

**BEREC Opinion on  
Phase II investigation  
pursuant to Article 32 of Directive (EU) 2018/1972**

**Case CZ/2021/2351**

**Wholesale access and call origination on public mobile telephone  
networks in the Czech Republic**

24 January 2022

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## 1. Executive Summary

On 18 November 2021, the Commission registered a notification from the Czech national regulatory authority (NRA), Český telekomunikační úřad (CTU)<sup>1</sup>, concerning the wholesale market for access to mobile services<sup>2</sup> in the Czech Republic.

In its draft measure, CTU proposes to designate O2 Czech Republic, T-Mobile Czech Republic and Vodafone Czech Republic as having significant market power (SMP) in the relevant market and proposes the imposition of a range of regulatory remedies on T-Mobile, O2 and Vodafone including (i) transparency; (ii) non-discrimination; (iii) accounting separation; (iv) access; (v) price control and cost accounting.

On 15 December 2021, the Commission sent a serious doubts letter opening a phase II investigation pursuant to Article 32 of Directive (EU) 2018/1972. The Commission's serious doubts concern CTU's proposed SMP assessment and that the draft measure would create a barrier to the internal market or its serious doubts as to its compatibility with Union law.

Based on the analysis set out in this Opinion, BEREC considers that the Commission's serious doubts are partially justified, namely with regard to application of the three criteria test and assessment of Joint-SMP.

## 2. Introduction

On 18 November 2021, the Commission registered a notification from the Czech national regulatory authority (NRA), Český telekomunikační úřad (CTU), concerning the wholesale market for access to mobile services<sup>3</sup> in the Czech Republic.

The Commission sent a request for information<sup>4</sup> to CTU on 24 November 2021 and received a reply from CTU on 29 November 2021.

The Commission initiated a phase II investigation, pursuant to Article 32 of Directive (EU) 2018/1972, with a serious doubts letter issuing on 15 December 2021.

On 20 December 2021, In accordance with Article 32 of Directive (EU) 2018/1972, BEREC established a dedicated Expert Working Group (EWG) with the mandate to prepare an Opinion concerning the justification of the Commission's serious doubts in the aforementioned case.

On 5 January 2022, the EWG held a virtual meeting. This meeting included interviews with relevant colleagues from both CTU and the Commission. The objective of the EWG was to reach a clear conclusion on whether or not the Commission's serious doubts are justified. The EWG finalised its draft Opinion on 21 January 2022, with a final Opinion presented and adopted by a majority of the BEREC Board of Regulators on 24 January 2022. This

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<sup>1</sup> Under Article 32 of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (the Code) (OJ L 321, 17.12.2018, p. 36).

<sup>2</sup> Corresponding to market 15 of Commission Recommendation 2003/311/EC of 11 February 2003

<sup>3</sup> Corresponding to market 15 of Commission Recommendation 2003/311/EC of 11 February 2003

<sup>4</sup> In accordance with Article 20(2) of the Code.

Opinion is now issued by BEREC in accordance with Article 32 (5) of Directive (EU) 2018/1972.

### 3. Background

#### Previous notifications

The markets for wholesale access to mobile services in the Czech Republic was previously notified to and assessed by the Commission under case CZ/2016/1835 and CZ/2019/2189.

In 2016, as the wholesale market for access to mobile services was not listed in the Recommendation on Relevant Markets, CTU carried out the three criteria test. CTU did not find high and non-transitory structural, legal or regulatory barriers to entry into the market. CTU further concluded that the market was tending towards effective competition, based on, among other things, a growing number of MVNOs in the market and decreasing retail prices. Finally, CTU concluded that competition law would be sufficient to address potential market failures. Consequently, CTU concluded that the three criteria test was not met and the relevant market was therefore not susceptible to ex-ante regulation.

In 2019 CTU notified the Commission of its market definition and three criteria test regarding the market for wholesale access and call origination on public mobile telephone networks. This time, CTU concluded that the three criteria test had been met and that the market was susceptible to ex-ante regulation.

