COMMISSION DECISION (EU) 2016/1983

of 26 May 2014

on the measure SA.33063 (2012/C, ex 2012/NN) regarding Trentino NGN srl following the withdrawal of Italy from the project

(notified under document C(2014) 3159)

(Only the Italian text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called upon interested parties to submit their comments pursuant to the provisions cited above ([1]),

Whereas:

1. PROCEDURE

(1) On 24 May 2011 the Commission received a complaint by the three main alternative telecommunications operators active in Italy (Wind, Fastweb and Vodafone). In their detailed submission, it was alleged that a project launched by the Italian Autonomous Province of Trento ('the Province') for the deployment of a next-generation access infrastructure throughout the territory of the Province constituted de facto State aid to Telecom Italia, granted in violation of the competition rules as stated in the Broadband Guidelines ([2]). In particular, the complainants alleged that they were not properly informed or consulted by the Province regarding its plans and objectives, that the beneficiary was predetermined before the start, and that the chosen infrastructure would not allow real competition after it had been deployed.

(2) Following a request for information sent on 22 June 2011, the Italian authorities replied on 20 July 2011, contending that their intention was to follow the market economy investor principle, and that their intervention did not constitute State aid and thus did not need to fulfil the compatibility conditions of the Broadband Guidelines. On 4 November 2011, having removed the confidential information, the Commission forwarded the reply by the Italian authorities to the complainants, who submitted additional observations and documentation on 29 November and 7 and 16 December 2011. The Italian authorities submitted various detailed items of additional information between January and May 2012. Between February and May 2012 the complainants also submitted additional information. Throughout this period various meetings and phone conferences were held with each of the parties involved.

(3) By decision of 25 July 2012 ('the opening decision'), the Commission informed Italy that it had initiated the formal investigation procedure set forth in Article 108(2) of the Treaty on the Functioning of the European Union with respect to the project. Having removed the confidential information, the Commission published the opening decision in the *Official Journal of the European Union* ([3]), inviting interested parties to submit their comments.

(4) The Commission received comments on the opening decision from Italy by letters of 22 and 23 November 2012. The Commission also received observations from interested parties: the representatives of Telecom Italia

([1]) OJ C 323, 24.10.2012, p. 6.
([2]) Communication from the Commission — Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks (OJ C 235, 30.9.2009, p. 7), revised in 2013: EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (OJ C 25, 26.1.2013, p. 1).
([3]) See footnote 1.

on 3 December 2012 and the representatives of Wind, Fastweb and Vodafone on 7 December 2012. By letter of 29 January 2013, the Commission forwarded the above-mentioned observations, having removed all confidential information, to the Italian authorities, which submitted their comments on the third parties' observations on 5 March 2013. Between March and December 2013 intensive discussions and exchanges took place with all the parties concerned (the Italian authorities, Telecom Italia, Wind, Fastweb and Vodafone) and various meetings and phone conferences were held with each of them.

(5) By letter of 31 January 2014 the Italian authorities informed the Commission of the Province's intention to withdraw from the project. On 14 and 20 March 2014, the Italian authorities provided additional information concerning the Province's effective withdrawal from the Trentino NGN joint venture, in particular concerning the sale of the Province's shares to Telecom Italia effected on 28 February 2014.

2. **DESCRIPTION OF THE MEASURE**

(6) In September 2010, the Province drew up a strategy to achieve its connectivity objective of 100 % coverage of its territory by an ultra-broadband fibre network by 2018. The strategy provided for two types of action, for 'medium-profitability' areas ([4]) and for 'low-profitability' areas in the Province: high-profitability areas were excluded. For the medium-profitability areas, the Province intended to set up a new company to be named Trentino NGN and to open it up to private partners. For the low-profitability areas, the Province planned to take an ad hoc State aid measure which would be developed and notified at a later stage, probably under the supervision of the Province's publicly owned company Trentino Network, a company distinct from Trentino NGN which was in charge of other initiatives falling within the Province's general broadband strategy.

