

JOINT VENTURE BETWEEN LIBERTY GLOBAL PLC AND TELEFÓNICA S.A.

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

COMP/M.9871

INTRODUCTION

1. On 7 May 2020, Liberty Global plc and Telefónica S.A. (together, the **Parties**) announced an agreement to merge their operating businesses in the UK (the **Notified Concentration**). 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**) on 8 October 2020, 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 30 September 2020. The 15 working day deadline in which to make a request under Article 9 is therefore 21 October 2020.

THE UNDERTAKINGS CONCERNED

3. Liberty Global plc (**Liberty Global**) is an international video, broadband and communications company. In the UK, it operates a telecommunications company (**Virgin Media**) providing fixed-line telephony and broadband as well as pay-TV services through its own fixed network infrastructure and is active

¹ The Notified Concentration constitutes a relevant merger situation within the meaning of the Enterprise Act 2002. The CMA's jurisdictional threshold under the 'turnover test' is met (as the UK turnover of the transferring businesses to the Notified Concentration exceeds £70 million).

in the wholesale supply of leased lines.² It also operates **Virgin Mobile**, a mobile virtual network operator (**MVNO**).³

4. Telefónica Europe Plc (**O2**) 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 is active as a mobile network operator (**MNO**) in the UK, offering voice, SMS and mobile data services through its mobile telecommunications network, and provides wholesale network access to MVNOs. O2 also provides fixed services (including fixed voice and internet access, retail business connectivity, retail internet hosting and IT services) to business customers.⁴
5. The Notified Concentration is the establishment of a 50:50 joint venture (**JV**) to which the Parties will contribute their UK businesses (Virgin Media (including Virgin Mobile) and O2). The Parties overlap in the supply in the UK of: (i) retail mobile telecommunications services; (ii) retail fixed telecommunications services; and (iii) certain retail business services. There are also vertical relationships that would arise due to: (i) the JV's provision of wholesale mobile access services and Virgin Media's retail activities; and (ii) the JV's provision of wholesale leased lines and mobile backhaul, and O2's wholesale and retail mobile activities. There is no horizontal overlap or vertical relationship between the Parties' activities in any EU Member State other than the UK.⁵

APPLICATION OF ARTICLE 9(2) EUMR

6. The CMA is making this request pursuant to Article 9(2) of the EUMR. The CMA considers that the Notified Concentration meets the criteria for referral set out in Article 9(2)(a) of the EUMR (because it threatens to affect significantly competition in a market in the UK). The CMA also believes that the referral of the Notified Concentration is consistent with the criteria set out in the Commission's notice on case referral (the **Notice**),⁶ and, more broadly,

² Wholesale leased lines are inputs for the provision of fixed communications services (retail fixed internet access and retail business connectivity) and mobile communications services, where leased lines are purchased or self-supplied by MNOs to connect mobile sites to their core networks.

³ Section 1, Form CO submitted by the Parties on 30 September 2020 (**Form CO**).

⁴ Section 1, Form CO

⁵ During the Transition Period until 31 December 2020, European Union law - with certain limited exceptions which are not applicable to this submission - continues to be applicable to and in the UK. Therefore, any reference to Member States in Union law shall be understood as including the UK. Every reference to EU or EEA Member States in this request includes the United Kingdom unless explicitly states otherwise.

⁶ Official Journal 2005/C 56/02.

with the guiding principles for the transfer of mergers cases set out in the EUMR.

7. The CMA also considers that the factors that justify the referral of this case are particularly compelling within the context of the UK's exit from the EU and the approaching expiration of the Transition Period.⁷
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.

THE LEGAL REQUIREMENTS FOR REFERRAL

9. In order for a referral to be made under Article 9(2)(a) of the EUMR, 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.' The Notice indicates 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 national in scope or narrower.
10. Based on the evidence that is available to date, the CMA believes that the requirements of Article 9(2)(a) of the EUMR are met in this case.

