



EUROPEAN COMMISSION  
Competition DG

***CASE AT.40305- NETWORK SHARING  
- CZECH REPUBLIC***

(Only the English text is authentic)

**ANTITRUST PROCEDURE  
Council Regulation (EC) No 1/2003**

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Article 9 Regulation (EC) 1/2003

Date: 11/07/2022

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Brussels, 11.7.2022  
C(2022) 4742 final

**COMMISSION DECISION**

**of 11.7.2022**

**relating to a proceeding under Article 101 of the Treaty on the Functioning of the  
European Union and Article 53 of the EEA Agreement**

**Case AT.40305 – Network sharing - Czech Republic**

(Text with EEA relevance)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty<sup>1</sup>, in particular Article 9(1) thereof,

Having regard to the Commission decisions of 25 October 2016 and 7 August 2019 to initiate proceedings in this case,

Having expressed concerns in the Statements of Objections of 7 August 2019 and 14 February 2020,

Having regard to the Oral Hearing held from 15 to 17 September 2020,

Having expressed concerns in the preliminary assessment of 27 August 2021,

Having given interested third parties the opportunity to submit their observations pursuant to Article 27(4) of Regulation (EC) No 1/2003 on the commitments offered to meet those concerns,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer,

Whereas:

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<sup>1</sup> OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty when where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". Where the meaning remains unchanged, the terminology of the TFEU will be used throughout this Decision.

## 1. SUBJECT MATTER

- (1) The present Decision is addressed to T-Mobile Czech Republic a.s. (“T-Mobile”) and to its parent company, Deutsche Telekom AG (“Deutsche Telekom”), as well as to CETIN a.s. (“CETIN”), O2 Czech Republic a.s. (“O2”) and to their parent company, PPF Group N.V. (“PPF Group”). T-Mobile and O2/CETIN are collectively referred as the “Sharing Parties”, while the Sharing Parties together with Deutsche Telekom and PPF Group as the “Parties”.
- (2) This Decision addresses concerns relating to the horizontal network sharing agreements (“NSAs”) concluded between T-Mobile and CETIN (initially O2, which was then legally succeeded by CETIN as a party to the NSAs and as the operator of the infrastructure concerned by the NSAs),<sup>2</sup> as well as to the Mobile Network Services Agreement (“MNSA”) concluded between O2 and CETIN. In its Preliminary Assessment (“PA”) of 27 August 2021, the Commission came to the provisional conclusion that the NSAs (and the MNSA) reduced the Sharing Parties’ ability and incentive to unilaterally invest in mobile network infrastructure, in turn negatively affecting the ability and incentives of T-Mobile and O2 to compete on the retail and wholesale markets for mobile telecommunications services in Czechia raising concerns as to their compatibility with Article 101 of the Treaty and Article 53 of the Agreement on the European Economic Area (“EEA Agreement”).

## 2. THE UNDERTAKINGS CONCERNED

- (3) **T-Mobile** is a wholly-owned subsidiary of Deutsche Telekom active in the telecommunications sector in Czechia. Its main business is the provision of voice telephony, messaging, data and content services based on 2G, 3G, 4G and 5G technologies. Additionally, it offers fixed-line telecommunications and a broad portfolio of IT services and systems-integration solutions for business customers and public administration authorities.
- (4) **Deutsche Telekom** is the former German incumbent telecommunications company headquartered in Bonn. It is the ultimate parent company of the Deutsche Telekom group, which is present in more than 50 countries worldwide and is one of the largest telecommunications providers in Europe. The German Federal Republic owns 31.9% of its shares, while the remaining shares are held by retail and institutional investors (17.6% and 50.5%, respectively).
- (5) The Commission preliminarily considers, that based on its 100% shareholding, Deutsche Telekom is able and is presumed, to exercise decisive influence over T-Mobile, and therefore that T-Mobile and Deutsche Telekom can be considered as a single undertaking.
- (6) **O2** is a telecommunications company mainly active in the provision of voice telephony, messaging, data and content services based on 2G, 3G, 4G and 5G technologies in Czechia and Slovakia. Its services are complemented by the provision of media services and the operation of TV programmes. Up to 2014, O2 belonged to the Telefónica Group<sup>3</sup> but, as of 28 January 2014, it is majority-owned by the PPF Group. As of 1 July 2021, the PPF Group had a shareholding of 90.47%

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<sup>2</sup> As of 1 June 2015, CETIN owns and manages both fixed and mobile infrastructure formally owned by O2, while O2 remained active as a Mobile Network Operator in Czechia.

<sup>3</sup> O2 operated under the names ‘Telefónica O2 Czech Republic, a.s.’ and ‘Telefónica Czech Republic a.s.’.

in O2, while the remaining shares (9.53%) were held by investment funds and individual shareholders.<sup>4</sup> Furthermore, on 23 June 2021, PPF Group announced its intention to initiate a squeeze-out procedure of the remaining minority shareholders and to initiate the withdrawal of the shares from trading on the Prague Stock Exchange.<sup>5</sup> As of 1 March 2022, PPF Group has become a 100% shareholder of O2.<sup>6</sup>

- (7) **CETIN** is an infrastructure-only company which is now a majority-owned subsidiary of PPF Group following a spin-off from O2. As of 1 June 2015, CETIN has owned and managed both fixed and mobile infrastructure previously owned by O2. In October 2021, PPF Group agreed to sell a 30% stake in CETIN Group N.V., which is a 100% shareholder of CETIN, to GIC, which is Singapore's sovereign wealth fund. The transaction was successfully closed on 9 March 2022.<sup>7</sup> PPF Group continues to exercise decisive influence over CETIN – for instance, PPF Group retains four seats, including the chair, in the seven-person Board of Directors.<sup>8</sup>
- (8) **PPF Group** is the ultimate parent company of the PPF Telecom Group N.V.<sup>9</sup> PPF Group is a privately-owned international investment company active in 25 countries across Europe, North America, and Asia with its core lines of business in financial services, telecommunications, media, real estate, mechanical engineering, and biotechnology.
- (9) The Commission considers that O2, CETIN and PPF Group constitute a single economic entity for the following reasons.
- (10) As for CETIN, at the time of addressing the PA, the Commission preliminarily considered that, based on its 100% shareholding at the time, PPF Group was able, and was presumed to exercise decisive influence over CETIN. The Commission considers that this conclusion is not altered by the aforementioned sell of a minority stake in CETIN Group N.V. to GIC.
- (11) As for O2, at the time of addressing the PA, the Commission preliminarily considered that the ability of PPF Group to exercise decisive influence could be established based on the following elements.
- (12) First, the Commission found that PPF Group was the single most important shareholder of O2, with a shareholding of 90.47%, the remaining free float shares being held by smaller minority shareholders (together 9.53%).
- (13) Second, its shareholding allowed PPF Group to exercise 90.47% of the voting rights, constituting a supra-majority in the General Meeting of O2's shareholders. Consequently, PPF Group could have alone decided in the General Meeting, without having to have any consideration of the minority shareholders. The General Meeting *inter alia* has the right to decide on instructions for members of the Board of

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<sup>4</sup> See [https://www.o2.cz/spolecnost/en/shares/284473-vlastnicka\\_struktura.html](https://www.o2.cz/spolecnost/en/shares/284473-vlastnicka_struktura.html) (viewed on 20 July 2021).

<sup>5</sup> See Press Release here: <https://www.ppf.eu/en/press-release/ppf-announces-its-intention-to-acquire-more-than-90-of-the-share-capital-of-o2-cz> (last viewed on 20 July 2021).

<sup>6</sup> Ownership title to O2 Czech Republic shares has passed to principal shareholder, online, available at: [https://www.o2.cz/pub/5d/d7/55/682516\\_1613111\\_220301\\_Transfer\\_of\\_shares\\_to\\_the\\_principal\\_shareholder.pdf](https://www.o2.cz/pub/5d/d7/55/682516_1613111_220301_Transfer_of_shares_to_the_principal_shareholder.pdf) (last viewed on 23 May 2022).

<sup>7</sup> CETIN Group N.V. Annual accounts 2021, online, available at: <https://www.cetin.eu/upload/document/1648635997qdijj-cetin-group-n.v.-annual-accounts-2021-public.pdf>

<sup>8</sup> PPF announces the closing of major CETIN Group transaction, online, available at: <https://www.ppf.eu/en/press-release/ppf-announces-the-closing-of-major-cetin-group-transaction>

<sup>9</sup> PPF Telecom Group, online, available at: <https://www.ppf.eu/en/our-companies/ppf-telecom-group>

Directors, approves financial statements and decides on the distribution of profits or other own resources or the cover of losses.

- (14) Third, PPF Group's supra-majority allowed it to elect almost all the members of the senior management of O2. In particular, the General Meeting elects – by simple majority – two out of three members of the Supervisory Board. Given that the Supervisory Board takes its decisions by simple majority, the members elected by PPF Group could have decided alone on each matter. The Supervisory Board *inter alia* has the right to elect the members of the Board of Directors, approve agreements on the performance of members of the Board of Directors, decide on their remuneration and (under certain circumstances) review their exercise of powers. Furthermore, the members of the Supervisory Board are aware of all strategic decisions. In particular, they have access to all documents and records relating to O2.
- (15) Moreover, and in any event, in relation to the actual exercise of decisive influence, the Commission preliminarily considered in the PA that there was a pattern showing that the same individuals were appointed simultaneously or consecutively as managers of O2 on the one hand and of different entities belonging to the PPF Group on the other hand. This manifested itself in the same people holding leading positions in parallel at two group entities and in the practice of “revolving doors”, *i.e.* the same people having consecutive managerial positions in the different PPF Group entities. In particular, four individuals were members of O2's Supervisory Board while holding managerial posts in other entities of the PPF Group<sup>10</sup> and two other individuals<sup>11</sup> went back and forth between PPF Group and O2. Given that since 1 March 2022 PPF Group owns 100% of the shareholding in O2, the Commission's preliminary consideration that PPF Group and O2 constitute a single economic entity is not altered.
- (16) Furthermore, the decisive influence of PPF Group and thus the fact that CETIN, O2 and PPF Group belong to the same single undertaking also manifests itself in the fact that as sister companies O2 and CETIN do not operate purely on an arms' length basis. In particular, the provisions of the MNSA which govern the terms and conditions, under which CETIN provides wholesale services to O2, do not reflect normal market conditions insofar as they guarantee that:
- O2 continues to benefit from the NSAs' [Contractual terms of the MNSA] principle [Contractual terms of the MNSA]: based on the [Contractual terms of the MNSA] principle, the mutually agreed upon updates of the key performance indicators (“KPIs”) which result in [Contractual terms of the MNSA] are indeed to be offered [Contractual terms of the MNSA] between the Sharing Parties. [Contractual terms of the MNSA]. O2 on the other hand is entitled to benefit from these updates of the KPIs [Contractual terms of the MNSA].
  - O2 is informed of [Contractual terms of the MNSA] network changes, creating transparency.
- (17) Based on the above, the Commission preliminarily considered in the PA that PPF Group was able to exercise and indeed was actually exercising decisive influence over CETIN and O2. Therefore PPF Group, CETIN and O2 constituted a single undertaking. This conclusion has not changed.

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<sup>10</sup> Aleš Minx, Ladislav Bartoniček, Martin Štefunko and Vladimír Mlynář.

<sup>11</sup> Tomáš Budník and Martin Vlček.



### 3. PROCEDURAL STEPS UNDER REGULATION (EC) NO 1/2003

- (18) On 8 May 2015, the Commission received a complaint under Article 7 of Council Regulation (EC) No 1/2003 of 16 December 2002 (“Regulation (EC) No 1/2003”)<sup>12</sup> lodged by Vodafone Czech Republic a.s. (“Vodafone”) against T-Mobile and O2.
- (19) On 25 October 2016, the Commission opened proceedings against T-Mobile, CETIN and O2 with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003.
- (20) On 7 August 2019, the Commission adopted a Statement of Objections (“SO”) addressed to the Sharing Parties. On the same day, the Commission decided to initiate proceedings pursuant to Article 2(1) of Regulation 773/2004 and Article 11(6) of Regulation (EC) No 1/2003 against the parent companies of the Sharing Parties, namely Deutsche Telekom for T-Mobile and PPF Group for O2 and CETIN. On 14 February 2020, a SO addressed to Deutsche Telekom and PPF was adopted by the Commission. On 15-17 September 2020, an Oral Hearing was organised in order for the Parties to exercise their rights of defence.
- (21) After careful analysis of the evidence on the file, including the arguments and evidence submitted by the Parties in reply to the SO and at the Oral Hearing, on 27 August 2021, the Commission adopted a PA as referred to in Article 9(1) of Regulation (EC) No 1/2003. The concerns expressed in the PA differ from the objections expressed by the Commission in the SOs addressed to the Parties. Solely the concerns expressed in the PA form part of the Commission’s preliminary assessment within the meaning of Article 9(1) of Regulation (EC) No 1/2003.
- (22) In the PA, the Commission set out its concerns as regards the compatibility of the NSAs and the MNSA with Article 101 TFEU and Article 53 of the EEA Agreement; the Commission considered that the NSAs (i) led to a lack of roll-out of the 2100 MHz capacity band in Eastern Czechia by T-Mobile, as well as to restrictions of the Sharing Parties’ individual flexibility in rolling-out the 1800 MHz band (“hold-back concern”), and (ii) disincentivised the Sharing Parties from unilateral network deployments of any type due to financial disincentives as well as information exchange. This assessment was notified to the Parties by letter of 30 August 2021.
- (23) On 15, 16 and 17 September 2021, the Parties submitted commitments (“the Initial Commitments”) to the Commission in response to the PA.
- (24) On 1 October 2021, a notice<sup>13</sup> was published in the Official Journal of the European Union pursuant to Article 27(4) of Regulation (EC) No 1/2003, summarising the case and the Initial Commitments and inviting interested third parties to give their observations on the Initial Commitments within one month following publication.
- (25) On 29 March and 7 April 2022, the Parties submitted an amended proposal for commitments (“Revised Commitments”). On 3 and 8 June 2022, the Parties submitted the Final Commitments.<sup>14</sup>

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<sup>12</sup> Council Regulation (EC) of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1.

<sup>13</sup> Communication from the Commission published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case AT.40305 - Network Sharing - Czech Republic 2021/C 398/16, C/2021/7128 (OJ C 398, 1.10.2021, p. 24).

<sup>14</sup> Final Commitments are the same as the Revised Commitments with one small clarification as to the implementation period of the Network Modernisation Commitment.

## 4. PRELIMINARY ASSESSMENT

### 4.1. Relevant markets

#### 4.1.1. Retail mobile telecommunication services

(26) O2 and T-Mobile are active in the provision of retail mobile telecommunication services, i.e. the provision of voice telephony, messaging, data and content services based on 2G, 3G<sup>15</sup>, 4G and 5G technologies, to end users.

##### 4.1.1.1. Product market

###### (a) Retail fixed vs mobile telecommunications services

(27) Previously, the Commission considered that mobile telecommunications services constitute a separate market from fixed telecommunications services.<sup>16</sup> Mobile services provide end users with different functionalities from those offered by fixed services, in particular with the ability to communicate ‘on the go’.

