

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

Case CZ/2022/2421

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

24 February 2023

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1. Executive Summary

On 29 December 2022, the Commission registered a notification from the Czech national regulatory authority (NRA), Český telekomunikační úřad (CTU)¹, concerning the wholesale market for access to mobile services² 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 30 January 2023, 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 justified, namely with regard to application of the three criteria test and the assessment of Joint-SMP.

2. Introduction

On 29 December 2022, the Commission registered a notification from the Czech NRA - CTU - concerning the wholesale market for access to mobile services³ in the Czech Republic.

The Commission sent a request for information⁴ to CTU on 10 January and received a reply from CTU on 13 January 2023.

The Commission initiated a phase II investigation, pursuant to Article 32 of Directive (EU) 2018/1972, with a serious doubts letter issued on 30 January 2023.

On 3 February 2023, in accordance with Article 32 of Directive (EU) 2018/1972, BEREC established a dedicated Working Group (WG) with the mandate to prepare an Opinion concerning the justification of the Commission's serious doubts in the aforementioned case.

On 08 February 2023, the WG held a virtual Kick-off meeting. On 10 February 2023, the WG held two virtual meetings. One meeting included interviews with relevant colleagues from CTU, and the other included interviews with relevant colleagues from the Commission. The objective of the WG was to reach a clear conclusion on whether the Commission's serious doubts are justified. The WG finalised its draft Opinion on 22

¹ 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).

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

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

⁴ In accordance with Article 20(2) of the Code.

February 2023, with a final Opinion presented and adopted by a majority of the BEREC Board of Regulators on 24 February 2023. This 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, CZ/2019/2189 and CZ/2021/2351.

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.

In 2021, under case CZ/2021/2351, CTU notified its market review and proposed to designate three MNOs (i.e. O2, T-Mobile and Vodafone) as having joint SMP in the wholesale mobile market. On 20 December 2021, the Commission opened a phase II investigation on the proposed assessment of the three criteria test and on the joint SMP finding. Following the in-depth investigation, including requesting and analysing third parties' comments and taking utmost account of the BEREC opinion⁵, the Commission closed the phase II investigation with a veto decision, requiring CTU to withdraw the measure in line with Article 32 of the Code.

The reason that the Commission had serious doubts as to the compatibility of the 2021 notified draft measure with Union law and, in particular, the objectives laid down in Article

⁵ BoR (22/06)

3 of the Code was due to a lack of evidence that the three criteria test was met and that there was insufficient evidence for a finding of Joint SMP.

In particular, the Commission noted that the market conditions have not changed substantially since 2019, when the Commission considered in its decision in case CZ/2019/2189 that the draft measure 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 sufficient to change the Commission's conclusion expressed in its comments in 2019.

Furthermore, in relation to the proposed finding of joint SMP, the Commission considered that CTU did not provide sufficiently robust evidence regarding the three cumulative conditions necessary to find Joint SMP as set out in the SMP Guidelines⁶. In relation to the transparency condition, the Commission considered that neither wholesale nor retail prices are sufficiently transparent to allow for coordination on the market to maintain economic rents. As regards the sustainability of the coordination, the Commission was of the view that the incentives to sustain the coordinated behaviour were not evident enough. This was based on the fact that two of the three MNOs share a network and that a cost-orientated roaming access obligation was imposed on O2 as part of a spectrum allocation granted in 2020. Finally, in relation to retaliation, the Commission did not consider that the price changes provided as evidence of retaliation by the CTU were definitive evidence of retaliation but could be considered standard competitive market behaviour.

Current notification and the Commission's serious doubts

Current notification

In this current notification, CTU again concludes that the three criteria test is met and that the three MNO's – namely O2, T-Mobile and Vodafone – have joint SMP on the wholesale mobile access market.

CTU has updated its market analysis to include the following;

- *Reduction of the time period for the market analysis to the end of 2024*

CTU took into account the comments of the EC and carried out a forward-looking analysis. In that regard, BEREC notes that CTU considers that market conditions will remain unchanged or worsen without regulatory intervention until at least the end of 2024. It is at this juncture that Nordic Telecom is expected to be in a position to meet the criteria to avail of the cost orientated roaming access from O2. However, CTU is of the view that even after that period, the new market entry of an MNO (incl. national roaming access on the basis of 5G auction conditions) cannot be expected with sufficient certainty.

⁶ 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.

