



EUROPEAN COMMISSION

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## **PUBLIC VERSION**

Vodafone Czech Republic a.s.  
náměstí Junkových 2808/2  
155 00 Praha 5 - Stodůlky  
Czech Republic

**Subject: Case AT.40305 – Network sharing – Czech Republic**  
**Commission decision pursuant to Article 7(2) of Commission Regulation**  
**(EC) No 773/2004 rejecting the complaint**  
(Please quote this reference in all correspondence)

Dear Sir or Madam,

1. I am writing to you in connection with your complaint of 8 May 2015 lodged with the European Commission (the “Commission”) against T-Mobile Czech Republic a.s. (“T-Mobile”) and O2 Czech Republic a.s. (“O2”)/CETIN a.s. (“CETIN”) (“Sharing Parties”)<sup>1</sup> (the “complaint”). I also refer in this context to the Commission’s letter of 19 May 2022 pursuant to Article 7(1) of Regulation 773/2004 (the “Article 7(1) letter”) informing you of the Commission’s intention to reject the complaint and to your reply of 17 June 2022 to that letter.
2. The Commission has examined the different elements you have submitted, in particular those contained in your letter of 17 June 2022. However, this examination has not led to a different assessment of your complaint. For the reasons set out below, the Commission does not intend to conduct a further investigation into your allegations and it has decided, pursuant to Article 7(2) of Commission Regulation (EC) No 773/2004<sup>2</sup>, to reject your complaint.

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<sup>1</sup> T-Mobile, O2, CETIN and their respective parent companies, Deutsche Telekom AG (“Deutsche Telekom”) for T-Mobile and PPF Group N.V. (“PPF”) for O2 and CETIN are collectively referred as the “Parties”.

<sup>2</sup> Commission Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 123, 27.4.2004, p. 18). 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 (the “TFEU”). The two sets of provisions are, in substance, identical. Pursuant to Article 5(3) of the Treaty of Lisbon, references in

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 considers in its Preliminary Assessment (“PA”) of 27 August 2021 and in its Commitment Decision of 11 July 2022, 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% 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

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legal acts to Articles 81 and 82 of the EC Treaty are to be understood as references to Articles 101 and 102 TFEU when appropriate.

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

<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).

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.
10. In this Decision, the Commission first summarises Vodafone’s complaint of 8 May 2015 and subsequent submissions. The Commission then sets out the procedural steps taken and summarises the concerns expressed in the Statement of Objections (“SO”) against the Sharing Parties of 7 August 2019 and, finally, in the PA of 27 August 2021. It also describes the Initial Commitments offered by the Parties and provides a summary of Vodafone’s written observations of 1 November 2021 to the market test of the Initial Commitments.
11. Subsequently, the Commission sets out the reasons for its conclusion that there is insufficient Union interest in pursuing your complaint as (i) some of the concerns put forward in your complaint are addressed by its Decision of 11 July 2022 adopted pursuant to Article 9 of Regulation (EC) No. 1/2003 (the “Commitment Decision”), making binding the Final Commitments and therefore there are no longer grounds for action as regards these allegations, and (ii) there is a limited likelihood for finding an infringement of Union competition law regarding further points raised in your complaint.

## 1. FACTS

### 1.1. Complaint

12. By letter dated 8 May 2015, you requested the Commission to launch an investigation as regards the Sharing Parties’ network sharing agreements for 2G/3G and 4G/LTE mobile telecommunications technologies concluded on 29 October 2013 and 2 May 2014 (“NSAs”)<sup>10</sup>. You alleged that the NSAs concluded between the Sharing Parties would severely undermine the conditions of effective competition in the Czech wholesale and retail mobile telecommunications

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<sup>7</sup> CETIN Group N.V. Annual accounts 2021, online, available at: <https://www.cetin.eu/upload/document/1648635997qdiij-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>

<sup>10</sup> CETIN legally succeeded O2 as the Party to the NSAs and as the operator of the infrastructure concerned by the NSAs. As of 1 June 2015, CETIN owns and manages both fixed and mobile infrastructure formally owned by O2, while O2 remains active as a Mobile Network Operator in Czechia.

markets. Based on the NSAs, you argued that the two largest mobile telecommunications operators active on the Czech market – T-Mobile and O2 – would have an extensive Radio Access Network (“RAN”) sharing arrangement, giving them a substantially lower individual cost base in addition to greater network coverage and performance.

13. The complaint argued that:

- (i) the NSAs would significantly reduce the Sharing Parties’ incentives to compete in the Czech mobile telecommunications market as their mutual dependency would increase<sup>11</sup>; and
- (ii) Vodafone, as the only meaningful source of competitive constraints, would be unable to compete effectively with the Sharing Parties (that in aggregate account for [70-80]% of the retail market), given it would be at a permanent cost and network quality disadvantage.<sup>12</sup> In light of these disadvantages, the complaint alleges that it would be very difficult for Vodafone to invest at a competitive cost with the Sharing Parties to build up Vodafone’s network across Czechia. As a result, Vodafone’s network would be likely to degrade in relative quality, and the competitive constraint offered by Vodafone would be significantly diminished, leading to less incentive of the Sharing Parties to continue to invest and innovate.<sup>13</sup>

14. Moreover, the complaint emphasised that Vodafone relies on the Sharing Parties for some 60% of its backhaul requirements. The complaint argued that, following the NSAs, the Sharing Parties would have a greater ability to undermine Vodafone as a competitor (particularly in 4G/LTE) through the supply of mobile backhaul.

15. Given the alleged reduced competition from Vodafone, combined with the reduction in competition and alignment of incentives between the Sharing Parties, the complaint concluded that there would be a significant reduction of effective competition in terms of multiple competitive parameters including price, quality, investment, differentiation and innovation, contrary to Article 101(1) TFEU.<sup>14</sup> Any efficiency gains would be unlikely to be passed on to consumers and, therefore, Article 101(3) TFEU would not be satisfied.

16. Since the submission of the complaint, the Commission had several exchanges with Vodafone. The Commission refers in particular to Vodafone’s submission of 19 September 2016, Vodafone’s response to the Commission’s request for information of 23 May 2017 and 6 August 2018, Vodafone’s comments on the Commission’s SO of 7 August 2019, Vodafone’s presentation at the Oral Hearing of 14 September 2020 and Vodafone’s observations to the market test of 1 November 2021.

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<sup>11</sup> Complaint, pages 6, 11 and 15.

<sup>12</sup> Complaint, page 14.

<sup>13</sup> Complaint, pages 6, 12 and 14.

<sup>14</sup> Complaint, page 11 and 15.

17. In these submissions, Vodafone complemented its complaint with additional allegations and generally endorsed the provisional competition concerns set out by the Commission in the SO.<sup>15</sup> For instance, Vodafone mentioned that T-Mobile is capacity constrained in the Eastern part of Czechia, where it is a Visitor operator, due to the fact that O2/CETIN is not able to deploy LTE 2100 MHz, because their infrastructure is not single-RAN enabled, resulting in a restriction of T-Mobile to freely deploy capacity in that part of the country – the technological “hold back”.<sup>16</sup>
18. Also, Vodafone claimed that there are technical limitations to undertake unilateral investments by the Sharing Parties, such as increased interference in the event of individual capacity enhancements,<sup>17</sup> as well as that T-Mobile is unable to unilaterally increase the capacity of its fibre backhaul as the result of actively sharing fibre backhaul.<sup>18</sup> Vodafone also feared that the Sharing Parties would engage in possible spectrum sharing, resulting in the Sharing Parties having together more spectrum than Vodafone.<sup>19</sup>
19. Finally, Vodafone argued that the active sharing in the more populated areas has the greatest potential to restrict MNOs’ ability to differentiate and therefore, similarly to Vodafone’s decision to unwind the network sharing it was part to in the UK and Italy, the Commission should require the Sharing Parties to unwind their 4G active network sharing in the more populated towns/cities/urban areas of Czechia, unless the Sharing Parties can demonstrate that any loss of competition will be offset by efficiencies. In Vodafone’s view, the Commission should also prevent the Sharing Parties from engaging in 5G active sharing in the same areas in which the Commission requires the Sharing Parties to unwind their 4G active sharing.<sup>20</sup>
20. On 5 June 2015, the Commission sent the Sharing Parties a non-confidential version of the Complaint. On 30 June 2015, T-Mobile submitted its comments on the complaint, taking the view that the network sharing in place does not have negative effects on competition and brings benefits to the market, such as innovative and quality improvements. T-Mobile also considered that Vodafone could compete efficiently, based on modern technologies – for instance, it had the largest LTE network at that time. On 17 July 2015, CETIN submitted its comments, emphasising the benefits of the network sharing for consumers and maintaining that Vodafone, which chose a business strategy of limited investment despite lower prices at retail level, remained competitive. Vodafone was granted access to the non-confidential versions of the aforementioned comments on the Complaint of T-Mobile and CETIN on 22 November 2016.

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<sup>15</sup> Vodafone’s submission in response to the Commission’s SO of 7 August 2019, page 6.

<sup>16</sup> Vodafone response to Commission’s request for information of 6 August 2018, Document ID: 1272, Non-confidential ID: 1228, pages 2, 4 and 11; Vodafone’s submission in response to the Commission’s SO of 7 August 2019, page 17.

