

Fastweb's initial Thoughts on European Commission Questionnaire on Review of the Recommendation on Relevant Markets Susceptible to Ex-Ante Regulation

Introduction

Fastweb agrees completely with the response to this consultation submitted by ECTA. We share in particular the positions that ECTA fixed-only operators propose regarding the former market 15 (mobile access) and the need to consider the SMS termination as a new potential market to be analysed by NRA's.

In the following we would like to present to the Commission Fastweb's more detailed views on these two specific topics. The two point has been put under the headlines proposed by the consultation's questionnaire.

Question 2: What are the changes in structure and functioning of the relevant markets (e.g. supply and demand side developments, bundles, convergence, geographic scope), which should be reflected in the revised Recommendation from an ex ante perspective?

The European Commission should re-consider whether to include again mobile access (former market 15 in the 2003 Recommendation) in the list of markets susceptible of ex-ante regulation. In the negative case, the European Commission should at least launch an investigation/enquiry to better understand the effective competitive conditions of this market. This is necessary not only for domestic services, but also in relation to roaming services.

Fact is, article 4 of the Roaming III Regulation¹ is interpreted² in a way the LBO access is not available, under regulated terms, to MVNOs, but only to MNOs. Under such interpretation, MVNO would be subject to a bizarre situation, whereby they may lose customers via LBO but they cannot acquire them. The only solution, in order to address an absurd asymmetric situation that represents a damage only to new entrants and on the contrary favours incumbents MNOs, would be to recognise an LBO access right under domestic rules.

Lacking a clear regulation to ensure that mobile access, including the capabilities to offer LBO would jeopardize the outcome of the structural measures adopted by the Roaming Regulation.

It is furthermore worth-noting that rather than to competition, the emergence of MVNO business in many European countries was due to the imposition or simple threat³ of regulation⁴, to antitrust pressure⁵, or in any case in a legal basis present in the GSM

¹ Regulation 531/2012 of 13 June 2012.

² Berec, International Roaming Guidelines.

³ Cyprus, Slovenia, Malta

⁴ France, Spain, Finland, Ireland.

⁵ Italy



licenses⁶ or in the old framework⁷. The fact that during that period mobile access (market 15) was still susceptible of ex-ante regulation was per se a circumstance inducing MNOs to grant mobile access at commercial conditions. By contrast, only in few Countries commercial MVNOs have started spontaneously and as a consequence of a truly competitive environment. In many countries (especially in Eastern Europe) MVNO access did not develop at all.

In any case, whatever may be the incentive for MNOs to grant mobile access, one should not conclude⁸ that once the an MVNO business is launched, then a virtuous circle will start and MNOs will be naturally induced to offer more and more competitive conditions to access seekers. Competition in this market seems to be a transitory situation rather than a irreversible achievement. One should neither conclude that MVNO may easily solve their problems by upgrading their business models and becoming full-MVNO, or by simply switching to another hosting operator.

In the following chapters we will describe the circumstances that the Commission should consider either to include the mobile access in the list or to launch an investigation in the sector.

Absence of a virtuous circle

Currently, the MVNO business is declining throughout Europe. A study of GSMA⁹ reports that recently 84 MVNOs closed the business, while 44 were acquired by MNOs. Considering that the number of MVNOs in Europe is around 500, this means that over 20% of the undertakings left the market. If this trend will continue, the MVNO business will be strongly reduced in Europe. A report from Analysis Mason shows that decline is well consolidated in Nordic countries¹⁰. Another report (Informa¹¹) considers that "the mortality of MVNO is very high" and that since 2006 the number of launches of MVNO is constantly declining.

In Italy almost 50% of MVNOs have left the market after 2007 or has a negligible relevance in the market. These figures suggest the idea that, while an important number of MVNO have been launched in the last 10 years, the cycle is now coming to an end.

In addition, one should note that market shares owned by MVNOs are negligible in most of the domestic markets. With the exception of a few countries, such as Netherlands, France and Germany, the average market share throughout the EU is 4,1%. In Italy MVNOs represent 4% of the mobile market. There is no evidence that such market shares may be increasing in the future.

As regards profitability, there are no official sources in the market. However, the business trends visible in the market (as showed above) gives a clear evidence that MVNOs are not profitable and may survive in the market only thanks to financial support of a parent company. Furthermore, truly independent MVNOs are rare in the market. On the contrary the

⁶ Germany. UK.