- *Further information on the non-use of national roaming by eligible applicants*

CTU collected and added into its analysis the current/actual statements of eligible applicants for national roaming – namely; *Nordic Telecom, PODA* and *incrate* – about their plans to utilise national roaming. In that regard BEREC notes that on 18 January 2023, Vodafone (MNO) acquired the 3600 to 3640 MHz (40 MHz) frequencies of PODA, which itself acquired them in an auction in 2017. As the CTU states; *‘this means, that the number of potential mobile service providers on the Czech market with the possibility of using national roaming (eligible applicants for regulated national roaming from 2020 auction) thus decreased from 3 to 2 (Nordic Telecom and incrate)’*⁷

- *Expanding the evaluation of the 3rd criterion of the Three Criteria test*

The CTU further develops its argument that competition law itself is insufficient to address the market failure. In that regard, BEREC notes that following from the Czech Competition Authority; *“A collusive behaviour (joint dominance or joint significant market forces) is precisely the situation where competition law cannot be considered sufficient or appropriate to address market failure due to the need for frequent or timely intervention because these generate the effects similar to those of exploitative practices such as excessive prices which have or may have a direct impact on customers.”*⁸

- *More information of the alleged common strategy of MNOs*

CTU has extended its analysis of the alleged coordination of the 3 MNO’s to include an assessment based on the hypothetical application of game theory. Furthermore, it extended its analysis of profitability of MNOs to a larger cohort of countries.

- *Consideration of the EC investigation into network sharing between O2/CETIN and T-Mobile*⁹

CTU considers that commitments offered by the parties do not ameliorate the incentives of the parties to coordinate their behaviour on the mobile market at either the retail or wholesale level.

- *Expert opinions, opinions and studies of external entities*

CTU provides studies by three independent groups supporting their notified proposals.

Commission’s serious doubts

The Commission is of the view that there is a lack of sufficient evidence that the market for wholesale access to mobile services including the market for wholesale access and call origination on mobile networks, as notified, meets the three criteria justifying the imposition of ex-ante regulation.

⁷ Response to BEREC EWG Information request to CTU.

⁸ Page 96 of the Notified Market Analysis.

⁹ AT.40305.

In summary, the Commission considers that market entry - based on the regulatory conditions stemming from the spectrum licenses acquired by O2 - is possible within this truncated market review period (i.e.; 2 years) thus reducing the entry barriers for those companies that are eligible to benefit from O2's regulatory obligations to provide cost-orientated National roaming i.e.; Nordic Telecom in particular.

With regard to CTU's joint-SMP assessment, the Commission is of the view that CTU has not provided clear evidence that the markets are sufficiently transparent to sustain a joint dominance. The asymmetric market structure in respect of market shares both at wholesale and retail levels and in terms of costs (two of the three MNOs share their networks) makes tacit coordination more difficult to sustain. Furthermore, according to the Commission, CTU has not provided sufficient evidence of the common policy allegedly being pursued by the MNOs on the wholesale market.

As such, the Commission is of the view that the enforcement of the obligations already imposed and that can be imposed in future on spectrum tenders could have the potential to address the high prices at the retail level in Czechia.

Therefore, the Commission considers that SMP based regulation appears to be disproportionate, as the parallel regulatory tools have the potential to effectively limit CTU's perceived ability of MNOs to coordinate their behaviours in the market.

4. Assessment of the serious doubts

BEREC's Assessment

It should be noted from the outset that most of BEREC's views expressed in the BEREC opinion in case CZ/2021/2351 remain unchanged and the position set out therein remains valid.

4.1 Lack of sufficient evidence to support the three criteria test

1st criterion: High barriers to entry into the market

Firstly, it should be noted that the presence of a large number of MVNOs in the market, which increased since the last review, indicates that market entry at the retail level is not only possible but has occurred. However, BEREC notes the low and stagnant market share held by MVNOs, as well as the asymmetry in bargaining power when contracting with MNO's at the wholesale level. BEREC also notes that, according to CTU, only a small part of the suite of MNO's retail offers can be replicated by MVNOs. More specifically, BEREC understands that, as CTU states, all agreements on the wholesale market between MNOs and MVNOs have been reached commercially, even though data packages are subject to a Margin Squeeze Test under spectrum auction obligations. Moreover, BEREC notes that according to the CTU, mediations between MVNO's and the MNO's hosted by CTU did not lead to enhanced commercial offerings to MVNO's. BEREC also notes that in January 2023, PODA sold its spectrum rights acquired in 2017 to Vodafone.