Notified Concentration threatens to affect significantly competition

11. Without prejudice to the outcome of a full investigation into the competitive effects of the Notified Concentration, the CMA's preliminary analysis indicates that the nature of the vertical relationships between the Parties raises *prima facie* concerns in relation to a possible significant adverse impact on competition in UK markets, in particular as a result of the following theories of harm:
 - (a) **Input foreclosure in relation to wholesale mobile services (upstream) and MVNOs (downstream) in the UK:** O2 supplies wholesale mobile services to MVNOs, including Sky. The JV may have both the ability and incentive to restrict the supply of these critical services. First, the JV may have an incentive to foreclose MVNOs in order to weaken competition in

⁷ As per Article 126 of the [Withdrawal Agreement](#), the Transition Period for the UK's exit from the EU will end on 31 December 2020.

retail mobile services in general.⁸ Second, the JV would also have significant retail fixed telecoms and television businesses (unlike O2) and may therefore have an incentive to foreclose MVNOs operated by firms that supply retail bundles (ie, fixed-mobile convergence (**FMC**) combining mobile with fixed telecoms and/or television) (**FMC bundles**), such as Sky. The latter scenario would be of particular concern as the take-up of FMC bundles is expected to increase in the future, given that the supply options available to FMC bundle providers may already be limited as another key supplier of wholesale mobile services, BT/EE, similarly competes at the retail level in the provision of fixed telecoms and television services.

(b) Input foreclosure in relation to wholesale leased lines and mobile backhaul (together, backhaul) (upstream) and retail mobile telecommunications services (downstream) in the UK: Virgin Media is the second largest provider of wholesale leased lines and is the only player of significant scale aside from BT. It is likely that, in some local areas, only the networks of BT and Virgin Media are close to customer sites (and the feasibility of using BT's network depends on the effectiveness of the regulatory requirements that govern its operations). The JV would comprise a much larger retail mobile business than Virgin Mobile would on a standalone basis in the counterfactual and may therefore have an incentive to foreclose rival mobile networks. Restriction of access or deterioration in the price and/or quality of Virgin Media's backhaul services could negatively impact on the ability of MNO (or MVNO) competitors to offer attractive retail mobile telecommunications services.

12. In addition to assessing the vertical relationships outlined above, any review of the Notified Concentration will need to consider potential horizontal unilateral effects in relation to retail mobile telecommunications services in the UK. Although Virgin Mobile is a relatively small retail mobile supplier, the Notified Concentration would strengthen O2 as the UK player with the largest (or second largest) market share.⁹ Significant adverse effects in these markets could lead to higher prices, less choice and less innovation for UK customers, negatively impacting businesses and consumers across the UK.

⁸ By having an expanded retail mobile offer (as a result of combining Virgin Mobile with O2), the JV may be better placed to capture any retail mobile customers that switch away from a foreclosed MVNO.

⁹ According to the Parties' data, O2 has the largest share of retail mobile subscribers and has a similar share of revenue to the BT/EE entity (the precise figure depends on the year in question).

National (or narrower) scope of the geographic markets affected by the Notified Concentration

13. It is well-established that the affected markets within the scope of the Notified Concentration are, at their widest, national (as consistently reflected in Commission and CMA precedent in relation to the markets at issue). As set out in the Parties' Form CO, horizontal overlaps and vertical relationships arise in several markets in the UK (or sub-segments of these markets), including in relation to the supply of:
- (a) Retail mobile telecommunications services;
 - (b) Retail fixed internet, voice and TV services;
 - (c) Retail business connectivity and other retail business services;
 - (d) Wholesale mobile services; and
 - (e) Wholesale leased lines.
14. It is clear that the impact of the structural changes brought about by the Notified Concentration does not '[go] beyond the border of any one EU Member State.'¹⁰ As explained above and without prejudice to the outcome of a full investigation, the CMA considers that that the Notified Concentration may have a significant impact on competition in several markets within the UK retail sector (in particular, as a result of the input foreclosure referenced at paragraph 11 above). 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 at widest, national in scope.

THE FACTORS THAT JUSTIFY REFERRAL

15. The Notice sets out a series of other factors, in addition to the legal requirements set out above, that are intended to inform the re-attribution of cases between the Commission and EU Member States, consistent with the principle of subsidiarity enshrined in the Treaty on European Union.¹¹ The Notice states that these factors are inter-linked and that the respective weight placed upon each of them will depend upon the specificities of a particular case, with the need to ensure the effective protection of competition in all markets affected by the transaction remaining of paramount importance.

