



To:

Ms. Carlota Reyners Fontana,
Director (DG COMP.C), and
Ms Annemiek Wilpshaar,
Head of Unit, Mergers (COMP.C.5)
Markets and cases II: Information Technology, Communication and Media

Directorate-General for Competition
European Commission

By e-mail: comp-merger-registry@ec.europa.eu

Re: Prospective notification of the acquisition by Optics BidCo, a corporate vehicle to be initially controlled by KKR, of TIM's entire fixed network (including FiberCop); participation in the concentration of Italy's Ministry of Economy and Finance and implications for the Commission's competition assessment

Paris, January 18, 2024

Dear Madams:

As was recently reported in the press,¹ Kohlberg Kravis Roberts & Co. L.P. (“**KKR**”) is expected to file with the European Commission in the near future a formal notification of the above-captioned transaction pursuant to Reg. (EU) No. 139/2004 (the “**Notification**” and the “**EUMR**”). According to standard practice, it is likely that KKR has already been engaging for some time in pre-notification contacts with the Commission's case team.

Pursuant to the announced transaction, Optics BidCo, a special-purpose vehicle to be initially controlled by KKR, is expected to acquire from Telecom Italia S.p.A. (“**TIM**”) its entire equity investment (currently equal to 58% of the share capital) in FiberCop S.p.A. (“**FiberCop**”) – the company that already owns and manages, also from a commercial standpoint, the activities relating to TIM's secondary fiber and copper networks –² after completion of the contribution by TIM into FiberCop of a business unit (referred to as “**NetCo**”) consisting, *inter alia*, of TIM's primary telecommunications network, in fiber and copper,

¹ See, e.g., Reuters, *KKR to notify EU of TIM network buyout by end of January* (Jan. 8, 2024), <https://www.reuters.com/markets/deals/kkr-notify-eu-tim-network-buyout-by-end-january-sources-2024-01-08/>.

² See *Autorità Garante della Concorrenza e del Mercato*, Case I850 – Accordi FiberCop, Decision No. 30002 of February 15, 2022 (making the proposed commitments binding on the parties and closing the proceedings without a finding of infringement of Article 101 TFEU). At present, FiberCop is jointly controlled by TIM and Teemo Bidco (a special purpose vehicle indirectly owned by investment funds managed by a subsidiary of KKR), which holds 37.5% of FiberCop's shares, with Fastweb S.p.A. holding the remaining 4.5% of FiberCop's capital.

backbone and the wholesale activity of access capacity to the primary network (the “**Contribution**” and the “**Transaction**”, respectively).

The Transaction will have a major structural impact on TIM, the incumbent vertically integrated main infrastructure manager and telecom service provider active on the Italian market. Furthermore, the Transaction will have obvious implications on the structure of the concerned markets (both at the wholesale and the retail level). Notwithstanding its transformational impact, TIM’s Board of Directors decided to approve the Transaction without submitting it to a shareholders’ vote.

Vivendi S.E. (“**Vivendi**”) is TIM’s largest shareholder. TIM’s second largest shareholder is Cassa Depositi e Prestiti S.p.A. (“**CDP**”), which is controlled by the Italian Ministry of Economy and Finance (the “**MEF**”). In addition, CDP controls (through its subsidiary CDP Equity S.p.A., “**CDPE**”) Open Fiber S.p.A., that is, FiberCop’s only competitor. Therefore, currently the MEF, through CDP, has a significant influence on TIM and indirectly controls Open Fiber.³

Against this background, Vivendi deems it important to draw this Hon. Directorate-General’s attention to the role and involvement of the MEF in the concentration at issue. Indeed, the MEF has entered into a memorandum of understanding with KKR to participate in the Transaction with an approximately 20% equity stake, and the President of the Council of Ministers has issued a decree (a “**DPCM**”) stipulating that the MEF shall have “*adequate powers to monitor management and safeguard mechanisms, including through governance rights, concerning any resolutions relevant to the pursuit of the objectives of NetCo’s development and strengthening, as well as in matters of strategic importance and national security*”⁴ (see below).

Despite the relevance of the MEF’s involvement in the Transaction for the Commission’s competition assessment, Vivendi is concerned and has reason to believe that the Notification may fail to properly disclose it or may downplay it, as discussed below.

³ On May 29, 2022, CDPE, Teemco Bidco S.à.r.l., a company controlled by one or more funds managed by KKR, Macquarie Asset Management, Open Fiber and TIM entered into a non-binding memorandum of understanding – whose effects were later extended until 30 November 2022 – concerning the planned integration of the TIM and Open Fiber networks, with a view to creating a single, non-vertically integrated telecom network operator, controlled by CDPE and participated by Macquarie and KKR, which would accelerate the diffusion of fiber optic and VHCN (Very High Capacity Networks) infrastructures throughout Italy. According to the parties, the planned integration would be structured by separating TIM’s fixed network infrastructure activities from its commercial activities - through a corporate transaction or combination of corporate transactions to be defined - and the integration of the former with the network controlled by Open Fiber in a manner to be defined: see *CDP Equity, KKR, Macquarie, Open Fiber and TIM: Memorandum of Understanding signed with the aim of integrating the networks of TIM and Open Fiber* (CDP’s press release of May 29, 2022, https://www.cdp.it/sitointernet/page/en/cdp_equity_kkr_macquarie_open_fiber_and_tim_memorandum_of_understanding_signed_with_the_aim_of_integrating_the_networks_of_tim_and_open_fiber?contentId=CSA39079).

⁴ See DPCM of September 1, 2023, concerning the authorization of the MEF to acquire shareholdings in NetCo S.p.A. (see Annex 1), Art. 3(1): (“*La struttura e le condizioni dell’operazione di acquisizione della quota di partecipazione di cui all’articolo 1 assicurano la conformità della stessa a quanto segue:*

...
c) *che l’accordo tra gli azionisti preveda, tra l’altro: 1) modalità di governance di NetCo idonee ad assicurare il conseguimento degli obiettivi del piano industriale; 2) adeguati poteri in capo al Ministero dell’economia e delle finanze di monitoraggio sulla gestione e meccanismi, anche di governance, di presidio da parte dello stesso Ministero sulle decisioni rilevanti ai fini del perseguimento degli obiettivi di sviluppo e potenziamento di NetCo e in materia di rilevanza strategica e sicurezza nazionale, anche in caso di mutamento della compagine azionaria; ... ”).*

Factual background

The Commission is no doubt familiar with KKR,⁵ TIM⁶ and Vivendi⁷ from previous merger filings. Vivendi – a company incorporated under French law, and one of the leading global players in the media (including the creation and distribution of audiovisual content), publishing and communication industries – has been holding since 2016 an equity interest in excess of 20% – currently of 23.75% – of TIM’s voting rights. As a result, Vivendi is TIM’s main shareholder, without however holding control of TIM. Moreover, since January 2023 Vivendi no longer has any representative in TIM’s Board of Directors and does not exercise any significant influence over TIM.

