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Cc to Margrethe Vestager, Executive Vice-President EC

**Subject: Request for review of possible violation of equal access to auction participants and violation of market balance**

We turn to you as an authority overseeing market intermediaries with an emphasis on consumer protection. With this letter, we would like to draw your attention to a very non-standard situation on the Slovak telecommunications market.

First, let us describe the current situation.

Slovak NRA for electronic communications and postal services (in Slovak: “Úrad pre reguláciu elektronických komunikácií a poštových služieb”, further referred to as “NRA”) intends to launch an electronic auction to auction off spectrum in 900 MHz and 2100 MHz bands. The spectrum that is subject to auction is currently held by 3 of the 4 Slovak MNOs. The spectrum expires by 2025 or by half of the 2026, respectively.

Currently, the NRA is executing a public consultation, which can be found at <https://www.teleoff.gov.sk/10807-sk/verejna-konzultacia-z-frekvencneho-pasma-900-mhz-a-2100-mhz/>. The deadline for submission of comments is September 21, 2023. According to information published by the NRA, the NRA intends to start the auction process on October 4, 2023. First public consultation on auction conditions realized in July/August 2023 was scrapped by the NRA without explanation and without reconciliation of the comments received in the public consultation. More details can be found here: <https://www.teleoff.gov.sk/konzultacie/> and here: [https://www.teleoff.gov.sk/data/files/53492\\_20230817\\_vyhodnotenie\\_vk900\\_2100mhz\\_info.pdf](https://www.teleoff.gov.sk/data/files/53492_20230817_vyhodnotenie_vk900_2100mhz_info.pdf). In the next step, the NRA launched the second public consultation in August/September with documentation substantially the same as in the first public consultation. We would specifically like to point to point out that such important topic is being publicly discussed during holiday period without rational reason for the hastening of the process as the spectrum expiration time provides the NRA with sufficient room to organize public consultation in a more appropriate time. We consider the actions of the NRA, especially considering failures and errors of the NRA as described below, as unfounded and dubious.

Given that the NRA changed the conditions of the auction for the new consultation only marginally and even kept the start date of the auction process on 4.10.2023 (extremely short period of time during which it is not possible for the NRA to address with due care the comments raised during public consultations), and given the NRA’s reluctance to change the auction conditions in any significant way (as expressed by the NRA during negotiations with us and with other parties raising comments in the public consultations), we have serious legitimate concerns that the NRA intends to execute the auction only formally, with a predetermined result. The actions of the NRA attracted political attention already. Mr. Richard Sulík, the former Minister of Economy of Slovak Republic and Chairman of one of Slovak

pro-EU liberal parties, acknowledging the importance of the auction (as it will set competitive conditions on the Slovak mobile market for several decades) has already expressed serious reservations regarding NRA's actions in the auction preparation process, and publicly asked the NRA to postpone the auction to a later time.

The NRA has repeatedly stated in the media that it is aware of the positive role that our company, the 4<sup>th</sup> MNO, is fulfilling on the mobile market by increasing its competitiveness. The NRA in the past created conditions for the entry of a third mobile operator, which brought about cheaper calls and SMS messages, and later a fourth mobile operator, which brought about a data revolution in Slovakia.

It is therefore inconceivable to us that the NRA prepared the auction to support 3 MNOs only thus completely resigning on its publicly declared intent to keep 4 MNOs on the market. This intent of the NRA is clearly visible throughout the entire draft of the auction conditions. We also strongly believe that the NRA's approach regarding the auction goes strongly against objectives of the European Commission, DG Competition, as well as EU and Slovak legislation on electronic communications.

The frequency auction under preparation by the NRA exhibits many dubious and highly non-standard issues, related to the process of its preparation as well as the conditions of the auction itself. The main major issues are outlined below.

- Timewise, the auction is being rushed: there are no rational reasons for the NRA to execute the auction in 2023, as the spectrum being auctioned will expire only in 2025, or 2026, respectively. When asked, the NRA, even publicly, could not provide an argument for the speed-up of the process. In the draft auction documentation, such explanation is also missing completely. We find it highly suspicious, that the speed-up of the process correlated with appointment of a new Slovak Minister of Transport, under whose authority the NRA is placed<sup>1</sup>, a former direct manager of the current Head of the NRA (both were long-time highest-ranking managers of one of the Slovak MNOs). To top it all off, the Chairman of the Slovak Antimonopoly Office was also a senior manager with the same MNO until he took office in March of this year.
- The independence of the NRA was further undermined by the recent change in legislation, which enabled Slovak Government to effectively remove the Head of the NRA from their position<sup>2</sup>. Limiting the powers of the NRA in June 2023 is just the icing on the cake. Such steps are very unusual in the case of an "Caretaker Government".
- We would also like to point-out that the current Slovak Government, including the transport minister, are so-called "Caretaker Government" appointed for a short time only, until a new Government will be formed based on the results of early general elections held in September 2023.
- There are strong indications that the NRA prepared the auction unprofessionally, without exercising due care. We have officially asked the NRA<sup>3</sup> to provide us with information on how the auction conditions and corresponding market analysis, based on which the conditions should have been prepared, were elaborated. In its answer received by us on September 19,