<sup>17</sup> Vodafone response to Commission’s request for information of 6 August 2018, Document ID: 1272, Non-confidential ID: 1228, page 10.

<sup>18</sup> Vodafone’s submission in response to the Commission’s SO of 7 August 2019, page 22.

<sup>19</sup> CRA, 25.05.2015, Document ID 7, page 2.

<sup>20</sup> Vodafone’s submission in response to the Commission’s SO of 7 August 2019, pages 5 and 6.

21. By letter of 19 May 2022, the Commission informed Vodafone that it considers that some of the concerns raised in the complaint will be addressed by the Final Commitments offered by the Parties, but there are insufficient grounds for acting on the remainder of its complaint.
22. In response, Vodafone made observations in its letter of 17 June 2022 stating that although Vodafone does not object in principle to the closing of the case with Commitments, Vodafone reiterates its comments in response to the market test of 1 November 2021, that the Network Modernisation Commitment does not provide an effective remedy to the hold-back competition issue resulting from the NSAs, as it does not cover the frequencies considered to be key for 5G roll-out (700 MHz, 3.4 – 3.7 GHz) Vodafone also maintains that a commitment to unwind more of the larger Czech cities would have created the right incentives for competition between T-Mobile and O2/CETIN.

## 1.2. Procedure

23. Between 2015 and 2019, the Commission undertook different investigative steps involving the Sharing Parties, their competitors and suppliers. In addition, the Commission had various exchanges, including State of Play meetings, with the Sharing Parties and their representatives, as well as with Vodafone.
24. On 25 October 2016, the Commission decided to initiate proceedings pursuant to Article 2(1) of Regulation 773/2004 and Article 11(6) of Regulation 1/2003 against the Sharing Parties.
25. On 7 August 2019, the Commission adopted the 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 1/2003 against the parent companies of the Sharing Parties, namely Deutsche Telekom for T-Mobile and PPF for O2 and CETIN. On 14 February 2020, an SO addressed to Deutsche Telekom and PPF was adopted by the Commission.
26. The Parties submitted their written replies to the SO on 31 January 2020, 20 April and on 18 May 2020. Vodafone received a preliminary redacted version of the SO on 3 December 2019 and a further, less redacted non-confidential version of the SO on 9 January 2020. Vodafone submitted its views on the SO on 27 March 2020. On 15, 16 and 17 September 2020, an Oral Hearing was held, at the request of the Parties. On 15 September 2020, Vodafone participated in the Oral Hearing, giving a presentation and receiving presentations of the Parties.<sup>21</sup> Given the above, Vodafone was able to get acquainted with the counterarguments of the Parties.
27. After careful analysis of the evidence on the file, including the arguments and evidence submitted by the Parties and Vodafone following the adoption of the SO, the Commission adopted the PA within the meaning of Article 9(1) of Regulation (EC) No 1/2003 on 27 August 2021. The PA was addressed to the Parties.

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<sup>21</sup> Vodafone was invited to attend the Oral Hearing only on the first day, during which the Commission and the Parties presented their main arguments, and had an opportunity to present its own views and arguments.

28. The Parties offered commitments pursuant to Article 9 of Regulation (EC) No 1/2003, to meet the Commission's competition concerns as set out in the PA, on 15, 16 and 17 September 2021 ("Initial Commitments"). The Commitments were market tested for one month, until 1 November 2021 – see section 1.5 below. On 29 March and 7 April 2022, 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"). The Initial Commitments, together with the Prague and Brno Commitment are referred to as the "Revised Commitments".
29. By a letter of 19 May 2022, pursuant to Article 7(1) of Regulation 773/2004, the Commission informed Vodafone of its intention to reject the complaint. The Commission attached to this letter also a non-confidential version of the PA addressed to the Parties of 27 August 2021.
30. By letter of 17 June 2022, Vodafone submitted written comments on the Commission's Article 7(1) letter. 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>22</sup>
31. On 11 July 2022, the Commission adopted the Commitment Decision, making binding the Final Commitments.

### **1.3. Outline of the Commission's Statement of Objections in case AT.40305**

32. In the SO, the Commission provisionally found that the NSAs (and the Mobile Network Services Agreement ("MNSA"<sup>23</sup>) concluded between O2 and CETIN) led to the reduction of infrastructure competition, investment and innovation as a result of the Sharing Parties' reduced ability and incentive to undertake unilateral investments. These effects result from, or are amplified by, the exchange of information triggered by the NSAs, 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 in breach of Article 101 of the TFEU and Article 53 of the Agreement on the European Economic Area.
33. Specifically, the Commission provisionally found in the SO that the NSAs have been concluded between the two strongest players in an already very concentrated market, where approximately [70-80]% of subscribers use the shared network. According to the Commission's provisional assessment, the structure of the wholesale and retail markets and the nature of the NSAs and the MNSA are such that they create for each of the Sharing Parties technical and financial disincentives to undertake unilateral investments in coverage, capacity and network functionalities. These disincentives also stem for a too wide

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<sup>22</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 [...]. 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.

<sup>23</sup> Contract concluded between O2 and CETIN, on the basis of which CETIN manages the mobile network for O2.

information exchange between the Sharing Parties. The provisional finding in the SO was that, absent the NSAs, the Sharing Parties would have operated their own independent active infrastructure or would have cooperated less intensively (i.e. through passive sharing or colocation) throughout Czechia.

34. With regard to the technical ability and incentives to invest in individual deployments, the Commission preliminarily expressed concerns in the SO about the following types of individual deployments: building extra independent/unilateral sites (sections 13.5.4.3 and 13.6.2 of the SO), installing a new unilateral sector on an existing shared site in the common grid (section 13.5.4.6 of the SO), deploying unilaterally an extra spectrum band, with T-Mobile not being able to deploy LTE at 2100 MHz spectrum band in CETIN's Master area (section 13.5.4.7 of the SO), technical limitations reducing the possibility for unilateral deployment of 3G extra capacity (section 13.5.4.8 of the SO), implementing [...] capacity deployments in the shared base-stations for LTE on the 800 MHz band (section 13.6.1 of the SO), as well as other forms of differentiated deployment of the network such as customised solutions, small cells and repeaters, additional services, extra functionalities, use of higher order MIMO techniques, use of higher order modulation (256QAM) and independent setting of certain cell-level parameters (section 13.5.4.10 of the SO) installing a new unilateral sector on an existing shared site in the common grid, deploying unilaterally an extra spectrum band, and deploying extra capacity within a given spectrum band.
35. With regard to the financial disincentives to invest in unilateral network expansion (section 13.5.4.11. of the SO), the Commission preliminarily concluded in the SO 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,<sup>24</sup> the Visitor Operator's incentives to invest would be reduced.
36. Moreover, the Commission provisionally concluded in the SO that the information exchanged under the NSAs, through its detailed level, frequency and forward-looking features, has the capability of allowing the Sharing Parties to understand the commercial constraints and deduce the commercial policy of the other Sharing Party and thereby has the likely effect of restricting competition. The detailed exchange of information agreed by the Sharing Parties in the framework of the NSAs is therefore likely to enhance the restrictive effects of such agreements in the sense that it reduces the companies' incentives to invest and innovate even further, and on the contrary incentivises them to co-ordinate (section 13.5.5. of the SO).

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<sup>24</sup> The cooperation is implemented by the two operators on the basis of a geographical split. The country (with the exception of Prague and Brno) is split into two areas. Each Sharing Party assumes the role of "Master Operator" in one of the two areas (T-Mobile in the western area, CETIN/O2 in the eastern area). The Master Operator has the responsibility of deploying, operating and maintaining the shared network in its area and procures the mobile network infrastructure and related supplies. Hence, the Master Operator provides network services not only to its own customers, but also to the customers of the other operator (called "Visitor Operator" of the area). Therefore, each operator relies on the other to serve its customers in the area where it is a Visitor Operator.



#### 1.4. Summary of the Preliminary Assessment in case AT.40305

37. In the PA, after carefully examining the Parties' replies to the SO, and their arguments put forward at the Oral Hearing, the Commission sets out its outstanding concerns as regards the compatibility of the NSAs and the MNSA with Article 101 TFEU and Article 53 of the EEA Agreement.
38. The concerns expressed in the PA differ to some extent from the objections expressed by the Commission in the SO 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 1/2003.
39. The PA preliminarily concluded that the NSAs, as well as the MNSA, may restrict competition in violation of Article 101(1) of the TFEU by their effects. The Commission preliminarily considered that the NSAs (together with the MNSA), considered in their specific market context, reduce the Sharing Parties' ability and incentives to unilaterally invest in capacity in certain specific ways, which in turn reduces their flexibility in competitiveness, innovation and technology/product differentiation and therefore may negatively affect the ability and incentives of T-Mobile and O2 to compete on the retail and wholesale markets for mobile telecommunications services in Czechia, leading to less choice, lower quality of services, as well as delays in innovation.
40. In the PA, 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.
41. As regards (i), in the PA, the Commission observed that T-Mobile's technology allows it to optimally use its spectrum holdings and deploy LTE in the 2100 MHz spectrum band ("LTE2100").<sup>25</sup> T-Mobile has made use of this ability in the area where it is the Master Operator<sup>26</sup> (the Western part of Czechia). However, the Commission's preliminary concern was that T-Mobile was unable to deploy LTE2100 in the area where it is the Visitor operator and which is served by CETIN's network (the Eastern part of Czechia), to the disadvantage of the subscribers in this part of the country. Moreover, capacity extensions on 1800 MHz spectrum band could be added without any major installations and/or modifications only on specific sites based on the common network planning of the Sharing Parties.
42. As regards (ii), the Commission preliminarily concluded that the Visitor Operator's incentives to invest may be reduced. This is due to the fact that, as the

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<sup>25</sup> T-Mobile uses equipment which supports the Single RAN concept, that is, the flexible use of 2G, 3G and 4G mobile telecommunications technologies in the same band, as well as across different bands.

