Anticipated joint venture between

LIBERTY GLOBAL PLC

and

TELEFÓNICA SA

Case No. ME/6914/20

Response to Issues Statement

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1. INTRODUCTION AND EXECUTIVE SUMMARY

1.1 This submission is made on behalf of Telefónica SA (**Telefónica**) and Liberty Global plc (**Liberty Global**) (together, the **Parties**), in response to the Competition and Markets Authority (**CMA**)'s Issues Statement dated 21 January 2021 (the **Issues Statement**) concerning the Parties' proposed joint venture combining their respective operating businesses in the United Kingdom, Virgin Media and O2 (the **JV** and the **Transaction**).

1.2 The Parties consider that the Transaction is strongly pro-competitive. The combination of the Parties' largely complementary businesses will create a new fixed–mobile operator, increasing competition, and leading to fixed and variable cost reductions that will feed through to lower prices and give greater scope for network investment. The Transaction will intensify the competition faced by the incumbent, BT, whose own acquisition of the EE mobile network was cleared unconditionally in 2016, and other strong competitors such as Vodafone, Sky and Three. All of this will benefit UK consumers.

1.3 The Issues Statement indicates that the CMA intends to focus its investigation on two vertical theories of harm. First, that the JV might withhold or worsen the terms of supply of wholesale mobile services by O2 to mobile virtual network operators (**MVNOs**), in particular to fixed operators that provide mobile services as an MVNO (so-called "fixed-MVNOs") and, second, that the JV might withhold or worsen the terms of supply of mobile backhaul services to competing mobile network operators (**MNOs**), in particular with respect to dark fibre (also referred to as "passive leased lines"). The Issues Statement indicates that the CMA does not currently intend to investigate further the limited horizontal overlaps between the Parties (where the Transaction would result in small increments in market shares and the Parties do not compete closely), customer foreclosure theories of harm relating to the retail and wholesale mobile and wholesale leased line markets, or other vertical relationships between the Parties.

1.4 The Parties welcome the CMA's intention to concentrate from an early stage on the issues that, based on its review of the file, it considers to be the most relevant to the assessment of the Transaction. In this submission, the Parties therefore focus on these two theories of harm and explain, in summary, why neither may be expected to result in a substantial lessening of competition (**SLC**), in particular on the basis of the stringent Phase 2 balance of probabilities standard. The Parties do not repeat the full submissions made during the Phase 1 process before the European Commission and the CMA or address overlaps or relationships which were not identified as giving rise to a realistic prospect of an SLC in the CMA's Phase 1 decision (the **Reference Decision**) and which the Issues Statement indicates that the CMA is not minded to investigate further.

1.5 In short, as regards the first theory of harm (potential foreclosure of fixed-MVNOs), the Parties submit that the JV will have neither the ability or incentive to foreclose fixed-MVNOs from the wholesale mobile market. Sky, the only existing fixed-MVNO potentially affected by this theory of harm, is protected by strong contractual provisions in its agreement with O2, [Confidential]. The JV will also not have the ability to foreclose Sky (or other fixed-MVNOs) by refusing to bid as aggressively for future wholesale mobile contracts, since actual and prospective MVNOs would always be able to turn to BT/EE, Vodafone and Three for wholesale access services.

1.6 As regards incentives, [Confidential]. If the JV were to attempt to foreclose Sky, it would not be able to recoup the lost wholesale revenues through increased downstream revenues. Sky's customers conclude contracts for fixed and mobile services separately, which allows them to change mobile contracts while leaving other Sky fixed services unaffected. Therefore, it is highly unlikely that Sky's customers would respond to a degradation in their mobile service by switching their fixed-line services. Even if some marginal customers did, they would be just as likely to switch to BT/EE's and

Vodafone's bundles as to those of the JV. The Parties note that the CMA has at this point not assessed in detail whether a hypothetical foreclosure strategy would be profitable. The Parties are confident that the CMA's in-depth investigation will confirm, based on the considerations and evidence summarised in this submission and the vertical arithmetic analysis conducted by the Parties' economic advisers at Phase 1, that it would not.

1.7 As regards the second theory of harm (potential foreclosure relating to mobile backhaul), the JV will lack the ability to foreclose other MNOs, given (i) the presence of BT Openreach as a regulated alternative to Virgin Media in all areas, and (ii) the alternatives provided by the rapidly growing availability of other backhaul suppliers and self-supply, both facilitated by regulated access to BT's ducts and poles. The Parties further note the protections afforded by network sharing arrangements, 5G dark fibre which has already been delivered and long-term contracts. The JV would also lack the incentive to attempt a foreclosure strategy, since the ubiquitous presence of alternatives would render such an approach self-defeating, as confirmed by the vertical arithmetic analysis conducted by the Parties' economic advisers at Phase 1. Even if such a strategy were to be pursued, it would in any event have no material effect on competition on the downstream retail mobile market, since any hypothetical increase in backhaul costs would be *de minimis*. Hence any effect of the Transaction on the costs bases of MNOs could not plausibly have more than a negligible impact on pricing on the national retail mobile market or 5G rollout.

1.8 The remainder of this submission is structured as follows. Section 2 summarises the pro-competitive rationale for the Transaction and the efficiencies that it will generate. Section 3 summarises why the Transaction will not give rise to an SLC through foreclosure of fixed-MVNOs. Section 4 summarises why the Transaction will not give rise to an SLC through foreclosure relating to mobile backhaul.

1.9 The Parties look forward to engaging further with the CMA over the course of its review.

2. THE TRANSACTION WILL CREATE A STRONGER COMPETITOR TO BT/EE AND GENERATE SUBSTANTIAL EFFICIENCIES TO THE BENEFIT OF UK CONSUMERS

2.1 The Transaction will combine the Parties' largely complementary businesses and network assets, creating a highly competitive fixed and mobile communications operator with scale, expertise and infrastructure. The Transaction will allow the Parties to achieve substantial synergies (estimated as having a net present value of around £[Confidential] billion). It will create a strong converged challenger to the fixed–mobile incumbent BT, stimulating competition to the benefit of UK consumers.

(a) **Network synergies and investment in network rollout**. The JV will achieve network synergies by eliminating double marginalisation (in particular by internalising the margin previously paid to third-party MVNO hosts and backhaul providers). It will allow for better optimisation of its combined network. This will offer greater scope for investment in fixed and mobile networks as well as lower prices for customers.[1]

(b) **Improved cost base from enlarged size and rationalisation**. The JV's enlarged customer base and operational cost savings will increase its efficiency compared to Virgin Media and O2 as standalone operators.