At that time, the Commission considered that the notified draft measure did not provide sufficient evidence that the three criteria were cumulatively met and questioned CTU's forward-looking analysis of the market. The Commission was also concerned that CTU's assessment would not be sufficient to support a finding of SMP. The Commission therefore urged CTU to reconsider its conclusions on the need to regulate this market. In 2019, CTU withdrew from the completion of the ex-ante wholesale mobile market regulation process due to the planned 5G auction that took place in 2020.

#### Current notification and the Commission's serious doubts

##### *Current notification*

In the current draft notification, CTU identifies 139 operators at the retail level, including three MNOs (T-Mobile, O2 and Vodafone). CTU notes that the retail market is national and is characterised by high retail prices, stable market shares for the MNOs and low market shares for the MVNOs, whose number has decreased in recent years. CTU's market description reflects the trends in the retail market.

CTU therefore defines the market for wholesale access to mobile services in the Czech Republic.

### *Three Criteria Test*

CTU concludes that the three criteria test has been met and that the market for wholesale access to mobile services is therefore susceptible to ex-ante regulation. CTU considers that there are obstacles for MVNOs to grow in the market to the extent that sustainable competition could not be expected without regulated wholesale access. CTU points to high and stable market shares of the three MNOs, the limited role played by independent MVNOs and the difficulties MVNOs have in obtaining wholesale access as evidence that the market is unlikely to tend towards effective competition over the next five years. Regarding the third criterion, CTU considers that competition law alone is not sufficient to adequately address any shortcomings that may arise in the market.

### *Finding of Significant Market Power*

CTU proposes to designate T-Mobile, O2 and Vodafone with having joint-SMP in the wholesale market for access to mobile services in the Czech Republic.

CTU's designation of Joint-SMP relies on the *Airtours* criteria. CTU notes that retail prices for mobile services in the Czech market are high by international standards. CTU considers the market structure is conducive to tacit collusion and that the retail market is sufficiently transparent, such that the focal point – prices of packages, can be easily monitored via publicly available price lists. CTU is of the view that this transparency allows for any deviation from the common strategy to be identified and effectively retaliated against. In addition, CTU finds that the three MNOs it proposes to designate as having Joint-SMP have sufficient symmetry in market shares and offer homogenous services.

Furthermore, CTU finds that the high barriers to entry, resulting from the high sunk costs and limited spectrum available, make market entry unlikely. In addition, CTU notes that the 2020 spectrum auction, MVNO access obligations and in particular obligations on O2 to provide cost-orientated access to a new entrant who had acquired 5G spectrum are unlikely to have positive market effects before 2026.

CTU therefore proposes to impose the following regulatory wholesale obligations: (i) transparency; (ii) non-discrimination; (iii) accounting separation; (iv) access; (v) price control and cost accounting on the three operators with Joint-SMP.

### *Commission's serious doubts*

The Commission argues that CTU has failed to provide sufficient evidence that the three criteria test is met in the relevant market.

The Commission notes that MVNOs have been able to enter the market and successfully compete at retail level. In addition, barriers to entry have been lowered due to the already existing wholesale regulation and obligations imposed in spectrum auctions. This may bring into question CTU's conclusion about the existence of high and non-transitory barriers to entry. The Commission highlights that retail and wholesale prices have decreased over the last four years, while data consumption has grown significantly over the same period. The Commission does however acknowledge that there is scope for improvement in the competitive conditions in the Czech mobile market.

With regard to CTU's joint-SMP assessment, the Commission finds that the evidence provided by CTU to be ambiguous, noting that while retail prices are high, the average cost of calls and data are decreasing. In addition, the Commission doubts CTU's argument that retail prices are easily monitored given the availability of discount offers. This lack of transparency, according to the Commission, calls into question CTU's conclusion that the market is conducive to tacit coordination. The Commission also questions whether tacit coordination would be sustainable over time given the asymmetries in the retail and wholesale market shares between the MNOs and the existence of asymmetrical regulatory obligations already in place.

