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European Commission, DG CNECT Unit B.3

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Ref: Case CZ/2021/2351 – MVNO Europe Observations on the European Commission’s Decision pursuant to Article 32(4) EECC relating to the Czech NRA’s notification of the market for wholesale access to mobile networks in the Czech Republic

To whom it may concern at the European Commission and members of the project team at BEREC in charge of issuing the BEREC Opinion,

Dear Madam, Dear Sir,

MVNO Europe hereby responds to the invitation to market participants to submit observations regarding the Commission’s serious doubts letter under Article 32 EECC relating to Case CZ/2021/2351.

The observations presented should be read in conjunction with the letters MVNO Europe sent on its own initiative to the European Commission on Case CZ/2021/2351 on 26 November 2021 and on Case CZ/2019/2089 on 23 July 2019. These letters are provided as Appendices.

In these observations, MVNO Europe addresses: (i) the Commission’s characterization of the relevant market as Market 15/2013,ii), the Commission’s position on the 3-criteria test, (iii) the Commission’s position on joint Significant Market Power, and (vii) the Commission’s conclusion. Our observations also touch upon the structure of the Czech mobile market, with emphasis on the market position of MVNOs, the 2020 spectrum licences’ wholesale conditions, and the Commission’s position on barriers to the internal market.

Characterization of the relevant market

In the serious doubts letter (footnote 2) as well as in the invitation to submit observations (footnote 3), the Commission characterizes the relevant market as "*Corresponding to market 15 of Commission Recommendation 2003/311/EC of 11 February 2003*", and adds that this market was

subsequently removed from the list of markets recommended by the Commission as susceptible to ex-ante regulation.

MVNO Europe respectfully disagrees with this characterization. Market 15/2003 was precisely defined as *"Access and call origination on public mobile telephone networks, referred to (separately) in Annex I(2) of the Framework Directive in respect of Directives 97/33/EC and 98/10/EC."* This market, at the time, was focused on voice calls on public telephone networks.

The Czech Telecommunication Office (ČTÚ) notification dated 18 November 2021 concerns the wholesale market for combined voice/sms/data services, and throughout the notification, heavy emphasis is placed on the data services component of this market, with particular attention to mobile broadband internet access.

Clearly, in the second decade of the 21st century, the data component is the element that drives both supply and demand of bundled mobile services. MVNO Europe therefore considers that the Commission and BEREC should treat the ČTÚ's market definition as a relevant newly notified market, to be assessed in the current timeframe and prospectively, and not in a backward-looking way. The removal of Market 15/2003 from subsequent editions of the Commission's Recommendation on Relevant Markets Susceptible to Ex-Ante Regulation is not relevant to the case at hand, and should not influence decision-making process. The notification should be assessed factually, with reference to the criteria laid out in great detail in the 2018 edition of the SMP Guidelines¹, which constitute a check list of the criteria to be assessed, including specifically for finding joint Significant Market Power (paragraphs 65-89 of the SMP Guidelines).

The Three-Criteria Test

Criterion 1: High and non-transitory barriers to entry

The Commission's serious doubts letter places a lot of emphasis (page 8, especially para 3) on evidence of numerous MVNOs being present on the Czech market, and on the possibility for further MVNO market entry. The Commission states (page 8, para 4) that it understands that all MVNO agreements were negotiated commercially.

MVNO Europe respectfully submits that whilst there may be over 100 companies presented as MVNOs, in reality these are nearly all treated as convenient distribution channels by the 3 MNOs. These companies are not generally able to act as fully fledged competitors on the mobile market.

¹ Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (Text with EEA relevance) (2018/C 159/01)

The fact that MVNEs (mobile virtual network enablers, which support MVNOs and brands) are marginal (page 6, para 1), and that the total market share of independent suppliers is only 2% (page 5, para 2), further emphasizes that the wholesale mobile access market is not functioning properly in the Czech Republic, and that – in application of current commercial conditions and regulation (incl. through the conditions of spectrum licences), there is no possibility for new entrants to overcome the high and non-transitory barriers to entry on the Czech mobile market. **In fact, the market situation in the Czech Republic demonstrates that additional wholesale access regulation is needed (over and above the wholesale access obligations contained in spectrum licences) for there to be any chance of companies (both spectrum holders and MVNOs and any combination thereof) overcoming the high and non-transitory barriers to entry.**