(28) In previous cases, the Commission also considered that mobile telecommunications services constitute a separate market from public Wi-Fi services<sup>17</sup> as these services cannot be substituted by public Wi-Fi services, given in particular the differences in terms of geographic coverage and quality.<sup>18</sup>

###### (b) Retail mobile telecommunications services vs over-the-top (OTT) consumer communications services

(29) In a decision of 1 September 2016,<sup>19</sup> the Commission examined the substitutability between OTT services and retail mobile services, and it considered that OTT services cannot be considered part of the same product market as retail mobile telecommunications services. OTT services rely on mobile telecommunications (data) services (and fixed broadband services) to function. As they depend on data services to function and voice, SMS and data services are part of the same market, OTT services cannot substitute retail mobile telecommunications services.<sup>20</sup>

###### (c) Retail market for mobile telecommunications services

(30) In previous decisions, the Commission considered whether in each case it would be appropriate to divide further the retail market but in most cases, it was not considered appropriate.<sup>21</sup> The Commission therefore assessed previous cases on the basis of a

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<sup>15</sup> 3G technology was already switched off by both Sharing Parties in 2021.

<sup>16</sup> Commission decision of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, recital 64; Commission decision of 1 September 2016 in case M.7758 – *Hutchison 3G Italy/WIND/JV*, recital 125; Commission decision of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele2 NL*, recital 155.

<sup>17</sup> Commission decision of 1 September 2016 in case M.7758 – *Hutchison 3G Italy/WIND/JV*, recital 127.

<sup>18</sup> Mobile network coverage is largely ubiquitous, whereas public Wi-Fi connectivity services are primarily focused on towns and city centres and even there the density of public Wi-Fi networks is not sufficient to enable them to be substitutable for mobile telecommunications services.

<sup>19</sup> Commission decision of 1 September 2016 in case No M.7758 - *Hutchison 3G Italy / Wind / JV*, recitals 120-145.

<sup>20</sup> For example, OTT instant messaging requires a smartphone with a data connection (be it fixed or mobile) and when OTT services are used in transit, they usually require mobile network connectivity, for which the consumers would pay based on their contract. The CTU Market Analysis 2017 assessed (inter alia) voice calls through Voice over LTE (“VoLTE”), but considered its use limited due to the lower penetration of capable end-user devices which are needed on the originator side as well as on the side of the receiving party.

<sup>21</sup> In previous decisions, the Commission found (i) as regards a division based on type of service, that all mobile providers offer all services to their customers; (ii) as regards a differentiation based on technology, that there was limited customer differentiation between different types of technology, and

single market for the provision of mobile telecommunications services to end customers.<sup>22</sup>

(d) Conclusion

- (31) Based on the above and given that the effects of the NSAs (and the MNSA) apply to the retail mobile telecommunications market as a whole, irrespective of any sub-segmentations, for the purpose of this case, the Commission preliminarily concluded in the PA that the relevant product market was the retail market for mobile telecommunications services (also referred to as "retail market").

4.1.1.2. Geographic market

- (32) According to the Commission's established practice, the retail market for mobile telecommunications is national in scope.<sup>23</sup> The Czech National Regulatory Authority's, the Czech Telecommunications Office's ("CTU"), view in relation to the geographic market definition for the retail mobile telecommunications market is consistent with the Commission's approach.<sup>24</sup>
- (33) In view of the above, the Commission reached a preliminary conclusion in the PA that the retail market for mobile telecommunications services was national in scope, that is to say limited to the territory of Czechia.

4.1.2. Wholesale market for access and call origination on public mobile networks

- (34) O2 and T-Mobile are active in the provision of wholesale access and call origination services on public mobile networks. Mobile Network Operators ("MNOs") sell access to their networks and provide Mobile Virtual Network Operators ("MVNOs") with the ability to initiate calls on their networks.

4.1.2.1. Product market

- (35) In previous cases,<sup>25</sup> the Commission defined a wholesale market for access and call origination on public mobile networks. The services provided by MNOs to MVNOs were considered as the key elements required for the MVNOs to be able to provide retail mobile communication services. Since both services were considered in these cases to be generally supplied together they were seen to be part of a single market.

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(iii) as regards differentiation based on end-users, that there was high substitutability on the supply-side. See Commission decision of 01 September 2016 in case M.7758 – *Hutchison 3G Italy / WIND / JV*, recitals 135 to 137 and 153 to 161; Commission decision of 09 July 2018 in case M.8808 – *T-Mobile Austria / UPC Austria*, recitals 118 to 123.

<sup>22</sup> Commission decision of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, recitals 31 to 55; Commission decision of 28 May 2014 in case M.6992 – *Hutchison 3G UK/Telefónica Ireland*, recital 141; Commission decision of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recital 58.

<sup>23</sup> Commission decision in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recital 73; Commission decision in case M.5650 – *T-Mobile/Orange UK*, recitals 25 and 26; Commission decision of 28 May 2014 in case M.6992 – *Hutchison 3G UK/Telefónica Ireland*, recital 164; and Commission decision of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, recital 74.

<sup>24</sup> CTU Market Analysis 2017 (<https://www.ctu.cz/vyzva-k-uplatneni-pripominek-k-navrhu-testu-tri-kriterii-pro-trh-mobilnich-sluzeb>), page 21.

<sup>25</sup> Commission decision of 2 July 2014 in case M.7018 – *Telefónica Deutschland/E-Plus*, recitals 77 to 79; Commission decision of 28 May 2014 in case M.6992 – *Hutchison 3G UK/Telefónica Ireland*, recital 156; Commission decision of 12 December 2012 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recitals 61 to 63; Commission decision of 1 March 2010 in case M.5650 – *T-Mobile/Orange*, recitals 27 to 30; Commission decision of 27 November 2007 in case M.4947 – *Vodafone/Tele2 Italy/Tele2 Spain*, recital 15.

In its Market Analysis 2017,<sup>26</sup> the CTU defined a single wholesale market including both services for full MVNOs or Mobile Virtual Network Enablers (“MVNEs”) and for other levels of MVNO/MVNE, including branded resellers / grey operators.

- (36) In view of the above-mentioned previous cases and CTU’s Market Analysis 2017, the Commission reached a preliminary conclusion in the PA that there was a distinct wholesale market for access and call origination on public mobile telephone networks.

#### 4.1.2.2. Geographic market

- (37) In previous cases, the Commission considered the wholesale market for access and call origination to be national in scope due to regulatory barriers stemming from the fact that licences granted to MNOs are generally national in scope.<sup>27</sup> The CTU’s 2017 Market Analysis comes to the same finding.<sup>28</sup>

- (38) In view of the above, the Commission reached a preliminary conclusion in the PA that the wholesale market for access and call origination on public mobile networks was national in scope, that is to say limited to the territory of Czechia.

#### 4.1.3. Preliminary conclusion on the relevant markets

- (39) Based on the above, the Commission therefore considers that the relevant markets in this case are the markets for the provision of retail mobile telecommunications services and wholesale services for access and call origination on public mobile telephone networks in Czechia.

## 4.2. Conditions for applying Article 101(1) TFEU

- (40) Pursuant to Article 101(1) TFEU all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market are to be prohibited.

#### 4.2.1. Agreements between undertakings, decisions by associations of undertakings and concerted practices

- (41) The Commission preliminarily found in the PA that the 2G/3G NSA, LTE NSA and the MNSA, concluded by the Sharing Parties as binding commercial agreements, as well as their conduct on the basis of these agreements<sup>29</sup> constituted agreements within the meaning of Article 101(1) TFEU.

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<sup>26</sup> CTU Market Analysis 2017 (<https://www.ctu.cz/vyzva-k-uplatneni-pripominek-k-navrhu-testu-tri-kriterii-pro-trh-mobilnich-sluzeb>), page 21.

<sup>27</sup> See Commission decision of 12 December 2014 in case M.6497 – *Hutchison 3G Austria/Orange Austria*, recitals 74 to 77 with further references.

<sup>28</sup> CTU Market Analysis 2017 (<https://www.ctu.cz/vyzva-k-uplatneni-pripominek-k-navrhu-testu-tri-kriterii-pro-trh-mobilnich-sluzeb>), page 21.

<sup>29</sup> In this regard, the Commission notes that in the case of a complex cooperation of long duration, the term “agreement” can properly be applied not only to any overall plan or to the terms expressly agreed upon by the parties in writing or orally but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose. As the Court of Justice has pointed out, it follows from the express terms of Article 101(1) TFEU that an agreement may consist not only in an isolated act but also in a series of acts or a course of conduct (judgment of the Court of 8 July 1999, *Commission v Anic Partecipazioni SpA*, C-49/92 P, EU:C:1999:356, paragraph 81).

#### 4.2.2. *Effect of prevention, restriction or distortion of competition*

- (42) To come within the prohibition laid down in Article 101(1) TFEU, an agreement, a decision by an association of undertakings or a concerted practice must have “*as [its] object or effect*” the prevention, restriction or distortion of competition in the internal market.
- (43) In this case, the NSAs do not contain provisions which by their very nature have the potential to restrict competition. It is therefore the Commission's preliminary view that the NSAs and the MNSA do not have an anti-competitive object and therefore the Commission proceeds to a preliminary assessment of the effects of the NSAs and the MNSA on competition. Article 101(1) TFEU does not restrict such an assessment to *actual* effects alone, as that assessment must also take account of the *potential* or *likely* effects on competition within the internal market (see *John Deere*<sup>30</sup> and *Asnef-Equinax*<sup>31</sup>).
- (44) These potential effects have to be appreciable, in the sense that they are not completely insignificant.<sup>32</sup> If, however, likely effects are demonstrated, the fact that no actual anti-competitive effect can be established has no bearing on the outcome of the case.<sup>33</sup>
- (45) The Commission therefore examined in the PA the actual and potential effects of the NSAs and the MNSA on competition.<sup>34</sup>
- (46) For an agreement to have restrictive effects on competition within the meaning of Article 101(1) TFEU it must have, or be likely to have, an appreciable adverse impact on at least one of the parameters of competition on the market, such as price, output, product quality, product variety or innovation. Agreements can have such effects by appreciably reducing competition between the parties to the agreement or between any one of them and third parties. This means that the agreement must reduce the parties’ decision-making independence,<sup>35</sup> either due to obligations contained in the agreement which regulate the market conduct of at least one of the parties or by influencing the market conduct of at least one of the parties by causing a change in its incentives.<sup>36</sup>

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<sup>30</sup> Judgment of the Court of 28 May 1998, C-7/95 P *John Deere v Commission*, EU:C:1998:256, paragraph 77, see also judgment of the Court of 10 December 1985, *ETA v DK Investment SA*, 31/85, EU:C:1985:494, paragraph 12 and of 17 November 1987, *BAT and Reynolds*, joined cases 142 and 156/84, EU:C:1987:490, paragraph 54.

<sup>31</sup> Judgement of the Court of 23 November 2006, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, C-238/05, EU:C:2006:734, paragraph 50; judgment of the Court of 21 January 1999, *Carlo Bagnasco and Others v Banca Popolare di Novara soc. coop. arl. (BNP) (C-215/96)* and *Cassa di Risparmio di Genova e Imperia SpA (Carige) (C-216/96)*, Joined Cases C-215/96 and C-216/96, EU:C:1999:12, paragraph 34; judgement of the Court of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, C-1/12, EU:C:2013:127, paragraph 70 and judgment of the Court of 26 November 2015, *SIA ‘Maxima Latvija’ v Konkurences padome*, C-345/14, EU:C:2015:784, paragraph 30.

<sup>32</sup> *John Deere*, supra, paragraph 77.

<sup>33</sup> *John Deere*, supra, paragraph 78.

<sup>34</sup> Paragraph 26 of the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (“Horizontal Guidelines”), *OJ C 11, 14.1.2011, p. 1–72*.

<sup>35</sup> Judgment of the Court of 28 May 1998, *John Deere Ltd v Commission of the European Communities*, C-7/95 P, EU:C:1998:256, paragraph 88; Judgment of the Court of 23 November 2006, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, C-238/05, EU:C:2006:734, paragraph 51.

<sup>36</sup> Horizontal Guidelines paragraph 27.

- (47) This will depend on several factors such as the nature and content of the agreement, the extent to which the parties individually or jointly have or obtain some degree of market power, and the extent to which the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power.<sup>37</sup>
- (48) Network sharing agreements are agreements to share a mobile telecommunications network or certain parts of a mobile telecommunications network and coordinate investments in such network or network elements in order to offer mobile telecommunications services. As such, these agreements constitute (horizontal) cooperation agreements between competitors. NSAs can be seen as joint production agreements. Joint production agreements can lead to a direct limitation of competition between the parties, inter alia since they may lead the parties to directly align output levels and quality or other competitively important parameters. This may restrict competition even if the parties market the products independently.<sup>38</sup>
- (49) Whether the possible competition concerns that horizontal cooperation agreements involving the sharing of production can give rise to are likely to materialise in a given case depends on the characteristics of the market in which the agreement takes place, as well as on the nature and market coverage of the cooperation and the product it concerns.<sup>39</sup>
- 4.2.3. *Effect on trade between Member States*
- (50) For Article 101 TFEU to apply, the agreement in question must be capable of affecting trade between Member States. It is not, however, required that each individual part of the agreement, including any restriction of competition which may flow from the agreement, is capable of doing so.<sup>40</sup>
- (51) An agreement, decision or concerted practice extending over the whole of the territory of a Member State is, by its very nature, capable of affecting trade between Member States.<sup>41</sup>
- (52) The Commission considers that the NSAs, together with the MNSA, may affect trade between Member States because of their capability of altering the competitive structure in a Member State constituting a substantial part of the Union based on their likely and actual effects.
- (53) The possible reduction of investment, quality and innovation may lead to a market development differing from market developments in the possible counterfactual and other parts of the EEA.

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<sup>37</sup> Horizontal Guidelines, paragraph 28.

<sup>38</sup> Horizontal Guidelines, paragraph 157.

<sup>39</sup> Horizontal Guidelines, paragraph 162.

<sup>40</sup> Judgment of the Court of 25 February 1986, *Windsurfing International Inc. v Commission of the European Communities*, 193/83, EU:C:1986:75, paragraph 96; and Judgment of the Court of First Instance of 14 May 1997, *Vereniging van Groothandelaren in Bloemkwekerijprodukten, Florimex BV, Inkoop Service Aalsmeer BV and M. Verhaar BV v Commission of the European Communities*, T-77/94, EU:T:1997:70, paragraph 126.

<sup>41</sup> Judgment of the Court of 19 February 2002, *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, interveners: Raad van de Balies van de Europese Gemeenschap*, C-309/99, EU:C:2002:98, paragraph 95; Judgment of the Court of 17 October 1972, *Vereeniging van Cementhandelaren v Commission of the European Communities*, 8/72, EU:C:1972:84, paragraph 29, and Judgment of the Court of 11 July 1985, *Remia BV and others v Commission of the European Communities*, 42/84 EU:C:1985:327, paragraph 22.

- (54) The Commission found in the PA that based on the combined market shares of over 70% of the Sharing Parties, as well as their significant revenue on the retail market for telecommunication services in Czechia,<sup>42</sup> the NSAs were capable of having an appreciable effect on trade between Member States.

