Dear Mr Novák,

Subject: Commission Decision concerning Case CZ/2015/1753: Wholesale local access provided at a fixed location in the Czech Republic

Commission Decision concerning Case CZ/2015/1754: Wholesale central access provided at a fixed location for mass-market products in the Czech Republic

Commission Decision concerning Case CZ/2015/1755: Wholesale high-quality access provided at a fixed location in the Czech Republic

Comments pursuant to Article 7(3) of Directive 2002/21/EC

1. PROCEDURE

On 30 June 2015, the Commission registered three notifications from the Czech national regulatory authority, Český telekomunikační úřad (ČTÚ)\(^1\), concerning the market for wholesale local access provided at a fixed location\(^2\), the market for wholesale central access provided at a fixed location for mass-market products\(^3\) and

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\(^3\) Corresponding to market 3b in the Recommendation on Relevant Markets.
the market for wholesale high-quality access provided at a fixed location\(^4\) in the Czech Republic.

The national consultation\(^5\) on the draft measures relating to the first two markets ran from 25 March 2015 to 27 April 2015. The national consultation on the draft measures relating to the third market ran from 3 April 2015 to 4 May 2015.

On 10 July 2015, a request for information\(^6\) was sent to ČTÚ and a response was received on 15 July 2015.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

2. DESCRIPTION OF THE DRAFT MEASURE

2.1. Background

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

The market for wholesale local access provided at a fixed location in the Czech Republic was previously notified to and assessed by the Commission under case CZ/2014/164\(^7\).

ČTÚ defined the market as wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location, including unbundled access products and services provided through the legacy copper network, as well as over fibre (FTTx). ČTÚ did not include access through cable and Wi-Fi. ČTÚ designated O2 Czech Republic a.s. (O2) with Significant Market Power (SMP) on the basis of its high wholesale market shares, overall size of the undertaking, control of an infrastructure that is not easily duplicated, product/services diversification, economies of scale and scope, vertical integration, barriers to entry and to the improvement of competition. ČTÚ presented in general terms the remedies that it intended to impose: (i) wholesale physical access, as well as access to passive infrastructure and dark fibre; (ii) transparency; (iii) non-discrimination\(^8\); (iv) price control; and (v) accounting separation. It explained that the precise design of the proposed remedies, including the roadmap for their implementation

\(^4\) Corresponding to market 4 in the Recommendation on Relevant Markets.

\(^5\) In accordance with Article 6 of the Framework Directive.

\(^6\) In accordance with Article 5(2) of the Framework Directive.

\(^7\) C(2014) 7537.

\(^8\) Including a general obligation to apply equivalent conditions in equivalent circumstances for copper and NGN networks. It also imposed an obligation to ensure the technical and economic replicability of services provided on both copper and NGN networks. ČTÚ indicated that it considered optical access networks to include not only FTTH networks but also any other access networks that enable the provision of services with the minimum speed of 30 Mbit/s.
implementation, would be the subject of separate administrative procedures. The Commission emphasized the importance of ensuring that access products that are imposed (VULA, in particular) are designed effectively and urged ČTÚ to notify the implementing measures for the remedies in this market within six months from the adoption of the notified market analysis.

The price control remedy was notified to and assessed by the Commission under case CZ/2015/1745\(^9\). ČTÚ proposed the final prices for copper-based wholesale local access services, provided at a fixed location calculated on the basis of a BU LRIC+ cost model. Given ČTÚ’s plan to review the treatment of civil engineering in the cost model, the Commission provided a comment asking to review and to notify to the Commission the adjusted cost model as soon as possible, but in any event by the end of the first half of 2016.

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

The market for wholesale central access provided at a fixed location for mass-market products in the Czech Republic was previously notified to and assessed by the Commission under case CZ/2014/1648\(^10\).