<sup>26</sup> The radio access development and operation is shared according to the territoriality principle of Master/Visitor Operator structure, whereby each of T-Mobile and CETIN is in charge of the network in one side of the country, e.g. T-Mobile deploys, operates and maintains a consolidated mobile network infrastructure in the Western part of Czechia (i.e. it is the Master Operator in this part of the country) and serves the subscribers of both operators in this area.

Commission's preliminary assessment suggested, network upgrades are charged by the Master Operator to the Visitor Operator at a price that is higher than the underlying costs. More specifically, the agreed prices for network deployments exceed the underlying cost of such deployment that would have been incurred by the Visitor Operator if it were the Master Operator. Also, the Commission preliminarily considered that the scope of the information exchanged goes beyond what is strictly necessary for the functioning of the NSAs and includes strategic information that decreases the Sharing Parties' incentives to compete with each other. As regards the information exchange, the Commission preliminarily considered that it is not counterbalanced by the structural separation of O2 and CETIN as CETIN – based on the provisions of the MNSA requiring CETIN to share certain information with O2 – does not function effectively as a “black box”, i.e. it does not effectively prevent information spill-over between T-Mobile and O2.

### **1.5. Commitments and Market Test Notice**

43. The Parties offered commitments pursuant to Article 9 of Regulation (EC) No 1/2003, to meet the Commission's competition concerns, as follows:

- Network Modernization Commitment - deployment of multi-standard Radio Access Network (“RAN”) equipment in the Mid-Band layers: 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 i.a. the existing hardware supports the operation of LTE2100 only to a limited extent. This network modernisation commitment will occur within less than 5 years, after the Commencement Date.<sup>27</sup>
- Financial Commitment - setting and review of the financial conditions for unilateral deployments - cost-based pricing for any investments demanded by the Visitor Operator to the Master Operator.
- 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.

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<sup>27</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 1/2003 and closing case AT.40305.

- Limit the information exchanged: update and refine the list of categories of information that can be exchanged within each respective working group, specify what 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 Commitments - measures to ensure that CETIN acts as a “black box” between T-Mobile and O2, and in particular the MNSA commitments:
    - specify how CETIN shall treat O2 under the MNSA compared to T-Mobile under the NSAs;
    - ensure that CETIN shall not inform O2 about or pass on or otherwise automatically make available to O2 commercially sensitive information;
    - ensure that CETIN shall not be constrained by O2 in changing the design and composition of the mobile network.
44. Furthermore, the Commitments stipulate that an independent Monitoring Trustee shall be appointed in order to monitor the Sharing Parties’ compliance with the Commitments.
  45. The Sharing Parties and the parent companies offered for the Commitments with regard to the NSAs to remain in force until 28 October 2033 (with the exception of the Prague and Brno Commitment, see below paragraph 46). The Commitments with regard to the MNSA would remain in force for a period of (i) the term of the MNSA or (ii) the term of the NSAs whichever of those terms ends earlier.
  46. On 1 October 2021, the Commission published in the Official Journal a Communication pursuant to Article 27(4) of Regulation 1/2003 (“Market Test Notice”).<sup>28</sup> The Market Test Notice invited interested third parties to submit their observations on the Commitments within four weeks of the date of publication of the Market Test Notice, as the Commission intended to adopt a decision under Article 9(1) of Regulation (EC) No 1/2003 declaring these commitments binding.
  47. After the market test, the Parties provided an additional commitment not to extend the geographical scope of the current NSAs to Prague and Brno. This commitment would remain in force until the [date within 7-10 years] (“The Prague and Brno Commitment”).
  48. The vast majority of those who commented on the market test considered the Commitments to remove the Commission’s preliminary competition concerns as set out in the PA.

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<sup>28</sup> OJ C 398, 1.10.2021, p. 24–27.

## 1.6. Outline of Vodafone's Observations on the Market Test Notice

49. On 1 October 2021, Vodafone received a copy of the Market Test Notice and the non-confidential versions of the Commitments with the same deadline of four weeks of the date of publication of the Market Test Notice to submit their observations. Vodafone submitted written observations on the market test on 1 November 2021.
50. Based on the information published in the Market Test Notice, Vodafone submits that the Commitments are neither adequate to create network competition between the Sharing Parties going forward, nor would they 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 Commitments will not resolve the technology hold-back issue targeted by the Network Modernisation Commitment in particular.
51. With regard to the suitability of Commitments to allay the Commission's competition concerns as set out in the PA, Vodafone took issue in particular with the following elements:
  - According to Vodafone, the acceptance of the 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>29</sup> Otherwise, more extensive sharing in large cities, including in 5G, would constitute the base of a formal and legally binding decision and setting a new and more permissive bar for future sharing.
  - 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 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

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<sup>29</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.

restricting the ability of a Party to individually decide how, where and when to deploy or activate a specific access technology.

- In relation to the Financial Commitments, 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 Commitments, 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 Commitments exclude spectrum sharing from any ongoing sharing that the Commitments may facilitate, but Vodafone considers that this should be clarified.

52. 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.

## **2. RELEVANT CONSIDERATIONS FOR THE ASSESSMENT OF COMPLAINTS**

53. Complaints facilitate the detection of infringements of the Union competition rules. They bring to the Commission's attention matters of fact and of law which the Commission examines<sup>30</sup>.

54. It is inherent to the complaints procedure that the obligation to substantiate the allegations lies with the complainant<sup>31</sup>, while the Commission is responsible for defining and implementing the orientation of the Union's competition policy. In order to perform that task effectively, it is entitled to give differing degrees of priority to the complaints brought before it<sup>32</sup>, in accordance with the principles set out at points 41 to 45 of the Notice on the handling of complaints,<sup>33</sup> including with regard to the investigation of individual aspects of an alleged infringement.

### **2.1. Complaints relating to concerns addressed by commitments**

55. In accordance with Article 7(1) of Regulation 773/2004, the Commission can consider that there are insufficient grounds for acting on a complaint on the basis

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<sup>30</sup> Judgment of 19 September 2013, *EFIM v Commission*, C-56/12 P, EU:C:2013:575, paragraph 71.

<sup>31</sup> See, to that effect, judgment of 19 September 2013, *EFIM v Commission*, C-56/12 P, EU:C:2013:575, paragraph 72.

<sup>32</sup> Judgment of 4 March 1999, *Ufex e.a. v Commission*, C-119/97 P, EU:C:1999:116, paragraph 88; judgment of 19 September 2013, *EFIM v Commission*, C-56/12 P, EU:C:2013:575, paragraph 72.

<sup>33</sup> OJ C 101, 27.04.2004, p. 65. See also the Commission's Report on Competition Policy 2005, pp. 25-27.

of the information in the Commission's possession. Subject to the requirement that it give reasons for such a decision, the Commission may decide that it is not appropriate to investigate or to continue to investigate a complaint alleging practices contrary to Articles 101 and 102 of the Treaty where the facts under examination give it proper cause to assume that the conduct of the undertakings concerned will be amended in a manner conducive to the general interest. To the extent that a complaint relates to concerns that could be adequately addressed by commitments made binding pursuant to Article 9 of Regulation 1/2003, the Commission may hence reject the complaint.<sup>34</sup> Article 9 of Regulation 1/2003 provides that where an undertaking offers commitments to address the concerns expressed to it by the Commission, the Commission may by decision make those commitments binding on the undertaking. Such a decision shall conclude that "*there are no longer grounds for action by the Commission.*" Whereas the Commission is required to consider attentively all the matters of fact and of law which the complainant brings to its attention, Article 7 of Regulation 1/2003 does not give a complainant the right to require the Commission to take a final decision as to the existence or nonexistence of an alleged infringement.<sup>35</sup>

## **2.2. Complaints relating to concerns not addressed by commitments**

56. When a complaint does not relate to concerns that will be addressed by commitments, the Commission takes various factors into account to decide whether there are sufficient grounds for acting. In order for the Commission to be able to efficiently perform its task of defining and implementing the orientation of the Union's competition policy, it is entitled to give differing degrees of priority to the complaints brought before it.<sup>36</sup> There is no fixed set of criteria of assessment,<sup>37</sup> but the Commission may *inter alia* take into consideration whether, on the basis of the information available, it seems likely that further investigation will ultimately result in the finding of an infringement. The fact that the Commission has already dedicated some time and resources to an investigation does not preclude a rejection of the complaint on grounds related to priority setting. Moreover, the Commission may take a decision to reject a complaint even at an advanced stage in the investigation.<sup>38</sup>

## **3. ASSESSMENT OF YOUR COMPLAINT**

57. Pursuant to Article 7(2) of Regulation (EC) No 773/2004, the Commission is entitled to reject your complaint by decision if the written submissions made in

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<sup>34</sup> Cf. Case C-449/98 P *International Express Carriers Conference v Commission* [2001] ECR I-03875, paragraphs 48-51.