### 4.3. Market characteristics

- (55) As preliminarily found by the Commission, the following factors are relevant for the competitive assessment of horizontal cooperation agreements such as the NSAs and the MNSA at hand: (i) whether the parties to the agreement have high market shares, (ii) whether they are close competitors, (iii) whether the customers have limited possibilities of switching suppliers, (iv) whether competitors are unlikely to increase supply if prices increase, and (v) whether one of the parties to the agreement is an important competitive force.<sup>43</sup>

#### 4.3.1. Importance of infrastructure competition

- (56) CETIN and T-Mobile provide the telecoms infrastructure for O2 and T-Mobile to provide wholesale access and call origination services, as well as retail mobile services. The main element at the core of the provision of these services is the telecoms infrastructure. Competition at infrastructure level does not take place on a separate market, but within the defined relevant markets and may therefore affect competition at both wholesale and retail level. For instance, Directive (EU) 2018/1972 of the European Parliament and of the Council (the European Electronic Communications Code),<sup>44</sup> which introduces a new connectivity objective, facilitates widespread access to, and take-up of, very high capacity networks. The European Electronic Communications Code provides at recital 27 that “*Competition can best be fostered through an economically efficient level of investment in new and existing infrastructure, complemented by regulation, where necessary, to achieve effective competition in retail services*”. The importance of mobile infrastructure is also recognised in the relevant Commission decisions.<sup>45</sup> Market shares aggregated at network level are therefore a relevant indicator for the competition level on the relevant markets.

#### 4.3.2. Market shares

- (57) Three MNOs operate in Czechia: T-Mobile, O2 and Vodafone and offer both wholesale and retail services. These MNOs operate through their own main brand or through sub-brands or affiliated MVNOs. There are also a number of independent MVNOs which operate their virtual network through wholesale access contracts on the networks of one of the three MNOs.
- (58) Retail competition is based on a number of factors, such as tariffs, package offerings, customer service, as well as network quality and network innovation. In relation to

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<sup>42</sup> According to the 2020 Annual Report of T-Mobile (page 104, available at [vyrocnizprava-2020-cz.pdf \(t-mobile.cz\)](https://www.t-mobile.cz/vyrocnizprava-2020-cz.pdf), last downloaded on 17 May 2021), T-Mobile’s revenues from contracts with customers with regard to the provision of mobile telecommunication network services in Czechia was CZK 18 645 million in 2020. According to the 2020 Annual Report of O2 (page 18, available at <https://www.o2.cz/spolecnost/en/annual-and-half-year-reports/>, last downloaded on 12 May 2021), the consolidated revenue of O2 in the mobile sub-segment in Czechia was CZK 20 344 million in 2020.

<sup>43</sup> Horizontal Guidelines, paragraph 173.

<sup>44</sup> Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code.

<sup>45</sup> E.g. Commission decision of 1 September 2016 in case M.7758 – *Hutchison 3G Italy/Wind/JV*, recitals 373-374.

the network aspects, the MVNOs which obtain access from their respective host MNOs offer the same network quality and network innovation to their customers by default.

- (59) Given that MVNOs compete with MNOs for retail mobile contracts on many aspects (such as tariff structure and pricing) but not on network quality and network innovation, the most relevant shares to consider in this case are those at network level and at wholesale level.<sup>46</sup>

#### 4.3.2.1. Market shares at network level

- (60) Retail market shares by subscribers and revenues on the network level reflect how many customers utilise the same radio access network (RAN), which is the core of the assessment in this case. In order to calculate the shares at network level, the Commission takes into account the subscriber and revenues share for the relevant MNO but also for the MVNOs hosted on the MNO's network, as the MVNO subscribers are also serviced indirectly by that MNO's network infrastructure.<sup>47</sup>
- (61) In 2017, based on subscriber numbers, T-Mobile had a market share of [30-40]% and a network share of [30-40]%. O2 had a market share of [30-40]% and a network share of [30-40]%. Vodafone had a market share of [20-30]% and a network share of [20-30]%. These shares have remained relatively stable since 2010 with fluctuations of several percentage points.<sup>48</sup>
- (62) In 2017, based on revenues, T-Mobile had a market share of [30-40]% and a network share of [30-40]%. O2 had a market share of [40-50]% and a network share of [40-50]%. Vodafone had a market share of [20-30]% and a network share of [20-30]%. These shares have remained relatively stable since 2010 with fluctuations of several percentage points.<sup>49</sup>
- (63) According to the above figures, approximately [70-80]% of retail subscribers who generate approximately [70-80]% of the revenues use the shared network of the Sharing Parties for their mobile telecommunications needs. In technical terms, these retail subscribers use the network infrastructure that is shared between CETIN/O2 and T-Mobile on the basis of the NSAs.

#### 4.3.2.2. Market shares on the wholesale market for access and call origination services

- (64) These market shares reflect the subscribers which connect to a mobile network via an independent MVNO. They also reflect the choice of MVNOs to negotiate and choose which MNO to partner with on the basis of their network characteristics, including innovation and new network services.
- (65) In 2017, based on revenues, T-Mobile had a market share of [20-30]% (hosting GoMobil TERMS a.s.) with a wholesale procurement share of [0-10]% and other independent MVNOs with a share of [10-20]%. O2 had a market share of [20-30]%

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<sup>46</sup> The Commission nevertheless also looked at retail shares. The retail shares of each of T-Mobile, O2 and Vodafone [...] with their network shares with independent MVNOs representing [0-10]% of the retail market in terms of subscribers but only [0-5]% in terms of revenues in 2017. In fact, retail shares by subscriber numbers are network shares minus MVNO subscribers.

<sup>47</sup> E.g. Commission decision of 1 September 2016 in case M.7758 – *Hutchison 3G Italy/Wind/JV*, recital 931.

<sup>48</sup> Responses to RFIs of 23 May 2017: RFI 8 to T-Mobile; RFI 10 to O2; RFI 11 to Vodafone; Responses to RFIs of 20 April 2018: RFI 22 to T-Mobile; RFI 24 to O2; RFI 25 to Vodafone.

<sup>49</sup> Responses to RFIs of 23 May 2017: RFI 8 to T-Mobile; RFI 10 to O2; RFI 11 to Vodafone; Responses to RFIs of 20 April 2018: RFI 22 to T-Mobile; RFI 24 to O2; RFI 25 to Vodafone.



(hosting CEZ with a share of [10-20]%, Moravia with a share of [0-10]%, Vinatel with a share of [0-5]% and with DH Telecom (after switch)). Vodafone had a market share of [40-50%] (hosting SAZKAmobil with a share [30-40%], DH Telecom (before switch) with a share of [0-10%] and other independent MVNOs with a share of [10-20%]).<sup>50</sup>

#### 4.3.2.3. Conclusion

(66) As found by the Commission in the PA, the structure of the mobile retail and wholesale markets in Czechia is such that the Sharing Parties have a strong market position. This is because of the high concentration in the market, the high market shares of the Sharing Parties (number 1 and number 2 operators with combined shares of [70-80]% at network level by subscribers and [70-80]% by revenues, [60-70]% at retail level by subscribers and [70-80]% by revenues and [50-60]% on the market for wholesale access); the fact that the third MNO, Vodafone, has somewhat lower market shares on the retail market and network level, as well the stability of the Sharing Parties' market position.

#### 4.3.3. Closeness of competition

(67) The Horizontal Guidelines include, among the factors that are relevant for the competitive assessment of an agreement, the assessment of whether the parties to that agreement are close competitors.<sup>51</sup>

(68) Evidence suggests that the Sharing Parties competed closely with each other with regard to infrastructure prior to the NSAs: (i) O2 and T-Mobile competed closely at the infrastructure level prior to the NSAs having rolled-out [Information on the roll-out of the shared network] 2G/3G networks covering the [Information on the roll-out of the shared network] country; and (ii) T-Mobile's and O2's internal documents corroborate the competitive pressure each was putting on the other in respect of infrastructure competition prior to the NSAs.<sup>52</sup>

(69) At retail level, T-Mobile and O2 have similar service offerings in terms of mobile tariffs and retail services provided. Mobile Number Portability ("MNP") data provided by each of T-Mobile and O2 for the years 2011-2016 suggests that [MNP churns].<sup>53</sup>

(70) In view of the above, the Commission reached a preliminary conclusion in the PA that O2 and T-Mobile were close competitors.

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<sup>50</sup> Responses to RFIs of 23 May 2017: RFI 8 to T-Mobile; RFI 10 to O2; RFI 11 to Vodafone; Responses to RFIs of 20 April 2018: RFI 22 to T-Mobile; RFI 24 to O2; RFI 25 to Vodafone; Vodafone correspondence on confidentiality of 19 July 2019.

<sup>51</sup> Horizontal guidelines, paragraph 34.

<sup>52</sup> T-Mobile [Information on the roll-out strategy], (T-Mobile response of 19 June 2017 to RFI 8 of 23 May 2017). In 2009, T-Mobile noted in an internal presentation concerning the options for 3G network sharing that the [Information on the roll-out strategy]. T-Mobile's presentation "3G network sharing (GOLEM phase)", slide 7, annex to T-Mobile response of 19 July 2017 to RFI 23.05.2017. Moreover, in 2013, in parallel with the discussions with T-Mobile, [Information on the roll-out strategy]. An internal presentation shows O2's perception of the [Information on the roll-out strategy]. Overall, the two presentations show that O2 and T-Mobile considered each other [Information on the roll-out strategy].

<sup>53</sup> As regards the port out data of [...], in the private segments, T-Mobile attracts [50-60]-[60-70]% of [...]'s customers in more recent years, while the remainder is accounted for by [...]. In the business segment, T-Mobile attracts [40-50]-[50-60]% of customers leaving [...], with [...] attracting a [...] port out in several of those years. As regards the port out data of [...], O2 and Vodafone appear to [...] from [...] customers, with [...].

#### 4.3.4. *Competitive pressure by other parties*

##### 4.3.4.1. Competitive pressure by Vodafone

- (71) As found in the PA, the Commission notes that Vodafone has, in the past, played a significant role in the market.<sup>54</sup> Notably, Vodafone was a frontrunner in the roll-out of LTE in Czechia. Vodafone used its available 900 MHz spectrum to roll-out LTE faster than the Sharing Parties by combining 3G and LTE mobile internet.<sup>55</sup>
- (72) Despite the significant investments made and its first mover advantage in the roll-out of LTE, Vodafone's retail market share has been relatively constant over time. Moreover, Vodafone's ability to constrain T-Mobile and O2 may be more limited than suggested by its current market share.
- (73) First, Vodafone entered the market as the last of the three Czech MNOs. This, according to Vodafone, meant that historically it faced a more difficult position when building its customer base and smaller number of sites suitable for the construction of base stations. Vodafone also claims that from a cost-benefit perspective, an investment in a new base station would depend on the expected newly generated revenues compared to the total operating and investment costs. Since revenues are likely to be correlated with the market share of the player, Vodafone would be in a position to invest less than the Sharing Parties.
- (74) Vodafone submits that its cost disadvantage is reflected in its earning before interest, taxes, depreciation, and amortisation (EBITDA) margin for Czechia. In 2014, T-Mobile's and O2's profitability expressed in EBITDA margin was higher than Vodafone's profitability.<sup>56</sup>
- (75) Second, due to its late entry to the market, Vodafone is to some extent reliant on the Sharing Parties. For example, T-Mobile and O2 could refuse or delay access (or increase prices) for backhaul services or collocation to Vodafone. However, the acquisition of Liberty Global by Vodafone Group<sup>57</sup> gave Vodafone access to the fixed infrastructure of UPC Česká republika, s.r.o., one of the largest providers of fibre and cable fixed infrastructure in Czechia. Moreover, the Commission has no evidence that the Sharing Parties would have refused or delayed access.
- (76) Finally, one MVNO hosted by O2/CETIN mentions that "[i]t's a public secret that esp[ecially] O2 and T-Mobile are in particular form an oligopoly. Vodafone is in many cases their price follower".<sup>58</sup>

##### 4.3.4.2. Competitive pressure by other operators

- (77) In the 2017 auction for the 3600–3800 MHz band and in the 2020 auction for the 700 MHz<sup>59</sup> and 3400–3600 MHz, three new entities successfully acquired spectrum, namely Nordic Telecom, PODA and CentroNet.
- (78) The Commission has analysed the results of these spectrum auctions in terms of potential entry but does not consider that these spectrum bands are sufficient for a

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<sup>54</sup> Vodafone itself considers that it has been an important competitive force in the market, having offered over time a number of price and product innovations. However, dynamically Vodafone considers that its competitive position will fade over time.

<sup>55</sup> According to T-Mobile, Vodafone's earlier adoption of the single RAN was the driver for T-Mobile to roll-out single RAN.

<sup>56</sup> CRA, 25.05.2015.

<sup>57</sup> Case M.8864 – *Vodafone / Certain Liberty Global assets*.

<sup>58</sup> CEZ Prodej response to the Commission's RFI of 18 May 2018, question 19.

<sup>59</sup> There were no new entrants acquiring the 700 MHz spectrum at the 2020 auction.

new entrant to become a fully-fledged MNO able to compete with the three existing MNOs in the short- to medium-term based on their acquired spectrum in the 5G auctions. This is because the 3400–3800 MHz frequency band has significantly lower coverage performance compared to the other mobile technology bands (such as the 800 MHz and the 900 MHz). Thus, the 3400-3800 MHz frequency band is intended for future use by mobile networks for high-speed Internet access services and the future development of 5th generation networks (5G).<sup>60</sup> In the short to medium term, however, it can be expected to be used only for fixed wireless broadband access, and therefore for services provided at a fixed location. On this basis, the Commission does not consider that other operators, in particular Nordic Telecom which is the largest of the operators that acquired spectrum in the 2017 and 2020 auctions, have currently - nor will have in the short to medium term - the ability to compete as an MNO with the Sharing Parties on a nationwide basis based on its acquired spectrum in the 5G auctions in relation to the market for retail mobile telecommunications services or wholesale access and call origination services. However, the national roaming obligation with cost-based pricing incorporated in the 2020 auction could potentially improve the competitive position of Nordic Telecom, PODA and CentroNet, thereby enabling them to provide retail and/or wholesale services based on the combination of their acquired spectrum and national roaming.

- (79) Concerning MVNOs, the Commission notes that they rely on the MNOs for their network access and therefore, while they compete (although from a disadvantaged cost basis) at the retail level, they are not a competitive constraint in terms of competition on investments in mobile network infrastructure. In any event, MVNOs which are not wholly or partially owned by MNOs, account for approximately 3% of the retail mobile market share by revenues and therefore are not a significant competitive constraint to the Sharing Parties.

#### 4.3.4.3. Conclusion

- (80) In view of the above, the Commission reached the preliminary conclusion in the PA that the competitive pressure exercised by other market players and most importantly by Vodafone was insufficient to counter the concerns raised in the PA.

#### 4.3.5. *No entry likely, timely and sufficient (due to high barriers to entry)*

- (81) An agreement may be less likely to pose any significant anti-competitive risk if market entry is sufficiently easy. For entry to be considered a sufficient competitive constraint, it must be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the agreement.
- (82) As found by the Commission in the PA, the NSAs reduce competition at infrastructure level which in turn potentially limits the ability of network sharing parties to compete in terms of quality and range of services provided at wholesale and retail level. Price competition at wholesale and retail level in principle remains. The relevant level at which entry must be assessed is therefore at network level. Entry by MVNOs is not sufficient as the quality and range of services that an MVNO is able to provide is dependent on the network of the MNO on which the MVNO is hosted.
- (83) For MNOs, barriers to entry are very high given the major investments required. A new MNO entrant would need to (i) obtain access to a spectrum of the right quantity

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<sup>60</sup> CTU Market Analysis 2017 (<https://www.ctu.cz/vyzva-k-uplatneni-pripominek-k-navrhu-testu-tri-kriterii-pro-trh-mobilnich-sluzeb>), page 12, footnote 48.

and nature in order to be able to deliver national services (such spectrum is scarce and expensive); (ii) build a RAN with national coverage, which involves significant sunk costs and multiple practical hurdles (access to new sites, negotiations with landlords, potential planning requirements, potential works to host the network equipment and site engineering for interference management); and (iii) have the ability to build a customer base, typically involving a network of stores and investments in customer acquisition.