¹⁰ EUMR, recital 8.

¹¹ Treaty on European Union, Article 5.

16. Based on the evidence provided in the Form CO, it is apparent that these factors support the referral of the Notified Concentration pursuant to Article 9(2)(a) of the EUMR.

More appropriate authority

17. 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. Finally, the Notice states that regard will be had to the 'implications, in terms of administrative effort' of the contemplated referral, which the Notice suggests is likely to require 'consideration of the relative cost, time delay, legal uncertainty and the risk of conflicting assessment' associated with an investigation being carried out by multiple authorities.

Characteristics of the case

18. The characteristics of the Notified Concentration make the CMA uniquely well-placed to assess it.
19. First, the CMA has recent direct experience in the markets that fall within the scope of the Notified Concentration, having reviewed similar overlaps and non-horizontal relationships in the 2016 acquisition by BT Group Plc (**BT**) of EE Limited (**EE**) (**BT/EE**).¹² The Notified Concentration is the second recent example (following *BT/EE*) in the UK of a 'convergent' transaction between a firm primarily active in fixed services and another in mobile services. The Notified Concentration also entails vertical consolidation similar to *BT/EE*, in which the CMA investigated several theories of harm pertinent to the assessment of the Notified Concentration. In particular:
 - (a) The Notified Concentration requires an assessment of whether the JV could foreclose MVNO rivals that rely on its wholesale mobile services. In *BT/EE*, the CMA considered whether the merged entity could foreclose MVNO rivals that rely on its wholesale mobile services.
 - (b) The Notified Concentration requires an assessment of whether the JV could foreclose (i) downstream competitors that are reliant on its wholesale leased lines and mobile backhaul services, and (ii) upstream

¹² *Anticipated acquisition by BT Group plc of EE Limited* (15 January 2016). BT is a UK-based telecommunications company active in fixed-line and mobile communications, including provision of mobile backhaul services to MNOs. EE, prior to the merger, was an MNO offering mobile services and wholesale access to its mobile network.

rivals from access to O2's demand for backhaul. In *BT/EE*, the CMA investigated whether the merged entity could foreclose downstream rivals in the retail mobile market that rely on its mobile backhaul services. The CMA also investigated whether customer foreclosure concerns would arise through *BT/EE* self-supplying mobile backhaul services.

(c) The Notified Concentration requires an assessment of whether the JV raises competition concerns in the retail mobile market. In *BT/EE*, the CMA considered whether concerns could arise from horizontal theories of harm involving retail mobile.

(d) The Notified Concentration requires an assessment of whether the increased ability of the JV to offer FMC bundles will increase its ability and incentive to foreclose rivals. In *BT/EE*, the CMA assessed whether conglomerate concerns could arise from the ability of *BT/EE* to cross-sell FMC bundles.

20. By contrast, the Commission's most recent assessment of UK telecommunications markets, in *H3G/Telefonica UK*, focused primarily on the existence of a significant impediment to effective competition (an **SIEC**) arising from overlaps in the retail and wholesale mobile telecommunications markets.¹³ These horizontal overlaps form just one aspect of the theories of harm that are relevant to the Notified Concentration. While the Commission is undoubtedly well-placed to analyse the Notified Concentration, this should not be determinative of whether the Commission is, as stated in the Notice, the 'more appropriate' authority to investigate this case.

21. Second, the CMA considers that a referral would ensure an efficient allocation of the administrative efforts expended on the case. Any effects on competition arising as a result of the Notified Concentration will be exclusively felt in the UK and after the expiration of the Transition Period. The CMA gave the Commission and the Parties early notice of its intention to submit an Article 9 request (in a reasoned submission made in July 2020, shortly after the first draft of the Form CO was submitted by the Parties), to enable the Commission and the Parties to take this into account during pre-notification discussions. The Commission retaining jurisdiction would raise a material risk of conflicting assessment between this case and subsequent cases in the UK telecoms sector (which will from 2021 fall under the exclusive jurisdiction of the CMA with respect to their effects in UK markets). The legal test that each authority applies is different: the CMA applies a 'substantial lessening of competition' test rather than the SIEC test applied by the Commission. The

¹³ M.7612, *Hutchison 3G UK / Telefonica UK* (2016).

