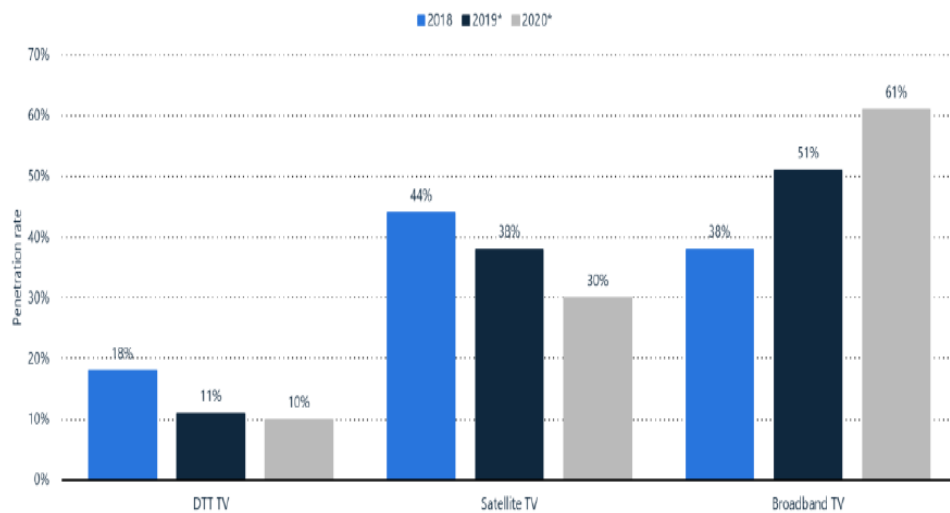
- I. The retail market for pay TV services (pay TV market);
- II. the market for wholesale fixed-line broadband and ultra-wideband access services;
- III. the market for fixed-line broadband and ultra-wideband retail telecommunications services;
- IV. The market for mobile telecommunications retail services.

The pay-TV market, with a national geographic dimension, coincides with the overall market for pay-TV services, which can be delivered through different means of transmission, and in particular via satellite (DTH), through digital terrestrial television (DTT), as well as via cable and the Internet (IPTV and OTT).

In the national and European practice, the pay-TV market is considered to be distinct from the free-to-air television market and, more specifically, from the market for advertising sales in the television medium, although there are links between them resulting

from horizontal relationships. This is because, "premium" programs and content normally distributed through pay TV are not normally substitutable with programs and content broadcast by free-to-air channels.

In this market, TIM is present with its TIM Vision offering and DAZN with its OTT service marketed directly or through distribution agreements with third-party operators. As for the transmission platforms used for pay TV, at present about 10 percent of users use digital terrestrial television (DTT), 30 percent use digital satellite, and 61 percent use the Internet platform (Broadband TV), which is gradually growing as shown in the figure below:



The market for wholesale access services to the fixed broadband and ultra-wideband network (hereinafter also referred to as the "wholesale market"), with a national geographic dimension, is defined from a commodity perspective as that which contains the services that enable telecommunications operators to provide services to end customers through access to the fixed broadband and ultra-wideband local area network. Access to the local network that connects the end customer

is a necessary productive factor to be able to operate in the downstream market for retail telecommunications services. For operators wishing to set up a telecommunications service offering aimed at end customers, the provision of local loop access services is essential, to the extent that it is not possible to serve end customers without having local loop access.

The market for fixed-line broadband and ultra-wideband retail telecommunications services (also "retail market"), with a national geographic dimension, is defined from a product perspective as the set of fixed-line broadband and ultra-wideband voice and data services to end users. This market is structurally oligopolistic in nature, although there is a more lively competitive confrontation than in the related upstream market for wholesale access services. In that market, TIM is the only vertically integrated operator in possession of an access network with coverage of the entire national geographic market, with a majority market share that is far greater (by almost three times) than the three main competing telecom operators.

Volume market shares, as of June 2020, are depicted in the following table:

Tabella 1 – Accessi al dettaglio a banda larga e ultra-larga (giugno 2020)²⁹

Operatore	Numero di accessi a banda larga e ultra-larga (mln di linee)	Quota di mercato (%)
Tim	7,52	42,2%
Vodafone	2,96	16,6%
Fastweb	2,69	15,1%
Wind Tre	2,49	14,0%
Linkem	0,67	3,8%
Eolo	0,49	2,8%
Tiscali	0,43	2,4%
Altri	0,54	3,0%
Totale	17,81	100,0

4.2 Preliminary assessments of the AGCM

With reference to the understanding put in place by the Parties, the Authority considers that the evidence on file points to the possible existence of a restrictive agreement on competition implemented by the Parties and its detrimental effect on competition.

