



Collective Dominance

Reflections Post-ECJ Judgment on Sony BMG case

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Background

- Collective dominance test pre-Sony BMG determined by Airtours CFI case 2002
 - CFI set out three conditions necessary to substantiate finding of tacit collusion
 - Transparency (monitoring)
 - (Sustainability) Need for a ‘retaliatory mechanism’
 - Absence of competitive constraints (role of entry, fringe and/or mavericks)



Sony BMG EC Decision

- Three separate relevant markets;
 - Recorded music
 - Online music
 - Music publishing
- Concern was raised in 2004 about the impact Sony BMG would have in the Recorded music market
- Despite concerns, expressed in the statement of objections, the EC declared the joint venture compatible with the common market



Sony BMG CFI Impala

- Independent Music Publishers and Labels Association (Impala) brought 3rd party action against the EC decision
- The CFI ruled in 2006 that the EC decision be annulled as errors in assessment were made
- Notification made again and the EC needed to re-assess



CFI judgment

- The CFI in its Impala decision noted that the Airtours criteria were suited to assessing the risk a concentration would create a collective dominant position NOT the existence of a collective dominant position
- The CFI did however assert the criteria are also applicable when assessing the existence of collective dominance
- Recital 249 of the decision refers to “indirect” means of testing collective dominance



CFI judgment

- Makes a distinction between prospective analysis (akin to the methods in ex ante regulation and market reviews) and pre-existing conditions (similar to ex post competition policy)



Sony BMG CFI Judgment

- 251 - It follows that, in the context of the assessment of the existence of a collective dominant position, although the three conditions defined by the Court of First Instance in *Airtours v Commission*, paragraph 45 above, which were inferred from a theoretical analysis of the concept of a collective dominant position, are indeed also necessary, they may, however, in the appropriate circumstances, be established indirectly on the basis of what may be a very mixed series of indicia and items of evidence relating to the signs, manifestations and phenomena inherent in the presence of a collective dominant position.
- 252 - Thus, in particular, close alignment of prices over a long period, especially if they are above a competitive level, together with other factors typical of a collective dominant position, might, in the absence of an alternative reasonable explanation, suffice to demonstrate the existence of a collective dominant position, even where there is no firm direct evidence of strong market transparency, as such transparency may be presumed in such circumstances.



ComReg Market 15 Review

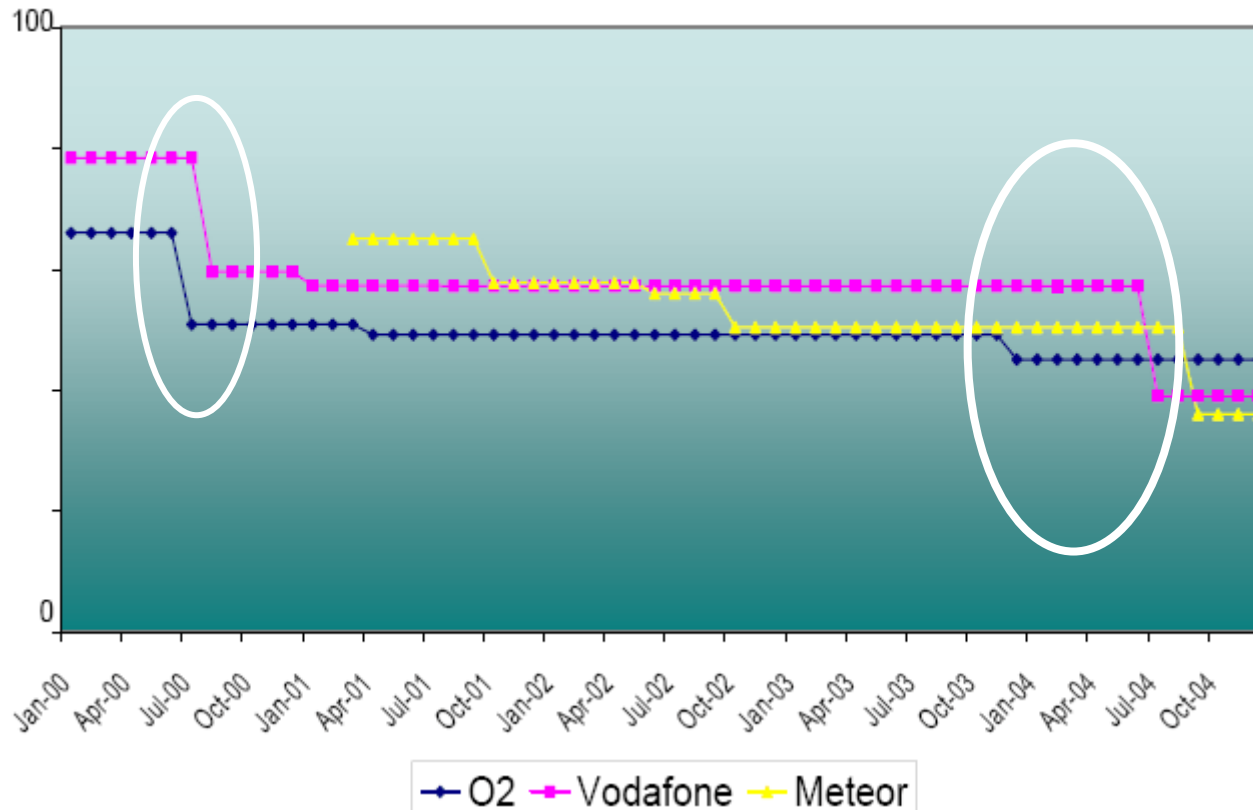
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MMB analysis: Low user, even

