

The Phone Co-op Limited

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## The Future Shape of Telecoms Regulation

### Key questions for legislators

FCS Comms Provider

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# Why is regulation important?

- Regulation might seem boring and bureaucratic, far from the commercial cut and thrust
- Regulation has been the foundation of the telecoms industry since privatisation
- It has opened it up to competition, and allowed new entrants
- Without it, we would not have the diverse industry we have today

# If regulation is important, what are the risks?

- Regulation can lead to benign or harmful outcomes
- If legislators create the wrong framework or if regulators execute it poorly, our industry won't reach its full potential to serve users
- Regulatory “capture” – when the relationship between certain players and regulators becomes too cosy, clouding regulators' judgement
- Regulation must adapt to change while holding to fundamental objectives

# What's Ofcom for?

- In Ofcom's words: "The Communications Act 2003 states that our principal duty is to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition."

# Ofcom's remit

- Are they delivering as well as they could on this?
- Are they really regulating for consumers?
- They seem a shadow of their former self
  - Cowed, lacking the will to take on powerful interests
  - Bogged down in legal cases

# Ofcom isn't the only actor

- Legislators give Ofcom and other regulators their powers
  - Are they powerful enough?
  - Do legislators understand the complex interplay between the roles of regulators and how it works in practice?
- Competition authorities in the UK and EU are critical
- Is there joined-up thinking?
  - BT/EE merger suggests perhaps not

# Regulatory capture

- “unless there’s some other career path, pretty much everyone with the expertise necessary to become a regulator will be either a former or future employee of the industry with the obvious implicit and explicit conflicts.” (Bruce Schneier, [Liars & Outliers: Enabling the Trust that Society Needs to Thrive](#), 2012)

# Regulatory capture

- “a kind of regular personnel interchange between agency and industry blurs what should be a sharp line between regulator and regulatee, and can compromise independent regulatory judgment. In short, the regulated industries are often in clear control of the regulatory process.” (Mark Green and Ralph Nader, “Economic Regulation vs. Competition: Uncle Sam the Monopoly Man”, 1973)



# Regulatory capture

- “although regulation is begun with the good intentions of those who promote and pass the laws, somewhere along the line regulators may become pawns of the regulated firms.” (Richard B. McKenzie and Gordon Tullock, *Modern Political Economy: An Introduction to Economics*, 1978)

# Regulatory capture

- “Every act of intervention establishes positions of power. How that power will be used and for what purposes depends far more on the people who are in the best position to get control of that power and what their purposes are than on the aims and objectives of the initial sponsors of the intervention.” (Milton and Rose Friedman, *Free to Choose* (1980))

# What Ofcom officials have said at FCS and other events (paraphrased)

- “Have you dealt with the big networks recently? They’re very litigious.” (When challenged about not limiting the power of the big networks)
- “We’re not here to protect a particular business model” (When asked whether Ofcom wasn’t happier to work with a small number of big players than a large number of smaller ones)

# What Ofcom officials have said (paraphrased)

- “We have the most competitive mobile market in the world, so we don’t see a need to change how it’s regulated”. (When asked why there wasn’t specific regulatory underpinning for MVNOs)
- “We have what I believe is known as a benevolent oligopoly” (in response to a similar question)

# Some significant problem areas involving Ofcom/other regulators

- “Significant Market Power” (SMP) is interpreted as meaning “overwhelming market power” in many cases
- Tendency only to look at single firm dominance rather than dominance by a small group of firms
  - Means oligopolies go unchallenged
  - Capture by large actors entrenches this
  - BEREC attempts to address this in 2015 (Brexit could undermine this move)

# Some significant problem areas

- Bundling of services makes regulation more difficult
  - Risk of cross-subsidy distorting the market
    - Between regulated products
    - Between regulated and unregulated products
  - Regulatory framework needs adapting to deal with this
  - Previous judgements (CAT) have undermined Ofcom's efforts to rectify this by opening up wholesale market in content

# Some significant problem areas

- Lack of focus on wholesale markets
  - Retail markets are of interest to the press – they hardly cover wholesale markets
  - Lack of willingness to regulate wholesale markets in some contexts especially mobile
  - Sometimes a lack of willingness to drill into what wholesale contracts really entail
  - Tendency to allow “regulatory holiday” as part of deals with government

# Some significant problem areas

- Tendency for government to dive in for political effect can distort markets
  - Absurd that Prime Minister announced he would “call in” the MNOs to discuss whether they could cut prices
  - DCMS direct negotiation with MNOs on coverage undermined regulatory framework. MVNOs were used as a threat but then cast aside. Government then put pressure on regulator to cut MNO’s fees to Ofcom.
- FTTC and business areas
- MVNOs – tacit or even explicit pricing and other controls by MNOs



# The context

- Vertically integrated oligopoly in mobile
- BT/EE merger has created a monster – biggest mobile operator with near-monopoly on fixed infrastructure
  - Cross-selling and upselling opportunities will keep them busy for a decade
    - threat to mobile wholesale?
  - Ability to bundle content with mobile and fixed access is a threat to other operators

# The context

- Failure to follow this by separating Openreach was disappointing
  - Pension problems not a valid justification
- FTTC delays in servicing business zones was a blatant attempt to protect leased lines revenues – undermined business competitiveness

# Last year I said it was time to re-regulate the mobile industry

- Recent wave of mergers should have prompted a completely fresh look at the regulation of the mobile industry
- Mobile market regulation has its origins in an entirely different situation from fixed line – the need to encourage investment in new infrastructure
- The industry is now essentially mature and regulators need to look forwards rather than backwards
- If we don't change there is a real risk of contradictions as fixed and mobile converge
- MVNOs have a key role but are being prevented from fulfilling it
- BT/EE merger added to this problem

# The role of MVNOs

- Operators acknowledge they work with MVNOs who don't pose a threat
  - Head of FT Wholesale at Berlin conference was clear
- There are significant barriers to entry for MVNOs
- Most entrants have to work through one of very few aggregators
- MNOs are effectively discouraging/managing competition from MVNOs

# Common barriers to entry for MVNOs

- High set up charges
- High monthly charges
- Uncompetitive wholesale rates (can be above retail)
- Lack of choice (some MNOs don't do MVNO)
- Insistence on exclusivity/restrictive clauses

# More barriers to entry for MVNOs

- Requirement to buy from aggregators
  - Again little choice
- Contracts weighted against the MVNO
- Limited security of supply
- Uneconomic costs for SIMs

# Why do MVNOs face these barriers?

- Most developed markets are effectively licensed oligopolies, becoming more like monopolies over time
- MNOs have no real interest in sharing the market with anyone else
  - They see MVNOs only as a vehicle to gain market share from other MNOs
  - This is not a genuine wholesale market because MNOs are conflicted. That's what regulation is designed to fix in the fixed line market
  - In France, the regulator has required MNOs to sell 4G at a reasonable price to MVNOs.

# Does regulation affect consumer behaviour?

- It can't but affect it
- Regulation determines the nature of markets consumers are able to buy in
- It affects consumer choice
- It affects prices
- It affects which products are profitable for operators
- It affects who provides them (e.g. lack of proper wholesale arrangements for FTTC early on)



# What's to be done?

- We need a comprehensive national review of telecoms legislation and regulation
  - Ofcom needs to be given the powers to open up markets at wholesale and retail level
  - There should be the same presumption against oligopoly as against monopoly. Governments should avoid creating/sustaining them
  - If Brexit happens, one opportunity will be the simplification of the framework

# What's to be done?

- FCS can and should play a leading role in pressing for change

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# Questions/discussion

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