

BT/EE MERGER SUBMISSION ON THE CMA PROVISIONAL FINDINGS.

23 November, 2015

BT Group / EE Consultation

Attn: Ronan Scanlan, Andy Toner, Darren Beck

On behalf of the Federation Communication Services (FCS) and The International MVNOx Association iMVNOx, I would like to thank you for your support during the course of the BT/EE Consultation. This document serves as our non-confidential response to your provisional findings. This only begins to clearly communicate the complexity of our objections to key conclusions that were presented in the Provisional Findings. We highlight some of the negative impacts that we foresee, in regards to the possible entrance of a new merged entity in the UK, as it relates to wholesale mobile access in the future vs the distressed conditions of the MVNO market today, under the considerable market power of the host MNOs; present in the counterfactual.

We submit that these key conclusion were either flawed entirely, lacked the appropriate level of certainty, or showed a need for further understanding of the complexity of the market, as they relate to wholesale mobile access. The arguments, set forth here, by and between the iMVNOx and the FCS, are only introductory, when compared to the depth of the expertise and experience our leadership and members have in regards to the reality of these concerns. We request that the CMA take serious consideration of this response, along with evidence and arguments presented to the CMA by the other responses submitted on the Provisional Findings. As well as, market information and public knowledge which support the important objections we identify below, in regards to the impact of the merged entity on the significant lessening of competition in the wholesale market. In order to address the following flaws within the Provisional Findings.

- Lack of competitive value and scope given to MVNOs by the CMA.
- Uncertainty as presented by the CMA around market theories.
- Lack of consideration or importance place on the impact of further market consolidation.
- Lack of understanding for the true scale of foreclosure within the wholesale market today.
- Lack of remedies required of the notifying parties, by the CMA, as conditions for approval.

These concerns are not solely those of the MVNOs and the wholesale industry alone; Ofcom, the Commission, and the ITU have spoken publicly on the value of MVNOs for competition, consumers, and innovation. We submit evidence of this in a response from the DCMS to the iMVNOx, where they too, addressed the understanding that MVNOs were important to competition.

Indeed, your case panel on this investigation is split on the consequences of continuing to allow consolidation in the national marketplace, without providing any regulatory structure to wholesale mobile access. Ultimately our concern, all of our concern, is the possible significant lessening of competition this merger could have on the wholesale mobile market and in the end, the UK consumers, both today and in the future.

The divided opinions of the CMA case team, in particular should add weight to the arguments we outline in our response to your Provisional Findings and address the overall complexity of the current investigation as it relates to wholesale mobile access.

In summary, we submit that the CMA must delay its final decision on the BT/EE merger to in order to;

- Consider further any new evidence presented in the responses,
- Come to a reasonable level of certainty around several key conclusions including bundled services,
- Await and align the BT/EE decision after understanding the Commissions review of the O2/H3G merger, and,
- Define remedies which can safeguard against the probable foreclosure of the wholesale market

Below, I have outlined the key arguments and requests that both, the iMVNOx and the FCS, make of/to the CMA in our response to your provisional findings.

1. We submit, that this merger cannot be approved without remedies to safeguard the wholesale mobile market.
2. We submit that already in the face of this consolidation, the UK market has become less competitive for consumers based on the US and European markets.
3. We submit, that the CMA pull all the wholesale contracts across the four MNOs to receive a more transparent understanding of the current foreclosure of the wholesale market in the UK.
4. We suggest that the CMA wants to take into account the EU Commissions determination on the O2/H3G merger, including the decision on the reference back to the CMA. Therefore, we submit that the CMA should delay it's decision for a short time.given the risks to competition and consumer welfare that are present in the counterfactual (of not waiting). We will submit to the CMA and to EUC and to the Department of Culure, Media, and Sport that it would be disproportionate not to do so.

As a whole and individually, the FCS, The iMVNOx, and our members believe in a supported wholesale market, where MVNOs are positioned as a positive force. Indeed that, MVNOs are important for consumers in the United Kingdom and across the European Union.

Yet, still today the MVNx ecosystem is an unregulated industry and the harsh reality of this environment is one in which wholesale players are beholden to the considerable market power of their host operators and are trapped in an unbalanced commercial environment that has become increasingly hostile. A market, which has moved to deepen its stranglehold on the wholesale channel even further, since the publishing of the CMA's Provisional Findings (PF's) in October – 2015.

Because of this reality, key stakeholders and MVNO execs are afraid to stick their 'head above the pulpit' even to provide the CMA the evidence it would need to make changes at this moment; fearful of retaliation from the carriers should they speak and still be granted to remedies to safeguard the survival of their business in face of not only the BT/EE merger but the additional consolidation that they can see just on the horizon.

The problem is real and impacts your findings; for the true stands that within a mature market such as the UK, where investment into the MVNx industry is deep and virtual players have already committed significant effort, capital resources, and expertise into their wholesale businesses - the fear of commercial exposure is tantamount.

Therefore, the consideration by the CMA of these objections to your Provisional Findings is of the utmost importance for our members and the market as a whole within the UK. We are also in communication with DCMS, Ofcom, the Commission, and are happy to have this response made available to any of those them should you feel it is beneficial.

Should you have any questions or have any specific feedback to the response please feel free to let us know. We hope to support the CMA in this decision and if we can provide you more/better arguments, as needed, in order for the CMA to use this moment to require merger conditions which will act as a catalyst for competition, consumers, and positive change within the wholesale mobile market in the UK.

Sincerely,

Ms. Frankie Spagnolo - Founder
On behalf of the members world-wide of
The International MVNOx Association

And

Chris Pateman - CEO
On behalf of the members of
The Federation of Communication Services

Response to the CMA's Provisional Findings (BT/EE) on behalf of;

The Federation of Communication Services
The International MVNOx Association

Our Findings (BT/EE)

The International MVNOx Association (iMVNOx), in collaboration with prominent UK trade organization the Federation of Communication Services (FCS), submit the following response to the Competitive Market Authority.

This response is in regards to the CMA's Provisional Findings (PF's); on the proposed British Telecom (BT) merger & acquisition by the Orange - Deutsche Telecom (DT), UK Everything Everywhere (EE). This submission is the non-confidential version and may be shared with other regulatory authorities (i.e. Ofcom, EU Commission).

"We as a body exists to position MVNOs as a positive force for competition, consumers, and innovation. We submit that proper utilization of MVNOs, such as a 'fair and reasonable' framework for the wholesale mobile market, is the remedy to consolidating markets." - Frankie Spagnolo, Founder – iMVNOx

The iMVNOx and the FCS submit, that the CMA has drawn flawed conclusions in their provisional findings as they relate to wholesale mobile access and the UK MVNO market.

This response constitute our objections to key conclusions presented in the PF's and highlights specific arguments in which we¹ find uncertainty with or opposition to conclusions in the CMA's analysis and findings of the BT/EE merger impacts. We submit that the response is limited in its scope when compared to the depth and complexity of our knowledge and expertise in this area, but of which is submitted as such, based on the confines of the CMA's timetable.

We will be pleased to provide additional and information if requested, in order to provide the CMA further understanding on the following key issues;

- Current foreclosure of the MVNO market in the UK,
- The pros/cons of MVNO remedies and considerations previously given by the EU Commission,
- Impacts from the compounding aspects of industry convergence between fixed/mobile - wireless/broadband, and,
- The possible impacts further network consolation with the UK market.

¹ the market expertise of our leadership concludes, and/or a majority or dominant industry view represents, and/or specific member evidence* supports

KEY OBJECTIONS

1. The Importance of MVNOs.²

- a. Based on the conclusion in the CMA's Provisional Findings, we disagree that MVNOs exercise only limited constraint on the market³. The positive influence of MVNOs (and a healthy wholesale environment) is well documented for their impact on competition, innovation, and consumer benefits in markets across the globe.
- b. Additionally, the influence of MVNOs as a remedy for national market consolidation.