<sup>35</sup> Case C-367/10 P *EMC Development AB v Commission* [2011] ECR-I 46, paragraphs 73 and 74; cf. also Case C-441/07 P, *Alrosa*, at para. 40.

<sup>36</sup> Judgment of 4 March 1999, *Ufex e.a. v Commission*, C-119/97 P, EU:C:1999:116, paragraph 88; judgment of 19 September 2013, *EFIM v Commission*, C-56/12 P, EU:C:2013:575, paragraph 72.

<sup>37</sup> Judgment of 4 March 1999, *Ufex e.a. v Commission*, C-119/97 P, EU:C:1999:116, paragraphs 79 and 80; judgment of 19 September 2013, *EFIM v Commission*, C-56/12 P, EU:C:2013:575, paragraph 85; judgment of 20 September 2018, *Agria Polska e.a. v Commission*, C-373/17 P, EU:C:2018:756, paragraph 61.

<sup>38</sup> Judgment of 17 May 2001, *IECC v Commission*, T-110/95, EU:T:1998:214, paragraphs 48 and 49.

response to the Article 7(1) letter do not lead to a different assessment of the complaint.

### **3.1. Overview of the Commission's provisional assessment of Vodafone's Complaint**

58. In the following sections, the Commission will distinguish between those points of the complaint that overlap with the concerns expressed in the PA in case AT.40305 and that are covered by the Parties' Final Commitments, and those points which do not coincide with the concerns expressed in the PA and therefore are not addressed by the Final Commitments.
59. The Commission's assessment is, accordingly, structured as follows:
- (i) Section 3.2 sets out the reasons for which the Commission considers that, in view of the Final Commitments, there are no longer grounds for action with regard to the allegations raised in the complaint that broadly mirror the preliminary competition concerns expressed in the PA, i.e. the allegations concerning the reduced incentives of the Sharing Parties to compete with each other, to invest and innovate and particularly refer to T-Mobile's inability to deploy LTE2100 in the area where it is the Visitor Operator and which is served by CETIN's network (the Eastern part of Czechia). The Commission takes the view that the Final Commitments adequately address these concerns;
  - (ii) Section 3.3 sets out the competition concerns provisionally retained by the Commission in the SO and generally agreed with by Vodafone,<sup>39</sup> but which, taking into account the submissions received thereafter, were not finally retained in the PA, as the Commission ultimately considered that the available evidence was insufficient to substantiate those concerns. In relation to those concerns, the Commission sets out the reasons for which it considers that the likelihood of finding of an infringement of Article 101(1) TFEU is limited;
  - (iii) Section 3.4 addresses the allegations raised in the complaint that were not raised in the SO and in the PA, and that are not covered by the Final Commitments. With regard to those allegations, this section sets out the reasons for which the Commission considers that the likelihood of finding of an infringement of Article 101(1) TFEU is limited, and therefore the Commission does not consider appropriate to investigate further the case and rejects this part of the Complaint on this basis.

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<sup>39</sup> In its reply of 27 March 2020 to the SO (page 6, section 2), Vodafone states that it agrees with the Commission's conclusions in the SO and repeats arguments made in the SO.

### **3.2. Competition concerns raised in the complaint that broadly coincide with the preliminary concerns expressed in the PA and particularly refer to T-Mobile's inability to deploy LTE2100 in the Eastern part of Czechia**

#### *3.2.1. Complaint about the alleged restriction of competition between the Sharing Parties*

60. As summarised in section 1.1 above, Vodafone considers that the NSAs in Czechia would significantly reduce the incentives of the Sharing Parties to compete with each other, to invest and innovate in the Czech wholesale and retail markets for mobile telecommunications services, as the Sharing Parties would have a high degree of mutual interdependence. The NSAs would also result in the weakening of Vodafone as an effective competitive constraint, which reinforces the alleged restriction of competition between the Sharing Parties.
61. Vodafone put forward, in response to the Commissions' request for information of 6 August 2018, that T-Mobile is not able to deploy LTE 2100 MHz for O2/CETIN in T-Mobile master area (in the West of Czechia, "the West"), where O2/CETIN is the Visitor operator, because of a lack of output power on its radio units. Moreover, Vodafone stated that O2/CETIN is not able to deploy LTE 2100 MHz on its existing radio units (in the East of Czechia, where it is the Master operator, "the East") because they are not single RAN enabled (i.e. the unit does not support multiple technologies, e.g. 3G and 4G at the same time). The result of this imbalance is that T-Mobile's network performance is better in the West and restricted in the East (due to the aforementioned inability of O2/CETIN to deploy LTE 2100 MHz). This in turn means that T-Mobile is constrained in the size of the data bundles it can offer, as it is restricted in its ability to freely deploy further capacity and functionality in the East.<sup>40</sup> Vodafone also emphasised that from both external and internal Vodafone benchmarking measurements it is clear that T-Mobile's network performance is better in the West, and that T-Mobile has difficulties with speed/scale of introduction of new/advanced features in the East.<sup>41</sup>
62. In its submission in response to the Commission's SO of 7 August 2019, Vodafone also emphasised that the NSAs have restricted the Sharing Parties' incentives to invest and that there is evidence of "hold back" effects, i.e. a lack of roll-out of the 2100 MHz capacity band in the East by T-Mobile, and loss of competition between T-Mobile and O2/CETIN in the East. It also mentioned that no steps were taken by the Sharing Parties to address this asymmetry.<sup>42</sup> Vodafone's presentation at the Oral Hearing<sup>43</sup> also focused on competition concerns regarding T-Mobile's technological hold back from deploying LTE 2100 MHz capacity in the East.

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<sup>40</sup> Vodafone response to Commission's questions received on 6 August 2018, Document ID: 1272, Non-confidential ID: 1288, pages 2 and 11.

<sup>41</sup> Vodafone response to Commission's questions received on 6 August 2018, Document ID: 1272, Non-confidential ID: 1288, page 4.

<sup>42</sup> Vodafone submission in response to the Commission's SO of 7 August 2019, page 17.

<sup>43</sup> Commission hearing: Czech network sharing, Document ID 3017, pages 6 and 7.



3.2.2. *The Commission's preliminary concern in the PA on the reduced incentive of the Sharing Parties to compete with each other*

63. The Commission considers that the issue of the reduced ability and incentive to independently deploy capacity by the Sharing Parties, as expressed in the PA, broadly coincides with the same concerns expressed in the complaint.<sup>44</sup>
64. After analysing all data and information available to it, including the Parties' replies to the SO and the views expressed during the Oral Hearing, which Vodafone attended on 15 September 2020 (receiving the presentations of the Parties delivered on that day), the Commission preliminarily concluded in the PA that the NSAs may restrict competition by effect in that they reduce the Sharing Parties' ability and incentive to undertake unilateral investments in capacity, which in turn reduces their flexibility in competitiveness, innovation and technology/product differentiation on the retail and wholesale market for mobile telecommunication services in Czechia and directly limits competition between them. Therefore, the Commission considers in its PA that the NSAs together with the MNSA are capable of harming end-consumers by leading to less choice, lower quality of services, as well as delays in innovation.
65. Specifically, the Commission preliminarily considered in the PA that the NSAs (i) led to a lack of roll-out of the 2100 MHz capacity band in the East 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.

3.2.3. *The adequacy of the Final Commitments in case AT.40305*

66. As explained in the Commitment Decision of 11 July 2022, the Commission considers that the Final Commitments proposed by the Parties are adequate to alleviate the competition concerns raised in the PA. This is for the following reasons.
67. As regards the Network Modernisation Commitment, first, the Commission considers that this Commitment would solve the 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 Commitments, have the ability to roll out the LTE 2100 MHz band throughout the territory of Czechia.
68. Second, the Commission considers that the Network Modernisation Commitment would alleviate 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 all sites covered by the Network Modernisation Commitment.
69. Third, the Commission considers that the Network Modernisation Commitment would enhance the Sharing Parties' ability and incentives to invest unilaterally,

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<sup>44</sup> Vodafone has not specifically referred to restricted flexibility in rolling-out the 1800 MHz band or to disincentives via financial means and unnecessary information sharing.

as the new hardware pre-installations would provide an increased level of flexibility for both Sharing Parties in deploying capacity more efficiently and independently from each other using the mid-band layers.

