

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

Cases CZ/2022/2372 and 2373

**Wholesale local access provided at a fixed location in the Czech
Republic**

**Wholesale central access provided at a fixed location for mass-
market products in the Czech Republic**

12 July 2022

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1. Executive summary

On 10 May 2022, the European Commission (EC) registered two notifications, under Article 32 of Directive (EU) 2018/1972 (the Code),¹ from the Czech national regulatory authority (NRA), Český telekomunikační úřad (ČTÚ), concerning the market for wholesale local access provided at a fixed location² and market for wholesale central access provided at a fixed location for mass-market products³.

In its draft decision, ČTÚ defines the market for wholesale local access at a fixed location and the market for wholesale central access provided at a fixed location for mass-market products as including all those technologies it identifies at the retail level, including services over xDSL, fibre, cable, wireless technologies and fixed LTE. The geographic market segmentation in these wholesale markets follows the analysis from the retail market, where ČTÚ identifies 5,859 geographic units that are competitive (Segment A) and 510 geographic units that are non-competitive (Segment B).

On the basis of the so called three criteria test,⁴ ČTÚ concludes that Segment B of the wholesale local access market is susceptible to *ex-ante* regulation, whereas the wholesale central access market is tending towards effective competition and no *ex-ante* regulation is required. In the wholesale local access market, ČTÚ concludes that the areas belonging to Segment A are competitive. In Segment B, ČTÚ identifies CETIN with significant market power (SMP) in 308 geographic units and seven other operators as having SMP in a further 66 geographic units, out of the total of 510 units deemed as non-competitive based on the analysis at retail level. ČTÚ subsequently concludes that geographic units of Segment B where SMP has been found are susceptible to *ex-ante* regulation. By contrast, in the areas circumscribed to Segment B where no SMP was identified, no regulatory obligations are proposed, accompanied by the withdrawal of remedies in the areas where regulation was previously imposed.

ČTÚ proposes to impose a series of regulatory obligations on CETIN, including access to copper and fibre loops and sub-loops – or virtual unbundled access to the local loop (VULA) if physical unbundling is not feasible, transparency, non-discrimination, accounting separation and price control. ČTÚ also proposes to impose a general non-discrimination obligation on the seven other operators to be designated with SMP.

¹ 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).

² Corresponding to market 1 in Commission Recommendation (EU) 2020/2245 of 18 December 2020 on relevant product and service markets within the electronic communications sector susceptible to *ex-ante* regulation in accordance with the Code (the 2020 Recommendation on Relevant Markets) (OJ L 439, 29.12.2020, p. 23-31).

³ Corresponding to market 3b in Commission Recommendation (EU) 2014/710 of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to *ex-ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ L 108, 24.4.2002, p. 33.).

⁴ Pursuant to Article 67(1) of the Code.

The Commission sent a request for information⁵ to ČTÚ on 18 May 2022 and received a reply from ČTÚ on 23 May 2022. Further exchanges of information followed subsequently.

On 8 June 2022, the Commission sent a serious doubts letter opening a phase II investigation pursuant to Article 32 of the Code. The Commission's serious doubts concern ČTÚ's proposed geographic market definition and SMP assessment in the case of alternative operators with a local presence⁶, as well as the three criteria test on the market for wholesale central access provided at fixed location for mass market products. Since the draft measures would create a barrier to the internal market, the Commission expressed serious doubts as to their compatibility with Union law.

BEREC is of the opinion that the Commission's serious doubts are partially justified with regard to the lack of sufficient evidence supporting the delineation of local geographic markets and the insufficient evidence supporting the SMP designation of alternative operators with a local presence. BEREC is of the opinion that the Commission's serious doubts are justified with regard to the application of the three criteria test in Segment B of the wholesale central access market. Therefore, BEREC's overall conclusion is that the Commission's serious doubts regarding the draft decision of the Czech national regulatory authority, ČTÚ, as expressed in the Commission's letter, dated 8 June 2022, are partially justified.

2. Introduction

On 10 May 2022, the Commission registered a notification from the Czech national regulatory authority (NRA), Český telekomunikační úřad (ČTÚ), concerning the market for wholesale local access provided at a fixed location and market for wholesale central access provided at a fixed location for mass-market products in the Czech Republic.