TIM’s second largest shareholder, with 9.81% of the voting rights, is currently CDP, a company under the control of the MEF, which holds 82.77% of its share capital. CDP’s Chairman sits in TIM’s Board of Directors. CDP is the (indirect) controlling shareholder of Open Fiber S.p.A. (“**Open Fiber**”).⁸ Open Fiber was set up in 2015 to install, supply and operate high-speed FTTH optical fiber electronic communication networks throughout the territory of Italy.⁹

The November 5, 2023, Resolution of TIM’s Board of Directors and the November 6, 2023, Transaction Agreement by and between TIM and Optics BidCo

By resolution of November 5, 2023 (the “**Resolution**”), TIM’s Board of Directors approved KKR’s binding offer concerning its acquisition, through Optics BidCo, of TIM’s stake in FiberCop after the Contribution (the “**Binding Offer**”).¹⁰ Moreover, on November 6, 2023, TIM announced the execution of a transaction agreement, with Optics BidCo, the vehicle controlled by KKR, in which, according to TIM’s press release, Azure Vista, a wholly-owned subsidiary of the Abu Dhabi Investment Authority, holds a minority shareholding (of undisclosed size) (the “**Transaction Agreement**”).¹¹

According to TIM’s scant disclosure about the Transaction’s terms, the Binding Offer values FiberCop (after the Contribution) at an Enterprise Value of 18.8 bn.¹² However, the Transaction Agreement provides for a potential earn-out of up to €2.5bn linked to the completion of the concentration with Open Fiber (see *supra*, note 3) and/or regulatory relief on

⁵ See, e.g., *KKR / Telefonica / Pangeaco*, Case M.11243 (2023); *GIP / KKR / Vodafone / Vantage Towers*, Case M.10991 (2023); *KKR / Koos Holding Cooperatief*, Case COMP/M.9899 (2020)).

⁶ See, e.g., *INWIT / TIM / Vodafone*, Case M.9674 (2020); *Vivendi / Telecom Italia*, Case COMP/M.8465 (2018)).

⁷ See, e.g., *Vivendi / Lagardère*, Case M.10433 (2023).

⁸ Open Fiber is 100% owned by Open Fiber Holdings S.p.A., which is in turn owned by CDP Equity S.p.A. (60%) and Fiber Networks Holdings S.a.r.l. (a company belonging to the Macquarie Group, 40%).

⁹ See *Enel / Cdp Equity / Cassa Depositi e Prestiti / Enel Open Fiber / Metroweb Italy*, Case M.8234 (2016).

¹⁰ As submitted by KKR to TIM on October 16, 2023: see *TIM: binding offer on NetCo received from KKR* (TIM’s press release, Oct. 16, 2023, <https://www.gruppotim.it/en/press-archive/corporate/2023/PR-KKR-binding-offer.html>). See also *TIM: Approved by the Board of Directors KKR’S offer on NetCo* (TIM’s press release, Nov. 5, 2023, <https://www.gruppotim.it/en/press-archive/corporate/2023/PR-5-November-def.html>).

¹¹ See *TIM: Transaction agreement for NetCo signed* (TIM’s press release, Nov. 6, 2023, <https://www.gruppotim.it/en/press-archive/corporate/2023/PR-6-november.html>).

¹² However, the €18.8 billion valuation also includes FiberCop, of which KKR is already a co-owner (with a 37.5% stake, with Fastweb owning another 4.5%). Therefore, out of the €18.8 billion valuation, TIM’s share would be €14.2 billion: see *Q3 '23 Delivering & Delaying* (TIM’s presentation of Nov. 9, 2023), slide 16.

prices, occurring within 30 months from closing, — which would increase the total Enterprise Value to €22 bn.¹³

The MEF/KKR Memorandum of Understanding of August 10, 2023, the Decree Law of the same day and the DPCM of September 1, 2023

TIM's November 6, 2023, press release mentioned above did not identify the MEF as a party to the Transaction Agreement.

However, as disclosed to the market by a press release issued on August 10, 2023,¹⁴ the MEF signed a Memorandum of Understanding with KKR (the “MoU”) with reference to the offer to be submitted by KKR to TIM concerning the acquisition of FiberCop (after the Contribution). As stated in the said press release, under the MoU, KKR and the MEF committed to submit to TIM a binding offer including, *inter alia*, the MEF's entry into NetCo with a shareholding between 15 and 20 percent. Moreover, “*The terms of the offer from the perspective of relations between the parties provide for a decisive role of the government in defining strategic choices. The next steps will relate to the adoption of a [decree of the President of the Council of Ministers, “DPCM”] to complete the process*”.¹⁵

The closing statement in the MEF's press release refers to the DPCM that the President of the Council of Ministers issued on September 1, 2023, authorizing the MEF to participate – jointly with KKR and, possibly, other minority investors – in the acquisition of FiberCop (after the Contribution of NetCo), with an investment of up to **€2.2 billion** for an equity stake of between 15 and 20 percent in FiberCop's capital.¹⁶ As noted, the DPCM specifies that, under the future shareholder agreement, the MEF shall have adequate powers to monitor management and safeguard mechanisms, including through governance rights, concerning any resolutions relevant to the pursuit of the objectives of NetCo's development and strengthening, as well as in matters of strategic importance and national security (see *supra*, note 4).

As reported by Reuters on December 19, 2023, Italian infrastructure fund F2i – whose shareholders include CDPE – is ready to set up a vehicle to invest approx. €1 bn, with a view

¹³ See TIM's press release of Nov. 5, 2023 (as per note 9 above) and *Q3 '23 Delivering & Delaying* (TIM's presentation of Nov. 9, 2023), slide 16.

