EU DIGITAL SERVICES ACT & NEW COMPETITION TOOL – ENSURING A FAIR AND HARMONISED DIGITAL SINGLE MARKET

SEPTEMBER 2020

I. ABOUT MVNO EUROPE

MVNO Europe represents various types of Mobile Virtual Network Operators (MVNOs), with different business models, addressing retail consumers, business users, the public sector, and Internet of Things (IoT). http://www.mvnoeurope.eu/members

MVNOs target various customer segments (e.g. young people, businesses, IoT, etc) and provide innovative services that make them particularly sensitive to an optimal experience with handsets.

MVNOs in the EU represent +/- 10% of SIM cards. Their market share is higher in some European markets, reaching around 25% of all SIM cards in the Netherlands, and is stable or growing in key European countries, as reflected by the French, British, German and Italian examples where MVNOs have millions of customers.

MVNOs strongly contribute to competition and provide clear Business to Consumer (B2C) and Business to Business (B2B) end-user benefits. MVNOs also contribute to financing mobile networks through payment of wholesale charges which assure revenues to Mobile Network Operators, whilst avoiding costly duplication of network assets.

II. COMMERCIAL PRACTICES DIMINISHING COMPETITION, INNOVATION AND CUSTOMER SATISFACTION

Like other telecommunications operators, MVNOs' business model is primarily based on the provision of bundles of voice/SMS/data services. Nowadays, customers expect uninterrupted mobile internet connectivity so as to access the full range of functionalities – including navigation, music and video streaming, text/voice/video messaging, mobile hotspot capability, and so on and so forth – that are available on their mobile device. Indeed, time spent on the Internet worldwide via mobile devices reached 79% in 2018[1].

For many years now, MVNOs have been encountering major obstacles preventing them from fulfilling their mission of providing their customers with the most flawless experience possible and of boosting competition in the telecommunications sector[2]. Some MVNOs' customers have faced technical issues primarily relating to the setting of various functionalities – such as the activation of mobile Internet, MMS, mobile hotspot and other messaging services – on their smartphone, being left with dysfunctions and/or compelled to manually configure those features themselves, often with disappointing results. Worse still, MVNOs are sometimes totally blocked and unable to even use some services such as Voice over LTE (VoLTE) or VoWifi (VoWifi). This means that millions of end-users are potentially paying important amounts of money for buying expensive devices that cannot be used to their full potential.

The above-mentioned obstacles originate from the commercial practices of some major handset manufacturers who deliberately limit the openness and interoperability of their operating system with certain mobile operators[3]. Structurally reluctant to cooperate towards finding mutually beneficial solutions[4], those handset manufacturers make the (proper) functioning of their operating system conditional upon the signature of a carrier partner agreement, which can include device distribution and promotion commitments. MVNOs, and probably some smaller Mobile Network Operators as well, experience these

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[1] Study *Mobile Advertising Forecasts*, Zenith

[2] This trend has been confirmed by the report '*Market study into mobile app stores*' published by the Netherlands Authority for Consumers and Markets, in April 2019, p. 6

[3] This is further substantiated by the report '*Market study into mobile app stores*' published by the Netherlands Authority for Consumers and Markets, in April 2019, p. 81

[4] This is confirmed by the report '*Market study into mobile app stores*' published by the Netherlands Authority for Consumers and Markets in April 2019, p. 6

requirements as one-sided and financially and commercially unsustainable/unrealistic. This type of behaviour hampers innovation and prevents MVNOs from offering essential and innovative services (such as VoLTE and VoWiFi communications or eSIM)[5] as they would like to their customers.

MVNO Europe has always been of the view that all operators – with or without "handset carrier partner agreements" – should be able to equally access and support features offered by operating systems/handset manufacturers, in the interest of users (be they consumers or business/public sector users).

III. COMPETITION AND FREEDOM OF CHOICE DAMAGED

The technical problems that smaller operators have to face because of the abovementioned commercial practices of some handset manufacturers constitute a structural competitive disadvantage, hampering new entrants on telecommunications and digital services markets and entailing risks of evicting MVNOs from certain (especially high-end) market segments. Such a situation is highly-detrimental to MVNOs' end-users and is not acceptable in a genuine and open digital single market.

EU policy aims to provide everyone in Europe with better quality goods and services at lower prices and is about applying rules to make sure companies fairly compete with each other and are encouraged to innovate for the benefit of consumers, business and public sector users. MVNO Europe is of the view that those goals should be pursued and respected by all companies active in the EU, including for the services provided through software/hardware combinations and especially the operating systems on devices.