CMA notes, in addition, that there is, following the General Court's recent annulment of the Commission's prohibition of the *H3G/Telefonica UK* merger,¹⁴ considerable uncertainty around the application of the SIEC test, particularly pending the appeal of that judgment to the Court of Justice. As the 'substantial lessening of competition' test was applied in the last major transaction in this sector in the UK (*BT/EE*), and will be applied in all future transactions (given the imminent end of the Transition Period), the risk of conflicting approaches to assessment would be minimised by the transfer of the case to the CMA.

22. Third, in light of the UK's departure from the EU, the relevance of the case to support European Union policy objectives, or to '[ensure] consistency in the way the different mergers falling into its competence in this sector are assessed throughout the EU',¹⁵ is materially less significant. The position in this case should therefore again be distinguished from other telecommunications cases in which requests under Article 9 of the EUMR have been rejected by the Commission.¹⁶
23. The Commission has consistently noted the value of the same authority ensuring consistency across cases in similar markets in decisions rejecting several previous Article 9 requests.¹⁷ In light of the UK's departure from the EU, the interests of consistency now speak in favour of a referral in this case.

Tools and expertise of authority

24. The CMA has recent significant expertise of investigating the relevant markets (including as regards the legacy position of BT in fixed telecommunication services and the specificities of the UK regulatory regime) through its review of *BT/EE*.
25. Based on a preliminary assessment, the CMA believes that the relevant markets affected by the Notified Concentration potentially have regional characteristics. Any UK-specific regional characteristics to the relevant

¹⁴ Judgment in Case T-399/16, *CK Telecoms UK Investments Ltd v European Commission* (28 May 2020).

¹⁵ EC Decision relating to Article 9, referring to Case M.7612, *Hutchison 3G UK / Telefonica UK* (4 December 2015), paragraph 59.

¹⁶ EC Decisions relating to Article 9, referring to Cases M.7978, *Vodafone / Liberty Global* (3 August 2016); M.7612, *Hutchison 3G UK / Telefonica UK* (4 December 2015); M.7018 *Telefonica Deutschland D / E-Plan* (31 October 2013).

¹⁷ For example, in response to the referral request by the CMA in relation to *Hutchison 3G UK / Telefonica UK*, the Commission stated that it had a strong interest in 'ensuring consistency in the way different mergers falling into its competence in this sector are assessed throughout the EU' (para 59); in response to the referral request by the BKA in relation to *Telefonica Deutschland D / E-Plan*, the Commission stated that the Commission was best placed to investigate because of the 'need to ensure consistency in the application of merger control rules in the mobile telecommunications sector and given the Commission's experience in assessing cases in this sector (see related press release).'

markets would make the CMA best-placed to leverage its knowledge of local variation and legacy suppliers from *BT/EE*.¹⁸ The CMA also has a longstanding history of cooperation with the UK's communications regulator Ofcom, which will facilitate an efficient, well-targeted investigation prioritising key substantive issues that affect UK consumers.

26. As noted above, the Commission's most recent assessment of UK telecommunications markets, in *H3G/Telefonica UK*, focused primarily on the existence of an SIEC arising from overlaps in the retail and wholesale mobile telecommunications markets.¹⁹ These horizontal overlaps form just one aspect of the theories of harm relevant to the Notified Concentration.

Locus of impact on competition

27. 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 fixed and mobile telecommunications services in the UK. Any adverse effects resulting from a loss of competition will be felt exclusively by consumers in the UK (and/or regions within) and would not have any impact on competition in markets in any other EU Member States, including on any cross-EU telecommunications initiatives.
28. Given the nexus of these competition concerns, the CMA considers that the principle of subsidiarity strongly supports a referral to the UK and should be given particular weight given the imminent end of the Transition Period. The UK has already left the EU and the Transition Period during which the UK remains part of the 'one-stop-shop' for EU merger control expires in less than three months' time. Absent a referral to the CMA, there is a reasonable prospect (if it is not possible to eliminate any 'serious doubts' in relation to the *prima facie* concerns set out above in a Phase 1 investigation) that the Commission (and other EU Member States) would be expending time and resources assessing a case that affects only competition in the UK after the end of the Transition Period (with any effects on UK consumers being liable to arise only after the end of the Transition Period).
29. More extreme outcomes could arise in the event that any Commission decision in relation to the Notified Concentration is subsequently appealed. The Commission could be engaged in the appeals process with the General