(7) In the following months, separate contacts between the Province and several private operators took place, and on 8 February 2011 the Province signed a memorandum of understanding with Telecom Italia for the setting up of the joint venture Trentino NGN to deploy a fibre-to-the-home infrastructure in the medium-profitability areas. Pursuant to this initial agreement, the Province committed itself to a cash contribution of up to EUR 60 million to the capital of Trentino NGN, while Telecom Italia was only to make contributions in kind, including (1) its existing passive infrastructure (ducts and poles) immediately; and (2) the switch-off of the existing copper network following the entry into service of the fibre-to-the-home network. Later in 2011, two other minor private shareholders signed the memorandum of understanding: a financial institution, Finanziaria Trentina, and a smaller internet service provider, McLink, each of which was to make a smaller financial contribution to the company.

(8) By December 2011, the business plan was finalised and a due diligence report was prepared at the Province's request by Analysys Mason. At the same time, the shareholders' respective rights and obligations were finally established and the contributions in kind by Telecom Italia to Trentino NGN were more precisely defined. Further amendments to the shareholders' agreements were introduced after discussions with the Commission and completion of an expert report on the project by Analysys Mason. By March 2012, the required expert report on Telecom Italia's initial contribution in kind was prepared by Reconta Ernst & Young, which led to a further adjustment.

(9) To begin with the Province set up Trentino NGN single-handedly, with a minimal capital contribution of less than EUR 100 000. The company was expected to reach its final capital structure through an increase in the equity to be implemented after finalisation of the agreements with the private shareholders. It was planned that the equity capital of Trentino NGN would be increased as follows: the Province would contribute EUR 50 million (corresponding to a stake of 52,2 %), Finanziaria Trentina would contribute EUR 5 million (a 5,2 % stake), McLink EUR 1,5 million (a 1,56 % stake) ([5]) and Telecom Italia the lease, by means of indefeasible rights of use, of its passive infrastructure (ducts and poles) in the whole of the Province, for use in the construction of the new fibre network ('the initial contribution'). Telecom Italia's initial contribution was originally valued at EUR 39,8 million, but the report by Ernst & Young on the value of this contribution indicated a slightly lower amount of EUR 39,3 million, which lead to an update to the agreement (the final estimation was EUR 39,448 million).

(10) On 18 May 2012, the joint venture Trentino NGN was set up and the initial contributions of each of the parties were made as follows: the Province paid up only part of the planned cash contribution, i.e. EUR 14,845 million

([4]) The medium-profitability areas identified were municipalities in which the cost of deploying the fibre-to-the-home infrastructure would remain around EUR 1 000 per household, i.e. 42 municipalities and 150 000 households, corresponding to 60 % of the population of the Province.

([5]) The opening decision said that MC-link would contribute EUR 1 million, corresponding to a stake of 1,6 %, but during the investigation the Italian authorities indicated that the correct figure was EUR 1,5 million, corresponding to a stake of 1,56 %.

instead of EUR 50 million; similarly, Finanziaria Trentino contributed only EUR 1,25 million of EUR 5 million, and McLink contributed only EUR 0,375 million of EUR 1,5 million. Telecom Italia contributed the indefeasible rights of use of its passive infrastructure, estimated finally at EUR 39,448 million. This resulted in the following shareholding structure: Province 52,16 %; Telecom Italia 41,07 %; McLink 1,56 %; Finanziaria Trentino 5,21 %. The resulting situation of Trentino NGN's shareholders and their respective shareholdings was as follows (during the 18 May 2012-28 February 2014 period).

Shareholder	Capital held %	Subscribed capital (EUR)	Paid-up capital (EUR)
Province	52,16	50 095 000	14 845 000
Telecom Italia	41,07	39 448 000	39 448 000
McLink	1,56	1 500 000	375 000
Finanziaria Trentina	5,21	5 000 000	1 250 000
Total	**100,00**	**96 043 000**	**55 918 000**

(11) The shareholders' agreement provided that at the end of the third year from the initial contribution, or upon the activation of at least 16 % of the new fibre connections, Telecom Italia and the Province could decide to initiate the 'second contribution' by Telecom Italia, i.e. the transfer to Trentino NGN (1) of the ownership (as opposed to the indefeasible rights of use already conferred) of the passive infrastructure existing in the medium-profitability areas identified by Trentino NGN; and (2) the ownership of the copper network, with a view to switching it off and migrating all customers onto the new fibre network. The preliminary estimate of the value of the contribution was EUR 520 per active copper line, including both Telecom Italia's retail lines and lines operated on behalf of the operators who had unbundled access to the local loop. This value was estimated to be boosted by EUR 2 million corresponding to the value of converting the indefeasible rights of use of the duct space (i.e. the initial contribution) into ownership. In this second phase, and on account of its second contribution, Telecom Italia would acquire the majority stake and control of Trentino NGN, if necessary by way of an additional capital injection by Telecom Italia.

