

# Indicators for Joint SMP

## Evidence from ex ante cases

Ilsa Godlovitch, WIK-Consult

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# Agenda

- **Joint SMP in an ex ante context**
- **Relevant cases and experience: mobile and fixed**
- **Potential indicators for ex ante analysis of joint SMP**

# Joint SMP: considerations

## How does ex ante compare with ex post?

- An ex post assessment observes the *actual current and past* market structure and behaviour of firms
- Ex ante assessments under the EU Framework require:
  - Forward looking *projections* (will the situation persist absent intervention?); and
  - The assessment of a (potentially hypothetical) situation in which there is *no pre-existing regulation* (modified greenfield approach)

Market reviewed	Retail market	Greenfield assumptions
Mobile access	Mobile	No SMP regulation of MVNO access
WLA	Fixed broadband	No SMP regulation of WLA
WCA	Fixed broadband	No SMP regulation of WCA, SMP regulation of WLA

# Joint SMP: considerations

## Challenges with joint SMP in ex ante context

- Additional evidence supporting conduciveness to tacit collusion is required for joint SMP compared with individual SMP c.f. Airtours
  - Focal point for collusion
  - Transparency of deviations from collusive outcome
  - Deterrence/retaliation mechanism that would render deviations unprofitable
  - No foreseeable disruption from fringe competitors, newcomers or customers that would undermine common policy
- Where there is pre-existing regulation there may be *limited evidence of actual aligned conduct* or parallel outcomes

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# Joint SMP case studies

## Experience from mobile markets

- Most confirmed ex ante joint SMP findings in *mobile access and origination* (former M15)
- Approved by Commission
  - Malta (2006)
  - Spain (2005)
  - Ireland (2004) – but later rejected by national court
- Challenged by Commission
  - France (2005)
  - Slovenia (2008)
- *Pre-existing regulated MVNO was not initially present in the approved cases* – i.e. no need for modified greenfield

# Mobile joint SMP cases: characteristics

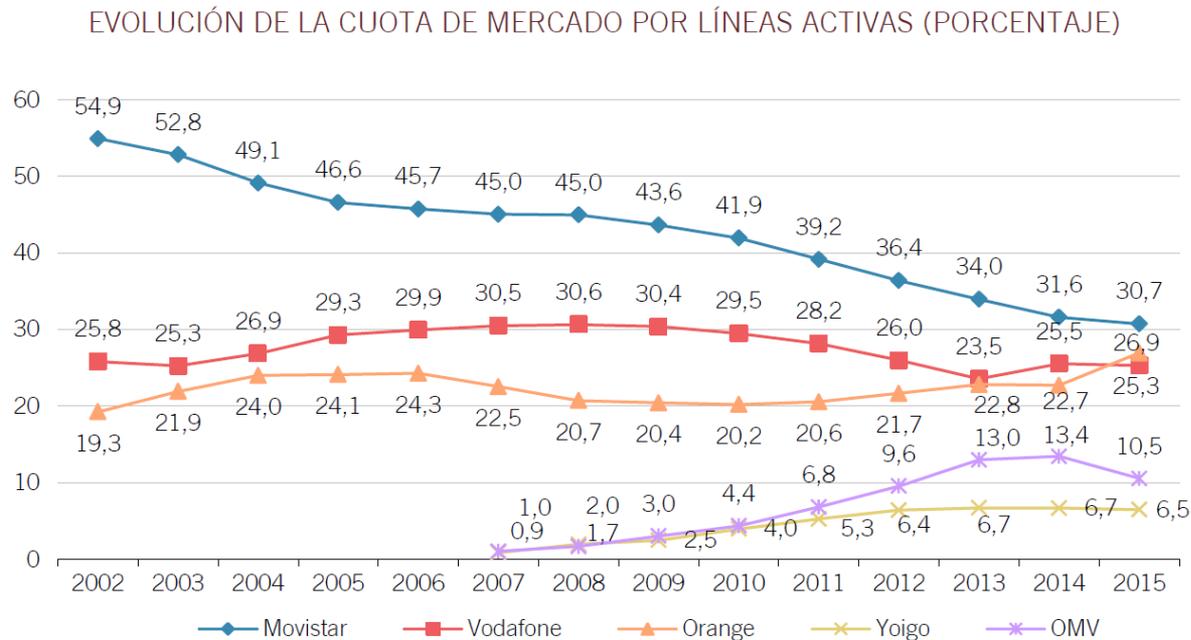
	MT	ES	IE	FR	SI
Pre-existing regulation	None	None	None	None	MVNO Single SMP (2005)
NRA proposal	2006 Joint SMP both operators	2005 Joint SMP, 3 operators	2004 Joint SMP, leading 2	2005 Joint SMP, all operators	2008 Joint SMP, leading 2
Finding	Joint SMP	Joint SMP (2005)	N/A Court challenge	N/A COM challenge	Single SMP (2009)
No. MNOs	2	3	4	3	4
Shares	51%/49%	53%/29%/19%	54%/40%/6%/0%	48%/36%/17%	62%/27%/3%/0%
MVNOs	None (delays in negotiating)	None (despite licenses)	None	Reseller, MVNO in process	2 (regulated)
ROCE at time of proposal	VF 42.09%, Go 36.71%	TEF 49%, VF 21%, Orange 9%	VF 39%, O2 38%	FT 32%, SFR 26%, Bouygues 13%	
Retail pricing (OECD)	High by EU comparisons	Above OECD average	OECD ave. except high use baskets	Stable, OECD average	
Subsequent entry & consolidation	Entry Melita mobile (2008)	Entry Xfera/Yoigo (2006)	4-3 consolidation (2014)	Entry Iliad (2011)	