¹⁴ See MEF, *Tim: Mef-Kkr siglano MoU* (press release No. 129), https://www.mef.gov.it/ufficio-stampa/comunicati/2023/documenti/comunicato_0129.pdf.

¹⁵ Our translation from the Italian original (“*I termini dell'offerta dal punto di vista dei rapporti tra le parti prevedono un ruolo decisivo del governo nella definizione delle scelte strategiche. I prossimi passaggi saranno relativi all'adozione di un Dpcm per completare l'iter procedurale*”; emphasis added).

¹⁶ Article 13-bis of Decree-Law No. 104 of August 10, 2023, as ratified by Law No. 136 of October 9, 2023, laying down “Urgent provisions on the protection of users, on economic and financial activities, and on strategic investments”, authorized the expenditure of **up to €2,525 million** for 2023 for the purpose of carrying out transactions concerning companies of strategic importance, including the acquisition or reacquisition of shareholdings as defined by one or more DPCMs. As made clear in Art. 1 of the DPCM of September 1, 2023, as well as in press release No. 48 issued on August 28, 2023, by the Office of the President of the Council of Ministers (<https://www.governo.it/it/articolo/comunicato-stampa-del-consiglio-dei-ministri-n-48/23452>), despite the general reference of the provision referred to above to “transactions concerning companies of strategic importance”, the bulk of the budget in question was specifically earmarked for the MEF's investment in NetCo, expressly characterized as an “investment of strategic interest”.

to acquiring a stake of approx. 10%, in NetCo, which would result in approx. 30% of NetCo's share capital being held by Italian investors controlled by or linked to the MEF.¹⁷

The pending civil litigation between Vivendi and TIM

As widely reported in the press¹⁸ Vivendi has challenged the Resolution before the Civil Court of Milan, requesting that the Court annul it and, consequently, declare the Transaction Agreement unenforceable and ineffective vis-à-vis TIM. As submitted by Vivendi in its writ of summons dated December 15, 2023, the Resolution is unlawful on at least two main grounds:

- (i) regardless of its terms, since the Transaction involves the divestiture of TIM's primary network, it entails a significant change in TIM's corporate purpose that requires a prior modification of its bylaws. The adoption of such modification falls within the exclusive power of TIM's extraordinary shareholders' meeting (to be adopted prior to a resolution of the Board approving the Transaction), with a majority of two-thirds of the voting share capital attending or represented at the meeting; and
- (ii) the acquisition of TIM's primary network by an investment consortium in which the MEF (which controls CDP) has announced its participation, with a 15/20% shareholding and the special powers laid down in Article 3(1) of the DPCM (see above), must be qualified as a related-party transaction (a "RPT"). Therefore, pursuant to the relevant Italian rules and TIM's internal procedures, the approval of the Transaction by the Board of Directors – which must be characterized as a transaction of greater significance (*operazione di maggiore rilevanza*) in light of its quantitative parameters – required the prior binding opinion of the Related Parties Committee of TIM's Board on the interest of the company in the completion of the transaction.¹⁹

Indeed, as submitted by Luca Enriques, Professor of Corporate Law at the University of Oxford, in the *pro veritate* opinion he delivered to Vivendi on October 28, 2023 (the "**Enriques Opinion**", see **Annex 2**):

- As TIM itself confirmed in 2022²⁰ CDP is a "related party" of TIM, the latter being subject to the former's significant influence, as proven, *inter alia*, by CDP's representation in TIM's Board as well as significant transactions between TIM and

¹⁷ See also Milano Finanza, *Rete Tim, il ruolo delle Casse nel fondo F2i per affiancare Tesoro e Kkr. Ecco chi partecipa* (Nov. 4, 2023, https://www.milanofinanza.it/news/rete-tim-il-ruolo-delle-casse-nel-fondo-f2i-per-affiancare-tesoro-e-kkr-ecco-chi-partecipa-202311032100555929?refresh_cens).

¹⁸ See, e.g., *TIM: Vivendi's lawsuit received, NetCo deal goes ahead as planned* (TIM's press release, Dec. 15, 2023, <https://www.gruppotim.it/en/press-archive/corporate/2023/PR-Vivendi.html>); Financial Times, *Telecom Italia's KKR deal sparks threat of legal action by Vivendi* (Nov. 6, 2023); Capacity, *Major shareholder furious over Telecom Italia's €18.8bn deal with KKR* (Nov. 6, 2023).

¹⁹ Had TIM's Related Parties Committee expressed a negative opinion, or a positive one but subject to any conditions or critical comments, the Transaction should have been submitted for authorization to TIM's ordinary shareholders' meeting for a vote under the so-called "whitewash" procedure (see CONSOB Regulation on RPTs, No. 17221 of March 12, 2010, as amended, Art. 11(3)). If the majority of the voting shareholders (other than related-party shareholders) had voted against it, the Transaction could not have been completed.

²⁰ TIM characterized CDP as a related party in the report of TIM's Board of Statutory Auditors dated 16 March 16, 2022, drawn up pursuant to Art 153 of Legislative Decree No. 58/1998 and in a press release of March 21, 2022; as well as, more specifically, as a company "affiliated" with TIM (as reported in the Information document on related party-transactions of greater importance drawn up pursuant to Art. 5 of the National Commission for Companies and the Stock Exchange (CONSOB)'s Regulation on related party-transactions, on the occasion of a transaction completed with Leonardo S.p.A., CDP Equity S.p.A. and Sogei S.p.A.).

CDP. Pursuant to International Accounting Standard 28, these elements characterize the relationship between two entities in terms of “significant influence”,²¹

- the MEF, as an entity that controls CDP and thus indirectly exercises significant influence over TIM, is itself a related party of the company, as clarified irrefutably by the International Accounting Standards themselves, by the illustrative examples reported by the International Accounting Standards Board with reference to the definition of “related party” and again by the CONSOB itself in its guidelines for the application of the Regulation on RPTs;
- the circumstance that the Binding Offer was formally submitted only by KKR, which had at the time sole control of the bidding vehicle, is irrelevant. TIM’s corporate bodies were already aware (including through the MoU) that the MEF would play an essential role in the Transaction, albeit subject to a number of implementing steps, as is the practice in transactions of such complexity. Therefore, the rules on RPTs should have been applied, also in light of the general principle according to which, for the purpose of identifying related parties and RPTs, a substantive approach must always be preferred to a formalistic one.
- Further, a relationship of “correlation” requires at most the power to exercise significant influence, not exclusive control. In this respect, Vivendi notes that the role of the MEF in the definition of the Transaction, the acquisition of a 15/20% interest and the governance of NetCo (see Article 3 of the DPCM) will be of absolute relevance, including for the purposes of pursuing public interest objectives, and will certainly entail the exercise by the MEF of at least significant influence – if not of joint control – over FiberCop.