The Commission considers that enforcement of the existing regulatory obligations imposed as part of spectrum conditions are very likely to bring positive changes to the market and that market-based regulation appears to be disproportionate in this case.

#### 4. Assessment of the serious doubts

On 15 December 2021, the Commission sent a serious doubts letter opening a phase II investigation pursuant to Article 32(4) of Directive (EU) 2018/1972. The Commission has serious doubts as to the compatibility of the notified draft measures with Union law and considers that they create barriers to the internal market for the following reasons:

- Lack of sufficient evidence to support the three criteria test
- Insufficient evidence supporting the joint SMP finding

##### 4.1 Lack of sufficient evidence to support the three criteria test

###### *Concerns of the Commission*

Under Article 67(1) and (3) of Directive (EU) 2018/1972, the three criteria test is an integral part of the market analysis procedure, which falls within the Commission's powers under Article 32(4).

The Commission notes that the market conditions have not changed substantially since 2019, when the Commission considered in its decision related to case CZ/2019/2189 that the draft measure of CTU did not provide sufficient evidence that the three criteria were cumulatively met and that the market was susceptible to ex-ante regulation. According to the Commission, CTU did not provide substantially different evidence that could change the Commission's conclusion expressed its comments in CZ/2019/2189.

###### 1<sup>st</sup> criterion: High barriers to entry into the market

The Commission notes that there is clear evidence of MVNOs' presence in the market. Entry is still possible and happening, even though there might be a limited potential for growth. Moreover, both regulated and commercial access options are available to access seekers. Furthermore, under the 2020 5G auction conditions, O2 is obliged to provide national roaming access to its networks to CentroNet, Nordic Telecom and PODA.

The Commission understands that at least one operator already met or could meet the eligibility conditions for regulated national roaming services and may become a credible

competitor (firstly as MVNO but in the future possibly as the fourth MNO) at the retail level. More importantly, this operator could enter the wholesale market in the near future. According to the Commission, CTU has not provided solid evidence to support the conclusion that it does not envisage any market entry based on the spectrum conditions before 2026.

Furthermore, the Commission notes that the fact that access to O2's spectrum shall be based on cost-oriented terms until 2029 gives strong incentives to access seekers to enter the market as quickly as possible.

Finally, the Commission notes that in 2016, CTU concluded that the first criterion was not met, as the MVNOs active in the market at the time benefited from wholesale access, provided by all MNOs, based on commercial agreements. The Commission also noted that under the terms of the frequency auction in 2014, the three national mobile network operators (MNOs) were obliged to publish a reference offer for MVNO access and provide national roaming.

#### 2<sup>nd</sup> criterion: Tendency towards effective competition

According to the Commission, the finding of CTU that the market does not display a tendency towards effective competition (second criterion) is not sufficiently supported by the evidence. The Commission refers to the facts that MVNOs have increased their market shares between 2014-2020, that most retail and wholesale prices have decreased over the last years and that the consumption of data per SIM card increased substantially.

With regard to the network sharing agreements investigated in case AT.40305, the Commission notes that this agreement does not limit the ability of the two MNOs to compete on price or on the terms they offer wholesale access, and therefore is not directly related to CTUs concern of high retail prices.

Finally, the Commission notes that in 2016, CTU concluded that the market was tending towards effective competition based among other factors such as the continuing growth in the number of MVNOs in the market and the observed decrease of mobile retail prices.

#### 3<sup>rd</sup> criterion: Insufficiency of competition law alone to address the identified market failure

The Commission considers that the relevant analysis by CTU regarding the 3<sup>rd</sup> criterion at this stage, is insufficient. This applies particularly in view of the fact that in the previous market review (in 2016) CTU concluded that this specific criterion was not met and the competition law would be sufficient to adequately address potential market failures. In the current draft measure, the CTU does not provide convincing evidence why the situation has changed so significantly to alter completely its previous conclusion.

