

HUTCHISON 3G UK INVESTMENTS LIMITED/TELEFONICA EUROPE PLC (the Notified Concentration)

REQUEST PURSUANT TO ARTICLE 9(2) OF COUNCIL REGULATION (EU) 139/2004

COMP/M.7612

INTRODUCTION

1. This submission is provided by the United Kingdom's (**UK's**) Competition and Markets Authority (**CMA**) to the European Commission (the **Commission**) in support of the CMA's request made under Article 9(2) of Council Regulation 139/2004 (**EUMR**) by letter of 2 October 2015, that the Commission refer the whole of the Notified Concentration to the UK so that the CMA can examine the Notified Concentration under the UK merger control provisions in the Enterprise Act 2002.¹

TIMING

2. The CMA received a copy of the parties' Form CO on 14 September 2015. The 15 working day deadline in which to make a request under Article 9 is therefore 5 October 2015.

THE UNDERTAKINGS CONCERNED

3. The acquiring company, Hutchison 3G UK Investments Limited (**H3G UK**) is an indirect wholly owned subsidiary of CK Hutchison Holdings Limited (**CKHH**) which also owns Hutchison 3G UK Limited (**Three**), a mobile network operator (**MNO**) in the UK. Three will become a wholly owned subsidiary of Hutchison 3G UK Investments Limited prior to completion of the Notified Concentration. Three is the most recent MNO entrant on the UK market, and launched its commercial operations on 3 March 2003 with a 2100 MHz 3G

¹ The CMA would have jurisdiction under the Enterprise Act 2002 to examine the Notified Concentration were it to be referred back under Article 9 EUMR as the Notified Concentration would constitute a relevant merger situation and the UK turnover of the target exceeds £70 million.

network. Three subsequently launched an 1800 MHz 4G network in December 2013.²

4. Telefónica Europe Plc (**O2 UK**) is a direct wholly-owned subsidiary of Telefónica S.A, which is the holding company of a group of companies that operate fixed and mobile communication networks in a number of EU member states as well as in countries outside Europe. O2 UK is active as an MNO in the UK offering mobile communications services such as voice, SMS, MMS, mobile internet and mobile broadband services. O2 UK operates a 900 MHz and 1800 MHz 2G network, a 900 MHz and 2100 MHz 3G network and a 800 MHz 4G network, and has approximately 22.29 million retail mobile customers. O2 UK also offers retail fixed broadband to business customers and is a provider of Wi-Fi services.³
5. Three and O2 UK are together referred to as the **Parties**.

APPLICATION OF ARTICLE 9 EUMR

6. The CMA is making this request pursuant to Article 9(2) of the EUMR. Specifically, the CMA believes that the Notified Concentration fulfils the criteria of Article 9(2)(a) as threatening to affect significantly competition in a market in the UK.
7. According to the Commission's notice on case referral⁴ (the **Notice**), in making a request, Member States should take account of the principle of subsidiarity and, in particular, consider which is the more appropriate authority for carrying out the investigation, the benefits inherent in a one-stop shop system and the importance of legal certainty with regard to jurisdiction.
8. The CMA has taken due regard of these factors and, for the reasons set out below, considers that it is appropriate that the case be referred to the CMA for investigation.

Most appropriate authority

9. According to paragraph 9 of the Notice, in deciding the more appropriate authority to deal with a case, regard should be had to the specific characteristics of the case as well as the tools and expertise available to the authority. Particular regard should also be had to the likely locus of any impact on competition resulting from the merger.

² Section 2 Form CO.

³ Section 2 Form CO

⁴ Official Journal 2005/C 56/02.

Impact of the CMA's investigation in BT/EE

10. Firstly, and uncommonly compared to other telecoms cases in which Article 9 requests by Member States have not been granted by the Commission, the CMA is already currently investigating a merger in the UK telecoms market. As the Commission is aware, the CMA is investigating the anticipated acquisition by BT Group Plc (**BT**) of EE Limited (**EE**) (**BT/EE**).⁵
11. BT is a UK-based communications services company, active in the provision of fixed-line and mobile communications services, broadband, TV products and services, and managed networked IT services. BT provides, on a wholesale basis, services to MNOs that enable these companies to connect their 'radio base stations' to their core network. These services are known as 'mobile backhaul services'.
12. EE is an MNO operating exclusively in the UK, running the EE, Orange and T-Mobile brands. It offers mobile services (consisting of voice, messaging and data services), fixed voice and broadband services and pay TV services to retail customers. EE also provides wholesale access to its mobile network.
13. In terms of the timing of the CMA's investigation into BT/EE, the CMA intends to notify provisional findings in October 2015 and publish its final report in November 2015.⁶ The statutory deadline is 23 November 2015. The CMA has set out in its published Issues Statement⁷ the potential theories of harm it is investigating in BT/EE. Many of the key issues being considered have direct and close links to and may impact on any assessment of the Notified Concentration (and vice versa). In particular:
 - (a) The CMA is undertaking a detailed assessment of the competitive dynamics in the retail mobile market. For example, the BT/EE investigation is assessing competition between MVNOs and MNOs and wholesale access to MVNOs. Given the Parties' major presence in this market, this assessment will be impacted by the Notified Concentration and the assessment will be duplicated unless the Article 9 request is granted.
 - (b) BT/EE gives rise to vertical links in the wholesale market, given BT's supply of mobile backhaul services to MNOs. The CMA has assessed the role of Three in the wholesale market as part of its assessment of the