As noted by the Italian Court of Auditors in its opinion on the DPCM, “*the choice made with the DPCM ... reflects a political and strategic assessment. In the [its response to this Court’s request for supplementary information, the MEF clarified] that the option of direct investment, instead of the alternative of merely enforcing - where necessary - the golden power rules, responds to the need to have means of protection and intervention based on corporate mechanisms, which are more effective and easier to use than administrative-type protections, such as those resulting from the exercise of special powers, as well as broader in scope, to the extent that they go beyond the pursuit of the defense and national security objectives. It also clarified that the binding offer of the investment consortium composed of KKR, the MEF and any other minority investors will also include commitments to be offered to the Italian government for the purpose of safeguarding strategic assets, pursuant to Decree Law No. 21 of March 15, 2012, as converted into law by Law No. 52 of May 11, 2012*” (our translation).²²

²¹ The Enriques Opinion deals extensively with IAS 28 in light of the International Accounting Standards Board’s guidelines and refers to precedents on this matter from CONSOB (according to which “*a related party is the parent company of a company that exercises significant influence over the listed issuer*”) and the Italian Court of Cassation.

²² “[L]a scelta fatta con il dPCM in esame – come ricordato – risponde ad una valutazione di carattere politico e strategico. Nelle integrazioni istruttorie, l’Amministrazione ha precisato che l’opzione dell’investimento diretto, in luogo della possibile alternativa del mero ricorso – ove necessario – all’istituto del golden power, risponde all’esigenza di disporre di modalità di presidio e intervento che si fondino su meccanismi societari, più efficaci e di più agevole utilizzo rispetto a tutele di tipo amministrativo, quali quelle derivanti dall’esercizio dei poteri speciali, oltre che di più ampio respiro, non essendo limitati alla protezione di esigenze di difesa e sicurezza nazionale. Specifica, altresì, che l’offerta vincolante del consorzio di investimento composto da KKR, dal MEF e

Further, after the Binding Offer was accepted, the Government officially and unequivocally reiterated its qualified participation to the Transaction through the MEF by the statements made on December 13, 2023 by the Minister for the Relations with the Parliament, Mr. Luca Ciriani, in response to a parliamentary question on the matter: “*the Government has followed the transaction from the beginning (...) requiring that the public control over the national network (...) be guaranteed through a direct participation of the Ministry of the Economy*”, and “*the public participation arises precisely from the need to prevent the loss of strategic control over the telecommunications network*” (Italian Parliament, Lower House, session No. 213 of Dec. 13, 2023; our translation).²³

In other words, it appears that the MEF’s announced participation in the Transaction would be indispensable for the Italian Government to allow the Transaction to go forward, since the Government considers it necessary to have a direct say as shareholder on the strategic decisions of the network company, as opposed to only through prescriptions imposed as part of its foreign direct investment review.²⁴

Nevertheless, TIM has repeatedly denied the central role of the MEF in the context of the Transaction, with a view to avoiding the application of the RPT procedures, which Vivendi had requested.²⁵ Therefore, in Vivendi’s view, it is highly likely that KKR will take the same approach in the Notification in order not to contradict its previous representations made by TIM (see *supra*, note 24).

da altri eventuali investitori di minoranza, includerà anche gli impegni da assumere nei confronti del Governo italiano ai fine della salvaguardia di asset strategici, ai sensi del d.l. 15 marzo 2012, n. 21, convertito dalla legge 11 maggio 2012, n. 52”: see Italian Court of Auditors, Deliberation No. 30/SSRRCO/PASP/2023, *Shareholding for the acquisition of NetCo S.p.A.* (Oct. 23, 2023), at 13 and 14 (in **Annex 3**).

²³ “Il Governo ha seguito fin dall’inizio l’operazione, rispettando l’autonomia di TIM, ma pretendendo che il controllo pubblico sulla rete nazionale, elemento assolutamente fondamentale per dare il via libera all’operazione, fosse garantito attraverso una presenza diretta del Ministero dell’Economia e delle finanze [e] assicurando un ruolo decisivo del Governo nella definizione delle scelte strategiche. ... La partecipazione pubblica nasce proprio per scongiurare ogni rischio di perdita di controllo strategico della rete di telecomunicazioni ...” (Italian Parliament, Lower House, session No. 213 of Dec. 13, 2023, <https://www.camera.it/leg19/410?idSeduta=0213&tipo=stenografico#sed0213.stenografico.tit00030.sub00010.int00040>).

²⁴ See also press conference No. 48 of the Council of Ministers of Aug. 28, 2023 (video available at <https://www.governo.it/it/media/conferenza-stampa-del-consiglio-dei-ministri-n-48/23450>, address by the Minister of Economy and Finance, Mr. Giancarlo Giorgetti, at 0’34”-2’16” and 17’15”-18’20”): “The MEF’s minority shareholding is aimed in any case at ensuring the exercise of [the State’s] special powers and thus, in essence, its ability to give effect to our security strategy regarding what we consider a decisive infrastructure also for the future of the country – that is, the telecom network, particularly as far as the implementation of the fiber infrastructure is concerned. [...] What the government is interested in is to reaffirm public control over certain strategic choices on an infrastructure that we consider to be strategic ... Since this is a strategic investment and the State has to be active in the control of the network ..., we will be there, as we have always said and as it should be ...” (our translation).

²⁵ See Oct. 30, 2023, letter from TIM’s President, Mr. Salvatore Rossi, to Vivendi (the MEF cannot be considered a related party of TIM, in particular since, “With regard to both the submission of the [B]inding [O]ffer and the negotiation of its content, TIM’s counterpart was only KKR, which expressly represented that, even after the investments of other partners, if any, it will maintain its sole control over TIM” (our translation).

Implications of the MEF's participation in the Transaction for the Commission's competition assessment

As discussed in the previous sections of this letter, the Transaction that will be notified to the Commission shortly by KKR encompasses not only KKR's initial "fronting" role but also the announced and necessary participation of the MEF under the terms described above (acquisition of a 15/20% shareholding in FiberCop post-Contribution), as well as the Italian fund F2i.

