Response to the Bundesnetzagentur

Orientierungspunkte und Bedarfsabfrage zur Bereitstellung von Frequenzen in den Bereichen 800 MHz, 1.800 MHz und 2,6 GHz für den Ausbau digitaler Infrastrukturen

21 March 2022

This MVNO Europe contribution may be published in its entirety.

A translation into the German language will be provided shortly.

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I. Introduction

1. MVNO Europe welcomes the initiative taken by the Bundesnetzagentur (hereafter 'the BNetzA') to conduct an additional stakeholder consultation, containing the BNetzA's orientation points for future radio spectrum licensing (800 MHz, 1.800 MHz and 2,6 GHz bands)[1].

2. This MVNO Europe response should be read in conjunction with our response to the BNetzA consultation on the 5 scenarios[2], which we filed in September 2021.

3. MVNO Europe represents various types of Mobile Virtual Network Operators (MVNOs), including companies active on the German mobile market (e.g. freenet Group, sipgate, Voiceworks) and companies active as pan-European/global Internet of Things operators (e.g. Cubic Telecom, Transatel, Sierra Wireless). We also represent companies that wish to expand to the German market for mobile services.

4. Please allow us to emphasize that MVNOs pay wholesale fees for access to mobile networks (for each voice call minute, for each SMS, for each Mb of mobile data). A portion of MVNOs' traffic is traffic that would otherwise not exist on Mobile Network Operators' networks, because MVNOs often serve market niches that Mobile Network Operators are not well equipped to

[1] BNetzA Orientierungspunkte 2022:

https://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/Sachgebiete/Telekommunikation/Unternehmen_Institutionen/Frequenzen/OffentlicheNetze/Mobilfunk/Orientierungspunkte2022.pdf?__blob=publicationFile&v=2

[2] BNetzA SzenarienPapier 2022:

https://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/Sachgebiete/Telekommunikation/Unternehmen_Institutionen/Frequenzen/OffentlicheNetze/Mobilfunk/Szenarienpapier2021.pdf?__blob=publicationFile&v=1

serve, and MVNOs develop innovative services that generate entirely new types and amounts of traffic. Therefore, MVNOs help Mobile Network Operators to grow their overall business, and contribute to Mobile Network Operators' return on investment, including the recovery of the fees that they pay for radio spectrum. In Germany, Service Providers / MVNOs (including 1&1) pay at least EUR 2bn per annum in wholesale fees to the three Mobile Network Operators.

II. MVNO Europe's Position, and Key Requests to BNetzA

5. MVNO Europe considers that the German mobile communications market is underperforming, and is not delivering adequate competition, innovation, and consumer welfare benefits, especially when compared to many other EU Member States, where mainstream services are available with better geographic coverage, at far better price to speed to data allocation ratios, and where services (and the companies delivering them) are much more diverse.

6. This state of affairs in Germany is a result of: (i) the way in which the market has been structured almost exclusively through 'raw' spectrum auctions, and (ii) lack of willingness of the regulatory authority to act decisively to promote competition and facilitate fit-for-purpose wholesale access to mobile networks.

7. The result has been a tight oligopoly with a tightly controlled competitive fringe, where wholesale access is often (constructively) denied, and wholesale access – where granted – occurs on terms that are deliberately degraded to stifle competition. In such a context, service providers (or light MVNOs) are largely seen as distribution channels for the mobile network operators, and full MVNOs are rare, representing a very small proportion of the market, with no new full MVNO having emerged since the acquisition of E-Plus by Telefónica Deutschland.

8. This situation must change, if Germany is not to be left lagging further behind other EU Member States in terms of digital transformation, and in order to empower consumers, business customers and public administrations through better and more tailored mobile service propositions, meeting their diversified needs for connectivity and related services.

9. In addition, in an environment characterized by sharply rising inflation, promoting competition is essential to keep services affordable for all types of users.

10. Therefore (also having examined the consultation document), MVNO Europe makes requests to BNetzA to proceed as follows:

    a) Structure the upcoming spectrum assignment proceeding in such a way that it is not a 'raw' spectrum auction, and attach explicit wholesale access obligations to the spectrum licences.

b) Ensure that these explicit wholesale access obligations go beyond a mere negotiation obligation, and explicitly ensure that both light and full MVNO access is effectively provided by spectrum holders on request of access seekers (within specific deadlines, e.g. 4 months from a formal request). Explicitly specify that the wholesale access obligations are intended to support any business models, non-exhaustively including business models addressing consumers, business users and public administrations, the Internet of Things, network slicing and other new network features and evolutions.

c) In case there are difficulties in ensuring that such access obligations cover all radio spectrum held by a company (and not just the 800 MHz, 1.800 MHz and 2,6 GHz bands to be made available), BNetzA could (as was done in the Czech Republic and France – referenced below) require a set of MVNO access commitments to be entered into in writing as part of the granting of the spectrum license.

d) Ensure that the wholesale access obligations include an internal-external non-discrimination obligation for non-price aspects (equivalent RAN coverage, equivalent access to technology generations without delay, freedom for the access taker to use its own equipment, software, OSS/BSS/HLR/switches/SMSCs, etc., own interconnection arrangements for all off-net traffic, own roaming agreements if desired, etc.). In essence, and by analogy with the regulation of fixed markets, the wholesale access taker should never be obliged to purchase a wholesale input if it can produce it itself or procure it from a third party.

e) Prohibit margin-squeeze, and specify that BNetzA will enforce this prohibition, by enabling BNetzA to set out the testing method, accompanied by a clear commitment from BNetzA that it will conduct regular margin-squeeze tests (as is the case in Norway)[3]. In addition, the license terms should explicitly contain the possibility for market participants and BNetzA to trigger margin-squeeze tests in case of a change in market circumstances.