70. 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 or specific frequency bands, such as 700 MHz and 3.5 – 3.7 GHz, are likely to take place. Vodafone, in its written observations to the Commission's Article 7(1) letter, acknowledges that "*the Commission has explained that 5G was not part of the investigation and so the Commitments could not be extended beyond the frequencies used for 4G and where the hold-back occurred*". However, in Vodafone's opinion, "*the Commission is not so constrained – the infringement was hold back of technology roll out and whether that was 4G or 5G or related to different frequency bands seems an unnecessarily narrow view of the case*". The Commission did not raise "hold-back" concerns in the PA in relation to 5G and the 700 MHz and/or 3.5 – 3.7 GHz bands (these spectrum bands having only been auctioned in 2020 and not being covered by the network sharing agreements under the Commission's investigation) and therefore an extension of the Network Modernisation Commitment in this respect was not necessary to address the competition concerns identified in the PA in relation to the hold-back issue. Even if such hold-back could in theory be possible, the Final Commitments cannot cater for every eventual future hold-back possibility which was not identified by the Commission in its preliminary assessment. In any event, the preliminary findings and the Final 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 Sharing Parties to "hold-back" the other technologically, this would likely raise competition concerns.
71. As regards Vodafone's argument that a commitment to unwind active sharing in large cities is needed, the Commission notes that Vodafone's comments are heavily based on the merger case M.9674 - *Vodafone Italia/TIM/Inwit JV*, where, to address specific concerns, TIM and Vodafone agreed to scale down their planned active network sharing by leaving out the most densely and highly populated cities and centres of economic importance, corresponding to over 30% of the Italian population and more than 33% of data traffic.<sup>45</sup>
72. That network sharing agreement and the surrounding assessment, however, differs from the situation in the current Czech network sharing case. As already stressed by the Commission on several occasions, the perceived inconsistency only shows that 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,

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<sup>45</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)

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.

73. 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. On the contrary, the Czech NSAs' scope is limited to 2G, 3G and 4G in a market with less concentrated spectrum holdings.
74. Second, the Commission only summarily assessed the Italian network sharing agreement in the context of a merger review. No antitrust procedure was opened and the Commission did not express any view 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 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 possible antitrust concerns which could stem from the network sharing agreements between Telecom Italia and Vodafone in Italy.
75. As to the Financial Commitment, the Commission considers that it would 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 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.
76. As regards Vodafone's comments regarding the Financial Commitment, the Commission welcomes Vodafone's general view that they should improve the incentives of the Visiting Operator to unilaterally invest in the visited area.
77. As to the Information Exchange Commitment, the Commission considers that it would reduce coordination and transparency on the market by limiting the type of information exchanged and the number of people involved in this exchange.
78. As to 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.
79. Finally, the Commission considers that the Prague and Brno Commitment would reduce any 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.
80. As regards Vodafone's comments regarding backhaul and spectrum sharing, as indicated in sections 3.4.4 to 3.4.6 below, the Commission takes the view that

there are insufficient grounds to investigate these issues further due to the limited likelihood of finding of an infringement.

81. In light of the above, the Commission has reached the conclusion that the Final Commitments address the allegations in the complaint that broadly mirror the competition concerns in the PA, i.e. the allegations regarding reduced incentives for the Sharing Parties to compete with each other, which specifically refer to T-Mobile's inability to deploy LTE2100 in the area where it is the Visitor Operator and which is served by CETIN's network.
82. The Commission also refers in this context to the comprehensive and forward-looking character of the Final Commitments as set out in section 1.5.
83. Furthermore, the Commission notes that Article 9(2)(b) of Regulation 1/2003 provides the Commission with an effective instrument to ensure that the Parties fully respect the Final Commitments once those are made binding by a decision of the Commission.
84. In view of the results of the market test, and the additional Prague and Brno Commitment, the Commission considers that the Final Commitments fully address the concerns raised in the PA and, therefore, on 11 July 2022 adopted the Commitment Decision which made the Final Commitments binding on the Parties. The Commission considers, therefore, that there are no longer grounds for action with regard to the allegations in the complaint that broadly mirror the competition concerns in the PA.

### **3.3. Concerns raised in the complaint and in the SO, but no longer in the PA**

85. The complaint, while alleging reduced competition between the Sharing Parties, provides limited details about the type of disincentives in question (technical, financial, information exchange, etc.) and their functioning, nor the necessary evidence backing its allegations.<sup>46</sup> In this section the Commission explains why various concerns raised by Vodafone and addressed in the SO were not finally retained in the PA.
86. In the context of the investigation, and specifically in its response of 17 September 2018 to questions asked by the Commission, Vodafone claimed that there are technical limitations to undertake unilateral investments, which reduce the Sharing Parties' ability for unilateral deployments. Vodafone mentions that in any RAN sharing arrangement, the shared macro coverage layer limits the scope for unilateral coverage enhancements by either party. Each individual enhancement must be properly integrated into the network to deliver a good customer experience. The surrounding area of an individual enhancement (new site, new layer, new sector) must be tuned (radio design and parameterisation) to avoid cells overlapping and generating interference.<sup>47</sup> Such issues were addressed in the SO.

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<sup>46</sup> Page 6, section 2.

<sup>47</sup> Vodafone response to Commission's questions received on 6 August 2018, Document ID: 1272, Non-confidential ID: 1288, page 10.

87. However, in the PA the Commission did not finally consider that potential technical limitations such as increased interference in the event of individual capacity enhancements would potentially result in restrictions of competition.
88. Indeed, as also acknowledged by Vodafone in its response of 17 September 2018, in any RAN sharing agreement, the shared macro coverage layer limits the scope for unilateral coverage enhancements by either party.<sup>48</sup> Given that RAN sharing agreements are not considered as restrictive of competition by object, these technical limitations need to be considered in their relevant context, to assess whether they can result in potential anticompetitive effects.
89. In accordance with settled case law, for 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>49</sup> (the counterfactual).
90. Under Article 101(1) TFEU, the Commission is required to define “a realistic scenario without the agreement at issue”.<sup>50</sup> As provided in the PA (recital 200), the Commission preliminarily considers that, in the absence of the agreements at issue, the Sharing Parties would have likely deployed and operated their own networks independently, which is a “realistic”, “economically viable” and “plausible” hypothesis<sup>51</sup>. On the basis of the case law, the Commission must show that the level of competition resulting from the agreement was likely “worse” than the level of competition that would have prevailed in the counterfactual.<sup>52</sup>
91. As regards 4G coverage, the Commission notes that this is already significantly high and almost ubiquitous.<sup>53</sup> Due to this, and on a forward-looking perspective,

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<sup>48</sup> Vodafone response to Commission’s questions received on 6 August 2018, Document ID: 1272, Non-confidential ID: 1288, page 10.

<sup>49</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*, C22/71, 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 caselaw cited; and also judgment of the Court of 6 April 2006, *General Motors v Commission*, EU:C:2006:229, paragraph 72).

<sup>50</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 166.

<sup>51</sup> Judgment of the Court of Justice of 11 September 2014, MasterCard and Others v. Commission, C-382/12 P, EU:C:2014:2201, paragraphs 108, 166 and 173.

<sup>52</sup> Judgment of 12 December 2018, *Servier and Others v Commission*, T-691/14, EU:T:2018:922, paragraph 1076; 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 71 and paragraph 29 of the Horizontal Guidelines.

<sup>53</sup> <https://digi.ctu.cz/pokryti/>

no major densification can reasonably be expected at the macrocell level (i.e. the high power mobile sites that provide wide area coverage) for 4G technology in the foreseeable future. Also, the Commission found no indications that the rollout under the NSAs was slower than in an individual deployment counterfactual. Furthermore, Vodafone acknowledged in a letter of 3 June 2021<sup>54</sup> that *“Technical issues around how to integrate unilateral deployments into an otherwise shared network may arise for example, when party A wishes to deploy an additional site in a shared area, using the same spectrum as the surrounding shared sites, and this may have an adverse impact on party B’s existing sites, as antennas may need to be adjusted. However, in our experience, these types of technical issue[s] are rare, and can often be resolved in a way that works for both parties, provided there is an incentive to do so”*.

92. As regards capacity, the investigation shows a capacity differentiation between the Sharing Parties at the level of the so-called “capacity layer” spectrum bands. This differentiation between the Sharing Parties in terms of deployed capacity indicates that each of them had sufficient means to independently expand capacity without a need to coordinate with the other. Specifically, both T-Mobile and O2 already had, during the period when the NSAs were in place, and still have enough availability of capacity layer spectrum bands to deploy for capacity extension and they have even more in the LTE 2100 MHz band, as the 3G technology was already switched off by both Sharing Parties during 2021.<sup>55</sup> As explained in section 3.2.1 above, the Commission preliminarily considers that the Final Commitments will solve any hold-back issues in the LTE 2100 MHz band, which indicates that any hurdles linked to capacity differentiation in this band will be eliminated in the future.
93. Finally, as regards the effects of the NSAs at consumer level, although the comparison on the average peak throughput that Vodafone submitted on 17 September 2018 shows a different performance between the two NSA areas, especially with respect to T-Mobile, there are no indications that consumers so far suffered from a poor quality network and that the overall quality was worse than in an independent deployment counterfactual.<sup>56</sup> Differences in quality between the two NSA areas are linked to the technological hold-back issue regarding the LTE 2100 MHz capacity deployment in the East and are expected to be remedied by the Final Commitments offered going forward.
94. Following further analysis and taking into account the Parties’ submissions in reply to the Statement of Objections and at the Oral Hearing, as already briefly referred to in paragraph 37 above, the Commission considered the following objections put forward in the SO as no longer warranted given that the available evidence was ultimately considered insufficient to retain those concerns.

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<sup>54</sup> Letter sent by Simon Burden following up on a call with the Commission on 28 May 2021 concerning network sharing in general.

<sup>55</sup> 3G se definitivně loučí. T-Mobile a O2 dnes ukončí provoz druhé nejstarší mobilní sítě, online, available here : <https://mobilmania.zive.cz/clanky/3g-se-louci-t-mobile-zacina-na-morave-s-vypinanim-druhe-nejstarsi-funkcni-site/sc-3-a-1352929/default.aspx>

<sup>56</sup> Vodafone response to Commission’s questions received on 6 August 2018, Document ID: 1272, Non-confidential ID: 1288, pages 4-6.

