

DATED 30 JUNE 2015

BT/EE MERGER INQUIRY

**BT GROUP PLC - PHASE 2 INITIAL
SUBMISSION**

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BT/EE – PHASE 2 INITIAL SUBMISSION

SECTION A

1. Introduction and summary

- 1.1. Following its request for a fast track reference, BT Group plc (**BT**) welcomes the opportunity to engage with the Group Members and the Competition and Markets Authority (**CMA**) in relation to the Phase 2 review of BT's proposed acquisition of EE Limited (**EE**) (the **Transaction**).
- 1.2. BT believes this Transaction will result in more competition, more investment and more innovation for the benefit of consumer and business customers in the UK communications markets. Even following the Transaction, the enlarged BT will have the lowest market share of any incumbent operator in the developed world, against the backdrop of the UK telecoms markets, which are among the most competitive across Europe.
- 1.3. The dynamic telecoms infrastructure environment in the UK is evolving rapidly. Ofcom noted in launching its Strategic Review of Digital Communications that "*The boundaries between landline, mobile and broadband services continue to blur, and people are enjoying faster services on a growing range of devices.*"¹ Traditional players such as Sky, TalkTalk and Vodafone are continuing to diversify and expand their offering,² while entirely new entrants continue to launch on a frequent basis.³ In order to remain competitive in this vibrant marketplace and meet consumers' changing needs, both BT and EE need to continue to evolve. The Transaction offers the Parties their best opportunity for that.
- 1.4. The Transaction brings together complementary businesses, with very little overlap in retail markets and no overlap in wholesale markets. The combination of EE's advanced 4G network with BT's existing fixed infrastructure will give BT greater end-to-end control over future investment and product innovation to satisfy customer needs. BT will also have increased investment capacity to develop and deploy new networks and services, particularly converged fixed-mobile services. The Transaction will allow the companies to share best practice and knowhow in order to improve the

¹ <http://media.ofcom.org.uk/news/2015/digital-comms-review/>

² For example, Sky announced in January 2015 that it would be launching a mobile service, <https://corporate.sky.com/media-centre/news-page/2015/sky-announces-plans-to-enter-mobile-sector>; Vodafone started rolling out broadband services to existing customers in June 2015, <http://www.vodafone.co.uk/cs/groups/configfiles/documents/assets/vfcon063787.pdf>.

³ There has been new Mobile Virtual Network Operator (**MVNO**) entry in the UK every year since 1999, see Piran Partners, *MVNO Observatory, Annual Report on the UK Market*, <http://piranpartners.com/wp-content/uploads/2014/12/Piran-Partners-MVNO-Observatory-Spring-2014.pdf>.

services they offer and develop new services using both companies' product portfolios, skills and networks.

- 1.5. BT and EE (together, the ***Parties***) combined have made £35 billion of investments in fixed and mobile infrastructure over the last ten years. However, continued investment and innovation is vital to meet customers' increasing demands for communications services. The Parties' shared commitment to high quality network technology and improving customer service will ensure the provision of innovative, seamless services to consumers across fixed and mobile products. Consumers will be able to benefit from a 'best in class' network for voice and data connectivity, wherever they are, and whichever device they choose to use.
- 1.6. BT understands that many other parties in the industry may make submissions expressing concerns about our Transaction. BT invites the CMA to note, as it will do naturally, those that are resistant to an increase in competition rather than any lessening, and those that focus on existing regulation issues rather than actual merger effects.

2. Scope of this submission

- 2.1. The Parties recognise that the Phase 2 investigation is not restricted to investigating the issues that were identified as a concern in the CMA's Phase 1 decision, issued on 9 June 2015 (the ***Decision***). That said, the Parties consider that it would be appropriate to focus this initial submission on responding to the issues identified in the Decision in order to assist the CMA in its transition from Phase 1 to Phase 2.
- 2.2. Before addressing the concerns set out in the Decision, the following paragraphs provide information about: the Parties; the efficiencies created by the Transaction and its benefits for customers; and the counterfactual against which the Transaction's competition effects should be assessed at Phase 2.

3. Description of BT

(a) BT

- 3.1. BT is currently active in the provision of fixed-line services, broadband, mobile and TV products and services and managed networked IT services.⁴
- 3.2. BT Group plc was formed when the O2 mobile telecoms business was demerged from BT plc in 2001. Since then, BT has focused on its core fixed line businesses, although it remained active in business mobile services as an MVNO⁵. There is only a very small overlap between the Parties in relation to

⁴ See Annex B of the merger notification submitted on 15 May 2015 (the ***Notification***) for further details on BT. Note that details on EE are provided in EE's initial submission, submitted to the CMA on 30 June 2015.

⁵ Initially on the Vodafone network, more recently on EE's network.

retail mobile. BT relaunched consumer mobile services in March 2015 as an MVNO on EE's network and, since its launch, BT has managed to build up a market share of [0-5%] and is just one out of more than 100 MVNOs in the UK market.

- 3.3. As the largest provider of fixed network services in the UK, BT is closely regulated by Ofcom across many of its functions. In particular, many of BT's network wholesale activities are run through its Openreach division, whose operational, engineering and systems capabilities are functionally separate from those of the rest of the BT group. This functional separation was implemented by undertakings offered to Ofcom in lieu of a reference in 2005 (the *Undertakings*) and has therefore now been in place for 10 years. The Undertakings ensure that Openreach provides exactly the same products on equal access terms (Equivalence of Inputs, *EOI*) to the BT customer-facing divisions and to all third party communications providers. This will remain the case following the Transaction.
- 3.4. Ofcom carries out market reviews of many of the markets in which BT is active every three years and has imposed a broad package of regulation on those services where BT has significant market power. However, it is notable that Ofcom has steadily decreased regulation on BT in a number of areas due to the emergence of effective competition across the telecoms markets.

(b) BT's relationship with EE

- 3.5. BT provides various services at a wholesale level to EE, including leased lines (used for backhaul to EE's mobile base stations), broadband access, fixed analogue exchange lines and ancillary services such as geographic call termination services.
- 3.6. EE provides MVNO services to BT.⁶

4. Transaction efficiencies and customer benefits

- 4.1. In accordance with the SPA signed on 5 February 2015, BT intends to acquire the entire issued share capital of EE for a purchase price of £12.5 billion.⁷
- 4.2. In the face of the evolving telecoms landscape and increased competition across its core businesses, BT continues to find ways to innovate and develop its offering, such as its entry into pay TV with the launch of BT Sport in 2013. The Transaction is the latest step in this regard. In particular, BT's rationale for the Transaction is as follows:

- (a) *Acceleration of BT's mobility strategy.* BT's diversification strategy to expand its traditional fixed line model to include mobile services will

⁶ The MVNO agreement was signed in March 2014, replacing BT's previous MVNO agreement with Vodafone.

⁷ See Annex C of the Notification for further details on the structure of the Transaction.

enable it to broaden its relationships with consumers, businesses and public sector clients. The Transaction would allow BT to accelerate its mobile strategy (which is currently premised on organic growth as an MVNO) by providing immediate scale of network, customers and operations. [X] This increases the likelihood that users will enjoy an improved quality of connectivity provided by femtocells.

- (b) *Greater control over investment and product innovation.* BT will gain greater end-to-end control over future investment and product innovation of the mobile network operator, EE, particularly in relation to converged fixed-mobile services. BT will also benefit from access to EE expertise for such product development.

4.3. BT considers that the Transaction will give rise to cost and revenue synergies compared to the Parties' stand-alone business plans. These synergies are:

- (a) *Cost synergies.* BT expects to achieve significant operating cost and capex synergies. These will mainly be realised by eliminating duplicative fixed costs currently incurred by EE. Savings will arise from consolidating sales and marketing operations; procurement savings; IT and network savings through consolidation of IT and network development and operations, and phased migration away from duplicate customer support systems; customer service savings from insourcing overseas and third party contact centre resources and expanding online/self-service facilities; and other savings from not duplicating head office functions and property. These cost synergies will give the merged entity increased investment capacity to further develop and deploy new networks and services, including converged fixed-mobile offerings, to the benefit of consumers.
- (b) *Revenue synergies.* BT hopes to generate additional revenues from offering a full range of communications services to the combined BT and EE customer base. This includes BT cross-selling its broadband, fixed telephony and pay TV services to EE customers and by selling mobile services, including mobile broadband, to current BT customers. However, BT does not expect any aspect of the Transaction to result in adverse price effects for its customers or reductions in quality of service.

4.4. BT expects cost synergies of £3.0bn net of integration costs and revenue synergies of £1.6bn. [X]

4.5. The Parties also expect the Transaction to lead to efficiencies that will increase competition in the market, directly benefiting consumers.

- (a) As set out above, the value of the Transaction to BT is based, in part, on revenue synergies from cross-selling. The Transaction will increase BT's incentive to price standalone products more aggressively to increase its customer base, and therefore increase the scope for cross-selling complementary products.

- (b) In addition, the Transaction will eliminate double marginalisation in relation to incremental mobile sales, providing the merged entity with a stronger incentive to price those additional sales more aggressively.
- 4.6. The Parties consider that the pro-competitive benefits of the Transaction are clear. The changing marketplace, with increasing demands for data and speed in both fixed and mobile, means that customers are expecting continual improvements in services, as well as value for money. The combination of BT and EE will lead to secure investment in each of fixed and mobile, and in the development of high quality converged products.
- 4.7. Competition in converged products is still relatively new. Virgin Media has been offering mobile plus fixed bundles in the consumer market. Vodafone, following its acquisition of Cable & Wireless Worldwide (*CWW*), is the leading provider of fixed and mobile bundles to corporate customers. Unlike in other countries, UK consumers have not typically bought such bundles, preferring instead to maintain one contract for the household's fixed communications needs and separate mobile contracts for individual members of the household – different buyers for each kind of service, sold through different channels to market. In any event, the Transaction will allow BT and EE to compete more effectively and offer consumers additional choice in bundled offers.

5. Phase 2 referral

- 5.1. On 9 June 2015 the CMA issued its Decision accepting the Parties' request for a fast-track reference for a Phase 2 investigation. The Parties requested fast-track treatment in order to allow the CMA efficiently to consider the complex issues involved in the fast-moving telecoms markets in depth without delay.
- 5.2. The CMA identified in the Decision two areas where it believed the test for reference would be met and listed others where third parties had expressed concerns.
- 5.3. It is important to note that the curtailed Phase 1 process meant that the Parties did not receive an issues letter or have an issues meeting. The Parties did not therefore have the same opportunity to rebut third party submissions and test the substantive issues identified by the CMA as would have been the case in a full Phase 1 process. The Decision's analysis and conclusions should therefore be read with that in mind.⁸
- 5.4. BT therefore welcomes the CMA's more detailed review in Phase 2 and is confident that it will result in the conclusion that the Transaction is not expected to result in an SLC in any market in the UK.

⁸ Note in this context that the Decision appears to overreach the CMA's Phase 1 mandate in some places by opining on the question of whether there would be an SLC, rather than the Phase 1 'realistic prospect' test: see, for example, paragraphs 100, 130, 145, and 152.

6. Appropriate counterfactual at Phase 2

- 6.1. At Phase 2, the CMA must select “only the most likely scenario” as the counterfactual, on the balance of probabilities. It must, therefore, approach the prospect of the counterfactual differently to the way in which the CMA reached its (very conservative) conclusion in Phase 1.
- 6.2. There are two relevant aspects to the counterfactual:
- (a) BT’s entry into consumer mobile; and
 - (b) The announced merger between Hutchison and O2, which is notifiable to the European Commission (the *Commission*).
- (a) *Entry into consumer mobile*
- 6.3. In the period prior to closing the Transaction, BT will continue to offer its newly-launched consumer mobile services through its existing MVNO agreement with EE. BT Business will also continue to offer mobile services to UK small and medium-sized enterprises; and BT Global Services will continue to offer mobile services to larger corporate customers in the UK. If the Transaction did not complete, BT would proceed with this organic mobile strategy.⁹ These plans also include the development of 4G femtocells for customers, although [REDACTED].¹⁰
- (b) *Hutchison/O2*
- 6.4. In relation to the prospective merger between Hutchison 3G and O2 (the **H3G/O2 Merger**), the CMA must decide whether the merger will, on the balance of probabilities, be likely to complete, and if so, on what terms. As at Phase 1, the CMA is limited by its ability to foresee events. The Guidelines state that “[the CMA] seeks to avoid importing into its assessment any spurious claims to accurate prediction or foresight.”¹¹ However, the CMA does not actually need to speculate as to the exact outcome of the merger control review of the H3G/O2 Merger, given that it can make certain assumptions as to the competitive effect of the decision.
- 6.5. In theory, there are three possible outcomes from the H3G/O2 merger control process:
- (a) **Counterfactual 1:** an H3G/O2 Merger is cleared by the competent competition authority without conditions;
 - (b) **Counterfactual 2:** an H3G/O2 Merger is blocked by the competent competition authority; or

⁹ See Annex J of the Notification for further details.

¹⁰ [REDACTED]

¹¹ Guidelines, paragraph 4.3.6.