(c) **Growth from FMC and improved B2B presence**. The JV will be able to cross-sell fixed–mobile converged products to O2's and Virgin Media's largely non-overlapping customer bases. To that effect, the JV is expected to offer customers additional discounts and services. The JV will also be better able to serve business customers by broadening its portfolio and combining sales capabilities.

[1] [Confidential].

2.2 In sum, the Transaction will lead to broader choice, lower costs and increased competition in the UK, and give greater scope for investment.

2.3 The Parties have provided a detailed explanation of how these synergies translate to merger efficiencies which will increase competition, including on the retail mobile market (which is the focus of the theories of harm set out in the Issues Statement). These submissions explain the substantial scale of those efficiencies, why and over what period they are likely to arise, why they are merger-specific and how they will benefit customers in the UK. The Parties submit that the Transaction will therefore give rise to rivalry-enhancing efficiencies in terms of the CMA's *Merger Assessment Guidelines*, as well as other relevant customer benefits.[2]

3. <u>THE TRANSACTION WILL NOT RESULT IN AN SLC THROUGH FORECLOSURE OF MVNOS</u>

3.1 The first theory of harm in the Issues Statement relates to O2's supply of wholesale mobile services[3] to MVNOs. Specifically, the Issues Statement indicates that the CMA will consider potential concerns around input foreclosure, i.e. the possibility that the JV might restrict access to these services, degrade the quality of its service provision or increase the price it charges for wholesale mobile services, so as to reduce rival MVNOs' competitiveness on the retail mobile market. The Parties set out below why the CMA's further analysis at Phase 2 should lead it to the conclusion that the Transaction will not give rise to an SLC.

3.2 O2 is a proactive supplier of MVNO services. It has strong incentives to offer access to its network in order to maximise its profit. The same incentives will apply to the JV after the Transaction. As correctly identified in the Reference Decision, there will be no change in the JV's ability or incentives to provide wholesale mobile services to mobile-only MVNOs.[4] In this submission the Parties have therefore focused on fixed-MVNOs, consistent with the emphasis of the Issues Statement.[5]

3.3 The Parties note that there are only a limited number of fixed-MVNOs currently active in the consumer segment of the UK market, namely: (a) Virgin Media (which operates as a fixed-MVNO on the EE and Vodafone networks); and (b) Sky, which operates as a fixed-MVNO on the O2 network under a long-term arrangement (see further below).[6] As such, Sky is the only fixed-MVNO of note that might plausibly be affected by the CMA's theory of harm.

3.4 For the reasons explained below, the Transaction does not give rise to any potential SLC in relation to Sky, or fixed-MVNOs more generally. In particular, there is no basis to support the view that the Transaction would give rise to vertical foreclosure effects in relation to FMC bundles in the UK. Indeed, the JV will have neither the ability nor the incentive to:

(a) degrade, within the existing contract, the quality of the wholesale mobile services that O2 currently provides to Sky; or

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2 In particular, the JV will make investments and deliver other pledges that will benefit customers in terms of lower prices, higher quality and greater range of services in UK telecommunications markets. These are described at: https://www.nationalconnectivitychampion.co.uk/pledges/.

3 The Parties agree with the CMA's assessment of the product and geographic scope of the market for wholesale mobile services at Phase 1, as set out in paragraphs 23 and 24 of the Reference Decision.

4 Reference Decision, paragraph 35; see also Referral Decision, paragraph 165.

5 Paragraph 32, noting that while the CMA *"will consider potential foreclosure of all MVNOs, [it] will give particular consideration to the potential for input foreclosure of fixed-MVNOs"*.

6 Following BT's acquisition of EE, BT Mobile operates as a sub-brand on the EE network. TalkTalk is no longer active on the downstream mobile market as a fixed-MVNO, having announced in May 2017 that it would exit its MVNO operations and to pursue a distribution strategy which requires less capital investment. [Confidential]. TalkTalk instead entered into a mobile distribution arrangement with O2 in October 2017. TalkTalk's light MVNO agreement with Vodafone, which it entered into in 2012, has been extended to support the smooth transition of remaining customers, but TalkTalk will cease its MVNO trading activity in 2021 and is no longer signing up new mobile subscribers. See TalkTalk Telecom Group PLC Annual Report 2019, page 34 and TalkTalk Telecom Group PLC Annual Report 2020, page 106.

(b) restrict or degrade the supply of wholesale mobile services to Sky, or any other fixed-MVNOs, by not bidding or bidding less aggressively for future contracts to supply them.[7]

3.5 Even if the JV were theoretically to pursue a foreclosure strategy, *quod non*, this would not result in an SLC in relation to the downstream provision of FMC bundles.

(1) *No risk of foreclosure of Sky under its existing agreement with O2*

No ability to foreclose

3.6 Sky is a full MVNO, meaning that it has invested in its own core network and systems and is only reliant on the O2 radio access network. As a result, Sky has a high level of control over the mobile services it provides and is not dependent on the O2 network or systems to introduce new pricing offers or customer services. Sky has the ability to switch to another MNO host in a straightforward manner (i.e. by establishing network interconnection between its core and the new host and providing an 'over the air' update to all Sky customers to switch them to the new provider's network).

3.7 Sky is, furthermore, protected by the terms of its wholesale access agreement with O2 (the **Sky Agreement**) which, as explained below, [Confidential]. As a result, the JV will not have the ability to worsen the services provided to Sky during the term of the Sky Agreement [Confidential].

Guaranteed wholesale access

3.8 O2 (and in future the JV) is contractually obliged to provide wholesale access to Sky until [Confidential], thereby ensuring that Sky has guaranteed wholesale access. [Confidential];[8] [Confidential].

Guaranteed service quality

3.9 [Confidential].[9]

3.10 [Confidential][10]; [Confidential];[11] [Confidential].[12] [Confidential].

3.11 [Confidential].[13] [Confidential].[14] Sky launched 5G services in the UK in January 2020.[15][16]

3.12 [Confidential].[17] [Confidential].[18]

3.13 If the quality of wholesale mobile service provided by O2 to Sky were to decrease following the Transaction, the JV would face significant potential penalties / damages for breach of contract, including:

(a) [Confidential].

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7 The Parties note that the CMA does not intend to assess customer foreclosure in relation to wholesale mobile services, since the presence of Virgin Mobile as a customer is not likely to affect the viability of other suppliers of wholesale mobile services (paragraph 34 of the Issues Statement) . The Parties agree with this assessment and do not discuss this further in this submission.
8 [Confidential].
9 [Confidential].
10 [Confidential]
11 [Confidential].
12 [Confidential].
13 [Confidential].
14 [Confidential].
15 Sky press release, "5G arrives on Sky Mobile free for new and existing customers", 16 January 2020.
16 [Confidential].
17 [Confidential].
18 [Confidential].