III. The Imposition of Wholesale Access Obligations is Legally Possible

11. MVNO Europe wishes to emphasize that there are no obstacles for BNetzA to impose explicit fit-for-purpose wholesale access obligations (as we propose above), where justified.

Under German law

[3] Nkom - Principles for margin squeeze tests in Market 15:

https://www.nkom.no/english/market-regulation/_/attachment/download/3d3948dc-1fd8-461f-bb8e-a630fd27c157:dccdd9d5a65715947cfccc19b12e7e2ff076abec/200514%20M15%20Annex%202%20Principles%20for%20margin%20squeeze%20tests.pdf

In its judgment dated 20 October 2021[4], the Federal Administrative Court clearly established that the BNetzA can impose a market-power-independent service provider obligation in frequency assignments with legal certainty.

The Monopolies Commission has followed-up, in its 12th sector report (December 2021)[5], by calling for competition to be safeguarded by a strict service provider obligation.

Under EU law, transposed into German law

12. Article 52 of the European Electronic Communications Code (transposed in § 105 of the German Telecommunications law applicable since 01/01/2021) means that the BNetzA is required by law to give reasoned consideration to potentially mandating wholesale network access as part of spectrum licensing proceedings. The reference (§ 105(2)1)[6] to "*beispielsweise*" implies that it covers not only national and regional roaming, but for instance also light and full MVNO access. The BNetzA proceedings are required to be explicit in this regard, i.e. the BNetzA cannot dismiss wholesale network access without a substantive discussion/elaboration of the issues concerned in its decision-making process.

IV. Further Remarks, Triggered by Sections 8 and 10

13. MVNO Europe notes that the BNetzA's consultation document makes reference to promoting competition (Section 8. Wettbewerb und chancengleicher Zugang) and to service competition (Section 9. Dienstewettbewerb).

14. However, we are surprised at how short (less than 1 page each), and very timid these references are, although we welcome (page 27, paragraph 5) that BNetzA apparently intends to evaluate the existing service provider obligations/arrangements and assess 5G-related further developments of the wholesale market.

15. This triggers the following comments from MVNO Europe:

    a) The market share of service providers / light MVNOs in Germany is shrinking. Studies such as those by the VATM (Marktstudie 2021) have shown that the German mobile network

[4] Judgment (6 C 8.20).

[5] Monopolkommission:

https://www.monopolkommission.de/de/gutachten/sektorgutachten-telekommunikation.html

[6] Reference:

https://dejure.org/gesetze/TKG/105.html

operators Telekom, Vodafone and Telefónica are reaching higher market shares from year to year (85.4% in 2020 to now 91.2% in 2021). The market shares of service providers / light MVNOs are decreasing significantly from year to year (14.6% in 2020 to only 8.8% in 2021). Whilst 1&1's transition to national roaming is a factor, this suggests that independent companies are less and less able to offer differentiated and attractive services to customers. The fact that there has been no new full MVNO in Germany for many years, is equally a matter of serious concern.

b) The focus should not only be on 'new' 5G business/wholesale solutions, such as those enabled by network slicing or aimed at 'verticals'. MVNO Europe is on record with BEREC (paragraphs 13 and 30 of our response to the consultation on the BEREC 5G Radar[7]) in advocating that attention is also needed to 'generic' (i.e. not specialized or newfangled) fit-for-purpose access to 5G networks, to ensure the promotion of competition across the board, for services ranging from traditional voice/sms/data bundles, over data-only offers, to the Internet of Things, and entirely new service propositions and business models.

16. As proceedings before the BNetzA show (in particular Transatel versus Telefónica[8]), a mere order to a Mobile Network Operator to negotiate with a company seeking wholesale access, is not producing market entry, and entails severe risk of ultimately validating constructive refusal to supply. Indeed, such a limited mandate allows the mobile network operator to play for time by stretching the negotiations and seek to impose technical restrictions and financial and/or volume commitments, which defeat innovative business models for which user take-up is uncertain and/or which may have to be tested again in lengthy and expensive dispute-resolution proceedings which small innovative companies simply cannot afford.

17. In fact, +/- 3 years of experience with the negotiation obligation contained in the 2018 spectrum licences underlines the failings of this regulatory approach. It will therefore not come as a surprise that MVNO Europe advocates a different model for the next radio spectrum assignment round, and in particular the explicit set of wholesale access obligations as set out in paragraph 10 above.