- (c) **Counterfactual 3:** an H3G/O2 Merger is cleared by the competent competition authority on conditions aimed at safeguarding effective competition in the markets that the authority considers to be affected.
- 6.6. The CMA can be comfortable that any one of these outcomes will ensure that the existing levels of effective competition will endure.
- 6.7. Recent Commission cases and statements indicate that Counterfactual 1 is extremely unlikely.
- (a) None of the recent mobile telecoms cases involving a concentration between MNOs taking the number of MNOs in the market from four to three has resulted in unconditional clearance: COMP/M.7018 - *Telefonica / E-Plus*, 2014 (cleared with commitments at Phase II); COMP/M.6992 - *Hutchison 3G UK / Telefonica Ireland*, 2014 (cleared with commitments at Phase II); and COMP/M.6497 - *Hutchison 3G Austria / Orange Austria*, 2012 (cleared with commitments at Phase II). These decisions have each followed an extensive Phase 2 enquiry, and required substantial remedies on the parties which involved major interventions in the markets.
- (b) Moreover, Margrethe Vestager, the European Commissioner for Competition has publicly stated that telecoms mergers will face particular scrutiny by the Commission.¹²
- 6.8. In the event that the CMA considered that Counterfactual 2 is the most likely, as an outright prohibition of the H3G/O2 Merger, the outcome would be that the status quo conditions of competition would prevail, such that the CMA need not take into account the H3G/O2 Merger at all.
- 6.9. The status quo conditions of competition would also prevail in all material respects if the CMA formed the view that Counterfactual 3 is the most likely outcome.
- 6.10. In this case, the CMA would have to recognise that the competent competition authority would have considered competition in the market and applied appropriate conditions to the H3G/O2 Merger in order to prevent any significant impediment to effective competition in the wholesale and/or retail markets which are considered to be affected. The CMA should not premise the counterfactual on the exit of an MNO (through merger) without also taking into account the fact that conditions imposed by the Commission in each of the recent ‘four to three’ mobile telecoms cases it has reviewed have, among other things, provided means for potential new entry and/or facilitated access to wholesale offers of the merged entity.

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http://www.thedeal.com/first_word/2015/01/exclusive_eu_antitrust_chief_vestager_talks_tough_on_telecoms.html

- 6.11. In any case, the level of competition currently in the market would, at a minimum, be preserved. The CMA must assume that any conditions imposed by the Commission would be sufficient, as any other prospect would rest on a failure in the Commission's merger review process. The CMA should therefore assess the Transaction against a counterfactual of effective competition in all relevant markets. As set out in the Notification and further below, there will not be any substantial lessening of competition (*SLC*) as a result of the Transaction on this basis.

7. Structure of this submission

- 7.1. With its focus on responding to the points in the CMA's Decision, the remainder of this submission is set out as follows:
- (a) Section B deals with wholesale access and call origination services to MVNOs;
 - (b) Section C deals with the supply of backhaul services to MNOs;
 - (c) Section D deals with retail mobile services; and
 - (d) Section E deals with retail fixed broadband services.

**SECTION B - WHOLESALE ACCESS AND CALL ORIGATION
SERVICES TO MVNOS ACTIVE IN THE SUPPLY OF FIXED-MOBILE
BUNDLES IN THE UK**

1. Introduction and summary

- 1.1. The Transaction creates no horizontal overlap in relation to the supply of wholesale access and call origination services (*wholesale mobile access*) to MVNOs. Of the merging Parties, only EE currently supplies wholesale mobile access. BT currently purchases wholesale mobile access services from EE, for its MVNO strategy.¹³
- 1.2. EE is the market leader in retail mobile. It is also a proactive supplier of MVNO services. It has strong incentives to offer access to its network in order to maximise wholesale revenues and profit. The same incentives will apply after the Transaction. Any anticipated cannibalisation of the merged entity's retail sales would occur to the same extent as it would have had the MVNO been a customer of the merged entity. In particular, there will be no possibility to recover wholesale revenues foregone as a result of restricting access to MVNOs through increased profits at the retail level.
- 1.3. Any MVNO refused access by the merged entity would remain able to enter the retail mobile market through access to other MNOs' networks (which together account for approximately 70% of MVNO subscribers). MVNOs can also fully replicate retail fixed services by procuring fixed wholesale supply from BT on equal access terms and/or using their own network infrastructure, irrespective of which MNO host they use to provide retail mobile services. Therefore, the incentive for the merged entity to supply wholesale mobile access to MVNOs - including to MVNOs active in the sale of fixed-mobile bundles - is unchanged. As such, MVNOs will be equally strong competitors in fixed-mobile bundles if hosted by an MNO host other than EE.
- 1.4. From a vertical perspective, the Decision:
 - (a) Identifies input foreclosure concerns in relation to MVNOs active in the supply of fixed-mobile bundles (Virgin, Sky and TalkTalk), rather than MVNOs who only offer mobile services;
 - (b) Does not allege any change in *ability* to foreclose as a result of the merger, but instead frames its concerns in terms of an alleged pre-merger ability (due to alleged insufficient alternative MNOs, in particular H3G, to ensure competitive pricing), combined with changed foreclosure *incentives* as a result of the Transaction; and
 - (c) Identifies concerns about downstream competitive effects in the retail provision of fixed-mobile bundles.
- 1.5. In response to the Decision, the Parties' case is that:

¹³ [X]

- (a) There is no current or prospective ability to foreclose MVNOs which supply fixed-mobile bundles (or any other MVNOs) - regardless of the Transaction and in neither counterfactual. In particular, the Decision is incorrect to conclude that H3G is not currently and prospectively an active competitor in the supply of wholesale mobile access;
- (b) Given the lack of ability to foreclose, the merged entity will have no incentive to do so on account of any impact on downstream competition;
- (c) In any event, there is no material merger-specific change in incentive arising from the downstream supply of fixed-mobile bundles in the foreseeable future, not least because consumer demand in the UK for purchasing fixed and mobile services as a bundle remains weak; and
- (d) Furthermore, the theory of harm should be assessed against a counterfactual where, pre-merger, EE in certain circumstances has elected not to bid for MVNO opportunities. In relation to the fixed operators named in the Decision, [X]. EE supplies Virgin in the context of a long-standing relationship, [X].

2. Upstream product and geographic scope

- 2.1. The Decision concludes that the appropriate frame of reference is the provision of wholesale access and call services to MVNOs. This is in line with numerous decisions of the Commission reviewing mergers in the mobile space, which have consistently defined a distinct wholesale market for access and call origination on public mobile telephony networks.¹⁴ This market definition is also in line with the Commission's 2003 Recommendation on relevant communications markets susceptible to ex ante regulation and has also been followed by Ofcom's predecessor, Oftel.¹⁵
- 2.2. MNOs, which own mobile networks, constitute the supply side of the market, alongside wholesale resellers such as MVNAs. MVNOs constitute the demand side of the market, contracting either directly with MNOs or gaining wholesale access indirectly via MVNAs. Network access and call origination are key inputs required to provide retail mobile communication services. Since these inputs are typically supplied together by MNOs, the Parties consider that they should be treated as part of the same market, and that this represents the narrowest feasible candidate market.

¹⁴ See for instance: Case COMP No. M.6992 *Hutchison 3G UK / Telefonica Ireland*, paragraph 155; Case COMP No. M.6497 – *H3G Austria / Orange Austria*, paragraph 63; Case COMP No. M.5650 – *T-Mobile / Orange*, paragraph 27.

¹⁵ Oftel, *Review of competition: mobile access and call origination - A consultation issued by the Director General of Telecommunications*, 11 April 2003 and *Mobile access and call origination services market - Identification and analysis of market and determination on market power - Final explanatory statement and notification*, 3 October 2003.

- 2.3. The Parties agree with the view adopted in the Decision that the Transaction should be considered against a geographic scope of the UK in accordance with previous decisions.¹⁶ This reflects the fact that competition among MNOs takes place on a national basis and the fact that the telecoms regulatory regime and, more specifically, the geographic scope of the spectrum licences granted to UK MNOs by Ofcom is limited to the borders of the UK.

3. Competitive effects

- 3.1. There is no overlap in the provision of wholesale mobile access services between the Parties, as BT is not active at the wholesale level of the mobile market. As a result, there is no prospect for the Transaction to give rise to adverse horizontal effects.
- 3.2. In relation to the vertical foreclosure concerns identified by the Decision, the Transaction will not result in or enhance any ability or incentive for the merged entity either to restrict access to its wholesale mobile services or to worsen the terms of service for these services such that it would foreclose MVNOs from the sale of fixed-mobile bundles in the downstream retail market. This is equally true of other MVNOs (to which the theory of harm set out in the Decision does not relate).
- (a) *The merged entity will have no ability to foreclose any MVNOs, as all other MNOs are credible suppliers of wholesale mobile access*
- 3.3. The Parties consider that all other MNOs are credible suppliers of wholesale mobile access at least to the same extent EE supplies such access. Therefore, the merged entity will have no ability to foreclose any MVNOs, including those active in the sale of fixed-mobile bundles.
- 3.4. The Decision's concern in relation to *ability* is predicated on its observation that "*H3G has historically decided for its own commercial reasons to play a more limited role in the wholesale market compared with other MNOs*".¹⁷
- 3.5. The Parties disagree that H3G has historically adopted a deliberate strategy, for its own commercial reasons, to play a more limited role in the wholesale mobile market. On the contrary, H3G has been an active participant in the wholesale market for some years and is currently both a strong and aggressive wholesale competitor:
- (a) While the perception of H3G's network quality may previously have presented it with challenges in winning MVNO contracts, this is no longer the case. H3G has invested heavily in improving its network coverage and reliability. This is reflected in the fact that H3G has

¹⁶ See for example: Case COMP No. M.6992 *Hutchison 3G UK / Telefonica Ireland*, paragraph 165; Case COMP No. M.6497 – *H3G Austria / Orange Austria*, paragraph 73; Case COMP No. M.5650 – *T-Mobile / Orange*, paragraph 31

¹⁷ Decision, paragraph 96.

drastically reduced its reliance on EE for 2G national roaming services (to provide in-fill). As a result, EE's revenues generated from providing national roaming services to H3G have declined significantly, by [X] over the past five years. Indeed, improvements to H3G's network and operational capabilities, coupled with its enhanced focus on customer experience, have led to H3G being named by Ofcom in mid-2014 (and confirmed in May 2015) as one of the least complained about networks in the UK and the one with the most significant improvements.¹⁸ Just two years prior, H3G was among the most complained about operators.¹⁹

- (b) Furthermore, H3G has actively been growing its MVNO business.²⁰ It has done so through a combination of (i) aggressive pricing for wholesale data, (ii) providing 4G data access to its wholesale partners [X], (iii) launching a new global MVNE platform called 'Hue' in April 2015 to drive MVNO uptake²¹; and (iv) targeting a 10% EBITDA contribution from its wholesale activities.²² All these factors make H3G a credible and major competitor for new MVNO business;
- (c) The fact that H3G has been successful in bidding for important MVNO contracts that were recently tendered further demonstrates its improved network capability and decision to compete aggressively in the wholesale mobile market. In August 2014, H3G secured Carphone Warehouse as an MVNO customer²³, and in May 2015 FreedomPop announced it would be launching as an MVNO on the H3G network with plans to grow to one million subscribers within 3 years.²⁴
- (d) Ofcom has recently confirmed its view that H3G is an effective wholesale competitor. In the November 2014 consultation relating to

¹⁸ Ofcom, Telecoms and Pay TV Complaints Q1 (January to March) 2014, 27 June 2014, page 20; <http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/complaints/Q1-2014.pdf>. H3G has maintained its position as the least complained about MNO in Ofcom's most recent report, Ofcom, Telecoms and Pay TV Complaints Q4 (October to December) 2014, 12 May 2015, page 21; http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/complaints/Q4_2014.pdf

¹⁹ Ofcom, Telecoms and Pay TV Complaints Q1 (January to March) 2014, 27 June 2014, page 20; <http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/complaints/Q1-2014.pdf>.

²⁰ See for example H3G's MVNO brochure, *Built For The Future*, <http://wholesale.three.co.uk/wp-content/uploads/2014/07/Three-Wholesale.pdf>

²¹ See <http://www.mobilenewscwp.co.uk/2015/04/17/hutchison-launches-new-global-mvne-platform/>

²² [X]

²³ Carphone Warehouse previously operated a successful MVNO on the Vodafone network, TalkMobile.

²⁴ See <http://www.mobilenewscwp.co.uk/2015/06/08/free-three-mvno-wants-1m-customers-within-three-years/>.

the release of 2.3 and 3.4 GHz spectrum, Ofcom stated that there are currently four national wholesalers (i.e. EE, H3G, O2 and Vodafone) each of which “*exerts an effective constraint on its rivals in terms of factors such as the provision of high quality services, competitive prices, and choice and innovation.*”²⁵

3.6. The Decision correctly (if implicitly) recognises that O2 and Vodafone are significant players in the provision of wholesale mobile access:

- (a) O2 has a strong position in the wholesale mobile market. This is supported by the fact that O2 has recently won two large MVNO contracts: in November 2014 O2 acquired TTG as an MVNO customer and in January 2015 O2 bid successfully to host Sky on its network. O2 also hosts a number of other significant MVNOs such as Tesco Mobile and Lycamobile.
- (b) If it were suggested to the CMA that O2 had limited network capacity and could therefore not be considered a viable alternative provider of wholesale mobile access, this would be inconsistent with the fact that, only in January 2015, O2 successfully bid to host Sky on its network, providing access to 2G, 3G and 4G services. It must be assumed that Sky entered into this MVNO agreement only after carrying out thorough due diligence of O2’s network capacity and its ability to satisfy Sky’s anticipated demand for large data volumes.