- (84) CTU tried to facilitate the entry of a fourth player through the 800, 1800 and 2600 MHz frequency auctions in 2014 but was unsuccessful. The undertakings on the market acknowledge the low likelihood of any other market entry.<sup>61</sup>
- (85) In view of the above, the Commission reached the preliminary conclusion in the PA that barriers to entry remained high and the likelihood of new MNO entry was low and thus insufficient to offset any potential anti-competitive effects of the NSAs on the relevant markets in Czechia.

#### 4.3.6. *Limited buyer power*

- (86) Even firms with very high market shares may not be in a position to restrict competition, if their customers possess countervailing buyer power.
- (87) The Commission considers that private and small business retail customers have no bargaining power given their fragmented demand. Only large business retail customers and wholesale customers, such as MVNOs, which typically negotiate contracts bilaterally with the MNOs, may have some bargaining power. However, in a market with high barriers to entry, such as the mobile telecommunications market, the only source of bargaining strength for these customers is leveraging one MNO against another. If two out of three MNOs *de facto* coordinate their network decisions, the only source of leveraging remains Vodafone.
- (88) In view of the above, the Commission reached the preliminary conclusion in the PA that possible buyer power exercised by customers of retail or wholesale mobile communication services constituted only a very limited countervailing factor in offsetting the possible anti-competitive effects of the NSA cooperation.

#### 4.4. **Practices raising concerns**

- (89) The Commission reached the preliminary conclusion in the PA that the NSAs might be restrictive of competition by their effects in that they reduced the Sharing Parties' ability and incentive to undertake unilateral investments in capacity. This in turn reduced their flexibility in competitiveness, innovation and technology/product differentiation on the retail and wholesale market for mobile telecommunication services in Czechia and directly limited competition between them. Therefore, the Commission considered that the NSAs together with the MNSA – in addition to their effects on competition and the structure of the market<sup>62</sup> – were capable of harming

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<sup>61</sup> Vodafone response of 19 September 2016 to RFI 6 of 29 July 2016, question 4c.

<sup>62</sup> According to the established case law, Article 101 TFEU aims to protect not only the interests of consumers or that of the competitors, but also the structure of the market, and in so doing, competition as such (see e.g. judgment of the Court of 6 October 2009, *GlaxoSmithKline Services Unlimited v Commission of the European Communities* (C-501/06 P) and *Commission of the European Communities v GlaxoSmithKline Services Unlimited* (C-513/06 P) and *European Association of Euro Pharmaceutical Companies (EAEP) v Commission of the European Communities* (C-515/06 P) and *Asociación de exportadores españoles de productos farmacéuticos (Aseprofar) v Commission of the European Communities* (C-519/06 P), Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 63). In the Intel decision (judgment of the General Court of 12 June 2014,

end-consumers by leading to less choice, lower quality of services, as well as delays in innovation.

- (90) After analysing all data and information available to it, including the Parties' replies to the SO and the Oral Hearing, the Commission preliminarily considered that the NSAs (i) led to a lack of roll-out of the 2100 MHz capacity band in Eastern Czechia by T-Mobile (the "LTE2100 hold-back effect") and restricted the Sharing Parties' flexibility in rolling-out the 1800 MHz band; and (ii) disincentivised the Sharing Parties from unilateral deployments of any type via financial means and unnecessary information sharing.

4.4.1. *Lack of roll-out of the 2100 MHz capacity band in Eastern Czechia and restriction of the Sharing Parties' flexibility in rolling-out the 1800 MHz band*

4.4.1.1. Technical limitations

- (91) The Sharing Parties can differentiate the quality of their services by individually adding capacity bands to the shared network or by upgrading to higher order MIMO such as the 4x4 multiple-input and multiple-output (MIMO).<sup>63</sup> However, certain technical limitations in the shared network have prevented the Sharing Parties from being able to do this and thus contributed to reducing competition based on capacity that would likely have existed in the absence of the NSAs.
- (92) The purpose of extra spectrum band deployments for LTE is not only to expand the installed capacity but is also a key enabler for the LTE-A carrier aggregation functionality (enabling subscribers to simultaneously use multiple LTE spectrum bands and aggregate their available capacities) which results in higher peak data and average data rates and thus improves quality.
- (93) In the context of the LTE NSA, the Sharing Parties decided on [Contractual terms of the NSAs], more or less preparing the environment for the initial unilateral and independent deployment of the 1800 MHz spectrum band over the pre-installed LTE800 only on these "eligible" sites in both areas of the LTE NSA. Based on this, although according to the LTE NSA the competent party to [Contractual terms of the NSAs], disputes can arise between the Sharing Parties due to different deployment strategies, which may hinder or delay deployments if the Sharing Parties fail to agree on a common deployment scenario.
- (94) An example of such a scenario could be the decision by one of the Sharing Parties to upgrade unilaterally the MIMO configuration from 2x2 to 4x4, [Contractual terms of the NSAs]. The necessary upgrade of the antenna concept in this case can result in a delayed implementation since this prerequisites changes of the antenna concept that should be agreed with the respective [Contractual terms of the NSAs].
- (95) In addition to the above [Information on the roll-out of the shared network], there may be additional technical limitations which hinder certain unilateral extra spectrum band deployments due to specific equipment vendor's implementation or any other RAN equipment related limitations. For example, due to technical limitations of

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*Intel Corporation v Commission*, T-286/09, EU:T:2014:547), the General Court further stated that “*the Commission is not required to prove either direct damage to consumers or a causal link between such damage and the practices at issue in the contested decision*” (paragraph 105).

<sup>63</sup> The use of higher order MIMO techniques is one of the primary tools available to an MNO to increase throughput and, through this, the capacity of RAN. Since the peak data rates tend to be proportional to the number of send and receive antennas, the 4x4 MIMO for example is theoretically capable of twice the peak data rates of the 2x2 MIMO systems.

CETIN's equipment T-Mobile cannot deploy LTE using the 2100 MHz spectrum band in CETIN's Master area. However, in all likelihood T-Mobile would have deployed LTE2100 in this area if it had operated its own independent network. The above technical limitations are known to the Sharing Parties and have in fact, removed T-Mobile's ability to apply this specific spectrum band deployment for LTE use in CETIN's Master area.

#### 4.4.1.2. The LTE2100 hold-back effect

- (96) From the higher spectrum bands (the so-called “capacity layer bands”), the one in 2100 MHz is preferable especially in pre-existing 3G sites. This is because the 2100 MHz is also the operating spectrum band for 3G technology and thus, the existing RAN and the associated site's grid has already been planned and installed by taking into consideration the electromagnetic propagation limitations of this spectrum band. The above deployment strategy significantly accelerates the LTE roll-out by using the 2100 MHz band even for initial basic coverage needs. Finally, the addition of LTE2100 on top of the 3G permits the sharing of some already installed components, such as antennas and Remote Radio Units, by which an MNO can achieve significant cost savings.
- (97) However, especially for T-Mobile, that higher spectrum band roll-out is not [Information on the roll-out of the shared network]. T-Mobile has [Information on the roll-out of the shared network] technology, which allows it to optimally use its spectrum holdings and deploy LTE2100 at [Information on the roll-out of the shared network].<sup>64</sup> It has made extensive use of this ability in the area where it is the Master Operator. In this area, T-Mobile has also combined multiple spectrum bands to deploy LTE-A, which effectively provides higher maximum data rates.
- (98) By contrast, T-Mobile has not deployed such functionalities, to the same extent, in the area where it is the Visitor Operator and is served by CETIN's network. This is because T-Mobile was not able to use the 2100 MHz spectrum band in CETIN's Master area due to technical limitations which are related to CETIN's RAN equipment. The delayed deployment of the LTE-A carrier aggregation operation by T-Mobile in areas where it acts as a Visiting Operator, in comparison to the rest of the territories of Czechia, is mentioned also by T-Mobile: “*TMCZ has originally started the deployment of [Information on the roll-out of the shared network] followed by its Master area. Deployment of [Information on the roll-out of the shared network].*”<sup>65</sup> This in turn means that T-Mobile is constrained in the size of the data bundles it can offer by the technical limitations of CETIN's RAN equipment to freely deploy further capacity and functionality in the Eastern part of Czechia.
- (99) Due to these limitations, T-Mobile has not been able to deploy LTE2100 in CETIN's Master area.<sup>66</sup> The deployment of [Information concerning TMCZ deployments] by T-Mobile in this area, at least until [Information concerning TMCZ deployments], has been insufficient to compensate for the lack of LTE2100 deployment.
- (100) Due to the limitations in the deployment of LTE2100 discussed above, T-Mobile was not able to offer LTE-A functionality to its subscribers residing in the Eastern part of the country (CETIN's Master area) to the same extent it was able in the Western part

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<sup>64</sup> The RAN equipment of T-Mobile supports the "Single RAN" concept, that is, the flexible use of technologies (GSM, UMTS and LTE) in the same band, as well as across different bands.

<sup>65</sup> T-Mobile's response of 30 June 2017 to RFI 8 of 23 May 2017, question (3)(a).

<sup>66</sup> See CTU's UMTS2100 coverage map available at <https://digi.ctu.cz/pokryti/> (last visited on 30 July 2021).

(T-Mobile's Master area). However, in all likelihood, T-Mobile would have done so if it had operated its own independent network, since this situation obliges T-Mobile to offer its customers in the Eastern part of the country a lower service level than in the Western part of the country and prevents it from basing its marketing on the same service level over the whole country.<sup>67</sup>

- (101) On the overall issue of differentiation, the Commission notes that the Sharing Parties themselves consider that it has been reduced by the network sharing. This is shown by the following internal documents: In an internal T-Mobile presentation on the planned LTE2100 deployment, it is noted that based on the common shared LTE network which is planned to achieve nation-wide coverage [Information concerning the roll-out of the shared network].<sup>68</sup> T-Mobile only differentiated and innovated in half of the country, namely the part where T-Mobile is the Master Operator. In the absence of the NSAs, the Commission reached the preliminary conclusion that T-Mobile would have deployed LTE2100 in the entirety of Czechia.
- (102) In addition to the need for achieving some level of differentiation towards O2, other drivers for T-Mobile's decision to replace the existing 3G RAN and to adopt a single RAN technology, allowing the LTE2100 deployment were the need to compete with Vodafone and to gain from the associated cost savings.<sup>69</sup> For instance, in a response to an RFI, T-Mobile describes the competitive advantage that has been achieved by Vodafone at the time due to the earlier adoption of the single RAN, and concludes that the need to compete with Vodafone was the driver for the single RAN roll-out.<sup>70</sup> It is very likely that these considerations would have also played in favour of the LTE2100 deployment in the Eastern part of Czechia, in the absence of the LTE NSA.
- (103) The quality of service offered to a MNO's customer is influenced by several parameters than the installed RAN capacity in the customer's region (specific customer location, number of active customers simultaneously accessing the network, capacity of backhaul links to core network, etc.) and demand for higher throughput services is to a certain extent influenced by installed capacity. In light of this, it may be difficult to demonstrate a one-to-one relationship between the installed network capacity and a specific quality level of services and, therefore, the real impact of possible capacity scarcity on the consumer experience.
- (104) Nevertheless, data based on drive tests carried out by the data analytics firm P3 in its last public P3 Benchmarking Campaign in Czechia (April 2018) which was commissioned by Vodafone, show that T-Mobile's inability to offer carrier aggregation in the Eastern part of Czechia is holding back its performance for customers residing in the Eastern part. The data show that consumers who live in the Eastern part are receiving a significantly poorer quality of service from T-Mobile, for the same price as consumers in the Western part.<sup>71</sup> The analysis shows that T-Mobile's network download and upload speeds in the Eastern part are on average

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<sup>67</sup> According to T-Mobile's summarised annual report for 2017: "LTE-A technology is now installed on 37% of our LTE transmitters, more or less in the entire western part of the Czech Republic and in Brno and the Pardubice, Olomouc and Ostrava districts." Retrieved from T-Mobile's site on 05 August 2018, ([https://www.t-mobile.cz/dcpublish/VZ\\_TM\\_2017\\_ENG.pdf](https://www.t-mobile.cz/dcpublish/VZ_TM_2017_ENG.pdf)).

<sup>68</sup> T-Mobile presentation "LTE2100 MHz - Single RAN Reasoning for TMCZ" of July 2013, slides 2-3.

<sup>69</sup> The above consideration is clearly depicted in T-Mobile's presentation "LTE2100 MHz - Single RAN Reasoning for TMCZ" of July 2013. [Information concerning network deployment strategy].

<sup>70</sup> T-Mobile's reply to question 13 of RFI 5, under the title "Development of T-Mobile's coverage plans in reaction to market and competition development".

<sup>71</sup> "Czech Republic Performance in Sharing Areas", Vodafone analysis based on P3 Benchmarking Campaign in the Czech Republic (April 2018).

over [Information concerning network download speed of TMCZ and O2] slower than in the Western part. This degradation in T-Mobile's performance is primarily a result of differences in levels of carrier aggregation in the Eastern part compared to the Western part. The download speeds of O2/CETIN and Vodafone are [Information concerning network download speed of TMCZ and O2] in both the Eastern part and the Western parts.

- (105) This imbalanced implementation of the carrier aggregation functionality between the Eastern and Western parts of Czechia is presented in Vodafone's internal monthly network benchmark of June 2018. According to the relevant measurements, the percentage of data sessions with carrier aggregation support in T-Mobile's Master area for T-Mobile is [Information concerning carrier aggregation on TMCZ network] higher than the ones in CETIN's Master area.<sup>72</sup>
- (106) In view of the above, the Commission reached the preliminary conclusion in the PA that the delayed deployment of carrier aggregation functionality and the lack of roll-out of LTE2100 by T-Mobile in the visitor area, implying a lower quality of service in the Eastern part of Czechia, showed anti-competitive actual effects. Moreover, the Commission reached the preliminary conclusion that the identified actual effects supported the preliminary finding of likely anti-competitive effects, *i.e.* the disincentives inherent in the NSAs to invest in unilateral deployment (see Section 4.4.2).
- (107) In addition to the inability to roll-out 2100 MHz band in the Eastern part of the country, as found by the Commission in the PA, the NSAs may have also limited the individual roll-out of 1800 MHz.
- (108) While the Sharing Parties have already invested on a unilateral (individual) basis in capacity extensions using capacity layer spectrum bands, the capacity extensions on 1800 MHz were already constrained as these capacity layer spectrum bands could only be added, without any major installations and/or modifications on the shared sites, over a pre-selected eligible subset of the existing grid of shared sites (see recital (93) above). The vast majority of LTE1800 capacity extensions, as shown in Table 1 below, were developed on top of the LTE800 grid.

Table 1: T-Mobile's higher spectrum bands (LTE1800 & LTE2100) sites per NSA's area in 2017

	LTE800+ LTE1800	LTE800+ LTE2100	LTE800+ LTE1800+ LTE2100	LTE1800+ LTE2100	LTE1800 only	LTE2100 only
T-Mobile's Master area	[130-190]	[900-1300]	[35-40]	[10-20]	[20-30]	[10-20]
CETIN's Master area	[400-500]	0	0	0	[0-50]	0

Source: Commission calculations based on T-Mobile's data<sup>73</sup>

- (109) Furthermore, the evolution on the number of sites with LTE2100 installations in T-Mobile's Master area for T-Mobile is [Information concerning TMCZ deployments].