2. The Complexity and Reality of the Market today.⁴

- a. Based on the CMA's definitions of the MVNx ecosystem, particularly the characterization of MVNOs which were set out in the Provisional Findings, seriously underestimates the complexity of the market, specifically the impact of the MVNE/MVNA layer plays within the ecosystem. We submit, that it is important for the CMA to understand that in practice a wholesale relationship between the MVNO/MNO relationships is rarely just a one-to-one commercial relationship. This characterization further underestimates the imbalance of power that the MNOs do exert over the market, of which we submit key pieces of evidence from our members.
- b. The consequence of this market power, along with the lack of regulatory protection for the wholesale environment, is serious reluctance from key stakeholders to speak out against their host operators, and share even confidentially through industry organizations such as the iMVNOx, or to the regulator directly, the hostile nature of their relationship and the true state of foreclosure in which the MVNO market in the UK finds itself in today.
- c. The alignment of the market definition with the current requirements of the Framework Directives and the risk of repeating our past mistakes (SEE BTCellNet) if the CMA maintains its current position and does not take into the fullest considerations the previous recommendations and public opinion of

3. The Uncertainty of the Provisional Findings.

- a. Outcomes and factual assessment need to be separated out. There is a difference between a case where; the substantial lessening of competition is not made out on the facts, and a case where; the CMA cannot be sure of the facts, such that an SLC could exist but the facts have not been properly identified or properly weighed. In short there should be reasonable certainty about the current factual position and a set of probable outcomes.
- b. We submit that the tone of the provisional findings is more one of uncertainty, whereas the CMA is representing; 'we don't know so we can't assess so we assume that the market will sort itself out'.

² Addition evidence can be found in Annex A

³ CMA provisional findings

⁴ Additional evidence can be found in Annex B

- i. Too much uncertainty on how much multi-play bundles will be taken up
- ii. Too much uncertainty over how much influence offering bundles (especially fixed-mobile bundles) will be on consumer decision to take up products
- iii. Too much uncertainty on how willing consumers will be to unbundle if the price rises (or quality decreases) on one part of the bundle
- iv. Too much uncertainty on how much consumers will be attracted to bundles because of a new mobile (or fixed) offering and how many will just take up a component from an existing supplier of other components.

“The different conditions in the mobile market have opened up new opportunities for the Post Office, which has launched its own MVNO as the market has shifted towards offering bundled services. Head of telecoms, Geoffrey Smyth explains that as consolidation continues to squeeze the UK MVNO market, this shift will only increase, claiming BT’s takeover of EE will ‘change the dynamic’. He says: ‘Change is accelerating, and again I think BT’s merger is going to change the dynamic. BT’s bundling strategy with TV to launch BT sport has demonstrated that its primary focus has been in bundles. In the MVNO space you can see unlimited bundles emerging, and customer demand for this will be critical for MVNOs that succeed in a period of consolidation.” – The Post Office , CEO -Geoff Smyth, Mobile Today (UK) November 17th, 2015⁵

4. The Counterfactual.⁶

- a. The effect of the BT/EE deal and associated O2/H3G deal are not facts that can reasonably be assessed with any likelihood today, but that will change in the very near future. What can be predicted is that the EU Commission will decide on jurisdiction in a matter of weeks (by 18th December) and has identified the fact that O2/H3G will reduce competition.
- b. Although the CMA has considered the counterfactual of the O2/Hutchinson merger. They have concluded that it prima facie raises competition issues and therefore they will need to be addressed as part of that merger. We submit that this is a flawed conclusion, as it relates to a specific danger in the wholesale market which may or may not be adequately addressed.
- c. We submit that there is a specific danger in the wholesale market which may or may not be adequately addressed as;
 - 1. Currently both O2 and Hutchinson provided mobile wholesale and have their own strategies around this.
 - 2. The potential merged O2/Hutchinson entity will presumably continue providing wholesale but it may be based on one or others strategy or a new strategy.

⁵ [The Post Office CEO sites the BT/EE and bundled service offers to change industry dynamic](#)

⁶ Additional evidence can be found in Annex C.

3. O2 is the larger party and currently has a strategy of having three channels other than its main brand to get to markets - Tesco (a JV MVNO), giffgaff (a wholly owned second brand), Lycamobile (a 3rd party MVNO).
 4. This is in practice a strategy of a single independent MVNO being in the international calling market.
 5. In addition, there is public evidence and it is popular opinion among those with a particular indicia of reliability that Vodafone is in a process of withdrawing from the wholesale market with the possible exception of the international calling market.
- d. We further submit that the reasons why it would be wrong for the CMA to make such a finding include that the outcome of O2/H3G is an unknown, but knowable if a short delay is taken, making a hurried determination unreasonable and disproportionate.

5. Pre-Merger Competition⁷.

- a. The UK fails behind other markets in regards to competition and pricing consumers in the face of market consolidation.
- b. There is already evidence that EE changed its wholesale attitude immediately post the CMA's provisional approval of the merger.
 - i. The Truth about Transatel, EE and that Elusive 4G Access.⁸
- c. There is new evidence in regards to retail services offered by BT which were not considered in the Provisional Findings.

6. Post-Merger Competition.⁹

- a. The incentives for EE to continue to support wholesale post-merger are minimal as the merged entity will have such a dominant position, in regards to both service and coverage, when considering its combined fixed/mobile/wifi assets that this would reduce their incentive to provide wholesale. There is a very serious risk that because of this dominance they will exit the wholesale market full stop, notwithstanding the CMA's arguments in the provisional findings.

7. Our conclusions.

- a. The iMVNOx and the FCS, in particular indicia of reliability for the wholesale market, and on behalf of their combined global member base submit that the CMA's Provisional Findings and approval of the BT/EE merger be reversed; unless the CMA resolves to revise their Provisional Findings to impose conditions, either structural and/or behavioral, which will act as remedies to safeguard MVNOs and wholesale mobile access in the UK.
- b. We submit, that these remedies which must be designed to remove both the barriers to market and the barriers to growth within the wholesale market, are necessary and should be required by the CMA, if the merger to go ahead without detrimental effects to the MVNOs across the UK and the competitive nature of the market as a whole.

⁷ Additional Evidence in Annex D

⁸ Request the wholesale copies of the last 3 versions of the wholesale contracts held by various layers of the MVNO ecosystem. Include contracts from varying types of MVNOs on the EE, Vodafone, and O2 networks.

⁹ Included in Annex D

- c. We submit, that key stakeholders from the wholesale market have received hostile terms from on of the notifying parties since the CMA published their (PF's) and request that the CMA pull all wholesale contracts across all four MNOs and in regards to all layers of the ecosystem, including MVNE/MVNA, as well as, lite and full MVNOs.
- d. We submit that the BT/EE 4G and Wifi offerings are examples of offerings that are new evidence and require the CMA to re-assess the wholesale mobile market in the light of the new evidence. Indeed, should the presences of the additional consolidation be approved that this counterfactual, would results in the complete foreclosure of a competitive wholesale market.
- e. Given these facts, as they relate to new evidence and further impact the uncertainty of the findings; we submit that the CMA wants to take into account the EU Commission determination on O2/H3G, including the decision on the reference back to the CMA, the CMA should delay its decision for a short time, and given the risks to competition and consumer welfare that are being run if it makes the wrong decision, it would be un reasonable and disproportionate not to do so.
- f. However, because of the considered investigation needed to determine the best framework, we submit that the merger does not have to be delay until these remedies are defined; only that the merger must include the conditions of these remedies and set a deadline for completion.
- g. We further submit that, in accordance with the 2005 BT Undertakings on OpenReach, a second Equality of Access Board (EAB) be established as part of the remedies required for CMA approval of the merged Entity. The EAB will provide oversight, alongside Ofcom, on the various remedies set forth in the merger conditions, as they relate to wholesale mobile access.
- h. Therefore, we submit that this conditions set forth in the remedies for approval must have a timeframe and deadline in accordance with the investigation of the Commissions O2/3 case, and may not be finalized on or before the authority has published it's final conclusion on the merger and the EAB has had sufficient time to review the conditions for the O2/3 merged entity to receive approval.

Annex A. The Importance of MVNOs.

Do MVNOs matter?

This is a question we were recently asked while evaluating the arguments which should be present in our response to the CMA

- MVNOs represent 188+million subscribers around the world.
- MVNOs give back to charities, effectively react to market change, require less capital investment, create social communities, drive corporate change, and influence consumer expectations.
- Combined, MVNOs are ranked 11th among the largest multi-national carrier groups in the world; based on global subscriber acquisition totals.
- Indeed, the MVNx ecosystem as a whole has influenced competition and driven major developments in virtual network platforms (NFV/OTA), machine 2 machine (IoT), and SaaS enablement solutions, and cloud-based technologies; with market-leaders like global player, Syniverse building MVNO operations and evaluating their own virtual strategies.