#### *Views of CTU regarding the Commission's serious doubts*

#### 1<sup>st</sup> criterion: High barriers to entry into the market

CTU considers that the market entry of MVNOs in the Czech mobile market (i.e. 136 MVNOs, with 133 of them independent) cannot be considered as sufficient evidence of a competitive market as this entry. MVNO entry is based on uncompetitive wholesale pricing terms, with wholesale charges significantly exceeding typical retail prices for calls and

data. CTU also notes that none of the 133 independent MVNOs present in the market can be regarded as being successful in the mobile market, despite some of them being strong regional players for fixed communication services. CTU also states that there is no guarantee that a market entry (or expansion of market presence of an MVNO that is entitled to national roaming) will quickly translate into an increased level of competition in the wholesale mobile market.

The MVNOs cannot rely on the regulated prices for access, since the regulated wholesale offers only cover data services, while wholesale access to voice/SMS is unregulated. MNOs refuse to offer regulated access to data coupled with unregulated access to voice/SMS, that would allow MVNOs to create competitive retail offers. Therefore, MVNOs have to rely on commercial wholesale offers for a consolidated package of data/voice/SMS services.

In its notified draft measure, CTU underlines that the three Operators (CentroNet, Nordic Telecom and Poda) that may benefit from the national roaming obligation of O2 had not registered the operation of 5G networks by November 2021, neither did they submit any official binding information that any of them could enter the market by the end of 2022. The operation of a 5G network of a certain size is a requirement to be eligible to get access based on the obligatory national roaming agreement.

CTU maintains that while a new entrant may be able to start offering mobile services based on national roaming in the future, it will take years for this new entrant to have sufficient market share to be able to affect the market dynamics. That is why CTU believes that the 5G auction and O2's national roaming obligation will not have a positive impact on the wholesale mobile market before 2026 due to the complexity, high investment costs, technological and security constraints (when selecting suppliers) in building 5G networks.

In the meantime, CTU believes that the proposed ex-ante regulation would accelerate the positive wholesale market effects that could be enabled by the take-up of the national roaming agreement. Once the positive effects of the national roaming agreement materialize on the market, the proposed ex ante regulation may be changed or discontinued.

## 2<sup>nd</sup> criterion: Tendency towards effective competition

CTU points out that despite price decreases, the Czech Republic has one of the highest mobile retail prices in the EU (based on the latest DESI report). At the same time, the wholesale data prices are almost twice the retail data price, which prevents MVNOs from competing in data-centric tariffs. As depicted in the CTU market analysis, 82% of MNO retail offers are not replicable by MVNOs due to deficiencies and imbalances in the wholesale contracts.

According to CTU, increased consumption per SIM card doesn't prove competitiveness on the wholesale market as the increased consumption per SIM happens predominantly on the retail SIM cards of the three MNOs. As depicted in CTU's market analysis, the most service intensive tariffs (i.e. with data included) are almost exclusively non-replicable by the MVNOs (99% non-replicability in the high-user tariffs).



Finally, regarding the change of CTU's position from the previous 2016 market analysis (1<sup>st</sup> and 2<sup>nd</sup> criteria), CTU notes that markets in 2016 and 2021 are neither identical, nor fully comparable. In its 2013 and 2016 market analysis, even though the market displayed strong indications of competition deficiencies, CTU was hopeful that competitiveness would develop without further regulatory intervention. As of 2021, CTU strongly believes that no such development can be reasonably expected as there was neither a market entry to the wholesale mobile market that would improve its competitiveness, nor a market entry that would effectively increase competitiveness on the retail market. According to CTU, this is documented by relatively stable market shares of the MNOs in both the wholesale and retail markets, as well as a consistently very low aggregate retail market share for the independent MVNOs (far below 10% of the retail market share).