With regard to the Commission's suggestion that spectrum holders such as Nordic Telecom and PODA could enter the mainstream mobile market, and especially would be able to enter the wholesale market for supply to MVNOs (page 8, para 1 and 2), MVNO Europe wishes to make very important observations. First, nation-wide coverage and good indoor coverage are essential to be able to credibly host MVNOs. No MVNO can seriously consider being hosted on a network with very limited coverage and/or poor indoor coverage, and even if it did, that MVNO would then not be able to become a credible competitor on any nation-wide markets it wishes to serve. The putative 4th, 5th or even 6th MNOs are very far from achieving, and may never achieve, nation-wide coverage, and good indoor coverage, including on account of the lack of sub-1 GHz spectrum assignments. Second, the Commission appears to assume that these spectrum holders could use the regulated national roaming they may obtain (especially from O2) in order to provide MVNO access. MVNO Europe wishes to observe that national roaming contracts frequently explicitly prevent the beneficiary of national roaming from providing MVNO access downstream. This type of explicit restriction has recently been confirmed in the context of the national roaming agreement between Telefonica Deutschland and 1&1 in Germany² and it points that the European Commission (DG COMP), BEREC and NRAs should take note of. In addition, the wholesale conditions of national roaming may be such as to de-facto preclude downstream wholesale supply to (Full) MVNOs, on account of technical restrictions and/or on account of the pricing model (even if national roaming is provided on cost-oriented terms). **We therefore urge the Commission, BEREC and the ČTÚ to investigate whether national roaming agreements will allow the beneficiary to supply downstream MVNO access, and on which terms, both technical and economic. Should the beneficiary/beneficiaries of national roaming not be**

² Statement made by Telefonica Deutschland management team at its Investor & Analyst Meeting, 10 November 2021.

entitled, willing, or economically able to provide fit-for-purpose (Full) MVNO (including MVNE) access downstream, the Commission's most important line of argument for issuing serious doubts would be moot.

Criterion 2: No tendency towards effective competition

The Commission's serious doubts letter refers to **spurious market share data**, which includes companies that are part-owned by an MNO (page 10, para 1). MVNO Europe considers this to be an error of fact. Only the market share of fully independent companies, and able to define their own products and services, should be taken into account. In particular, companies part-owned by an MNO, and also pure resellers or distributors, should be excluded, to avoid serious errors when defining markets (and also at the SMP assessment stage). **Whilst we agree that it is not uncommon for some companies to be part-owned by MNOs (including leading so-called MVNOs, some of which may have been acquired by MNOs), this does by no means imply that companies part-owned by MNOs could be treated as competitors for the purpose of market definition.**

The Commission's serious doubts letter places a lot of emphasis (page 10, para 3) on retail price declines. MVNO Europe respectfully submits that retail prices for the mobile component of bundles are declining in all markets, and that far sharper declines are notable in more competitive EU Member States, where MVNOs represent 8 to 20+% market share. **The Commission does not provide any evidence that the decline of retail prices in the Czech Republic is linked to increased competition.** Also, increased data consumption (also mentioned at page 10, para 3) is not as such an indicator or increased competition. Furthermore, the Commission's points are overshadowed and indeed **contradicted** by the fact that the Czech Republic is characterized by persistent very high retail mobile broadband prices (among the highest in the EU, as shown in the DESI Connectivity Study 2021 (data as of end-2020)). See for instance pages 108 (Czech Republic at the bottom of the most expensive cluster) and 174 (**high retail prices, and across-the-board retail price increases for data-only mobile services**)³.

Criterion 3: Insufficiency of competition law alone

MVNO Europe notes that the Commission considers that the ČTÚ has provided insufficient evidence on the insufficiency of competition law alone. It is not obvious to MVNO Europe that the ČTÚ

³ Overview: <https://digital-strategy.ec.europa.eu/en/policies/desi-connectivity>

Link to the cited study on Study on mobile and fixed broadband prices in Europe at the end of 2020: <https://ec.europa.eu/newsroom/dae/redirection/document/81045>

notification is any different in this regard than those of numerous other NRAs in numerous other cases, in which the Commission did not issue serious doubts.