<sup>72</sup> Vodafone response to Commission's questions received on 6 August 2018.

<sup>73</sup> T-Mobile response of 11 May 2018 to RFI 22 of 20 April 2018, question 2.



This may indicate a reduced ability and incentives for deploying LTE1800 by T-Mobile which may arise from cost and/or technical limitations.

- (110) A direct comparison, by using the data in Table 2 below, of the LTE2100 and the LTE1800 layers between the NSA area where T-Mobile is Master Operator and the NSA area where it is the Visitor Operator, shows that [Information concerning TMCZ deployments].

Table 2: T-Mobile's higher spectrum bands (LTE1800 & LTE2100) in both NSA's areas

	T-Mobile's Master area				CETIN's Master area			
	LTE1800		LTE2100		LTE1800		LTE2100	
	Sites	RBs	Sites	RBs	Sites	RBs	Sites	RBs
2014	[20-30]	[5000-6000]	0	0	0	0	0	0
2015	[25-35]	[6000-7000]	[175-225]	[20000-30000]	[0-10]	[0-10000]	0	0
2016	[30-40]	[7000-8000]	[350-450]	[55000-65000]	[0-10]	[0-10000]	0	0
2017	[160-240]	[55000-65000]	[900-1300]	[160000-200000]	[400-480]	[90000-140000]	0	0

- (111) Source: Commission calculations based on T-Mobile's data<sup>74</sup>

#### 4.4.2. Unilateral deployments disincentives

##### 4.4.2.1. Financial disincentives

- (112) As found by the Commission in the PA, the fact that the Sharing Parties have in principle agreed to share costs of network expansions is likely to act as a disincentive for them to take financial risks and compete with each other by developing individual solutions.
- (113) The NSAs provide that both Sharing Parties are to designate [Information concerning contractual terms of the NSAs].<sup>75</sup>
- (114) Moreover, the representatives of each party [Information concerning contractual terms of the NSAs].<sup>76</sup>
- (115) Under the NSAs, the Sharing Parties also have a number of options to individually expand capacity in the area in which they are the Visitor Operator. For instance, they can ask the Master Operator to deploy more spectrum at an existing site or ask the Master Operator to build a unilateral site. For many of such network expansions, the NSAs foresee the corresponding payments that the Visitor Operator must make to the Master Operator.<sup>77</sup> For the network expansions, for which [Information concerning

<sup>74</sup> T-Mobile response of 11 May 2018 to RFI 22 of 20 April 2018, question 2.

<sup>75</sup> Clause 6.2.3.2 (s) of Annex 10 to the LTE NSA.

<sup>76</sup> Clause 6.2.1 of Annex 10 to the LTE NSA.

<sup>77</sup> See for example Annex 9 ("Prices and cooperation principles") to the LTE NSA.

contractual terms of the NSAs], the NSAs foresee that [Information concerning contractual terms of the NSAs].<sup>78</sup>

- (116) The Commission preliminarily considered in the PA that, to the extent the agreed prices for network expansions exceed the underlying cost of providing the network upgrade that would have been incurred by the Visitor Operator if it were the Master Operator, the Visitor Operator's incentives to invest would be reduced.
- (117) In this respect, according to the Sharing Parties' reply to the Commission's request for information, it appears that network upgrades are indeed charged by the Master Operator to the Visitor Operator at a price that is higher than the underlying costs.
- (118) CETIN indicated that [Information concerning contractual terms of the NSAs]<sup>79</sup>
- (119) While the Sharing Parties argue that these charges do not include an economic profit above costs, the Commission considers that this pricing structure may lead to charges that are higher than the Master Operator's true incremental costs. In particular, the fact that charges to the Visiting Operator for an extra sector or an extra site include a portion of the overhead costs (e.g. general and administrative costs), as these are unlikely to be incremental to the additional sector/site added, can have a deterrent effect on requesting additional services from the Master Operator, as explained in more detail below (see paragraph (121) below). Similarly, as regards the extra charges related to the cost of capital, the NSAs and the Sharing Parties' reply to the Commission's RFIs do not specify on which basis is the level of the cost of capital calculated and what is the assets base on which the calculation of the cost of capital is based. More importantly, the fact that the cost of the new equipment required for unilateral upgrades is paid in full by the Visitor Operator can also have a deterrent effect on requesting additional services from the Master Operator.
- (120) In addition, given the fact that the agreed prices for network expansions are the same for CETIN and T-Mobile, it is very likely that for each type of network expansion at least one of CETIN or T-Mobile is providing the service at a charge that is above its underlying costs.<sup>80</sup> This is consistent with CETIN's reply to Q28 of RFI 9 of 23 May 2017: [Cost information].
- (121) As also noted by the Commission in the PA, an internal document of T-Mobile presenting a list of the charges by T-Mobile to CETIN for network upgrades reports that, for certain items provided by the Master Operator to the Visitor Operator (e.g. [Information concerning contractual terms of the NSAs]), the applicable charges are the underlying "real costs", while for other items (e.g. [Information concerning contractual terms of the NSAs]) the applicable charge is a specified fee for which the relation with the underlying direct incremental costs of the network upgrade is unclear. In fact, CETIN acknowledged that there is a mark-up, which is rather an indirect result of negotiations between T-Mobile and CETIN.<sup>81</sup>
- (122) Another concern about the Master/Visitor Operator relationship is the possibility that the charges by the Master Operator to the Visitor Operator for network upgrades be used to effectively transform costs that would be fixed on a standalone basis (that is, irrespective of the amount of customers or traffic volumes incurred by the operator)

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<sup>78</sup> Clause 2.9 of Annex 9 to the 2G/3G NSA; clause 2.10 of Annex 9 to the LTE NSA.

<sup>79</sup> CETIN's reply to Q28 of RFI 9 of 23 May 2017.

<sup>80</sup> Assuming that none of the Sharing Parties would agree to provide a network expansion to the Visitor Operator at a charge that is below costs.

<sup>81</sup> See CETIN response of 15 August 2018 to RFI 37 of 29 June 2018, question 10, page 15.

into costs that are variable. This would happen, for instance, if the prices charged by the Master Operator to the Visitor Operator for network upgrades are not in the form of a one-off payment but are rather based on the subscriber numbers or traffic volumes served by the Visitor Operator. The latter arrangement would be a concern because while fixed costs are unlikely to affect an operator's pricing, the variable costs form the basis on which a firm normally sets its prices. By making more costs variable compared to the cost structure of a stand-alone operator, the NSAs would be artificially increasing the variable costs of an operator, thereby making this operator less aggressive on the product market.

- (123) Based on the information available to the Commission, the charges currently agreed between the Visitor and the Master Operators do not appear to be contingent on the Visitor Operator's subscriber numbers or volumes (minutes, data, etc.) served. However, the NSAs allow the Sharing Parties scope for renegotiating the current terms and agree on commercial terms in the event the modification to the network that is requested by the Visitor Operator is not included amongst the agreed terms and conditions in Annex 9 to the LTE NSA. Without an explicit reference to a principle that all charges currently agreed and all charges agreed or renegotiated in the future will have to correspond to the cost incurred by the Master Operator to provide the service, there can be no certainty that the Visitor Operator's incentives to expand the network in the Master Operator's area mirror the incentives that the Visitor Operator would have if it were to roll-out the network on its own.
- (124) In view of the above, the Commission reached the preliminary conclusion in the PA that the NSAs created financial disincentives for the Sharing Parties to invest unilaterally on their separate networks, compared to the incentives that each MNO would have had on a stand-alone basis.

#### 4.4.2.2. Disincentives due to the information exchange

- (125) The Commission considers that the information exchange between the Sharing Parties in this case is linked to the NSAs and therefore the preliminary assessment of the information exchange should be carried out in the context of the assessment of the horizontal cooperation agreement itself.<sup>82</sup>
- (126) According to case-law, the exchange of market information may lead to restrictions of competition in particular in situations where it is liable to enable undertakings to be aware of market strategies of their competitors.<sup>83</sup> The Commission preliminarily considered in the PA that the information exchange between the Sharing Parties pursuant to the NSAs and the MNSA increased market transparency for the reasons set out below and thus disincentivated the Sharing Parties to engage in unilateral deployment and differentiate themselves on the basis of their network. This is because the detailed level, frequency and forward-looking nature of the information exchange allows the Sharing Parties to understand the commercial constraints and deduct the commercial policy of the other party, and thus deviate their own commercial plans by refraining from investing in unilateral deployment until they know the other party is doing so. As such, the NSAs and the MNSA have an adverse impact with regard to product quality, product variety and innovation on the retail and wholesale mobile telecommunications market.

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<sup>82</sup> Horizontal Guidelines, paragraph 56.

<sup>83</sup> *John Deere*, supra, paragraph 88.

### *Market characteristics*

- (127) The Commission first takes note of the characteristics of the market on which the information exchange takes place. In particular, and as described in Section 4.1 in more detail, the retail market for mobile telecommunication services in Czechia is highly concentrated, with the Sharing Parties being the largest MNOs on an only 3-player market. Consequently, the information exchange covers a large part of the relevant market.

### *Scope of information exchanged*

- (128) According to the NSAs, certain "*categories of information, particularly of technical nature, have to be shared or accessible*" between the Sharing Parties.<sup>84</sup> The NSAs also acknowledge that exchange of certain sensitive information may breach competition law, and, therefore, they include guidelines for the type of information which can be shared, as well as procedures and persons to whom the information exchanged should in principle be confined.
- (129) For some information, the NSAs provide an express prohibition on sharing it between the Sharing Parties ("Prohibited Information"). This refers to certain financial<sup>85</sup>, business<sup>86</sup> and technical<sup>87</sup> information.
- (130) Furthermore, the NSAs provide that "Commercially Sensitive Information" may be shared by the Sharing Parties to the extent which is necessary for the implementation of the network sharing. For this purpose, the NSAs qualify Commercially Sensitive Information mainly in relation to the following categories: [Information concerning contractual terms of the NSAs].<sup>88</sup>
- (131) However, certain other commonly sensitive information remains within the scope of sharing, such as data traffic exchange, traffic forecast, certain types of costs or details of relationships with suppliers, planned investments, cost, prices and revenues per customer and future business strategy.
- (132) Therefore, the Commission preliminarily considered in the PA that the scope of the information exchanged went beyond what was strictly necessary for the functioning of the NSAs and included strategic information that decreased the Sharing Parties' incentive to compete with each other by individualising their offers based on unilateral investments. In particular, the Commission considers that the granularity and forward-looking nature of the information exchanged restricted competition.
- (133) In particular, concerning (data and voice) traffic forecasts, the Visiting Operator has to provide regular traffic forecasts to the Master Operator for planning purposes. According to the NSAs: "*[Information concerning contractual terms of the NSAs]*".<sup>89</sup> This forms the basis for [Information concerning contractual terms of the NSAs]. As specified in the LTE NSA, "*[Information concerning contractual terms of*

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<sup>84</sup> Clause 10.1.3 of Annex 10 to the 2G/3G NSA; Clause 11.1.2 of Annex 10 to the LTE NSA.

<sup>85</sup> [Information concerning contractual terms of the NSAs] information such as [Information concerning contractual terms of the NSAs].

<sup>86</sup> Business information such as (i) future business strategy such as new products, new services, planned acquisitions; (ii) customer base and details of customer relationship; and (iii) identification of customers; information about market situation, e.g. new market entries.

<sup>87</sup> Technical information such as (i) key customers' sites data; and (ii) specific customer solutions.

<sup>88</sup> Clause 10.2.3 of Annex 10 to the 2G/3G NSA; Clause 11.2.2 of Annex 10 to the LTE NSA.

<sup>89</sup> Clause 4.4.5.4 of Annex 4 to the 2G/3G NSA; Clause 4.4.7.3 of Annex 4 to the LTE NSA.

*the NSAs]*".<sup>90</sup> The LTE NSA indicates that "[*Information concerning contractual terms of the NSAs]*".<sup>91</sup>

- (134) While the NSAs specify that the traffic forecasts provided "[*Information concerning contractual terms of the NSAs]*",<sup>92</sup> the Commission preliminarily considered that traffic forecasts unavoidably carried information on new investment plans to be adopted and thus allowed the Sharing Parties to benefit from such strategic information.
- (135) With regard to relationships with suppliers, the Commission preliminarily considered in the PA that it was not necessary for the proper functioning of the network sharing to share information on the Sharing Parties' sourcing strategies, let alone to align them. Indeed, one of the tasks of the [*Information concerning contractual terms of the NSAs]* (at the [*Information concerning contractual terms of the NSAs]* level), which is expressly specified in the NSAs<sup>93</sup> is to [*Information concerning contractual terms of the NSAs]*. Such alignment regarding supply strategy significantly decreases the Sharing Parties' ability to differentiate.
- (136) The Commission further notes that, as with traffic forecasts and details of relationship with suppliers, strategic information, such as planned investments, cost, prices and revenues per customer and future business strategy, are only categorised as Commercially Sensitive Information by the NSAs<sup>94</sup> and not as Prohibited information not to be shared. The Commission preliminarily considered that the sharing of such highly sensitive information was not only unnecessary for the technical functioning of the network sharing, but restricted competition by increasing the transparency regarding any present and future business strategy between two main competitors.

#### *Governance structure*

- (137) According to the Sharing Parties, the NSAs contain clear rules as regards the restricted number of persons from each Sharing Party who have access to the sensitive information under the NSAs and the ways to deal with it in a way in which no such information is passed on outside the restricted circle in order to influence the commercial strategies of the two main competing MNOs in the Czech market, T-Mobile and O2.
- (138) The "[*Information concerning contractual terms of the NSAs]*" included in the NSAs list the type of information which may be viewed as commercially sensitive and provide that this can only be shared to the extent strictly necessary for the implementation of the NSAs, only to the persons who "[*Information concerning contractual terms of the NSAs]*".<sup>95</sup> The format of exchanges has to be approved by the designated [*Information concerning contractual terms of the NSAs]* of the Sharing Parties.<sup>96</sup>
- (139) The principle is that information may only be circulated within a specific work stream [*Information concerning contractual terms of the NSAs]*.<sup>97</sup> Whenever

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<sup>90</sup> Clause 4.4.7 of Annex 4 to the LTE NSA.

<sup>91</sup> Clause 4.4.7 of Annex 4 to the LTE NSA.

<sup>92</sup> Clause 4.4.7.3 of Annex 4 to the LTE NSA; Clause 4.4.5.4 of Annex 4 to the 2G/3G NSA.

<sup>93</sup> Clause 6.2.3.2 of Annex 10 to the LTE NSA and to the 2G/3G NSA.

<sup>94</sup> Clause 11.2.2 of Annex 10 to the LTE NSA; Clause 10.2.3 of Annex 10 to the 2G/3G NSA.

<sup>95</sup> Clause 11.2.1 of Annex 10 to the LTE NSA; Clause 10.2.1 of Annex 10 to the 2G/3G NSA.

<sup>96</sup> Clause 11.4.1 of Annex 10 to the LTE NSA; Clause 10.4.1 of Annex 10 to the 2G/3G NSA.