However, perhaps the question is more appropriately answered from the point of view of the over 188+ million subscribers who have chosen MVNOs as their service providers. Are they happy they switched? Why did they change carriers? The answers would be more or less the same; all over the world.

- Price, service, convenience.
- Frustration with their current carrier or long-term contracts.
- Need for a pre-paid or ILD solution.
- In order to escape roaming and bill shock.
- To align their carrier with their personal beliefs and social philosophy.

Whatever the reason and no matter how you define them, MVNOs matter and in the end, they matter most, to consumers.

The case for MVNOs is not new.

During the 2009 merger of Deutsche Telecom and Orange France, in a merger which launched the UK mobile network operator Everything Everywhere (EE). Both Ofcom's own consumer protection department, The Communication Consumer Panel and the UK's Consumer Focus group, in a letter to then EU Commissioner, Nellie Kroes; campaigned on behalf of MVNOs, because of their benefit to competition and consumers.

"...we are concerned that at the wholesale level, the proposal could have detrimental consequences for MVNOs, with knock-on effects for consumers. A reduced choice of competing networks at the wholesale level could make conditions harder for virtual operators seeking to enter the market or improve their existing arrangements. Clearly, this would also affect consumer choice at the retail level." – Philip Culum, Consumer Focus and Anna Boydrey, Communications Consumer Panel¹⁰

¹⁰ [A Letter to EU Commissioner Nellie Kroes from Consumer Focus and the Communication Consumer Panel](#)

Within new and mature markets alike, history has proven that MVNOs can create an immediate drop in retail pricing (US, Czech Republic, Mexico), effectively cater to niche markets (ethnic, travel, SME, not spots, mobile broadband) and encourage advances in both consumer solutions and customer experience (OTT, Wi-Fi calling, crowd support, fair-trade phones) as well as, effectively utilize network capacity and decrease overall costs when compared to retail mobile channel (Omantel)¹¹

In Conclusion.

Do MVNOs matter?

The Answer is Simple and the economics are sound.

1. MVNOs provide competition.
2. MVNOs are good for consumers.
3. MVNOs are more cost effective.
4. MVNOs drive innovation and change.

MVNOs as a remedy to consolidation

1. [Visiongain request more supportive regulation for the Growth of MVNOs and consumer welfare](#)

“Visiongain expects critical markets to open their doors and create a more supportive regulation for MVNOs; increasing competition and consumer welfare in the telecoms industry.” – Visiongain, NOV 2015

2. [The GSMA speaks out on MVNOs](#)

“MVNOs have long been encouraged in Europe by regulators as a way to increase competition and reduce prices...” – GSMA, Global Industry Report - 2015

3. [\(Mobile World Live, Asia – Speaks on MVNOs as a way to mitigate risk for the regulator article\)](#)

“Industry sources say the regulator is now thinking seriously about opening the market to MVNOs and sees a role for them to play in injecting more innovation and competition. In moments of consolidation, supporting the MVNO route certainly would be less risky.” – Mobile World Live, GSMA - Asia

¹¹ Omantel is the Fouding Carrier Me

4. [Regulators worldwide weigh in on the value of MVNOs for Consumers](#)

“IDA also proposes to provide guiding principles to aid wholesale negotiations between Mobile Virtual Network Operators (MVNOs) and mobile network operators, recognising that MVNOs who have the ability to re-package wholesale services into their own service offerings can also bring about new service offerings for targeted consumer segments.” – IDA regulatory authority, Singapore

5. [MVNO Dynamics on the Value of MVNOs](#)

“Presently many companies and regulatory bodies are strongly in favour of MVNOs.” – MVNO Dynamics

6. [In a thesis written in 2007 at the Helsinki University of Technology and Networking Laboratory, sites sources as far back as 2002 saying...](#)

“...MVNOs are seen as an important part of the mobile value chain network (VCN). They emphasize dynamic business networks formed by independent companies. We see the selection of competent and compatible host partners as the key factor for success. Rapid introduction of new, innovative products will be achieved through a network consisting of the large companies to provide resources and the small ones that are faster to move...”- Ulset, S., Mobile virtual network operators:¹²

Annex B. The Complexity and Reality of the Market today.

We submit that this investigation is complicated by three main issues.

1. The definition of MVNOs and the wholesale ecosystem which while inconclusive and limiting are not wholly incorrect but which are compounded by;
2. The common requirements within the Framework Directives, requiring both Ofcom and the CMA to define and investigate the market by taking.. [the utmost account of the EUC Relevant Market recommendations¹³] and that given the complex nature of this requirement; in conjunction with the pending O2/H3G merger and the converging nature of fixed/mobile industry; not to mention when compounded by;
3. the lack of evidence supporting the partial foreclosure of the wholesale market due to the considerable market power of that the MNOs currently hold over MVNOs.

Therefore the CMA must consider both the inaccuracies within their current definitions of MVNOs but also the inaccuracies of the market definition as a whole. In an effort to work within their remit and refine their PF's to represent a more considered approach to wholesale conditions, more in keeping with the EU Commission and the current state of foreclosure found in the UK wholesale market today.

The MVNO Definition.

1. Under Ofcom's challenging definition of MVNOs; as it relates to the competitive impact of MVNOs in the UK marketplace based on the CMA's analysis, finds that less than a twenty-five percent (>25%) of MVNOs in the UK today were evidenced as competition.
 - 1.1. As sited in the Provisional Findings Ofcom registered 21 Full-MVNOs, EE concluded there must be less than this under Ofcom's definition, and other stakeholders confirmed over 100 MVNOs in the market. Some sources site over 200 MVNOs in the UK market as of May-2015.¹⁴
 - 1.2. This speaks to the complex nature of the rapidly growing MVNx industry and the importance of regulatory definitions within a vulnerable commercial environment and the SMP of the host operator.
2. In the UK, over 100 varying types of MVNOs, represent a host of niche markets and SME's.
 - 2.1. As presented, by the GAMMA submissions to the CMA, wholesale SME provides, face continued market pressure from their host operators and come from the unique position of having experienced functional separation on the wholesale fixed line business, while facing the impact of a lack of regulation around wholesale mobile access. This allows, wholesale entrants such as Gamma, the ability to provide suggestions for remedies that can balance both sides of their business proposition for the benefit of SME's in the UK.
 - 2.2. And the SME market usage of mobile networks is growing. As sited in the CMA's findings, in 2014, for the first time ever business calls made up over 50% of all mobile calls made by subscribers.
 - 2.3. Most of these SME wholesale providers, as well as the majority of B2C/retail MVNOs are connected via MVNE/MVNA's, such as Gamma to the host network.

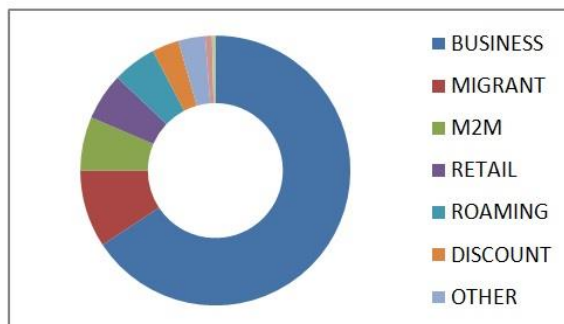
¹³ sited in the CMA's Provisional Findings, pg. 49 (4.10)

¹⁴ [MVNO statistics UK - may 2015](#)

3. The presence of MVNE/MVNA wholesale relationships on/with all four UK-MNOs. Along with the proliferation of lite-MVNOs/resellers in the market, as well as, the few major brands who have successfully entered the wholesale market – making the strategic decision to either enter into a JV-MVNO (Tesco) or spend considerable capital on assets to grow from a lite/retail-full MVNO into a FULL-MVNO or fixed-MVNO (Virgin Media) shows the lack of incentive the MNOs have to support these type of Full MVNOs.
4. Full MVNOs as defined by Ofcom, require direct access to the carrier’s network and allow the MVNO complete control of both their services and subscriber base. Because of this issue over subscriber control and the value of the relationship with the subscribers, UK-MNOs are not incentive to provide this type of wholesale agreement. Indeed, many MVNE/MVNA in the UK are not provided this type of advance integration, especially without, significant investment, carrier-imposed exclusivity, as well as, minimum commitments to volume. Our evidence shows that today, only 50% of the MNOs in the market have allowed this type of integration, while other entrants gain limited access to the host network via a series of Authentication Protocol Information (API) integrations.
 - 4.1. In the UK, only 2 MVNOs successfully meet the definition provided by Ofcom, in the PF’s as a FULL MVNO, as this definition relates to owning and managing its own core network
5. Based on our expertise of the MVNO market today; of the over 1800+ MVNOs globally only, less than 2% of MVNOs meet this definition.