(b) [Confidential].

3.14 In addition, the Open Internet Regulation prevents an MNO from discriminating against an MVNO's customers and/or content as it requires, as a general principle, providers of internet access services to treat all traffic equally when providing internet access services, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used.[19] The Open Internet Regulation is retained EU law and continues to apply in the UK following the UK's exit from the European Union.[20]

Sky has guaranteed competitive pricing

3.15 [Confidential].[21] [Confidential].[22]

No incentive to foreclose

3.16 The JV will not have the incentive to worsen the services provided to Sky. O2 recognised the competitive threat which Sky would pose on the retail mobile market and still decided to host Sky as another MNO would have done so otherwise. The risk that Sky will cannibalise O2's retail mobile revenue arises independently of whether Sky is hosted by O2. The JV's incentive will not change, given that the Transaction does not alter the number of players on the wholesale market. Hence, any attempt to degrade the quality of the wholesale mobile services provided to Sky would place at risk significant wholesale revenues and profits, with no possibility of recoupment.

3.17 As explained below, it is not plausible that sufficient numbers of Sky's loyal TV and broadband customers would switch their household pay-TV and broadband services to the JV due to a degradation in their mobile service to make a hypothetical foreclosure strategy profitable. This is true even if fixed-mobile bundles become more prevalent in the UK.

3.18 First, mobile services are not a driver of fixed broadband or pay-TV services. Mobile is mostly an individual purchase whereas broadband is a household purchase, with different purchase triggers (e.g. new handsets vs house moves). Fixed-mobile bundles are therefore fundamentally different from the bundling of TV and broadband, which are both household products that may be delivered over the same physical connection.[23] The evidence shows that cross-selling of fixed services to mobile customers is more difficult than *vice versa*.[24] As the CMA noted in its submission to the Commission in *Hutchison 3G UK / Telefónica* (***Hutchison / O2***): "*The evidence we have seen suggests that fixed providers are cross-selling mobile to their existing customers, rather than using mobile to attract new customers*". [25]

3.19 Second, the vast majority of customers who purchase a mobile contract from their fixed provider do so under a separate (additional) contract and because they have a preference for that provider's mobile offer, which will often include a discount for existing (fixed) customers. Customers who purchase fixed-mobile "bundles" from Sky do so by subscribing for a contract for fixed voice, broadband and/or

19 Regulation (EU) 2015/2120 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (the **Open Internet Regulation**) and the Open Internet Access (EU Regulation) Regulations 2016 (the **Enforcement Regulations**)(SI 2016 No. 607).

20 Open Internet Access (Amendment etc.) (EU Exit) Regulations 2018/1243 came into force on 31 December 2020 and amend the Open Internet Regulation as retained law and make a number of consequential amendments to the Enforcement Regulations.

21 [Confidential].

22 [Confidential].

23 BT / EE Final Report, paragraph 14.146.

24 For example, [Confidential].

25 *Hutchison / O2*, paragraph 989.

TV services, and a separate SIM-only contract for mobile services as an "add-on". As a result, a Sky fixed-mobile customer can switch mobile provider without any impact on their fixed / TV services.

3.20 The most likely outcome of any hypothetical degradation in the quality or increase in the cost of Sky's mobile services sufficient to result in switching would be for affected consumers to terminate their mobile contract and simply to purchase their mobile service from an alternative supplier while continuing to take their fixed services (including pay-TV) from Sky. But the share of diverted customers to O2 would not compensate for the foregone wholesale revenues, and the JV does not materially impact this calculation due to the limited horizontal overlap. Ofcom has found that less than 8% of consumers that switched their mobile provider switched one or more other services (i.e. landline, broadband and/or pay-TV) at the same time.[26]

3.21 There are several reasons why Sky customers, in particular, are unlikely to switch their fixed / TV services as a result of a degradation in the mobile element of a bundle, as follows:

(a) As noted by the Commission in the Referral Decision, Sky's TV customers are particularly loyal to its brand and TV content, "*which would limit the number of customers that would switch the whole bundle as opposed to just switching the mobile content in the case of Sky*".[27] Sky [Confidential] in TV net promoter scores (**NPS**), owing in large part to superior content perception with a more extensive channel range and exclusive sport and movie content. This can be seen in Figure 1 below, which is based on Virgin Media's quarterly NPS surveys. Moreover, communications markets are characterised by a strong correlation between customer loyalty and the number of different services a customer takes from a given provider. As shown in Table 1 below, using fixed broadband subscribers as the base, [Confidential]. Sky's customers are therefore likely to be, on average, [Confidential]all customers of UK communications providers, even putting to one side Sky's clear advantage in the perception of its TV offering.

Figure 1 – [Confidential]

Table 1 – Triple-play/quad-play penetration rates among fixed broadband customers (Q1 2019 – Q1 2020)

	Q1 2019	Q2 2019	Q3 2019	Q4 2019	Q1 2020
Sky	[Confidential]	[Confidential]	[Confidential]	[Confidential]	[Confidential]
Virgin Media	[Confidential]	[Confidential]	[Confidential]	[Confidential]	[Confidential]
Vodafone	[Confidential]	[Confidential]	[Confidential]	[Confidential]	[Confidential]
BT	[Confidential]	[Confidential]	[Confidential]	[Confidential]	[Confidential]

Sources: [Confidential]

(b) Sky's fixed broadband services are clearly differentiated from Virgin Media's, particularly as many Sky customers purchase broadband / pay-TV packages from Sky and all Virgin Media broadband customers also receive pay-TV services from Virgin Media. In addition, Sky's retail fixed customer churn is very low, indicating a high level of customer satisfaction with Sky's fixed broadband services. [28]

26 Ofcom (2017), Ofcom switching tracker 2017, Table 102. Note, equivalent questions are not covered in Ofcom's 2018 and 2019 switching trackers.

27 Referral Decision, paragraph 169.

28 An Ofcom report into service quality dated 30 April 2019 found that Sky broadband customers had a significantly lower than sector average reason to complain about their home broadband service; see Ofcom, Choosing the best broadband, mobile and landline provider, 30 April 2019.