The Joint SMP Finding

Transparency – price competition

MVNO Europe has carefully studied the diagrams on pages 12 and 13 of the Commission's serious doubts letter. Our findings, based on these diagrams, are striking, especially taking into account that in the second decade of the 21st century, data is the driving element of mobile bundles:

- a) For the year 2020, the average retail price (green dotted line point for 2020 at the bottom of page 12) for 1 Mb of data is +/- CZK 0,04, whereas the average wholesale price is +/- CZK 0,09 (green dotted line point for 2020 in the second diagram on page 13). **The average 2020 wholesale price for data is therefore more than double the 2020 retail price.**
- b) For the year 2020, the retail price of MNO 1 (yellow line, presumably the leading MNO O2) for both 1 minute and 1 Mb is above the corresponding wholesale prices of the same MNO.
- c) Also for the year 2020, the retail price of MNO 2 (green line, presumably the second MNO) for 1 Mb is slightly below the corresponding wholesale price.
- d) Even if there are indeed pricing differences between MNOs 1, 2 and 3, these differences fade into irrelevance when seen in the light that they all 3 MNOs practice extremely high retail and wholesale prices. For instance, the **average wholesale price for data in 2020 of CZK 0,09 for 1 Mb corresponds to EUR 3,7 per Gb, which is above the regulated wholesale roaming cap for data in 2020 (EUR 3,5 per Gb⁴). The lowest wholesale price for data for 2020 is barely lower, at +/- CZK 0,075 or CZK 0,08 per MB for MNO 3 (purple line, presumably the third MNO). CZK 0,075 corresponds to EUR 3.1 per Gb⁵.**

⁴ Article 12 of the consolidated text of the EU Roaming Regulation contains the wholesale price caps for data: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02012R0531-20170615&from=EN>

In addition, it should be noted that BEREC data gathering indicates that operators trade wholesale roaming traffic well below the wholesale caps, and often well below 1 EUR/Gb) see page 37 of [BEREC Annual Reports for 2020 \(europa.eu\)](#).

⁵ Our currency conversion from CZK to EUR was performed on 5 January 2022.

How the Commission can somehow use this data to express serious doubts on the need for ex-ante regulatory intervention is a mystery to MVNO Europe. Fact is that all 3 MNOs sustain extremely high retail and wholesale prices compared to other EU Member States (indeed wholesale prices are a high multiple of those in many EU Member States), and are highly profitable (see also page 4 diagram on profitability). There is therefore a real concern that the 3 MNOs have found a way to coordinate, in a manner which results in excessive rents. The differences between them are not an indication of the existence of effective competition.

Sustainability of tacit coordination

The Commission refers to new spectrum holders, the regulatory obligations on spectrum holders, the allegedly asymmetric position of O2, and future bundles (page 14).

MVNO Europe emphasises that **it is not because an SMP operator is regulated, and is required to provide cost-oriented wholesale access, that it is necessarily unable to act independently from the competitors who purchase wholesale access. The fixed sector is rife with examples where specific regulatory intervention was needed** to force the SMP operator to cease margin-squeeze practices, to cease non-price discrimination, and other forms of distortion of competition, even in the presence of SMP regulation. Why would the mobile market be different?

As regards **future services and bundles**, MVNO Europe observes that the Commission appears to treat 5G as somehow different and special, and foreshadows the possibility of 5G-only data (internet-only?) services and unusual combinations of 5G data (internet-only?) wholesale services, with other agreements for voice/sms. MVNO Europe wishes to comment that **no EU Member State is expected to rely on 5G alone for the 5-year duration of the market analysis cycle, and certainly not for nation-wide and indoor coverage. The Commission is not providing a credible prospective analysis pointing to non-sustainability of tacit coordination.** If this type of Commission speculation were to affect all market analyses, there would be no cases in which ex-ante regulation could ever be considered justified. The potential future should be assessed on the basis of fact and historical precedent. **The Czech Republic's past and current situation does not provide a basis for optimism that all will be for the best in the best of possible worlds⁶.**

⁶ <https://en.wikipedia.org/wiki/Candide>

With regard to the 'internet-only?' references made in the paragraph above, MVNO Europe wishes to draw attention to the fact that in the Czech '5G' spectrum licences, the MVNO access remedy may be limited to internet access and solely in the 700 MHz band (page 7, para 3). A data connection/service and internet access service are not one and the same. A data connection/service enables various services and applications, including dedicated and specialised data services for business-to-business communications, connectivity for vehicles, etc. Internet access service is merely one type of service delivered over an underlying data connection. In this context, MVNO Europe notes that European Commission's serious doubts letter does not appear to consider the importance of data connections/services other than internet access, which could lead to errors in its assessment, including the prospective assessment. An MVNO (or any operator) cannot be a fully-fledged competitor on the mobile market if its wholesale input only enables the provision of internet access service. MVNO Europe has advocated in earlier correspondence, and in response to the ČTÚ's national consultations, that wholesale data services are essential to enable business connectivity services and the Internet of Things (which often is not actually internet access service).