⁷ Denmark, Netherlands, Sweden.

⁸ EXPLANATORY NOTE to the 2007 Commission Recommendation on Relevant Product and Service Markets, p. 45.

⁹ Wireless Intelligence "The MVNO model, global footprint and outlook", Joss Gillet, May

¹⁰ http://www.analysysmason.com/About-Us/News/Newsletter/Is-there-a-glassceiling-for-MVNOs/

¹¹ Informa 2011, Global MVNO Forecasts to 2015.



innovation capacity of MVNOs should rely on a sustainable business model that could counterbalance the slow take up of new services (such as payment services) in many Countries. It can be easily observed that in the last years, the main incumbents have only reacted to innovation introduced by alternative players. Thus, promoting fair access to mobile resources could sustain a wave of innovation carried out by MVNOs for the benefit of the final customers.

In addition, the dependence from the parent companies may frequently affect the capability of the MVNOs to operate competitively in the market. When, as in most of the cases, the parent company is a MNO, the MVNOs is not free to launch aggressive retail offers, because the business of the mother company could be cannibalised. In other cases, when the mother company is a MNO, a cable operator or a fixed incumbent, the MVNO will not be free to fight for better access conditions, because this request may jeopardise the regulatory interests of the mother company (which prefers to maintain an unregulated environment for its access network, whether fixed or mobile).

All the above conditions lead to think that the virtuous competitive circle is not working for MVNO, this business is generally declining and MVNOs are not able to exercise competitive constraints over MNOs.

Absence of real mobile access agreement in the market

The European Commission tends to believe that the mobile access is competitive because of the large amount of commercial MVNO deals in the market (around 500 in the EU).

Against this background, one should note that the vast majority of such deals cannot be considered as "access" in concrete terms, because they are pure resale/rebranding agreements. Therefore, the European Commission should investigate, before concluding that this market is competitive, the exact nature of the variety of commercial deals offered by MNOs, whether they consist in real access agreements or pure resale deals. The regulatory practice developed in the fixed market should help to this extent. In the fixed sector pure resale agreements are not deemed sufficient to consider a market to be competitive.

It is crucial to assess that the choice of a reselling access agreement rather than real mobile access does very rarely depend on the commercial strategy of MVNOs.

New entrants MVNOs have had so far, in a non-regulated environment, little choice and no negotiating power, therefore the choice of pure reselling models might not have constituted a free choice but rather the only option to enter the mobile market.

The European Commission should therefore investigate whether the scarcity of full-MVNOs in the market is due to the anticompetitive attitude of MNOs rather than to scarce inclination or willingness of MVNOs to invest.

It is worth-noting that, once a pure resale agreement is operational, the upgrade to a full-MVNO model is very difficult, burdensome and problematic, since in addition to the mentioned problems (lack of unbundling combined with the cost of the mobile access) one should consider further issues like the change of SIM-cards and the full migration process (see below). Such conditions affects negatively and definitely hinder the capability of MVNOs to compete in the domestic markets.

No switching capability

It would be easy to infer that once a MVNOs have been granted access and start to operate, they could freely negotiate new access conditions and eventually migrate towards another (competing) hosting MNO to get a better deal. Unfortunately this scenario is far from reality.



Once an access agreements started and has become operational, the hosting operator becomes a sort of monopolist vis-à-vis the MVNO, because the latter cannot realistically switch to another operator 12.

A change of hosting operator is still possible from theoretical point of view, however the economical, procedural and technical implications are so detrimental for the MVNO that it is better to avoid such a solution. The European Commission should not be surprised about this, because the impact of switching costs has been largely analysed in the fixed sector (when examining the factual possibility for Altnets to switch from a telecom incumbent to a cable operator, for instance).