(c) Customers switching from Sky fixed services to Virgin Media fixed services need to undertake a "cease and re-provide" process which requires them to contact both their current provider (Sky) and the new provider (Virgin Media) to arrange the new service. This would provide Sky a further opportunity to retain any fixed customers seeking to switch as a result of dissatisfaction with their mobile service (this compares to customers switching between communication providers using BT's network, such as Sky, who need only contact their new provider (referred to as a "gaining provider led process")).[29]

3.22 Third, even in the unlikely event that a large proportion of Sky's customers were not prepared to 'unpick the bundle', and would instead choose to switch their entire bundle, the JV would only capture a small proportion of such customers, removing any incentive to engage in such conduct. Both BT / EE and Vodafone have their own mobile and fixed networks. As such, the JV would continue to face multiple competitors that could offer customers both fixed and mobile services and would not be affected by a foreclosure strategy. Moreover, the JV will only have a fixed network covering around half of UK premises, limiting the extent to which it could capture any FMC switchers.

3.23 The vertical arithmetic analysis conducted by the Parties' economic advisors also shows that the JV would not have the incentive to engage in any quality reduction strategy as regards Sky. The analysis considers a putative reduction in the quality of service offered to Sky by the JV under the existing agreement. Such a strategy would be strictly loss-making for the JV since:

(a) A minimum condition for the degradation strategy to be profitable is that the average retail margin earned by the JV on those customers that would leave Sky in response to any quality degradation (given by the product of the JV's average retail margin and the proportion of those Sky customers that would switch to an O2 contract) would be higher than the average wholesale margin.

(b) The analysis shows that that condition is not satisfied. Therefore, with any reduction in quality to Sky, the JV would strictly decrease its profitability as there is no realistic prospect of re-capturing sufficient subscribers downstream to outweigh the lost wholesale profits upstream. This is true irrespective of the number of Sky subscribers that would be induced to switch away, and even under the conservative assumption that the degradation strategy would not trigger any contractual penalties against O2.[30]

3.24 Fourth, Sky would also be able to exert significant countervailing buyer power, as:

(a) The JV will be strongly incentivised to retain Sky, as O2's largest wholesale MVNO customer in the UK (excluding Tesco Mobile), accounting for approximately [Confidential] of O2's [Confidential] wholesale revenues in the UK in 2019 on this basis.

(b) The JV will be dependent on Sky for wholesale access to its pay-TV offering, including Sky Sports and other channels, in order to offer competitive fixed and fixed-mobile bundles to its customers. As acknowledged by the Commission, the Sky Sports premium sports channels are 'must-have' content for any competing pay-TV provider.[31] If the JV were to attempt to foreclose mobile services provided to Sky (which would only impact Sky's quad-play bundles), it would therefore run the risk, in particular, of Sky adopting a similar strategy in relation to premium pay-TV content (which would impact the JV's triple-play and quad-play bundles).

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29 Ofcom, Switching broadband provider.

30 In relation to those customers that decided to remain with Sky despite the quality degradation, the JV would actually receive a reduced wholesale margin on each retained subscriber, further reducing the profitability of a hypothetical foreclosure strategy, [Confidential]. However, for the purposes of the vertical arithmetic analysis it has been conservatively assumed that [Confidential], and that the JV would therefore receive the full wholesale margin for each retained subscriber.

31 Referral Decision, paragraph 169.

3.25 Finally, as noted above, the JV would be subject to significant contractual penalties under the existing contract between O2 and Sky if it sought to downgrade the quality of service provided to Sky. There would also be significant reputational risks for the JV if it were to pursue such a strategy. In particular, since all of O2's wholesale mobile customers insist on equivalence obligations in their contracts, if O2 were to breach such provisions in the Sky Agreement, this would severely undermine its ability to credibly compete for future wholesale mobile contracts for other MVNOs (which the CMA has accepted the JV will be incentivised to win).

(2) *No risk of foreclosure due to bidding for future wholesale contracts for fixed-MVNOs*

3.26 The JV will also not have the ability or incentive to restrict or degrade the supply of wholesale mobile services to Sky, or any other fixed-MVNO, by bidding less aggressively for future contracts to supply them (i.e. in the case of Sky, when the Sky Agreement comes up for renewal).

No ability to foreclose

3.27 Following the approach taken by the CMA in *BT / EE*, the ability to harm fixed-MVNOs, including Sky, by bidding less aggressively for future contracts would only arise if (i) O2 would have made the best offer in the counterfactual by a material margin or (ii) in a scenario where the JV did not bid or bid more weakly, other MNOs would recognise that competition was weaker and degrade their wholesale offers materially in response.[32] The evidence shows that this is not the case.

3.28 First, the JV will not have the ability to foreclose Sky, or other fixed-MVNOs, from the retail mobile market because there are several credible alternative providers of wholesale mobile services which any fixed-MVNO could turn to in the event the JV refused, *quod non*, to make a wholesale offer. In particular, as explained below, each of O2's rivals will continue to represent compelling alternatives for fixed-MVNOs after the Transaction, as they are today:

(a) **BT / EE**: In *Hutchison / O2*, the Commission concluded that BT / EE was the largest and most significant wholesale access provider in the UK.[33] BT / EE provides access to more than 30 MVNOs serving over 5 million customers, and has a track record of winning new business, as well as existing business from other wholesale access providers.[34] Following the acquisition of EE by BT in 2015, BT / EE has continued to offer competitive wholesale terms to other fixed-MVNOs, as shown by the fact that it secured an extension of Virgin Media's MVNO contract in 2017 [Confidential]). With EE's recent loss of Virgin Media, a long-standing and important wholesale customer, EE now has added incentives to compete aggressively to host new MVNOs. [Confidential].

(b) ***Vodafone***: Vodafone hosts a number of strong MVNOs on its network. It successfully won the contract to provide wholesale access to Virgin Media in 2019 and competed to become Sky's host operator in 2015. On 11 September 2020 it announced that it had successfully won the five-year exclusive contract to provide wholesale access to ASDA Mobile (currently hosted by EE).[35] Vodafone has the incentive to use its well established MVNO capabilities to attract further wholesale customers. This incentive will only increase as a result of the Transaction, compared to the counterfactual, given that around 3.25 million Virgin Media customers expected to transition to the Vodafone network will not do so.

(c) ***Three***: In *Hutchison / O2*, the CMA submitted that Three is a credible wholesale competitor for large mass-market MVNOs, including fixed-MVNOs.[36] The Commission concluded that

32 BT / EE Final Report, paragraph 14.28.
33 *Hutchison / O2*, paragraph 2220.
34 For example, in 2013, it won ASDA Mobile's business from Vodafone, [Confidential].
35 See Vodafone press release, "https://newscentre.vodafone.co.uk/press-release/asda-chooses-vodafone-as-new-uk-partner-for-asda-mobile/".
36 *Hutchison / O2*, paragraph 1976.