<sup>97</sup> Clause 11.3 of Annex 10 to the LTE NSA; Clause 10.3 of Annex 10 to the 2G/3G NSA.

information needs to be circulated to another work stream or when [Information concerning contractual terms of the NSAs] information are deemed necessary to be exchanged in the network sharing framework, the [Information concerning contractual terms of the NSAs] has to approve it [Information concerning contractual terms of the NSAs], as well as [Information concerning contractual terms of the NSAs].<sup>98</sup>

- (140) The Sharing Parties furthermore commit to making all their representatives who work on network sharing undertake [Information concerning contractual terms of the NSAs] and further acknowledge [Information concerning contractual terms of the NSAs], by observing the "need-to-know" principle and the prohibition to exchange commercially sensitive information and, in this respect, [Information concerning contractual terms of the NSAs] joining the teams.<sup>99</sup>
- (141) However, the Commission preliminarily considered in the PA that the information exchanged regarding the network sharing was circulated to an unnecessarily large group of people within the Sharing Parties.
- (142) In this regard, the Commission first notes that the [Information concerning contractual terms of the NSAs] Level, as the highest governance level of the NSAs, comprises top and senior level representatives of both Sharing Parties.
- (143) The Commission preliminarily considered that the involvement of high-level managers in the management of the NSAs was not necessary for the functioning of the NSAs and the sharing of information between the Sharing Parties at this level significantly increased market transparency between the Sharing Parties.
- (144) Second, the Commission preliminarily considered that the NSAs did not prevent information spill-over to a sufficient degree as the work streams were not completely separated. [Information concerning contractual terms of the NSAs]<sup>100</sup> [Information concerning contractual terms of the NSAs]<sup>101</sup> [Information concerning contractual terms of the NSAs].<sup>102</sup>
- (145) Finally, the Commission preliminarily considered that the NSAs did not prevent non-technical staff from accessing information regarding the network sharing, which went against the [Information concerning contractual terms of the NSAs] "on the need-to-know basis" principle. As an example, [Information concerning contractual terms of the NSAs].<sup>103</sup>

*CETIN as a black box*

- (146) The Commission preliminarily took the view that the information exchange detailed above was not counterbalanced by the structural separation of O2 and CETIN as CETIN, O2 and PPF Group continued to constitute a single undertaking and CETIN – based on the provisions of the MNSA – does not function as a "black box".
- (147) In particular, the Commission considers that the fact that CETIN is obliged under the MNSA to inform O2 of [Information concerning contractual terms of the MNSA],<sup>104</sup>

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<sup>98</sup> Clause 11.4.2 of Annex 10 to the LTE NSA; Clause 10.4.1 of Annex 10 to the 2G/3G NSA.

<sup>99</sup> Clause 11.1.3 of Annex 10 to the LTE NSA; Clause 10.1.1 of Annex 10 to the 2G/3G NSA.

<sup>100</sup> Or upon specific request of one of the Sharing Parties (clause 8.2.3, Annex 10, 2G/3G NSA).

<sup>101</sup> Namely, the [Information concerning contractual terms of the NSAs].

<sup>102</sup> Clause 6.2.3.1 of Annex 10 to the LTE NSA and the 2G/3G NSA.

<sup>103</sup> Clause 6.2.2 of Annex 10 to the LTE NSA and the 2G/3G NSA.

<sup>104</sup> [Information concerning contractual terms of the MNSA].

[Information concerning contractual terms of the MNSA],<sup>105</sup> means that information on T-Mobile's planned investment would be disclosed to O2 as well.

### *Conclusion*

(148) Based on the above, the Commission preliminarily considered that the information exchange within the NSAs and the MNSA might have an adverse impact on the parameters of competition on the retail and wholesale mobile telecommunication market, in particular with regard to product quality, product variety and innovation.

#### *4.4.3. The competitive landscape in the absence of the agreements (counterfactual)*

(149) In accordance with settled case-law on assessing the potential anticompetitive effects, competition should be assessed within the actual context in which it would occur in the absence of the agreement in dispute<sup>106</sup> (the counterfactual).

##### *4.4.3.1. A realistic scenario without the agreements at issue*

(150) Under Article 101(1) TFEU, the Commission is required to define “*a realistic scenario without the agreement at issue*”.<sup>107</sup> Irrespective of the context or aim in relation to which a counterfactual hypothesis is used, it is important that that hypothesis is appropriate to the issue it is supposed to clarify and that the assumption on which it is based “*is not unrealistic*”. The Court of Justice also refers to “likely developments” that would occur in the absence of the agreements and to an “economically viable” and “plausible” hypothesis.<sup>108</sup>

(151) In the PA, the Commission preliminarily considered that a realistic scenario without the agreements at issue may have been for the Sharing Parties to deploy and operate their own networks independently and that this hypothesis is a “realistic”, “economically viable” and “plausible” hypothesis.

(152) First, as regards the 2G/3G technology, the Commission noted that the 2G/3G technology was already rolled-out independently by the Sharing Parties and the implementation of the 2G/3G NSAs meant that the two networks became consolidated. Had the agreements not been entered into, the Sharing Parties would not have consolidated their separate networks but would have maintained and operated them on a stand-alone basis. In addition, Vodafone, which is the third operator in the retail market, operates both its 2G and 3G network on a stand-alone basis.

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<sup>105</sup> [Information concerning contractual terms of the MNSA].

<sup>106</sup> Judgment of the Court of Justice of 11 September 2014, *MasterCard and Others v. Commission*, C-382/12 P, EU:C:2014:2201, paragraph 161, and judgments of the Court of 30 June 1966, *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)*, C-56/65, EU:C:1966:38, paragraph 250; judgment of the Court of 25 November 1971, *Béguelin Import Co. v S.A.G.L. Import Export*, C-22/71, EU:C:1971:113, paragraphs 16 and 17; judgment of the Court of 10 July 1980, *SA Lancôme and Cosparfrance Nederland BV v Etos BV and Albert Heyn Supermart BV*, C-99/79, EU:C:1980:193, paragraph 26; judgment of the Court of 11 December 1980, *NV L'Oréal and SA L'Oréal v PVBA "De Nieuwe AMCK"*, C-31/80, EU:C:1980:289, paragraph 19; judgment of the Court of 10 December 1985, *ETA Fabriques d'Ébauches v SA DK Investment and others*, C-31/85, EU:C:1985:494, paragraph 11; judgment of the Court of 21 January 1999, *Carlo Bagnasco and Others v Banca Popolare di Novara soc. coop. arl. (BNP)* (C-215/96) and *Cassa di Risparmio di Genova e Imperia SpA (Carige)* (C-216/96), Joined Cases C-215/96 and C-216/96, EU:C:1999:12, paragraph 33 and the case-law cited therein; and also judgment of the Court of 6 April 2006, *General Motors v Commission*, EU:C:2006:229, paragraph 72).

<sup>107</sup> *MasterCard*, supra, paragraph 166.

<sup>108</sup> *MasterCard*, supra, paragraphs 108, 166 and 173.

- (153) Second, as regards the 4G technology, in the PA, the Commission noted that each party had an individual obligation to roll-out 4G/LTE nationwide due to the spectrum auction licence conditions. Vodafone also had individually undertaken to roll-out LTE networks as a result of the spectrum auctions and was able to roll-out individually an LTE network of comparable capacity and number of sites.
- (154) Third, in the PA, the Commission noted that O2's and T-Mobile's internal documents show independent deployment plans prior to the conclusion of the NSAs. They appear to indicate that, in the absence of the NSAs, [Information concerning network deployment strategies].<sup>109</sup>
- (155) Fourth, there are multiple examples of independent deployment in other countries,<sup>110</sup> and of Vodafone in Czechia.
- (156) Finally, recent evidence shows that deployment and maintenance costs of mobile networks in Czechia are not disproportionately high in comparison to other Member States.<sup>111</sup>
- (157) Therefore, in the PA, the Commission considered that the Sharing Parties would have been capable of rolling-out their networks on a stand-alone basis.
- (158) Moreover, in the context of a counterfactual analysis the Commission may rely on counterfactual hypotheses or realistic situations that might arise and are less restrictive of competition than the conduct in question.<sup>112</sup>
- (159) A realistic scenario without the NSAs under investigation could have also entailed less restrictive forms of collaboration, such as: (i) passive sharing,<sup>113</sup> (ii) collocation or site sharing,<sup>114</sup> (iii) geographically more limited active sharing,<sup>115</sup> or (iv) active sharing with less restrictive conditions, allowing the Sharing Parties more freedom to unilaterally deploy capacity without any technical, financial or information exchange hurdles.

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<sup>109</sup> In 2008, before setting up the NSA, when T-Mobile was discussing its LTE strategy for 2009-2022, it notes that "*Czech mobile data market is changing due [Information concerning network deployment strategies]*"- T-Mobile response of 19 June 2017 to RFI 8 of 23 May 2017.

<sup>110</sup> Telecoms operators are successfully operating without active network sharing in the Netherlands, Estonia and Malta for instance. Even in cases where there is 2G/3G network sharing already in place, 4G may still be deployed independently (Greece, Sweden, France).

<sup>111</sup> The public results of the Commission's *Mobile Cost Model for Roaming and the Delegated Act on a Single EU-wide Mobile Voice Call Termination* show that from 2015 to 2025, the hypothetical efficient operator in Czechia would have costs lower than EU average for data and SMS roaming, higher than EU average for voice roaming and mixed for voice termination.

<sup>112</sup> *MasterCard*, supra, paragraphs 109 and 111.

<sup>113</sup> There are several examples in the EU of passive sharing without active sharing - e.g. Vodafone and Movistar in Spain, CYTA and Epic in Cyprus, Eircom and Three in Ireland, etc.

<sup>114</sup> Vodafone has entered into some limited site-sharing arrangements with T-Mobile and O2/CETIN in 2000 (Vodafone's follow-up letter of 27 November 2015). A presentation by Telefónica (now O2) also indicates that [Information concerning network deployment strategies] (O2 response of 3 July 2017 to RFI 10 of 23 May 2017, "LTE workshop Slough-TO2 CZ.pptx", slide 31: "[Information concerning network deployment strategies]").

<sup>115</sup> There is geographically limited active sharing in France, Spain, the UK, Italy, etc. Also, in the initial stages of discussing a potential network sharing cooperation (starting with 3G which was an innovative technology at the time), the Sharing Parties considered that it should [Information concerning network deployment strategies]. In a presentation of 13 December 2010 to the European Commission, the Sharing Parties mentioned that [Information concerning network deployment strategies] ("*Presentation for the European Commission. 13 December 2010. Proposed Network Sharing Agreement in the Czech Republic*").



- (160) The Sharing Parties themselves recognised that in the absence of the agreements at issue, they would probably have put less far-reaching arrangements in place, although without describing the forms of cooperation they would have entered into.
- (161) The Commission is not required to define, in a precise way, where market forces would have led the Sharing Parties in the absence of the agreements.<sup>116</sup> Considering that if the Sharing Parties would not have entered into such agreements, they might have chosen less restrictive forms of cooperation or they might have not cooperated at all, it cannot be required of the Commission to describe the one and only scenario that would have unfolded as regards the precise form of cooperation or scope. It should therefore be sufficient for the Commission to prove that the Sharing Parties could viably and plausibly operate on the market without the current active sharing agreements<sup>117</sup> and to compare the competitive structure introduced by the agreements with a plausible one that would have prevailed in its absence.<sup>118</sup>

#### 4.4.3.2. The competitive situation in the absence of the agreements as they stand

- (162) On the basis of the case law, and in particular Case T-691/14 *Servier v Commission*, the Commission must show — by a comparison between the competition that existed when the agreement was in force and the competition that would likely have occurred if that agreement had not been concluded — that the competitive situation was “worse” when that agreement was in force.<sup>119</sup>
- (163) In accordance with *Servier*, the requirement of likelihood and realism applying to the description of the competition that would have occurred had an agreement not been concluded refers to establishing the “sufficiently likely nature” of the restrictive effects of the measures in question; the General Court confirmed the Commission’s approach that restrictive effects on competition must be established with a “sufficient” degree of probability”.<sup>120</sup> The Guidelines on the application of Article 101(3) TFEU and the Guidelines on horizontal cooperation agreements refer to a “reasonable degree of probability” for finding restrictive effects.<sup>121</sup>
- (164) The Commission analyses, in the context of the actual legal and economic context in which competition would occur in the absence of the agreements as they stand, those competition parameters which are relevant in the case at hand, as they are affected by the competition concerns put forward, such as capacity, and innovation.
- (165) At the same time, in the context of the examination of the likely effects of agreements at issue the Commission should not be required to quantify in an objective manner the degree to which the agreements at hand are harmful to competition in order to show a restriction of competition.<sup>122</sup>

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<sup>116</sup> *MasterCard*, supra, paragraph 99. In the same sense, see the Opinion of AG Mangozzi in *MasterCard*, paragraph 53 – “it cannot be required that proof be adduced that the scenario used in the context of that assessment will inevitably arise in the absence of the presumed restriction” (EU:C:2014:42).

<sup>117</sup> *MasterCard*, supra, paragraphs 111 and 173.

<sup>118</sup> Judgment of the Court of First Instance of 2 May 2006, *O2 (Germany) GmbH & Co. OHG v Commission of the European Communities*, T-328/03, EU:T:2006:116, paragraph 74; Opinion of AG Mangozzi in *MasterCard* (paragraphs 52 and 53, EU:C:2014:42).

<sup>119</sup> Judgment of 12 December 2018, *Servier and Others v Commission*, T-691/14, EU:T:2018:922, paragraph 1076; *O2 (Germany)*, supra, paragraph 71 and paragraph 29 of the Horizontal Guidelines. *Servier*, supra, paragraphs 1134 to 1138.

<sup>121</sup> Paragraph 24 of the Guidelines on the application of Article 101(3) TFEU and paragraph 28 of the Horizontal Guidelines.

<sup>122</sup> According to the General Court the examination of a hypothetical counterfactual scenario is more an examination of the effects of agreements at issue on the market than “an objective examination of

- (166) Moreover, the comparison between the counterfactual and the actual situation in terms of efficiency gains, i.e. of the pro- and anti-competitive effects of the agreements, is to be undertaken under Article 101(3) TFEU.<sup>123</sup>
- (167) In this case, in the absence of the NSAs, when making their unilateral roll-out plans neither of T-Mobile and O2/CETIN would take the interests of their competitor into account. As a result, and in the absence of efficiencies, there is a sufficient and/or reasonable degree of probability that they would have greater ability and incentives to undertake unilateral investments in particular in capacity in the absence of the agreements as they stand. They would therefore in all likelihood choose a level of investment that is higher than in the case in which they enter into an NSA, resulting in more competition with respect to the introduction of new technologies, geographical expansion of the network, the improvement of network quality and improvements or upgrades in the medium and long term.
- (168) As indicated in section 4.4.1.2, in the PA, the Commission preliminarily considered that, in the absence of the agreements as they stand, T-Mobile would have been able to deploy LTE2100 in CETIN's area as well, not only in the Western part of the country, where T-Mobile is the Master Operator, and therefore would not have been held back from its technological expansion in the Eastern part of Czechia. In the absence of the NSAs, there is a reasonable degree of probability that the Sharing Parties would have been able to deploy capacity on a wider scale.
- (169) Also, other less restrictive forms of cooperation, such as passive sharing, would not have resulted in such hold-back issues, as passive sharing would have allowed T-Mobile to deploy independently LTE2100 throughout the entire territory of Czechia. A more geographically limited active sharing or active sharing with less restrictive conditions allowing the Sharing Parties more freedom to unilaterally deploy capacity without any technical constraints would have also allowed T-Mobile to deploy more extensively its LTE2100.
- (170) Moreover, in the absence of the NSAs as they stand the Sharing Parties would have no financial disincentives to unilaterally deploy, as that would be at cost, while in accordance with the current financial arrangements, a Sharing Party would pay a margin to the Master Operator for such a deployment in the area where that Sharing Party is a Visitor Operator (see section 4.4.2.1).
- (171) As regards the exchange of information, this goes beyond what is necessary for the purposes of the NSAs and of the MNSA. The current scope of information exchanged and the current range of recipients needlessly increases transparency on the market, and disincentivises unilateral deployment by the Sharing Parties (see section 4.4.2.2). In the absence the NSAs and MNSA, as they stand, there would be less transparency and therefore less disincentives for the Sharing Parties to proceed to unilateral deployments.