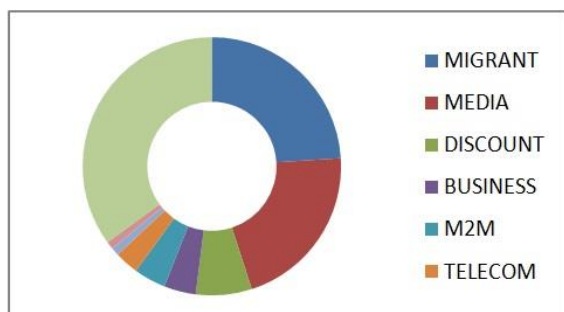
UK MVNOs By Focus: Active MVNOs at year end 2013

BUSINESS	163
MIGRANT	23
M2M	16
RETAIL	14
ROAMING	13
DISCOUNT	8
OTHER	8
TELECOM	2
MEDIA	1



14 Million Subscribers (SIMs), Active MVNOs at year end 2013

MIGRANT	24
MEDIA	21
DISCOUNT	7
BUSINESS	4
M2M	4
TELECOM	3
OTHER	1
ROAMING	1



Responsibility lies with the CMA but are they in line with Ofcom and the EUC?

We submit that the CMA must revise the PF's prior to final approval of the BT/EE case. The final decision must take into consideration the overall position of the EU Commission, which has relied on MVNOs as a competitive remedy in the face of market consolidation. In the CMA must allow for consideration of publicly documented opinions, from Ofcom and the DCMS, whom have spoken out on the need for and value of MVNOs.

1. [Ofcom weighs in the the UK/EUs regulation of the wholesale market](#)

"Ofcom has raised the possibility that such consolidation may necessitate new regulation in relation to wholesale mobile access for mobile virtual network operators (MVNOs). The UK has a very competitive MVNO market, but Ofcom notes that consolidation at a network operator level may affect the commercial incentives for operators to properly support MVNOs. In the meantime, MVNOs will no doubt be reviewing the terms of their MVNO contracts (particularly in relation to quality of service, access to new technologies and pricing reviews)."

2. [As the EU Commission moves away from the mistakes of wholesale remedies past](#)

Meanwhile, UK competition regulators are vetting a separate \$20 billion deal whereby the country's fixed line broadband market leader BT is set to acquire the biggest mobile network operator, EE, from Orange and Deutsche Telekom. "If you can't go from four to three operators in a tiny market like Denmark, then why allow England and Italy, which are much bigger, to consolidate?" – Reuters, 2015

Learning from our Past Mistakes.

As the UK telecom market continues to repeat its past mistakes, the CMA refuses to provide regulatory remedies on the BT/EE merger by passing the 'buck' from one merger investigation to the next, looking for the market to take care of itself. Despite the lessons to be learned from the history of BT Cell Net, the authorities have taken a passive view of BT's new climb to the top. The CMA has published a conclusion on this merger under the simple national market definition, rather than address the impact from convergence within the environment and the complex nature of possible multi—merger market consolidation.

The conclusions presented by the CMA in their Provisional Findings are far from aligned, let alone improve upon any of the EU Commissions decisions and previous remedies for MVNOs and wholesale mobile access during carrier consolidation in other markets. However, despite a split vote on the investigating case panel, the CMA, have granted BT/EE provisional approval – without a single undertaking or remedy to safeguard the future of today's wholesale market.

“We need to make sure that the level of competition achieved so far is not only maintained but enhanced, in order to enjoy all the benefits of a digital single market.” – EU Commissioner, Margrethe Vestager¹⁵

In her speech at the 42nd Annual Conference on International Antitrust Law and Policy Fordham University, 2 October 2015, EU Commissioner Margrethe Vestager states that despite the fact remedies around MVNOs have been given as conditions for the merger, we still must see if these remedies actually safeguard not only the survival of a competitive market but encourage it to grow.

“Some have questioned whether this means that we are having second thoughts about the remedies in the merger cases cleared in Austria in 2012 and in Ireland and Germany in 2014. In those cases, the Commission considered that the establishment of new mobile virtual network operators (MVNO), which is a less structural solution than creating a new MNO, was sufficient to resolve the competition concerns. I do not question that conclusion, which was reached in view of the specificities of the markets and merging parties concerned. It is also probably too early to conclude on the effectiveness of the remedies in those cases as they are still being implemented. The remedies in the German case are also under appeal before the Court.” – EU Commissioner, Margrethe Vestager

With these market failures behind us and little to no influence to date, MVNOs are at the mercy of both the CMA and the EU Commission, to require either structural or behavioral conditions, and enable the survival¹⁶ of the MVNO industry as a whole. Indeed, the survival of MVNOs is essential if MVNOs are going to continue to be considered as a remedy for competition and innovation in the face of carrier consolidations and market convergence. Even in markets where regulation allowed for initial conditions for MVNOs upon entry to market the overall impact of short-term upfront remedies leave MVNOs struggling to grow.

“In Austria, Ireland and Germany the Commission had required the merging companies to wholesale network capacity to rival service providers known as mobile virtual network operators (MVNOs). But in Denmark, on the TeliaSonera case, Vestager indicated that she wanted the creation of a new rival network owner.” – Frankie Spagnolo, Founder - iMVNOx

¹⁵ [The EU Commission makes a stand for the more than just maintaining a competitive market](#)

¹⁶ Because of the current state of foreclosure in the market, this is seen as survival rather than success.

"This shift in remedies raises concerns that the Commission will no longer accept MVNOs as an effective remedy in a merger situation." – Frankie Spagnolo, Founder - iMVNOx

However, we submit, that unlike the conditions in the past, the iMVNOx and the FCS will work together with the CMA and the EU Commission to investigate the failings that the previous frameworks have raised in the functional implementation of the conditions. These failings vary from market to market but as evidence by our members.

"In Austria, regulating the wholesale fees of mins/data/text and not any other fees like per sub/activation fees/ integration fees which are absolutely not capped and which have no discrimination clause around technology roll-out...carriers are allowed to charge a premium and have no incentive to provide new technology to their wholesale partners quickly or on-board new market entrants." – MVNE, Austria¹⁷

"In Ireland, the fact that the 'Capacity' model allows the MNO to control the retail price that the MVNO can offer to the market, along with the minimum required MVNOS per network, means that no new MVNOs have entered the market." – MVNO, Ireland¹⁸

Should remedies continue to fall short of expectations, MVNOs face a limited role in the development of both national markets and across the EU, as a remedy for market consolidation. Lessening their value in future market growth and their participation in solutions which enable a Digital Single Market and the Internet of Things (m2m).

Today, the debate over remedies gets political.

In a campaign to bring awareness to the concern for their members and the MVNO market as a whole, the iMVNOx in collaboration with the prominent UK trade organization, the Federation of Communication Services (FCS), contacted The Department of Culture and Digital Economy. In a direct request to Minister Ed Vaisey; the iMVNOx asks the Minister to become engaged in the transaction and its investigation of MVNOs and the UK wholesale market based on the concerns raised after the initial findings by the CMA, were published, showing provisional approval on the BT/EE merger without any remedies.

In their response, DCMS refers to Ofcom's newest CEO – Sharon White, who six years after the Orange/DT merger concerns, is still publicly promoting the benefits of MVNOs, is

¹⁷ Confidential Source

¹⁸ Confidential Source

quoted, in both the CMA's own Provisional Findings' (PF's) and in a response to the (iMVNOx) from the Department of Culture and Digital Economy, saying...