As far as Vivendi understands on the basis of the available public information, the end result of these two steps would be that KKR and the MEF would acquire over FiberCop (post-Contribution) joint control for the purposes of the EUMR (as noted, Article 3 of the DPCM refers to a shareholder agreement to be entered into by KKR and the MEF, under which the latter shall be conferred additional rights on key decisions concerning the telecom network managed by FiberCop and going beyond the veto rights normally accorded to minority shareholders in order to protect their financial interests in a joint venture)²⁶.

In the alternative, as noted, the MEF would obtain at least a significant influence over FiberCop (post-Contribution), which, in light of the MEF's indirect control of Open Fiber, would also be relevant for antitrust purposes.

In Vivendi's view, the above considerations are of relevance for the Commission's competition assessment of the Transaction at least from the following standpoints:

- (i) interrelated transactions: The circumstance that when the Transaction Agreement was executed KKR was the only relevant shareholder of the acquisition vehicle is irrelevant. Not only is the Transaction open to the MEF's participation, pursuant to the MoU between KKR and the MEF, but also the Government has made it clear that the MEF's eventual participation in the network company as a shareholder with special governance powers will be critical to preserve public control over the strategic assets. The two steps of the Transaction described above are unitary in nature and the change of the relevant markets' structure will be brought about by them together. They thus constitute a single concentration for the purposes of Article 3 EUMR. As demonstrated by the fact that KKR and the MEF entered into the MoU more than two months, and that the DPCM was adopted 1.5 months, before KKR submitted the Binding Offer to TIM, the two steps of the Transaction are interdependent, in such a way that one legal transaction would not be carried out without the other, regard being had to the underlying economic reality and the economic aim pursued by all the parties involved. Even *de facto* conditionality, where it can be satisfactorily demonstrated, may suffice for treating separate transactions as a single concentration, based on their economic assessment. Further indications of the interdependence of several transactions may be the statements of the parties themselves or the simultaneous conclusion of the relevant agreements. Only "*a pronounced lack of simultaneity*" may put into doubt the true interdependence of legally separate transactions.²⁷ Accordingly, even if the MEF opted to realize its investment in NetCo a few months later than the closing

²⁶ See EC's 2008 Jurisdictional Notice, §§ 65 *et seq.*

²⁷ See *id.*, §§ 38 *et seq.*


of KKR's acquisition of a majority stake in NetCo, in order not to weaken even further the position taken by TIM to rebut Vivendi's objections to TIM's failure to apply the RPT procedures, this would not affect the inherently interrelated nature of the two steps of the Transaction for purposes of the EUMR.

- (ii) The MEF's joint control (or significant influence) over NetCo will add to its sole control of Open Fiber through CDP and to CDP's significant influence over TIM. In the scenario where, at least initially, FiberCop (post-Contribution) would operate on the market for the provision of wholesale broadband access services in competition with Open Fiber, the Commission will need to assess how to address the risk of creation of a joint dominant position, of a facilitated flow of sensitive information among the two competitors, and generally of coordination through the MEF/CDP;
- (iii) Further, as noted, the Transaction Agreement has already contemplated the combination of the TIM and Open Fiber networks, as proven by TIM's right to receive a very significant earn-out should the combination be completed within 30 months of the closing of the first step of the Transaction. Thus, the Commission will need to consider whether the competitive effects of the envisaged creation of a near-monopoly in the Italian market for the provision of wholesale broadband access services should be assessed as part of the notified Transaction.

* * *

Vivendi trusts that this Hon. Directorate-General will find the information set out in this letter clear and useful. We stand ready to answer any questions that you may have and remain at your disposal to discuss the matter further over the phone or at a virtual or in-person meeting.

Sincerely,



Frédéric Crépin
Group General Counsel, Member of the Management Board

Cc: Mr Guillaume Lorient
Deputy Director-General Mergers (COMP.DDG2)

Enclosures



Al Presidente del Consiglio dei Ministri

VISTO l'articolo 4 del decreto legislativo 30 marzo 2001, n. 165, che prevede, tra l'altro, che gli organi di governo esercitano le funzioni di indirizzo politico-amministrativo;

VISTO il decreto legislativo 19 agosto 2016 n. 175 (di seguito denominato: "decreto legislativo n. 175 del 2016"), recante il testo unico in materia di società a partecipazione pubblica, e in particolare:

- a) l'articolo 5 il quale prevede, tra l'altro, che:
- a eccezione dei casi in cui la costituzione di una società o l'acquisto di una partecipazione, anche attraverso aumento di capitale, avvenga in conformità a espresse previsioni legislative, l'atto deliberativo di costituzione di una società a partecipazione pubblica, anche nei casi di cui all'articolo 17, o di acquisto di partecipazioni, anche indirette, da parte di amministrazioni pubbliche in società già costituite deve essere analiticamente motivato con riferimento alla necessità della società per il perseguimento delle finalità istituzionali di cui all'articolo 4, evidenziando, altresì, le ragioni e le finalità che giustificano tale scelta, anche sul piano della convenienza economica e della sostenibilità finanziaria nonché di gestione diretta o esternalizzata del servizio affidato. La motivazione deve anche dare conto della compatibilità della scelta con i principi di efficienza, di efficacia e di economicità dell'azione amministrativa (comma 1);
 - l'atto deliberativo di cui al comma 1 dà atto della compatibilità dell'intervento finanziario previsto con le norme dei trattati europei e, in particolare, con la disciplina europea in materia di aiuti di Stato alle imprese (comma 2);
 - l'amministrazione invia l'atto deliberativo di costituzione della società o di acquisizione della partecipazione diretta o indiretta all'Autorità garante della concorrenza e del mercato, che può esercitare i poteri di cui all'articolo 21-bis della legge 10 ottobre 1990, n. 287, e alla Corte dei conti, che delibera, entro il termine di sessanta giorni dal ricevimento, in ordine alla conformità dell'atto a quanto disposto dai commi 1 e 2 del presente articolo, nonché dagli articoli 4, 7 e 8, con particolare riguardo alla sostenibilità finanziaria e alla compatibilità della scelta con i principi di efficienza, di efficacia e di economicità dell'azione amministrativa. Qualora la Corte non si pronunci entro il termine di cui al primo periodo, l'amministrazione può procedere alla costituzione della società o all'acquisto della partecipazione di cui al presente articolo (comma 3);
- b) l'articolo 7 il quale prevede, tra l'altro, che:
- la deliberazione di partecipazione di un'amministrazione pubblica alla costituzione di una società è adottata con decreto del Presidente del Consiglio dei ministri, su proposta del Ministro dell'economia e delle finanze di concerto con i Ministri competenti per