The switching costs and implications may be summarised as follows:

- Replacement of all SIM cards: normally (a part the rare cases of full-MVNO) MVNOs do not own SIM-cards and numbering resources, therefore changing hosting MNO would imply the replacement of all SIM cards of all customers. This process is particularly lengthy and difficult, especially when the customer-base consists of prepaid subscriptions (the norm for MVNOs): each customer should be contacted multiple times (initial information, replacement of the SIM cards, resolution of problems, etc.) with exceptional complexities and costs. Considering that the migration from a MNO to another should not last too much (otherwise the duplication of costs would make the process not convenient), the result would be that a considerable part of the customer-base will not migrate and will be lost.
- Migrating numbers and replacing cards is even more complicated than an ordinary numbering portability process_: in fact, when normally the final customer has deliberately chosen a new operator, is well aware of the moment the portability will be carried out) On the other hand in case of MNP to change the hosting operator, the customers could not be offered any choice about the moment the MNP would be carried out. In Italy a very burdensome negotiation and process would be needed to ensure a smooth move from a hosting operator to another, with a high risk of malfunctioning for customers. The effort of migrating a customer-base of 500.000/1 million units would represent an extraordinary challenge, and would last months to be carried out entirely. Lacking any regulation (unlike MNP) and considering the natural reluctance of the abandoned MNO to let the customer-base of the MVNO to migrate to other networks, the entire operation is destined to be a disaster for the MVNO.
- Losing the investments made to "interconnect" with the original hosting operators (including cost of SIM-cards) and making new investments to adapt to the new one: in particular, to set up a MVNO the new entrant is almost always required to build and set up proprietary interfaces to match the Hosting operator architecture and processes. Most of these interfaces cannot be "reused" in case a new access agreement is launched. In other words all the investments for network elements would be lost and not recoverable.

To conclude, the European Commission should carry-out a deep analysis about concrete switching possibility for MVNOs, also examining concrete historical cases, before concluding that this market is competitive because MVNO are allowed to switch from a MNO to another.

¹² This does not apply in case the access agreement has been launched originally as a "roaming" agreement, where the MVNO has a full control over every single network element, and relies on the Host operator only for airtime access, on the licensed spectrum.



The emergence of new technologies and the contribution of innovators.

The recent assignment in Europe of the LTE licences is due to reinforce the position of incumbent mobile operators, to the detriment of the fragile competition exerted by MVNOs.

In fact, in case there is no imposition of access measures to LTE and in general to mobile networks in favour of MVNOs, the consolidation of mobile access resources could hinder the possibility to introduce innovative offers that would be brought to the market by alternative players as MVNOs, seeking to confirm their role in domestic and European markets.

Question 11: On the basis of the three criteria test carried out at EU level, should any of the markets regulated by NRAs on the basis of national circumstances (such as SMS termination or broadcasting transmission services) be added to the list in the revised Recommendation from an ex ante perspective? If yes, please provide comprehensive reasoning thereof.

It is a matter of facts that, in most European countries, mobile network operators (MNOs) are allowed, in the absence of regulation, to charge SMS termination fees well above the real cost rewarding the termination service. Such extra-profits are used by MNOs either to keep retail prices at unreasonable levels (to the detriment of consumers) or to distort competition and affect new entrants, in particular virtual mobile operators (MVNOs). The European Commission should therefore add the SMS termination market to the list of the relevant market in order to clearly empower NRAs to address such issue.

The following background should be taken into consideration in order to proceed with our recommendation.

Unreasonable level of unregulated termination fees

Comparison between regulated termination fees (applicable in the few countries where such market is regulated, such as France, Poland and Denmark) and commercial unregulated practices show that in the absence of regulation MNOs are clearly induced to overcharge SMS termination fees to competitors. In "regulated" countries the price for SMS termination is around or less than 1 Eurocent, ¹³ while in non-regulated countries the average price is around 4/5 Eurocent. ¹⁴ According to independent expert studies, ¹⁵ the real cost for SMS termination should not exceed 0,15 Eurocent.

The absurdity of unregulated termination tariffs is also showed by the comparison with both wholesale caps under the Roaming III regulation (2 Eurocent as from July 2013) and wholesale voice caps under the Termination Recommendation (1 Eurocent/minute).

¹³ The efficient level of SMS termination has been fixed to 1 Eurocent in France; 0,26 Eurocent in Denmark; 1.18 Eurocent in Poland.

¹⁴ Cullen International, October 2012.

¹⁵ Keshaw, The Costs of Text Messaging, 2009: http://blizzard.cs.uwaterloo.ca/keshav/wiki/index.php/Papers-area



Finally, the constant practices of MNOs consisting in offering for free large packages of onnet SMS is a clear evidence that real costs for SMS termination are well below commercial unregulated tariffs.