# Mobile joint SMP cases: NRA evidence and Commission reactions

- Key indicators highlighted by NRAs
  - Stable market shares, limited impact of fringe MNOs, where present
  - High/parallel prices for all (FR, ES, MT) or medium/high use (IE) customers
  - High profits for leaders (FR, ES, IE, MT)
  - No or inadequate existing MVNO access despite demand
- Commission comments
  - A finding of retail joint SMP not necessary to prove wholesale joint SMP, but high retail prices and profits are relevant (to incentives, retaliation)
  - Check whether 'fringe' players have potential to be mavericks at the wholesale level as well as retail level e.g. are they reliant on others through roaming agreements? (SI, IE)
  - Are profits sufficiently high to sustain tacit collusion? (SI)
  - If MVNO access is being/might be commercially agreed puts joint SMP finding into doubt (FR, SI)

# Mobile joint SMP cases

## Example of stable market shares



Source: CNMC, Informe Annual 2016.

- Data from CNMC shows stable market shares around the time of the joint SMP finding – subsequently disrupted by Yoigo and MVNOs



# Mobile joint SMP cases

## Lessons learned

- Actual wholesale and retail conditions and profit levels in mobile markets can often be assessed, because they are typically unregulated
- Mobile markets with 3 players or which involve fringe players which have not yet achieved effective entry can be (but are not necessarily) associated with a lack of effective MVNO offers, high profits, stable market shares, parallel pricing, probability increased for 2 players... but
- Disruptive entry or the development of fringe players can make mobile co-ordination at wholesale or retail level unstable over time

# Joint SMP in fixed broadband

## Features of the market

- Fixed BB markets display some differences from mobile:
  - Different technologies in short term (cable vs DSL/FTTx) although FTTP convergence expected
  - More challenging replicability – less likelihood of disruptive entry than for mobile – at least where duct access not available or outside densely populated areas
  - Enduring wholesale duopoly or monopoly in some countries or less densely populated areas, tending to 3 significant infrastructure players in dense areas (where duct access available)
- These features might make the case for regulation more compelling than for mobile
- However, unlike mobile, entry in fixed BB is not constrained by licences

# Joint SMP in fixed broadband

## Evidentiary challenges for joint SMP

- Fixed markets more challenging to analyse because of pre-existing regulation
  - Requires Modified Greenfield Approach
  - What would be wholesale and retail impact in absence of regulation?
  - Few counterfactual examples
- Relevant data on fixed broadband profitability may not be separately reported or be challenging to estimate due to converged networks
- There is (thus far) no confirmed '*ex ante*' case precedent in the EU for a joint SMP finding in fixed broadband
  - MT 2008 withdrawn
  - NL 2015 proposal concerned retail not wholesale joint SMP
- But market characteristics and experience indicate that tacit collusion may be possible especially in symmetric 2 player markets

# Fixed broadband

## History of access, price & quality in broadband

- Positive effects from cable on BB deployment (vs 1 infrastructure provider markets eg IT, EL), but pace of cable vs ADSL deployment, price/quality similar in some markets
- Nardotto/Valletti (2015) study shows disruptive effects of LLU initially on penetration, and quality longer term
- Bitstream did not have a similar effect
- Slow deployment of FTTP in BE, MT vs 3+ player mkts
- Denial of access seen historically in 2 player markets from both incumbent and cable