### 3<sup>rd</sup> criterion: Insufficiency of competition law alone to address the identified market failure

The CTU first underlines that in the 2016 market analysis, the 3<sup>rd</sup> criterion was addressed only indirectly based on the analysis of the 1<sup>st</sup> and 2<sup>nd</sup> criteria. In the 2021 market analysis, the CTU has evaluated the 1<sup>st</sup> and 2<sup>nd</sup> criteria more extensively and differently and has found that both criteria are met.

In addition, the CTU mentions that the Czech Antimonopoly Office had pointed out in 2015 its limited competencies with relation to the mobile services market. The recent standpoint of the Czech Antimonopoly Office (15/11/2021) also confirms the CTU's view that the 3<sup>rd</sup> criterion is met and that competition law alone cannot mitigate the market situation.

### *BEREC's Assessment*

#### 1<sup>st</sup> criterion: High barriers to entry into the market

BEREC acknowledges that the presence of a large number of MVNOs in the market indicates that market entry at the retail level is possible. On the other hand, BEREC notes the low and stagnant market share held by MVNOs, as well as the unfavourable terms and conditions that the MNOs force the MVNOs to sign in order to give access to their network. More specifically, BEREC understands that, as CTU states, all agreements on the wholesale market between MNOs and MVNOs have been reached commercially, while MNOs have so far refused to improve the commercial conditions for MVNOs, which would enable MVNOs to effectively compete on the retail market. Moreover, BEREC notes that according to CTU, MNOs in all instances explicitly refuse to comply with standpoints issued by CTU in the context of mediations.

BEREC also notes that the information provided by CTU regarding market entry based on the obligations from the spectrum auction (i.e. market entry in 2026 at the earliest) contradicts the view of the Commission (who suggests that market entry in the near future is possible). BEREC is of the view that, although the conditions and prerequisites (in terms of population coverage and 5G base-station roll-out) in order to activate the national roaming obligation are challenging, cost-oriented access to O2's network provides a strong incentive to the three MNOs that have been awarded spectrum in order to speed up the process and meet the coverage and roll-out targets as soon as possible. In this context, BEREC agrees with the Commission that the national roaming obligation lowers the entry barriers for a new (4<sup>th</sup>) mobile Operator during the period covered by the proposed market review.

2<sup>nd</sup> criterion: Tendency towards effective competition

BEREC is of the view that the data set provided by CTU, although not complete, shows that the mobile market at both the retail and wholesale level has serious competition problems. Indeed, although requested by BEREC, CTU did not provide details/market shares for specific retail offers, such as offers below 500 CZK, which seem to be the ones that are replicable and are mostly offered by the MVNOs. Market dynamics for specific market sectors would have helped BEREC to better assess the competitive conditions and conclude whether the MVNOs are established in some market segments and have the potential to grow their business in other segments, too. Nevertheless, the overall data lead to the conclusion that:

- There is significant market failure at the retail level with the prices established well above the EU average. MVNOs cannot offer competitive prices to subscribers due to the burdensome terms and conditions at the wholesale level.
- The competition in the wholesale market that would trigger competition at the downstream market is insufficient. The behavior of the three MNOs shows that they exercise their power in order to force the MVNOs to accept commercial agreements that do not allow them to compete with the MNOs on equal terms.
- Market shares are stable and give no indication of tendency towards competition in the near future.

In addition, BEREC notes the ongoing proceedings regarding the Network Sharing Agreement in case AT.40305 and the Commissions preliminary findings in that case. Taking the above into consideration, BEREC disagrees with the Commission that the 2<sup>nd</sup> criterion has not been met.

3<sup>rd</sup> criterion: Insufficiency of competition law alone to address the identified market failure

BEREC notes that some regulation is already in place in the relevant market and that future spectrum awards may foster market entry.

BEREC also notes the position of the Commission, CTU and the Czech Antimonopoly Office regarding the use of competition law in this case. In addition, BEREC notes the ongoing proceedings in case AT.40305 and views of DG Comp on the Czech mobile market.