(12) Finally, the shareholders' agreement also provided that after three more years, or after reaching the objective of 43 % active and connected lines, Telecom Italia would have the right to exercise a call option vis-à-vis the Province and McLink to acquire their shares of Trentino NGN. In return for the concession of this right to Telecom Italia, and *if* it was eventually exercised, Telecom Italia would pay EUR 6,5 million to the Province, half of it within 1 year and the other half within 2 years. The purchase price for the shares would be equal to the value of the contribution increased by an annual 7,75 % net of the distributed dividends ([6]). The other two shareholders, McLink and Finanziaria Trentina, were granted a put option whereby they could decide to sell their shares in Trentino NGN to Telecom Italia at a price corresponding to the value of their contributions increased by respectively 5,5 % and 7 % per year.

(13) In addition, through specific shareholders' agreements, Telecom Italia was also appointed the supplier of Trentino NGN for the construction, management and operation of the network. The type of network to be deployed was what is known as the point-to-multipoint model. No unbundling or access obligations were envisaged. The chosen architecture provided only for the rollout of three parallel GPON networks ([7]), two of which would be available for concession to other operators.

3. **OPENING OF THE FORMAL INVESTIGATION**

(14) The Commission opened the formal investigation because it had serious doubts as to the compliance of the measure with the market economy investor principle, and in order to determine whether, if it was shown to contain elements of State aid, it could be deemed compatible with the internal market.

([6]) These figures are those resulting from the third amendment to the shareholders' agreement, signed on 11 May 2012. The original figures were EUR 4,7 million as a cash contribution and the annual rate established was 7,5 %.

([7]) A technology allowing provision of internet services on a point-to-multipoint basis. Operators interested in providing services would have to activate the full network using the GPON technology.

(15) In the opening decision, the Commission expressed its concern that the Province's involvement in Trentino NGN had several features which made it doubtful whether it complied with the market economy investor principle and whether the Province's participation was indeed equivalent to that of its private partners. The Commission's doubts related in particular to the following:

— The timing of the project. The Commission doubted that the Province had acted since the beginning as a market economy investor, guided not by public policy objectives but by economic and profitability considerations. It appeared that the Province had initiated the project in the public interest, and then designed it as a joint venture with the incumbent Telecom Italia, and had attempted to render the project compliant with the market economy investor principle only *ex post*, making changes, inter alia, following discussions with the Commission, while keeping the structure of the initiative unaltered.

— The participation of private parties. The participation of McLink and Finanziaria Trentina was negligible, while Telecom Italia's was significant, but spread over time.

— Concomitance of the investment. The Province was to act immediately, while Telecom Italia's contribution was spread over time and conditional upon certain events and decision-making processes.

— Same terms and conditions. It was not clear that the terms and conditions on which the Province was investing in the joint venture were the same as those of the private partners, and more specifically Telecom Italia. The Commission noted several discrepancies regarding the timing and conditionality of Telecom Italia's contributions, and the possibility for Telecom Italia to acquire the Province's shares and gain full control of Trentino NGN via the call option.

— Telecom Italia's initial contribution ([8]). The value of Telecom Italia's initial contribution appeared to be calculated on the basis of documents, assumptions, forecasts and financial analyses made by the parties which had not been verified by an independent expert. It was doubtful whether a private investor would be prepared to accept a significant equity participation in a joint venture in return for access to a regulated asset which could be obtained by contractual means at regulated prices. It was not clear that a market economy investor would accept that a lease of infrastructure, to be acquired outright at a later date, was adequate participation in the equity. The Commission doubted whether a market economy investor would acquire infrastructure that was not necessary, since the indefeasible rights of use would apply to Telecom Italia's ducts and poles throughout the Province and not just in the areas in which Trentino NGN was to deploy its network.