ČTÚ defined the market as the wholesale broadband access to electronic communication networks at a fixed location, including wholesale broadband access over xDSL and FTTx. Cable and Wi-Fi were excluded from the market definition. ČTÚ designated O2 with SMP on the basis of high market shares\(^11\), overall size of the undertaking, control of an infrastructure that is not easily duplicated, product/service diversification, economies of scale and scope, vertical integration, barriers to entry and to the improvement of competition. ČTÚ presented in general terms the remedies that it intended to impose: (i) provision of bitstream access, including a new access point located at the level of the regional Ethernet network (RE\(\text{N}\)); (ii) transparency; (iii) non-discrimination\(^12\); and (iv) accounting separation. As for Market 3a, ČTÚ explained that the precise design and roadmap of the proposed remedies would be the subject of separate administrative procedures. ČTÚ did not impose a price control obligation in Market 5, therefore continuing the regulatory approach to price control that was in place at the time, based on pricing flexibility subject to a margin squeeze test. Similarly to the comment made on Market 3a, the Commission called on ČTÚ to ensure that the features of the substitute Bitstream offer were the closest possible to a physical unbundling product and urged ČTÚ to notify the implementing measures for the remedies in these markets within six months from the adoption of the notified market analysis. Moreover, the Commission urged ČTÚ to closely monitor the geographic price


\(^10\) C(2014) 7537.

\(^11\) Above 72% of accesses.

\(^12\) As in Market 3a, a general obligation of non-discrimination was imposed, but EoI was required for access to O2’s NGA networks. ČTÚ imposed an obligation to provide bitstream access that used vectoring technology, if O2 deployed vectoring in the future. Together with EoI, ČTÚ also stated that it would impose an obligation to ensure technical and economic replicability.
variations at retail and wholesale level and to analyse the appropriateness of future price control should the need arise.

2.1.3. Wholesale high-quality access provided at a fixed location in the Czech Republic

The market for wholesale high-quality access provided at a fixed location in the Czech Republic was previously notified to and assessed by the Commission under case CZ/2014/1673\(^\text{13}\).

The product market included services allowing to provide transmission capacities through conventional analogue or digital (TDM) lines, as well as those over transmission frames and Ethernet interfaces. The market did not include terminating segments of leased lines for provisioning capacity to base stations. ČTÚ segmented the product market into Segment A (terminating segments of leased lines with guaranteed bandwidths up to and including 2 Mbit/s) and Segment B (with guaranteed bandwidths exceeding 2 Mbit/s). ČTÚ designated O2 with SMP on Segment A, based on high market shares\(^\text{14}\), not easily duplicable infrastructure, high prices for classical leased lines, vertical integration, potential competition and barriers to entry. In Segment A, ČTÚ imposed, in general terms, obligations of (i) access\(^\text{15}\); (ii) transparency; (iii) non-discrimination; and (iv) accounting separation on O2. Like in the previous review, no price obligation was proposed. ČTÚ found Segment B to be competitive\(^\text{16}\) and did not designate an SMP operator, nor imposed any remedy. The Commission had no comments.

The relevant geographic market was considered to be national for all three markets.

2.2. Proposed regulatory remedies

2.2.1. General remarks

In June 2015, the operator designated with SMP on the three markets under analysis, O2, underwent a corporate separation which resulted in the creation of two separate entities – O2 and Česká Telekomunikační Infrastruktura (CETIN). Given that CETIN is the owner of the relevant fixed-line infrastructure\(^\text{17}\), ČTÚ confirms that CETIN is the corporate entity on which the notified SMP remedies will be imposed.

ČTÚ also confirms in the answer to the RFI that it will conduct and notify to the Commission a coordinated analysis pursuant to Article 13b(2) of the Access

\(^{13}\) C(2014) 9662.

\(^{14}\) 61.43% of terminating segments of leased lines excluding self-supply.

\(^{15}\) The existing access obligation was amended to allow a new regional level of Ethernet interconnection.

\(^{16}\) ČTÚ states that O2 Czech Republic has only 18.57% market share, while there are two other undertakings active in this segment with a share exceeding 10% (GTS Czech s.r.o. and CBL Communication by light s.r.o.).

\(^{17}\) Covering 97% of the Czech population. None of the other operators has such extensive network coverage.
Directive\(^{18}\), related to the voluntary separation of the incumbent operator. ČTÚ expects to notify such analysis with regard to Markets 3a and 3b of the Recommendation on Relevant Markets in the course of the first half of 2016.

### 2.2.2. Wholesale local access provided at a fixed location in the Czech Republic

The current notification outlines the detailed design and timeline for implementation of the remedies to be imposed on CETIN, the general principles of which were adopted following case CZ/2014/1647. The current notification, therefore, provides details on the following remedies: (i) access to specific network elements and associated facilities\(^{19}\); (ii) transparency\(^{20}\); (iii) non-discrimination\(^{21}\); and (iv) accounting separation\(^{22}\). The details of the price control remedy are not included, as they have been notified separately under case CZ/2015/1745.

