



Public consultation on the draft revised Horizontal Block Exemption
Regulations and Horizontal Guidelines

MVNO Europe response
focused on
Mobile Infrastructure Sharing Agreements
(Chapter 3.6 of the draft Horizontal Guidelines)
and
Sustainability Agreements
(Chapter 9 of the draft Horizontal Guidelines)

26 April 2022

I. Introduction and Focus on Mobile/Wireless Communications

1. MVNO Europe welcomes the opportunity to respond to the European Commission's public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines.
2. MVNO Europe notes with interest that the European Commission's proposals include, in the draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, a Chapter 3.6 entitled '*Mobile Infrastructure Sharing Agreements*', which, for the first time, would provide upfront guidance on this important topic. MVNO Europe's also notes with attention that '*Sustainability Agreements*', addressed in Chapter 9 of the same document, could be relevant to the mobile/wireless communications sector.
3. Whilst MVNOs do not deploy masts, antennas and mobile Radio Access Network (RAN) equipment, and typically do not hold rights-of-use in radio spectrum, they lease these resources (and where applicable other resources such as backhaul) in aggregated form from Mobile Network Operators (hereafter 'MNOs').
4. Given that Mobile Infrastructure Sharing Agreements (and potentially Sustainability Agreements as well) have important market-shaping consequences, their specific legal and regulatory treatment is clearly of interest for MVNOs.
5. Where reference is made to the text contained in the draft COMMUNICATION FROM THE COMMISSION – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, we use the term 'Draft Horizontal Guidelines'.

II. Mobile Infrastructure Sharing Agreements (Chapter 3.6)

6. MVNO Europe has taken careful note of paragraphs 296 to 305 of the Draft Horizontal Guidelines. We welcome that the text applies not only to mobile communications, but also to Fixed Wireless Access (footnote 163), and we appreciate that the Commission addresses 3 types of infrastructure sharing, especially in [paragraphs 297 and 302](#) (passive sharing, active RAN sharing and spectrum sharing). We believe that the European Commission would be **well-advised to include** in the Draft Horizontal Guidelines **a possibility of further types of agreements** (over and above the 3 listed) potentially affecting markets, and thus **requiring assessment**. In particular, the combination of fixed and mobile infrastructures may be relevant in this regard.

7. MVNO Europe notes in particular [paragraph 300](#), which recognises the risk of restrictive effects, and recognizes the importance of competition at both the wholesale level and the retail level: *"Mobile infrastructure sharing agreements can, however, give rise to restrictive effects on competition. They may limit infrastructure competition that would take place absent the agreement ¹⁶⁷. Reduced infrastructure competition may in turn limit competition at wholesale as well as at retail level"*. MVNO Europe wishes to emphasize, and **asks the European Commission to recognize, that competition at the wholesale level is not only the (joint) self-supply of MNOs (e.g. those engaging in infrastructure sharing) but also concerns wholesale supply to third party operators, such as light and full MVNOs.** The European Commission has done so in individual 4 to 3 MNO merger cases, and it is appropriate for it to do so in the Horizontal Guidelines as well.
8. In light of the statement above, and with reference to [paragraph 301](#), there is a risk that Mobile Infrastructure Sharing Agreements would, directly or indirectly, limit the ability or incentives for parties to make available fit-for-purpose wholesale mobile access to third parties (e.g. light and full MVNOs), or that terms or information exchanges could affect parties' positioning on the wholesale market for supply of services to MVNOs.
9. MVNO Europe considers, with reference to [paragraph 302](#), that **assessments of each of the 3 types of sharing agreements (and any others) should explicitly be required to address any and all impacts on the provision of wholesale services to third parties such as light and full MVNOs, and not just existing provision but also new provision going forward.** As the text stands, the impression may be given that only the third type (spectrum sharing agreements) could impact wholesale offers, and the wholesale offers concerned may be seen as self-supply (or supply by a joint-venture to the parties to the agreement), and not include supply to third parties such as MVNOs.
10. With regard to [paragraph 302 \(c\)](#) and especially [footnote 173](#), MVNO expresses its **shock and disagreement**. The reference to *'stable combined market shares of 90%'* (etc.) appears to amount to **positive bias** to allowing the **two largest MNOs** to engage in forms of infrastructure sharing that may potentially enable them to **seize the market**, to the detriment of smaller MNOs and MVNOs. This is likely to **ultimately to lead to the exclusion of both smaller MNOs and MVNOs from the market altogether.**

