

Utilizing the Pro-competitive Potential of the Spectrum Allocation and Strengthening Consumer Interests

- 1.) The associations **MVNO Europe**, **Bundesverband Breitbandkommunikation (BREKO)**, **Bundesverband Glasfaseranschluss (BUGLAS)** and **Verband kommunaler Unternehmen (VKU)** welcome the statements of the Federal Network Agency that "competition at the service level¹ is to be promoted in the context of the provision of frequencies".² Under § 105 TKG, the Federal Network Agency is required to promote effective competition and avoid distortions of competition when allocating frequencies. Significant market power is not a prerequisite for the imposition of such frequency-regulatory measures. Rather, the "promotion of competition" is the decisive factor for the imposition of frequency-regulatory measures, provided that the other requirements of § 105 TKG are met.
- 2.) **A glaring imbalance has arisen on the entire telecommunications market** with the marketing launch of 5G products by German mobile network operators more than three years ago. The symmetrical structure of the established mobile network operators closes the German market to demand for 5G wholesale services. In this way, the German mobile network operators shield themselves from independent competition on the mobile retail market, **prevent potential market entry** by new mobile network operators, and **distort the competitive conditions on the German fixed-network market** – here, fixed-network operators cannot compete without competitive mobile and bundled products with the large mobile network operators who are also operating their own fixed-networks.
- 3.) **Mobile communications:** In the view of the German Federal Government, the existence of effective service competition is of "great importance to the economy as a whole."³ However, service competition can only have a stimulating effect on competition if demanders are not placed in a worse position than the mobile network operators' own sales in terms of either conditions or technical specifications of the upstream services. Even more than three years after the start of 5G marketing, demand-side companies do not have 5G access or are offered 5G, if at all, on financially and technically discriminatory terms (e.g., reduced transmission speeds). The Monopolies Commission analyzes that the market mechanism, which would offer mobile network operators in functioning markets an incentive to cooperate with demanders, is being invalidated by a uniform conclusion strategy of the active mobile network operators together with ineffective regulation.⁴ Only if this market environment is countered with effective regulation in the future, a competitive market environment can emerge and benefit consumers in particular.
- 4.) **Fixed network:** All German mobile network operators are also active on the fixed-network market. There, they enforce the sale of bundled products comprising fixed-network and mobile services as the market standard. The fact that the mobile communications market is closed off to customers of all kinds - in addition to network-independent mobile communications providers, for example, also to fiber-optic companies and municipal utilities - distorts competition in the fixed-network area: fixed-network operators without their own mobile communications network are excluded from any competition on an equal footing with mobile network operators and **cannot offer competitive bundled products**.
- 5.) **Listening to competition experts:** Both the Monopolies Commission and the Bundeskartellamt have taken a position on the **need for effective regulation to eliminate existing market distortions**. After the Monopolies Commission had already highlighted the pro-competitive effect of an MVNO and service

¹ According to the jurisdiction of the Federal Network Agency, the service level includes both service providers and MVNOs

² BNetzA Position Paper 2022, p. 26

³ Statement of the Federal Government on Sector Report No. 12 of the Monopolies Commission, p. 22.

⁴ 12th Telecommunications Sector Report of the Monopolies Commission, p. 58 et seq.

provider obligation, the Federal Cartel Office has most recently also **recommended** that the "next frequency allocation should be combined with an enforceable service provider obligation."⁵

- 6.) **Using effective regulation for fair competition:** Pricing mechanisms applicable in the case of regulation ensure that the purchase prices for demanders - whether service providers, MVNOs, or fixed-network operators - are created in line with competition and include the pro rata contributions to the spectrum, network expansion, and network operating costs of the mobile network operators. This means, for example, that every mobile communications customer of a municipal utility bears the same share of infrastructure costs as a customer who is contracted directly with the mobile network operator. In order to create equal treatment of customers and achieve **sustainable competition**, future regulation should enable demanders to replicate mobile network operators' offerings in an economically sensible way.
- 7.) **Competition strengthens demand for white label and other products:** An MVNO and service provider obligation would intensify wholesale competition between MVNOs and mobile network operators, as demanders of white label mobile products would have a greater choice of wholesale providers. This would enable wholesale customers to buy from MVNOs as well and, with regard to 5G products, would no longer be limited to mobile network operators - which has been unsuccessful to date. Thus, an MVNO and service provider obligation would also contribute to the promotion of sustainably competitive telecommunications markets (*§ 2 (2) no. 2, 2nd var. TKG*) and to the protection of consumer interests in the field of telecommunications by working toward effective competition and the greatest possible benefits for users in terms of choice, price and quality (*§ 2 (2) no. 3 lit. b) TKG*). However, by once again waiving a MVNO and service provider obligation, the Federal Network Agency would, contrary to § 11 (2) TKG, maintain structures that impede effective competition.
- 8.) **MVNO and service provider obligation for all suitable demanders creates fair framework conditions for providers and consumers:** In the view of the subscribing associations, an MVNO and service provider obligation with validity for all suitable demanders is the **mildest effective regulatory instrument** that can **eliminate the existing imbalances** between mobile network operators and wholesale demanders in all market segments and at the same time **promote the interests of consumers** in the best possible way. If the pro-competitive potential of this frequency allocation is not effectively exploited, the German telecommunications market is threatened with a massive and long-lasting deterioration of the already weak competitive situation until at least the next frequency allocation in 2033.

MVNO Europe, Bundesverband Breitbandkommunikation (BREKO), Bundesverband Glasfaseranschluss (BUGLAS) and Verband kommunaler Unternehmen (VKU) call on the Federal Network Agency to follow their plan to promote service competition and to impose an MVNO and service provider obligation as a frequency-regulatory measure in order to achieve the goal.

⁵ Statement by the Federal Cartel Office on the BNetzA Position Paper 2022, p. 4