BEREC recognizes that competition law alone may not resolve issues in the Czech mobile market. However, BEREC considers that CTU should reconsider its draft notification to provide additional supporting analysis regarding the application of competition law to remedy the market failures. In this regard, CTU may need to engage further with the Commission on the required analysis.

## 4.2 Insufficient evidence supporting the joint SMP finding

### *Concerns of the Commission*

The Commission has doubts whether CTU has provided sufficient evidence regarding the three cumulative conditions as stated in the SMP Guidelines<sup>5</sup> (held by the General Court in *Airtours*), to prove the existence of a position of joint SMP.

#### 1<sup>st</sup> condition: Transparency – Price competition

The Commission states that the finding of collective dominance at the retail level is neither necessary nor sufficient to demonstrate collective dominance at the wholesale level. However, the characteristics of competition at the retail level can be informative as to the existence of collective dominance at the wholesale level. For such coordinated behaviour to be plausible, members of the oligopoly i) must be aware, sufficiently precisely and quickly, of the way in which the other members' market conduct is evolving and, ii) the alleged collusion at wholesale level must manifest itself in some degree of coordinated behaviour at the retail level which has as its ultimate aim the creation and/or protection of economic rents.

According to the Commission, the information provided by CTU seems to be ambiguous: On the one hand, CTU states that the retail market is characterised by high prices relative to the EU level and profitability of the main market players, on the other hand, CTU's own data indicate that at least average retail prices for calls and data are decreasing. At the wholesale level, price evolution does not follow the same pattern as retail prices, which may suggest that the latter are not a good focal point for monitoring the behaviour in the wholesale market. The Commission states that it is doubtful whether retail prices are as easy to monitor as CTU argues, especially in the light of discount offers that the three MNOs offered in the past years and one of them may still offer.

#### 2<sup>nd</sup> condition: Sustainability of tacit coordination

The Commission states that tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy in the market. That aspect ought to be analysed from a historic perspective but also during the prospective analysis.

In that context, the Commission points to the regulatory obligations imposed on O2 (as part of spectrum conditions) to provide national roaming access to the new entrants. The Commission takes note of CTU's view that the regulated access under spectrum licence will not be granted during this market review. According to the Commission, this statement is, however, not supported by any evidence. If such access is not granted, CTU has the relevant legal instrument to enforce O2's compliance with this regulation.

The fact that O2 must follow regulatory obligations also creates asymmetry in the market as the players in the oligopolistic market are not in the same position to act independently of their competitors. Therefore, the Commission doubts whether all the members of the

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<sup>5</sup> Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications network and services (SMP Guidelines), OJ C 159, 7.5.2018, p. 1, points 67 and 68.

alleged dominant oligopoly maintain the parallel conduct that all can benefit from. At least O2 will not be able to act independently of those operators who can request regulated national roaming based on cost-oriented prices.

The same applies to the obligation imposed on all the holders of the 5G spectrum to grant MVNO access for the purpose of providing mobile data services (by mid-2022). The regulated 5G-based data offers could be bundled with commercial MVNO agreements covering other services (e.g. voice and SMS), which could potentially make MVNOs' offers more attractive. In addition, operators providing data only packages can put competitive pressure on the pricing strategy of established MNOs.

The Commission also points to the asymmetry between the three MNOs, with regard to market shares. On retail, T-Mobile and O2 have higher market shares than Vodafone. On wholesale, this asymmetry is even higher. According to the Commission, CTU has not sufficiently assessed the potential incentives of the MNOs to depart from the alleged tacit collusion.

### 3<sup>rd</sup> condition: Retaliation mechanism

The Commission notes, that CTU has not provided any evidence that price reductions in the past were in any way retaliatory and not a standard feature of competition in the market. Moreover, the Commission notes, that although it cannot be excluded that such a retaliation mechanism may occur, it is difficult to draw a clear conclusion regarding the future behaviour of the three established mobile operators. Furthermore, the Commission considers that CTU did not sufficiently consider whether a retaliation of the MNOs at the retail market by lowering their retail prices in reaction to possibly better wholesale agreements of one or more MVNOs is credible.