The technical problems endured by MVNOs' customers clearly show that devices and their embedded operating systems may challenge the general objective of an open Internet in terms of how end-users can (or rather cannot) practically access and use Internet services on their devices. Acting as gate-keepers, operating system providers are able to obstruct the chain that connects end-users to Internet content, information, services and applications. This is not only worrying from the perspective of the open Internet but also from a freedom of choice perspective as choices are being made for the end-user him/her/itself. Indeed, if the end-user is to make full use of the mobile device of his/her/its choice and its functionalities, he/she/it may be forced to subscribe to telecommunications services that are provided by a mobile operator certified by the handset manufacturer – and thereby potentially turn down his/her/its initial preferred choice of mobile services provider.

IV. DEVICE NEUTRALITY AS THE WAY FORWARD

The European Commission has indicated in its communication "Shaping Europe's Digital Future" that it will explore ex-ante rules to ensure that markets characterised by large platforms with significant network effects acting as gate-keepers, remain fair and contestable for innovators, businesses, and new market entrants in the context of the Digital Services Act (DSA) package.

MVNO Europe is of the view that, like the Regulation on platform-to-business relations[6], such a package has the capability to deal with – among other things – the issues related to devices, operating systems and Internet access that are described above, including where competition between electronic communications providers is distorted by the behaviour of device manufacturers and operating systems in phones, tablets, wearable devices, in-car systems, and other future devices.

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[5] VoLTE is nowadays a must have functionality to ensure voice services for the mid and long term, especially considering that MNOs will be gradually decommissioning 3G as from 2021.
[6] The results of the inter-institutional negotiations on this P2B Regulation failed to address the existing imbalances in the relationships between providers of operating systems and their business users.

Indeed, MVNO Europe considers that the DSA can provide end-users with improved freedom of choice by obliging certain big players to stop market-distorting behaviour and allow for more competitive market dynamics.

The European Commission should be able to reach those goals by integrating the notion of device neutrality within its proposal, which is a principle that European consumer organisations[7] and some national regulators[8] would also like to be applied within the European Union and which aims to give end-users control over their devices and guarantee access to the open internet in all parts of the value chain. "*Device neutrality extends the principle of net neutrality to guarantee that, like your telecoms operator, a platform cannot interfere with your decisions by restricting your freedom of choice*"[9].

As far as MVNO Europe is concerned, the following should apply if device neutrality is to make the market fairer and more competitive:

- Whether they are smartphones, tablets, smart speakers, voice assistants, wearable devices or any other connected devices, consumers must be able to use their devices in a neutral and non-discriminatory way[10].
- Inescapable device manufacturers should not, merely for business reasons, deliberately degrade the selection of content and services available on their own devices, by preventing providers from accessing the functions they need to fully operate their services[11].
- Device manufacturers and providers of operating systems should not be able to impose restrictions on mobile operators' customers and app developers to limit access to key device functionalities (e.g. mobile Internet, GPS or voice commands) for purely commercial reasons.
- Operating systems developed for connected devices should be interoperable with the services provided by all mobile (virtual) network operators. End-users should have the right/ability to smoothly access all the functionalities of a given operating system (i.e. features are properly working and do not require complicated manual configuration by the end-user) regardless of the choice they made for their mobile operator/telecommunications services. This interoperability should not be subject to any type of commercial agreement dictated by the hardware/operating system provider.
- To improve the overall information available on how device manufacturers and OS providers operate, the European Commission as well as an expert regulator may be given the power to gather general information from all market players[12].
- The ability for affected market participants and end users to file dispute-resolution proceedings with the European Commission and/or an expert regulatory authority would be most welcome.

Finally, MVNO Europe is of the view that the New Competition Tool envisaged by the European Commission can also contribute to address the problems described above by further allowing for the supervision of companies owning/controlling the main Operating Systems and, when needed, swift intervention to restore competition on the market.

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[7] *An EU that keeps working for Consumers - BEUC proposals for the 2019-2024 European Commission,* BEUC p. 18

[8] *The state of the internet in France - 2019 Report*, ARCEP & '*Market study into mobile app stores- April 2019''*, ACM, p. 8.

[9] *The state of the internet in France - 2019 Report*, ARCEP. p. 64

[10] *The state of the internet in France - 2019 Report*, ARCEP. p. 65

[11] *Open Internet and devices - Devices, the weak link in achieving an open internet* (February 2018), ARCEP. p.56.

[12] *Open Internet and devices - Devices, the weak link in achieving an open interne*t (February 2018), ARCEP. p. 47.

V. CONTACT US

MVNO Europe represents the interests of Mobile Virtual Network Operators active on European mobile and Internet of Things markets, and that have negotiated wholesale access to the networks of host Mobile Network Operators (MNOs). MVNO Europe gathers various type of business models addressing retail consumers, business users, the public sector, machine-to-machine (M2M) and Internet of Things (IoT). The goal of MVNO Europe is to create a more openly accessible market for all MVNOs so that they can better contribute to the growth of the mobile communications sector, further ensure that consumers as well as business users have a wider range of diversified services to choose from and to, finally, boost competition on the retail mobile market to their benefit. Our members are convinced that MVNOs stimulate innovation in the telecom sector.

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