95. For the following reasons the Commission considers that the likelihood of establishing the existence of an infringement of Article 101(1) TFEU is limited.
96. First, as regards building extra independent/unilateral sites (sections 13.5.4.3 and 13.6.2 of the SO), the need of extensive (unilateral) site densification appears ultimately relatively limited. The Commission found no evidence that more LTE800 sites would have been rolled out under an independent deployment scenario (in fact, evidence suggests there have been more LTE800 sites rolled-out under the NSAs than in the independent deployment counterfactual) and the shared network has adequate performance with almost ubiquitous coverage. Furthermore, the Sharing Parties have some unused spectrum holdings for future capacity additions.<sup>57</sup> Due to this, the need for a significant macrocell densification (and as such independent/unilateral sites) appears as reduced. Moreover, any potential technical limitations appear only in the limited scenarios of unilateral/independent site deployments in the same frequency bands with the ones that have already been deployed by both the Sharing Parties over the shared grid and there are mitigation techniques (e.g. relying on multiple ports antennas, separate antennas, down tilting antennas on new sites, densifying the common network, densifying only in the higher frequency band, densifying with small cells or use of interference mitigation software) available to deal with this type of potential issue. Therefore, there is insufficient evidence to show that this would have significant negative effects on competition.
97. Second, as regards installing a new unilateral sector on an existing shared site in the common grid (section 13.5.4.6 of the SO), the Commission preliminarily considers that such installation using an existing and already deployed spectrum band in the same site is rarely used in practice in 4G technology as a technique to increase capacity. Moreover, the potential technical limitations mentioned in the SO ultimately appear only in the limited scenarios of new unilateral sectors in the same frequency bands as the shared network. Therefore, there is insufficient evidence to show that this would have significant negative effects on competition.
98. Third, as regards the technical limitations reducing the possibility for unilateral deployment of 3G extra capacity (section 13.5.4.8 of the SO), the Commission preliminarily considers that, given that 3G technology was already switched off by both Sharing Parties during 2021<sup>58</sup> such likely effects have become obsolete.
99. Fourth, as regards the character of capacity deployments in the shared base-stations for the LTE on the 800 MHz band (section 13.6.1 of the SO), the outcome may in fact result from deploying a certain amount of spectrum holdings of both T-Mobile and O2 in this specific band on the shared grid, and the overall number of shared sites is related to the fulfilment by the Sharing Parties of their spectrum licence coverage obligations. The necessary flexibility for adding capacity independently and the expected level of capacity differentiation can be achieved and already occurred in the past, by deploying capacity layer spectrum

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<sup>57</sup> <https://digi.ctu.cz/pokryti/>

<sup>58</sup> 3G se definitivně loučí. T-Mobile a O2 dnes ukončí provoz druhé nejstarší mobilní sítě, online, available here : <https://mobilmania.zive.cz/clanky/3g-se-louci-t-mobile-zacina-na-morave-s-vypinanim-druhe-nejstarsi-funkcni-site/sc-3-a-1352929/default.aspx>

bands, such as the 1800 MHz and the 2100 MHz ones, on top of the shared grid.<sup>59</sup> Therefore, the Commission has no evidence that the deployment would have been less extensive and/or slower under the NSAs than in the independent deployment counterfactual.

100. Finally, as regards other forms of differentiated deployment of the network such as customised solutions, small cells and repeaters, additional services, extra functionalities, use of higher order MIMO techniques, use of higher order modulation (256QAM) and independent setting of certain cell-level parameters (section 13.5.4.10 of the SO), there is ultimately insufficient evidence showing that the Sharing Parties could not independently engage in any of these deployments also in presence the NSAs and, even in case of potential lack of differentiated deployment, there is insufficient evidence supporting likely negative effects resulting from the Sharing Parties' independence being limited as regards these forms of differentiated deployment of the network.

101. The Commission considers, therefore, that the likelihood of finding of an infringement of Article 101(1) TFEU in relation to those concerns is limited.

### **3.4. Vodafone's further allegations and insufficient grounds for action by the Commission**

102. With regard to the other remaining allegations raised in the complaint, the Commission takes the view that there are insufficient grounds to investigate them further, given, in particular, the low likelihood of establishing the existence of an infringement of Article 101 TFEU. This concerns the following Vodafone allegations:

- the NSAs result in the weakening of Vodafone's competitive force and in an allegedly superior network of the Sharing Parties, giving rise to a restriction of competition (section 3.4.1).
- active network sharing in the more populated areas has the greatest potential to restrict MNOs' ability to differentiate and therefore network sharing should be rolled back in these areas (section 3.4.2).
- the Sharing Parties should not engage in 5G active sharing in the same areas in which the Commission requires them to unwind their 4G active sharing (section 3.4.3).
- as a result of the NSAs, both Sharing Parties would have the increased ability and incentive to foreclose Vodafone by refusing to supply fibre backhaul, raising costs or otherwise hindering access to backhaul (section 3.4.4).
- T-Mobile is unable to unilaterally increase the capacity of its fibre backhaul as the result of actively sharing fibre backhaul (section 3.4.5).
- the Sharing Parties would engage in possible spectrum sharing and, therefore, T-Mobile and O2 would collectively have more than double Vodafone's allocation of spectrum below 1 GHz (section 3.4.6).

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<sup>59</sup> <https://digi.ctu.cz/pokryti/>



### 3.4.1. Alleged weakening of Vodafone's competitive force because of the NSAs

103. The complaint largely bases its allegation regarding Vodafone's reduced ability to compete effectively with the Sharing Parties, resulting in reduced incentives for the Sharing Parties to invest and innovate, on the fact that Vodafone's ability to constrain the Sharing Parties in terms of price, product or service innovation would be greatly reduced due to the structural market change resulting from the NSAs<sup>60</sup> and due to the fact that the NSAs would create a network with a higher number of base stations, high cost savings and better coverage and quality than the network of Vodafone.<sup>61</sup>
104. As regards Vodafone's claim that it is the structural market change resulting from the NSAs that weakens competition, the Commission considers that the PA does not derive its preliminary conclusion that the NSAs result in a restriction of competition solely from the structural change it brought on the market. Indeed, in accordance with case-law, 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 following the agreement was “worse” than that which would have prevailed in its absence.<sup>62</sup> The new market structure is only one of the elements that is relevant for the competition assessment, but is not proof of a potential restriction of competition in itself.
105. Other relevant factors also need to be taken into consideration, such as: the type and depth of sharing (including the degree of independence retained by the network operators), the scope of shared services and shared technologies, the duration and the structure put in place by the agreements, the geographic scope and the market coverage of the network sharing agreement, the market structure and characteristics (market shares of the parties, amount of spectrum held by the parties, closeness of competition between the parties, barriers to entry, etc.).
106. While the PA<sup>63</sup> refers to certain competitive disadvantages from which Vodafone claims to suffer, there was no evidence found regarding the weakening of the overall competitiveness of Vodafone and its strength as a competitive constraint due to the structural market change introduced by the NSAs.
107. In particular, the PA refers to Vodafone's entry to 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 a smaller number of sites suitable for construction of base stations was available. 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

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<sup>60</sup> Complaint, page 11.

<sup>61</sup> Complaint, pages 4 and 15.

<sup>62</sup> Judgment of 12 December 2018, *Servier and Others v Commission*, T-691/14, EU:T:2018:922, paragraph 1076; 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 71 and paragraph 29 of the Horizontal Guidelines.

<sup>63</sup> Section 5.3.4.1. Competitive pressure by Vodafone.

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. Also, Vodafone submits that its cost disadvantage is reflected in its EBITDA margin for Czechia. In 2014, T-Mobile's and O2's profitability expressed in EBITDA margin was higher than Vodafone's profitability.<sup>64</sup>

108. Moreover, Vodafone argued that CETIN and T-Mobile would separately own and operate a significantly lower number of base stations, and therefore incur significantly less costs than Vodafone. Overall, the NSAs would allow CETIN and T-Mobile to achieve significant annual savings that Vodafone estimates to be in the order of [500-700] million CZK (EUR [18-25] million) per operator, which according to the Sharing Parties' public statements, would be a very significant proportion of their network costs.<sup>65</sup> However, CETIN's estimation of the cost savings is significantly lower than Vodafone has stated in the complaint and [...].<sup>66</sup>

109. The Commission notes that Vodafone has in the past played a significant role in the market.<sup>67</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. Vodafone also states that it plays an important role in price formation on the retail market, having cheaper tariffs when entering the market and introducing unlimited tariffs with a lower price than the Sharing Parties.<sup>68</sup>

110. Based on the available evidence, the Commission preliminarily considers that Vodafone's role and competitive position does not appear to have shrunk due to the NSAs. Indeed, based on the retail market shares of Vodafone, it appears that Vodafone was able to gain more customers, as its market share rose from 23.6% in 2011 to 25.4% in mid-2019 and especially from 22.2% in 2014 to 25.4% in mid-2019, i.e. increase in market share by more than 14.4% at the expense of the Sharing Parties as the market shares of the (independent) MVNOs were relatively low (ca. 2%).<sup>69</sup>

111. Vodafone also bases its allegation regarding the NSAs resulting in a restriction of competition between the Sharing Parties on the argument that the NSAs create an allegedly superior network. Vodafone argues that the shared network would have [30-40]% and [40-50]% more 2G and 3G base stations, respectively, compared to

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<sup>64</sup> CRA, 25.05.2015, Document ID 7.

