European Commission

Recent Experience on Coordinated Effects

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Outline

Recent Case Overview

Theoretical and Practical Challenges with Coordinated Effects

Lessons from Recent Case Studies

European Commission

Recent Phase 2 Cases (Sept. 2012- to date)

Case	Date	Outcome / ToH
1. Universal / EMI	Sept 2012	Remedies / UE
2. M- Commerce UK	Sept 2012	Unconditional clearance
3. Outokumpu/Inoxum	Nov 2012	Remedies / UE
4. H3G/Orange	Dec 2012	Remedies / UE
5. UPS / TNT	Jan 2013	Prohibition / UE
6. Ryanair / Aer Lingus III	Feb 2013	Prohibition / UE
7. Munksjo/Ahlstrom	May 2013	Remedies / UE
8. Syniverse /Mach	May 2013	Remedies / UE

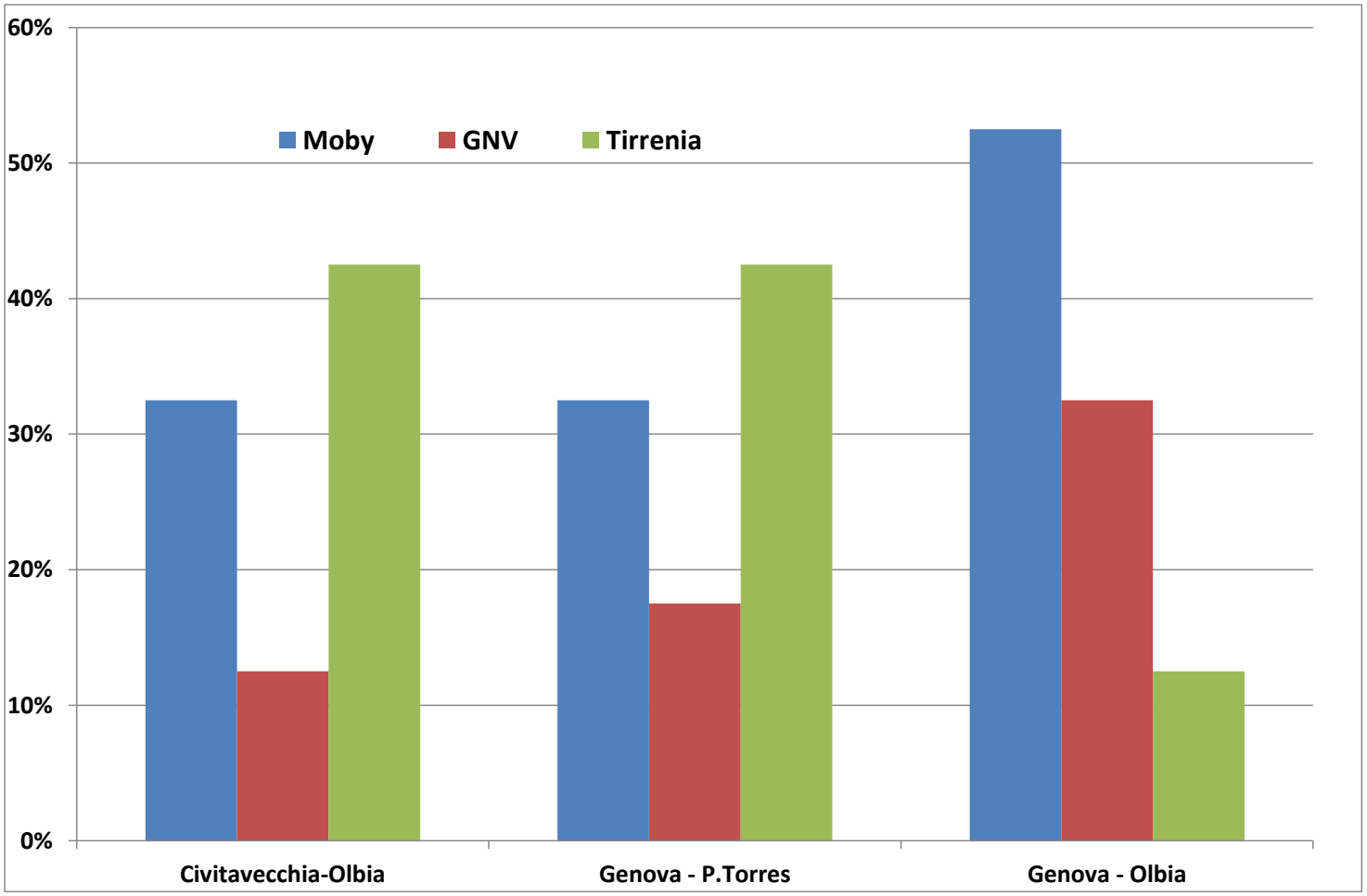
Why are CE harder than UE?