⁵ Please see the [CMA's case page](#) for more details.

⁶ BT/EE [administrative timetable](#).

⁷ [BT/EE issues statement](#): This sets out the main issues that the CMA is likely to consider in reaching its decision. This does not preclude the consideration of any other issues which may be identified during the course of the investigation.

vertical issues. This theory of harm also considers the role of fixed/mobile bundles which may also be relevant in the assessment of the Notified Concentration.

(c) The backhaul services provided by BT will be relevant to the consideration of key lines of investigation around network sharing in the assessment of the Notified Concentration, given that the MBNL network may rely exclusively on BT backhaul inputs as a result of the BT/EE merger. The outcome of the BT/EE investigation in this regard will therefore be relevant to the consideration of any possible foreclosure impact on competitors such as Vodafone as a result of the Notified Concentration.

14. The Notified Concentration also impacts directly on the CMA's assessment of BT/EE through the determination of an appropriate counterfactual for the assessment. The Notified Concentration transaction constitutes a 'parallel transaction' for the purpose of the BT/EE transaction. In the event that the Article 9 request is not granted by the Commission, the CMA's visibility as to the outcome of the investigation will be limited which may create difficulties in the development of a workable counterfactual against which to assess BT/EE. The CMA has already faced difficulties avoiding a purely speculative counterfactual while the Commission's assessment of the Notified Concentration is uncertain. If the Notified Concentration was also considered by the CMA, this would facilitate the CMA's development of a workable counterfactual.
15. For the reasons set out above, there are clear substantive links between these two cases which would be better dealt with by the same authority. Given the current stage of the BT/EE investigation which leaves no opportunity of referral to the Commission, the appropriate authority to do so is necessarily the CMA. As set out further below, the benefits of the one-stop-shop principle in this case arise by referral of the Notified Concentration to the CMA.

Locus of impact on competition

16. Notwithstanding the important issue of the parallel consideration of another merger in this market, the CMA considers that the Commission should have particular regard (as envisaged by the Notice) to the fact that the effects of the Notified Concentration are wholly UK-centric. The transaction solely concerns undertakings operating mobile networks in the UK and all overlaps are limited to the UK. As a result, any adverse effects resulting from a loss of competition (the likelihood of which is set out further below) will be felt exclusively by consumers in the UK. Given this nexus of competition concerns, the CMA

considers that the principle of subsidiarity strongly supports a referral to the UK.

17. As set out further below, the CMA believes that this particular transaction may have a significant impact on competition in the UK and therefore, as envisaged by the Notice in cases where the possible harm on competition is greater, the CMA's case for re-attributing jurisdiction is even more compelling.

One-stop shop

18. The CMA notes that, as referred to in the Notice, the principle of a one-stop-shop is beneficial to competition authorities and businesses alike and these benefits should be taken into account in considering the referral of cases between the Commission and national competition authorities. The CMA recognises that the handling of a merger by a single competition authority normally increases administrative efficiency, avoiding duplication and fragmentation of enforcement effort as well as potentially incoherent treatment (regarding investigation, assessment and possible remedies) by multiple authorities. For example, the CMA recently made a request under Article 22 of the EUMR that the Amadeus/Navitaire merger be referred for review by the Commission,⁸ in circumstances where that transaction meets the thresholds for review by the CMA.
19. In the present case, however, one-stop-shop considerations support a referral of the Notified Concentration to the CMA. In particular, given the CMA's current investigation in BT/EE, the granting of the Article 9 request will avoid duplication and fragmentation of the investigation of mergers in this market. The CMA has been working closely with market participants and will be able to avoid duplication and increased burden on businesses through the investigation of the Notified Concentration. This benefit has been recognised by third parties. Referral to the CMA also removes the possibility of inconsistent approaches being taken by different competition authorities, which the one-stop-shop principle aims to avoid.
20. Given that the overlaps are fully and only within the UK there is also no possibility of fragmentation of the assessment of the Notified Concentration being caused by the referral. Instead, due to the ongoing investigation of BT/EE, the risk of fragmentation of enforcement effort in this market would

⁸ Proposed acquisition by Amadeus IT Group S.A. of Navitaire LLC. Article 22 request submitted 18 September 2015.

arise if the Commission rather than the CMA were to assess the Notified Concentration.