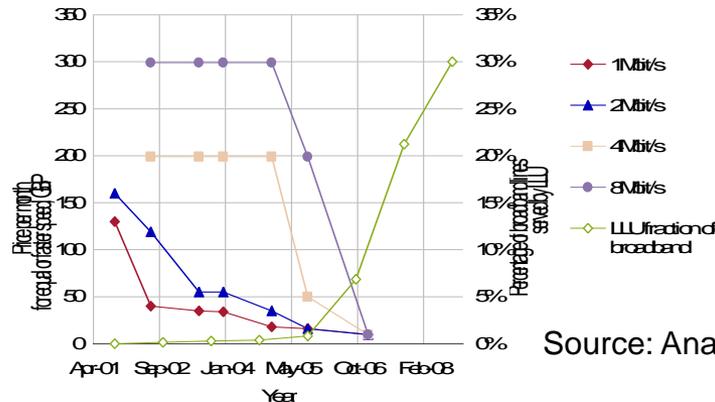
# Fixed broadband

## History of access, price & quality in broadband (2)

**UK**

2005: 200,000 LLU  
When undertakings  
signed

Competitors drive cost of 8Mbit/s to £20



Oct 2010: Competitors  
Pass 7 million  
Unbundled lines

Source: Analysys Mason

2005

2006

2007

2008

2009

2010

June 2005  
Reduced  
LLU charges  
+ FS

2006: BT increases  
Speed From 2Mbit/s  
to 8Mbit/s (OECD)

Jul 2008: BT  
announces  
£1.5bn NGA  
Investment to  
40% households  
by 2012

Jan 2008: Virgin  
announces  
50Mbit/s from  
End 2008

May 2009: VM  
develops  
200Mbit/s.  
Announces coverage  
to additional 500,000  
homes

Jul 2009: BT  
accelerates  
NGA investment  
1m homes by  
Mar 2010  
Wholesale basis

Oct 2009: BT  
accelerates  
NGA investment  
2.5m homes  
By 2012  
Wholesale basis

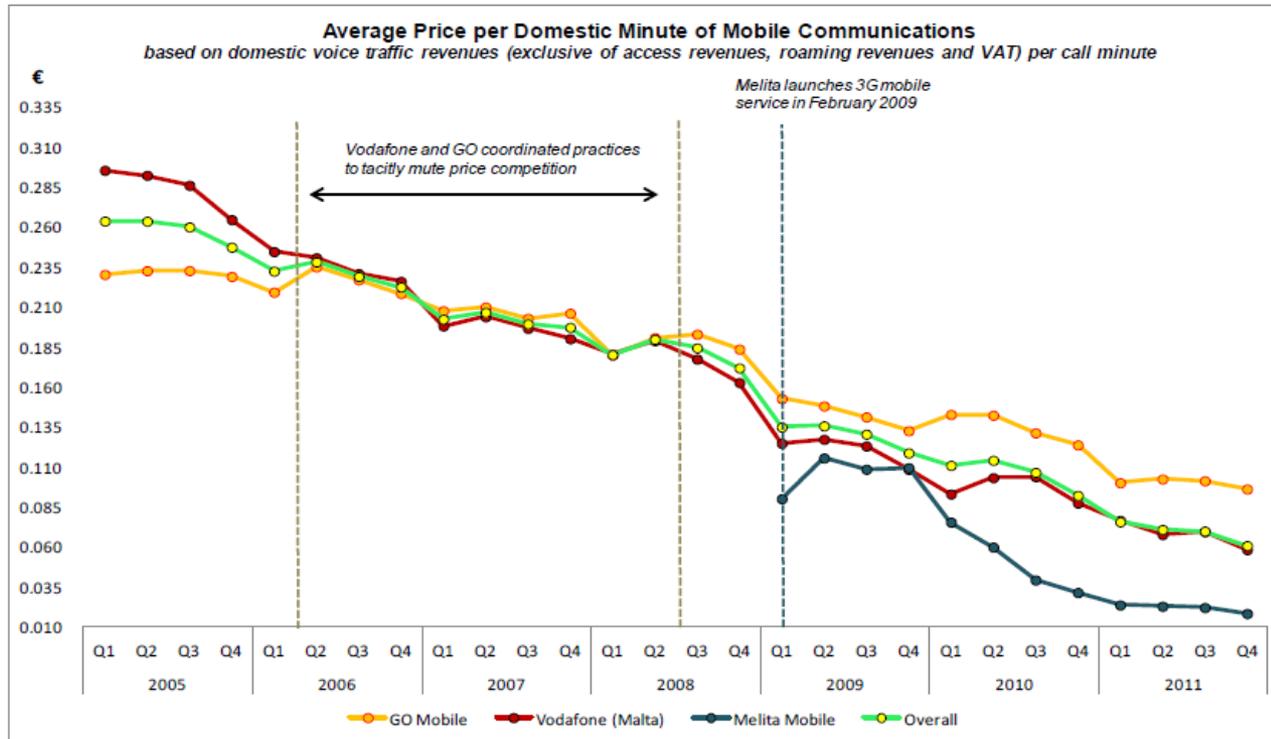
Feb 2010:  
Virgin Media  
Rolls out 100Mbits  
By end 2010