ČTÚ imposes obligations that have already been imposed as a result of past analyses, as well as new obligations. The new obligations apply to unbundled access to the fibre local loop, the offer of virtual unbundled access to the local loop (VULA), as well as to access to passive infrastructure, especially cable ducts and protectors, and to dark fibre.

ČTÚ imposes the non-discrimination obligation in the form of equivalence of inputs (EoI) for NGA products, i.e. for unbundled access to the fibre local loop and VULA. The availability of a VULA product is required where physical unbundling becomes unfeasible because of the deployment of vectoring\(^{23}\) and of GPON fibre networks.


\(^{19}\) Obligation of unbundled access of copper loop and copper sub-loop; Obligation of physical unbundled access of fibre line or part of fibre subscriber line (FTTx); Obligation of unbundling of the local virtual loop (VULA); Obligation of access to associated facilities, ducts and cable protection tube and access to dark fibre; Obligation of Service-Level Agreement (SLA) and Service-Level Guarantees (SLG).

\(^{20}\) Obligation to publish the information related to unbundling and associated facilities; Obligation to inform in advance about intention to terminate the offers on provision of access via unbundled cooper local loop due to migration to FTTx or using vectoring technologies; Obligation to publish key performance indicators (KPI); Obligation to inform 3 months in advance about changes in the reference offers.

\(^{21}\) Obligation to apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services; Obligation to provide services and information to others under the same conditions and of the same quality as it provides for its own services; Obligation to provide FTTx and VULA services by proper application of Equivalence of Input (EoI) according to the Commission’s recommendation 2013/466/EU; Obligation to ensure economic replicability of services provided by the SMP operator on market 3b separately for legacy copper based services and NGA services.

\(^{22}\) Obligation to keep evidence of costs and revenues separately for each group of access service in order to avoid cross financing between Market 3a and Market 3b and input data for the LRIC+ cost model.

\(^{23}\) Access seekers will also be allowed to deploy vectoring in exchanges where the SMP operator does not intend to do so at the moment and when the access seeker requires a higher speed service. In case of deployment of vectoring by access seekers, the SMP operator is obliged to provide VULA to other access seekers.
CETIN is running a pilot project to test the vectoring technology, but has not decided on a date of commercial launch.\textsuperscript{24}

ČTÚ expects that the detailed content of the EoI and VULA obligations, to be included in CETIN's Reference Offer, will be available in seven months after the current draft decision becomes legally effective. In the response to the RFI, ČTÚ considers that Article 7 of Directive 2002/21/EC does not oblige to notify the EoI and VULA details to the Commission, BEREC and other NRAs.

As regards the obligation for the SMP operator to satisfy an Economic Replicability Test (ERT)\textsuperscript{26}, ČTÚ has opted for an economic space test (between markets 3a, 3b and the retail level), instead of an ERT between the respective wholesale and retail products on both markets 3a and 3b. ČTÚ indicated in the response to the RFI that it considers that cost-oriented prices on Market 3a, as notified in case CZ/2015/1745, on their own would not ensure a sufficient economic space between markets 3a and 3b, since prices (both copper and NGA) on market 3b are not regulated. The necessity to ensure economic replicability is driven by ČTÚ's effort to promote infrastructure-based competition by incentivising market entry by access seekers in more upstream markets. Without imposing such obligation, ČTÚ argues, the incentive to move between individual rungs of the so called "ladder of investment" would not be sufficient.

\subsection{2.2.3. Wholesale central access provided at a fixed location for mass-market products in the Czech Republic}

The current notification outlines the detailed design and timeline for implementation of the remedies to be imposed on CETIN, the general principles of which were adopted following case CZ/2014/1648. The current notification, therefore, provides details on the following remedies: (i) access to specific network elements and associated facilities\textsuperscript{28}, (ii) transparency\textsuperscript{29}, (iii) non-discrimination\textsuperscript{30}, and (iv) accounting separation\textsuperscript{31}. No price control remedy was imposed on this market.