However, another development since the last notification is that Nordic Telecom, which has been operating on the market in the role of full MVNO since 2018 has improved its

number of base stations for the provision of telecommunication services to a large proportion of the Czech population. Implementation of 5G technology on the aforementioned stations will allow Nordic Telecom to access regulated national roaming on O2 network, thus allowing it to provide retail and wholesale services across the market. As such, Nordic Telecom infrastructure investment makes it more likely to be a competitive force in the Czech retail mobile market in the short to medium term.

Taking the above into consideration, BEREC agrees with the Commission that the arguments in the analysis suggest that barriers to entry will continue to be overcome. This is because there are 3 MNOs already present as well as the fact that regulatory obligations linked to spectrum allocation can continue to facilitate market entry in the short to mid-term (especially taking into account possibility the entrance of Nordic Telecom as the 4th MNO).

Furthermore, BEREC notes that CTU proposes that the market review period would run until the end 2024 and not the five year maximum period set out under the Code.

2nd criterion: Tendency towards effective competition

BEREC notes CTU's evidence that although prices are falling, especially for mobile data, they remain persistently well above the EU average.

Furthermore, MVNOs do not appear to offer competitive retail packages. This may be due - in part - to the contractual terms and conditions available at the wholesale level from MNO's. This is evident from information provided by CTU in the answers to the Commission RFI of 10th January 2023 where the average MNO's wholesale price for data services were - in some cases - reportedly over 50% higher than the retail price for the same services. This illustrates that in some cases, wholesale prices are twice as high as the retail prices. This indicates that market entry could be difficult for independent MVNOs and is a sign of market failure. The competition in the wholesale market that would trigger competition at the downstream market seems to be insufficient.

BEREC also notes that market shares appear to be stable over the medium to long term.

However, BEREC is of the view that the arguments put forward by CTU indicate that the ability of Nordic Telecom to utilise the O2 network for roaming, coupled with its significant population coverage, should allow it to offer a National service in competition with the existing MNO's in the retail market in the short to medium term.

3rd criterion: Insufficiency of competition law alone to address the identified market failure

BEREC notes the view of CTU in relation to the efficacy of ex-post Competition Law to address market failures in the Czech mobile markets.

4.2 Insufficient evidence supporting the joint SMP finding

Regarding the finding of Joint-SMP by CTU and the Commission's doubts, BEREC recognizes that the Czech mobile market is characterized by comparatively high prices. BEREC agrees that the competitive conditions, high retail prices, and wholesale strategies of the three MNOs in the Czech mobile market may raise competition concerns.

However, as regards the possible joint dominance of the three MNOs, BEREC is of the view that CTU has not provided clear evidence that the markets are sufficiently transparent to sustain a finding of joint dominance.

The asymmetric market structure in respect of market shares both at wholesale and retail levels and in terms of costs (two of the three MNOs share their networks) indicates that tacit coordination may be difficult to sustain. Furthermore, the incentives and ability of the three MNOs are unlikely to be sufficiently aligned given that this asymmetry in the structure of the MNO's is exacerbated by the regulatory obligations on O2 to provide regulated roaming to MVNO's as part of its spectrum allocation in 2020.

Moreover, BEREC is of the view that CTU has failed to articulate the common policy allegedly being pursued by the MNOs on the wholesale market and furthermore have not provided sufficient evidence that such a common policy is being pursued by the MNO's at the wholesale level. BEREC also notes that prices of MNO's for most retail services have been falling (albeit from a very high base) over the last number of years.

In addition, BEREC agrees with the Commission that CTU has failed to demonstrate how an effective retaliation mechanism might work.

As such, BEREC agrees with the Commission that CTU has failed to provide sufficiently substantive evidence to support its draft conclusion. Furthermore, BEREC agrees with the Commission's view that the enforcement of the obligations already imposed as part of spectrum allocation obligations can be utilised in future and could have the potential to bring positive changes to the market in the medium term.

5. Conclusions

BEREC is of the opinion that the Commission's serious doubts are justified with regard to the application of the three criteria test. BEREC considers that, based on the evidence presented by CTU, the Czech mobile market has competition problems with high retail prices, a lack of effective competition from MVNOs and stagnant MNO market shares. However, BEREC considers that, from the information available, the National roaming obligation should lower barriers to entry for a fourth MNO, with a resulting positive impact on competition in the mobile market. Indeed, the fact that the market review period is shortened to the end of 2024 implies that positive changes to the structure of the market may develop in the short to medium term.

BEREC is of the opinion that the Commission's serious doubts are 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.

In conclusion, BEREC agrees with the Commission that SMP-based ex-ante regulation appears to be disproportionate, as parallel regulatory tools have the potential to limit the MNO's incentive and ability to coordinate their behaviour in the market.