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<sup>1</sup> In Slovakia the NRA is financially directly linked to the Ministry of Transport

<sup>2</sup> Before the change the Head of Slovak NRA could only be removed from position by Slovak Parliament

<sup>3</sup> Based on the Law no. 211/2000 Coll. on free access to information

2023, the NRA stated that the auction conditions and corresponding documentation were created by the Chairman of the NRA as well as other senior managers of the NRA and one externally retained contractor. Based on the mentioned contractor's LinkedIn profile, the person had been a long-term (16 years) Regulatory Affairs Manager of one of the Slovak MNOs and a close colleague to the Chairman of the NRA, Chairman of the Antimonopoly Office, and current provisional Slovak Minister of Transport when they all worked for the MNO. Due to demanding managerial tasks of the Chairman of the NRA as well as the NRA senior management, we believe it is rational to assume that the actual work on the auction conditions was performed by the above-mentioned contractor, a person with strong ties to one of the auction participants.

- We would also like to point out that the “market analysis” that the NRA published in connection with the auction, is incomplete and wrong, as it especially lacks proper forward-looking analysis on how the potential auction outcomes would influence market competition and assumes that the auctioned spectrum will be evenly split between 3 MNOs rather than all 4 MNOs present on the market.
- Based on our analysis of published contracts of the NRA<sup>4</sup> with third parties, including consultants, we have not identified any professional external consultant<sup>5</sup> that has been retained by the NRA to help it prepare the market analysis and auction conditions. While we appreciate that the NRA is saving public money, it is not a consistent approach by the NRA: we have found NRA contracts with Ernst & Young consultants related to analyses of relevant markets and universal service, totaling to 770ths € in 2023 alone. In 2021 the NRA contracted Ernst & Young for an aggregate amount of almost 2 million €. It is therefore clear that the NRA regularly uses external help for important topics of its agenda. The upcoming frequency auction will set a playing field on the Slovak mobile market for the next 20 years, and yet, no reputable external experts were involved in its preparation while other topics on NRA's agenda with equal, or perhaps lower, importance received external funding.
- Based on information provided to us by the NRA on September 19, 2023, the NRA allegedly contacted EC DG Competition and RSPG regarding the auction, however, no concrete outcomes from these contacts/ meetings were presented by the NRA. We therefore believe that the NRA has so far not completed its consultations with DG Competition and RSPG and consider therefore potential launching of the auction by the NRA without completion of the consultations as highly premature. In this context we would like to stress the known long-term strategy of European institutions, i.e., to take a preventive approach to regulation during auctions, so that the largest possible degree of competition is maintained on the market in question, bringing consumer-acceptable prices and the highest possible degree of innovation. This approach supports one of the basic goals of the European Commission. We believe that the current approach of the NRA is in contrary with the above-mentioned strategy.
- NRA intends to restrict competition on the mobile market by limiting access to vital sub-1 GHz spectrum for the 4<sup>th</sup> MNO on the Slovak market – our company would be effectively left with maximum 2x5 MHz band in sub-1 GHz, while the other 3 MNOs will have gained access to at

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<sup>4</sup> Source: [https://www.crz.gov.sk/2171273-sk/centralny-register-zmluv/?art\\_zs1=Úrad+pre+reguláciu+elektronických+komunikácií](https://www.crz.gov.sk/2171273-sk/centralny-register-zmluv/?art_zs1=Úrad+pre+reguláciu+elektronických+komunikácií)

<sup>5</sup> The above-mentioned contractor is not listed in the official list of external contracts by the NRA

least 2x30 MHz<sup>6</sup> each. As a late comer to the market in 2015, our company entered the market at substantial technology disadvantage with own spectrum limited to 1800 MHz and national roaming entitlement that the NRA was unable to secure for us<sup>7</sup>. Without our own crucial sub-1 GHz spectrum with sufficient capacity for nationwide coverage by 5G, and with unclear and in principle impossible to contract regulated national roaming (as stipulated in upcoming auction conditions), we may be forced out of market. From our market launch till today our company has contributed substantially to market competition, which the NRA even, repeatedly, publicly acknowledged even in the very recent past<sup>8</sup>, especially spearheading competition in mobile data services. Removing the 4<sup>th</sup> MNO (our company) from the mobile market will substantially decrease market competitiveness, also considering that one of the other MNOs on the Slovak market is being acquired by the e&<sup>9</sup> and a very high earn-out based on future business results in Slovakia is at stake for the seller<sup>10</sup>. When a third operator entered, the NRA created a package of frequencies that helped the third player build its own competitive network. Considering that 4ka has been declaring for a long time that it is ready to invest considerable funds (and already at present) and considering the need to maintain competition on the market, a similar procedure would be offered. The NRA has long resigned itself to supporting competition in the market. Regulated national roaming, to which the 4<sup>th</sup> mobile network operator was entitled, was never brought to reality by the NRA. On the contrary, the national roaming disputes that the NRA could decide as a regulatory authority, ended up in national courts and have remained unresolved there for almost 10 years. The NRA must therefore be aware of the unenforceability of obligations not only of the wholesale offer, but also of regulated national roaming.