— Telecom Italia's second contribution ([9]). There were doubts regarding the future valuation of Telecom Italia's second contribution, which at the time was based on a negotiated methodology, without an expert opinion. It was not clear that the preliminary valuation of the conversion to ownership of the indefeasible rights of use was in line with market terms, and in particular that there was no overlap between the valuation of the initial contribution (a lease) and the second one (ownership), given that, for the most part, the rights conferred covered the same infrastructure. The Commission had doubts about the appropriateness of the methodology for the evaluation of the transfer of ownership of all the components of the copper network ([10]), given its high maintenance costs, given that the main objective was to switch it off once the fibre network had become operational, and given the potential alternatives to the methodology proposed.

— The business plan and the parties' levels of risk. There were significant differences between the risk profiles of the public authority and the private investors, given the different nature and timing of their contributions, the different rights and obligations of the parties — *prima facie* low risks for Telecom Italia, low opportunity costs for Telecom Italia, low risks to existing business as Telecom Italia would retain control over the copper network even after contributing it to the joint venture by simultaneously acquiring control of the joint venture, and acquisition of full control and internalisation of profits through exercise of the call option if the joint venture were to prove profitable; whereas the Province seemed to be acting as a financial investor in an infrastructure upgrade project, expecting at most a return of 7,75 % and EUR 6,5 million if the call option

([8]) The initial contribution consisted of the transfer of the indefeasible rights of use.

([9]) The second contribution consisted of two parts: (1) the conversion into ownership of the indefeasible rights of use (which formed the initial contribution) over Telecom Italia's ducts space only in the areas of medium profitability in the Province (i.e. the target areas of Trentino NGN); and (2) the transfer of the ownership of all the components of the copper network, with a view to switching it off after migrating all customers onto the new fibre network.

([10]) The methodology used to establish such a value at the time was based on the average theoretical network replacement value, on the basis of the BU-LRIC model used by the Italian National Regulatory Authority AGCOM to determine ULL fees (unbundled access to the local loop), a value taken to be the average value across the whole country and not calculated specifically for the Province.

was exercised ([11]). The calculations in the business plan might not have been entirely accurate, owing to optimistic assumptions regarding actual demand by end-users and revenues from alternative operators activating all the GPON lines available ([12]). There were other similar risks: Telecom Italia might decide to postpone the switch-off of the legacy copper network, in the absence of any contractual provision obliging it to do so, and this might delay the breakeven point for Trentino NGN. There was incertitude regarding the total financial resources necessary to complete the network rollout, quantified at EUR 150 million.

— Other concerns. The choice of Telecom Italia without public tender, and its remuneration as a provider of services to Trentino NGN; Telecom Italia's dual position as shareholder and supplier.

4. THE PROVINCE'S DECISION TO WITHDRAW FROM THE PROJECT

(16) On 31 January 2014 the Italian authorities informed the Commission that the Province had decided to withdraw from the Trentino NGN project and not to pursue it, in agreement with all the other parties: Telecom Italia, McLink and Finanziaria Trentina.

(17) On 14 March 2014 the Italian authorities informed the Commission that the Province had sold its participation in Trentino NGN to Telecom Italia for a payment of EUR 15 852 435, corresponding to the value of Province's partial cash contribution to Trentino NGN in the amount of EUR 14,845 million, plus compound interest at 3,75 %. According to the Italian authorities, Trentino NGN was now controlled by Telecom Italia, while Finanziaria Trentina and McLink remained as minority shareholders.

(18) The Italian authorities explained that, although Trentino NGN was set up and partial contributions to its capital were made on 18 May 2012, on 20 August 2012 (after the opening decision) the Province and other parties to Trentino NGN modified the shareholders' agreement, and all the activities of NGN were suspended pending the conclusion of the Commission's ongoing formal investigation. Thus, the full payment of the contributions was suspended (only partial payments were made) for all the parties concerned. All the other subsequent steps called for in the shareholders' agreement were also suspended. Trentino NGN never started to roll out its planned fibre-to-the-home network (or any other network).