Three was a significant wholesale access competitor that was very active in tendering for and winning wholesale access contracts and was rapidly growing its market share.[37] It found that Three participates in tender processes and/or informal negotiations for both small and large MVNOs.[38] Three is considered 'very competitive' in relation to terms offered in its wholesale access contracts both in terms of price and quality.[39] Moreover, to the extent that fixed-mobile bundles became more prevalent, Three's incentives to bid for future contracts with fixed-MVNOs would be expected to increase, given that it does not currently have a fixed offering of its own, and the constraint exerted by Three on the wholesale access market would therefore increase.[40]

3.29 Second, even in a scenario where the JV did not bid, or bid more weakly than in the absence of the Transaction, other MNOs would not recognise that competition was weaker or degrade their wholesale offers materially in response. In *BT / EE*, the CMA found that the wholesale mobile bidding market was not transparent. This continues to be the case. In any given case, the MNOs involved in the process will not be aware of which other MNOs are bidding. As such, the perception of MNOs' involvement and the information provided by the MVNO to potential hosts is of key importance in obtaining competitive outcomes.[41] Given the JV could not credibly commit not to bid (or to bid more weakly) for fixed-MVNOs, together with the lack of visibility and the MVNO's control of the bidding process, other MNOs would continue to view the JV as a competitive constraint. They would, therefore, bid for fixed-MVNO contracts on the same competitive terms as pre-transaction.

3.30 Given the above, Sky and other fixed-MVNOs will be able to secure equally attractive commercial terms as would be possible in the counterfactual, regardless of whether the JV chose to bid for future wholesale contracts.

<u>No incentive to foreclose</u>

3.31 The JV will have no incentive to foreclose wholesale access to its mobile network to Sky, or other fixed-MVNOs, since this would (i) result in the JV sacrificing significant wholesale revenues by bidding less aggressively and risking losing a tender it otherwise would have likely won, (ii) with no realistic prospect of offsetting those lost revenues with sufficient gains in the downstream retail market. In the case of Sky, this would involve sacrificing significant existing wholesale revenues. There is no reason to expect the Transaction to have a material effect on the incentives of the JV post-merger as regards providing wholesale access to fixed-MVNOs.

3.32 First, for the reasons set out above, no incentive to foreclose can arise because the merged entity would not have the ability to foreclose fixed-MVNOs.

3.33 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. This is because any refusal to supply or degradation in the terms on which wholesale mobile services are supplied to Sky or other fixed-MVNOs would not lead to material switching by those MVNOs' fixed customers to the JV. This is true, even if FMC bundles become more prevalent in the UK, for the reasons set out in paragraphs 3.18 to 3.23 above. The absence of any change in incentives following vertical integration was confirmed by BT / EE's behaviour on the wholesale market following the acquisition of EE by BT. In particular, as noted above, BT / EE has continued to compete to host fixed-MVNOs, [Confidential].

3.34 Moreover, the vertical arithmetic analysis conducted by the Parties' economic advisors supports the finding that the JV would have no incentive to foreclose wholesale access to fixed-MVNOs. In

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37 *Hutchison / O2*, paragraph 1936 to 1965.
38 *Hutchison / O2*, paragraph 1966 to 1983.
39 *Hutchison / O2*, paragraph 2043.
40 BT / EE Final Report, paragraph 14.71.
41 BT / EE Final Report, paragraph 13.35.

particular, the vertical arithmetic considers a scenario for Sky specifically where a range of potential price increases are assumed that Sky would face if they were hosted by a competing MNO following a putative foreclosure strategy by the JV.[42] None of the assumed wholesale price increases would be sufficient to drive enough downstream switching of subscribers from Sky to the JV in order for the JV to recoup their foregone wholesale profits with increased downstream profits. This illustrates that the JV would not have the incentive to foreclose Sky as a hosted fixed-MVNO.

No material effects in downstream retail markets

3.35 Even if the JV were to pursue a foreclosure strategy, *quod non*, this would not materially affect the degree of competition in the downstream retail markets. In particular:

(a) Even if the JV could bring about a reduction in the quality of service or higher prices for wholesale mobile services available to one or more fixed-MVNOs, this would not give rise to an SLC. In particular, as accepted by the CMA in *BT / EE*, the extent of any harm brought about by a refusal by the JV to bid for future fixed-MVNO contracts would be limited by the constraint imposed, in the round, by the remaining three MNOs.[43] Fixed-MVNOs would, in particular, be able to secure contracts from other MNOs.

(b) Moreover, there would continue to be effective competition from other FMC providers, including BT / EE and Vodafone, which have their own mobile and fixed networks. The Parties note in this regard that in *BT / EE*, the CMA found that even if BT / EE could have caused Virgin Media – which was at the time the largest provider of FMC bundles in the UK – to be excluded from mobile services entirely, this would not have resulted in a SLC given the presence of other providers of FMC bundles.[44]

(c) As regards the possibility of within-contract partial foreclosure of Sky, given the strict contractual protections in the Sky Agreement, there would be no scope for O2 to engage in a foreclosure strategy which would have a significant effect on competition, let alone give rise to an SLC. This is particularly the case given the credible option which Sky would have to switch to an alternative MNO host and the presence of other competitors in the downstream retail market.

4. THE TRANSACTION WILL NOT RESULT IN AN SLC THROUGH INPUT FORECLOSURE RELATING TO MOBILE BACKHAUL

4.1 The second theory of harm in the Issues Statement relates to the vertical relationship between Virgin Media's upstream supply of wholesale leased lines, in particular to MNOs to use for the purposes of mobile backhaul, and O2's activities as an MNO. Specifically, the Issues Statement indicates that the CMA will consider potential concerns around input foreclosure, i.e. the possibility that Virgin Media would have the ability and incentive to withdraw, degrade or worsen the terms of supply of mobile backhaul to MNOs, and whether this would lessen competition on the retail mobile market.[45]

4.2 The Parties set out below why the CMA's further analysis at Phase 2 should lead it to the conclusion that the Transaction will not give rise to an SLC, since the JV will have neither the ability nor the incentive to foreclose other MNOs and such a strategy would in any event have no material effect on competition on the retail mobile market.

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42 This could arise by the JV not bidding to host Sky in the future, as well as if the JV bid less competitively to such a degree that it lost the tender to another MNO.

43 BT / EE Final Report, paragraph 14.204.

44 BT / EE Final Report, paragraph 14.306.

45 The Parties note that the Issues Statement indicates that the CMA does not intend to assess customer foreclosure in relation to wholesale leased lines, since suppliers will continue to be able to sell leased lines for mobile backhaul to Vodafone and Three (paragraph 39). The Parties agree with the CMA's assessment, but would add that, in turn, MNOs represent only a part of the potential customer base for leased line suppliers, with fixed network operators and large business customers also representing significant sources of demand. In addition, given Virgin Media's limited footprint, O2 will continue to require leased lines from third parties as well.