- Another fact with a significant impact on the competition is the original reservation of spectrum lines for existing players operating a 2G or 3G network. In the original auction conditions proposal, these blocks were favored with a price tag of EUR 2 million. The new auction conditions proposal, without any justification, be it factual or economic, includes changed price advantage of EUR 3 million. The price advantage and its change were not supported by any analysis by the NRA. In our opinion, the mentioned advantage, irrespective of its amount, may represent illegal state aid for “older” and larger MNOs, which will lead to a significant disruption not only of the course of the auction, but also to the consumers and the market itself.
- Furthermore, based on the information we received from Slovakian Antimonopoly Office in September 2023 (see Appendix 1 for copy of the letter), it is obvious that the Antimonopoly Office expects the NRA to assess applicability of state aid in connection with the auction. This information was further reinforced by a copy of the letter by Slovakian Antimonopoly Office to the NRA regarding the auction dated January 2023 (see Appendix 2 for copy of the letter). It is therefore highly questionable why such assessment is missing in the NRA’s auction

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<sup>6</sup> In 700, 800, and 900 MHz bands

<sup>7</sup> Henceforth we are relying on a commercial national roaming agreement that will expire by end of 2025.

<sup>8</sup> See, for example: <https://zive.aktuality.sk/clanok/ETfspGK/stat-porovnal-ceny-slovenskych-operatorov-jeden-dopadol-velmi-zle-rozdiely-su-obrovské-detailne-tabulky/>

<sup>9</sup> See: <https://www.ppf.eu/en/press-release/ppf-announces-partnership-with-global-technology-group-e>

<sup>10</sup> We would like to point out that the NRA in Slovakia has so far not investigated the transaction despite the fact that a similar transaction is being reviewed by the Spanish – see

<https://www.reuters.com/markets/deals/spain-scrutinising-saudi-stake-strategic-telefonica-2023-09-06/>

documentation submitted for both the first and the second public consultations. What is even more striking is the fact that the Antimonopoly Office had not raised such comments in the first public consultation<sup>11</sup>. As already mentioned in the beginning of our letter, the second public consultation is still open until September 21, 2023.

- DG Connect knows very well the case of network sharing from the Czech Republic. Unfortunately, a similar case is now also taking place in Slovakia. The first step of one of the signatories after concluding this contract was a completely illogical increase in the price of services. At the same time, the contract itself will bring substantial savings to both contracting parties. The NRA completely failed to consider this network sharing agreement recently announced between 2 MNOs<sup>12</sup> on the Slovak market in the auction conditions. Neglecting such agreement in the upcoming auction conditions will severely impair competition on the market by providing unfounded advantages to 2 MNOs participating in the network sharing.

We believe that above mentioned facts, combined with the unfounded speed-up of auction process, strongly indicate that the NRA acts under political influence, and even may indicate unlawful lobbying practices. We are therefore taking legal action to limit potential damage not only to our company coming from such unfounded and rushed actions by the NRA.

We strongly believe that both EU and Slovak laws are currently being violated in several ways on the Slovak market. Due to the all the above-mentioned facts and pan-European-wide declared intention of consumer protection, we ask DG Competition to review the conditions of the proposed auction, not only from the perspective of limiting competition on the market, but also regarding the spectrum limits recommended by the RSPG, helping to improve innovations.

To best contribute to the assessment of the situation, we offer a personal meeting, during which we could shed more light on the context and document any documents mentioned. Dear customers, we are concerned with serious treatment that will lead to further development of competition and lower prices for the end customer. After all, if we want to build a digital society, the availability of data services, both locally and in terms of price, is a basic prerequisite. Thank you in advance for your reply.

With regards

Appendix 1: Letter of the Slovakian Antimonopoly Office to our company dated September 7, 2023 (original in Slovak; the English translation was executed by our company and is therefore nonbinding and included for information only)

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<sup>11</sup> All comments raised by all parties in the first public consultation can be found at: <https://www.teleoff.gov.sk/konzultacie/> under label "Výsledky národných aj nadnárodných konzultácií".

<sup>12</sup> See: <https://spolocnost.o2.sk/pre-media/o2-a-slovak-telekom-uzavreli-historicku-dohodu-o-zdielani-mobilnej-siete-na-slovensku>

Appendix 2: Letter of the Slovakian Antimonopoly Office to the NRA dated January 26, 2023 (original in Slovak; the English translation was executed by our company and is therefore nonbinding and included for information only) received by our company from the NRA on September 19, 2023