The Commission initiated a phase II investigation, pursuant to Article 32 of the Code, with a serious doubts letter issued on 8 June 2022. In accordance with Article 32 of the Code and its' rules of procedure, on 16 June 2022 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 cases.

On 23 June 2022, the EWG held two virtual meetings. These meetings included separate interviews with relevant colleagues from both ČTÚ and the Commission. The EWG prepared a series of questions for both the Commission and ČTÚ, having received written inputs from ČTÚ. The objective of the EWG was to reach a clear conclusion on whether the Commission's serious doubts are justified. The EWG finalised its draft Opinion on 1 July 2022, with a final Opinion presented and adopted by a majority of the BEREC Board of Regulators on 12 July 2022. This Opinion is now issued by BEREC in accordance with Article 32 (5) of the Code.

⁵ In accordance with Article 20(2) of the Code.

⁶ In this opinion, the term 'alternative' operator refers to operators, other than CETIN, that ČTÚ proposes to be designated with SM.

3. Background

Previous notifications

The markets for wholesale local access provided at a fixed location and wholesale central access provided at a fixed location for mass-market products⁷ in the Czech Republic were previously notified to and assessed by the Commission under cases CZ/2017/1985 and CZ/2017/1986.

In 2017, following the voluntary separation of CETIN (as the owner of infrastructure and wholesale service provider) from O2 (retail service provider), ČTÚ proposed a nationwide market for both wholesale markets that did not include cable TV (CATV) or WiFi-based networks in the relevant product market. Instead, ČTÚ analysed the indirect constraints from these two network infrastructures in the assessment of SMP. CETIN was designated with SMP in both markets and was imposed a series of regulatory obligations including an “economic space test” between the wholesale access prices in both markets.

Current notification and the Commission’s serious doubts

Current notification

In the current draft notification, ČTÚ defines the market for wholesale local access at a fixed location and the market for wholesale central access provided at a fixed location for mass-market products as including all technologies included in the relevant market at the retail level, namely services over xDSL, fibre (FTTH, FTTB), CATV (including DOCSIS 3.1), wireless technologies and fixed LTE.

The geographic market segmentation in these wholesale markets follows the analysis from the retail market, where ČTÚ identifies 5,859 geographic units that are competitive (Segment A) and 510 geographic units that are non-competitive (Segment B) at retail level.

Three criteria test and finding of Significant Market Power

ČTÚ carries out the three criteria test in both wholesale markets and determines that in the market for wholesale local access provided at a fixed location the test is met and that Segment B is susceptible to *ex-ante* regulation in that market. ČTÚ concludes there are no significant and persistent barriers to entry in Segment B of the wholesale central access market and that the market shows a trend towards the development of effective competition. On this basis, ČTÚ considers the three criteria test in the wholesale central access market is not met.

In the market for wholesale local access provided at a fixed location, ČTÚ concludes that the areas belonging to Segment A are competitive.

In Segment B, ČTÚ identifies CETIN with SMP in 308 geographic units and seven other operators as having SMP in a further 66 geographic units. For the 136 remaining geographic units where no SMP operator has been found, ČTÚ considers that they should be deregulated where prior regulation was imposed in those areas.

⁷ Corresponding to market 3a and 3b in the Commission Recommendation (EU) 2014/710

ČTÚ subsequently proposes to impose a series of regulatory obligations on CETIN including access to copper and fibre loops and sub-loops – or virtual unbundled access to the local loop (VULA) if physical unbundling is not feasible, transparency, non-discrimination, accounting separation and price controls. ČTÚ also proposes to impose a general non-discrimination obligation on the seven alternative operators to be designated with SMP.

Commission's serious doubts

On 8 June 2022, the Commission sent a serious doubts letter opening a phase II investigation pursuant to Article 32 of the Code.

The Commission's serious doubts concern ČTÚ's insufficient evidence to support the proposed geographic market definition and SMP assessment in the case of the alternative operators, as well as the three criteria test undertaken on the wholesale central access market in the areas belonging to Segment B. The Commission states that the draft measure would create a barrier to the internal market and, therefore, it has serious doubts as to the compatibility of the proposed measures with Union law.

4. Assessment of the serious doubts

In the following sections, BEREC presents its assessment of the serious doubts expressed by the Commission.

