

Case summary

23 March 2022

Assessment of “grey spots cooperation” under competition law concluded

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| Sector: | Mobile markets |
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On 21 March 2022, the Bundeskartellamt ended its proceeding to assess the “grey spots cooperation” in the mobile market under competition law. The planned cooperation which originally only involved Vodafone GmbH (Vodafone) and Telekom Deutschland GmbH (Telekom) first raised competition concerns. Especially the exclusive nature of the cooperation was likely to reduce the intensity of competition. Following the Bundeskartellamt’s intervention, the two companies changed the project to also include Telefónica Germany GmbH & Co. OHG (Telefónica). Now that these agreements have been signed, the proceeding could be concluded.

Original plans

In late 2019, Vodafone and Telekom informed the Bundeskartellamt of their cooperation plans to give each other mutual access to selected parts of their mobile network in Germany (so-called network sharing). The parties intended to implement the cooperation exclusively in areas where one of them is not able to offer network coverage while the other party already can (“grey spots”). The planned cooperation only pertained to 4G network coverage using the 800 MHz frequency band.

Mutual access for use was to be implemented based on an MOCN approach (Multi Operator Core Network), the idea being that each cooperation partner shares the active components of its mobile network with the other party in the area in question. The “guest” operator’s mobile traffic reaching the cells approved for MOCN sharing is transferred to the “guest” operator’s network via a link to the “host” operator’s base station site at defined cross points. End customers cannot see that they have been briefly handed over to the respective other operator’s network. A reciprocal approach was intended for this active sharing, i.e. both parties were each supposed to make an equal number of existing base station sites – altogether several thousand – available for use by the other party. Neither party was required to set up new base station sites for this cooperation. Only the already existing base station sites were supposed to be included in order to keep the costs incurred due to sharing very low compared to the advantages gained.

Competition concerns and Bundeskartellamt's interference

In early 2020, the Bundeskartellamt initiated an administrative proceeding to assess the planned cooperation. After various talks with the parties and other market players as well as several market investigations, the authority found that there was the risk of the project in its original form appreciably restricting competition, thus violating Section 1 of the German Competition Act (GWB) and Article 101 TFEU. Although Telekom's and Vodafone's customers would directly benefit from the improvements to network coverage and such a cooperation would also be cost efficient, the authority nevertheless held that there was the avoidable risk that due to the exclusive nature of the project and the structure of the German mobile market, the intensity of competition would be reduced, which in the medium to long term would also result in disadvantages for all mobile customers.

Besides Telekom and Vodafone, Telefónica was the only operator with its own mobile network that was active in the German mobile market in 2020. Whereas in recent years all three providers have served more or less the same number of mobile customers, Telekom and Vodafone have been significantly stronger in the segment for larger business customers and have been able to achieve higher prices in general. Telefónica's market shares, in contrast, have been higher with regard to price sensitive customers. One of the reasons for this development is the fact that Vodafone and Telekom have been able to offer better network coverage than Telefónica while certain customers have been willing to pay higher prices for this advantage. By entering this cooperation, both companies could have further increased this competitive lead in network quality without having to invest in their own infrastructure. Telefónica, however, would not have been able to catch up with its competitors on its own, or only at very high costs, since expanding the network in areas with mobile traffic as low as in those covered by the cooperation plans would hardly be commercially viable without partners. As a consequence, this cooperation would have made it more difficult for Telefónica to exert competitive pressure on Vodafone and Telekom with regard to customers valuing quality; overall, this would have decreased the intensity of competition in the market. This had to be viewed even more critically since there are several indications suggesting that the intensity of competition both in the German end customer market for mobile services and in the wholesale market also affected is rather low when compared internationally. During the past year, the Bundeskartellamt had informed the parties of these competition concerns and discussed these concerns with them. Following this, both companies agreed to generally open the cooperation to Telefónica. Ultimately, it was agreed that Telekom and Vodafone would each enter into similar technical cooperations with Telefónica, which was seen as the best alternative in technical and economic terms. After relevant potential analyses had shown that there were sufficient base station sites to also implement this project, the authority once again made it clear that in terms of their scope, the cooperations involving Telefónica were not allowed to fall significantly behind those between Telekom and Vodafone. Once all parties had finally agreed on how the base station sites were to be

distributed among them, all three companies signed letters of intent in early 2021 and made their cooperation project known to the public. Since the final contracts were not signed until early 2022, the authority's administrative proceeding was not concluded until then. During the entire proceeding, the Bundeskartellamt had widely consulted the Bundesnetzagentur on its assessment of the competition situation and its approach in this case.

General assessment of cooperations in the mobile market and further development of the project

Overall, the proceeding shows that the Bundeskartellamt is generally open to cooperation projects in the mobile sector. Various forms of infrastructure sharing can be used in this sector to generally improve the networks in a cost-efficient way to the benefit of providers and customers alike. Nevertheless, cooperations always also involve the risk that the parties limit their competitive behaviour towards each other or, just like in the present case, companies that are not involved in the project are restricted in their scope to compete effectively in a way that is likely to altogether reduce the intensity of competition. In assessing such projects, it is therefore always necessary to take into account the current market structure as well as other basic conditions. The fact that there were only three network operators active in the German mobile market at the time and that the two leading companies in terms of network quality wanted to work together exclusively was therefore a key factor in assessing the project.

Overall, only limited competitive pressure is exerted on the network operators by so-called service providers which offer mobile services without owning network infrastructure and therefore have to use the networks operated by Telekom, Vodafone and Telefónica. Since it can be assumed that the current cooperation plans are to be pursued in the long term, the authority made it clear that, in principle, the network operators also have to allow service providers and roaming partners operating on the third party's network to use the base station sites made available for their cooperation so that they can also benefit from improved coverage.

In addition, the Bundeskartellamt made it clear that if in the future another network operator could also make its infrastructure available for such a reciprocal exchange, the companies may not rule out this cooperation per se. The authority reserves the right to re-examine the cooperations' effects on competition if the market structure changes since it must be possible to rule out, among other things, that cooperation projects between network operators have a foreclosing effect either on their own or in conjunction with other cooperations, i.e. they must not prevent other network operators from entering the market or unduly limit their possibilities to compete in the market.

With regard to further cooperation projects to be expected in the future, it therefore has to be noted that their effects on competition will not only depend on how the cooperation is structured, but also on

the market structure at the time, already existing cooperations, regulatory and other general conditions, the scope of the project, the market position of the parties involved and of other potentially suitable cooperations. Where applicable, possible restrictions of competition may be acceptable if, for example, they provide benefits for consumers or contribute to promoting technical progress and are indispensable to the attainment of this result. Since infrastructure sharing is generally suitable for improving the network in a comparatively efficient manner or for achieving network coverage in the first place, it is also in the authority's interest not to prohibit projects that raise competition concerns, but to work towards appropriately modifying the projects in order to achieve a result that is altogether positive in terms of competition.