Furthermore, the fact that O2 participated in the Sky tender shortly after O2 had acquired TTG as an MVNO customer, indicates that O2 was confident to host a further MVNO with large data requirements on its network and that it had the required capacity.

More generally, MVNOs’ network capacity requirements are small in comparison with MNOs’ overall ever-increasing capacity requirements due in particular to rapidly growing data volumes. For example, existing MVNOs on the EE network represent only approximately [5-10%] of total data demand. Therefore, while an MVNO’s network capacity requirements are relevant, an MNO is unlikely to regard them as decisive in determining whether to offer wholesale mobile access.

- (c) Vodafone has generally been focused on large MVNOs or those targeting niche segments. Vodafone’s largest MVNO customer is Lebara. It also established a joint venture with Sainsbury’s in 2013, and provides MVNO services to a number of smaller customers. When Lebara re-tendered its MVNO contract towards the end of the previous contract with Vodafone in 2014, [X] was ultimately successful.

²⁵ Ofcom, *Public Sector Spectrum Release (PSSR), Award of the 2.3 GHz and 3.4 GHz bands*, paragraph 7.26.

While Vodafone has seen a recent reduction in the number of MVNO customers that it hosts, primarily as a result of capability limitations that impacted its wholesale platform²⁶, Vodafone is now in the second year of its three year £6 billion organic investment programme (Project Spring) to enhance its network position across Europe, including in the UK.²⁷ The Parties expect this to improve Vodafone's network capability and operations substantially,²⁸ enhancing its attractiveness to wholesale MVNO customers in the future.

Moreover, Vodafone has recently partnered with Digitalk to provide a new MVNE platform integrated with Vodafone's network to improve the services it provides to MVNOs. It is believed that this platform will also provide access to 4G services. A number of existing Vodafone MVNOs are expected to migrate to the new platform, enabling Vodafone to close down certain legacy platforms which it has described as "obsolete".

- 3.7. For the reasons set out in Section A6, it has to be assumed that in the alternative counterfactual (i) either the H3G/O2 Merger will be blocked and the competitive conditions therefore would remain unchanged; or (ii) that transaction will be cleared on conditions ensuring continued effective competition in relation to wholesale (as well as retail) mobile services. Therefore no incremental concerns can arise from consideration of the alternative counterfactual.
- 3.8. On a reasonable view, therefore, the merged BT/EE will not be able to foreclose any MVNOs, including those active in the sale of fixed-mobile bundles.
- (b) *The merged entity will have no incentive to foreclose*
- 3.9. The relevant question in relation to incentives is whether the Transaction would result in a change in incentives for the merged BT/EE, to seek to foreclose MVNOs selling fixed-mobile bundles (including TTG, Sky and Virgin Media).²⁹
- 3.10. There would not be a relevant change in incentive in respect of any of Virgin Media, TTG or Sky for the following reasons:

²⁶ Paragraph 6.13 of Annex I of the Notification.

²⁷ See, e.g. <http://www.techweekeurope.co.uk/workspace/vodafone-investment-project-spring-131602>.

²⁸ [X]

²⁹ The Decision suggests that the merged entity would have a weakened incentive to supply MVNOs that are active in the supply of fixed/mobile bundles. This is premised on the assumptions that (i) the merged entity would be a stronger provider of fixed/mobile bundles as a result of the Transaction; (ii) post-merger, the merged entity could recapture a higher retail customer diversion from foreclosed MVNOs; and (iii) thereby gain higher retail variable profit margins, see Decision, paragraphs 97-98.

- (a) First, for the reasons set out in paragraphs 3.3 to 3.8 above, no incentive to foreclose can arise because the merged entity would not have the ability to foreclose MVNOs. The merged entity would lack this ability for all MVNOs including those that are active in the supply of fixed-mobile bundles. As the merged entity would have no ability to foreclose such MVNOs, it would have no incentive to attempt to do so, as it would imply a sacrifice of wholesale margins for no downstream benefit.
 - (b) Second, even if the merged entity was assumed to have such an ability, there is no basis to assume a material change of incentives related to the Transaction, for the reasons set out below.
- (i) *No material change arising from the merged entity's position as a provider of fixed-mobile bundles as a result of the Transaction*
- 3.11. The Decision's theory of merger-specific foreclosure incentive is predicated on there being strong demand for fixed-mobile bundles. However, whilst fixed-mobile bundles have been available in the UK for some time, the response of consumers and businesses to fixed-mobile bundled propositions has been modest.
- 3.12. Market data, including data relied on by Ofcom as well as third party market research, shows that most end-users in the UK purchase fixed and mobile services on a standalone basis.³⁰ These data show that:
- (a) there is evidence that consumers continue to see fixed and mobile services as distinct and that consumers prefer to choose best-priced standalone options³¹;
 - (b) mobile services tend to be bought on an individual basis and mobile contracts are usually entered into for a limited period of time and come up for renewal after the initial term. In contrast, fixed telephony services and broadband internet access are usually bought at a household level, and on a longer-term basis;
 - (c) fixed telephony services are mostly purchased online or via telesales³². In contrast, customers tend to buy mobile services in physical shops.

³⁰ Enders Analysis, *UK broadband, telephony and pay TV trends Q3 2014*, see BT – Index of supporting documents – Third Party, No. 17.

³¹ Enders Analysis, *UK mobile user survey 2014: High on networks, low on convergence*, see BT – Index of supporting documents – Third Party, No. 23, p.19.

³² See, e.g. Enders Analysis, *UK broadband, telephony and pay TV trends Q3 2014*, see BT – Index of supporting documents – Third Party, No. 17, p.18.

According to Enders Research, 59% of total mobile contract sales are physical shop sales.³³

- 3.13. Consequently, the merged entity would not have any significantly increased incentive to foreclose a downstream fixed-mobile MVNO from access to mobile services than pre-merger on account of seeking to recapture not only their mobile but also their retail fixed sales. This is because that MVNO would remain a strong supplier of fixed services on a standalone basis and so would be capable of retaining sales of fixed services given consumers' willingness to unpick bundles and purchase separately.
- (ii) *Change of incentive given potential stronger future demand for fixed-mobile bundles highly speculative*
- 3.14. Should demand for fixed-mobile bundles increase in the mid- to long term future, it would be highly speculative to assume that the merged entity would at that point develop an incentive to foreclose MVNOs active in the supply of fixed-mobile bundles. It would be implausible to assess a hypothetical market development with significant change on the demand side while assuming static conditions on the supply side when it is clear that there are significant changes taking place (notably the entry of Sky and Vodafone into the mobile and fixed retail markets respectively).
- 3.15. A number of potential scenarios could eventuate but, in either counterfactual, the better view is that, in a hypothetical situation where users develop a stronger valuation of fixed-mobile bundles and demand moves towards fixed-mobile convergence, other MNOs (and indeed MVNOs) would have an incentive to promote and/or launch fixed services in order to replicate fixed-mobile bundles and to compete effectively. They would have the ability to do so due to the availability of upstream inputs: wholesale access to the fixed components of fixed-mobile bundles is available on competitive terms either because those services are regulated or because there are sufficient competitive offerings. Bundle to bundle competition would be intense.
- 3.16. Furthermore, in a hypothetical fixed-mobile converged market, other MNOs who did not themselves develop a strong fixed-mobile proposition would have a strong incentive to host MVNOs with strong fixed-mobile propositions on their networks, in particular MVNOs whose specific strengths in fixed services would allow them to expand the MNO's reach (such as Sky's position in the pay TV market and Virgin Media's position in superfast cable broadband).
- 3.17. The factors above mean that the recapture rate and associated margins of any future hypothetical foreclosure strategy would be highly uncertain.

³³ Enders Analysis, *UK mobile market Q3 2014, Growth maintained, but uncertainty ahead*, see BT – Index of supporting documents – Third Party, No. 18, p.7.

(iii) *EE's supply of MVNO services in the counterfactual*

- 3.18. For the reasons set out above, the merged entity will have neither the ability or incentive to foreclose MVNOs active in the supply of fixed-mobile bundles post-merger. In any event, the theory of harm set out in the Decision needs to be assessed in a context where, pre-merger, EE does not seek to bid for all MVNO opportunities. [REDACTED]
- 3.19. [REDACTED]
- 3.20. [REDACTED] in a bidding market such as the wholesale mobile market, the participation of all MNOs in bids is not necessary to ensure a competitive outcome.
- 3.21. [REDACTED]
- 3.22. [REDACTED]
- 3.23. [REDACTED]
- 3.24. [REDACTED]

SECTION C - BACKHAUL

1. Introduction and summary

- 1.1 BT is the largest wholesale communications provider in Europe. For many years it has pursued a strategy of being the wholesaler of choice for its customers, in relation to all wholesale products, both those that are regulated and those subject to no regulation, those provided to mobile network operators and those provided to fixed network operators. Just as BT has proactively sought to grow its wholesale business to fixed network operators who are its competitors in the retail market, so BT will continue in future proactively to seek to grow its wholesale business to mobile network operators after the Transaction. The Transaction would not change these incentives such that BT's conduct would change from that evidenced in practice for many years for fixed network customers.
- 1.2 BT provides products for backhaul at two levels. At the 'upstream' level of the backhaul supply chain, Openreach provides backhaul access services via wholesale leased line products. BT Wholesale offers managed backhaul services which are 'downstream' of Openreach, including the provision of a value added layer on top of the Openreach inputs and transmission across BT's 21CN network.³⁴ Both Openreach's and BT Wholesale's backhaul products are used as inputs for the fixed and mobile retail services offered by BT itself and BT's wholesale customers. EE purchases BT Wholesale's Managed Ethernet Access Service (**MEAS**) for backhaul to its mobile cell sites.
- 1.3 There is no horizontal overlap in relation to either the wholesale supply of leased lines or in any narrower market segment. Of the merging Parties, only BT is active at the wholesale level.
- 1.4 The CMA's analysis in the Decision relates to a narrow putative 'fibre mobile backhaul' market. The CMA's key concerns are vertical, as follows:
 - (a) The CMA accepts total foreclosure by Openreach would be unlikely, but queries whether Openreach could discriminate against EE's rival MNOs by changing the relative prices of Openreach's products, introducing more costly premium services, or selectively introducing/blocking new services.³⁵
 - (b) At the 'downstream' level, the Decision considers whether BT Wholesale could engage in partial foreclosure by degrading service quality and innovations benefitting EE's rival MNOs (possibly

³⁴ Managed services involve the provision of an end to end service, which aggregates traffic from the connected sites across BT's 21CN, providing capacity management across the network, and certain technical products and services (such as network switching, synchronisation and transmission planning).

³⁵ Paragraphs 106 and 149 of the Decision.

combined with a price increase, although the Decision acknowledges that the relatively small, and fixed, nature of backhaul costs would reduce the likelihood of partial foreclosure by price alone).³⁶

- (c) The Decision queries the effectiveness of existing and prospective rival suppliers to BT Wholesale, whether within the period of MNOs' existing contracts, or when they come up for renewal.³⁷

1.5 The Transaction will not give rise to these vertical concerns, even on a hypothetical 'fibre mobile backhaul' segment:

- (a) At the upstream level, Openreach provides access inputs for backhaul services on exactly the same terms and at regulated prices to all its communications network customers (including, specifically in this context, MNOs), as required by Ofcom regulation and by the Undertakings, such that there is no possibility of Openreach being able to discriminate or to foreclose supply to any extent. There cannot be *any* merger effect in relation to these products. Specifically,
 - (i) Openreach cannot discriminate or foreclose input supply in any aspect of its activities under the terms of Ofcom regulation and the Undertakings;
 - (ii) It cannot differentiate between competitors in the service standards it provides for its products;
 - (iii) It cannot discriminate or foreclose input supply in the development of new products, which are governed by regulated Statements of Requirements (**SOR**) processes;
 - (iv) In the event that MNO customers were dissatisfied with products or prices, they can bring matters to Ofcom to be resolved under the dispute resolution procedure, which is subject to a four month statutory deadline.
- (b) Where Openreach inputs are not directly regulated (although they are still governed by the Undertakings), Ofcom has explicitly determined that regulation is not required indicating that Ofcom does not consider that market power could be exerted. This will not change as a result of the Transaction.
- (c) Ofcom has expressly considered 'downstream' managed backhaul services (as offered by BT Wholesale, and also others) and has determined that regulation is not required. Ofcom considers that market power cannot be exerted, because equal access to inputs at the Openreach access level renders managed backhaul services replicable

³⁶ Paragraphs 108 and 113 of the Decision.

³⁷ Paragraphs 114-118 of the Decision.

by competitors and by customers who self-supply.³⁸ BT agrees with this analysis and considers that no merger effects can be expected in relation to these products.