\begin{itemize}
\item \textsuperscript{24} There are about 2 500 vectoring-ready DSLAMs.
\item \textsuperscript{25} The measure for switching technologies is flexible if parties agree to a shorter timeframe. This means that any switching scenario is possible in case of a mutual agreement.
\item \textsuperscript{26} The proposed methodologies for the ERTs to be applied to copper and NGA products will be the same, i.e. downstream costs determined on the basis of an Equally Efficient Operator (EEO), Current Cost Accounting (CCA) and an LRIC+ cost model. A reasonable level of profit will be determined on the basis of the current value of the Weighted Average Cost of Capital (WACC).
\item \textsuperscript{27} For Market 3a, ČTÚ adopts a portfolio approach for both copper and NGA based services. For Market 5, the regulator adopts a portfolio approach for copper based services and a flagship approach for NGA products. The flagship product is always the NGA retail product with the highest number of retail customers (end-users). Moreover, a second retail NGA product with such parameters (price, speed, contention ratio etc.) qualifying it as the retail product with the highest potential to replace the current service with the highest number of end-users can also be considered as a second flagship product. Therefore, at any time, there may be a maximum of two retail flagship products.
\item \textsuperscript{28} Obligation to meet reasonable requests for access to and use of specific network elements and associated facilities under conditions which are determined by the access reference offer, so as to allow operators to take bitstream from the network provider to its own network on IP layer; Obligation to offer bitstream access to another operator at the regional Ethernet network (REN); Obligation to offer Service-Level Agreement (SLA) and Service-Level Guarantees (SLG); Obligation to comply
ČTÚ imposes obligations that have already been imposed as a result of past analyses, as well as new obligations. The new obligations relate to the possibility for third parties to require access to the regional Ethernet network (REN)\(^{32}\), and, as in Market 3a, the obligation of non-discrimination in a form of EoI for NGA products. ČTÚ states that, for the purposes of this decision, it classifies the VDSL2 connections as a new-generation access network, considering the fact that it is possible to provide services at speeds of at least 30 Mbit/s through them.

As in Market 3a, ČTÚ imposes the obligation to offer in the contractual framework specific SLA related penalties, as well as the obligation to publish key KPIs documenting compliance with the SLAs.

The details of the ERT, which are also applicable to Market 5, are described in Section 2.2.2 above.

2.2.4. **Wholesale high-quality access provided at a fixed location in the Czech Republic**

The current notification outlines the detailed design and timeline for implementation of the remedies to be imposed on CETIN, the general principles of which were adopted following case CZ/2014/1673. The current notification, therefore, provides details on the following remedies: (i) access to specific network elements and associated facilities\(^{33}\); (ii) transparency\(^{34}\); (iii) non-discrimination\(^{35}\); and (iv) with requirements of migration between wholesale offers, migration between providers and to allow naked DSL access.

29 Obligation to publish information related to access; Obligation to publish the key performance indicators (KPI); Obligation to inform 3 months in advance about the changes in the reference offer.

30 Obligation to apply equivalent conditions and provide the same services and information in equivalent circumstances to other undertakings; Obligation to ensure economic replicability separately on copper and selected NGA services according to the Commission’s recommendation No. 2013/466/EU; Equivalence of Input; Obligation to comply with a technical replicability test for NGA services.

31 Obligation to keep evidence of costs and revenues separately for each group of access service and further for copper based services with speeds lower than 30 Mbit/s in order to avoid cross financing between Market 3b and the retail market and input data for verification of costs and revenues for individual access services.

32 This will allow alternative operators to offer increased differentiation from the SMP operator's services.

33 Obligation to meet reasonable requests for access and use of specific network elements and associated facilities under conditions which are determined by the access reference offer so as to allow operators to take over service of leased of transmission capacity via classic lines or via transmission frames or Ethernet interface; Obligation to allow using of access points of the transmission network in the areas of edge network elements of regional Ethernet network (REN) for services of leased transmission capacity via transmission frames and Ethernet interface.

34 Obligation requiring the operator to publish information related to access. The obligation to publish a reference offer is not proposed by ČTÚ as the obligation is implied by the Act.

35 Obligation to apply equivalent conditions in equivalent circumstances to other undertakings; Obligation to provide services and information to others under the same conditions and of the same quality as it is provided for its own services.
accounting separation. No price control remedy was imposed on this market in the market review.

In the scope of this draft decision, ČTÚ defines a new obligation to allow Ethernet access at the level of the regional Ethernet network (REN), to be granted upon expression of interest by an access seeker.

3. COMMENTS

The Commission has examined the notification and the additional information provided by ČTÚ and has the following comments:

Need for transparency and coherence in the notification of remedies under the EU consultation procedure

The Commission welcomes ČTÚ’s general approach to impose the non-discrimination obligation in the form of equivalence of inputs (EoI) for NGA products, i.e. for unbundled access to the fibre local loop and VULA. However, it notes that the current proposals, while setting out a more precise timetable for the implementation of EoI compared with the market analysis, still do not contain the precise characteristics of the implementation of EoI, and of the VULA access product obligations. The Commission understands that these will only be defined after CETIN submits its EoI proposal and then its Reference Offer to ČTÚ - approximately seven months after the current draft decisions becomes legally effective.