#### 4.4.3.3. Conclusion

- (172) On the basis of all the above, the Commission preliminarily concluded that, in the absence of the NSAs, the Sharing Parties might have operated their own independent active and passive infrastructure throughout Czechia. In the absence of the NSAs and the MNSA as they stand, T-Mobile and CETIN/O2 might have also entered into

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*whether they are sufficiently harmful to competition*" ( judgement of the General Court of 8 September 2016, *Lundbeck v Commission*, T-472/13, EU:T:2016:449, paragraph 473).

<sup>123</sup> *O2 (Germany)*, supra, paragraph 69; and paragraph 29 of the Horizontal Guidelines.

other less restrictive forms of collaboration, such as passive sharing, more geographically limited active sharing or active sharing with less restrictive conditions allowing the Sharing Parties more freedom to unilaterally deploy capacity without any technical, financial or information exchange hurdles.

- (173) After a preliminary assessment of the impact of the agreements on competition and the competition situation in the absence of the agreements, the Commission preliminarily considered that the competitive situation might likely be worse in the presence of the agreements as they stand than in their absence.

#### **4.5. Application of Article 101(3) TFEU**

- (174) In accordance with Article 101(3) TFEU and also with the Guidelines on the application of Article 81(3) (now 101(3)) of the Treaty,<sup>124</sup> the application of the exception rule of Article 101(3) is subject to four cumulative conditions:

- (a) the agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress;
- (b) consumers must receive a fair share of the resulting benefits;
- (c) the restrictions must be indispensable to the attainment of these objectives; and
- (d) the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

- (175) According to Article 2 of Regulation (EC) No 1/2003, the burden of proof under Article 101(3) TFEU rests on the undertaking(s) invoking the benefit of the exception rule.<sup>125</sup>

- (176) It is not contested that NSAs may generate potential efficiencies. Sharing two mobile networks<sup>126</sup> can take the form of consolidating and sharing two separate existing networks (as was the case for the 2G/3G NSA) or joint deployment of a new technology (as was the case for the LTE NSA). Both network consolidation and joint network deployment have the potential to generate savings for operators in terms of CAPEX<sup>127</sup> and OPEX.<sup>128</sup>

- (177) Putting to one side any anticompetitive effect, as a consequence of these cost savings, and depending on the nature of the agreement and nature of these cost savings, as well as the competitive conditions and structure on the market, MNOs sharing a network may have an incentive to maintain or build a better network compared to a stand-alone scenario. Alternatively, operators may simply decide to build a similar network to the one that they would have built on a stand-alone basis (i.e. without Multi-Operator RAN (“MORAN”) sharing) and instead keep the cost savings in the form of increased profits.

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<sup>124</sup> Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, p. 97, paragraph 34).

<sup>125</sup> Guidelines on the application of Article 81(3) of the Treaty, *supra*, paragraph 41.

<sup>126</sup> In this section, a generic reference to network sharing is intended to relate to MORAN sharing.

<sup>127</sup> Capital expenditure is funds used by a company to acquire or upgrade physical assets such as property, industrial buildings or equipment. It is often used to undertake new projects or investments by the company.

<sup>128</sup> Operating Expense is a category of expenditure that a company incurs as a result of performing its normal business operations.

- (178) The qualitative benefits of MORAN sharing<sup>129</sup> may include improved geographic and population coverage, faster deployment and improved service quality (e.g. increased capacity available for consumers). However, if and to the extent these qualitative benefits stem directly from cost savings, considering both types of benefits would amount to double counting of the beneficial effects of the agreements. If, however, there is an alternative channel that generates these qualitative benefits then they should also be taken into account.
- (179) The Commission examined the arguments put forward by the Parties, claiming that the NSAs bring: (i) price reductions due to cost savings, (ii) faster deployment of 4G/LTE networks, and (iii) better coverage, speeds and other mobile network characteristics.
- (180) The Commission preliminarily considered in the PA that the efficiency claims did not meet the conditions of Article 101(3) TFEU. In particular, the Commission considered that a very large part of the cost savings claimed by the Parties as efficiencies were fixed costs related to coverage obligations, which would have been incurred under any scenario irrespective of the underlying costs. These costs savings are unlikely to alter the Sharing Parties' behaviour and therefore benefit consumers in terms of lower prices and/or increased investment.
- (181) As regards the qualitative efficiencies put forward by the Parties, the Commission preliminarily considers, as found in the PA, that in this specific case the evidence available does not allow one to conclude that active sharing has led to appreciable objective quality improvements compared to less restrictive forms of cooperation (e.g. passive sharing).

## 5. INITIAL COMMITMENTS

- (182) The key elements of the Initial Commitments offered by the Parties on 15, 16 and 17 September 2021 were as follows:
- Network Modernization Commitment - deployment of multi-standard Radio Access Network ("RAN") equipment in the Mid-Band layers (1800 MHz and 2100 MHz): existing equipment, including both hardware and software, on all existing sites where, by the end of March 2021, at least one Mid-Band layer has been active, will be replaced in order to be able to support both 4G and 5G operations in the Mid-Band layers. The upgrade of the existing hardware will enhance the capabilities of the RAN in the deployment of capacity layer bands, since *inter alia* the existing hardware supports the operation of LTE2100 only to a limited extent. This Network Modernisation Commitment will occur within [Less than 5 years] months after the Commencement Date.<sup>130</sup>
  - Financial Commitment - setting and review of the financial conditions for unilateral deployments - cost-based pricing for any investments demanded by the Visitor Operator from the Master Operator.

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<sup>129</sup> The Commission notes that the fact that certain benefits may be generated by MORAN sharing does not imply that MORAN sharing is indispensable to achieve those benefits (e.g. lighter forms of sharing may have the capacity to generate the same or most of the benefits of MORAN sharing).

<sup>130</sup> Commencement Date means the date on which the Sharing Parties are notified by the Commission of the adoption of the final decision accepting these commitments pursuant to Article 9 of Regulation (EC) No 1/2003 and closing case AT.40305.

- Information Exchange Commitment - improvement of the NSAs' contractual provisions as regards information exchange - contractual changes to limit information exchange:
  - streamline the governance structure involved in information exchange: remove one of the levels of the governance structure, limit working groups to technical staff only (involving non-technical staff only to the extent objectively necessary and under defined rules for their participation), working groups to be staffed on a need-to-know basis, and limit meetings of the working groups;
  - limit the information exchanged: update and refine the list of categories of information that can be exchanged within each respective working group, specify which information may be handed out to the non-technical staff, commercially sensitive information to be classified as prohibited information, explicitly prohibit the exchange of capacity forecasts and traffic forecasts, remove the obligation to annually discuss changes of certain conditions of the NSAs;
- MNSA Commitment - measures to ensure that CETIN acts as a “black box” between T-Mobile and O2:
  - specify how CETIN is to treat O2 under the MNSA compared to T-Mobile under the NSAs;
  - ensure that CETIN does not inform O2 about or pass on or otherwise automatically make available to O2 commercially sensitive information;
  - ensure that CETIN is not constrained by O2 in changing the design and composition of the mobile network.

(183) Furthermore, the Initial Commitments stipulate that an independent Monitoring Trustee shall be appointed in order to monitor the Sharing Parties' compliance with the Commitments.

(184) The Sharing Parties and the parent companies offered to keep the Commitments with regard to the NSAs in force until 28 October 2033. The Commitments with regard to the MNSA would remain in force for a period corresponding to (i) the term of the MNSA or (ii) the term of the NSAs whichever of those terms ends earlier.

## **6. COMMISSION NOTICE PURSUANT TO ARTICLE 27(4) OF REGULATION (EC) NO 1/2003**

(185) In response to the publication on 1 October 2021 of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003, the Commission received nine responses from interested third parties. The respondents generally welcomed the proposed Initial Commitments, which they believed would address the concerns expressed by the Commission. Only two of the nine responses considered the Initial Commitments insufficient. Those two responses are explained in more detail below.

### **6.1. Respondents' view on the Commitments**

#### *6.1.1. Vodafone's view on the Commitments*

(186) Based on the information published in the Market Test Notice, Vodafone submits that the Initial Commitments are not adequate to create network competition between the Sharing Parties going forward or address the anti-competitive effects the network sharing has had on competitors such as Vodafone as the only external network

constraint. Vodafone further submits that the Initial Commitments will not resolve the technology hold-back issue targeted by the Network Modernisation Commitment in particular.

(187) With regard to the suitability of the Initial Commitments to allay the Commission's competition concerns as set out in the PA, Vodafone took issue in particular with the following elements:

- Vodafone considers that the Network Modernisation Commitment does not remedy the general technology hold-back concerns identified by the Commission, especially on a forward-looking basis. This is – according to Vodafone – because the “hold-back” of the Visitor Operator by the Master Operator does not only occur in capacity layer deployment, but could also take place regarding other radio network innovations, features and services, especially in relation to forthcoming technologies such as the 5G network slicing. In particular, Vodafone suggested that the proposed Initial Commitments should prevent the Parties from holding back the other's upgrades as the market moves to 5G, and therefore should also cover the most important spectrum bands for 5G (i.e. the 700 MHz and the 3.5-3.7 GHz bands). Moreover, the Commission would need to broaden the Network Modernisation Commitment into a more general obligation to refrain from any behaviour that has the equivalent object or effect of restricting the ability of a Party to individually decide how, where and when to deploy or activate a specific access technology;
- according to Vodafone, the acceptance of the Initial Commitments would create a clear inconsistency with the Commission's conclusions in the Italian network sharing case (case M.9674 – *Vodafone Italia/TIM/Inwit JV*), where only less geographically extended network sharing was permitted. Vodafone therefore suggested that a commitment to unwind part of the existing shared grid in large Czech cities is needed.<sup>131</sup> Otherwise, more extensive sharing in large cities, including in 5G, would constitute the base of a formal and legally binding decision and set a new and more permissive bar for future sharing;
- in relation to the Financial Commitment, Vodafone takes the view that, given the limited information on the existing financial model, it is difficult to comment in detail and determine whether it will actually incentivise the Visitor Operator to pursue unilateral deployment in the visited area, but considers that this should improve those incentives. However, changing the financial model is in its view clearly insufficient;
- as regards the Information exchange Commitment, Vodafone considers that protocols to limit information exchange are intrinsic to any network sharing arrangement to reduce the risk of coordination and spillover effects. However, they cannot cure the underlying theory of harm of technology hold back in this case;
- as regards spectrum sharing, Vodafone concludes that the Initial Commitments exclude spectrum sharing from any ongoing sharing that the Initial

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<sup>131</sup> According to Vodafone's presentation slides prepared for the Oral Hearing, Document ID 3017, the unwinding of part of the network should specifically consist in: (i) excluding significantly more than 30% of the population as was done in the aforementioned Italian network sharing agreement; and (ii) the geographic unwind which should cover 5G, 4G and active fibre backhaul.

Commitments may facilitate, but Vodafone considers that this should be clarified.

- (188) Lastly, Vodafone notes that there is no commitment regarding mobile backhaul, which is another important element in the sharing and which, in Vodafone's opinion, has resulted in anti-competitive effects.

6.1.2. *CTU's view on the Initial Commitments*

- (189) In its response to the market test, CTU expressed concerns regarding the NSAs' effect on competition in the Czech mobile market. Specifically, CTU argued that the lack of competition at the wholesale level and the associated inability of MVNOs to provide competitive retail offers in the market is due to the negative effects of the NSAs. According to CTU, this lack of competition results in higher retail prices for the Czech consumers.

- (190) Therefore, CTU does not agree with the proposed Initial Commitments, as it considers that they do not respond to the competition concerns that, in CTU's view, stem from the NSAs. CTU therefore would consider as appropriate the following two additional commitments:

- (a) wholesale access commitments: the Sharing Parties would have to publish a reference wholesale access offer with prices regulated based on margin squeeze test. CTU proposed a duration of this commitment corresponding to the duration of the NSAs and designated as eligible access seekers MNOs with capacity spectrum holdings and MVNOs not partly/wholly owned by the Sharing Parties;
- (b) divestment commitment: limiting information exchange and coordination on a market by selling a controlling stake of companies operating a shared network, in particular CETIN.

- (191) Following further discussions with the Commission, on 17 January 2022, CTU modified its views as to what it would consider as appropriate commitments, by suggesting to add:

- (a) a transparency clause obliging the Sharing Parties to submit certain information to CTU, e.g. any shared information (similar to all interconnection agreements, relevant corporate documents such as the governance structure, information about staff active in the relevant groups, rules concerning information sharing); and
- (b) a new obligation for the Sharing Parties to allow passive (including antennas) as well as active (multi-standard) sharing with other MNOs through a wholesale offer. CTU argued that new MNOs, which acquired spectrum holdings in the 3.4-3.8 GHz frequency band, are entering the market and, according to CTU, are facing serious obstacles in collocation negotiations with the Sharing Parties, which in turn restricts competition and innovation.

- (192) On 14 April 2022, CTU took the view that the Initial Commitments do not address the competition concerns that CTU referred to as resulting from the NSAs (such as high prices) and maintained its view as to what it would consider as appropriate commitments in the present case.

### 6.1.3. Other respondents to the market test

(193) The other respondents were network operators from several Member States and MVNOs hosted by the Sharing Parties as well as by Vodafone. These respondents were favourable towards the proposed Initial Commitments and were of the opinion that they are sufficient to address the Commission's concerns as expressed in the PA. They described the perceived positive effects of network sharing agreements (cost savings, faster roll-out, lower environmental impact, etc.) and appreciated more guidance from the Commission in assessing network sharing agreements. Some respondents stated that the quality of the Czech mobile network infrastructures is high and that network sharing is needed to lower the costs of the operators.

## 6.2. The Commission's assessment of the Initial Commitments in light of the comments from third parties during the Market Test

(194) The Commission welcomes the view of the majority of the respondents that the Initial Commitments are sufficient to address the Commission's preliminary competition concerns.

(195) As regards Vodafone's concerns that the Network Modernisation Commitment is not sufficiently forward looking, in that similar "hold-back" issues to the LTE2100 MHz could arise in future in respect of other frequencies or radio network innovations, features and services (including network slicing), the Commission has not investigated, nor does it have any evidence or indicia that such hold-back issues in respect of specific technologies in future are likely to take place. Even if such hold-back could in theory be possible, commitments cannot cater for every hold-back possibility. However, the Commission's preliminary findings (addressed by the Commitments) can act as guidance going forward for the Sharing Parties. The Sharing Parties are well aware, as a result of the Commission's preliminary assessment in this case, that were one of the Sharing Parties to "hold-back" the other technologically, this would likely raise competition concerns.