Retaliation mechanism

The Commission refers to the specific position of O2 (page 15, para 3) in the following terms: "*O2 will be forced to grant access based on regulated prices. The enforcement of the national roaming for the benefit of an operator who already has its own infrastructure and spectrum may, indeed, change the dynamics in the market. This operator would be in a position to constrain the members of the oligopoly both at retail level (as 'maverick' operator) and at wholesale level as the fourth provider of MVNO access*".

MVNO Europe **disagrees strongly** that a putative 4th, 5th or even 6th MNO relying on regulated national roaming will readily be able to act as the fourth provider of MVNO access, for the same reasons as explained under Criterion 1 for market definition. Indeed, **it is much more likely that the national roaming beneficiary will be prevented from providing downstream MVNO access, or will not be able to make a credible or competitive offer of wholesale MVNO access.** Please refer to the section above on Criterion 1 for details. **The Commission's line of argument for issuing serious doubts on joint SMP is likely to be moot as there is no assurance that national roaming can be used as a foundation for the provision of fit-for-purpose MVNO access.**

The European Commission's Conclusion

In the concluding section of its serious doubts letter, the European Commission helpfully states that it does not deny that there is scope for improvement of the competitive conditions in the Czech mobile market. However, it then goes on to simply restate that there is asymmetry in retail and wholesale market shares, that barriers to entry to the retail market seem low, and that all these elements do not support the ČTÚ's finding that the three criteria test is met as well as the joint SMP finding (page 15, para 5).

MVNO Europe finds that this seems a **very narrow basis for a potential veto of the ČTÚ notification, especially in light of the serious flaws identified by MVNO Europe in the Commission's treatment of the facts, and given the arguments developed by MVNO Europe** in these observations.

The Commission expresses the view (page 15, para 6) that enforcement of the obligation already imposed as part of spectrum conditions are very likely to bring positive changes to the market in the foreseeable future. MVNO Europe respectfully disagrees. The Czech Republic already had MVNO access conditions attached to spectrum licences also before 2020, which have: (i) not produced the expected results, and (ii) required additional specific action by the NRA. The Commission reiterates its view (page 15, para 7) that the beneficiary/beneficiaries of regulated national roaming will be able to provide downstream access to MVNOs, which is far from a certainty, and indeed unlikely, as is explained in these MVNO Europe observations. **We urge the Commission, BEREC and the ČTÚ to investigate whether the national roaming agreements will allow the beneficiary to supply downstream MVNO access, and on which terms, both technical and economic. Should the beneficiary/beneficiaries of national roaming not be entitled, willing, or economically able to provide fit-for-purpose Full MVNO (including MVNE) access downstream, the Commission's most important line of argument for issuing serious doubts would be moot.**

MVNO Europe finds it particularly striking that the Commission's conclusion does not even attempt to identify which of the ČTÚ's proposals would infringe which of the 4 objectives of Article 3 EECC, and which barriers to the internal market would allegedly be CREATED by the ČTÚ's proposals. This is very different from previous Commission serious doubts letters, which precisely identified the reasons with reference to specific articles and sub-articles of the applicable legal framework.

In particular, we find it nothing less than surreal that the ČTÚ's proposal to defined the market, find joint SMP, and mandate MVNO access would somehow, according to

the Commission, CREATE barriers to the internal market. Which barriers, why? On the contrary, allowing the ČTÚ's to adopt its notified draft measures, including mandating MVNO access, will enable new entry, from within and from outside the Czech Republic, improve competition on the Czech market, and enable the internal market, for traditional voice/sms/data services for consumers and business users, and for the Internet of Things, which in many cases has a pan-European service scope (e.g. connected vehicles).

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MVNO Europe conclusion

On the basis of the material contained in these observations, MVNO Europe requests that the Commission withdraws its serious doubts, and that BEREC issues an Opinion in support of the ČTÚ's notification and rejecting the Commission's serious doubts, with reference to factual errors, and lack of justification in the Commission's serious doubts letter. This is also important to avoid the setting of a negative precedent, both in terms of the substance of the assessment, and the level of justification for the Commission proceeding to serious doubts and a potential veto.

MVNO Europe Contact Details

Should you require any clarifications or further information on the elements and positions set out by MVNO Europe in these observations, please contact:

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Appendix 1

MVNO Europe own initiative letter to the European Commission on Case CZ/2021/2351 of 26 November 2021

Appendix 2

MVNO Europe own initiative letter to the European Commission on Case CZ/2019/2089 of 23 July 2019.