Further, ČTÚ indicated in the response to the RFI that it believes that, according to Article 7 of Directive 2002/21/EC, it is not obliged to notify to the Commission the details of the EoI and of VULA access product.

In this regard, the Commission recalls that the acceptance of a Reference Offer by ČTÚ, is a decision that falls within the scope of Articles 15 and 16 of the Framework Directive. Furthermore, this decision would affect trade between Member States, particularly as the EoI proposal and Reference Offer will set out many of the material details specifying obligations that so far have been set out only in general terms in the draft measure. In particular, the decision will have an impact on investment decisions of access seekers, including those based outside of the Czech Republic. For this reason, in the Commission's view there is no doubt that ČTÚ's approval of the Reference Offer must be notified to the Commission in accordance with Article 7(3) of the Framework Directive, and a failure to do so by ČTÚ would constitute of breach of that provision.

The Commission, therefore, urges ČTÚ to notify CETIN's EoI proposal and Reference Offer under Article 7(3) of the Framework Directive and invites ČTÚ to do so within the first half of 2016.

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36 Obligation to keep the separate evidence of cost and revenues at retail / wholesale level that unjustified cross-financing is not taking place; Obligation to have evidence for the verification of costs and revenues for each individual service.

37 In accordance with Article 7(3) of the Framework Directive.
In the same context, the Commission urges ČTÚ to ensure that the details of CETIN's Reference Offer, in particular those concerning the VULA access product and EoI, take into utmost account the Commission's Recommendations on Relevant Markets and the Recommendation on consistent non-discrimination obligations and costing methodologies\(^{38}\), respectively, and fulfil the objectives set by ČTÚ in the market analysis.

**Efficacy of price related obligations**

The Commission acknowledges ČTÚ's justifications for applying an economic space test (between markets 3a, 3b and the retail level) instead of a traditional ERT between wholesale products and retail products simultaneously on both markets 3a and 3b. The Commission acknowledges, in particular, ČTÚ's goal to promote infrastructure-based competition by incentivising entry to more upstream markets (from market 3b to market 3a).

The Commission also recalls the reasons for ČTÚ for not imposing a price control remedy in Market 3b and for not applying a geographic segmentation to the market, as outlined in case CZ/2014/1648. This is justified, amongst others, by the fact that competitive constraints are applied at a national level, notably by Wi-Fi (and by cable in urban areas).

Nonetheless, the Commission observes that the upcoming implementation of vectoring technology by the SMP operator may increase take-up by households of higher speed broadband, including in areas where no alternative cable or FTTx networks are present. In these areas, Wi-Fi networks alone may find it increasingly hard to compete with high-speed broadband provided over the SMP network. While in areas where cable and FTTx are expanding CETIN has a robust and probably durable competitive constraint, in other areas Wi-Fi competitors that do not choose to deploy FTTx will find it increasingly harder to compete outside the most price-sensitive brackets of the market, particularly as CETIN plans to upgrade its network.

As a result, the Commission notes, as at the time of the market analysis, that for certain geographic areas where cable and FTTx are not present, there might be the risk that CETIN will find it increasingly attractive to apply excessive prices, particularly for its higher speed products, which are less constrained by Wi-Fi. In such cases, the current margin squeeze test alone may no longer be able to prevent excessive prices at wholesale level.

In conclusion, the Commission reiterates its previous comment that ČTÚ maintains a close observation of geographic price variations at retail and wholesale level, not just in the aggregate for the whole wholesale market but also for different brackets of products, and to analyse the appropriateness of future price control on Market 3b should the need arise.

Pursuant to Article 7(7) of the Framework Directive, ČTÚ shall take the utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure; where it does so, shall communicate it to the Commission.

The Commission’s position on this particular notification is without prejudice to any position it may take vis-à-vis other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC\(^{39}\) the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission\(^{40}\) within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.\(^{41}\) You should give reasons for any such request.

Yours sincerely,

For the Commission,
Robert Madelin
Director-General

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\(^{40}\) Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

\(^{41}\) The Commission may inform the public of the result of its assessment before the end of this three-day period.