- materia, previa deliberazione del Consiglio dei ministri, in caso di partecipazioni statali (comma 1);
- l'atto deliberativo è redatto in conformità a quanto previsto all'articolo 5, comma 1 (comma 2);
 - c) l'articolo 8 il quale prevede che le operazioni, anche mediante partecipazione a operazioni straordinarie, che comportino l'acquisto da parte di un'amministrazione pubblica di partecipazioni in società già esistenti sono deliberate secondo le modalità di cui all'articolo 7, commi 1 e 2 (comma 1);

VISTO il decreto legislativo 8 novembre 2021, n. 207 recante attuazione della direttiva (UE) 2018/1972 del Parlamento europeo e del Consiglio, dell'11 dicembre 2018, che istituisce il Codice europeo delle comunicazioni elettroniche, il quale, nel disciplinare, tra l'altro, la rete di accesso e il modello regolatorio di co-investimento, per incentivare la costruzione di nuove reti ad altissima capacità, dispone che gli impegni per aprire al coinvestimento la realizzazione di tale nuova rete possano prevedere la contitolarità o la condivisione del rischio a lungo termine attraverso cofinanziamento o accordi di acquisto che comportano diritti specifici di carattere strutturale da parte di altri fornitori di reti o servizi di comunicazione elettronica;

VISTO il decreto legislativo 30 luglio 1999, n. 300, e successive modificazioni, che attribuisce al Ministero dell'economia e delle finanze la gestione di partecipazioni azionarie dello Stato e al Ministero delle imprese e del made in Italy competenze in materia di politica per le comunicazioni;

VISTO l'articolo 4 del decreto del Presidente del Consiglio dei ministri 26 giugno 2019, n. 103, e successive modificazioni, recante regolamento di organizzazione del Ministero dell'economia e delle finanze, che attribuisce al Dipartimento del tesoro la competenza, tra l'altro, in materia di gestione delle partecipazioni societarie dello Stato ed esercizio dei diritti del socio;

CONSIDERATI gli obiettivi del Piano nazionale di ripresa e resilienza per la realizzazione dell'infrastruttura digitale di telecomunicazioni, volta a rendere più moderni, sicuri e affidabili i servizi pubblici digitali per cittadini ed imprese;

PRESO ATTO dell'attuale perimetro delle "aree nere", "aree grigie" e "aree bianche" di cui alla comunicazione della Commissione europea 2013/C 25/01 recante "*Orientamenti dell'Unione europea per l'applicazione delle norme in materia di aiuti di Stato in relazione allo sviluppo rapido di reti a banda*" e del fondamentale interesse del Governo al raggiungimento di una copertura omogenea di tutte le aree;

CONSIDERATA l'attuale configurazione del settore delle telecomunicazioni, nonché la necessità di sviluppare reti di telecomunicazioni di nuova generazione capillari e sicure in ragione del preminente interesse del Paese a garantire la sicurezza delle reti e dei sistemi informativi in ambito nazionale e internazionale, che consentano al Paese di raggiungere gli obiettivi che si è prefisso in un sistema ad alta competitività internazionale, salvaguardando i livelli occupazionali e la specificità del territorio;

PRESO ATTO dello stato di attuazione della Strategia italiana per la banda ultralarga;

CONSIDERATO che TIM S.p.A. (di seguito denominata: "TIM") ha avviato una procedura per la dismissione della partecipazione in un veicolo societario (c.d. "NetCo") che verrà a detenere il perimetro gestionale e infrastrutturale della rete fissa detenuta da TIM, inclusi i cespiti patrimoniali e le attività di FiberCop S.p.A. e la partecipazione in Telecom Italia Sparkle S.p.A. (cd. "NetCo");

CONSIDERATO che TIM ha comunicato in data 22 giugno 2023 di aver avviato, in esclusiva, una negoziazione migliorativa con Kohlberg Kravis Roberts & Co. L.P. (nel prosieguo, "KKR"), finalizzata a ottenere la presentazione – nel più breve tempo possibile compatibilmente con la complessità dell'operazione e comunque entro il 30 settembre 2023 – di un'offerta conclusiva e vincolante secondo i migliori termini e condizioni, nonché di convenire il perimetro, le modalità e i tempi per l'esecuzione dell'attività di due diligence confirmatoria richiamata nella stessa offerta di KKR;

CONSIDERATA la necessità di procedere nella realizzazione della rete di telecomunicazioni in fibra ottica quale infrastruttura di importanza strategica per il Paese, assicurandone la migliore funzionalità, la parità di accesso e garantendo, nel contempo, la sicurezza della rete e il rispetto degli impegni assunti per la conclusione degli investimenti previsti nell'ambito del Piano di ripresa e resilienza dell'Italia anche in ottica prospettica di uniformità del grado di infrastrutture in fibra presenti in tutte le aree del Paese;

CONSIDERATO che è intendimento del Governo, alla luce delle predette finalità, aderire all'iniziativa di scorporo della rete, come definita da TIM, assicurando allo Stato, anche tramite adeguati presidi di governance, un ruolo di vigilanza e controllo sulle materie di rilevanza strategica e di sicurezza nazionale;

RITENUTO opportuno che il Ministero dell'economia e delle finanze sottoponga, all'esito della definizione della struttura dell'operazione, un'offerta vincolante unitamente a KKR che consenta l'acquisizione da parte del Ministero di una quota di minoranza nel capitale di NetCo idonea a garantire al Ministero presidi di vigilanza e controllo sulle materie di rilevanza strategica e di sicurezza nazionale;

VISTA la deliberazione del Consiglio dei ministri, adottata nella riunione del 28 agosto 2023;

SULLA PROPOSTA del Ministro dell'economia e delle finanze, di concerto con il Ministro delle imprese e del made in Italy;

DECRETA:

ART. 1

Il Ministero dell'economia e delle finanze è autorizzato a presentare congiuntamente con KKR e, eventualmente, altri investitori di minoranza un'offerta vincolante idonea a consentire

l'acquisizione da parte del Ministero di una quota di partecipazione di minoranza compresa fra il 15 e il 20 per cento del capitale di NetCo, nel limite massimo di risorse di 2.200 milioni, a valere sull'autorizzazione di spesa di cui all'articolo 1, del decreto-legge 31 agosto 2023, n. 118, recante misure urgenti in materia di finanziamento di investimenti di interesse strategico.