[7] MVNO Europe response to BEREC:

https://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/9801-contribution-from-mvno-europe-to-the-pub_0.pdf

[8] Streitbelegungsverfahren nach §133 TKG:

https://www.bundesnetzagentur.de/DE/Beschlusskammern/1_GZ/BK2-GZ/2021/BK2-21-0005/BK2-21-0005_Antrag.html

18. In sum, MVNO Europe would expect that the next round of spectrum assignments entails unequivocal requirements for spectrum holders to provide fit-for-purpose wholesale access, including to MVNOs, in order to preserve and enhance competition, innovation and ultimately to be beneficial to end-user interests.

V. Relevant EU Member State Precedents

19. Please allow MVNO Europe to reiterate that in other EU Member States, wholesale access obligations have effectively been mandated through radio spectrum allocation proceedings. Most recently, in 2020 and in 2019, Portugal, the Czech Republic and France have imposed such requirements, with Full MVNO access being explicitly mandated in spectrum assignment proceedings in all three countries (in the cases of the Czech Republic and France through signed commitments of the bidders for radio spectrum).

    a) Portugal: Article 45 of the Auction Regulation for the Allocation of Rights of Use of Frequencies in the 700 MHz, 900 MHz, 1800 MHz, 2.1 GHz, 2.6 GHz and 3.6 GHz bands, addressing network access obligations (English language text available[9]).

    b) Czech Republic: Invitation to 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 (English language text available)[10]. See especially in Annex 2A, the section requiring a Commitment to provide a wholesale offers (for existing mobile network operators)[11] which also includes the description of a margin-squeeze test that will be applied if needed. Please note also that the Czech NRA has applied the margin-squeeze test recently, and that its decision was upheld by the appeals court. This resulted in a 41% reduction of wholesale charges applied by an MNO (T-Mobile Czech Republic) to an MVNO[12].

    c) France: ARCEP Decision on the modalities and conditions for granting spectrum rights of use in the 3,4-3,8 GHz band in metropolitan France to establish and exploit a mobile radio

[9] Regulation no. 987-A/2020, of 5 November 2020: https://www.anacom.pt/render.jsp?contentId=1573881

[10] Ref. No. ČTÚ-38 426/2020-613, dated 7 August 2020. An English version of all documents is provided below the main body of the announcement of the procedure.

[11] Page 8 and following of Annex 2A: https://www.ctu.eu/sites/default/files/obsah/ctu/announcement-invitation-tender-granting-rights-use-radio-frequencies-provide-electronic/obrazky/annex2adeclarationincumbentoperator.pdf

[12] From CTU website (in English): https://www.ctu.eu/monthly-monitoring-report-no-72021-dispute-decision-wholesale-prices-mobile-data-unsolicited-calls

network open to the public[13]. See especially Section I.6.1, entitled "Engagements d'accueil des MVNO" (pages 33-34). This ARCEP Decision was validated by Government Decision of 30 December 2019[14].

MVNO Europe's responses to BNetzA consultations dated 28 February 2018 and 29 September 2017 contain details on earlier proceedings in EU Member States, in which (full) MVNO access was mandated through spectrum licensing proceedings. We included specific citations of previous French spectrum licences which have led to Full MVNO access since +/- 2010.

VI. About MVNO Europe

20. MVNO Europe represents various types of Mobile Virtual Network Operators (MVNOs), with different business models, addressing consumers, business users (including start-ups/scale-ups)/medium/large businesses, the public sector, ICT service/systems integrators, and Internet of Things (hereafter 'IoT') markets, etc.

21. MVNOs currently represent +/- 10% of SIM cards in the European Union.

22. The term "virtual" refers to the fact that MVNOs do not control radio frequencies and related mobile physical infrastructure (antennas, base stations etc.). However, MVNOs do control the necessary hardware/software/resources to provide wireless/mobile services and may own other telecom infrastructures depending on the extent of their business model.

23. Our members provide mobile-only offers, fixed-mobile convergent offers and offers incorporating audio-visual media content, financial services, machine-to-machine communications, embedded data SIMs for tablets, laptops and other devices, connected mobility for vehicles, etc. Some of our members are also active on wholesale markets as MVNE (E=Enabler) / MVNA (A=Aggregator) supporting other companies and brands that provide wireless/mobile services. MVNO Europe does not represent branded resellers.

24. MVNOs contribute strongly to innovation and competition and provide clear Business to Consumer (B2C) and Business to Business (B2B) end-user benefits.

25. MVNOs also contribute to financing mobile network infrastructure through payment of wholesale charges which assure revenues to Mobile Network Operators, whilst avoiding costly duplication of network assets.

[13] Decision 019-1386 of 21 November 2019: https://www.arcep.fr/uploads/tx_gsavis/19-1386.pdf

[14] https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000039699703

VII. MVNO Europe Contact Details

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

Mr. Quentin Phillipart, Secretariat of MVNO Europe

Tel: +32 2 789 66 23 – quentin@mvnoeurope.eu | www.mvnoeurope.eu

38, Rue de la Loi, 1000 Brussels – 5th floor