1. Lack of sufficient evidence supporting the delineation of local geographic markets

Concerns of the Commission

In the current draft notification, ČTÚ identifies 5,859 competitive geographic units (Segment A) and 510 non-competitive geographic units (Segment B). These geographic units are administrative units in the Czech Republic. ČTÚ uses the municipality as the basic geographic unit, with the exception of the four largest cities, which are further divided into parts of municipalities, referred to as MOMC.

For this type of analysis, the Commission has frequently stated that NRAs should choose geographic units that: (a) are of an appropriate size, i.e., small enough to avoid significant variations of competitive conditions within units, but big enough to avoid a resource-intensive and burdensome micro-analysis that could lead to market fragmentation, (b) are able to reflect the network structure of all relevant operators, and (c) have clear and stable boundaries over time (SMP guidelines)⁸.

The 5,859 geographic units of Segment A feature the presence of the incumbent operator's network and local alternative operators providing services of various levels of quality, ranging from 256 Kbps up to 1 Gbps. For 374 out of the 510 units of Segment B, i.e., the non-competitive market, ČTÚ proposes to designate seven operators along with the incumbent

⁸ See Communication from the Commission (C/2018/2374) Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (OJ C 159, 7.5.2018, p. 1) p. 49.

CETIN as having SMP in their respective geographic areas. In Segment B, these operators provide services to very small communities ranging from c.a. 300 to up to c.a. 10,000 inhabitants. The Commission understands that CETIN is present in almost all municipalities and applies uniform retail prices across the entire country – i.e., no price difference observed in Segment A versus Segment B. Additionally, the Commission observes that alternative operators would be expected to apply lower prices in areas where they allegedly face competitive pressure.

The Commission argues that ČTÚ fails to provide sufficient evidence supporting the delineation of local geographic markets, noting that the identified geographic units are very small in size, and ČTÚ fails to provide its estimation of the stability of the market structures as set out in the notified draft measures. The Commission states that the gaps in coverage of market shares could be quickly overcome by a local competitor or a new entrant.

The Commission considers that ČTÚ's market definition, the delineation between Segments A and B, and the determination of local markets in Segment B do not follow the principles of competition law and therefore may not comply with Articles 64 and 67 of the Code.

Views of ČTÚ

Despite ongoing consolidation, ČTÚ considers that the Czech market is characterised by a high number of access infrastructure owners (over 1,600 different operators) at all levels – national, regional and local. In view of this, ČTÚ believes that administrative geographical units are most suitable for its analysis, rather than the footprint of any particular network.⁹ According to ČTÚ, competition is primarily based on independent infrastructures (including xDSL, cable TV networks (CATV and DOCSIS 3.1), FWA, fixed LTE and fibre (FTTH, FTTB)) that are not topologically related to the network and nodes of the network of the incumbent CETIN. The geographical scope of the offers of alternative providers is mainly determined at the level of administrative units, such as municipalities.

As a basis for its geographical segmentation, ČTÚ opts for the municipality level (LAU 2) and parts of municipalities of the four largest cities in the Czech Republic. By delineating the geographical market based on administrative units, ČTÚ considers that its draft notification relies on the Commission Recommendation on Relevant Markets (2020) and the related Explanatory note,¹⁰ the Commission Guidelines on market analysis and the assessment of SMP (SMP Guidelines thereafter)¹¹ as well as the BEREC's guidance on geographic aspects of market analysis.¹²

ČTÚ argues that it, in its assessment, has considered smaller (sub-units) and larger (districts) administrative geographical units, but both are inappropriate as they would result in either too much granularity or geographic areas with insufficiently homogeneous competitive conditions. ČTÚ argues that the latter would most likely lead to the conclusion that all districts are

⁹ There is also very limited (and decreasing) use of LLU in the Czech Republic.

¹⁰ Commission Recommendation (EU) 2020/2245.

¹¹ See the Communication from the Commission (C/2018/2374) Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (OJ C 159, 7.5.2018)

¹² BoR (14) 73 and BoR (18) 213

competitive. By contrast, ČTÚ considers that municipal boundaries and MOMC's are commonly used and stable over time.