"...competition in the mobile market in the UK is important in delivering innovation, investment in the infrastructure and good value for consumers and businesses, sentiments with which I am sure you agree. The competition provided by MVNOs is an important part of this..." – Ofcom CEO, Sharon White as quoted by the Department of Culture and the Digital Economy¹⁹

"Ofcom's experience is that competition, not consolidation, drives investment and delivers low prices. Our analysis of a dozen countries, inside the EU and beyond, shows no relationship between consolidation and investment." – Ofcom CEO, Sharon White as quoted by the CMA from the 42nd Annual Conference on International Antitrust Law and Policy Fordham University, 2 October 2015. See Competition and Telecoms speech²⁰

The DCMS also highlighted the recent regulatory remedies provided for MVNOs in the face of carrier consolidation, by the EU Commission, in countries like Austria, Germany, and Ireland.

"The rulings by the European Commission on recent mobile mergers in Austria and Ireland show that it too is aware of the value of MVNOs being part of the competitive ecosystem" – The Department of Culture and the Digital Economy highlights the EU Commission and its previous regulatory remedies for MVNOs

The State of True Foreclosure

Despite, seemingly supportive views on the positive impact of MVNOs, the MVNX industry in the UK today is a partial state of foreclosure.

"...with MVNOs feeling the squeeze [...] big names exit the market, with Sainsbury's recently ending its joint venture with Vodafone. Smaller brands such as WWF came and left the market quite quickly, owing its departure to the cut-throat nature of wholesale." – Mobile Today, UK

¹⁹ [The iMVNOx response from the office of Minister Vaizey at the UK's GCMS](#)

²⁰ [CMA Provisional Findings](#)

“The extent of price competition resulting from the entry of MVNOs will depend on the terms and conditions with which MVNOs gain access to mobile networks. It is likely that regulatory intervention will be required in determining the prices, terms and conditions for the access by MVNOs to the networks of licensed operators since the early indications are that commercial negotiation will not be easy to conclude.”
– *ITU International*²¹

“We submit that today this relationship is present and that the SMP of the MNO allows for wholesale access agreements to include terms which, fundamentally mean your subscriber base can be taken over by the mobile operator under certain circumstances.” – *Wholesale Service Provider, UK*²²

“H3G UK – used to be very open to new MVNO opportunities but since signing a couple of large brands are already starting to “turn away more than they get into negotiations with” – recent quote from their wholesale department. The merger with O2 who are already MVNO averse will no doubt accelerate this change in view.” – *Multi-National MVNO, UK*²³

“...the historic nature of MNOs being forced into wholesale by the regulators, has presented a challenging operating environment for the MVNO, most notably with regard to negotiating the best wholesale deal possible.” – *MVNO Dynamics*

“The different conditions in the mobile market have opened up new opportunities for the Post Office, which has launched its own MVNO as the market has shifted towards offering bundled services. Head of telecoms, Geoffrey Smyth explains that as consolidation continues to squeeze the UK MVNO market, this shift will only increase, claiming BT’s takeover of EE will ‘change the dynamic’. He says: ‘Change is accelerating, and again I think BT’s merger is going to change the dynamic. BT’s bundling strategy with TV to launch BT sport has demonstrated that its primary focus has been in bundles. In the MVNO space you can see unlimited bundles emerging, and customer demand for this will be critical for MVNOs that succeed in a period of consolidation.” – *The Post Office , CEO -Geoff Smyth, Mobile Today (UK) November 17th, 2015*²⁴

²¹ [The ITU weighs in on MVNOs and regulation](#)

²² Confidential source

²³ Confidential source

²⁴ [The Post Office CEO sites the BT/EE and bundled service offers to change industry dynamic](#)

Evidence. Oppressive Contract Terms.²⁵

1. Difficult to get API access to MO system to allow stream lining of service provision and reduction in potential fraud and human error and innovation in service provision.
2. Because the MVNO model is at the whim of the MO very difficult to invest with confidence and in the case of actually trying to complete an MVNO it really only seems to be for the big boys like Tesco who have the scale to make it work
3. Because Cloud and VOIP work across any device without having the mobile element within the portfolio as a main stream product this gives the MO an unfair advantage in the Cloud market as they have all the elements (fixed, IP, Access, Mobile) where's as most others are missing the Mobile
4. Typically the pricing given in the current mobile MVNO market is very often more expensive than we can go down the road to Tesco's or the Vodafone shop and buy as an end users.
5. Restrictive practice as Gamma have suffered from with Vodafone where even today Vodafone will not give Gamma 4G data, again restricting true choice.

While arguments for and on behalf of MVNOs as an important layer of the value chain are not new, as cited above in Annex A; a thesis written in 2007 at the Helsinki University of Technology and Networking Laboratory, sites sources as far back as 2002

"In an MVNO-MNO relationship, the MVNO's most crucial contract from business point of view is the wholesale contract negotiated with MNO [2, 9]. MVNOs have to be able to negotiate lucrative tariffs for call and data transmission and value-added service infrastructure in MNO's network. Ulset [9] found that even though the regulator officially expects the same price to be offered for external MVNOs as internal subsidiaries, this objective may never be fully attained due to the many indirect ways operators may use to reimburse and favor their own MSOs. It was also pointed out that one MNO can offer dissimilar contract structures and types to its different MVNOs." - Ulset, S., Mobile virtual network operators²⁶

Yet conditions set forth by the regulatory bodies which require 'fair' or 'reasonable' terms, we submit – in agreement with the research that MNOs hold a dominant market power over MVNOs. This struggle was present in 2002, again in 2007 and is something that MVNOs, still struggle with almost 15 years later. Furthermore it is this market dominance and commercial control from the host operator that contribute to the lack of evidence represented in the CMA's provisional findings on the current state of foreclosure in the UK wholesale market today.

²⁵ Confidential Wholesale Source

²⁶Ulset, S., MVNOs - a strategic transaction cost analysis of preliminary experiences, Telecommunications Policy 26, pp. 537-549

“The business cases provided insight into the possible financial bottlenecks, whereas the view on the benefits generated by MVNOs provided a general envelope of investment that the government may consider in order to remove the barriers to entry that may prevent the benefits from being realized.” – Analysys Mason²⁷

Annex C. The Counterfactual.

The Pending Counterfactual

We submit, that based on our preliminary conversation and feedback from the CMA in regards to the BT/EE merger, our preliminary and subsequent submission would be considered for its various impacts, as they related to the merged entity creating (SLC) with a view towards further wholesale foreclosure concerns present when considering the approval of the pending O2/3 merger.

Indeed, we submit that the CMA portrayed their investigation to be in consideration of the various market threats and that these threats would be evaluated with a view towards the impacts of market convergence and Ofcom’s Digital Communication Review and the EU Commission.

We further submit, that based on the CMA’s provisional findings (PF’s,) the counterfactuals presented have not been adequately addressed. Although the CMA confirms a consideration of the counterfactual (whereby O2/ Hutchinson3 combined to form a second merged entity in the UK market), their findings state that this consideration in primia facia raises competition issues and therefore they will need to be addressed as part of that merger.

We submit, that MNO market concentration with BT/EE happening at the same time as O2/H3G will considerably lessen competition in the Wholesale mobile/ MVNO supply market. We further submit, that it is wrong to assume that the O2/H3G merger will be either blocked or approved subject to conditions that *will* protect competition.

Further, to this if the CMA fails to require remedies on the BT/EE merger than Ms. Vestager and the European Commission will be the only line of defense for preserving effective competition in the UK mobile market.