- **Economic theory does not provide unambiguous predictions from greater concentration**
  - Impact on incentive compatibility constraints
  - Relationship between asymmetries and concentration
- **CE based on the <u>creation</u> of the conditions for coordinated pricing rely on prediction of significant change in competitive conduct**
  - This may be hard to establish depending on the evidence
- **CE based on the <u>strengthening</u> of the conditions for coordinated pricing require evidence of prior coordination**
  - Distinguishing between tight oligopolies (UE) and tacit coordination is notoriously difficult

CIN / Tirrenia – the case that never was…

- **Case notified to the European Commission in Nov. 2011**
  - Phase II opened in January 2012
  - Transaction withdrawn in April 2012
- **Formation of a JV in the Italian ferries market, with focus on routes to Sardinia**
  - Moby, Marinvest (GNV) and Grimaldi each acquire 1/3 of Tirrenia
  - Moby, GNV and Tirrenia main operators on routes to/from Sardinia (from Genova and Civitavecchia)
- **Cartel decision by AGCM against Moby and GNV in June 2013**

CIN / Tirrenia: market structure



Source: AGCM

CIN / Tirrenia: theories of harm

- **Unilateral effects**
  - Concentration effects are high, but depend on assumptions on Tirrenia's behaviour under joint control (see literature on partial ownership stakes and JV)
  - Not a "merger to monopoly" despite very high combined shares of JV and its parents
  - Unilateral incentives of Grimaldi in relation to Sardinian routes unclear

CIN / Tirrenia: theories of harm

- **Coordinated effects**
  - Cartel investigation started by AGCM in May 2011
  - Sudden increase in fares for Summer 2011 implemented from late 2010, shortly after the formation of CIN
  - Price increase by acquiring parties (typically 60%+) well above level justified by increase in fuel costs (+30%), and above non-Sardinia benchmarks
  - Tirrenia's price increases for Summer 2011 are instead in line with costs (+5-30%)
  - Documentary evidence on contacts, on contractual links (e.g. revenue sharing), and on extensive monitoring of rival fares
- ***A textbook case for CE?***

H3G/Orange

- **Consolidation in the Austrian mobile telephony market**
  - 4-to-3 merger
  - 3rd and 4th largest operator coming together, with combined share of post-paid subscribers of around 25%
- **Unilateral effects**
  - Share of new subscribers well above share of stock of all contracts (45%+)
  - Diversion ratios based on portability data well above those implied by market shares (suggesting a symmetric structure across the 4 operators)
  - UPP-style exercise suggests potentially significant price effects
  - Remedy allows for both MVNO and MNO entry

H3G/Orange – how about CE?

- **Mobile markets have some features that may make them vulnerable to coordination**
  - Absolute barriers to entry due to spectrum requirements
  - Disaggregated buyer-side
  - A degree of retail price transparency (even though pricing is complex)
  - Past cartel investigations from some NCAs
- **Further Austrian-specific features**
  - Some evidence that H3G had "maverick" properties in Austria
  - Overall transaction structured so as to also benefit largest incumbent A1 (with transfer of low-cost brand Yesss!)
- **Ultimately Commission did not consider that evidence on CE met the required standard of proof…**
- **… on the other hand commitments also address risk of coordination**

M-Commerce

- **JV between the three main MNOs in the UK for the offer of mobile wallet services (via NFC technology)**
- **Potential concern is one of (joint) foreclosure of alternative payment systems**
  - SIM-based solutions offered by the Parties compete with non-SIM based ones (e.g. embedded Secure Elements (eSE))
- **Investigation shows no *technical* ability to foreclose eSE via control of the SIM**
- ***Commercial* ability and incentives to foreclose also analysed (e.g. via pressure on OEMs and/or retailers, or via commercial choice of handset)**

M-Commerce – Commercial foreclosure

- **Incentives to engage in commercial foreclosure analysed for both unilateral and coordinated case**
- **Unilateral foreclosure:** each party to the JV has incentives to foreclose rival m-wallet solution, assuming that other members of the JV do the same ("JV as a coordination device")
- **Coordinated foreclosure**: each party to the JV has incentives to foreclose rival m-wallet solution, assuming that other members of the JV will "detect" and "punish" deviations from joint foreclosure strategy
- **Analysis (including numerical exercise) suggests limited scope for either type of foreclosure incentives**

Lessons from recent cases

Evidentiary standard for CE remains high (in particular relative to UE)

Most promising cases will include clear evidence of past coordination (ideally in same market) and removal of significant asymmetries

Several recent Phase II have "merger to monopoly" features and therefore clearly not suitable for CE analysis