May 2010: BT  
accelerates  
NGA investment  
Two thirds homes  
By 2015  
Wholesale basis

Oct 2010:  
Virgin Media  
May use BT  
Duct access

# Fixed broadband

## Example of price following in mobile duopoly



Source: MCA

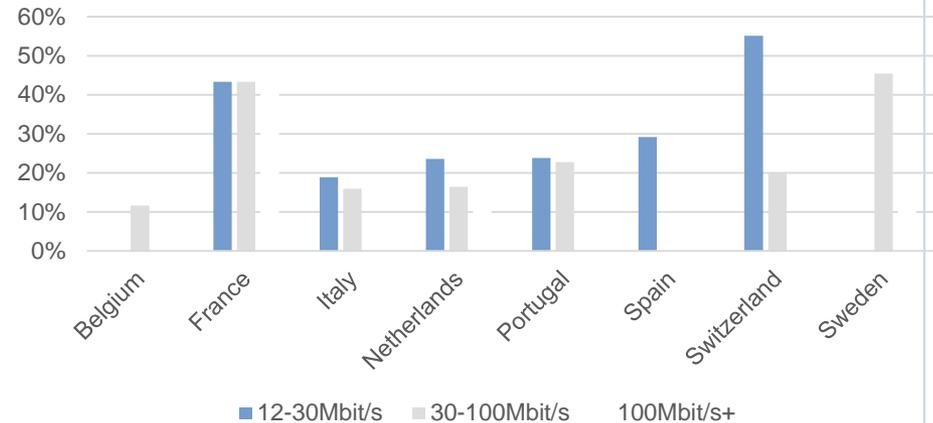
- Malta mobile pricing shows parallel conduct in symmetric duopoly period prior to entry of 3<sup>rd</sup> operator

# Fixed broadband

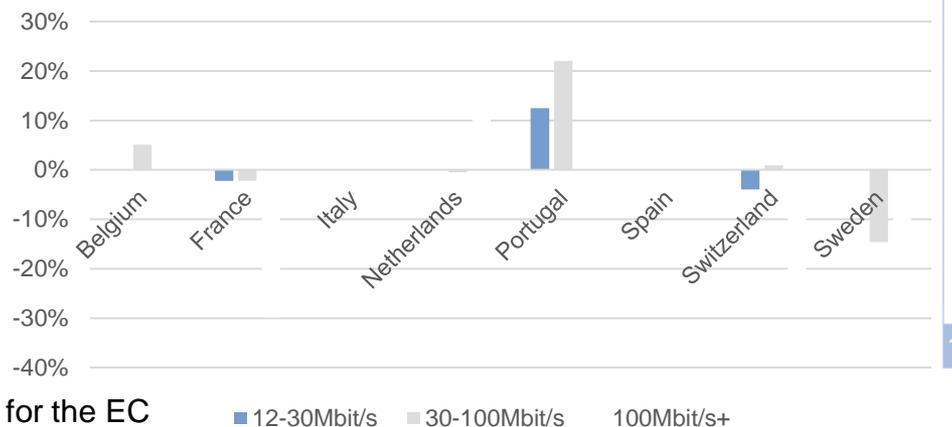
## Comparing pricing strategies

- In theory, cable should be able to offer fast BB at lower cost than incumbent FTTx, but
- Cable prices match incumbent in many markets, while new entrant offers are available at lower prices
- Could this indicate 'symmetry' and transparency (amongst market), especially if prices are stable and/or parallel?
- What would happen if cable or incumbent engaged in price war?