- (d) There are both existing and potential third party options for MNOs to acquire mobile backhaul services and they also have the ability to self-supply using Openreach regulated inputs. Demand is highly concentrated among only three customers (MBNL, O2 and Vodafone), and subject to long-term contracts, so a static analysis of existing suppliers does not necessarily reflect all potential options.
 - (i) Vodafone is in the process of switching to self-supply, running down its purchases of BT Wholesale's MEAS in favour of its own network (acquired through its purchase of CWW³⁹ and since expanded), supported by regulated Openreach inputs.
 - (ii) There are existing suppliers of fibre mobile backhaul services in the UK, such as Virgin Media and CWW (the latter currently only to its parent, Vodafone, but who could also offer the same services to third parties).
 - (iii) There are various operators of Ethernet fixed networks who could realistically expand into the supply of fibre mobile backhaul services (for instance, existing fixed line competitors such as TalkTalk or third party dark fibre providers such as Zayo or Cityfibre). In this respect, MNO customers have previously sponsored such an expansion by Virgin Media and could do so again.
 - (iv) MNO customers could self-supply using Openreach regulated inputs and other equipment and transmission links available in the market. If, pursuant to its latest BCMR consultation, Ofcom mandates dark fibre access to Openreach then this will

³⁸ See paragraph A11.56, BCMR Consultation 2015 *“Notwithstanding BT Wholesale's high shares of managed services, we consider that in principle, a rival would be able to use Openreach's regulated Ethernet leased line services (or dark fibre), together with standard electronic equipment and unregulated transmission links available from BT or its competitors, to supply managed services to MNOs in competition with BT Wholesale (or indeed for the MNOs to self-supply managed services using the same inputs).”*

³⁹ Note that CWW is now known as Vodafone Carrier Services since its acquisition by Vodafone. The term CWW will be used throughout this paper, to distinguish it from Vodafone's retail mobile services business.

add to MNOs' (and fixed line operators') options for self-supply.⁴⁰

- (v) Alternative technologies include microwave links and other various forms of wireless backhaul.⁴¹
- (vi) Multi-sourcing is common among the MNOs and third party alternatives to BT Wholesale's products need not have the same reach to act as an effective constraint.
- (e) All MNO purchasers of mobile backhaul services (namely MBNL, Vodafone and O2) are protected by their current contracts with BT for sufficient time to allow them to turn to alternatives; and
- (f) BT has no incentive to raise price, restrict access or degrade the terms or quality of service, which is clear by looking at its relationship with each MNO in turn. [X]

2. Product scope

- 2.1 The CMA concluded in Decision that the appropriate frame of reference for considering BT's supply of leased lines to EE is 'fibre mobile backhaul services'. The CMA's proposed frame of reference would be inconsistent with well-established precedent, which has to date not led to the definition of a separate market for mobile backhaul, let alone fibre mobile backhaul services.
- 2.2 Ofcom concluded in its 2013 BCMR Statement, and has again provisionally concluded in its latest BCMR consultation, that there is no separate market for mobile backhaul, which should properly be considered as part of a broader leased lines market: "*given our proposed definition of the [Contemporary Interface Symmetric Broadband Origination] market in which BT has SMP everywhere outside the [Central London Area], we consider competitive conditions to be sufficiently homogenous that it is not necessary for us to identify a separate market for MNO backhaul*".⁴²
- 2.3 Ofcom reached this conclusion on the basis that:

⁴⁰ [X] It states that "*Increased innovation is likely to be a key benefit... Passive remedies could provide CPs with opportunities to reduce overall equipment costs, and may also allow us to simplify regulation in the longer term.*" See BCMR consultation 2015, paragraph 1.30.

⁴¹ Alternative technologies such as xDSL, cable based backhaul and wireless backhaul are expected to remain viable alternatives in the foreseeable future (RSPG Report on Spectrum issues on Wireless Backhaul available here https://circabc.europa.eu/d/a/workspace/SpacesStore/cdd664eb-3007-4463-8dc9-e7940bd36d8f/RSPG15-607-Final_Report-Wireless_backhaul.pdf). There are also developments in the context of satellite backhaul which could be particularly useful to service rural areas.

⁴² BCMR consultation May 2015, paragraph 4.179.

- (a) MNO backhaul is technically equivalent to standard leased lines;⁴³
 - (b) synchronisation is a standard feature of Ethernet and so in principle MNO backhaul and standard services are substitutable;⁴⁴ and
 - (c) Ofcom considers BT Wholesale's supply of MEAS to be constrained by the prospect of alternative supply using the regulated inputs from Openreach.⁴⁵
- 2.4 The Commission has also not previously considered a distinct market for mobile backhaul: in *Vodafone/Cable & Wireless* it considered whether it was appropriate to segment wholesale leased lines into trunk and terminating segments, but did not consider other segmentations and ultimately left the market definition open.⁴⁶
- 2.5 The Decision states that the CMA's approach differs from Ofcom's in that Ofcom's "*conclusion is based primarily on supply-side considerations*" whereas "*the CMA identifies the relevant product market primarily by reference to demand-side substitutability.*"⁴⁷
- 2.6 Limiting the analysis to demand side considerations is inconsistent with the standard economic approach to market definition. The Merger Assessment Guidelines state at paragraph 5.2.18 that it may be particularly appropriate to take into account supply side considerations "*in markets characterised by bidding and tendering processes where firms bid on the basis of the service they can offer to supply customers with bespoke products. The competitive constraint on firms in this case comes from a customer's willingness to award the contract to a rival rather than to switch to a different bespoke product.*" This applies in the present case as backhaul contracts tend to be both long-term and bespoke, and few in number (in respect of backhaul used for mobile) since there are only three customers.
- 2.7 The CMA's narrow approach had led the Decision to an unduly static view of MNOs' options for backhaul. A dynamic analysis, taking into account potential entry from other suppliers with the capability to offer services, is

⁴³ BCMR consultation May 2015, paragraph A.11.71.

⁴⁴ Ibid.

⁴⁵ "In principle, a rival would be able to use Openreach's regulated Ethernet leased line services (or dark fibre), together with standard electronic equipment and unregulated transmission links available from BT or its competitors, to supply managed services ...[or] to self-supply managed services using the same inputs"... "we would expect BT Wholesale's supply of MEAS to be constrained by the prospect of alternative supply using the regulated inputs, and we would therefore not expect it to have SMP at the level of managed services" (BCMR consultation May 2015, paragraphs A11.65 and A11.69)

⁴⁶ Case No COMP/M.6584 – *Vodafone/Cable & Wireless*, paragraphs 29 and 30.

⁴⁷ See footnote 36 of the Decision.

therefore vital to understand the sector and reach a correct market definition. Suppliers of leased lines could enter the putative fibre mobile backhaul market in a short period of time, relative to the time it takes to negotiate a backhaul agreement.

- 2.8 Even by reference only to demand side substitution, the fact that MNOs already use a range of options, including a significant quantity of microwave backhaul, shows that this frame of reference is too narrow. The CMA does not take account of the significant constraint represented by microwave links in most locations. Although the Parties recognise that microwave backhaul is not suitable for all mobile base stations, it is available across a majority of locations: [X].⁴⁸
- 2.9 In any event, regardless of whether the CMA takes into account the range of constraints on BT in relation to backhaul provision in defining the relevant market, or instead during its competitive effects analysis, the conclusion remains that there can be no significant lessening of competition as a result of the Transaction, as will be demonstrated below.

3. Geographic scope

- 3.1 The Parties agree with the CMA's views in the Decision that the Transaction should be considered against a geographic scope of the UK as a whole, in line with the Commission's previous practice, given that BT's leased line contracts are generally negotiated on a national basis.
- 3.2 The Parties also note the CMA's acknowledgement that Ofcom has identified narrower regional markets as part of the BCMR, i.e. (i) Hull; and (ii) the western, eastern and central London areas including Slough (*WECLA*). Ofcom has concluded that BT does not have SMP in these areas even at the upstream Openreach level.⁴⁹ Even if the CMA did find that BT had an incentive to exercise a foreclosure strategy, any such incentive would necessarily be diluted, given that it could not be effective across the whole of the UK (see paragraph 4.45 below).

4. Competitive effects

- 4.1 At the 'upstream' level of the backhaul supply chain, BT provides backhaul services via wholesale leased lines, using its functionally separate Openreach infrastructure. These inputs are regulated under Ofcom's ex ante regulatory powers and/or the Undertakings. Downstream of Openreach, backhaul services are offered by BT Wholesale (as well as other CPs), which makes use

⁴⁸ See Appendix E18 of the Notification, [X].

⁴⁹ Ofcom has concluded that BT does not have SMP for MISBO services in WECLA. Note that Ofcom proposes in the current BCMR consultation to replace WECLA with the Central London Area (*CLA*) which would be completely deregulated and the London Periphery (*LP*) which would have a lighter level of regulation than the rest of the UK (excluding Hull).

of regulated upstream backhaul inputs sourced from Openreach, and adds an additional value added layer and transmission across BT's 21CN network. This section responds to the CMA's potential concerns about partial foreclosure by Openreach, followed by any concerns about a foreclosure strategy by BT Wholesale. However, it is important to recognise that these points are interconnected because, as noted in the BCMR, the ability of BT Wholesale to exercise market power downstream is constrained by the ability of MNOs to bypass BT Wholesale and use regulated upstream access inputs.

- (a) *BT has no ability to foreclose EE's competitors in relation to fibre mobile backhaul services supplied through Openreach, due to extensive regulation*
- 4.2 Openreach is subject to extensive regulation, both under Ofcom's ex ante regulatory powers and the Undertakings.⁵⁰ Openreach supplies fibre mobile backhaul services in the form of unmanaged Ethernet Access Direct (**EAD**) products. These EAD products are also used by BT to provide other leased line and backhaul products.
- 4.3 The CMA's Phase 1 Decision correctly concludes that "*the CMA believes that it is unlikely that the merged entity would have the ability to engage in total input foreclosure of mobile backhaul services supplied by Openreach*" as a result of regulation. However, the Decision goes on to consider whether Openreach could engage in partial foreclosure. This is not the case, as regulation also ensures that Openreach would not have any ability to increase prices or decrease quality in an anticompetitive manner.
- 4.4 Regulation of Openreach leased lines includes an overarching EOI obligation preventing undue discrimination, FRAND supply obligations and a charge control. Openreach's flexibility within these regulatory bounds is limited and has been judged by Ofcom to be both appropriate and proportionate.⁵¹ In addition, CPs are able to request the provision of new product innovations from Openreach through the SOR process, which is subject to review by the Equality of Access Board (**EAB**).⁵² CPs can also refer disputes on individual SORs to Ofcom for determination under the Communications Act 2003.
- 4.5 In relation to the concerns specifically highlighted in the Decision:⁵³

⁵⁰ Note that Ofcom has reduced or even removed ex ante regulation over some Openreach products in certain geographic locations where it has found that sufficient competition exists, i.e. MISBO in WECLA. However regulation imposed by the Undertakings still applies to these products, unless Ofcom separately consents otherwise.

⁵¹ This view has been reiterated in the current consultation: "*our initial view is that the proposed obligations for BT not to discriminate unduly and to ensure that its charges, terms and conditions are fair and reasonable are sufficient to address any concerns about unreasonable pricing practices that may arise*" (BCMR consultation May 2015, paragraph 8.163).

⁵² See Annex E of the Notification for details on the EAB.

⁵³ Decision, paragraph 149.

- (a) Openreach could not discriminate between MNOs by altering the relative prices of its regulated products. [X]⁵⁴
- (b) Openreach could not discriminate against other MNOs by introducing more costly premium services for enhanced care. Openreach's standard of service is regulated such that Openreach would be precluded from offering a service standard that would require customers to buy an enhanced care product. If an MNO chooses to purchase enhanced care, this would be at the MNO's election and on terms equivalent to all other CPs, on an EOI basis. The EOI obligations are rigorously monitored by the EAB, which in turn has reporting obligations to Ofcom. The EAB has stated that it will monitor and report on compliance training for EE staff alongside other aspects of compliance (e.g. the protection of confidential information) as they arise.⁵⁵
- (c) Openreach could not offer mobile backhaul services that are more suited to the needs of EE's backhaul division than its competitors (whether now or in the future). Mobile operators generally use harmonised technology across the industry based on common international standards developed by 3GPP and any developments that could benefit EE (and thereby also H3G as it is part of MBNL) would also be beneficial for other MNOs (Vodafone and O2) in so far as they needed to rely on inputs from Openreach at all. This is illustrated by the similarity of the requirements identified by MNOs at workshops held between Openreach and the MNOs in January and April 2015.
- (d) Similarly, Openreach could not block or deny developments of services that would benefit any MNO more than EE. As noted above, CPs are able to request the provision of new product innovations from Openreach through the SOR process. The SOR process is monitored by the EAB, which can and does carry out investigations into requests which are rejected by Openreach,⁵⁶ and disputes can also be referred directly to Ofcom. In any case, any services requested by another MNO would likely be equally of benefit to EE.