The 6,369 units are grouped into competitive (segment A) and non-competitive (segment B) zones based on criteria related to individual network coverage and retail market shares of the present operators. The competitive conditions in the geographic areas belonging to Segment B are broadly similar (in the sense that they fulfil the criteria assessed by ČTÚ, namely on coverage and retail market share), but differ in terms of SMP designation. For practical reasons, ČTÚ does not investigate the competition in neighbouring units since that process would be too cumbersome. Besides, ČTÚ considers that merging certain units under the same conditions to create a smaller number of individual geographic markets would not change the conclusions of the analysis of the relevant markets as each individual unit may have a unique infrastructure from another local operator and they cannot be meaningfully connected.

ČTÚ emphasises that, based on available data from the past and observed trends, the situation in municipalities in which an SMP undertaking is designated is not expected to change significantly over the next few years. The expected future development of networks is mainly foreseen in Segment A, where a higher return on investment can be presumed. ČTÚ however does not suppose that this will lead to a significant change (i.e., deterioration) of the competitive situation in Segment A. The situation will be monitored by ČTÚ every two years.

BEREC's Assessment

ČTÚ delineates the geographical scope of the relevant markets based on municipalities and MOMC. In doing so, BEREC is of the opinion that ČTÚ provides sufficient evidence to show that it has evaluated all possible options and an argumentation for its choice to use municipalities as a starting point for its assessment. BEREC notes that ČTÚ has processed a high amount of very detailed statistical data (i.e. at address level) to substantiate its decision of the choice of the geographically delineated markets under discussion.

The Czech market, as described by ČTÚ, is characterised by a multitude of technologies and operators in the broadband market. Whilst CETIN is one of the largest operators in the Czech market, competition is seemingly taking place at a local level between operators with varying degrees of network coverage. Thus, for the Czech market, it seems appropriate to delineate the relevant market on the basis of a geographical unit that is limited in size. Had a larger geographic unit been chosen, it seems likely that ČTÚ would have found too much variation in competitive conditions.¹³ In this regard, BEREC is of the opinion that ČTÚ has provided sufficient evidence for their choice to use municipalities and MOMC's as the starting point for the geographic analysis.¹⁴ Generally, municipal borders, or any other type of administrative units, tend to have clear and stable boundaries over time. Thus, the administrative units of municipality and MOMC seem to be appropriate for measuring the network structure of all relevant operators.

Moreover, in line with the Commission's Recommendation on relevant markets,¹⁵ ČTÚ establishes a first definition of the scope of the geographic market by aggregating together

¹³ C.f. ČTÚ draft for market 1 (hereinafter draft) page 65.

¹⁴ Commission Recommendation (EU) 2020/2245, recital 37.

¹⁵ Recommendation (EU) 2020/2245, recital 38; SWD(2020) 337 final, page 19p.

units that exhibit similar competitive conditions. While CETIN has a network presence in large parts of the Czech Republic, ČTÚ points out that its network coverage in certain municipalities is limited.¹⁶ At the same time, BEREC notes that the network coverage of some operators varies significantly between municipalities¹⁷ and networks are typically deployed at a municipal level in the Czech Republic.¹⁸ Therefore, BEREC is of the opinion that ČTÚ is correct to aggregate municipalities in segment B where CETIN is the main provider, as distinct from municipalities where other alternative operators are the main providers.¹⁹

BEREC believes that the delineation between the competitive area (Segment A) and the non-competitive areas (Segment B, in which the SMP assessment is later performed), based on the two criteria (network coverage and retail market share), may become unstable overtime. However, BEREC stresses that the lack of stability would be mainly due to the strong reliance of the retail market share criterion as one of only two differentiating criteria, rather than the fact that the areas under investigation are small or that gaps in coverage can be quickly overcome (as discussed below).

BEREC considers that, while market shares are a relevant and commonly used criteria used when defining geographic markets, overreliance on retail market shares to define the relevant geographic market without any additional criteria other than coverage, or assessment of additional criteria at an aggregated level is unlikely to guarantee stability. In that regard, BEREC points to the Commission's statement in the SMP Guidelines that requires for market definition purposes an "analysis of all available evidence of past market behaviour and an overall understanding of the mechanics of a given sector"²⁰. While it can be assumed that coverage, once above 50%, will remain above this level, retail market shares are more likely to change over the period of a market review. According to the data provided to BEREC by ČTÚ, in some municipalities where operators were found to have SMP, the retail market share of the SMP operator was stable between 2016 and 2019, while in others the retail market share of that operator increased or decreased significantly. This could lead to some municipalities being included in Segment B at first but later being included in Segment A during the market review period, and vice versa.