²⁷ [Analysys Mason says Barriers to Entry must be removed by the regulators in order to see the full benefits of MVNOs on competition and innovation.](#)

ANNEX D. Pre/Post Merger Competition

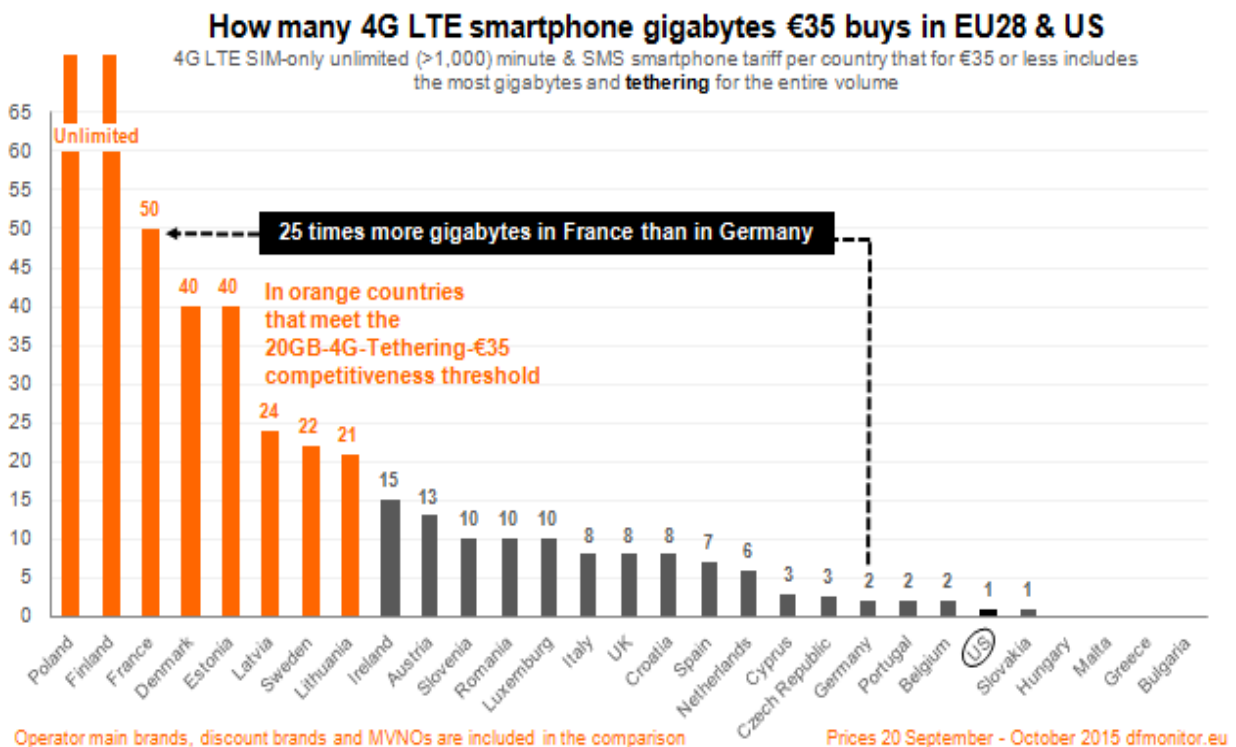
A Decline in Competition affects the UK market pre-merger.

The following evidence shows the true decline in competition in the UK today, even with BT as an MVNO and 4 national carriers in the face of both the BT/EE merger and the pending O2/3 case. We submit, that the UK market has already seen an impact on its competitive nature and should the merged entity be approved without any remedies for wholesale mobile access will only continue to move the UK in that same direction, with a significant lessening of competition on the wholesale and/or retail mobile input being further compounded by the pending O2/H3G merger.

This is especially true, in oligopoly markets, where the few competitors are economically incentivized to inflate prices and profits by collectively restricting supply. As is shown in the [DFmonitor.eu examines the impact of carrier consolidation](#) and additional analysis and documentation on the negative impact of carrier consolidation can be found.

Competition Development in key European Markets

Competition development in key European markets when compared to the UK today, prior to either the BT/EE proposed merger or the pending O2/3 investigations reaches the final decision for approval.



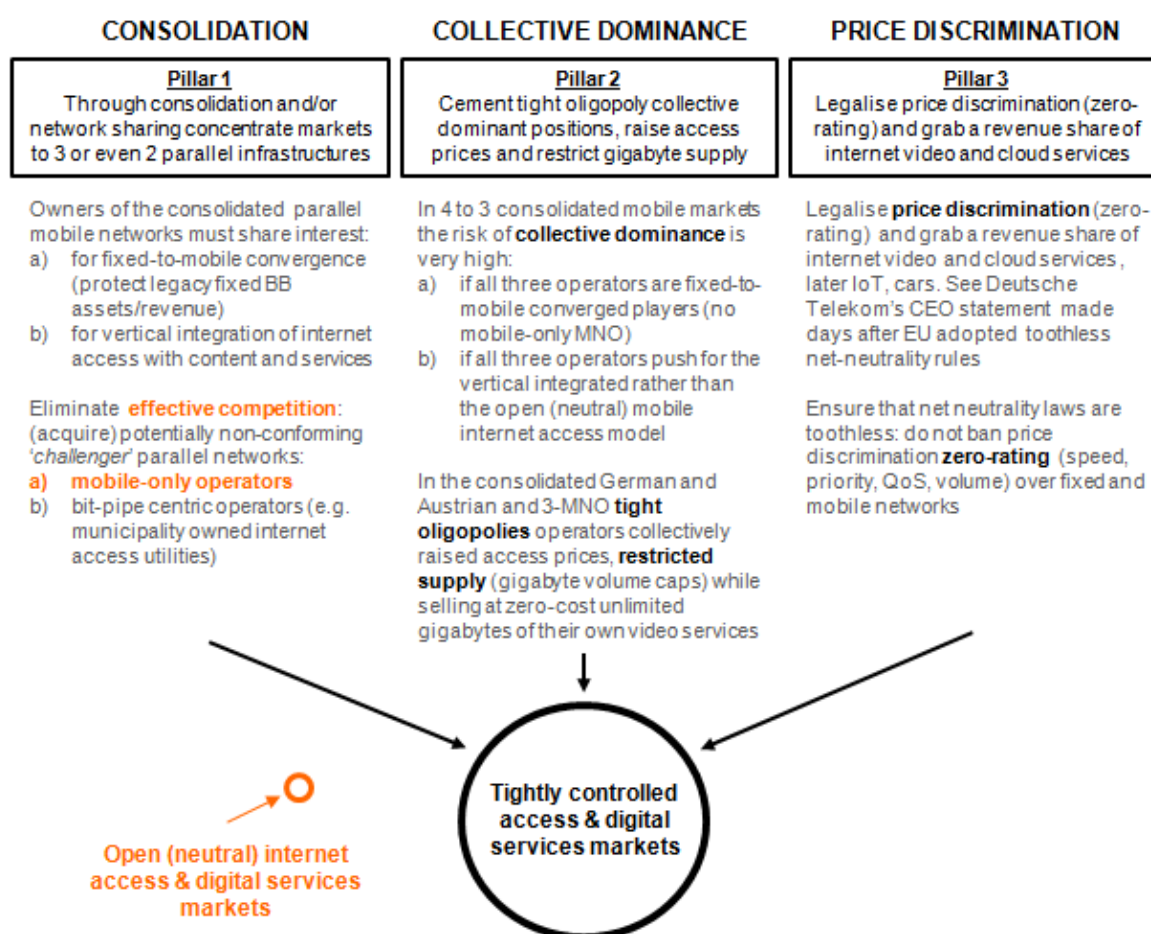
Note: correction for Slovenia, 10.11.2015. €35

*UK: **Falling behind!** Has the planned 4 to 3 consolidation of Hutchison Three and Telefonica o2 in the UK, now in Phase II investigation, already pulled the breaks on effective competition? For the first time UK does not meet the competitiveness threshold and is now coloured grey in the charts.*

- **Denmark: Back to normal!** The prohibition of the Telenor and Telia Sonera 4 to 3 merger restored effective competition and sparked a new round of volume cap increases and lower gigabyte prices.
- **Italy: Elvis has left the building!** Has the planned 4 to 3 consolidation of Hutchison Three and Vimpelcom Wind already turned the Italian market to a tight oligopoly?
- **Germany: Competition no more!** After the 4 to 3 merger approval, currently contested in EU courts as unlawful, German consumers experience the full force of excessive mobile internet access prices. The German 3-MNO tight oligopoly is fully controlled by three of EU's 5 big telecom groups Deutsche Telekom, Vodafone, Telefonica, Orange and Telekom Italia also known as the E5. Just two days after the EU adopted toothless net-neutrality rules the CEO of Deutsche Telekom "demanded startups to pay a share of their revenue to get good internet service". Vodafone Germany agreed.
- **France: In the 4-MNO market competition is thriving!** €35 buys in the French 4-MNO competitive market 25 times more open mobile internet gigabytes than in the Germany.
- **US: Sky-high prices and laggard in LTE speeds!** US mobile internet access prices resemble prices charged in effective duopolies (e.g. Cyprus, Greece) and its LTE speeds those of developing markets.
- **Israel: Only non-EU-OECD market with competitive prices!** Infrastructure based competition (5 mobile network operators) is fuelling very affordable consumer prices and a hostile environment for market coordination. Will the planned in-market 5 to 4 consolidation put all these in jeopardy?
- **Finland: The most mature data market in the world!** According to TeliaSonera CEO, Johan Dannelind, Finland is 'the most mature data market in the world'. Affordably priced truly unlimited open mobile internet smartphone (€25) and data-only (€19) 4G LTE plans with tethering are increasingly used to substitute fixed broadband access for many customer segments (youth, students, single parents, etc.). During the 1H2015 mobile data consumption per capita exceeded 9 gigabytes per month and the penetration of fixed-broadband subscriptions has started to decrease.
- **Austria: No longer a competitive market!** 4 to 3 consolidation has turned Austria from being one of the most competitive EU mobile markets in 2012 to rank below average among EU28 countries in 2015.
- **Poland: In the 4-MNO Polish market competition is thriving!** Play, an independent fourth entrant challenger mobile-only operator has organically captured over 22% of the market by offering affordable unlimited volume smartphone plan, including tethering, for less than €20 and a 100 gigabyte mobile broadband plan for less than €22.