Incumbent price vs lowest offers for triple play Autumn 2015



Incumbent price vs cable - for triple play (lowest offers) Autumn 2015



# Analysing joint SMP

## Application of the modified greenfield approach

- In some recent ex ante cases NRAs have applied the modified greenfield approach to assessment of joint SMP
- Key question raised: likelihood of continued access absent regulation
- ES (2017 M15): CNMC considered that the mobile market would tend towards competition in the absence of (joint SMP) intervention inter alia on the basis that:
  - MVNOs were able to switch host MVNOs – contracts were renegotiated without CNMC’s intervention and access to 4G networks was obtained by MVNOs
  - Agreements had different expiry dates – and it was unlikely that MNOs would refuse to sign agreements
- NL (2015 retail broadband market): ACM suggested that KPN and UPC/Ziggo were unlikely to offer commercially attractive access absent regulation. They referred to:
  - Absence of cable wholesale offers and statements suggesting lack of KPN willingness to volunteer wholesale on satisfactory terms

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# Assessing joint SMP in practice

## Questions to ask: retail market

1. What are actual developments in retail markets e.g. in relation to prices and/or ARPU, profit, quality? Evidence of high levels/price or quality following?
2. What would be the implications on retail outcomes if wholesale access were no longer provided or if it were offered on less favourable terms?
3. How do present outcomes (affected by SMP regulation) compare with outcomes in same market before regulation?
4. What does evidence from other similar countries with deregulated markets suggest might happen if regulation were removed?

# Assessing joint SMP in practice

## Questions to ask: wholesale market

1. Is the market structure conducive to tacit collusion:
  - Is there similar network coverage, vertical integration, market maturity, links between the parties?
  - Is there any evidence of price/quality following?
  - Would that be expected in competitive market when considering cost-base and comparable benchmarks?
  - How does situation compare with period prior to regulation?
2. What is the focal point?
  - Are/were the regulated party or parties reluctant to grant access on reasonable terms?
  - What was approach of the unregulated party towards wholesale access?
  - Would it have been in the interests of the party or parties to offer access in a competitive market? Is it in the collective interest of the parties (profit enhancing) to deny access or deteriorate access conditions (e.g. with reference to benchmarks)?

# Assessing joint SMP in practice

## Questions to ask: wholesale market (2)

### 1. Are there credible retaliatory mechanisms?

- Is there evidence of high retail pricing and profitability when SMP obligations not whole effective?
- If not – could high prices and profits be maintained in the absence of regulation with reference to theoretical analysis, past history or comparable benchmarks?
- Are prices or ARPUs transparent amongst the parties?

### 2. Is the collusive outcome sustainable?

- Are there high economic (or other) barriers to entry/limited viability of duplication (test with reference to cost-models and history of duplication/ similar benchmarks)

# Potential indicators for Joint SMP

## Examples of evidence that may be relevant

Criterion	Indicator	Types of supporting evidence	
		No pre-existing regulation	Pre-existing regulation
<b>Is there a retail market failure?</b>	Poor value and/or quality, limited innovation, choice	High prices/ARPU Slow NGA deployment Capped quality	Likelihood of failure if regulation removed: refer to structure, prior history/benchmarks
<b>Is the market structure conducive to tacit collusion. If so, who has potential to tacitly collude?</b>	Similarity or links between players	Stable (similar) market shares. Gap with fringe Similar prices (even if different costs), coverage Co-operation agreements or other links	Similar product scope, network evolution, vertical integration, price following Stable penetration, shares Likelihood of parallel outcomes absent regulation
<b>What is focal point for co-ordinated outcome at wholesale level</b>	Denial of access, degraded access, excessive charge and/or margin squeeze	Refusal to supply (on reasonable terms) despite demand No/low access-based competitor market share	Reluctance to supply of regulated and other firm(s). Need for regulatory intervention/threat. Incentive to supply absent regulation
<b>How will oligopolists retaliate?</b>	Evidence of financial and technical capability to retaliate	High sustained pricing High sustained profit levels Capacity to increase volumes Switching potential Potential to target retaliation (easier for duopoly)	Ability and incentives to collude measured against past behaviour and benchmarks, potential for excessive pricing. Transparency (greater in duopoly).
<b>Is collusive outcome likely to be disrupted?</b>	High barriers to entry/expansion  Low countervailing power	High economic barriers. Refer to 3 criteria test – likely for fixed outside dense areas Likely for mass-market	High economic barriers. Refer to 3-criteria test; likely for fixed outside dense areas Likely for mass-market

**I.Godlovitch@wik.org**

WIK-Consult GmbH

Postfach 2000

53588 Bad Honnef

Deutschland

Tel.: +32 2 830 0380

Fax: +32 497 505641

[www.wik-consult.com](http://www.wik-consult.com)