4.6 In the latest BCMR consultation, Ofcom is proposing more stringent regulation in some areas, such as minimum service levels on EAD. Openreach's freedom of action will therefore be even more tightly constrained should these remedies be imposed. Even pending such (potential) regulatory

⁵⁴ Note that there is some variation in purchases of certain BT Wholesale regulated products, but that it would still not be possible for BT to price discriminate for these products. [X] Ofcom concluded in the 2013 BCMR that the charge controls imposed on BT "*are sufficient to constrain BT's pricing*" (see paragraph 1.82).

⁵⁵ BT, Equality of Access Board Annual Report 2015, p.2.

⁵⁶ BT, Equality of Access Board Annual Report 2015, p.6.

changes, the Undertakings and the current 2013 BCMR SMP conditions ensure that there is no prospect of discrimination between the quality of service or range of products offered to all customers.

(b) *BT has no ability to foreclose EE's competitors in relation to fibre mobile backhaul services supplied through BT Wholesale*

4.7 BT Wholesale supplies backhaul services in the form of managed MEAS (see section 3 of Annex E of the Notification) and also a bespoke product Ethernet Access Connect (*EAC*) which has a thinner value added layer. Although, as noted in the Decision, approximately [90-100%] of BT's provision of mobile backhaul is through BT Wholesale and only [0-5%] through Openreach, BT Wholesale relies on inputs supplied by Openreach to provide these managed services. These regulated inputs (which account for a high proportion of the costs of these managed products – approximately [X]) are provided by Openreach to BT Wholesale on the same terms (including price) and using the same processes as are provided to other CPs.

4.8 Although, in relation to the supply of managed backhaul, BT Wholesale is not subject to the EOI obligations under the Undertakings, it is still subject to Ofcom's regulatory oversight, as reviewed every three years through the BCMR in relation to leased lines. The Decision suggests that "*there is potentially scope for the merged entity to raise the prices or deteriorate the quality*" of BT Wholesale's managed products because they are not currently regulated.⁵⁷

4.9 Where particular products are not regulated, Ofcom has reviewed the competitive dynamics of the appropriate segment of the market and has taken an active decision that regulation is not necessary. In particular, Ofcom stated in the 2013 BCMR Statement that it was not necessary to regulate BT Wholesale's 'downstream' managed fibre backhaul services for mobile operators. Ofcom reached this conclusion on the basis that it found "*encouraging signs that competition in providing MNOs with mobile backhaul solutions is developing*" and that Ofcom did "*not see a need for additional mobile backhaul remedies*" given its regulation of upstream wholesale Ethernet services. This conclusion has been reiterated in Ofcom's current BCMR consultation, "*we would expect BT Wholesale's supply of MEAS to be constrained by the prospect of alternative supply using the regulated inputs, and we would therefore not expect it to have SMP at the level of managed services.*"⁵⁸ Ofcom is an expert regulator which takes into account views and data from a range of stakeholders in order to meet its duty to promote competition in telecoms services and is consistent with how MNOs seek to source backhaul services from multiple suppliers.

⁵⁷ Paragraph 112 of the Decision.

⁵⁸ See paragraph A11.69 of the BCMR Consultation, May 2015.

- 4.10 There will not be any change to regulation of upstream inputs, nor to alternative supply options as a result of the Transaction. As a result, BT considers that there can be no possible merger effect.
- (c) *BT Wholesale does not have any ability to foreclose EE's competitors because of the range of alternative options available to them.*
- 4.11 There is a wide range of alternatives for mobile backhaul. However, it is not easily illustrated by bidding data given that there are only three customers (MBNL, Vodafone and O2) and they make purchasing decisions infrequently. As a result, it is also inappropriate to take a static view of the relative strength of possible alternatives. Nevertheless, a review of existing arrangements makes the following points clear.
- (i) *Vodafone is already in the process of switching to self-supply.*
- 4.12 **Vodafone** is [REDACTED].⁵⁹ [REDACTED]
- (ii) *There are existing suppliers of fibre mobile backhaul services.*
- 4.13 The CMA has acknowledged that **Virgin Media** is “[a] large provider of fibre mobile backhaul services [...], charging prices similar to BT Wholesale and offering a comparable service quality”. This is consistent with the Parties’ experience.⁶⁰ MBNL uses Virgin Media to supply approximately [REDACTED] of the sites on which it uses fibre backhaul. BT’s internal documents also show [REDACTED]:
- (a) When bidding for the [REDACTED] contract, BT Wholesale considered [REDACTED].
- (b) BT Wholesale considers that [REDACTED].
- (c) BT Wholesale has to price and compete on the basis of the margin available downstream of the regulated Openreach input prices because of competition law constraints. Virgin Media can compete on the margin on the totality of its business giving it a potential pricing advantage where it chooses to use it.
- 4.14 [REDACTED] Virgin Media could expand this reach based on regulated Openreach EAD products.
- 4.15 Similarly, **CWW**, as part of Vodafone, already supplies fibre mobile backhaul, although only internally at present. It could be expected to offer backhaul to third parties if BT attempted to foreclose EE’s competitors. Vodafone shares arrangements for backhaul with O2 through the CTIL network sharing agreement. [REDACTED]

⁵⁹ [REDACTED]

⁶⁰ See <http://www.virginmediabusiness.co.uk/business-types/Wholesale-Markets/Mobile-Backhaul-Network/> for details on Virgin Media’s offer. Virgin Media highlights that its services are “high capacity... high performance... low latency... low cost.”

4.16 [REDACTED]

(iii) *There are various possible operators of Ethernet fixed networks who could expand into the supply of fibre mobile backhaul services.*

4.17 **Third party dark fibre** options (such as from Zayo⁶¹ or City Fibre⁶²) [REDACTED].⁶³

4.18 The Decision questions whether third party dark fibre providers can be competitive given that they do not have the same geographic reach as BT Wholesale. In fact, [REDACTED].⁶⁴ The networks of these providers are typically concentrated in urban areas where capacity requirements, and therefore the need for fibre backhaul, are greatest. In practice, an MNO would be able to use Zayo or CityFibre as a prime contractor responsible for purchasing fibre inputs from Openreach, Virgin or others, or microwave as necessary (where fibre backhaul is not required), in order to provide a single managed solution covering the scope of the MNO's needs (see further below in relation to multi-sourcing strategies).⁶⁵

4.19 The CMA has stated in relation to prospective new entry by **TalkTalk Group** that *"If it did enter this market, it is unclear at what price it could provide managed backhaul services or whether it would be reliable enough for mobile applications"*.⁶⁶ Given that TalkTalk is not currently supplying any MNOs with backhaul, it is difficult for the Parties to draw firm conclusions as to the type of service that TalkTalk would provide. However, the following points can be noted:

(a) TalkTalk already has a more extensive network than BT Wholesale, as it notes on its own website.⁶⁷ TalkTalk operates around 3000 Ethernet nodes. BT Wholesale estimates that [REDACTED].⁶⁸

(b) [REDACTED]

⁶¹ <http://www.zayo.com/services/mobile-infrastructure>.

⁶² <http://www.cityfibre.com/activemast/?rq=mobile>.

⁶³ [REDACTED]

⁶⁴ Calculations based on EE internal analysis.

⁶⁵ Zayo is a highly credible supplier of managed services to MNOs. In October 2014, O2 signed a 15 year deal with Zayo to provide and manage a fully resilient core fibre network between mobile switching sites – see <http://www.zayo.com/news/zayo-inks-deal-with-o2-for-nationwide-uk-network>

⁶⁶ Paragraph 116 of the Decision.

⁶⁷ *"the largest network in the UK (+3,000 exchanges)...[with] ongoing expansion and network innovation..."* <http://www.talktalkbusiness.co.uk/products-and-services/connectivity-networking/ethernet/>

⁶⁸ [REDACTED]

- (c) TalkTalk is continuing to invest in and expand its network. For instance, it has partnered with Sky and CityFibre to build an ultrafast FTTP network in York, which is expected to launch this autumn and does not rely on Openreach inputs.⁶⁹
- (d) Recent reports indicated that TalkTalk aims to grow its fibre network, reaching 10 million homes in the next 5-10 years.⁷⁰

4.20 [X]

4.21 Any prospective supplier of managed backhaul services could similarly make use of Openreach's regulated inputs (or BT Wholesale's Wholesale Ethernet product) to enter the market and offer a competitive alternative to BT Wholesale's MEAS product. Wholesale Ethernet is not specifically directed at MNOs, but also uses BT's 21CN network and so provides aggregation benefits in the same way as MEAS. Wholesale Ethernet is supplied to a wide range of communications providers and operates in a highly competitive market (for instance, TalkTalk is already active as a direct competitor to Wholesale Ethernet). Any attempt by BT Wholesale to increase prices or degrade quality for MEAS could lead to third party providers offering a more competitive product, based on Wholesale Ethernet.

(iv) *MNOs could themselves self-supply, including by purchasing Openreach's regulated inputs or BT Wholesale's Wholesale Ethernet product.*

4.22 Openreach's regulated inputs could also be used by other MNOs (in a similar way to Vodafone) for **self-build** purposes, to bypass using BT Wholesale's unregulated products. BT Wholesale's managed products build on regulated inputs supplied by Openreach, connecting in to the 21CN network, combined with off the shelf equipment available from numerous vendors. The same equipment and regulated Openreach inputs could equally be used by other MNOs to create an equivalent solution. All of the MNOs already make use of various methods of self-supply for parts of their demand, and the Parties believe that there is an increasing trend towards self-supply. Openreach publishes a price list which enables MNOs to price a self-build option. Furthermore, Openreach is actively working with the MNOs to understand and respond to their priorities better, including through two industry wide workshops so far this year.

4.23 If Ofcom mandates **dark fibre access** as part of the May 2015 BCMR consultation, this will provide additional options for 'self-build' backhaul

⁶⁹ <http://www.cityfibre.com/news/2015/3/26/cityfibre-announces-completion-of-first-phase-ftp-roll-out-in-york-with-joint-venture-partners-sky-and-talktalk>

⁷⁰

http://www.uswitch.com/broadband/news/2014/12/talktalk_targets_10m_uk_households_with_fibre_broadband_network/

networks.⁷¹ Ofcom's proposal in the May 2015 consultation paper is that BT should be required to provide access to dark fibre on Openreach's network. This is currently still under consultation, and Ofcom is likely to publish its initial conclusions at the start of 2016, for any requirement to provide access to dark fibre to come into force in April 2017.

- 4.24 Note that BT does not consider that a dark fibre access remedy is necessary given that there is already competition in business connectivity markets, supported by 'active' remedies that allow operators to differentiate their products. It is important to note that Ofcom's proposal relates to the 'upstream' Contemporary Interface Symmetric Broadband Origination (**CISBO**) market segment served by Openreach which is broader than fibre mobile backhaul (but includes the whole of the fibre mobile backhaul segment), and is intended to "*deliver important benefits [such as increased innovation and greater opportunities for CPs to reduce overall equipment costs] to support our overall aim more effectively than an actives-only remedies package*". It therefore would act in combination with the existing 'active' remedies package on Openreach described in paragraphs 4.2 to 4.6 above to further enhance competition.
- 4.25 If Ofcom proceeds with its current proposals, this would provide a further backstop to MNOs of being able to switch to a dark fibre based access solution on regulated terms. In any event, the effectiveness of BT's rebuttal of the Decision's concerns about mobile backhaul does not depend on the prospective availability of Ofcom-mandated dark fibre access.
- (v) *Microwave is a viable alternative to fibre backhaul in large parts of the country.*
- 4.26 Even if the Decision uses fibre mobile backhaul as the product frame of reference, the CMA must take into account the competitive constraint which **microwave** exerts on BT's provision of fibre backhaul services, including in relation to 4G.
- 4.27 For instance, [X]. All of the MNOs currently use microwave for some part of their requirements. BT believes that: [X]; and MBNL deploys microwave across approximately [X].
- 4.28 The constraint provided by microwave includes, in particular, in more rural/lower density areas where capacity requirements do not necessitate high bandwidth backhaul services. For example, the European Commission Radio Spectrum Policy Group has recently reported that, in the period from 2015-2020, in rural areas "*the backhaul connecting these sites will have a substantially lower capacity requirement... from a few to several hundred of Mbit/s is deemed sufficient.*"

⁷¹ Dark fibre could also be used by existing and prospective suppliers (as in (ii) and (iii) above) to expand their reach.

4.29 The latest microwave radio solutions can utilise numerous frequency bands for which Ofcom issues individual link licences as well as other spectrum bands licensed to MNOs. There are many suppliers of equipment capable of provided mobile base station backhaul connections at speeds of up to and in excess of 1Gbit/s.^{72 73}

4.30 The Decision questions the utility of microwave in poor weather conditions.⁷⁴ In fact, microwave links are engineered to take account of rain, such that this is factored in at the link design stage and does not prevent them reaching their planned throughput. The parameters used are set out in statute and applied on a link by link basis. Application is made to Ofcom, specifying location, capacity and availability required for a particular link. Ofcom then performs a detailed calculation, advising on the assigned channel, power and modulation required.⁷⁵ In BT's experience, microwave links always exceed the planned availability.