The Commission states that, if CTU decides to enforce its obligations resulting from the spectrum license, O2 will be forced to grant access based on regulated prices independently of the possibility to face retaliation. This could benefit an operator who already has its own infrastructure and spectrum. This operator would be in a position to constrain the members of the oligopoly both at the retail level (as a 'maverick' operator) and at the wholesale level as the fourth provider of MVNO access.

### *Views of CTU regarding the Commission's serious doubts*

#### 1<sup>st</sup> condition: Transparency – Price competition

Regarding retail prices as a focal point for monitoring the wholesale market, CTU argues that the wholesale prices of MNOs directly affect the retail prices of MVNOs. When one MNO lowers its wholesale prices, these lower wholesale prices would translate into lower retail prices, which are publicly available and thus observable by other MNOs. All MNOs are aware of which MVNOs are hosted on which MNOs' network and can thus easily monitor the wholesale prices of the other two MNOs'.

Regarding the monitoring of retail prices, CTU underlines that the practice of non-public offers on the market is minimal. Data available to CTU show that between 2017 and 2020, the share of retention offers in all provided services of two of the MNOs decreased by 50%, amounting newly to approximately 3,5 % of all services. The decline of these offers has been largely caused by recent amendments to the Act on Electronic Communications

facilitating end-users migration between operators, which reduced the incentive of MNOs to provide retention offers, whose main goal is to retain and lock the user with the current MNO. CTU continues by pointing out that if the MVNOs cannot replicate the retail list prices (without discounts), then they even more so can't replicate any discounted prices offered by the MNOs.

## 2<sup>nd</sup> condition: Sustainability of tacit coordination

CTU believes that the market players have symmetric positions so that they could engage in parallel behaviours and have an incentive not to depart from the common policy.

CTU states that O2's regulatory obligation to provide national roaming access (5G auction) does not create asymmetry between players yet as it will not come into force during the timeframe of this market analysis (see above in Views of CTU on the 1<sup>st</sup> criterion of the 3C test). CTU also argues that it does not have the necessary legal instruments to enforce O2's compliance with this regulation because the national roaming obligation does not include any timeframe for the roaming contract negotiations to happen.

CTU underlines that the cost advantage from network-sharing for O2 and T-Mobile does not represent a barrier for Vodafone to align its wholesale pricing strategy with them, as all of the 3 MNOs achieve a very high level of profitability. CTU further notes that if Vodafone chose to follow a different strategy, it would have manifested in the retail market. There has been no significant deviation to the standardized pricing and market behaviour on the side of Vodafone as compared to the remaining network-sharing operators.

CTU also asserts that the market shares of the MNOs are stable and generally symmetrical in both retail and wholesale markets. CTU notes that even with a joint SMP, the market shares cannot be completely static over a long period of time. Ideal symmetry and complete stability of market shares would correspond to the theoretical concept of tacit collusion which is almost impossible to materialize in reality. There is no fluctuation in market shares on a Y-o-Y basis indicating competition between MNOs (Average Y-o-Y change of market shares of #2 and #3 operators over 7 years of 0,4 percentage point). The market shares on revenues remain almost unchanged, at least for the second (more relevant) half of the 2014-2020 period.

## 3<sup>rd</sup> condition: Retaliation mechanism

CTU shows three examples from the past when MNOs reacted to the sudden and unexpected retail market move of an individual MNO, in 2013, 2017 and 2019 (in the form of a fall in prices or a change in the structure of tariffs). According to CTU, the fact that those deviations from tacit collusion policy by one of the participants led to immediate reactions of other players and thus did not lead to a substantial increase in market share, demonstrates the existence of retaliatory mechanisms.