21. Based on the timetable set out above, the CMA considers that the specific circumstances in this case present a unique scenario in that the CMA, if the Article 9 request is granted, will have the possibility of ensuring a consistent outcome between the two mergers currently proposed in the UK telecommunications market. In the event that the CMA were to consider that the BT/EE merger raises competition concerns (a decision to be taken by the Inquiry Group, appointed from an independent panel, the outcome of which is not yet known), the Inquiry Group would move on to assessing the different options for remedies. This stage of the assessment would come after the publication of the provisional findings in weeks 16 to 24 of the case (in BT/EE this is expected to be October to November 2015). While any remedies decision would likely have been taken prior to the completion of the CMA's investigation of the Notified Concentration (should it be referred to the CMA), there will be scope for a joined up outcome as it will be open to the CMA to make modifications to any BT/EE remedies based on its assessment of the Three/O2 UK merger. The CMA considers that this will enable a consistent approach to enforcement, increasing the CMA's ability to accept targeted, effective and proportionate remedies and a consistent outcome for both cases without duplication and fragmentation of enforcement effort.

Legal certainty

22. The CMA is not aware of any reasons relating to legal certainty which should prevent a referral. Instead, as this referral request makes clear, there are substantial compelling reasons, given the particular circumstances of the case, to depart from the Commission's original jurisdiction.
23. In addition, the CMA acted promptly in making the Parties aware of the possibility of an Article 9 referral to the CMA. For example, a meeting with the Parties was held at a very initial stage (prior even to commencement of pre-notification with the Commission) in which the Parties were made aware of the strong possibility of a request for a referral by the CMA. In addition, the Parties are aware of the CMA's engagement on the substantive issues in this case and indeed have chosen to engage directly with the CMA on this transaction.
24. The Commission has also been aware of the CMA's strong intention to make an Article 9 request as this has been communicated numerous times to the Commission.

Article 9(2)(a) requirements

25. With respect to a request being made pursuant to Article 9(2)(a), the CMA is required to show that the Notified Concentration 'threatens to affect significantly competition in a market within the UK, which presents all the characteristics of a distinct market'.
26. By way of explanation, the Commission's Notice states that in order for the Commission to refer the case to the CMA, the CMA must demonstrate that, based on a preliminary analysis, there is a real risk that the transaction may have a significant adverse impact on competition and thus deserves close scrutiny. In addition, the CMA must show that the geographic markets affected by the transaction are at most national in scope.
27. The following paragraphs summarise the views of the parties and third parties on the question of jurisdiction before giving the reasons why the CMA believes that the requirements of Article 9(2)(a) are met.

Views of the Parties

28. The CMA received representations from H3G UK as to the appropriateness of an Article 9 request. H3G UK submitted that there is no compelling reason that would justify the Commission exercising its discretion to refer the Notified Concentration to the CMA. According to H3G UK, the legal test for an Article 9 referral is not satisfied since the merger does not threaten to affect significantly competition in the UK market; rather the UK mobile market will remain highly competitive post-merger. H3G UK also submits that it would not be appropriate for the Commission to exercise its discretion to refer the merger, in particular for the following reasons:
 - (a) referrals to national authorities should be limited to exceptional circumstances which do not exist in this case;
 - (b) a referral would lengthen and complicate the review process and would create additional complications and uncertainty;
 - (c) a referral to the CMA would result in a significant and unnecessary additional administrative and cost burden on the parties; and
 - (d) in the recent past the Commission has consistently rejected Article 9 requests from other national competition authorities in relation to mobile mergers. The policy and consistency reasons cited by the Commission in those cases are equally applicable to the Notified Concentration.

29. The CMA has set out in detail in this referral request why it believes the legal thresholds are met and why, on the particular circumstances of the case, it considers it appropriate for the Commission to exercise its discretion and refer the Notified Concentration to the CMA for review.