(vi) *All of the MNOs use multi-sourcing strategies.*

4.31 Finally, it is not necessary for a particular alternative to have exactly the same reach as BT Wholesale for it to be an effective constraint. The Decision appears not to consider **multi-sourcing strategies** in evaluating the options available to MNOs. In practice, all MNOs already make use of multiple options for backhaul provision. The coordination costs of managing multiple suppliers are not significant in the context of the overall costs of a network, and it is possible to outsource this function. Indeed, BT Managed Services currently acts as the network topology manager for MBNL, a role that was previously carried out by Ericsson. BT therefore deals with third party suppliers on MBNL's behalf, taking over the day to day functions of network management such as identifying and placing orders for components according to parameters set by MBNL. It need not, therefore, be materially more difficult or costly to source backhaul from multiple providers.

(d) [X]

4.32 All the MNOs have contractual protection through long-term contractual commitments for backhaul from BT, supplied through competitive tenders.
[X]

4.33 [X]⁷⁶⁷⁷

⁷² See <http://www.nec.com/en/global/prod/nw/pasolink/products/ipasolink-iX.html?>

⁷³ See http://www.us.aviatnetworks.com/media/files/WTM_3100_Data_Sheet.pdf

⁷⁴ Paragraph 71 of the Decision.

⁷⁵ <http://www.ofcom.org.uk/static/archive/ra/topics/fixedlnk/publictns/fixdlnkp-p/fixdlnkp-p.htm>

⁷⁶ [X]

⁷⁷ [X]

- 4.34 The contract acts as a backstop, which ensures security and quality of supply at a predictable price at least until such time as any more significant innovation occurred. [X]
- 4.35 [X] Service standards for the underlying regulated Openreach inputs are also supported by regulation.
- 4.36 These contracts protect the MNOs against any adverse change in the terms of supply for the foreseeable future and in particular at least for the time required for each MNO to turn to alternative actual and potential suppliers. [X]
- (e) *Openreach does not have any incentive to employ a foreclosure strategy against EE's rivals*
- 4.37 Openreach is functionally separate from the client-facing divisions of BT. The Undertakings have now been in place for ten years. Openreach has significant experience of providing services to BT's own downstream divisions and to BT's existing fixed line competitors on an EOI basis successfully. There will not be any effect on this as a result of the Transaction and there is no reason to believe that there would be any concern in relation to mobile competitors either. The fact that Openreach is functionally separate from the rest of BT means that its commercial incentive is always to satisfy customer demands in order to maximise profits.
- 4.38 In the alternative, even if the CMA considers that there is a prospect for BT to take into account EE in Openreach's strategy going forwards, this could only lead to efficiencies for all mobile operators given the generic nature of mobile backhaul inputs. If the CMA considered that Openreach's incentives would be affected by BT acquiring a more significant downstream presence in retail mobile, Openreach would have greater incentive to be responsive to developments that benefit MNOs (equally, given the generic nature of the inputs), which would lead to greater progress and technological advances for mobile.⁷⁸
- (f) *BT Wholesale does not have any incentive to employ a foreclosure strategy against EE's rivals.*
- 4.39 Given the small number of MNO customers for backhaul, it is necessary to consider BT's possible incentives for each in turn, as this affects its overall incentives. Even if the CMA found that BT did have both ability and incentive to foreclose in relation to one MNO customer that would imply a

⁷⁸ Vodafone made this point in its response to the BCMR call for inputs: "*It is notable that in the UK BT is an incumbent without a mobile presence of its own and therefore unlikely to develop appropriate solutions for mobile operators in the same manner the incumbent may have such incentives in markets where it is both a business and customer retailer as well as service provider.*"
Vodafone response to BCMR Call for Inputs 2014
<http://stakeholders.ofcom.org.uk/binaries/consultations/business-connectivity-market-review/responses/Vodafone.pdf>, p17/18.

much weaker incentive than if it found ability and incentive to coincide for all MNO customers. This is because a vertical foreclosure strategy exercised against only one MNO customer would mean that any downstream ‘recapture’ benefits would be shared with the other MNO customers, substantially weakening the incentive.

- 4.40 First, **Vodafone** is [X].
- 4.41 Second, **H3G** is part of the MBNL network sharing arrangement with EE. As a result, EE would suffer equally from any deterioration in quality, while any attempt to increase prices would be unlikely to be accepted, since [X]⁷⁹ [X]. BT therefore has a strong incentive to continue actively to compete for MBNL’s business.
- 4.42 Third, **O2** is part of the CTIL arrangement with Vodafone. Any attempt to increase prices or reduce quality by BT would potentially cause O2 to make greater use of its relationship with Vodafone to use CWW for backhaul (or switch to other options).
- 4.43 MEAS uses the shared 21CN network, so any attempted quality degradation related to the network targeted at EE’s rival MNOs would in fact harm EE as well as BT Wholesale’s other customers and those of BT Global Services and BT Business. It would not therefore be possible to pursue a targeted strategy of discrimination against the other MNOs without damaging BT’s wider business, and also its reputation. BT therefore has no incentive to reduce the quality of its service for EE’s rivals.
- 4.44 In general, loss of any customer (whether MBNL, Vodafone or O2) will not only reduce the wholesale revenues earned by BT, but also reduce any aggregation benefits which BT could enjoy itself (and for remaining customers), and increase the aggregation benefits enjoyed by its wholesale rivals, reducing any incentive for BT to risk losing MNO volumes through even a partial foreclosure strategy.
- 4.45 Even if the CMA considers that suppliers with a lesser reach than BT Wholesale or Openreach do not constitute an effective substitute for the whole country (even in combination with other options), or that microwave is not a suitable alternative in some areas, the presence of these alternatives across the majority of BT’s target market means that any incentive to foreclose would be diluted for the ‘rump’ of circuits where MEAS would be the only option and in any case not changed by the Transaction (since BT would be the only option pre-merger).
- 4.46 Finally, the CMA noted in its Phase 1 Decision that “*backhaul costs are a relatively small proportion of an MNO’s total costs*”. It suggests that this means that any wholesale revenue loss to BT would be limited.⁸⁰ However, it

⁷⁹ [X]

⁸⁰ Paragraph 122 of the Decision.

follows from this (as accepted by the CMA in paragraph 113 of the Decision) that there can only be a very small potential pass through of cost increases to end customers, particularly given that such costs are largely fixed costs. This reduces any incentive to pursue a foreclosure strategy based on pricing given that there can only be an insignificant effect on retail customers, meaning that BT could not hope materially to gain from such a strategy.

5. Customer foreclosure

- 5.1 The Transaction will not lead to an SLC as a result of any customer foreclosure in fibre mobile backhaul.
- 5.2 EE is not a necessary trading partner. Many other purchasers of wholesale business connectivity services (including both mobile and fixed telecommunications services providers) will be active, post-Transaction, on this market, such that rival suppliers of wholesale leased lines would have other actual or potential customers apart from EE. Besides serving EE's competitors in mobile telecommunications services, suppliers of wholesale leased lines also serve (predominantly, in fact) providers of fixed voice and data services. The variety of wholesale customers will remain unaffected post-Transaction.
- 5.3 Rival providers of wholesale leased lines (whether to mobile or fixed operators) could not therefore plausibly claim that any 'removal' of EE as an actual or potential customer would foreclose those rivals from being able to compete effectively in wholesale leased line provision.
- 5.4 Moreover, [X] so the merged entity would not be able unduly to favour BT over other upstream suppliers.

SECTION D - RETAIL MOBILE

1. Introduction and summary

- 1.1 The Transaction creates a horizontal overlap in the supply of retail mobile services. However, the current overlap is small. Whilst both BT and EE are active in the retail mobile market, BT has only recently re-entered the consumer mobile segment and remains a very small MVNO, with a share of the overall retail mobile market of less than [0-5%]. Any potential overlap issues are therefore mainly prospective, given BT's plans to increase its scale as an MVNO.
- 1.2 The Parties consider that competition will be enhanced, not reduced by the Transaction. The combined entity will be more effective at innovating with technology solutions and customer propositions in response to customer needs than the Parties would be individually. In addition, the merged entity will be able to realise cost synergies (and potentially revenue synergies) that will enhance its ability and incentives to compete strongly.
- 1.3 The Decision did not reach a conclusion in relation to retail mobile, but rather noted concerns that had been expressed by third parties:
- (a) The Decision focused on potential competition. It noted that, absent the Transaction, *"BT might have exerted an increasingly significant competitive constraint on rival MNOs and MVNOs"*.⁸¹
 - (b) The Decision indicated that this might occur in particular because of:
 - (i) BT's *"investment in spectrum and innovative femtocell technology"*⁸² giving BT lower variable network costs than other MVNOs and allowing it to compete more aggressively,⁸³ and
 - (ii) BT's *"substantial customer base for selling fixed communications services which would provide cross-selling opportunities"*.⁸⁴
 - (c) However, the Decision recognised that there is some uncertainty about how successful BT would become in the retail market, absent the Transaction, given that:
 - (i) *"BT's technological plans were novel"*; and

⁸¹ Decision, paragraph 136.

⁸² Decision, paragraph 140.

⁸³ Decision, paragraph 136.

⁸⁴ *ibid.* The Parties note that the Decision mentions a concern raised by third parties relating to BT's "network assets and backhaul supply" (Decision, paragraph 137), but this concern is vertical in nature.

- (ii) “there are many other MVNOs in the market”.⁸⁵
 - (d) The Decision indicated that any concerns would be higher under the alternative “H3G/O2 unconditional merger clearance” counterfactual.⁸⁶
 - (e) Finally, the Decision referred to some other concerns of third parties in relation to rivals’ capacity constraints⁸⁷ and the future of Cornerstone Telecoms Infrastructure Limited (**CTIL**) and Mobile Broadband Network Limited (**MBNL**).⁸⁸
- 1.4 The concerns expressed in the Decision therefore rely on BT being or becoming an MVNO with special advantages relative to a “normal” MVNO, i.e. becoming what a third party referred to as a “super MVNO”.⁸⁹
- 1.5 In response to these concerns the Parties submit that:
- (a) Given the highly competitive nature of the market, it is not plausible that BT could have materially enhanced market-wide competition absent very substantial special advantages:
 - (i) There are many scale MVNOs in the UK market with continued evidence of new entry by MVNOs;
 - (ii) Since BT announced its intentions to return to the consumer mobile market, two of its major fixed telecoms competitors, TalkTalk and Sky, have also announced new commitments to this market, signing new MVNO contracts with O2; and
 - (iii) Other than in relation to its ambitions to deploy a consumer femtocell solution, described below, BT is in a similar position to any other significant MVNO competitor in the market and is similar to TalkTalk who have announced a similar strategy to BT’s.
 - (b) [REDACTED] BT will remain more MVNO-like than MNO-like [REDACTED]
 - (i) [REDACTED]

⁸⁵ Decision, paragraph 141.

⁸⁶ Decision, paragraph 142.

⁸⁷ Decision, paragraph 143.

⁸⁸ Decision, paragraph 144. As explained in the Decision, footnote 66, CTIL is a 50/50 joint venture between Vodafone and Telefónica formed in 2012, with active sharing of 4G infrastructure in London and 2G, 3G and 4G infrastructure in the rest of the UK. MBNL is a 50/50 joint venture between EE and H3G formed in 2007 (between H3G and T-Mobile), with active sharing of 3G and passive sharing of 4G infrastructure.

⁸⁹ Decision, paragraph 137.

- (ii) [REDACTED] These cost savings would also be offset against the cost of purchasing spectrum at auction (£202m) and the significant capital expenditure required to deploy femtocells at scale, [REDACTED]. Moreover, [REDACTED].⁹⁰
 - (iii) [REDACTED]
 - (iv) Indeed, any quality benefits that femtocells could achieve for mobile services would not give BT a substantial special advantage in the retail mobile market as they would be substantially replicable by others (with femtocells or alternative technology).
 - (v) No other MVNOs bid for spectrum in Ofcom's auction of 800 MHz and 2.6 GHz spectrum, which completed in March 2013 (the *4G Auction*).⁹¹ This indicates that the business case for launching femtocells at scale remains unproven, even though it has been a known technological option available to them. However, TalkTalk has referred to plans to deploy femtocells in public statements, as noted below.
- (c) [REDACTED]
- (i) [REDACTED]
 - (ii) [REDACTED]
- (d) In any event, other MVNOs can substantially replicate a number of the benefits BT (as an MVNO) [REDACTED]:
- (i) All MVNOs (and MNOs) benefit from mobile devices automatically switching to WiFi when they enter a WiFi-enabled area (such as the customer's home or office).⁹² When a device switches to WiFi in this way, the cost of carrying data will be shouldered by the fixed broadband provider. MVNOs therefore already benefit from offloading mobile data traffic to fixed broadband connections. As noted in Annex J of the Notification, a huge amount of data is offloaded in this way and MVNOs do not need to have a fixed network, spectrum licences, or femtocells in order to obtain this benefit.

⁹⁰ [REDACTED]

⁹¹ For further information on the use of the electromagnetic spectrum for mobile telecoms and the allocation of spectrum between mobile service providers, see Annex H of the Merger Notice.