MVNO Europe's position is that sharing agreements between the two largest MNOs need particular scrutiny, also at much lower combined market shares, to prevent exclusionary effects, both with regard to non-participating MNOs and with regard to MVNOs.

In fact, we consider that any such agreements would best be associated with explicit conditions requiring both openness to participation by any other interested party, and guaranteeing wholesale supply to (light and full) MVNOs.

11. In light of the comments made above, Paragraph 303 (d), 304 (b) and 304 (c) would benefit from being **enhanced with explicit references to wholesale access to third party operators, such as light and full MVNOs**. This is necessary to avoid that the authorities conducting the assessments focus only on (joint) self-supply of the parties to the agreement, and forget the important role that MVNOs play in enhancing competition and benefiting end-user interests.

III. Sustainability Agreements (Chapter 9)

12. To the extent that Sustainability Agreements (Chapter 9) could affect mobile infrastructure sharing, or have market-shaping effects on mobile/wireless communications markets, our comments on Mobile Infrastructure Sharing Agreements apply *mutatis mutandis* to relevant Sustainability Agreements.

IV. About MVNO Europe

13. MVNO Europe represents various types of Mobile Virtual Network Operators (MVNOs), with different business models, addressing consumers, business users (including start-ups/scale-ups)/medium/large businesses, the public sector, ICT service/systems integrators, and Internet of Things (IoT) markets, etc. <http://www.mvnoeurope.eu/members>
14. MVNOs currently represent +/- 10% of SIM cards in the European Union.
15. The term “virtual” refers to the fact that MVNOs do not control radio frequencies and related mobile physical infrastructure (antennas, base stations etc.). However, MVNOs do control the necessary hardware/software/resources to provide wireless/mobile services and may own other telecom infrastructures depending on the extent of their business model.
16. Our members provide mobile-only offers, fixed-mobile convergent offers and offers incorporating audio-visual media content, financial services, machine-to-machine communications, embedded data SIMs for tablets, laptops and other devices, connected mobility for vehicles, IoT in a broad sense, etc. Some of our members are also active on wholesale markets as MVNE (E=Enabler) / MVNA (A=Aggregator) supporting other companies and brands that provide wireless/mobile services. MVNO Europe does not represent branded resellers.

17. MVNOs contribute strongly to innovation and competition and provide clear Business to Consumer (B2C) and Business to Business (B2B) end-user benefits.
18. MVNOs also contribute to financing mobile network infrastructure through payment of wholesale charges which assure revenues to Mobile Network Operators, whilst avoiding costly duplication of network assets. Specifically, MVNOs pay for each voice call minute, for each SMS, for each Mb of mobile data. A portion of MVNOs' traffic is traffic that would otherwise not exist on Mobile Network Operators' networks, because MVNOs often serve market segments that Mobile Network Operators are not well equipped to serve, and MVNOs develop innovative services that generate entirely new types and amounts of traffic. Therefore, MVNOs help Mobile Network Operators to grow their overall business, and contribute to Mobile Network Operators' return on investment, including the recovery of the fees that they pay for radio spectrum.

V. MVNO Europe Contact Details

Should you require any clarifications or further information on the elements and positions set out by MVNO Europe in this document, please contact:

Ms. Veronica ZABOIA, Policy Officer - Secretariat of MVNO Europe

Tel: +32 2 896 66 23 – veronica@mvnoeurope.eu | www.mvnoeurope.eu

38 rue de la Loi, 1000 Brussels – 5th floor