Low User Even



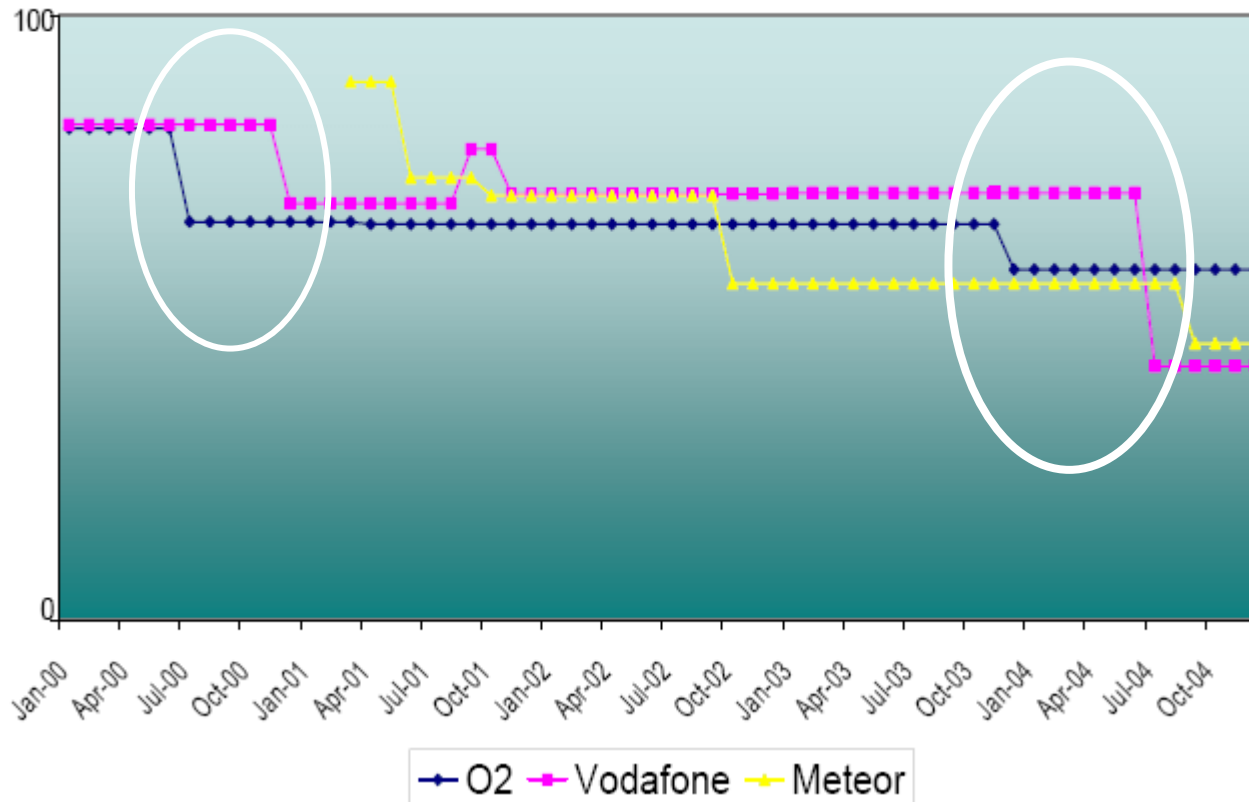
Source: ComReg "Market Analysis - Wholesale Mobile Access and Call Origination (Response to Consultation Document 04/05)" 04/118a, 9 December 2004