⁹² By default, WiFi is the preferred connection for data usage on current mobile devices, although users can opt to switch manually between cellular data and WiFi.

- (ii) In order to achieve substantial further cost savings, MVNOs can deploy their own mobile core network (making them “full” MVNOs). [X]
- (iii) [X] there is no reason why other MVNOs with access to spectrum could not also achieve similar femtocell deployments in the future. TalkTalk has announced that it is planning a femtocell proposition, utilising its licence for shared access to the 1.8 GHz Low Power GSM (**LP GSM**) band of spectrum.⁹³ TalkTalk plans to begin deployment of femtocells in 2015.⁹⁴ It has not yet been proven whether TalkTalk’s proposition involves any handover to the O2 network, but the development demonstrates the availability of options for other MVNOs.
- (iv) In addition, it is possible for MVNOs to replicate substantially the customer experience benefits of femtocells, through the use of a range of technologies, and without the need to acquire spectrum [X]. This includes the deployment of femtocells using a “hosted solution” [X]. Under these arrangements, an MVNO can supply femtocells to its customers that use the MNO host’s spectrum (and potentially also its mobile core network), thereby securing the customer experience benefit; whilst the MNO can achieve related benefits by offloading traffic from its macrocell network (increasing capacity on the macrocell layer) and capturing incremental mobile usage, which might otherwise be substituted for fixed voice or over-the-top (**OTT**) services, via WiFi.⁹⁵
- (v) Moreover, since BT purchased spectrum in the 4G Auction, voice over WiFi (**VoWiFi**) has emerged as an alternative technology that other MNOs and MVNOs could use to fill in coverage blackspots with a voice service in and around homes, offices and anywhere else with access to WiFi. In any event, [X] although BT does offer an OTT app, which provides services via WiFi.

⁹³ The LP GSM band of spectrum is held concurrently by 12 licensees. This is a block of 6.6 MHz of spectrum that can be used on a low-power basis. Ofcom’s press release on the award of these licences is available here: <http://media.ofcom.org.uk/news/2006/ofcom-awards-12-licences-following-spectrum-auction/>.

⁹⁴ See for example TalkTalk’s results announcement for the year ending 31 March 2015, in which it states that it shall in 2015 “*begin deploying femtocells...which will allow us to offload mobile traffic onto our fixed line network via our in-home 4G network*”, available at <http://www.talktalkgroup.com/investors/results-centre>.

⁹⁵ In this respect, OTT platforms (such as iMessage, Facetime, Blackberry Messenger, WhatsApp, Google and Facebook) provide a significant competitive constraint on mobile operators.

- (e) BT's ability to cross-sell mobile services to its customer base for fixed services would not give it a substantial special advantage:
 - (i) BT has been active in the business segment of the retail mobile market for a number of years. However, even with the ability to cross-sell mobile services to its fixed line customers, it has only achieved a share of around [0-5%] in that segment.
 - (ii) Whilst BT would try to cross-sell mobile services to its fixed line customers – which also forms the basis of some of BT's hoped-for revenue synergies from the Transaction – evidence in recent years has suggested that consumers in the UK prefer to purchase mobile services separately from fixed services and do not have a significant appetite for fixed-mobile bundles. As such, any advantage BT would have as an MVNO, absent the Transaction, would be modest.
 - (iii) BT has tried on a number of occasions to enter the consumer segment with innovative fixed-mobile propositions, including BT Fusion, but has not achieved success. It therefore cannot be assumed that BT, as an MVNO, would derive advantages in the retail mobile market from having a fixed network.
 - (iv) If cross-selling from fixed to mobile or vice versa, or selling fixed-mobile bundles were to become an advantage, it would be one that was shared by several other MVNOs with significant fixed businesses. Virgin Media is present in fixed and mobile markets by means of its MVNO contract with EE. Sky and TalkTalk have MVNO contracts with O2. Vodafone, following its acquisition of Cable & Wireless Worldwide provides fixed and mobile contracts to corporate customers and has recently announced its intentions to launch consumer fixed services. All of these providers have similar scale and fixed-mobile cross selling opportunities. Sky and Virgin additionally have quad-play cross-selling opportunities bringing pay TV services into the bundle, which are more limited for BT.
- (f) In relation to the H3G/O2 Merger, the CMA can be comfortable that any of the possible outcomes will ensure that the existing levels of effective competition will endure in that counterfactual.⁹⁶
- (g) In relation to the other concerns raised by third parties, these do not reflect plausible theories of harm and are, in any case, addressed below.

1.6 Furthermore, the Transaction will have a pro-competitive effect, by increasing the merged entity's incentives to reduce prices for retail mobile services (in

⁹⁶ See Section A, above.

particular, because of incremental cross-selling of fixed and mobile services). In addition, the merged entity will be a stronger competitor to Virgin Media in the consumer segment and to Vodafone in the business customer segment, the current established leaders in fixed-mobile offers.

- 1.7 [X] This could also enable BT to implement further product innovations, which it would not be in a position to do absent the Transaction.

2. Product scope

- 2.1 Whilst the CMA did not conclude in its Decision on the appropriate frame of reference for considering the retail mobile market, the Parties submit that the relevant product scope for the CMA's assessment is the market for retail mobile telecommunications services (referred to throughout this submission as the *retail mobile market*). This is the market on which MNOs and MVNOs sell voice and data services to end customers via a mobile network.⁹⁷
- 2.2 Given that the vast majority of customers purchase retail mobile services on a stand-alone basis (rather than as part of a wider bundle), the Parties consider that the appropriate product scope for the CMA's assessment of the horizontal impact of the Transaction is not broader than the market for retail mobile telecommunications services.⁹⁸
- 2.3 The Parties have also provided details in respect of potential narrow segments for business customers ("B2B") and consumers ("B2C") in Annex J of the Notification.

3. Geographic scope

- 3.1 The Transaction should be considered against a geographic scope of the UK as a whole, in line with the Commission's previous practice, given that MNOs and MVNOs sell, market and price their services on a national level. In addition, telecoms regulatory regimes are national in scope and Ofcom grants spectrum licences, which are required to operate mobile networks, for the territory of the UK.

⁹⁷ As set out in Annex J of the Notification, this market has been defined in a number of recent Commission precedents, respectively concerning the UK and other Member States, such as *Case COMP/M.5650 T-Mobile/Orange*; *Case COMP/M.6497 Hutchison 3G Austria/Orange Austria*; *Case COMP/M.6992 Hutchison 3G UK/Telefonica Ireland*.

⁹⁸ In the UK, 95% of consumers purchase mobile telecoms as a stand-alone service, rather than as part of a bundle of products from a provider, "which suggests it continues to be purchased at an individual rather than a household level." Ofcom Research Report, *The Consumer Experience of 2014*, published January 2015: http://stakeholders.ofcom.org.uk/binaries/research/consumer-experience/tce-14/TCE14_research_report.pdf.

4. Competitive effects

- 4.1 Whilst EE has a share of around [20-30%] of the retail mobile market, due to BT's small share of the market at present (of less than [0-5%]) the Transaction could not plausibly give rise to an appreciable loss of actual competition.
- 4.2 However, the Decision suggests that the Transaction may result in a loss of potential future competition, which would have been provided by BT as a growing MVNO in the counterfactual. BT's plans forecast a share of only [5-10%] after 5 years and [5-10%] over 10 years, but these are increasingly uncertain over time: this does not suggest that BT would be substantially specially advantaged over other MVNOs.
- 4.3 The Decision also suggests that the loss of potential competition could be more significant in the alternative counterfactual, whereby the H3G/O2 Merger goes ahead. Both counterfactuals are considered below, noting that the alternative counterfactual at Phase 2 is different from and more realistic than the highly conservative counterfactual at Phase 1.
- (a) *Given the highly competitive and dynamic nature of the market, it is not plausible that BT (as an MVNO) would have materially enhanced market wide competition absent very substantial special advantages*
- 4.4 In order to find that the Transaction would give rise to an SLC, the CMA must consider that BT's plans (as an MVNO) would have materially enhanced market-wide competition prospectively.
- 4.5 However, as noted above, the retail mobile market is already highly competitive with many scale MVNOs and continued evidence of new entry by MVNOs.⁹⁹ As such, BT's re-entry into the consumer segment and plans to grow in the retail mobile market overall were not necessary in order to stimulate competition. The market would have remained highly competitive absent the realisation of BT's plans.
- 4.6 It is therefore not plausible that an SLC could arise, unless absent the Transaction, BT (as an MVNO) could be expected to have very substantial special advantages in the market. We therefore confine our attention in the remainder of this Section to demonstrating that BT would not have substantial special advantages.
- (b) *BT would not have substantial special advantages in the retail mobile market*
- 4.7 The Decision notes that the possibility of BT exerting an "increasingly significant competitive constraint" in the counterfactual is "particularly the case given its investment in spectrum and innovative femtocell technology, and

⁹⁹ For example, Dixons Carphone's recent entry with "iD".

*its substantial customer base for fixed communications services which would provide cross-selling opportunities”.*¹⁰⁰

4.8 The Decision also cites comments from third parties suggesting that, absent the Transaction, BT’s market position and assets would have made it a prospective “*super MVNO*”, which “*due to its spectrum holdings, network assets and backhaul supply, absent the merger, would have been able to provide an unmatched mobile service, for example through faster backhaul upgrades and repairs (benefitting MBNL), larger data bundles and better coverage*”.¹⁰¹

4.9 We address each of these perceived advantages in turn, except for the alleged vertical aspect which is separately addressed in Section C.

(c) *BT’s spectrum holding does not give it a substantial special advantage*

4.10 BT purchased a licence for 2.6 GHz spectrum suitable for mobile telecoms use in the 4G Auction.

4.11 [REDACTED]

4.12 [REDACTED]¹⁰²

(d) [REDACTED]

4.13 In contrast to macrocell base stations (large outdoor mobile cell sites), femtocell base stations are a type of small mobile cell site (or “small cell”) designed for deployment in small, indoor environments, much like a WiFi router (as an MVNO, BT plans to incorporate femtocells into a new generation of its “Home Hub” WiFi router).¹⁰³ Femtocells can therefore be used to provide high quality mobile coverage within homes and small offices.

4.14 All of the UK’s MNOs supply 3G femtocells to users within their customer bases, if customers report difficulties with indoor mobile coverage in the home or office to help alleviate these difficulties (generally as a customer retention measure). [REDACTED]¹⁰⁴

4.15 [REDACTED]

¹⁰⁰ Decision, paragraph 136.

¹⁰¹ Decision, paragraph 137.

¹⁰² [REDACTED]

¹⁰³ WiFi routers make use of the unlicensed 2.4 GHz and 5 GHz bands of spectrum to deliver wireless connectivity, based on WiFi standards; femtocells make use of licensed spectrum to deliver wireless connectivity, based on mobile technology standards (such as LTE).

¹⁰⁴ [REDACTED]

4.16 [REDACTED]¹⁰⁵ [REDACTED]¹⁰⁶ [REDACTED]

4.17 MVNOs need not hold a spectrum licence in order to achieve cost savings; one way in which an MVNO may be able to achieve variable cost savings is the deployment of a mobile core network:

(a) [REDACTED] At present, [REDACTED].¹⁰⁷ [REDACTED]

(b) [REDACTED]¹⁰⁸ [REDACTED]

(c) Any MVNO – with or without spectrum – can thereby potentially become a “full” MVNO and harness variable cost savings, if it is prepared to make the investment investments involved in establishing itself as a full MVNO.

4.18 [REDACTED] In addition, the potential quality benefits that could be provided through use of 4G femtocells would be substantially replicable by other MVNOs.

(e) [REDACTED]

4.19 [REDACTED]

(a) [REDACTED]¹⁰⁹

(b) [REDACTED]

(c) [REDACTED]

(d) [REDACTED]

(e) [REDACTED]

(f) [REDACTED]

4.20 [REDACTED]

4.21 [REDACTED]

4.22 An alternative approach to femtocell deployment, which would still allow for the quality (but not cost) benefits of femtocells to be harnessed, is a “hosted solution”. In this scenario, the MNO would host the MVNO’s femtocells on the MNO’s core network, and could in theory use spectrum held by either the MNO or the MVNO. [REDACTED] Any MVNO (with or without spectrum) could potentially utilise this option. In this case the MVNO may not achieve the cost savings of offloading mobile traffic from the MNO’s network onto the

¹⁰⁵ [REDACTED]

¹⁰⁶ [REDACTED]

¹⁰⁷ [REDACTED]

¹⁰⁸ [REDACTED]

¹⁰⁹ [REDACTED]

MVNO's network, although it will depend upon the commercial terms that can be negotiated. However, it may increase network total capacity if some traffic were carried on femtocells rather than macrocells. [X]

(f) [X]

4.23 [X]

(i) [X]

4.24 [X]

4.25 As a large part of BT's expected offload benefit comes from in-home offload, it is worth noting that consumers can simply choose to offload more of their mobile traffic onto WiFi networks. Not only are consumers already in the habit of doing this, it is often automatic as devices are programmed to switch to WiFi networks when they come into range, and the customer does not need to have the same supplier of fixed and mobile services for the benefit to apply.¹¹⁰

(a) [X]

(b) [X]

4.26 As a result, based on its cost structure, BT would remain much more like a "normal" MVNO than an MNO, even with the potential future benefit of femtocells taken into account.