Moreover, BEREC acknowledges that ČTÚ has studied the evolution of retail market shares over the past 4 years to select SMP operators, inferring high barriers to entry in view of those retail market shares. BEREC considers that past retail market share evolution has a limited prediction power over future competition developments and would like to recall that according to the modified Greenfield approach "*NRAs should take into account existing market conditions as well as expected or foreseeable market developments over the course of the next review period in the absence of regulation based on significant market power*".²¹ In this regard, retail market shares over the past 4 years could have been impacted by the regulatory framework adopted by ČTÚ.

¹⁶ C.f. draft page 97

¹⁷ C.f. draft, page 68pp.

¹⁸ C.f. Response of the Czech Telecommunications Office to RFI of the European Commission from 18 May 2022, page 9.

²⁰ C/2018/2374, p. 25.

²¹ See C/2018/2374 p. 17.

One way to reduce the importance of fluctuating retail market shares could be to delineate the relevant markets by encompassing all geographic units where one operator fulfils the criteria established by ČTÚ. By doing so, changes in retail market shares in individual municipalities would not necessarily impact the delineation of the entire relevant geographical market based on other robust criteria. Furthermore, and as stated above, BEREC considers that it is advantageous to delineate relevant markets not only with reference to retail market shares and coverage but also to take into account national circumstances and additional criteria that are not transitory, such as population density, topography, prevailing technologies, rollout plans from network operators, etc.²²

BEREC notes that ČTÚ has access to detailed data on both network coverage and market share that is regularly updated and ČTÚ has stated that it intends to update the geographical delineation every two years, should significant market developments occur. In BEREC's view, altering the market analysis – and therefore, by extension, the regulatory environment – too frequently on the level of individual municipalities could lead to regulatory uncertainty and unpredictability for investors.

BEREC disagrees with the Commission's view that, given the very small sizes of the identified geographic units, the gaps in terms of coverage or market shares can be quickly overcome by a local competitor or a new entrant. Even if BEREC, in principle, acknowledges that deploying a large network results in high costs, BEREC points out that a gap in terms of coverage or market shares is not necessarily quickly overcome in a market that is small geographically, since the contestability of a market does not depend solely on its size, but more prominently on other criteria such as population density, the specific topography of the territory and potential economies of scale and scope that could be achieved in those areas. In that regard, it may be difficult to enter a market, even a small one, if it is characterized by a low population density and therefore low prospects of profitability. Nonetheless, the technical characteristics of the underlying infrastructure should be evaluated, notably the level of costs implied by each type of access (e.g., passive or active access to xDSL or FttH, fixed wireless access, etc). Certain wireless technologies may, for instance, facilitate access at a reasonable cost compared to access through a fixed network, however network congestion and spectrum availability issues may be a hindering factor.

In view of the forward-looking assessment concerning the delineation of geographically localized markets in the Czech Republic, BEREC notes that ČTÚ could have further substantiated its analysis with demand-related behavioural information, such as switching (including switching costs), pent-up demand and satisfaction with services²³.

In any event, BEREC emphasises that behavioural factors on the demand side are likely to be of lesser importance when the structural competitive conditions themselves limit the ability of end-users and access seekers to influence suppliers. For example, in geographical areas with limited or no parallel network coverage where the expected profitability of further network rollout is low, end-users and access seekers will exercise very limited countervailing buying power on the existing supplier.

²² SWD(2020) 337 final, page 21.

²³ Recommendation (EU) 2020/2245, p. 3 and recital 38

To that end, BEREC is of the opinion that the Commission's serious doubts relating to the lack of sufficient evidence supporting the delineation of local geographic markets are partially justified.