No ability to foreclose

Limited scope for strategic behaviour due to self-supply, network-sharing arrangements and long-term contracts

4.3 As a threshold matter, the JV's ability to engage in strategic behaviour is extremely limited, as a result of self-supply, network sharing arrangements, 5G backhaul circuits already delivered and long-term contracts.

(i) EE is vertically integrated with BT, the dominant backhaul provider in the UK. [Confidential].[46] There is therefore no possibility of an input foreclosure strategy directed against EE.

(ii) Vodafone is able to rely on its own backhaul capabilities to a very substantial extent. In 2012, Vodafone acquired Cable & Wireless Worldwide (**C&WW**), which owned a network of leased lines roughly comparable in scale to that of Virgin Media.[47] Vodafone now uses the C&WW network for self-supply. In addition, the use of regulated access to BT's ducts and poles ("PIA", discussed further below) allows Vodafone to build further on this network at significantly reduced costs, further increasing the scope for self-supply. Vodafone and Virgin Media signed [Confidential][48] [Confidential].

(iii) Vodafone also shares backhaul with O2 through the Beacon network-sharing arrangements. As explained in detail in the Parties' Phase 1 submissions, the terms of these arrangements would preclude the JV from engaging in any form of foreclosure strategy in the areas in which backhaul is shared, which cover the entirety of the UK with the exception of London, which in any case is characterised by a high degree of competition in the supply of backhaul with multiple rival networks.[49]

(iv) Three is guaranteed backhaul supply by Virgin Media on a long-term, [Confidential] basis under the terms of its [Confidential] existing contracts, [Confidential]. In particular, the contracts involve the provision of dark fibre on an [Confidential].

Ubiquitous availability of regulated backhaul supply from BT Openreach

4.4 In all areas where the JV will be active, MNOs can choose to procure backhaul from BT Openreach. BT Openreach holds a leading position in the supply of mobile backhaul, with a network far more extensive than that of the JV (451,000km compared to the JV's 186,000km). It is required by Ofcom to provide access on regulated terms in all areas other than central London, where BT is not regulated due to the high availability of competing networks, and Hull (where KCom is the legacy incumbent and Virgin Media is not present).[50] BT Openreach even has a duty to build and supply leased line circuits to sites where BT is not present. BT Openreach therefore represents a ubiquitous and continuing alternative to the JV.

4.5 At Phase 1, the Reference Decision noted that the presence of BT Openreach as alternative might not prevent a foreclosure strategy because BT Openreach is not required to offer dark fibre in areas where Virgin Media is present and (it was suggested) the active leased lines which BT Openreach is required

46 [Confidential].

47 Based on the European Commission's analysis of market shares in M.6584 – *Vodafone / Cable & Wireless*, paragraphs 88-89.

48 [Confidential].

49 [Confidential].

50 The currently applicable regulatory regime (under the 2019 Business Connectivity Market Review (**BCMR**)) and the proposed regulatory regime for the 2021-26 period under the Wholesale Fixed Telecoms Market Review (**WFTMR**), as set out in Ofcom's January 2020 consultation, were described in paragraphs 22-55 of Chapter 5 of the Form CO. Under both regimes, BT/EE is/would be designated as having significant market power (**SMP**) in all areas except the Central London Area.

to offer are not a close substitute for dark fibre.[51] The Issues Statement indicates that the CMA will consider the substitutability of active products further as part of its Phase 2 investigation, both in the context of market definition and in assessing the competitive effects of the Transaction.[52] The Parties believe that this further analysis will show clearly that BT Openreach's active products are sufficiently substitutable with Virgin Media's offering to preclude any foreclosure strategy. While there are certain differences in pricing structure and the impact on purchasers' balance sheets, dark fibre customers need to purchase electronic transmission equipment to make use of the fibre which converts the dark fibre into a product that could also be purchased from a supplier as an active product. Active products in the market have the technical ability and bandwidth comparable to the equipment that dark fibre customers can purchase in the equipment market. The constraint posed by BT Openreach's active products is also evident in [Confidential]. [Confidential]. The Parties also note that Ofcom considers dark fibre and active products to be in the same relevant product market and is expected to confirm that assessment in its forthcoming Wholesale Fixed Telecoms Market Review (**WFTMR**) in March of this year.

4.6 The Parties further see tension in the third party submissions that the CMA received on this point at Phase 1, which claimed on the one hand that BT Openreach's active products are not a strong constraint on Virgin Media's dark fibre, such that a foreclosure strategy may be possible in areas where BT is the only alternative, yet, on the other hand, suggested that Virgin Media offers dark fibre on favourable terms in those areas, such that a foreclosure strategy could have a significant negative impact on their costs.[53] It is difficult to reconcile claims that Virgin Media offers low prices with claims that it holds a quasi-monopoly position in the relevant areas. In fact, the evidence will show that [Confidential]. This is again consistent with BT Openreach exerting a significant competitive constraint on Virgin Media and, in any event, precludes Virgin Media from being able to impose a substantial cost increase on MNOs since this would be effectively capped by BT Openreach's prices. The Parties will provide further evidence on these points in due course.

<u>*Expanding presence of additional competitors*</u>

4.7 In addition to alternative supply from BT (whether from Openreach directly or BT Wholesale), other suppliers can and do compete for backhaul demand. For instance, this is evidenced by the number of suppliers invited to participate in O2's recent 5G backhaul tender launched in October 2019 (comprising, [Confidential]), as well as the fact that both Colt and CityFibre have recently been selected as "preferred providers" to supply Three with backhaul.[54] While the footprint of these players may be smaller than that of Virgin Media, they are able to compete for business in areas where they do not have existing infrastructure, as evidenced by the "anchor tenant" strategy pursued by CityFibre, under which it will build out a network in a new city where it can win a sufficiently large wholesale customer and (the Parties believe) will often price very aggressively in order to win such a tenant, with a view to adding further customers to the new network in due course at low additional costs. The competitive constraint through CityFibre is evident in the Three tender for 5G mobile backhaul, for which the Parties believe [Confidential]. Given CityFibre's current footprint, it must be the case that CityFibre was able to convince Three that its roll-out would be sufficiently fast, presumably helped by PIA regulated access (see 4.9 below). The current footprint of CityFibre therefore significantly underestimates CityFibre's ability to compete in mobile backhaul. Considerations on footprint also need to be put into perspective due to the importance of London: [Confidential].