In-market consolidation increases the risk for collective dominance, price discrimination and sub-optimal tight oligopoly competition outcomes

Published in dfmonitor.eu the figure below illustrates the three pillars for creating tightly controlled access and digital services markets. First eliminate parallel infrastructures that are controlled by non-conforming owners through in-market consolidation and grow the share of the access pie revenues for remaining operators. Second cement collective dominant positions, restrict supply and raise access prices. Last but not least, having no challengers in tight oligopolies, inflate the revenue base by grabbing a share of the service and content business using price discrimination (zero-rating) and/or internet gatekeeper tolls (see Deutsche Telekom CEO statement).



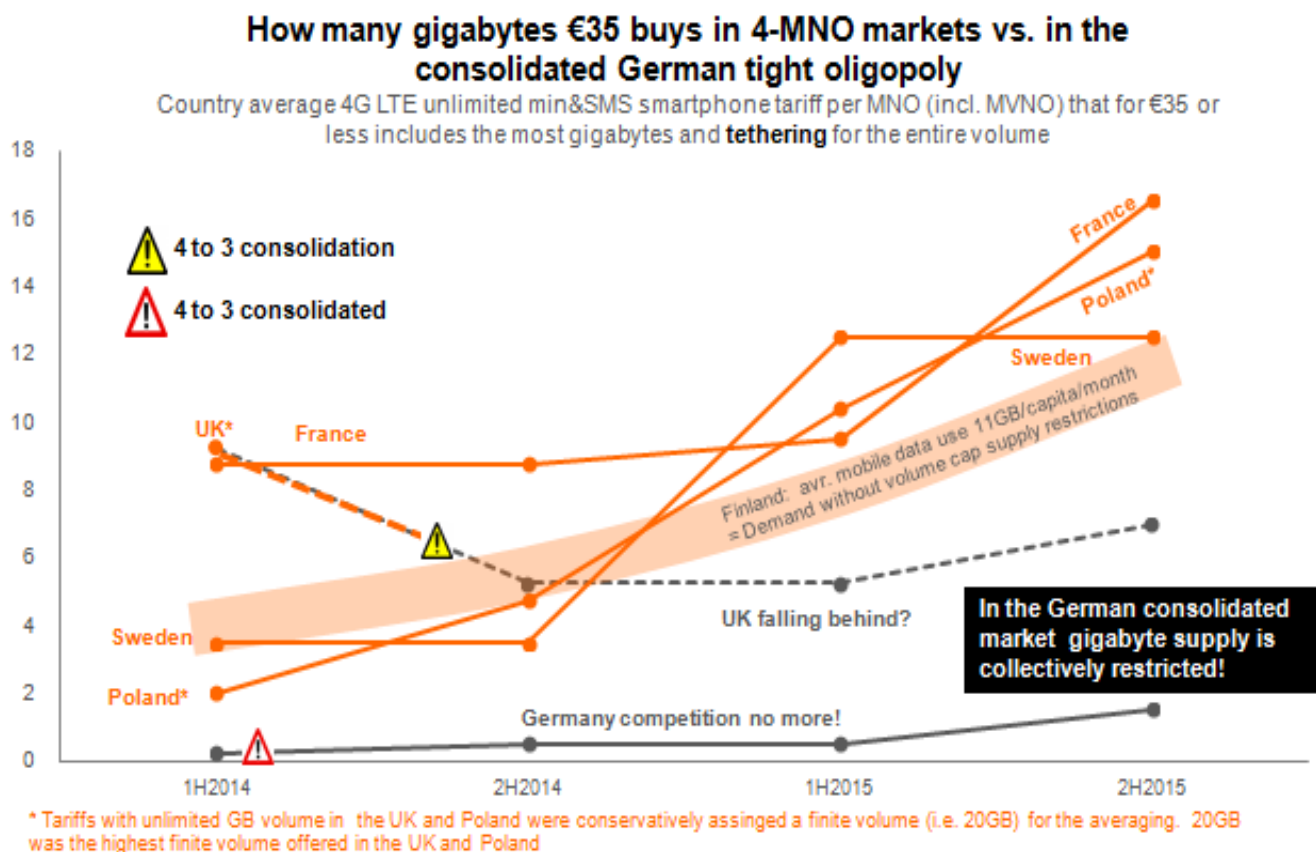
Over 100 times difference in gigabyte prices and included gigabyte volumes among EU28 and OECD countries

The striking differences in gigabyte prices and included gigabyte volumes among EU28 and OECD countries that Rewheel first exposed in early 2013 (see FT and Reuters stories) are unchanged.

While in Germany, Belgium and many other countries consumers run out of their 1 or 2 gigabyte monthly volume allowance after watching an hour of mobile video in the Nordics, Baltics, France and Poland consumers get tens or truly unlimited amount of 4G gigabytes at affordable prices (€15 – €35) and enjoy worryless consumption of video and cloud services over their smartphones or laptops by using the included tethering functionality.

The controversial 4 to 3 merger approvals, courtesy of the previous European Commission and Joaquin Almunia to EU's incumbent telcos and the wave of planned mergers that follow those unlawful approvals exacerbated further this abnormal pattern by turning the ultra-competitive Austrian and fairly competitive Irish markets to 3-MNO tight oligopolies, lacking oversight from or pre-merger input on the wholesale remedies from industry trade-bodies and the regulators themselves. Moreover, the planned 4 to 3 merger in the UK has already pulled the breaks on effective competition and seriously threatens to turn the once very competitive UK mobile market to a consolidated tight oligopoly.

While competition is thriving in 4-MNO competitive mobile markets (e.g. Denmark, France, Poland, Sweden) in the consolidated German 3-MNO tight oligopoly the supply of mobile internet gigabytes is collectively restricted.



In the 4-MNO Swedish, Polish and French mobile markets consumers could buy in October 2015 for €35 or less (i.e. affordable) 4G LTE smartphone plans that included an average of 12.5, 15 and 16.50 gigabytes of data volume and had no tethering restrictions. In Denmark, where effective competition was restored after the prohibition of the Telenor and TeliaSonera 4 to 3 merger consumers could buy in average more than 20 gigabytes (tethering included) for €35 or less. In Finland, the most mature data market in the world, consumers could buy truly unlimited open mobile internet gigabytes in their smartphones including unlimited tethering for €25.

In Germany, where effective competition was essentially foreclosed by the 4 to 3 Telefonica o2 and E-Plus unlawful merger approval, consumers could buy in average a tiny 1.5 gigabyte of volume as of October 2015. Moreover, the gigabyte volume that German consumers could buy for €35 or less has hardly grown since 1H2014.

Just before the consolidation ripples reached the UK coast line, in 1H2014, UK consumers could buy in average more gigabytes than French, Swedish or Polish consumers. As shown above consolidation has pulled the breaks on effective competition and by October 2015 the UK has fallen behind other 4-MNO competitive markets.

The Incentives for Foreclosure

Much of the incentives to foreclosure existed pre-merger (given EE's position as an MNO and BT's as a MVNO); as can be evidence by the current behaviour of the four carriers in market.