2. Insufficient evidence supporting the SMP designation of local alternative operators

Concerns of the Commission

Concerning ČTÚ's SMP assessment, the Commission expresses its doubts on the identification of alternative operators (other than CETIN) as holding SMP in their restricted local markets. The Commission is wary that the retail market share threshold of 50% and the coverage criteria, having been applied by ČTÚ without taking into account other relevant elements (such as the presence of additional infrastructure at the level of the defined geographic unit or the extent to which products are differentiated), result in a flawed SMP designation for the alternative operators.²⁴ The Commission's further arguments point towards the potential contestability of the small local markets identified by ČTÚ, concluding that, generally, *"the smaller the geographic area of a given relevant market, the more transitory the potential SMP position is"*.

In relation to the SMP designations in the market for wholesale local access, the Commission notes that, considering the light touch nature of the proposed remedies on the alternative operators holding SMP (namely, the non-discrimination obligation), competition in the downstream wholesale central access market is unlikely to develop as no *ex-ante* access obligation is mandated. ČTÚ identifies a wide range of competition problems in these areas – refusal to grant wholesale access, potential to discriminate, including with respect to prices, and charging of excessive prices, but nevertheless the obligations that would be imposed on the seven alternative SMP operators would only partially address these issues.

The EC concludes by noting the fact that ČTÚ's proposed obligations *"can be perceived as a form of a punishment for a successful business case with a limited added value for the promotion of competition"* in the case of the seven alternative operators.

Views of ČTÚ

ČTÚ points to the fact that its analysis is not based solely on the retail market shares indicator, but on a series of other indicators, such as the availability of wholesale access, the prices of the unbundled local-loop and its take-up, control of non-replicable infrastructure, overall size of the undertaking to be designated as SMP, the technological advantages, easy or privileged access to financial resources, vertical integration, as well as prices and profitability.

Regarding the considerations of the Commission with respect to the size of the alternative operators proposed to be designated with SMP, ČTÚ points to the fact that the entities

²⁴ In that line, the Commission states that "at least in 5 out of 7 areas where alternative operators are proposed to be designated as having SMP there is a parallel infrastructure of the wholesale incumbent operator", while "In the remaining two areas there is some alternative wireless infrastructure" (C(2022), 4037 final, page 13).

susceptible to *ex-ante* regulation are also present in segment A of the market (i.e. the competitive segment) and that thresholds on the size-related element have been set – namely, 80 million CZK in terms of revenues generated from the electronic communications services provided at a fixed location and at least 20,000 connections present across the country.

Moreover, ČTÚ explains that, from a practical perspective, there is no difference in the assessment in the situations where CETIN has been deemed the dominant operator when compared to the situation of the smaller seven alternative operators.

Another point that ČTÚ makes is the fact that, during the timeframe of the review, the situation in the relevant markets has been stable, with the positions of the SMP operators having not been challenged – stable retail market share, high network coverage, etc. In this regard, in instances when ČTÚ has noticed a decline of the retail market share of the main operators corresponding with an increased retail market share for the main competitor in those localized markets, it has concluded that those geographical markets are not susceptible to *ex-ante* regulation.

ČTÚ also highlights the limited infrastructure coverage of CETIN in those areas where the seven alternative operators have been identified as having SMP.

With regard to the proposed light-touch remedies to be imposed on the seven alternative operators, ČTÚ points to the proportionality assessment and to the results of the public consultation of the notified measures, considering the non-discrimination remedy coupled with the symmetric access obligations to physical infrastructure deriving from the transposition of the Act No. 194/2017 (Broadband Cost Reduction Directive or BCRD) enough to resolve the competitive issues identified in those local markets.

BEREC's Assessment

BEREC disagrees with the position of the Commission that ČTÚ in its SMP assessment considered only retail market shares and infrastructure coverage. BEREC notes that ČTÚ used the aforementioned criteria as the threshold for possible regulation in these market segments (presumption of dominance). However, ČTÚ, in its application of the three criteria test for Segment B²⁵ in the market for wholesale local access at a fixed location, came to the conclusion that the market is susceptible to *ex-ante* regulation. In this regard, the Commission did not comment on ČTÚ's assessment concerning the high barriers to entry and the (non) tendency towards effective competition. Moreover, ČTÚ, in its assessment of SMP designation²⁶, examined the following criteria: (i) size and evolution of market shares, (ii) control of non-replicable infrastructure, (iii) total size of the enterprise, (iv) technological advantage or dominance, (v) easy or privileged access to financial resources or capital markets, (vi) vertical integration and (vii) prices and profitability, in order to assess the existence of dominance. This procedure resulted in identifying 374 out of the 510 units of segment B as being subject to SMP. In addition, a further 136 geographic units are deemed to be competitive as no operator with SMP can be identified.