CTU further notes that even if these reactions have been triggered by retail market competition between the three MNOs, or more likely by anticipation of a new player entry (e.g. from the 4G auction in 2013), the mechanism of described MNOs' reactions would be very similar to retaliation mechanisms in the tacit collusion.

*BEREC's Assessment*

Regarding the finding of Joint-SMP by CTU and the Commission's doubts, BEREC recognises that the Czech mobile market is characterised by high prices relative to the EU level and a lack of sufficient competition. On the basis of the information provided by CTU, it appears the Czech mobile market is not sufficiently competitive at present. However, BEREC agrees with the Commission that CTU has failed to provide substantive evidence to support its draft conclusion.

However, BEREC considers that the market transparency may in principle be sufficient to meet the Airtours test. Each of the MNOs concerned has the necessary resources and skills to monitor and match competitor offerings, including discount offers, in a timely manner. In addition, CTU may also use its relevant powers under national legislation and the European Electronic Communications Code to gather this information (e.g. detailed information on the retail offers including number of subscribers and traffic volumes etc.) that may be relevant to its analysis of the Czech mobile market.

BEREC considers that CTU has failed to provide sufficient evidence and data to support its view that the tacit collusion is sustainable in the market over the coming period. BEREC agrees with the Commission that the regulatory obligations imposed on O2 (as part of the 2020 spectrum auction) ensures that O2's behaviour needs to be sufficiently different from other MNOs to cast doubt on whether such tacit collusive behaviour could exist during the period of the market review.

In addition, BEREC agrees with the Commission that CTU has failed to demonstrate how an effective retaliation mechanism might work. The incentives of the three MNOs are unlikely to be aligned given the asymmetry in the market and different regulatory obligations on O2. The timely enforcement of the national roaming agreement and introduction of a new operator should change the dynamic in the market and disrupt any tacit coordination.

Overall, BEREC partially agrees with the Commission regarding its views of the Czech mobile market and the assessment of the Joint-SMP finding by CTU.

## 5. Conclusions

On the basis of the analysis set out above in section 4, BEREC considers that the Commission's serious doubts on the draft decision of CTU concerning the wholesale market for access and call origination on public mobile telephone networks in the Czech Republic, as expressed in the EC's letter to CTU of 15 December 2021, are partially justified. BEREC finds that some of the serious doubts raised by the Commission regarding the application of the three criteria test and the Joint-SMP assessment are not justified.

BEREC is of the opinion that the Commission's serious doubts are partially justified with regard to the application of the three criteria test. BEREC considers that, on the basis of the evidence presented by CTU, the Czech mobile market has serious competition problems with high retail and wholesale prices, a lack of effective competition from MVNOs and stagnant MNO market shares. However, BEREC considers that the national roaming

obligation will lower barriers to entry for a fourth MNO, with a resulting positive impact on competition in the mobile market. Furthermore, BEREC considers that CTU could reconsider its draft notification to provide additional supporting analysis relating to the third criteria.

BEREC agrees with the Commission that enforcement of existing regulatory obligations imposed as part of spectrum conditions should help to bring about positive changes in the relevant market. The market entry of a new mobile operator, based on the use of national roaming obligation imposed on O2 and/or through the acquisition of spectrum in any future auction, has the potential to create competitive pressure in the retail and wholesale market.

BEREC is of the opinion that the Commission's serious doubts are partially justified with regard to the assessment of Joint-SMP by CTU. BEREC agrees with the Commission that CTU has failed to provide sufficient evidence to support its finding of Joint-SMP over the coming period. However, BEREC agrees with CTU that the competitive conditions, high retail prices and wholesale strategies of the three MNOs in the Czech mobile market do raise concerns.

Therefore, BEREC's overall conclusion is that the Commission's serious doubts regarding the draft decision of the Czech national regulatory authority, CTU, as expressed in the Commission's letter, dated 15 December 2021, are partially justified. BEREC notes that the Commission and the CTU continue to engage regarding the Commission's reservations with the aim of addressing any doubts and gaps in evidence.