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PRO-COMPETITIVE TELECOM STRATEGY

DIGITAL FUEL MONITOR
MONITORING MOBILE CONNECTIVITY COMPETITIVENESS
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Collateral damage to infrastructure based competition and investments caused by Almunia's refusal to enforce EU antitrust law and block harmful mobile mergers (in Austria, Ireland, ... Germany?)

Rewheel/Digital Fuel Monitor research note, 2nd June 2014

The problem as perceived by the telcos

European telecom operators faced with declining revenues and depressed valuations claim that infrastructure investment across the continent – and ultimately their own future – is at risk.

The telcos proposed remedy

Consolidate all markets where 4 mobile networks operators are present (Ireland, Germany, Italy, Spain, France, UK, Sweden, etc.).

The policy challenge from in-market consolidation

Big EU telcos, eager to take full control of the online media and cloud markets are forcing consumers to their own media and cloud applications by severely restricting open mobile internet access volume allowances while at the same time not counting the volume generated by their own media and cloud apps in the end-users' usage allowances (zero-rating). In-market consolidation will concentrate control of all parallel fixed & mobile networks in the hands of few friendly operators thus increasing the risk of coordination, higher prices and market foreclosure practices such as zero-rating. Higher open mobile internet access prices and telco control of the media and cloud business will harm consumers and slow down the growth of digital economy.

The EU competition (merger) law hurdle

The European Commission after examining the Austrian, Irish and German in-market mobile consolidations (from 4 to 3) has come to the conclusion that the proposed concentrations would be harmful for consumers and are therefore unlawful.

Almunia's problem

Once the proposed merger is deemed harmful to consumers and therefore unlawful EU, antitrust authorities' hands are tied. In the absence of effective commitments they must prohibit the merger! EU Remedies Notice leaves no room for interpretation on what constitutes effective commitments: "*The commitments have to eliminate the competition concerns <u>entirely</u> and have to be comprehensive and effective <u>from all points of view</u>*". So Almunia is faced with a burdensome choice. In the absence of a willing credible new 4th entrant network operator, that is the only truly effective remedy, he should clearly block the merger (prohibit the concentration). But this would certainly displease, among others, Ms. Merkel, Mr. Juncker and Mr. Montebourg.

Almunia's woolly compromise

Well aware of the Austrian merger approval fiasco (no MVNO has so far launched on Hutchison's network and prices have gone up http://dfmonitor.eu/insights/2013_oct_austria/) and running the risk of an EU court striking down his approvals as unlawful, Almunia walked a fine line in Ireland. Once again, like in Austria in 2012, rather than enforcing EU law and blocking the merger, he cut a deal with Hutchison and approved the harmful concentration by accepting an ineffective (and therefore unlawful) MVNO access commitment. Just few hours after he announced the conditional approval the Irish telecoms regulator (ComReg) published and Information Notice and basically said that the Hutchison commitments were "*inadequate*", "*ineffective*" and "they *do not appear to comply with the EC's requirements as set out in its Remedies Notice*". In other words ComReg said that the accepted commitments appeared to be unlawful. ComReg's Information Notice can be found at http://www.comreg.ie/_fileupload/publications/ComReg1453.pdf .

ComReg is not the only independent, conflict-free telecom body that has argued that an MVNO wholesale access commitment cannot remedy the serious competition concerns that arise from the elimination of a full-fledged network operator. The Austrian telecom regulator RTR, the Austrian competition authority BWB, Rewheel and most recently Fitch Ratings(!) expressed similar views. Fitch Ratings wrote in a research note published on the 30th of May 2014 https://www.fitchratings.com/gws/en/fitchwire/fitchwirearticle/O2-Ireland-Sale?pr_id=832294 "*While Hutchison must provide 30% network capacity to two MVNOs, we do not believe a new MVNO entrant has the potential or motivation to disrupt the market as much as Hutchison's Three did in the past. The most likely partner for this capacity is Liberty Global's UPC arm, because it already has an established cable business in Ireland and piggy-backing on the Hutchison/O2 network as an MVNO would enable it to offer a combination of TV, fixed-line, broadband and mobile services. While UPC's mobile strategy is at an early stage, it has not so far taken an aggressive approach to launching similar "quad-play" services in other markets and has tended to avoid aggressive, price-based competition to build up its customer base. Cable operators have so far tended to restrict their mobile services to existing customers, of which UPC has 530,000 in Ireland."* Well at least we hope that Mr. Almunia's team made sure that MVNOs do not exclusively offer the mobile service bundled with their pay-TV and fixed broadband service. That would be an utter failure.

Almunia's Irish deal could be worse than nothing! It sounds like Google doesn't it?

If UPC or a UPC-like friendly cable operator becomes the MVNO Trojan Horse in Ireland (and don't forget Germany) one thing is certain:

Open mobile internet access prices will increase as they did in Austria causing substantial harm to consumers and to the wider digital economy and information society.

One step closer to on ex-ante wholesale access regulatory intervention in the mobile industry

So why then Vodafone Ireland (market leader) has fired a warning that it is considering court action? Wouldn't Vodafone as the market leader in Ireland benefit from consolidation and fewer network players? Well for the exact same reason that the CEO of Deutsche Telekom warned Telefonica to walk away from its acquisition of E-Plus if the merger remedies were to lead to mobile wholesale access regulatory intervention (fixed price dedicated bandwidth pipe). EU telcos fear that in the end this could lead to an ex-ante unbundling of mobile access, like in the DSL monopolies, and give rise to a new generation of MVNO capital-lite unbundlers.

So are consumers, infrastructure based competition, investments and open mobile internet access harmed?

Without any doubt! Consumers would have enjoyed more competition and lower open mobile internet access prices in a market with 4 network mobile operators. Who knows: Hutchison as a market leader might decide to join other European incumbents and start discriminating all 3rd party video streaming and cloud storage apps by zero-rating the volume that it's own or its partner's apps generate. Furthermore, network operators as Vodafone Ireland pointed out have a higher incentive to invest when they do not have to share the superior network quality (investment returns) with co-passengers. So infrastructure based competition and investments will suffer. So who benefits? The shareholders of Hutchison, Telefonica Ireland, Vodafone Ireland and of course let's not forget the UPC-like MVNO aspirants.

So what will Almunia do in Germany?

If a failing-firm and/or the claimed efficiencies are not proven and Telefonica's commitments are not effective (lawful) he will enforce EU law and block the merger (issue a prohibition). If he doesn't the Courts will.
To find out what may constitute effective commitments in Germany read our premium report;

"Telefonica's Mickey Mouse commitments are irrelevant and ineffective"

It is available for Digital Fuel Monitor subscribers at:
http://www.dfmonitor.eu/insights/2014_may_premium_telefonica/