²⁶ Section 4.1 of the draft

BEREC also disagrees with the Commission's view that the designated SMP operator may not be able to act to an appreciable extent independently especially because "*there is a parallel infrastructure of the wholesale incumbent operator*". BEREC points out that CETIN's network footprint is not ubiquitous in Czech Republic, and in Segment B it covers only, on average, 26.3% of dwellings.²⁷ This is partially due to the length of the local loops, making it impossible to carry broadband services in a competitive way. BEREC understands that there is no legacy network exercising countervailing power in most of the areas where alternative SMP operators have been identified by ČTÚ. On the other hand, BEREC acknowledges the Commission's concerns that, despite the above considerations, in a narrowly defined market, a large incumbent could potentially constrain another leading operator due to the incumbent's size and the economies of scale it enjoys. However certain elements may hinder such potential entry as elaborated below.

BEREC doubts the Commission's view that "*the smaller the geographic area of a given relevant market, the more transitory the potential SMP position is*". As stated above, the contestability of a market may not depend solely on its size, but on other criteria such as population density, the specific topography of the territory and technical aspects, as well as costs related to the access of the available networks. In that regard, it may be difficult to enter a market, even a small one, if it is characterized by a low population density and other burdening socio-economic factors which are beyond the control of the competitive mechanisms as such. In such areas, state policies and regulatory intervention may play a role. However, there is not enough evidence supporting market entry by CETIN in the timeframe of the review, ČTÚ's assessment lacks a forward-looking analysis of, for instance, commercial co-investment initiatives²⁸ or the impact of the operators' investment projects²⁹ that may occur in Segment B over the period of the market review.

Regarding the ability of the proposed alternative SMP operators to abuse their position, BEREC agrees with the Commission that it is unlikely to exhibit such a conduct for the reason that the alternative SMP operators are also present in other areas that are competitive. In practice, the alternative SMP operators practice uniform prices everywhere they are present. Under these circumstances, those SMP operators have to weigh the monopoly benefits they could extract from the uncompetitive areas (i.e., increasing prices in these areas only) and the costs stemming from the implementation of price differentiation, as well as the margin they may lose to their competitors pursuant to implementing a uniform price rise. As such, the hypothesis of uniform prices (for billing or marketing purposes for instance) could therefore act as a countervailing factor and temper any intent of abuse of a dominant position.

Furthermore, BEREC agrees with the Commission's comment that the sole imposition of the non-discrimination obligation on the seven alternative operators, without imposing any additional obligations, has implications for the downstream wholesale central market. BEREC understands the proportionality concerns of ČTÚ, but it doubts that the provisions of the BCRD would adequately address the barriers to entry in the wholesale central access market taking due account of the situation in the wholesale local access market. In fact, an access seeker

²⁷ Table 31 of the draft

²⁸ No concrete details on the co-investment initiatives are available at the time of forming BEREC's opinion. Nevertheless, because their development may have an important impact on the competitive conditions in a forward-looking perspective and since the Commission emphasized those (SDL, pg 14), BEREC considers it is worth noting.

²⁹ Section 2.1.1. of the draft measure

may need to undertake significant investments (i.e., sunk costs) in order to be in a position to offer market 3b wholesale services on the basis of access that is reliant upon the BCRD provisions. Moreover, the small size of the markets could further worsen the investment environment, as the costs involved can only be (partially) recouped by earnings from a small number of potential subscribers.

Taking into account the above matters, BEREC is of the opinion that the Commission's serious doubts relating to the insufficient evidence supporting the SMP designation on market 1 of local alternative operators are partially justified.

3. Lack of sufficient evidence that the three criteria test in areas belonging to Segment B on the market for wholesale central access provided at a fixed location for mass-market products would not be cumulatively met

Concerns of the Commission

The Commission has doubts about ČTÚ's analysis of the three criteria test applied in the wholesale central access market. The Commission considers that the analysis is correlated with and dependent on the delineation between Segments A and B, as well as on the determination of the local markets in Segment B. The Commission considers that ČTÚ has not provided sufficient evidence that the three criteria test is not met in Segment B of the market for wholesale central access. Furthermore, the Commission finds the analysis of the three criteria test in the market for wholesale central access to be correlated with and dependent on the SMP designation and proposed regulation in the market for wholesale local access.