(19) The activities of Trentino NGN were restricted exclusively to providing access to third parties to the indefeasible rights of use of infrastructure in order to comply with regulatory obligations. In relation to this last aspect, the Italian authorities explained that because Telecom Italia remained subject to regulatory access obligations towards other licensed operators, after Telecom Italia transferred the rights of use of the passive infrastructure to Trentino NGN, in May 2012, some operators requested access to that passive infrastructure and access was granted. Consequently, Telecom Italia made several payments to Trentino NGN as remuneration for purchasing access to the passive infrastructure from Trentino NGN in order to meet the other licensed operators' access requests. These payments amounted to less than EUR 15 000, and constituted the entire revenue generated by Trentino NGN after its incorporation.

(20) The Italian authorities also indicated that the Province had not and would not pay any penalty for withdrawing from Trentino NGN. The shareholders' agreement of 16 December 2011 and subsequent amendments contained provisions concerning termination which enable the Province to leave Trentino NGN without any penalty, even in the event that the project had not been implemented even in part.

5. ASSESSMENT

(21) Although some preparatory steps were taken by Italy to implement the Trentino NGN project, notably through the various agreements and acts leading to the setting up of the joint venture, and the above-mentioned partial payment of the contribution in cash by the Province (along with the partial contributions in cash by other parties and the contribution in kind by Telecom Italia), the project did not progress beyond that stage.

([11]) Maximum remuneration capped at a return on equity of 10,5 % in the initial calculations made by the Province.
([12]) Three parallel GPON networks were to be rolled out, two of them beyond the requirements of Trentino NGN and in theory to be leased for operation by alternative providers.

(22) In relation to the partial payment made by the Province into the capital of Trentino NGN, the Italian authorities have explained that Trentino NGN deposited all the amounts received as cash contributions from its shareholders (i.e. the financial contributions from the Province, McLink and Finanziaria Trentina, minus costs and taxes) in a bank account on which it received interest at a rate of 2,71 % in 2012, 1,509 % until 1 February 2013 and 1,524 % after 1 February 2013. The partial payments (including the Province's) have remained inactive in Trentino NGN's bank account. According to the Italian authorities, on 28 February 2014 the Province recovered its partial cash contribution plus 3,75 % compound interest. The Italian authorities have explained that the 3,75 % compound interest was the result of a negotiated settlement between the parties and represents approximately double the rate for 2- to 3-year Italian government bonds, and is similar to the rate for 10-year bonds.

(23) The partial payment of the cash contribution by the Province to Trentino NGN involved a transfer of State resources. However, on the basis of the information available, since the deployment of the Trentino NGN project was suspended on 20 August 2012 and the Province effectively withdrew from the project and recovered its initial payment in full, plus reasonable interest, on 28 February 2014, the Commission is willing to accept that this partial payment did not give rise to an economic advantage for Trentino NGN or its shareholders.

(24) As for the minimal activity engaged in by Trentino NGN, i.e. the transactions concerning the sale of rights of use (see recital 19), these activities were performed in order to comply with regulatory obligations which remain incumbent upon Telecom Italia and do not appear to have caused an economic advantage for Trentino NGN or its shareholders, including Telecom Italia. Under these circumstances, the transactions concerned do not call into question the assessment made above.

(25) The Commission accordingly accepts that the Trentino NGN project was never implemented, so that following the Province's withdrawal from the project the present investigation no longer serves any purpose.

6. **CONCLUSION**

(26) In the light of the above, the Commission has decided to close the proceedings under Article 108(2) TFEU, since following the withdrawal of the Italian authorities (the Province) from the Trentino NGN project the proceedings no longer serve any purpose,

HAS ADOPTED THIS DECISION:

Article 1

Following the withdrawal of the Italian authorities from the Trentino NGN project, the present proceedings no longer serve any purpose. The Commission has therefore decided to close the proceedings initiated under Article 108(2) of the Treaty.

Article 2

This Decision is addressed to Italian Republic.

Done at Brussels, 26 May 2014.

For the Commission
Joaquín ALMUNIA
Vice-President