51 Paragraphs 26 and 46.

52 Paragraphs 25 and 38(a).

53 Compare e.g. paragraphs 26, 49 and 52 of the Reference Decision.

54 On 18 February 2020, CityFibre announced that it had been chose as a preferred provider for Three's 5G rollout outside London (CityFibre press release, "CityFibre chosen as a preferred provider of full fibre capacity for Three's 5G's rollout nationwide"), and on 4 September 2020 CityFibre announced that this partnership had been expanded to an additional 1,300 masts across 59 towns and cities (CityFibre press release, "Three expands Full Fibre connectivity partnership with CityFibre"). On 8 October 2020, Three announced a partnership with Colt as a "preferred provider" to further diversify its fire backhaul capacity and support its 5G roll-out. See Three press release, "Three UK further diversifies its fibre backhaul capability", 8 October 2020.

4.8 The expansion of competing suppliers is explicitly acknowledged in Ofcom's WFTMR consultation, with regulations expected to come into force in April 2021. In its geographic market definitions, Ofcom includes planned build-out up to 2026.

Lower barriers for third party and self-supply due to PIA regulation

4.9 The availability of alternative supply is likely to continue to increase, as networks expand to meet demand for fixed full-fibre connections supported by a pro-competitive regulatory environment. In the 2019 BCMR, Ofcom imposed unrestricted charge-controlled access to BT's physical infrastructure (Physical Infrastructure Access or **PIA**), and Ofcom's proposed regulatory approach for 2021-26 in the WFTMR is intended to encourage further network roll-out by further increasing access to BT's physical infrastructure and preserving investment incentives. Ofcom estimates that the number of postcode sectors with at least two alternative "multi-service networks", defined as Virgin Media and, CityFibre,[55] will increase from 15 postcode sectors to 1,639 postcode sectors by the end of 2025, leading to a coverage increase from 0.2% of all UK premises to 21% of all premises.[56] In addition, there are further "leased line only" networks, which are mainly concentrated in the 759 postcode sectors covering High Network Reach and the Central London Areas. In these areas, Ofcom's data suggests that the average number of networks based on 2019 BCMR data is 4.3 in the Central London Area, and 2.4 outside.[57]

4.10 Access to BT's duct and pole infrastructure, combined with readily available suppliers of fibre pull/splicing services, means the barriers to entry for provision of dark fibre services are extremely low. This is evidenced by the prevalence of use of PIA by alternative network providers, including CityFibre, which have successfully used it to deploy full fibre infrastructure. Such access is very competitively priced, which ensures that new entrants and expanding players can compete effectively against existing players such as Virgin Media.

4.11 In addition to use of PIA by alternative networks, the Parties believe that PIA-based self-build represents an alternative to third-party supply for MNOs – in particular for Vodafone which, as noted above, already has substantial fixed network assets of its own. [Confidential].

No incentive to foreclose

Any foreclosure strategy would be self-defeating given alternatives available to MNOs

4.12 BT / EE's ubiquitous presence and regulatory obligations will continue to provide an incentive for the JV to supply backhaul. The existence of this alternative and its regulated prices impose an effective constraint on the JV's backhaul prices, rendering any putative foreclosure strategy self-defeating. This has been confirmed by an exhaustive vertical arithmetic analysis conducted by the Parties' economic advisors at Phase 1 in light of, in particular, the CMA's previous analysis of this question in the context of its review of BT / EE, which shows that the upstream losses associated with any total or partial foreclosure strategy would be orders of magnitude larger than any putative profit increases in the downstream retail mobile market. The Parties welcome their engagement with the CMA on this analysis to date, and look forward to discussing it further as the CMA's investigation progresses. In particular, the Parties intend to submit an updated version of the analysis reflecting [Confidential].

55 WFTMR consultation, January 2020, volume 2, paragraph 7.20

56 WFTMR consultation, January 2020, volume 2, tables 7.2 and 7.3

57 WFTMR consultation, January 2020, volume 2, paragraph 7.78 and tables 7.5 and 7.6. This also includes FibreNation, which was acquired by CityFibre in March 2020, see https://www.cityfibre.com/news/cityfibre-completes-acquisition-fibrenation-increasing-rollout-plans-pass-8-million-premises/

<u>Withdrawing from the supply of dark fibre would entail significant upstream losses</u>

4.13 The Issues Statement notes that one potential input foreclosure strategy which the CMA will consider is that the JV could choose to offer only active fibre leased lines, rather than dark fibre.[58] This appears to reflect suggestions in the Reference Decision that the JV might be able to pursue a foreclosure strategy in this way without a significant sacrifice at wholesale level.[59] The Parties disagree with this and believe the evidence strongly supports their view.

4.14 The Parties note that such a strategy could only raise concerns if the cost increase resulting from a putative price increase represented a significant share of rivals' costs, but, as explained above and below, that is not the case. In addition, such a strategy would in fact entail significant upstream losses for the JV. Dark fibre represents a means for Virgin Media to differentiate its offering and offset the competitive disadvantage it faces against BT's ubiquitous presence and existing fibre connections. Ceasing to offer dark fibre would result in the JV losing business to BT, as well as to other competitors and to self-supply by MNOs. It would also forgo [Confidential].[60] [Confidential].

4.15 Any incentive to foreclose would therefore need to be premised on downstream gains that outweigh significant upstream losses. But as the Parties' economic analysis at Phase 1 shows, in detail and by reference to the specific circumstances of Vodafone and Three, any downstream gains would be far below a level capable of offsetting those upstream losses.

<u>A foreclosure strategy against Vodafone would harm the JV's own network and its wider business</u>

4.16 A further reason why the JV would have no incentive to pursue a foreclosure strategy arises from the Beacon network sharing arrangement between O2 and Vodafone. The JV will rely on the Vodafone network (including shared backhaul) in approximately half the country. Disrupting the Vodafone network would thus undermine the JV's own retail offering.

4.17 In addition, Virgin Media supplies [Confidential]. This attractive business would likely be jeopardised by attempting to foreclose Vodafone in the supply of leased lines for mobile backhaul purposes, incurring additional upstream losses.

<u>No anticompetitive effects</u>

4.18 Even if the JV had the ability and incentive to foreclose, any putative foreclosure strategy could not have any effects on downstream competition in the retail mobile market. This would require such a strategy to result in a substantial increase in MNOs' prices at retail level and/or a significant deterioration in quality. Neither could plausibly result, in light of the constraints outlined above.