Views of third parties

30. The CMA issued an invitation to comment (**ITC**) on the possibility of submitting a request to the Commission under Article 9 EUMR on 16 September 2015 and invited third parties to comment by 24 September 2015.
31. The CMA received support from third parties for making a request for referral under Article 9, in particular based on the following considerations:
- (a) the Notified Concentration threatens to affect significantly competition in the UK mobile market;
 - (b) the affected market is national in scope;
 - (c) there will be complex interaction with the BT/EE investigation already underway by the CMA; and
 - (d) the CMA's expertise in reviewing transactions in this market previously.

National scope of the geographic markets affected by the concentration

32. According to the Parties' Form CO, horizontal overlaps arise in the following markets in the UK:
- (a) mobile communications services to end customers ('retail mobile');
 - (b) wholesale access and call origination on public mobile telephone networks ('wholesale mobile'); and
 - (c) wholesale market for international roaming.
33. As explained below and without prejudice to the outcome of a full investigation, the CMA considers that there is a real risk that the Notified Concentration may have a significant adverse impact on competition in the UK retail mobile and wholesale mobile markets. The CMA therefore considers that the second requirement of the Article 9(2)(a) test is met, since the Notified Concentration affects geographic markets that are national in scope.

Notified concentration threatens to affect significantly competition

34. Without prejudice to a full investigation into the competitive effects of the Notified Concentration, for the reasons set out below and based on the information provided by the Parties in the Form CO and the CMA's knowledge of the UK telecommunications market (supplemented by Ofcom), the CMA considers on a preliminary analysis that there is a real risk that the transaction may have a significant adverse impact on competition in the UK retail mobile and wholesale mobile markets. The CMA therefore believes that the first requirement of Article 9(2)(a) is met, that the Notified Concentration threatens to affect significantly competition.

Retail mobile

Horizontal unilateral effects

35. The Notified Concentration will reduce the number of MNOs in the UK from four to three. The CMA notes that the UK's communications regulator, Ofcom has previously found that UK customers are likely to benefit from better services at lower prices if there continue to be at least four credible national wholesalers of mobile services.⁹ On a preliminary basis and based on the information provided by the parties in the Form CO, the CMA considers that the Notified Concentration will result in a large combined market share in retail mobile with a significant increment. The Parties submit that their combined share of retail mobile (based on subscribers or revenues) would be 37%, with an increment of 10%. At the network level,¹⁰ their combined share of retail mobile would be 37% (subscribers) and 40% (revenues) with an increment of 10% on either basis. Following the planned migration of a large MVNO (TalkTalk) to O2 UK, this will increase to 44% (subscribers) and 41% (revenues).
36. These significant market shares are also reflected in shares of gross additions (or 'gross adds', ie numbers of subscribers won as a share of all subscribers that have switched in a given period). The Parties have not provided network-level shares of gross adds, but the combined retail share of Three, O2 and Tesco¹¹ come to 40% (with an increment of 11%).
37. The CMA is concerned that Three is an important competitive force which will be lost as a result of the Notified Concentration, illustrated by the fact that

⁹ Ofcom assessment of future mobile competition and award of 800 MHz and 2.6 GHz, paragraph 1.10.

¹⁰ That is, assigning to each MNO the share of subscribers or revenues represented by MVNOs that they host on their network.

¹¹ Tesco is on the O2 network.

Three still wins a much larger share of gross adds than its current market share in certain customer segments. For example, in the high-data segment, Three's share of gross adds in mobile broadband was 47% in 2014. The CMA also received submissions from third parties which identified Three as an important challenger in the market given that Three has consistently been the retail operator introducing the cheapest retail offers in the marketplace.

38. These considerations raise prima facie concerns that the Notified Concentration will allow the merged entity to raise prices for retail mobile services for UK consumers.

Vertical effects - impact on independent distribution

39. The CMA considers that the role of independent distributors such as Dixons Carphone may be important for the intensity of retail competition and any impact of the Notified Concentration on these distributors may also lead to increased prices in the retail mobile market. Independent distributors currently have negotiating strength against MNOs due to their large volumes of sales and the ability to influence end customers, for example by providing information to consumers on different mobile packages.
40. Currently, O2, Vodafone and EE supply mobile packages to independent distributors, which supply those packages to retail customers. As a result of the Merger, O2 may have an increased incentive to withdraw from these distributors and engage in direct retailing only (ie as Three is currently doing). Sales diverting to Three as a result of withdrawal would be recaptured and the Parties' benefit of access to independent retailers' distribution networks may have a smaller benefit following any expansion of the Parties' retail network resulting from the Notified Concentration. This would be likely to make independent distributors' offering less attractive to customers and undermine any buyer power they have, ultimately weakening the competitive constraint and potentially leading to worse prices being offered to consumers. In addition, this would make independent distributors vulnerable to possible foreclosure by Vodafone and BT/EE, either unilaterally or in a co-ordinated manner.
41. This possible theory of harm is relatively specific to the UK market, insofar as a significant independent distribution is not common in other Member States.