¹⁸ For example, the supply of wholesale leased lines depends on local infrastructure and coverage by providers varies across the UK. Some of Liberty Global's documents imply it takes a localised approach developing and marketing its fixed lines across the UK (see eg Annex Liberty Global 5.4.LG 1.0000022, slide 46).

¹⁹ M.7612, *Hutchison 3G UK / Telefonica UK* (2016).

Court for several years regarding a concentration which raises solely UK-specific competition concerns with no bearing on trade between EU Member States. Any decision by the General Court would relate to the application of Commission rules, such as the SIEC standard, which will no longer apply in the UK by that time.

30. The transfer of the case would also be consistent with other ongoing cases in which the Commission and the CMA have agreed to the transfer of mergers involving only UK markets in which *prima facie* competition concerns had been identified at the time of referral, including:
 - (a) the joint venture entered into by Carlsberg A/S and Marston's PLC, in which the notifying parties submitted (and the Commission, granted) a referral request under Article 4(4) of the EUMR; and
 - (b) the acquisition by XPO Logistics, Inc. of Kuehne + Nagel Drinkflow Logistics Holdings Limited, in which the notifying parties submitted (and the Commission, granted) a referral request under Article 4(4) of the EUMR.
31. There is no obvious basis upon which these cases can be distinguished from the present case.

One-stop shop

32. The Notice explains that the 'one-stop-shop' is beneficial to competition authorities and businesses alike and makes clear these benefits should be considered when assessing referral of cases between the Commission and national competition authorities.
33. The benefits provided by the EUMR's 'one-stop-shop' are, of course, not applicable in this case. The Notified Concentration will either be reviewed exclusively by the Commission or by the CMA. Moreover, for the reasons explained above, the avoidance of 'potentially incoherent treatment' of merger cases, which is one of the key benefits of the 'one-stop-shop' set out in the Notice, would (when considered across multiple cases in the UK telecommunications sector) be better achieved by the transfer of the case to the CMA.

Legal certainty

34. Finally, the CMA is not aware of any reasons relating to legal certainty that should mitigate against 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.

35. As noted above, the circumstances at issue are unique and already characterised by a significant degree of uncertainty.
36. The CMA has sought to maximise legal certainty by acting as promptly as possible during pre-notification discussions in alerting both the Parties and the Commission of the CMA's intention to make a request under Article 9 of the EUMR.²⁰ The Parties have been mindful of the CMA's direct interest in the case and have engaged with the CMA throughout the investigation to facilitate efficient conduct of the case (including, in the event that an Article 9 request is granted).

CONCLUSION

37. The Notice states that referral should normally only be made when there is a 'compelling reason' for departing from 'original jurisdiction' over the case in question. As explained above, it is apparent that the legal requirements of Article 9(2)(a) of the EUMR are met in this case, and that the factors that inform the re-attribution of cases between the Commission and Member States, in the round, provide such a 'compelling reason' for the case to be transferred.
38. While the General Court has previously set out that referrals to national authorities are limited to 'exceptional circumstances',²¹ such circumstances clearly exist in this case given, in particular, the departure of the UK from the EU and the imminent end of the Transition Period and the fact that the UK is uniquely well-placed to assess it. The considerations that the Commission has cited to retain previous transactions in the telecommunications sector do not apply (with many of the guiding principles previously applied by the Commission instead speaking in favour of referral on the facts of this case).
39. Accordingly, for the reasons described above, the CMA requests the Commission to refer in full the Notified Concentration to the CMA to review.

²⁰ CMA submission regarding intention to request pursuant to Article 9(2) of Council Regulation (EU) 139/2004 dated 29 July 2020.

²¹ Case T-119/02 *Royal Philips Electronics NV*, paragraph 354.