<sup>65</sup> Complaint, pages 4 and 5.

<sup>66</sup> This was already noted in the SO, paragraph 800.

<sup>67</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 – Complaint, page 6.

<sup>68</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>69</sup> The Commission also notes that in the 2017 auction for the 3600–3800 MHz band and in the 2020 auction for the 700 MHz and 3400-3600 MHz, three new entities successfully won spectrum, namely Nordic Telecom, PODA and CentroNet. Moreover, national roaming obligation with cost-based pricing incorporated in the 2020 auction could potentially improve the competitive position of Nordic Telecom, PODA and CentroNet going forward, thus adding to competition in the market.

Vodafone's network and would thus offer better coverage and mobile signal of higher quality. The shared network would also have [30-40]% more 4G base stations than Vodafone's network.<sup>70</sup>

112. However, the Commission's preliminary investigation did not provide sufficient elements to support this allegation. The Commission notes that, as shown in Table 6 of the SO,<sup>71</sup> until 2015, Vodafone had [...] number of base stations in 4G in Czechia. Moreover, while [...], their coverage was very similar to that of Vodafone. With regard to higher quality of mobile signal, the P3 Benchmarking Campaign in the Czech Republic (April 2018) data as referenced in the SO showed that Vodafone was consistently either the operator with the highest quality or the second best, [...].<sup>72</sup> In addition, Vodafone has been designated (for the second time in a row) as having the highest quality network in test organised by magazine Chip in cooperation with NET CHECK in the year 2021 and 2022.<sup>73</sup>

113. As also shown by Vodafone,<sup>74</sup> in April 2018, Vodafone was rated the best network, when the testing was split more equally between the East and the West than in 2017. Moreover, with the exception of a few regions, Vodafone had the best network for download speed in the East, and the second best network in the West also according to Facebook's assessment of Vodafone's download speeds in the Czech Republic in June 2018.<sup>75</sup>

114. Finally, even if the network sharing resulted in higher number of base stations for the shared network in comparison with Vodafone's network, which could result in better coverage and quality and/or in lower costs for the Sharing Parties, this is not considered in itself a potential restriction of competition. Indeed, the Commission generally recognises potential benefits from network sharing agreements arising from cost reductions or quality improvements. Cost reductions, for example related to rollout and maintenance, may benefit consumers in terms of lower prices. Better quality of services or a wider variety of products and services can stem, for example, from faster roll-out of new networks and technologies, wider coverage or denser network grids.

115. In view of the above, the Commission preliminarily concludes that there is insufficient evidence that Vodafone's ability to constrain the Sharing Parties has been reduced as a result of the NSAs and the structural market changes resulting from the NSAs. It is therefore unlikely that the Commission could establish a

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<sup>70</sup> Complaint, page 4.

<sup>71</sup> SO, Table 6, page 46.

<sup>72</sup> "Czech Republic Performance in Sharing Areas", Vodafone analysis based on P3 Benchmarking Campaign in the Czech Republic (April 2018), Document ID 1277, NC ID 1287.

<sup>73</sup> Nezávislé testy potvrdily kvalitu českých mobilních sítí. LTE je rychlejší než pevné připojení, online, <https://mobilmania.zive.cz/clanky/nezavisle-testy-potvrdily-kvalitu-ceskych-mobilnich-siti-lte-je-rychlejsi-nez-pevne-pripojeni/sc-3-a-1350494/default.aspx> and Vodafone CZ post on Facebook of 28 January 2022.

<sup>74</sup> Vodafone response to Commission's questions received on 6 August 2018, Document ID: 1272, Non-confidential ID: 1288, page 4.

<sup>75</sup> Vodafone response to Commission's questions received on 6 August 2018, Document ID: 1272, Non-confidential ID: 1288, page 6.

restriction of competition on that basis and therefore the likelihood of finding of an infringement of Article 101(1) TFEU is limited.

3.4.2. *Alleged restriction of MNOs' ability to differentiate in the more populated areas*

116. Vodafone considers that active network sharing in the more populated areas has the greatest potential to restrict MNOs' ability to differentiate. Therefore, Vodafone argues that excluding a sufficiently large proportion of the more populated areas will ensure that the Sharing Parties retain the incentives to invest in their networks and differentiate in these areas, which would enable the Sharing Parties to offer higher data allowances and/or network performance and/or better pricing, which can then also be offered nationwide.<sup>76</sup>
117. Vodafone also emphasised its network sharing experience in the UK, where it decided to unwind the network sharing in the densest populated areas in order to avoid that its network investments/plans are held back, and in Italy, where they reduced the scope of their planned network sharing.
118. In respect of the geographic scope of the NSAs, the Commission notes the following. First, Prague and Brno are excluded from the NSAs – these are the two largest cities in Czechia (Prague being also the most densely populated city and Brno being one of the most densely populated cities in Czechia). The geographic scope and whether the network sharing agreement concerns densely populated areas, is one of the relevant factors to be taken into account when assessing such agreements. The BEREC common position on active network sharing suggests that in densely populated areas active sharing is likely to be less beneficial than infrastructure-based competition.<sup>77</sup> The exclusion of Prague and Brno is in line with this approach.
119. Second, the Commission's investigation resulted in finding preliminary technical, financial and information exchange disincentives to undertake unilateral investments in capacity in all areas covered by the NSAs, independently of the density of the population. In this particular case, in its preliminary assessment the Commission found no evidence that unilaterally investing into capacity would be particularly restrained in the more densely populated areas. The Commitments therefore cover the whole geographic area within the scope of the NSAs.
120. That being said, whilst the Sharing Parties will continue to actively share RAN also in a number of large cities in Czechia, with the exception of Prague and Brno, given the eligibility condition for sites to be modernised (at least one of the Mid-Bands is already deployed on the mobile site), the Final Commitments ensure that the vast majority of sites in the larger cities will be eligible for the Network Modernisation Commitment upgrade.<sup>78</sup> That indicates that more densely populated areas will benefit proportionally more from the Network

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<sup>76</sup> Vodafone's submission in response to the Commission's SO of 7 August 2019, pages 9 and 10, Vodafone's presentation of 14 September 2020 at the Oral Hearing, Document ID 3017, p. 4.

<sup>77</sup> BEREC common position on mobile infrastructure sharing of 13 June 2019, Section 4.2. Active sharing.

<sup>78</sup> See section 1.5 describing the proposed Commitments.

Modernisation Commitment, providing for increased individual technical flexibility of the Sharing Parties. The Commission considers that this is reinforced by the Prague and Brno Commitment which would address potential concerns relating to a possible geographical expansion of the existing NSAs going forward. It should be noted that the compatibility of the NSAs with Article 101 TFEU was carried out on the basis of the current geographic scope of the NSAs.

121. Therefore, the Commission preliminarily considers that based on the information in its possession it is unlikely that the Sharing Parties' ability to unilaterally invest into capacity would be particularly restricted in the more densely populated areas and hence the likelihood of finding of an infringement of Article 101(1) TFEU is limited.

#### *3.4.3. 5G active sharing*

122. Vodafone also considers that the Commission should prevent the Sharing Parties from engaging in 5G active sharing in the same areas in which the Commission requires the Sharing Parties to unwind their 4G active sharing.<sup>79</sup>

123. In this respect, the Commission notes that 5G cooperation is outside the scope of the NSAs and therefore, of the investigation. The Prague and Brno Commitment might, however, result indirectly in a disincentive for network sharing on 5G in the densest areas of Czechia in the next years, in particular since network sharing on 5G may, at least initially, be based on the 4G infrastructure.

#### *3.4.4. Alleged increased ability and incentive to undermine Vodafone through the supply of fibre backhaul*

124. Vodafone argues that, as a result of the NSA, both Sharing Parties will have the increased ability and incentive to foreclose Vodafone by refusing to supply fibre backhaul, raising costs or otherwise hindering access to backhaul.<sup>80</sup>

125. Vodafone also argues that it is unable to obtain equivalent terms as T-Mobile does for access to fibre backhaul from O2/CETIN in the (mainly rural) areas where O2/CETIN is the dominant fibre provider.<sup>81</sup>

126. These allegations, however, are largely unsubstantiated. First, there is no evidence of such foreclosure attempts and Vodafone did not claim that such a scenario occurred in reality.

127. Second, the Commission notes that in backhaul analysis of the Czech national telecoms regulator (CTU) of 2018, CTU states that CTU does not have any information concerning instances of refusal to supply or applying unfair conditions (including price) when providing backhaul services. In the same analysis, CTU declares that it did not find any reasons to apply ex-ante regulation

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<sup>79</sup> Vodafone's submission in response to the Commission's SO of 7 August 2019, pages 5 and 6.

<sup>80</sup> Complaint, page 13.