ART. 2

1. Ai fini della presentazione dell'offerta vincolante da parte del Ministero dell'economia e delle finanze il Dipartimento del Tesoro è autorizzato a nominare uno o più esperti di provata esperienza nel settore di riferimento e in operazioni similari, con particolare riferimento agli aspetti finanziari, strategico-industriali e legali, per l'individuazione delle modalità di ingresso nell'operazione, ivi inclusa la fase di determinazione del prezzo di acquisto della partecipazione, e l'esecuzione degli adempimenti societari richiesti ai fini del perfezionamento dell'acquisizione.

ART. 3

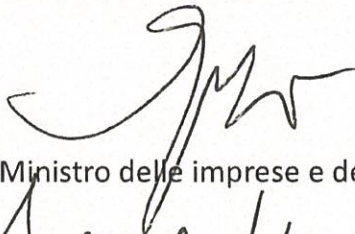
1. La struttura e le condizioni dell'operazione di acquisizione della quota di partecipazione di cui all' articolo 1 assicurano la conformità della stessa a quanto segue:
 - a) che la definizione di un piano industriale sia idoneo al conseguimento di potenziamento e sviluppo della rete di telecomunicazioni in fibra ottica;
 - b) che le azioni assegnate al Ministero dell'economia e delle finanze godano dei medesimi diritti patrimoniali assegnate alle altre azioni;
 - c) che l'accordo tra gli azionisti preveda, tra l'altro: 1) modalità di governance di NetCo idonee ad assicurare il conseguimento degli obiettivi del piano industriale; 2) adeguati poteri in capo al Ministero dell'economia e delle finanze di monitoraggio sulla gestione e meccanismi, anche di governance, di presidio da parte dello stesso Ministero sulle decisioni rilevanti ai fini del perseguimento degli obiettivi di sviluppo e potenziamento di NetCo e in materia di rilevanza strategica e sicurezza nazionale, anche in caso di mutamento della compagine azionaria;
 - d) che siano definiti i criteri e le modalità con le quali il Ministero dell'economia e delle finanze può acquisire, anche in una fase successiva, l'intero capitale di Telecom Italia Sparkle S.p.A.
2. Il presente decreto è trasmesso alla Corte dei conti e all'Autorità garante della concorrenza e del mercato ai sensi dell'articolo 5, comma 3, del decreto legislativo n. 175 del 2016.
3. La pubblicazione del presente decreto sul sito della Presidenza del Consiglio dei ministri e del Ministero dell'economia e delle finanze fa luogo ad ogni adempimento di legge.

Roma, 1° settembre 2023

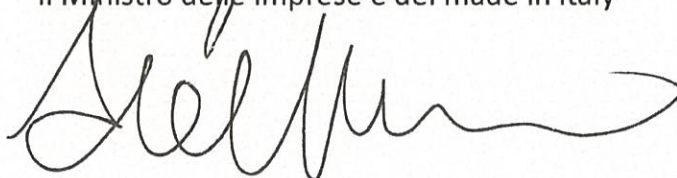
il Presidente del Consiglio dei ministri

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il Ministro dell'economia e delle finanze

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il Ministro delle imprese e del made in Italy

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Al Presidente del Consiglio dei Ministri

HAVING REGARD to Article 4 of Legislative Decree No. 165 of March 30, 2001, which stipulates, among other things, that the governing bodies shall exercise the functions of political-administrative guidance;

HAVING REGARD TO Legislative Decree No. 175 of August 19, 2016 (hereinafter referred to as "Legislative Decree No. 175 of 2016"), setting forth the Consolidated Law on Publicly Held Companies, and in particular:

- a) Article 5 which provides, among other things:
- with the exception of cases in which the establishment of a company or the acquisition of a shareholding, including through capital increase, takes place in accordance with express legislative provisions, the deliberative act of establishment of a company with public shareholding, including in the cases referred to in Article 17, or the acquisition of shareholdings, including indirect shareholdings by public administrations in companies already established must be analytically motivated with reference to the necessity of the company for the pursuit of the institutional purposes referred to in Article 4, highlighting, also, the reasons and purposes that justify this choice, also in terms of economic convenience and financial sustainability as well as direct or outsourced management of the entrusted service. The justification must also give an account of the compatibility of the choice with the principles of efficiency, effectiveness and economy of administrative action (paragraph 1);
 - the deliberative act referred to in paragraph 1 acknowledges the compatibility of the planned financial intervention with the rules of the European treaties and, in particular, with the European framework on state aid to enterprises (paragraph 2);
 - the administration sends the deliberative act of establishing the company or acquiring the direct or indirect shareholding to the Competition and Market Authority, which may exercise the powers under Article 21-bis of the Law of October 10, 1990, No. 287, and to the Court of Auditors, which shall rule, within the term of sixty days of receipt, on the conformity of the act with the provisions of paragraphs 1 and 2 of this article, as well as articles 4, 7 and 8, with particular regard to financial sustainability and the compatibility of the choice with the principles of efficiency, effectiveness and economy of administrative action. If the Court does not rule within the period referred to in the first sentence, the administration may proceed with the establishment of the company or the purchase of the shareholding referred to in this article (paragraph 3);
- b) Article 7 which provides, among other things:
- the resolution on the participation of a public administration in the establishment of a company shall be adopted by a decree of the President of the Council of Ministers, upon the proposal of the Minister of Economy and Finance in consultation with the ministers responsible for

matter, after deliberation by the Council of Ministers, in the case of state holdings (Paragraph 1);

The deliberative act shall be drawn up in accordance with the provisions of Article 5, Paragraph 1 (Paragraph 2);

- c) Article 8 which stipulates that transactions, including through participation in extraordinary transactions, involving the acquisition by a public administration of shareholdings in existing companies shall be deliberated in the manner set forth in Article 7, paragraphs 1 and 2 (paragraph 1);