Non-substitutability between SMS, mail and IM

Large MNOs tend to maintain that regulation of SMS termination is unnecessary because at retail level such services may compete with other communication tools like mail and instant messaging (IM). This development should be due to the expansion of mobile Internet access as well as the increasing availability of smart-phones.

By contrast to the above, we do not believe that SMS fall within the same market of mail and IM, for the following reasons:

- o the increase of smart-phones does not entail automatically usage of mail and IM, because only a share of smart-phones are enabled with data-SIM cards; 16
- SMS are aimed to satisfy immediate and real-time communications needs, while the same need is not necessarily pursued via mail and IM. In fact, real-time and immediate communications needs may be satisfied by mail and IM only subject to a plurality of conditions, such as: (a) subscription of an flat fee Internet connection by all concerned users; (b) sender and receiver must be online in the same time; (c) sender and receiver shall be using the same application.
- Unlike SMS, mail/IM or not used by the generality of users, but only by some categories: mail are more used by professionals (people who need to be online constantly, unlike residential users), while IM are mostly used by younger people (people normally using social platforms and other similar applications, unlike elderly people).
- Unlike SMS, the usage of mail or IM in mobility underpins the download of a specific client or application in the smart-phone.
- o IM applications are normally non-interoperable, unlike SMS.
- The coverage of mobile Internet access is normally smaller than the one for GSM/SMS services.
- o there is no clear evidence that possible decrease of SMS revenue may be related to the use of increased usage of mail and IM. By contrast, figures in the Italian market¹⁷ show that the usage of SMS is constant or even increasing, therefore the potential decline of revenue is only a result of decrease of costs.

Remarkably, the non-substitutability between SMS and mail/IM is confirmed by the Roaming III regulation (recital 70). In addition, most NRAs tend to exclude VOIP services from traditional voices on the base of grounds which are the same for distinguishing mail/IM from SMS. ¹⁸

Effects on competition and consumers welfare

¹⁶ In Italy only 50% of smart-phones have data SIM cards (AGCOM Annual Report 2012, schemes 2.13 and 2.14).

¹⁷ AGCOM's decision 420/CONS/2012, according to which from 2008 to 2011 off-net SMS are increasing, on annual basis, by 6% (§73).

¹⁸ See in Italy AGCOM's decision 11/06/CIR.



The high level of commercial SMS termination fees is seriously distorting competition between larger and smaller mobile operators (in particular MVNOs). MNOs are normally vertically integrated operators and are naturally induced, by leveraging high termination tariffs, to discriminate non-integrated operators such as MVNOs.

More specifically, MNOs may use extra-profits from SMS to subsidize on-net communications so as to reinforce network externalities. In Italy, on-net SMS amount to around 85% of the entire SMS figures, ¹⁹ which create a serious barrier to entry for MVNO. The same figures may be found in other European countries.

As a result of the above, MVNOs become net-payers of larger MNOs, with serious effect on their capability to survive in the market. It has to be noted that other the SMS termination fee, MVNOs have to bear also the cost for the access leg (airtime for SMS originated and terminated) therefore, for MVNOs the overall cost for terminating SMS is much higher than the one borne by MNOs and at the same time.

This situation is detrimental also on consumers due to pay higher and unreasonable charges for off-net SMS, which are unlikely to compensate potential benefits for on-net discounts. In this respect, one should consider that on-net discounts may have the negative effect to reduce the possibility for consumers to switch from a provider to another.

Moreover, it has to be noted that when compared to the regulated mobile termination rates, where the SMS termination fee is not regulated as in Italy, the price per Kbit of a SMS termination is abnormally high (please note that a single SMS requires only 2Kbit bandwidth and no time since it's an event and does not require a dedicated channel for the duration of the conversation, while voice channel requires 128Kbit/min)²⁰.

¹⁹ AGCOM's decision 420/CONS/2012, scheme n. 2.

²⁰ For instance, in case the voice termination fee, with cost orientation is 4€c per minute, and the same price is applicable to non-regulated SMS, it is clear that price per Kbit is abnormally high for the latter, resulting in €c 0.031 for voice and in €c 2 for SMS.