(196) As regards the CTU's reply to the Market Test, as a preliminary observation, the Commission notes a substantial change in CTU's position regarding network sharing (as previously expressed for example in *Opinion of CTU on network sharing of 2G, 3G, and 4G* of September 2015<sup>132</sup> or *Three Criteria Test for Mobile Service Market* (Article 7 notification of June 2019)<sup>133</sup>). In the last document, CTU considered that *"One of the effects of sharing networks may thus also be the increasing intensity of competition on the retail market. One may observe these facts today in the quality of coverage of the territory of the Czech Republic by 4G networks [...] which was achieved faster than according to obligatory development criteria, the speed of introduction of new services and technologies [...], as well as the changing market shares according to the number of SIM cards of individual providers."*

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<sup>132</sup> "Based on the analysis of [the above-mentioned] risks, CTU has not identified any significant risk that could lead to significant distortions of competition in the short term": *Opinion of CTU on network sharing of 2G, 3G, and 4G*, page 9, online, available at: [https://www.ctu.cz/cs/download/aktualni\\_informace/stanovisko\\_ctu\\_sdileni-siti\\_2g-3g-4g\\_04\\_09\\_2015.docx](https://www.ctu.cz/cs/download/aktualni_informace/stanovisko_ctu_sdileni-siti_2g-3g-4g_04_09_2015.docx)

<sup>133</sup> "Sharing networks may thus be beneficial for end users, which may bring a growth in satisfaction. Sharing networks may also create pressure on the uninvolved operator, in our case Vodafone, and force it to greater efficiency or faster innovations when offering its services to the benefit of users": *Three Criteria Test for Mobile Service Market*, page 68.



- (197) More importantly, the Commission observes that the competition concerns that CTU put forward, in its reply to the Market Test in relation to high prices at retail level and inability of MVNOs to compete due to tacit coordination at wholesale level, are new and different from the competition concerns that the Commission identified in the PA. Indeed, the Commission notes that its preliminary antitrust concerns focus on the Parties' reduced flexibility and lack of incentives for independent deployment of infrastructure, which may limit innovation and therefore restrict competition at wholesale and retail level on parameters other than price (e.g. quality and innovation).
- (198) The Initial Commitments offered by the Parties are therefore intended to solve other preliminary competition concerns than the concerns expressed by CTU. CTU's conclusion that the proposed Initial Commitments do not solve competition concerns such as high prices or tacit coordination are therefore not related to the preliminary concerns as expressed by the Commission in the PA. The commitments cannot be expected to solve concerns other than those expressed by the Commission in its PA.
- (199) Moreover, the Commission notes that on 18 November 2021, CTU notified draft measures concerning the wholesale market for access to mobile services in Czechia, in which CTU argued that retail prices for consumers are particularly high, the market is susceptible to *ex ante* regulation and that the three MNOs (T-Mobile, O2 and Vodafone) hold a position of joint significant market power on the wholesale market. CTU proposed a full set of regulatory remedies, including an obligation to provide price-regulated wholesale access to MVNOs. On 20 December 2021, the Commission informed CTU of its serious doubts as to the compatibility of the draft measures related to the notified market with Union law and on 17 February 2022, the Commission adopted a veto decision pursuant to Article 32(6) of Directive (EU) 2018/1972. As already explained above, commitments are not meant to address other alleged competition concerns than those expressed by the Commission in the PA and in particular, not the alleged concerns identified by the CTU which could not be addressed by the CTU through regulatory measures.
- (200) As regards Vodafone's comments regarding the Financial Commitment, the Commission welcomes Vodafone's general view that it should improve the incentives of the Visiting Operator to unilaterally invest in the visited area.
- (201) As regards Vodafone's comments that the Information Exchange Commitment would not solve the technological hold-back concern as such, the Commission considers that the Information Exchange Commitment would reduce the disincentives for the Sharing Parties to engage in unilateral deployment arising from market transparency. The technological hold-back issues would be solved by the Network Modernisation Commitment.
- (202) As regards Vodafone's comments regarding spectrum sharing, the Commission notes that, as a part of the Initial Commitments, the Sharing Parties offered to remove the reference to the possibility of potential cooperation in the area of spectrum sharing<sup>134</sup>. The Initial Commitments do not prevent pooling of spectrum. However, were that to happen, the NSAs would change in their scope and character and would no longer be covered by Article 9 decision given that the Commission's assessment is based on the scope of the NSAs as they are currently in place.

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<sup>134</sup> NSAs Commitments, point 4.1, Section "*Update or remove NSAs provisions referring to specific information exchanges*".

- (203) After the market test, the Parties provided an additional commitment not to extend the geographical scope of the current NSAs to Prague and Brno (“the Prague and Brno Commitment”), which would remain in force until [End date within 7-10 years]. The Initial Commitments, together with the Prague and Brno Commitment are referred to as the “Revised Commitments”.
- (204) Finally, on 3 and 8 June 2022, the Parties submitted Final Commitments which are the same as the Revised Commitments with one clarification as to the implementation period of the Network Modernization Commitment.<sup>135</sup>

## **7. APPROPRIATENESS AND PROPORTIONALITY OF THE FINAL COMMITMENTS**

### **7.1. Principles**

- (205) It follows from Article 9 of Regulation (EC) No 1/2003 that the Commission may, in cases where it intends to adopt a decision requiring that an infringement be brought to an end, make the commitments offered by the undertakings concerned binding, where they address the competition concerns expressed by the Commission in its preliminary assessment.
- (206) In the context of Article 9 of Regulation (EC) No 1/2003, application of the principle of proportionality entails, first, that the commitments in question address the concerns expressed by the Commission in its PA and, second, that the undertakings concerned have not offered less onerous commitments that also address those concerns adequately.<sup>136</sup> When carrying out that assessment, the Commission must take into consideration the interests of third parties.<sup>137</sup>

### **7.2. Application in this case**

- (207) The Final Commitments are sufficient to address the concerns identified by the Commission in its PA.
- (208) As regards the Network Modernisation Commitment, first, the Commission considers that this Commitment addresses its concerns with regard to LTE2100 hold-back effect identified as an actual anti-competitive effect of the NSAs. This is because the Sharing Parties would, following the Final Commitments, have the ability to roll-out the LTE 2100 MHz band throughout the territory of Czechia.
- (209) Second, the Commission considers that the Network Modernisation Commitment addresses the concerns raised regarding the capacity extensions on 1800 MHz spectrum band, as the Sharing Parties would be able to add this band without any major installations and/or modifications on the sites covered by the Network Modernisation Commitment.
- (210) Third, the Commission considers that the Network Modernisation Commitment would enhance the Sharing Parties’ ability and incentives to invest unilaterally, as the new hardware pre-installations would provide an increased level of flexibility for

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<sup>135</sup> In the Initial (and Revised) Commitments, the starting date of the implementation period of the Network Modernisation Commitment was the Commencement Date, corresponding to the notification of the Decision, provided that the notification of the Decision occurred by 30 June 2022. This conditional starting date of the implementation period was deleted from the Final Commitments. Moreover, the Parties changed the implementation period from a [Less than 5 years] period to the corresponding number of months after the Commencement Date ([Less than 5 years] months).

<sup>136</sup> *Commission v Alrosa*, supra, paragraph 41.

<sup>137</sup> *Commission v Alrosa*, supra, paragraph 41.

both Sharing Parties in deploying capacity more efficiently and independently from each other using the mid-band layers.

- (211) Moreover, given the eligibility modernisation criterion for sites (at least one of the Mid-Bands is already deployed on the mobile site), the Network Modernisation Commitment ensures that the vast majority of sites in the larger cities will be eligible for an upgrade.<sup>138</sup> That indicates that more densely populated areas will benefit proportionally more from the Network Modernisation Commitment, providing for increased individual technical flexibility of the Sharing Parties. The Commission considers that this is reinforced even more by the Prague and Brno Commitment which would address potential concerns relating to a possible geographical expansion of the NSAs going forward, also given that one of the factors that has been considered in the PA is the geographical scope of the network sharing, with the densest areas of the country, i.e. Prague and Brno, being left out of the cooperation. The Commission notes that CTU welcomed the introduction of the Prague and Brno Commitment.
- (212) As regards Vodafone's argument that a commitment to unwind active sharing in large cities is needed, the Commission notes that Vodafone's comments rely heavily on network sharing arrangements between TIM and Vodafone in Italy. At the same time as assessing the Inwit JV (see case M.9674 - *Vodafone Italia/TIM/Inwit JV*), the Commission considered potential competition concerns that could arise from that network sharing agreement. In order to address any potential concerns, TIM and Vodafone voluntarily decided to scale down their planned active network sharing by enlargening the areas that were excluded from the scope of the network sharing. Ultimately, the excluded area corresponded to over 30% of the Italian population and more than 33% of data traffic.<sup>139</sup>
- (213) That network sharing agreement and the surrounding assessment, however, differs from the situation in the current Czech network sharing case. The Commission analyses network sharing agreements on a case-by-case basis. Moreover, given the variety of factors (geographic scope of the sharing, scope of services/technologies shared, identity of the Sharing Parties and country-specific competitive conditions, e.g. number of operators in the market, their shares, closeness of competition between the Sharing Parties, competitive pressure exerted by other, players, etc.) which need to be assessed, a case-by-case assessment should remain the default assessment option for the Commission.
- (214) First, the market circumstances and especially the nature of the agreements in question are different. The Italian NSA mainly concerns the joint 5G roll-out of the two strongest mobile operators in Italy, in terms of 5G spectrum holdings. By contrast, the Czech NSAs' scope is limited to 2G, 3G and 4G in a market with less concentrated spectrum holdings.
- (215) Second, the Commission only summarily assessed the Italian network sharing agreement in the context of the simultaneous merger review of the Inwit JV transaction. No antitrust procedure was opened and the Commission did not express any view, not even in the form of a preliminary assessment, on possible antitrust concerns raised by the network sharing agreement. The Commission merely noted in the press release accompanying the merger clearance that, at that point of time, the

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<sup>138</sup> See section 5 describing the proposed Commitments.

<sup>139</sup> Mergers: Commission clear acquisition of joint control over INWIT by Telecom Italia and Vodafone, subject to conditions, available here: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_414](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_414)

setup of the network sharing agreements as adjusted during the merger review, along with the fact that with five mobile network operators the Italian telecommunication markets were considered less concentrated than in other Member States, would seem to alleviate any possible antitrust concerns which could stem from the network sharing agreements between Telecom Italia and Vodafone in Italy.

- (216) The Commission considers therefore that a similar commitment would be unnecessary and disproportionate in this case, based on the evidence gathered, as the Parties presented less onerous commitments addressing the potential competition concerns expressed in the PA – that is the Network Modernisation Commitment (see section 5 above). Moreover, a commitment to unwind the network sharing in the larger cities would only partially address the Commission’s preliminary competition concerns, which cover in fact the whole territory of the NSAs.
- (217) With regard to the wholesale access commitment suggested by CTU, the Commission considers that such commitment would not solve any of the preliminary antitrust concerns expressed in the PA. Indeed, none of the concerns raised by the Commission related to wholesale access for MVNOs and the price of that access. The Commission also notes that none of the respondents to the Market Test, and in particular those MVNOs that responded, have complained about wholesale access issues stemming from the NSAs.
- (218) As regards the further, modified suggestions of CTU of 17 January 2022, regarding a new obligation for the Sharing Parties to allow passive and active sharing with other MNOs through a wholesale offer, the Commission observes that its preliminary competition concerns in the present case relate to a potential limitation of infrastructure competition between the Sharing Parties. The Commission has not raised any potential competition issue regarding MNOs (or MVNOs) not being able to access infrastructure.
- (219) As regards the Financial Commitment, the Commission considers that it will remove financial disincentives for the Sharing Parties to unilaterally invest in their networks, by ensuring that any deployment implemented by the Master Operator for the Visitor Operator will be done at cost-based pricing according to the Price List for Unilateral Deployments with the applicable prices for each type of unilateral deployment being the same for the Sharing Parties set-up by the Monitoring Trustee.
- (220) As regards the Information Exchange Commitment, the Commission considers that it will reduce coordination and transparency on the market by limiting the type of information exchanged and the number of people involved in this exchange. As regards CTU’s suggestion that the commitments should also encompass a divestment commitment, with the aim of limiting information exchange and coordination by selling a controlling stake of the Parties, in particular CETIN, the Commission considers that such a divestment commitment would be disproportionate and therefore is not warranted. The Commission considers that the preliminary competition concerns regarding the information exchange identified in the PA will be adequately addressed by the Final Commitments, given the contractual changes to streamline the governance structure involved in information exchange and to limit the information exchanged (see section 5 above).
- (221) As regards CTU’s suggestion that the Initial Commitments should also include a transparency clause obliging the Sharing Parties to submit certain information to CTU, the Commission considers that such a commitment would not be aimed at decreasing transparency between the Parties and therefore it would not address the

preliminary competition concerns expressed in the PA regarding information exchange between the Parties.

- (222) As regards the MNSA Commitment, the latter ensures that CETIN functions as a “black box” between T-Mobile and O2 and therefore eliminates unnecessary transparency that could otherwise lead to disincentives for the Sharing Parties to engage in unilateral deployment.
- (223) The Parties have not offered commitments less onerous than the Final Commitments, which are sufficient to adequately address the Commission’s concerns.
- (224) The need to ensure increased deterrence through the imposition of fines has been removed by the submission of the Final Commitments which will be made legally binding and enforceable through this Decision. This effectively removes the risk of recidivism and has positive effects on the market structure and European consumers.
- (225) The Commission has taken into consideration the interests of third parties, including those of the interested third parties that have responded to the notice pursuant to Article 27(4) of Regulation (EC) No 1/2003.
- (226) This Decision accordingly complies with the principle of proportionality.

## **8. CONCLUSION**

- (227) By adopting a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes binding on the undertakings concerned those commitments offered by them to meet the Commission’s concerns as expressed in its PA. Recital 13 of Regulation (EC) No 1/2003 states that such a decision should not reach any conclusion as to whether or not there has been or still is an infringement. The Commission’s assessment as to whether the commitments offered are sufficient to meet its concerns is based on its PA, representing the preliminary view of the Commission based on the underlying investigation and analysis, and the observations received from third parties following the publication of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003.
- (228) In the light of the Final Commitments offered, the Commission considers that there are no longer grounds for action on its part and, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings in this case should therefore be brought to an end.
- (229) The Commission retains full discretion to investigate and open proceedings under Article 101 of the Treaty and Article 53 of the EEA Agreement as regards practices that are not the subject matter of this Decision.

HAS ADOPTED THIS DECISION:

### *Article 1*

The Final Commitments as listed in the Annex shall be binding on the Parties from the date of notification of the decision to both CETIN and T-Mobile until 28 October 2033 with regard to the NSAs (with the exception of the Prague and Brno Commitment, which shall be binding until [End date within 7-10 years]). The Commitments with regard to the MNSA shall be binding on CETIN, O2 and PPF Group from the date of notification of the decision to both CETIN and O2 until: (i) the term of the MNSA or (ii) the term of the NSAs whichever of those terms ends earlier.

*Article 2*

It is hereby concluded that there are no longer grounds for action in this case.

*Article 3*

This Decision is addressed to:

T-Mobile Czech Republic a.s., Tomíčková 2144/1, Prague 4 – 148 00, Czech Republic

Deutsche Telekom AG, Friedrich-Ebert-Allee 140, 53113 Bonn, Federal Republic of Germany

CETIN a.s., Českomoravská 2510/9, Libeň, Prague 9 – 190 00, Czech Republic

O2 Czech Republic a.s., Za Brumlovkou 266/2, Prague 4 – 140 22, Czech Republic

PPF Group N.V., Strawinskylaan 933, 1077 XX Amsterdam, The Netherlands

Done at Brussels, 11.7.2022

*For the Commission*

*(Signed)*

*Margrethe VESTAGER*

*Executive Vice-President*