(ii) [X]

4.27 [X]

4.28 [X]

4.29 As such, in respect of quality for mobile services, BT is also much more like a "normal" MVNO than an MNO.

(g) *BT's femtocell proposition would be replicable by other MNOs and MVNOs*

4.30 BT as an MVNO would not expect the benefits of 4G femtocells to give it an "unmatchable" mobile service, as any other MNO or MVNO with access to spectrum could replicate BT's proposition by rolling out femtocells (with the added advantage that BT has already helped to commercialise 4G femtocells

¹¹⁰ As set out in Annex J, Cisco suggest that close to 80% of mobile data usage is indoor and nomadic, rather than truly mobile, with the vast majority of that data offloaded to WiFi, *Cisco Service Provider Wi-Fi: A Platform for Business Innovation and Revenue Generation*, http://www.cisco.com/c/en/us/solutions/collateral/service-provider/service-provider-wi-fi/solution_overview_c22-642482.pdf. See also Enders Analysis *UK Mobile User Survey 2014*, page 21, which notes that "85% of smartphone users offload data activities onto WiFi networks at home or at their place of work, with the figure no doubt higher if including under 16s". BT estimates that, at present, around 80% of mobile data traffic in the UK is offloaded to WiFi.

for consumer use, by developing the technology with chipset manufacturers). Indeed, TalkTalk is currently planning a 4G femtocell proposition, which will make use of its licence for shared access to the 1.8 GHz LP GSM band of spectrum.¹¹¹

4.31 As BT has invested in its own licensed spectrum, it would benefit from being able to use the capacity that its spectrum provides on its femtocells. If TalkTalk develops its femtocell proposition as planned and considers that it requires more capacity than the LP GSM band can provide, it would also have the option of purchasing more spectrum. In addition, other operators would be able to achieve similar benefits over similar timescales by using existing spectrum, or by purchasing spectrum at Ofcom's upcoming auction (expected at the end of 2015, or early in 2016) for 2.3 GHz and 3.4 GHz spectrum.

4.32 [X] This is not the only way to achieve the benefits of femtocells and therefore other operators (including TalkTalk) may take a different approach.

4.33 Indeed, with a willing MNO partner, an MVNO can achieve similar quality benefits without itself having access to spectrum (or its own mobile core network), by asking the MNO to provide a "hosted solution" (as described in paragraph 4.22 above).

(h) [X]

4.34 Absent the Transaction, rather than being substantially specially advantaged, BT (as an MVNO) is actually disadvantaged in certain respects as compared with MNOs and, potentially, other MVNOs.

4.35 [X]

4.36 [X]

(i) [X]

4.37 [X]¹¹² [X]

4.38 [X]

4.39 [X]

4.40 [X]

4.41 [X]

¹¹¹ [X] For details see: *TalkTalk Business Reveals Fibre, 4G And Converged Ambitions for 2015*, TechWeek Europe, 12 January 2015: <http://www.techweekeurope.co.uk/mobility/4g/talktalk-business-fibre-4g-converged-158982>; see also *TalkTalk's Inside-Out LTE femtocell*, ThinkSmallCell, 12 March 2015: <http://www.thinksmallcell.com/Residential/talktalk-s-inside-out-lte-femtocell.html>.

¹¹² [X]

(ii) [REDACTED]

4.42 [REDACTED]

4.43 [REDACTED]

4.44 [REDACTED]

(i) *MVNOs can substantially replicate a number of the benefits BT hopes to secure for itself* [REDACTED]

4.45 All MVNOs benefit from customers offloading mobile data traffic to fixed broadband connections, via WiFi. Indeed, as noted in Annex J of the Notification, the vast majority of indoor mobile data usage is currently offloaded to WiFi networks (primarily in mobile users' homes or offices). MVNOs do not need to have a fixed network, spectrum licences, or femtocells in order to obtain this benefit. [REDACTED]

4.46 Furthermore, since BT purchased spectrum in the 4G Auction, VoWiFi has developed to the point of being integrated into normal mobile voice services (including through use of the customer's normal mobile number to make and receive calls). This has made it a viable alternative to femtocell technology that other MVNOs could use to deliver voice services to any location with access to WiFi.

4.47 For voice services, VoWiFi potentially allows for much the same coverage and capacity benefit of femtocells. That technology can also be replicated on any WiFi connection, without the need for an expensive femtocell to be deployed. Indeed, all UK MNOs have now launched or announced launch of VoWiFi services, in order to realise this benefit. EE has recently launched its "WiFi calling" service allowing, for example, an EE subscriber to make a call on the London Underground, using EE's wholesale access for its customers to Virgin Media WiFi on the London Underground. [REDACTED]¹¹³

4.48 Even without access to VoWiFi itself, it is also possible for MNOs and MVNOs to realise similar benefits through customer use of WiFi calling apps (which provide an OTT service to harness the WiFi connection). Many such apps are provided by third parties and are well established in the market (for example, Skype, Viber and Whatsapp). In addition, some MVNOs have also deployed their own apps to provide a more deeply-integrated service for their customers.¹¹⁴

¹¹³ Details of EE's VoWiFi service are available here: <http://ee.co.uk/ee-and-me/network/wifi-calling>.

¹¹⁴ For example, Virgin Media and TalkTalk have deployed apps that allow customers to benefit from minutes or rates linked to their fixed line packages to make calls. Details of Virgin Media's "SmartCall" app can be found here: https://recombu.com/digital/article/virgin-media-claims-customers-saved-12-million-smartcall_M13200.html; details of TalkTalk's "Talk2Go" app can be found here: <https://myaccount.talktalk.co.uk/myservices/talk2golanding>; and details of BT's own

- (j) *BT's ability to cross-sell from its customer base for fixed services into mobile would not give it a substantial special advantage over other providers*
- 4.49 Absent the Transaction, BT would hope to attract some customers by cross-selling from its customer base for fixed services into its mobile proposition. However, given that UK consumers have not yet shown a significant appetite for fixed-mobile bundles, BT's ambitions to cross-sell from its customer base for fixed services into mobile are modest (as set out in Section A above).
- 4.50 BT has tried on a number of occasions to enter the consumer segment with innovative fixed-mobile propositions, including BT Fusion, but has not achieved success. It therefore cannot be assumed that BT, as an MVNO, would derive advantages in the retail mobile market from having a fixed network.
- 4.51 In addition, many other retail mobile providers have the ability (or are developing the ability) to cross-sell from or to their customer bases for fixed services: for example, Virgin, TalkTalk, Sky and Vodafone, who as well as having acquired Cable & Wireless Worldwide's fixed network business for corporate customers has also recently announced that it is currently deploying a fixed network focused on the consumer segment.
- 4.52 As such, BT's ability to cross-sell to its fixed customer base would not give it a decisive advantage over other providers.
- (k) *Other concerns of third parties in relation to rivals' capacity constraints and the future of CTIL do not reflect plausible theories of harm*
- 4.53 The Decision noted further concerns raised by third parties in relation to capacity constraints of some of the other MNOs and the impact of the Merger on the current network sharing arrangements:
- (a) In respect of capacity constraints, the Parties consider that the concerns raised by third parties are likely to relate to the spectrum holdings of some of the other MNOs. The Parties consider that none of the MNOs will be capacity constrained on their networks before the auction of 2.3 GHz and 3.4 GHz spectrum that is scheduled for late 2015 or early 2016 (or in the short to medium term after). (All have developed their spectrum holdings that reflect their strategic priorities through participation in all of Ofcom's prior spectrum auctions.) At that point, all operators will have ample opportunity to purchase additional spectrum that will be able to provide significant additional capacity, given that 190 MHz will become available for sale, an increase in the total spectrum currently available for mobile use of around 30 per cent. Qualcomm has also announced that it is selling its 40 MHz block of spectrum in the 1.4 GHz band, which can be used for "supplemental

"Smart Talk" app can be found here: http://bt.custhelp.com/app/answers/detail/a_id/40735/~/how-does-the-bt-smarttalk-app-work-and-what-are-the-benefits%3F.

downlink” capacity.¹¹⁵ In addition, as explained in Annex H of the Notification, all the MNOs have many options to upgrade their networks and undertake denser deployment if they do not want to acquire more spectrum at the prevailing price at the auction.

- (b) The Transaction also cannot be expected to impact on the current network sharing arrangements in a way that would marginalise CTIL. The Transaction involves no change to the network sharing arrangements in the UK. As there can be no concern relating to BT’s backhaul provision (addressed in Section C) the Parties consider that there is in fact no plausible theory of harm relating to the current network sharing arrangements. If this concern relates to the possibility that O2 would enter into a sharing agreement with H3G and the merged entity (whether in the H3G/O2 Merger counterfactual or not) it would likely be subject to scrutiny from Ofcom, the CMA and/or the Commission and that agreement could not be implemented if it would marginalise Vodafone.

(l) No change in competitive effects in the H3G/O2 counterfactual

- 4.54 As explained in Section A above, if the H3G/O2 Merger goes ahead, the CMA can be comfortable that any of the possible outcomes will ensure that the existing levels of effective competition will endure, including in the retail mobile market.

(m) The Transaction will increase competition in the retail mobile market

- 4.55 The Transaction is likely to increase competition in the retail mobile market.
- 4.56 As set out in Section A, paragraph 4.5(b), the Transaction will eliminate double marginalisation in relation to incremental mobile sales, providing the merged entity with a stronger incentive to price those additional sales more aggressively.
- 4.57 As set out in Section A, paragraph 4.5(a), the value of the Transaction to BT is based, in part, on revenue synergies from cross-selling. The Transaction will increase BT’s incentive to price standalone products more aggressively to increase its customer base, and therefore increase the scope for cross-selling complementary products. This incentive will grow in strength in the event that consumer appetite for bundles grows.
- 4.58 The competitive nature of the relevant markets means that these efficiencies will be passed through to final customers.
- 4.59 In the business segment, the Transaction will also result in a merged entity that is much better placed to compete with Vodafone:

¹¹⁵ See here: <http://www.fiercewireless.com/europe/story/qualcomm-seeks-cash-l-band-spectrum-following-ec-sdl-decision/2015-06-08>.

- (a) At present, Vodafone has a share of the business segment of around [40-50%], with O2 and EE trailing behind with [20-30%] and [20-30%] shares, respectively.
- (b) As with EE, BT has been active in the business segment for a number of years, but has only managed to capture a share of around [0-5%].
- (c) However, the combined entity will be able to offer fixed-mobile converged propositions and will benefit from the cost synergies noted above, allowing it to become a stronger competitor to Vodafone in the business segment.

4.60 As a result, the Transaction will increase competition and bring benefits to customers in both the business and consumer segments.

(n) *Consistency with BT's expectation of Transaction synergies*

4.61 The analysis summarised above is consistent with BT's expectations of Transaction synergies. In particular, while BT expects to generate incremental revenue from selling cross-sold and bundled services to BT's and EE's respective existing customer bases for both consumers and business customers, the magnitude of these synergies is modest at the level of the market and inconsistent with the notion that the combined entity will achieve unassailable cost or product sales advantages that would marginalise rivals.

(o) [REDACTED]

4.62 [REDACTED]

4.63 BT also recognises that, even after it has acquired EE, there will still be potential benefits that can be realised by rolling out femtocells in relation to the wireless connectivity of fixed broadband connections, as distinct from benefits relating to mobile services:

- (a) An initial benefit would be provided by offloading some of a user's wireless connectivity from WiFi onto LTE (i.e. 4G radio spectrum), so that the user would benefit from LTE's increased spectral efficiency, quality of service capability and lower interference (as compared with some WiFi connections), as well as the improved coverage from using EE's 800 MHz spectrum (which is dedicated to providing LTE services). For example, mobile devices, such as phones and tablets, could be provided with a fast LTE connection, leaving more bandwidth available for WiFi-only devices such as computers and internet-enabled TVs.

- (b) [REDACTED]¹¹⁶ [REDACTED]¹¹⁷

¹¹⁶ [REDACTED]

¹¹⁷ [REDACTED]

4.64 [

SECTION E - RETAIL FIXED BROADBAND

- 1.1. Paragraph 148 of the Decision notes that, as the test for reference has been met in relation to mobile backhaul and wholesale mobile, *“it has not been necessary for the CMA to conclude on whether or not the Merger results in an SLC in relation to the supply of fixed retail broadband services in the UK or any part of the UK.”*
- 1.2. Beyond stating (also in paragraph 148) that third parties raised concerns that the Transaction could reduce retail competition in local areas where retail operators rely solely on WBA, the Decision contains no details of these concerns nor any reasoning as to how such concerns could translate into a plausible theory of harm.
- 1.3. Although the CMA’s reasons for such cursory treatment are understandable, one consequence is that the Parties cannot engage with this aspect of the Decision.
- 1.4. That said, the Parties will of course respond in full to this aspect of the CMA’s Phase 2 Market Questionnaire.
- 1.5. In the meantime, the Parties note that, for some time, [X]. EE estimates that its retail fixed broadband share across Market A exchanges as a whole is in the region of [0-5%].