Three circumstances must be considered in this regard:

1. First of all, the nature of the audiovisual content related to the top national championship at a particularly relevant stage such as the beginning of the new three-year period of commercialization of TV rights for the viewing of the Serie A championship, which was characterized by the assignment of the majority of the rights under consideration to a new operator that by express provision of the Agreement is limited in the exploitation of audiovisual rights exclusively on the Internet platform, after the previous marketing cycles had seen the assignment of the majority of the events under consideration to an operator active on a traditional platform. At the same time, it should also be noted, alongside the premium nature of Serie A sports television content for pay TV markets, the circumstance that, at a time of particularly sensitive development of the Broadband and ultra-wideband network, the TIM/DAZN agreement is likely to hinder the development of demand for services for alternative operators to TIM, nominally identified in the agreement. Moreover, it is noted that the investments made by the parties could still find adequate remuneration through the provision of less restrictive limitations than those contained in the agreement under consideration.

2. Second, it notes the timeliness of promotional campaigns that identify particularly advantageous conditions for the purchase of the TIM Vision system associated with the purchase of fiber services, aimed only at residential customers who hold or will subscribe to TIM's telecommunications services. Since these promotions are only for TIM users and TIM telecom offerings are predominantly sold with options with significant exit costs, TIM's customer acquisition at this early stage will have significant effects on the fixed telecom market for a very long period (up to 48 months).
3. Third, the AGCM believes that, from a technical standpoint, all operators should be put in a position to be able to develop technological improvement solutions and thus to put in place all the necessary technical initiatives to enable their users to enjoy audiovisual content from the start of the championship. In addition, the technical discrimination operable by TIM and the significant reduction in incentives for DAZN to invest in interconnection with telecom operators other than TIM due to the Agreement could significantly affect the quality of DAZN service, hindering the investment efforts of alternative operators to TIM to improve the network, increasing their dependence on TIM's active services, and debasing competition based on investment and quality.

4.3 Concluding remarks on the case discussed

In light of what has just been discussed, it is clear that the TIM DAZN Agreement is not a classic case of a cartel but rather falls into a particular type of potential violation of Article 101 TFEU: a vertical

distribution agreement apparently capable of producing exclusionary effects in the medium to long term in the fixed network access market, strengthening the market position of a single operator (Telecom Italia). The closure of the proceedings before AGCM is scheduled for June 30, 2022, and there is particular expectation for its outcome, also in light of the following considerations.

The agreement in question has for the first time promoted the enjoyment of premium TV content (the Serie A) exclusively on an Internet platform, thus limiting the historic market power of the satellite platform held by Sky in offering such paid content.

The exclusivity of distribution under TIM, however, posed a trade-off between the economic sustainability of DAZN's investment (which opened up the pay content market, hitherto dominated by Sky) and the antitrust risks associated with TIM's ability to leverage content exclusivity to strengthen its dominant position in the physical network access market.

However, the results on balance of this investment, as well as the commitments made by TIM in the precautionary proceedings (offering the soccer package to customers of all operators without discrimination, commitment not to market soccer content in contractual or economic bundles with access service offers, which in fact depotentiate the competitive advantage of the exclusivity paid to DAZN) are inducing relevant changes in the strategic interactions taking place in the market.

According to recent press reports, DAZN would be willing to give a substantial discount to TIM for the 2021-2024 TV rights, with the amount dropping from 340 million to 100 million annually. In return, the telco would give up its exclusivity on distribution with DAZN,

which has already been partially deprioritized in the antitrust by the waiver to bundle sales of fiber network access and the TIM Vision content package. DAZN, freed from exclusivity, will be able to enter into distribution agreements with other operators (ex: Sky or Amazon).

In conclusion, it will be interesting to see how AGCM will be able to weigh in this case the expansion of competition connected to the possibility of enjoying on the Internet platform content historically the preserve of the satellite platform, with the need to prevent the distribution agreement in question from being used by TIM to strengthen its position in markets where it is already dominant.