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MMB analysis: Medium user

Medium User Even



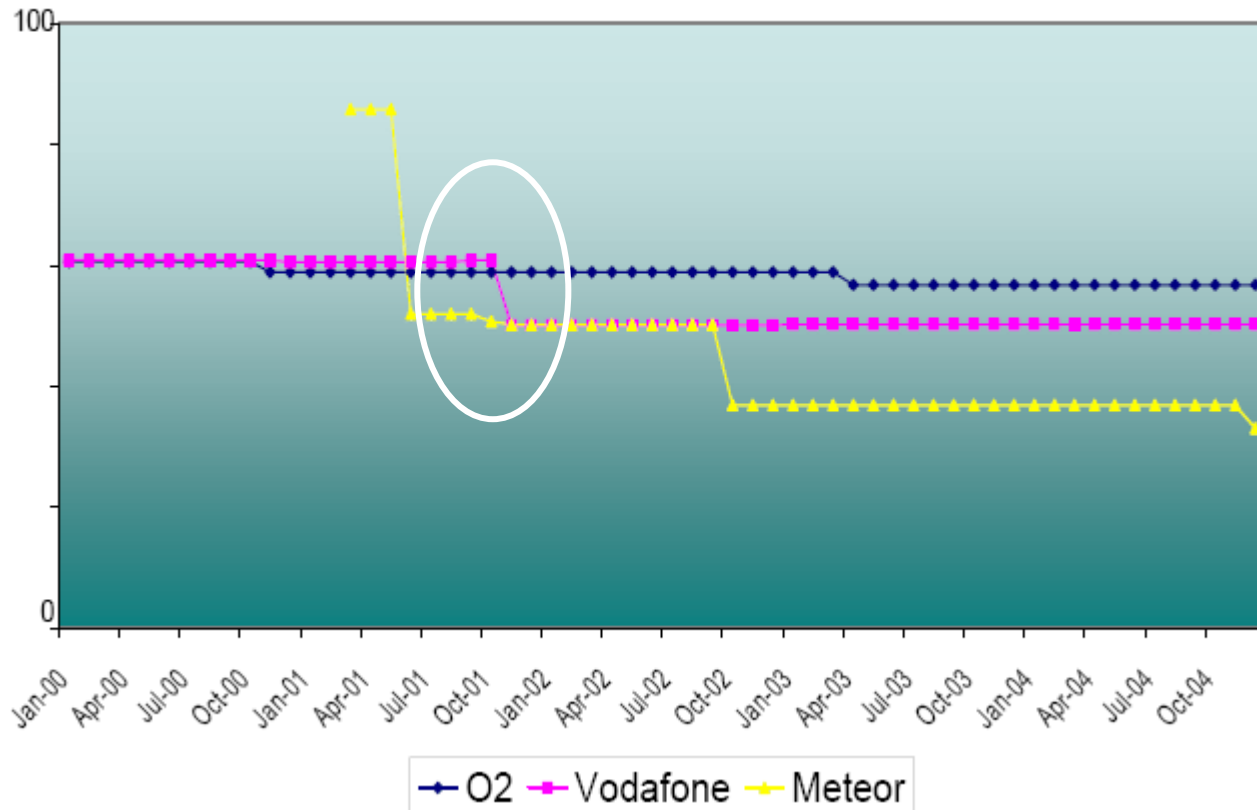
Source: ComReg "Market Analysis - Wholesale Mobile Access and Call Origination (Response to Consultation Document 04/05)" 04/118a, 9 December 2004

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MMB analysis: High user, even

Post Paid: High User Even



Source: ComReg "Market Analysis - Wholesale Mobile Access and Call Origination (Response to Consultation Document 04/05)" 04/118a, 9 December 2004

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Market 15 in Ireland

- Had the review taken place after the CFI judgment and before the ECJ judgment, ComReg may have had found it easier to persuade the appeal panel with regard to the use of pricing evidence
- On the other hand, as the ECJ determined, the application of the *Airtours* test in a mechanical fashion may have been demonstrated



Sony BMG ECJ Judgment



ECJ Judgment 2008

- The ECJ overturned the CFI decision
- Three areas of weakness identified in CFI ruling including its interpretation of collective dominance criteria
- The ECJ regarded the CFI's application of the Airtours criteria:
 - 125 “In applying those criteria, it is necessary to avoid a mechanical approach involving the separate verification of each of those criteria taken in isolation, while taking no account of the overall economic mechanism of a hypothetical tacit coordination.”



Hypothetical Tacit Coordination Test

- 126 “In that regard, the assessment of, for example, the transparency of a particular market should not be undertaken in an isolated and abstract manner, but should be carried out using the mechanism of a hypothetical tacit coordination as a basis. It is only if such a hypothesis is taken into account that it is possible to ascertain whether any elements of transparency that may exist on a market are, in fact, capable of facilitating the reaching of a common understanding on the terms of coordination and/or of allowing the competitors concerned to monitor sufficiently whether the terms of such a common policy are being adhered to. In that last respect, it is necessary, in order to analyse the sustainability of a purported tacit coordination, to take into account the monitoring mechanisms that may be available to the participants in the alleged tacit coordination in order to ascertain whether, as a result of those mechanisms, they are in a position to be aware, sufficiently precisely and quickly, of the way in which the market conduct of each of the other participants in that coordination is evolving.”



Electronic Communications and Collective Dominance

- Very few attempts to apply concept of collective dominance
- Ofcom initially considered application to market 18
- Spanish regulator CMT in market 15
 - Unsuccessfully by ComReg in Ireland, others have withdrawn or delayed (Arcep, UKE)



Future applications?

- Market reviews
 - Unlikely unless specific markets in mobile identified
- Competition cases
 - Possible, particularly for mergers and cases which may involve access to facilities in mobile and/or NGNs



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