VODAFONE:

"A few months ago TalkTalk accused Vodafone of "withdrawing entirely from the [Mobile Virtual Network Operator] market" and today we learn that Sainsbury's, which entered into a similar MVNO agreement in 2013, has been unable to reach a deal for continued service. The original complaint by TalkTalk also accused Vodafone of choosing to terminate their own MVNO agreement "without warning", which forced the ISP to swap on to O2's platform. At the time TalkTalk's submission to the Competition and Markets Authority (CMA) further claimed that Vodafone had "served notice to terminate the MVNO agreement that it has in place with Sainsbury's." At the time Vodafone chose not to comment on some of TalkTalk's other claims. But today's statement by Sainsbury's will do little to dampen concern about Vodafone's position on MVNO deals." –ISPReview.co.uk, OCT- 2015²⁸

²⁸ [Talk Talk reports hostile terms to the CMA](#)

Vodafone's inability to launch Sainsbury, along with the deaths of many smaller; more innovative MVNOs over the past 12 months including; Ovivo and Samba, both of whom were on the Voda-network. In addition to this bloodbath; Vodafone also saw the exit of another major retail MVNO, Asda Mobile, who switched host MNOs from Vodafone to EE, all of this following a quiet dismantling of their London-based MVNA, Cognatel in mid-2014.

ASDA, a supermarket chain owned by US-based Wal-Mart, has recently switched network providers for its MVNO service from Vodafone to EE.

Vodafone CEO, has spoken publicly about his lack of interest in wholesale and those with particular indicia of reliability do not consider Vodafone a viable option in the wholesale market. Vodafone currently hosts one of our major MVNE/MVNA members, which enables numerous types of SME wholesale MVNOs. We submit, that further confidential evidence can be provided if necessary.

TELEFONICA/O2

O2 also limits its involvement in wholesale, choosing to work only with major brands such as Tesco Mobile, of which it has a 50% ownership stake. This was highlighted in the wake of major MVNO entrant SSE, failing to launch;

"...this comes as a blow to O2's MVNO team which has a reputation for being highly selective in the MVNO partners it chooses and for building only large blue chip MVNOs such as the Tesco Mobile MVNO." – Mobile Today, UK July-2014²⁹

In addition to a focus on launching big MVNO brands, O2 to seems to play preferential treatment to its JV partners, leaving even if the biggest of players out in the cold; if they demand to much network access or system control (ie 4G)

"On Friday the 18th of October Tesco became the first UK virtual mobile network operator (MVNO) to launch 4G services to all its customers.....but BT, the fixed-line incumbent who won 2.6GHz spectrum in the 4G auction, changed its provider from O2 to EE." – Antonio Mariulos, IHS Technologies³⁰

²⁹ [SSE pulls the plug on 25m GBP MVNO](#)

³⁰ [4G and O2 is it just for their JV partners...BT's new MVNO thinks so!](#)

Hutchison Three (3G)

Even as the smallest player in the market, who prior to their announcement reviling their intentions to buy O2, had consistently provided access to many smaller and more niche MVNO partners and leveraged the smart ‘wholesale as a retail’ strategy to build its presence in the UK.. have pulled away from various MVNOs deals in the past three to six months.³¹

“H3G UK – used to be very open to new MVNO opportunities but since signing a couple of large brands are already starting to “turn away more than they get into negotiations with” – recent quote from their wholesale department. The merger with O2 who are already MVNO averse will no doubt accelerate this change in view.” – Multi-National MVNO, UK³²

EVERYTHING EVERYWHERE

The 4G Press Release³³

Notifying party, EE has been busy since the CMA published the provisional approval on their merger efforts with BT. No sooner had the Provisional Findings been published, then EE went to press³⁴ announcing its support in providing 4G to its MVNOs and publicly promoting their intention to continue supporting wholesale, all as Vodafone is forced to defend their continued reluctance for MVNOs.

Speaking to Mobile following the networks half year results Vittorio Colao said: ‘There needs to be a willingness from the guy who buys capacity to understand there are new investments and a lot of costs they’ll have to participate in. It’s a bit too easy to say I want 4G but I don’t want to pay more, that’s just the way it works.’ Vodafone CEO, Vittorio Colao – Mobile Today (UK) Nov. 2015

Better still, only days before, The Peoples’ Operator, one of EE’s newest MVNOs announced its switch from EE (the self-appointed leader in 4G access) to Three. TPO, CEO sited problems with “4G coverage and access” as the main reasons for moving to Hutchison 3G.

‘It’s a better quality 4G network and operationally and commercially it is better. The 4G product we’re getting with 3 is vastly superior and we feel there’s a

³¹ BT/EE and O2/H3G

³² Confidential source

³³ [The 2014 4G Press Release](#)

³⁴ [EE Waxes Poetic on 4G Access for MVNOs but the reality doesn't pass muster](#)

market that want 4G, we feel that if we have 4G people would switch to us.” –
Mark Epstein, CEO & Co-Founder (TPO), Mobile Today (UK) November, 2015³⁵

Despite the loss of (TPO), EE continues to skew the message, in an effort to impact public opinion and ultimately swing a positive light on the carrier’s perceived commitment to wholesale, as the CMA concludes its final stage of the BT/EE merger investigation. However what their statement fails to mention is the terms on which EE has granted this special 4G access.

The truth of these commitments include hostile exclusivity terms and excessive volume guarantees and the reality for their MVNOs; is far more lengthy, complicated, and expensive than they imply.

“Now the only question is...which is worse? The Vodafone strategy of brutal honesty or the methods of EE to bury the facts below the surface? Either way...MVNOs feel the squeeze.” – Frankie Spagnolo, Founder - iMVNOx

If necessary, we can provide confidential testimony which will show tangible evidence to support the argument that not only will EE’s incentive to support wholesale decrease if approval is granted for the merged entity; but that indeed that the wholesale suppliers (EE) incentives to provide ‘fair and reasonable’ decreased immediately, once the provisional approval was published by the CMA, allowing for the possible entrance of the EE/BT merged entity in the UK market.

This evidence was presented confidentially, therefore we formally submit our request that the CMA pull the wholesale contracts of all four UK-MVNOs including a full range of MVNOs, including MVNA hosted MVNOs, lite and full MVNOs.

With the express purpose, for the CMA to gain a true and full understanding of the nature and reasonability of the commercial environment for wholesale providers in the UK. As well as note any material changes in contract terms, specifically since the publishing of the Provisional Findings.

With special review of contracts provided by notifying party EE, with attention to its MVNA agreements and the terms to which their MVNOs are granted 4G access, as well as to, the actual reality of the notifying party’s level of execution (in regards to all technology pass through clauses and access term) as per the current ability their MVNOs actually have to provide 4G –versus- the public understanding presented by EE in the press.

³⁵ [TPO claims 4G network coverage better with Three than EE](#)

EE currently represents almost 40% of the wholesale market in the UK and is home to several of the largest MVNOs including Virgin Media, of which all would be in great jeopardy considering the incentives for wholesale of the new merged entity. EE also host several of our member MVNOs on its various MVNA/MVNE platforms and their on-going reluctance to roll-out simple technologies such as Short Code Functionality³⁶ and more confidential evidence can be provided here under proper confidential conditions.

The Phone Line Rental Price Increase

In addition to their behavior on their 4G side of their wholesale business; EE have silently increased pricing to their customers buying home phone services.

“Telecoms operator EE has quietly increased the standard price of their Phone Line Rental service, which is usually bundled alongside their Home Broadband packages, from £16.40 to £17.50 per month. In addition, customers who prefer to pre-pay for their line rental in advance will now have to pay the monthly equivalent of £15.75 (total over 12 months of £189), which is a sharp increase from the previous level of £13.75 (total over 12 months of £165).” –
Ispreview.co.uk, NOV 24th - 2015³⁷

Post Merger-Competition.

Based on the evidence submitted above, we submit the BT/EE merged entity would either not provide services or provide them at uncompetitive prices or other hostile terms.

In addition, we submit that it is almost, self-evident that in a capacity constrained but a data hungry world, where applications such as video streaming depend on quality of service and guaranteed capacity.

The lability of BT to self-supply optical cable to its own base stations and guarantee quality of service for mobile data to end users on either fixed or mobile or combinations of both is dependent on its ability to offer a bundle.

The current advertising campaign being run by BT offering EE’s 4G where BT broadband is has lower quality is a clear example of fixed/mobile convergence and the type of offering that provides BT/EE with an unavoidable competitive advantage.

³⁶ Confidential Source

³⁷ [EE silently raises prices for their bundled Phone Line Rental service](#)