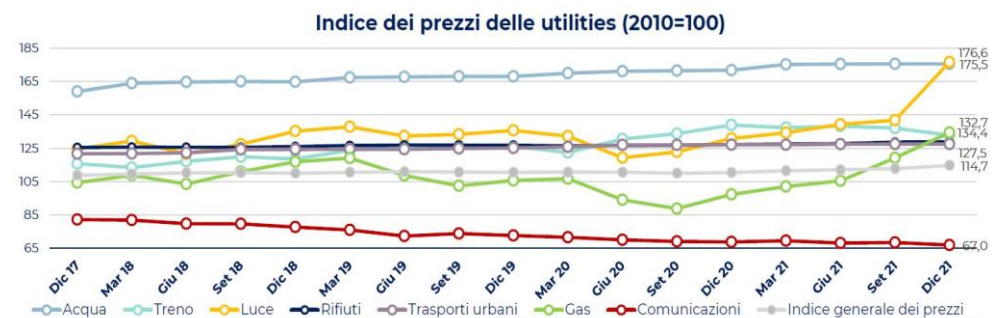
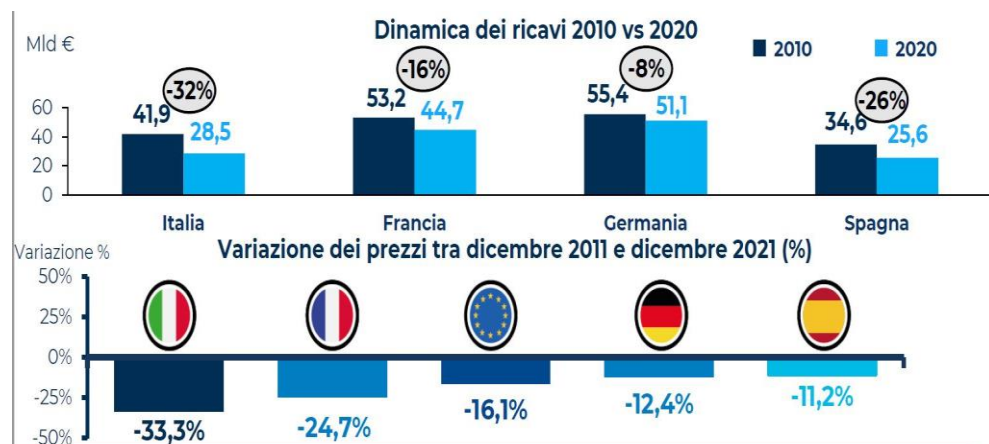
5. OVERALL FINAL CONCLUSIONS

The three cases discussed have an interesting common trait, which can be considered typical in the Italian market: cartels in the fixed-line telecommunications sector in Italy do not generally take the classic form of a cartel between competing operators, but take other forms, generally centered on the role of the dominant operator and whether-through agreements made upstream or downstream that could conceivably fall under Article 101 TFEU-the same could further strengthen its dominance.

This circumstance appears consistent with the fact that the fixed telecommunications market in Italy has been characterized by trends not consistent with phenomena of collusion between operators, but rather by very strong competition, which has led in the last 10 years to a reduction in prices and revenues of more than 30 percent, from €42 billion in 2011 to €28 billion in 2021, to a strong dynamism in

operators' market shares, systematically to the detriment of the incumbent Telecom Italia, and more recently to strong technological innovation (with an infrastructural new entrant competitor such as Open Fiber), as well as in supply policies (with the spread of service packages that include both access and content).

In addition, the sector is regulated by AGCOM, and the current rules have allowed the entry of new players from other sectors, without the need to face any particular barriers to entry. Specifically, companies from the media (e.g., Sky) or electric utilities have come in to provide telecommunications services.



Le TLC sono l'unico ambito, tra le utilities, che ha avuto una **forte riduzione dei prezzi** negli anni: nel periodo **tra la fine del 2017 e il 2021** mostrano una **flessione del 18%** mentre tutti gli altri settori sono in aumento. In particolare, **nel 2021 i prezzi delle TLC hanno registrato un calo del 3%, contro un aumento medio del 12% da parte degli altri comparti** (e senza considerare gli ulteriori rincari del 2022)

FONTE: OSSERVATORIO SULLE COMUNICAZIONI AGCOM, APRILE 2022

The vertically integrated nature of the incumbent, the large number of competitors and the competition centered on prices are likely among the causes of the high litigiousness typical of this market, which-as seen-has often led to the involvement of AGCM on the recommendation of Telecom Italia's competing operators to avoid the strengthening of its dominant position, with substantial absence of horizontal cartel proceedings between telephone operators⁹.

⁹ *The most recent case (I820 - 28-day billing, closed by AGCM with fines totaling € 228 million against Telecom Italia, Fastweb, Vodafone and Wind for an anticompetitive agreement related to repricing carried out in the return to monthly billing) ended with the annulment by the Tar Lazio of AGCM's order.*