4.19 In relation to pricing:

(i) As described above, BT Openreach's prices represent an effective constraint on the price increase the JV could theoretically impose. Even if the JV were to (unprofitably) foreclose access to Virgin Media's infrastructure in respect of a given site, its rivals would be able to switch to BT / EE's price-regulated alternative. Since Virgin Media [Confidential], any cost increase at that site would be very limited.

(ii) The Issues Statement notes that its assessment of the effects of a foreclosure strategy will take into account the roll-out of 5G technology.[61] In this context, the Parties [Confidential].[62]

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58 Paragraph 37.
59 Paragraph 52 and footnote 52.
60 [Confidential].
61 Issues Statement, paragraph 38(c).
62 As noted in the Parties' Phase 1 submissions, [Confidential].

(iii) Even taken in aggregate, an MNO's backhaul costs represent a very small proportion of the costs that influence retail pricing. This was recognised as an important factor excluding foreclosure concerns in the CMA's *BT / EE* decision, and remains the case today. The Parties estimate that backhaul costs (including self supply) represented just [Confidential] of Telefónica UK's total incremental costs in 2019,[63] implying that even a substantial increase in backhaul costs across an MNO's entire network would not affect total costs or pricing significantly. While the Parties do not have direct knowledge of other MNOs' cost bases, they do not see why they would differ to the extent that has apparently been put to the CMA, and would encourage the CMA to test those claims robustly.

(iv) Again, the Parties do not believe this will change even if demand for data increases significantly with 5G roll-out. The Parties have presented in their Phase 1 submissions an analysis of the size of O2's backhaul costs both now and in the future, taking into account O2's internal projections. The analysis shows that backhaul costs will remain a very modest proportion of total costs.[64]

(v) In fact, even considering this (very small) ratio of overall backhaul costs to other costs substantially *overstates* any foreclosure potential, since any cost increase could conceivably apply only to a small proportion of cell sites, not an MNO's entire network:

(A) Only the sub-set of sites located within Virgin Media's footprint (covering around half the UK) could even theoretically be affected.

(B) At Phase 1, the CMA's analysis in the Reference Decision focused on the possibility that the JV might have the ability to worsen the terms of supply in areas where BT is the only alternative supplier. In much of Virgin Media's footprint, Virgin Media faces further competitors in addition to BT, meaning any price increase could relate only to a sub-set of a sub-set of sites. An analysis of O2's own network indicates that only around [Confidential] of O2 sites fall within areas where Virgin Media is present and BT is the only alternative supplier. Moreover, the dense urban areas which are the focus of the first phase of 5G roll-out are characterised by the presence of alternative providers, as illustrated by O2's own recent backhaul tender and CityFibre's partnership with Three described above.

(C) In the case of Vodafone, this area would be further limited to areas outside the scope of the Beacon network sharing arrangements with O2. [Confidential].[65]

(D) Since pricing for existing orders is set under long-term contracts, as described above, only future orders that are both outside the scope of those contracts and within this limited area could be affected.

4.20 By way of illustration, after taking into account self-supply, the limited network reach of the Virgin Media network and contractual protections, calculations show that the JV would only be able to impact around [Confidential] of Three's incremental costs. Since BT Openreach is always a similarly priced competitor, withholding backhaul (to the extent feasible) would only result in an incremental cost increase for Three in the region of [Confidential].[66]

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63 Around [Confidential] of O2's network costs, [Confidential] of Telefónica UK's direct cost and [Confidential] of Telefónica UKs' total cost. Telefónica UK covers both retail and wholesale MVNO costs.

64 [Confidential].

65 [Confidential].

66 [Confidential], the Parties consider that the JV could not impact Vodafone's costs at all. However, even before [Confidential], the extent of any cost increase that might theoretically have resulted from the JV withholding supply was similarly *de minimis*, as shown in the vertical arithmetic presented at Phase 1.

4.21 Overall, therefore, even if the JV were able to increase costs by withdrawing from the supply of dark fibre (or increasing prices for its products) in areas where BT is the only other supplier, this could at most involve a small cost increase at a minority of cell sites, representing a small proportion of backhaul costs which, even taken in aggregate, amount to a *de minimis* proportion of total costs. It is simply not plausible that this would result in a material increase in retail mobile prices, which are set on a national basis. This will not change with 5G roll-out.

4.22 Beyond price, the Issues Statement notes that the CMA will consider the scope for a foreclosure strategy involving stopping or delaying the roll-out of passive fibre leased lines so as to reduce MNOs' network coverage.[67] The Parties do not see how such a strategy could conceivably affect competition at retail level. Given the availability of backhaul supply from BT in all areas, and competitive supply in many areas along with the possibility of self-supply, MNOs simply do not depend on Virgin Media for their ability to deploy network infrastructure and offer mobile services in any area.

4.23 Indeed, Ofcom has noted that BT Openreach will typically be able to provide a new link more rapidly than its rivals, due to its ubiquitous existing physical infrastructure,[68] and other providers have achieved considerable success in winning contracts to support 5G roll-out, as evidenced by Three's selection of Colt and CityFibre as preferred providers. While volumes have also been awarded to Virgin Media by Three, the [Confidential] nature of the contract precludes any disruption to Three's roll-out. Vodafone, meanwhile, not only benefits from similar protections in respect of [Confidential], but in addition, the network sharing arrangements with O2 mean that any disruption would harm the JV's ability to offer 5G services to its own customers.

4.24 In any event, backhaul costs are not a determining factor in MNOs' decisions on whether and when to rollout new technologies, including 5G, which are driven instead by customer demand and the need to maintain a competitive network offering. EE, in particular, leads the way in 5G deployment, placing strong competitive pressure on other MNOs to roll-out 5G.[69] The Transaction will not change this competitive dynamic. Moreover, since 5G technology allows for more efficient use of spectrum than 4G, MNOs will remain incentivised to rollout 5G to new areas regardless of any hypothetical increase in associated backhaul upgrade costs.

4.25 The Parties are therefore confident that, on further analysis, the CMA will be able to conclude that the potential effects of a hypothetical foreclosure strategy would be far too small to materially affect competition on the retail mobile market. This in turn reinforces why the JV would have no incentive to pursue such a strategy in the first place.

4 February 2021

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67 Issues Statement, paragraph 37.

68 WFTMR Consultation, Volume 2, paragraph 5.27: *"BT can provide new network links more rapidly than competitors as the ubiquity of its network significantly reduces the need for the construction of new physical infrastructure"*.

69 See Rootmetric, UK Mobile Performance in Review 2H 2020: UK-wide, nation, and metro area results, January 2021 available at: https://rootmetrics.com/en-GB/content/uk-mobile-performance-in-review-2H-2020.