Co-ordinated effects

42. The CMA notes that the Commission has previously considered the possibility of co-ordinated effects arising in mobile telecommunication mergers. The CMA considers that a reduction in the number of MNOs from four to three in

the UK retail merger market increases the likelihood of co-ordinated behaviour between the remaining MNOs, since co-ordination will become easier and more profitable for the remaining MNOs. The CMA notes that the merged 3/O2 and EE would together have a share of 68% of the retail mobile market, and this share would be even larger in the private segment. Focal points on which suppliers could co-ordinate their retail mobile offerings include both price and quality aspects of the retail mobile offering, including retail mobile package allowances, which are transparent.

Wholesale mobile

Horizontal unilateral effects

43. The Notified Concentration also represents the loss of an important player in the wholesale market. Three, while having a small share of the wholesale market, has recently improved its market position, for instance by acquiring spectrum in the 1400 MHz band and winning Dixon Carphone as an MVNO customer, as well as FreedomPop in 2015 with a plan to grow to one million subscribers within three years. Three has also launched a new global MVNE platform¹² called 'Hue' in April 2015 to drive MVNO uptake. In these ways, Three may have been expected to act as a disruptive force in the market. The Notified Concentration would reduce the incentives for Three to compete aggressively to win customers from the competing wholesale operators.
44. To the extent that fixed-mobile convergence increases in future, BT/EE (and, potentially, to a lesser extent Vodafone) may have limited incentive to provide mobile service to fixed operators (such as Sky or TalkTalk). In such an environment, the Notified Concentration represents a reduction in suppliers from three to two (or from two to one absent Vodafone who is also active as a retail supplier of fixed line services).
45. Competition between national wholesalers is likely to remain key to many aspects of quality of services valued by UK consumers. It is national wholesalers' access to spectrum and RANs¹³ that provide them with much greater scope to compete and innovate on quality of services, for example by deploying new technological developments or configuring networks to meet consumers' demands for new or better-quality services.
46. In addition, the CMA considers that the reduction in the number of national wholesalers risks having a direct and significant impact on retail prices due to

¹² Mobile virtual network enabler. This provides the mobile network infrastructure and related wholesale services to MVNOs, which in turn package up those inputs with customers services, branding, sales teams, etc.

¹³ Radio Access Networks.

the reduced competitive constraints. In particular, MVNOs may obtain poorer commercial terms as a result of the reduced competition at MNO level. The CMA also considers that MVNOs in the market are unlikely to have sufficient buyer power to be able to compensate for loss of competition at the MNO level.

Impact of the merger on network sharing arrangements

47. While there are currently four national wholesalers in the UK, at the network level there are two sets of complex network sharing arrangements, between EE and H3G (MBNL) and between Vodafone and O2 (Beacon). A merged H3G/O2 would therefore have a stake in each of the two existing network sharing partnerships.
48. Currently, the Parties, as members of different networks, compete through these networks to improve the quality of their retail mobile services. For example, national wholesalers can improve coverage and average speeds by expanding their access networks, including deploying additional macro cells, deploying small cells in congested areas and deploying femtocells in the consumers' homes and offices.
49. While Beacon is currently exclusive to O2 UK and Vodafone, the Parties submit that Three intends to negotiate with Vodafone to amend the arrangements to allow roaming of Three traffic to the O2 UK network and vice versa. As such, the merged entity would become party to, and may have a degree of control over the operations of the networks of the two remaining entities competing to provide mobile network infrastructure in the UK. This materially impacts on the ability and incentive for both networks to compete, affecting competition in both the retail and wholesale markets. The Parties' involvement in both networks may also facilitate information sharing or co-ordinated behaviour.
50. It is also possible that, in the longer term, the Three/O2 UK merged entity may see benefits in running only one network (for example to minimise fixed costs). It may therefore attempt to phase out its involvement in one of the networks. This would ultimately have an impact on that network partner's ability to compete as it would no longer benefit from network sharing and, in the interim, may reduce the quality of one of the networks as Three/O2 transferred and reduced its investment in that network.

Conclusion on competition concerns

51. For the reasons set out above, the requirements of the Article 9(2)(a) test is met, since the Notified Concentration threatens to significantly affect competition in the retail mobile and wholesale mobile markets in the UK.

CONCLUSION

52. For the reasons described above, the CMA requests the Commission to refer in full the Notified Concentration to the CMA to review.