The Commission points out that in some geographic markets, where an alternative operator is proposed to be designated with SMP in the market for wholesale local access, no access regulations for wholesale local access products are being imposed. The Commission considers that the barriers to market entry in the market for wholesale central access based on inputs from the market for wholesale local access remain high due to the lack of a regulated access product in some parts of Segment B.

The Commission further notes that while ČTÚ has noted plans for commercial investment in its assessment of the three criteria test, a complete forward-looking analysis has not taken place and therefore the Commission is not convinced about the impact of these co-investment agreements on the outcome of the three criteria test.

The Commission concludes that it cannot exclude, at this stage, that ČTÚ's assessment of the three criteria test in the market for wholesale central access is correct. However, it has serious doubts regarding the analysis as it results from the proposed market delineation and SMP assessments on the upstream market for wholesale local access where the Commission has expressed serious doubts.

Views of ČTÚ

In assessing the wholesale central access market, ČTÚ considers that it has complied with the Recommendation on relevant markets and has taken into account the 'ladder of investment' and interconnectedness that exists between that market and the upstream wholesale local access market. ČTÚ considers the wholesale local access market to be a most upstream market when (first) assessing the possibility of market entry and development of competition from the point of view of the potential application of remedies.

ČTÚ notes in its response to the RFI that in Segment B of the market for wholesale local access, since it has proposed to apply remedies in the form of facilitating access to (physical) infrastructure (stemming from the provisions of the BCRD), it considered that market entry barriers were substantially reduced when analysing the downstream market for wholesale central access. Given the proposed remedies in the market for wholesale local access, ČTÚ considered the impact of existence of potential competition stemming from providers potentially using wholesale inputs from the market for wholesale local access, that should lead to ensure effective competition in the wholesale central access market from a forward-looking perspective. ČTÚ also notes that there are commercial co-investment initiatives being implemented (e.g., CETIN and T-Mobile) or are subject to negotiations.

ČTÚ concludes that the conditions of the three criteria test for the wholesale central access market in Segment B are not met, in particular due to the low barriers to entry in the market and to its tendency towards effective competition.

BEREC's Assessment

BEREC notes that any analysis of the three criteria test in the wholesale central access market will be predicated on a comprehensive analysis and regulatory regime (where required) in related upstream markets. BEREC considers that ČTÚ's analysis and conclusions in Segment B of the wholesale central access market do not take sufficient account of the lack of upstream wholesale access in areas where the seven alternative operators are deemed to have SMP. To that end, in BEREC's view, in light of the market failures identified by ČTÚ, it could have at least imposed an access obligation on the alternative SMP operators in a proportionate manner.

Taking into account the above matters, BEREC is of the opinion that the Commission's serious doubts relating to the application of the three criteria test in Segment B of the wholesale central access market are justified. However, BEREC notes that the Commission, in its' view cannot exclude, at this stage, that ČTÚ's assessment of the three criteria test in the wholesale central access market is correct.

5. Conclusions

Based on the detailed analysis set out in Section 4 above, BEREC is of the opinion that the Commission's serious doubts on the draft decision of ČTÚ concerning the market for wholesale local access at a fixed location and market for wholesale central access provided at a fixed location for mass market products, as expressed in the EC's letter to ČTÚ of 8 June 2022, are partially justified. BEREC finds that some of the serious doubts raised by the Commission regarding the geographic market definition and SMP assessment are not justified.

BEREC is of the opinion that the Commission's serious doubts are partially justified with regard to the lack of sufficient evidence supporting the delineation of local geographic markets and the insufficient evidence supporting the SMP designation of local alternative operators. BEREC is of the opinion that the Commission's serious doubts are justified with regard to application of the three criteria test in Segment B of the wholesale central access market.

Therefore, BEREC's overall conclusion is that the Commission's serious doubts regarding the draft decision of the Czech national regulatory authority, ČTÚ, as expressed in the Commission's letter, dated 8 June 2022, are partially justified.