HAVING REGARD to the Legislative Decree of November 8, 2021, no. 207 implementing Directive (EU) 2018/1972 of the European Parliament and of the Council of December 11, 2018, establishing the European Electronic Communications Code, which, in regulating, among other things, the access network and co-investment regulatory model to incentivize the construction of new very high-capacity networks provides that commitments to open the construction of such a new network to co-investment may include co-ownership or long-term risk sharing through co-financing or purchase agreements involving specific structural rights from other providers of electronic communications networks or services;

HAVING REGARD TO Legislative Decree No. 300 of July 30, 1999, as amended , which assigns to the Ministry of Economy and Finance the management of state shareholdings and to the Ministry of Enterprise and Made in Italy responsibilities for communications policy;

HAVING REGARD to Article 4 of Prime Ministerial Decree No. 103 of June 26, 2019, as amended, setting forth regulations for the organization of the Ministry of Economy and Finance, which gives the Department of Treasury jurisdiction over, among other things, the management of state corporate holdings and the exercise of shareholder rights;

CONSIDERED the goals of the National Recovery and Resilience Plan for the implementation of the digital telecommunications infrastructure, aimed at making digital public services more modern, secure and reliable for citizens and businesses;

TAKING NOTE of the current perimeter of "black areas", "gray areas" and "white areas" referred to in European Commission Communication 2013/C 25/01 on *"EU Guidelines for the application of State aid rules in relation to rapid deployment of bandwidth networks"* and the Government's fundamental interest in achieving homogeneous coverage of all areas;

CONSIDERING the current configuration of the telecommunications sector, as well as the need to develop capillary and secure new-generation telecommunications networks because of the country's preeminent interest in guaranteeing the security of networks and information systems in the national and international spheres, which will enable the country to achieve its goals in a system with high international competitiveness, while safeguarding employment levels and the specificity of the territory;

TAKEN NOTE of the status of implementation of the Italian Ultrabroadband Strategy;

WHEREAS, TIM S.p.A. (hereinafter referred to as: "TIM") has initiated a procedure to divest its stake in a corporate vehicle (so-called "NetCo") that will come to hold the management and infrastructure perimeter of the fixed network held by TIM, including the assets and activities of FiberCop S.p.A. and the stake in Telecom Italia Sparkle S.p.A. (so-called "NetCo");

WHEREAS TIM announced on June 22, 2023 that it had entered into exclusive, improved negotiations with Kohlberg Kravis Roberts & Co. L.P. (hereinafter, "KKR"), aimed at obtaining the submission - in the shortest possible time compatible with the complexity of the transaction and in any case by September 30, 2023 - of a conclusive and binding offer under the best terms and conditions, as well as to agree on the scope, terms and timing for the execution of the confirmatory due diligence activity referred to in KKR's offer itself;

CONSIDERED the need to proceed in the implementation of the fiber optic telecommunications network as an infrastructure of strategic importance for the country, ensuring its best functionality, equality of access and guaranteeing, at the same time, the security of the network and compliance with the commitments made for the conclusion of the investments provided for under the Plan for the Recovery and Resilience of Italy, also with a view to the prospect of uniformity of the degree of fiber infrastructure present in all areas of the country;

WHEREAS, it is the Government's intention, in light of the aforementioned purposes, to adhere to the network unbundling initiative, as defined by TIM, ensuring that the State, including through appropriate governance mechanisms, plays a supervisory and control role in matters of strategic importance and national security;

WHEREAS, it is **deemed** appropriate that the Ministry of Economy and Finance submit a binding offer together with KKR at the outcome of the definition of the structure of the transaction, which would allow the Ministry to acquire a minority stake in NetCo's capital suitable for ensuring the Ministry's oversight and control over matters of strategic importance and national security;

HAVING REGARD TO the resolution of the Council of Ministers, adopted at its meeting on August 28, 2023;

ON THE MOTION of the Minister of Economy and Finance, in consultation with the Minister of Business and Made in Italy;

DECREE:

ART. 1

The Ministry of Economy and Finance is authorized to jointly submit with KKR and, possibly, other minority investors a binding offer suitable for enabling

the acquisition by the Ministry of a minority stake of between 15 and 20 percent in NetCo's capital, up to a maximum resource limit of 2.2 billion, from the expenditure authorization in Article 1, of Decree-Law No. 118 of August 31, 2023, on urgent measures on the financing of investments of strategic interest.

ART. 2

1. For the purpose of the submission of the binding offer by the Ministry of Economy and Finance, the Department of Treasury is authorized to appoint one or more experts with proven experience in the relevant sector and in similar transactions, with particular reference to financial, strategic-industrial and legal aspects, for the identification of the modalities of entry into the transaction, including the phase of determining the purchase price of the stake, and the execution of the corporate formalities required for the completion of the acquisition.

ART. 3

1. The structure and conditions of the stake acquisition transaction referred to in Article 1 shall ensure its compliance with the following:

- a) That the establishment of a business plan is suitable for the achievement of fiber-optic telecommunications network upgrading and development;
- b) That the shares allocated to the Ministry of Economy and Finance enjoy the same property rights allocated to other shares;
- c) that the shareholders' agreement provides for, among other things: 1) NetCo's governance arrangements suitable for ensuring the achievement of the objectives of the business plan; 2) adequate powers under the Ministry of Economy and Finance to monitor management and mechanisms, including governance, for oversight by the same Ministry over decisions relevant to the pursuit of NetCo's development and strengthening objectives and in matters of strategic importance and national security, including in the event of a change in the shareholding structure;
- d) That the criteria and methods by which the Ministry of Economy and Finance may acquire, even at a later stage, the entire capital of Telecom Italia Sparkle S.p.A. be defined.

2. This decree shall be transmitted to the Court of Auditors and the Competition Authority pursuant to Article 5, paragraph 3, of Legislative Decree No. 175 of 2016.

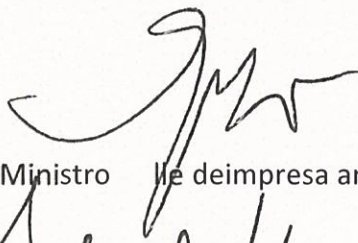
3. Publication of this decree on the website of the Presidency of the Council of Ministers and the Ministry of Economy and Finance shall result in all legal requirements.

ROnna, Sept. 1, 2023

the nte del Copresidium of ministers

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the minister of economy and finance

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il Ministro lle deimpresa and ael made in italy

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