<sup>81</sup> Vodafone's response to the Commission's request for information of 6 August 2018, pages 2 and 3.

of backhaul.<sup>82</sup> Supply of fibre optic backhaul is not regulated in Czechia, although Vodafone has previously argued that this should be the case. Moreover, it appears that there are many alternative fibre providers that can be used as an alternative source of fibre backhaul in Czechia in rural as well as urban areas.<sup>83</sup> For example, Vodafone names ČD – Telematika as one of its providers of fibre backhaul.<sup>84</sup>

128. Third, following the acquisition of Liberty Global Assets in (i.a.) Czechia by Vodafone,<sup>85</sup> namely the companies UPC Česká republika, s.r.o. and UPC Infrastructure, s.r.o. which own fixed infrastructure, Vodafone could, at least in some areas covered by this network, self-supply (fibre) backhaul, while continuing to rely on CETIN's fibre in rural areas outside the UPC network footprint.<sup>86</sup>

129. It is therefore unlikely that the Commission could establish a restriction of competition on that basis and therefore the likelihood of finding of an infringement of Article 101(1) TFEU is limited.

#### 3.4.5. *Alleged inability to unilaterally increase the capacity of T-Mobile's fibre backhaul*

130. Vodafone argues that the result of actively sharing fibre backhaul is that T-Mobile is unable to unilaterally increase the capacity of its fibre backhaul and is reliant on reaching an agreement with CETIN to do so. This would restrict a crucial parameter of T-Mobile's mobile network, as having insufficient backhaul capacity can create a bottleneck and slow down network speeds.<sup>87</sup>

131. However, there is no indication that there is a lack of capacity in the backhaul links. Moreover, the capacity of a fibre link is high and even if there is a limitation due to the technology used (e.g. Gigabit Ethernet) the line is easily upgradable to a different technology (e.g. 10G Ethernet) to provide the necessary capacity. In addition, there is no proof that there was any slow down of network speeds for T-Mobile or that any alleged such slow down would be due to active sharing of fibre backhaul. It is therefore unlikely that the Commission could establish a restriction of competition on that basis and therefore the likelihood of finding of an infringement of Article 101(1) TFEU is limited.

#### 3.4.6. *Possible spectrum pooling*

132. Vodafone raised the concern that T-Mobile and O2 would collectively have more than double Vodafone's allocation of spectrum below 1 GHz, if they are able to

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<sup>82</sup> Preliminary Analysis of Mobile Backhaul Market (in Czech), page 30, online, accessible at the following link: <https://www.ctu.cz/sites/default/files/obsah/ctu/vyzva-k-uplatneni-pripominek-k-predbezne-analyze-trhu-mobilniho-backhau/obrazky/predbeznaanalyzamilanibackhaulverzeprovkverejna.pdf>

<sup>83</sup> RFI 5 to T-Mobile, Document ID 00246 NC ID 00288, Q63, Q67 and Q68.

<sup>84</sup> Vodafone's submission of 19 September 2016, Document ID 254, page 14.

<sup>85</sup> Commission decision of 18 July in case M.8864 – *Vodafone / Certain Liberty Global Assets*.

<sup>86</sup> Document ID 1230-5745, slides 5-6.

<sup>87</sup> Vodafone's submission in response to the Commission's SO of 7 August 2019, page 22.

pool spectrum as part of network sharing at a point in the future.<sup>88</sup> Vodafone also raised concerns in relation to the 5G auction rules as proposed by the Czech NRA.

133. First, with regard to allocation of spectrum below 1 GHz, Vodafone had almost the same bandwidth as T-Mobile and O2, i.e. 2x10 MHz in the 800 MHz spectrum band and 2x10 MHz (Vodafone) and 2x12.4 (T-Mobile and O2) in the 900 MHz spectrum band.<sup>89</sup>
134. Second, regarding Vodafone's concerns in relation to the 5G auction rules, namely the NRA's view that the 700 MHz auction threatens to leave Vodafone without 5G spectrum or regulated access to 5G and that CETIN and/or its affiliates may become the holder of 2/3 or more of auctioned 5G spectrum,<sup>90</sup> the results of 5G auction in Czechia in which Vodafone acquired 2x10 MHz in the 700 MHz spectrum band, i.e. the same spectrum allocation as T-Mobile and O2, the spectrum holdings of Vodafone, T-Mobile and O2 are even more symmetrical.<sup>91</sup>
135. Third, as to the 3.4-3.8 GHz spectrum band, Vodafone was able to acquire 20 MHz<sup>92</sup> on top of the already acquired 40 MHz in the 3.6-3.8 GHz spectrum band in 2017.<sup>93</sup> In summary, Vodafone acquired the same allocation (2x10 MHz in the 700 MHz spectrum band and 60 MHz in the 3.4-3.8 GHz spectrum band) as T-Mobile and O2.
136. Fourth, T-Mobile and O2 have not pooled their spectrum until now, more than 10 years after the conclusion of the first NSA, and the Commission has no indication that the Sharing Parties will do so in the future. Moreover, as a part of the Final Commitments, the Sharing Parties offered to remove the reference to the possibility of potential cooperation in the area of spectrum sharing.<sup>94</sup> The Final Commitments do not prevent pooling of spectrum. However, were that to happen, the NSAs would change in their scope and character and would no

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<sup>88</sup> CRA, 25.05.2015, Document ID 7, page 2.

<sup>89</sup> SO, Table 4: Spectrum allocation per MNO.

<sup>90</sup> Document ID 1230-5745, slide 7.

<sup>91</sup> Tender for granting of the rights to use radio frequencies to provide electronic communications networks in the 700 MHz and 3400-3600 MHz frequency bands, online, accessible at the following link: <https://www.ctu.eu/sites/default/files/obsah/ctu/information-conclusion-and-results-auction-phase-tender-granting-rights-use-radio-frequencies/obrazky/20201113-informationonauctionend.pdf>

<sup>92</sup> Zpráva o průběhu a výsledcích výběrového řízení (Report on the progress and results of the auction), online, accessible at the following link: <https://www.ctu.cz/sites/default/files/obsah/ctu/oznameni-ceskeho-telekomunikacniho-uradu-o-vyhlaseni-vyberoveho-rizeni-za-ucelem-udeleni-prav-k/obrazky/20210304-zpravaoprubehuavysledcichvyberovehorizenisigned.pdf>

<sup>93</sup> Oznámení o ukončení a výsledcích aukční fáze (Announcement of the end of the Auction and the distribution of radio frequencies to the Auction winners), online, accessible at the following link: <https://www.ctu.cz/sites/default/files/obsah/ctu/oznameni-ceskeho-telekomunikacniho-uradu-o-vyhlaseni-vyberoveho-rizeni-za-ucelem-udeleni-prav-k/obrazky/oznameni-o-vysledcich-aukce-3700mhz.pdf>

<sup>94</sup> NSAs Commitments, point 4.1, section called "Update or remove NSAs provisions referring to specific information exchanges".

longer be covered by the Commitment Decision given that the Commission's assessment is based on the scope of the NSAs as they are currently in place.

137. The Commission thus notes that T-Mobile, O2, and Vodafone have similar spectrum holdings and the Sharing Parties have not pooled their spectrum within the NSA so far. Moreover, the Sharing Parties explicitly removed a reference to spectrum pooling from the NSAs. Should the Sharing Parties share spectrum, the scope and character of the NSA would be different and would not be covered by the Article 9 decision. It is therefore unlikely that the Commission could establish a restriction of competition on that basis.

138. With regard to the alleged weakening of Vodafone's competitive force because of the NSAs, increased ability and incentive to undermine Vodafone through the supply of fibre backhaul, inability to unilaterally increase the capacity of T-Mobile's fibre backhaul and possible spectrum pooling of the Sharing Parties, in conclusion, it is unlikely that the Commission could establish a restriction of competition and therefore the likelihood of finding of an infringement of Article 101(1) TFEU is limited.

#### **4. CONCLUSION**

139. For the reasons set out above, and after carefully reviewing your observations made in response to the Article 7(1) letter, the Commission confirms its conclusion that there are insufficient grounds for conducting a further investigation into the alleged infringements. Your complaint is consequently rejected pursuant to Article 7(2) of Regulation (EC) No 773/2004.

#### **5. NEXT PROCEDURAL STEPS**

##### **5.1. Right to bring an action**

140. An action for annulment may be brought against this Decision before the General Court of the European Union, in accordance with Article 263 TFEU.

##### **5.2. Confidential information**

141. The Commission may send a copy of this Decision to T-Mobile, O2 and CETIN. Moreover, the Commission may decide to make this Decision, or a summary thereof, public on its website<sup>95</sup>.

142. If you consider that certain parts of this Decision contain confidential information, you are requested to inform [...] (e-mail: [...])@ec.europa.eu and [...] (email: [...])@ec.europa.eu) within two weeks from the date of receipt of this Decision, identifying clearly the information that you consider confidential. Also, you are requested to indicate why you consider that certain information should be treated as confidential.

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<sup>95</sup> See paragraph 150 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (OJ C 308, 20.10.2011, p. 6).



143. If you do not respond within that time-limit, the Commission may assume that you do not consider that this Decision contains confidential information and that it can be published on the Commission's website or sent to T-Mobile, O2 and CETIN.

144. The published version of this Decision may conceal your identity upon your request if this is necessary for the protection of your legitimate interests.

*For the Commission*

*(Signed)*  
*Margrethe VESTAGER*  
*Executive Vice-President*