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Ronan Scanlan
Principal Case Officer,
Competition and Markets Authority
Victoria House
Southampton Row
LONDON
WC1B 4AD

3rd July 2015
By e-mail

Reference: Proposed acquisition of EE Limited (“EE”) by British Telecommunications plc (“BT”)
NON-CONFIDENTIAL

Gamma Telecom Holdings Limited (“**Gamma**”) welcomes the commencement of the Phase II investigation by the Competition and Markets Authority (“**CMA**”) into the potential acquisition of EE BT (the “**Acquisition**”).

We also welcome the invitation from the CMA to make further submissions on the Acquisition to inform its work. At this time there is nothing substantively different that we wish to say beyond our input into and prior to Phase I, however, we would like to reinforce and elaborate on a few points.

Wholesale Mobile Access

Gamma especially notes that the CMA has focussed on the issue of Wholesale Mobile Access as being a risk area in the Acquisition. It will be no surprise that Gamma supports this from our initial submissions. [REDACTED]

[REDACTED] we have drawn up a technical definition of what we would consider to be an appropriate remedy at Appendix 1 to this submission. We have also taken the liberty of copying this letter to Brian Potterill at the Office of Communications (“**Ofcom**”) whom we understand to be working on Ofcom’s own input to the CMA in this area.

We trust it is useful and helps inform the forthcoming debate; our Chief Architect, Mobile Design Authorities and myself are at your disposal to talk through the detail with the CMA and/or its technical advisors if required.

Finally, in this area, we referred in Phase I to our experience [REDACTED] and the barriers to entry and signs of oligopolistic behaviour from the Mobile Network Operators (“**MNOs**”), e.g. [REDACTED]

[REDACTED]; on the presumption there is a hearing to which Gamma is invited, we would welcome the opportunity to expand on these issues in more detail.

Access Dominance

Gamma appreciates that the current “scope” of the Phase II Investigation is not concrete. We absolutely recognise and support the current scope as encompassing two of the most pivotal aspects of the Acquisition, but there are equally other areas that cannot be ignored. We would like to reinforce points we have made previously about the combined BT/EE entity having significant dominance across a variety of “access media”; be that the final mile/local loops of fixed access in BT’s Openreach division, spectrum in EE (noting both the addition of BT’s



spectrum and it not being coextensive with the other operators relative to market share), or WiFi across both. Much of the competition in retail telecommunications relies on there being an effective distribution system free of distortions and malpractice – the combined BT/EE entity has the ability to raise many drawbridges, not just those relating to Wholesale Mobile Access and associated backhaul.

Hutchison 3G UK Limited (“H3G”) and Telefonica O2 UK Limited (“O2”)

The economic concept of Joint Dominance is one that has grown in traction over recent years; to this end we reiterate our position that the proposed merger of H3G and O2 cannot be considered independently of this Acquisition, especially given the current “scope” of the Phase II Investigation. A small number of large undertakings, such as we will see if both transactions proceed, can, without explicit collusion, act in an anti-competitive manner.

Whilst the merits of the decisions in *Gencor Limited v Commission of the European Communities*¹ and *Airtours plc v Commission of the European Communities*² can be debated *ad nauseum* and the market definitions in each case and the Acquisition are different, there are striking similarities when taking H3G/O2 and BT/EE together.

Gamma welcomes the CMA’s reference to this situation in the Phase I Decision, and we would appreciate further guidance from the CMA on how it considers these matters will evolve so best to inform our engagement with the relevant authorities and are more than happy to discuss our concerns in a hearing if appropriate.

In the meantime, we would suggest that the initial Access Charges set by the MNOs at a retail level for the imminent implementation of Ofcom’s changes to the market for non-geographic calling services point to an oligopolistic market with features of joint dominance as it stands, even without the proposed transactions taking place and are worthy of at least a preliminary exploration by the CMA at this stage.

Foreign Ownership

Gamma understands that Deutsche Telekom (“DT”) will take a 12% stake (with one Board Member appointment guaranteed) in BT as a result of the Acquisition. There have been rumours in the national press that DT will use cash it generates from divestments in North America to fund increasing that stake.

Whilst powers exist for the Secretary of State under Section 94 of the Telecommunications Act 1984 to give directions in relation to the Acquisition in terms of national security, we feel it is unlikely that DT’s holding and position at this stage would be troublesome. This is especially given that further substantial acquisition of BT’s equity by DT may trigger a second review by relevant authorities.

However, the question of whether or not DT’s proposed stake in a combined BT/EE merger is a position of material influence, to use the phrasing of the Enterprise Act 2002, is far more relevant. DT and BT compete directly for multinational business customers; both DT’s T-Systems and BT’s Global Services divisions compete with each other for business in the market for systems integration. Is the proposed stake for DT a strategic one? Is it a vehicle for collusion? We would suggest that a condition of this stake being sold down or disposed of to a less material level (and/or having a competitor on your Board being prohibited) should be considered as part of Phase II in light of these potential conflicts in spite of the comments in the Phase I Decision. We say this, primarily, because (appreciating that not every aspect of the CMA’s logic can be articulated in such documents) that the discussion around it appear, *prima facie*, to be on the historic evidence of previous board meetings and not in the context of possible future activity or the interaction of their respective trading arms mentioned above.

Ofcom’s Strategic Review of Digital Communications

¹ Judgement of the Court of First Instance of 25th March 1999 case T-102/96

² Judgement of the Court of First Instance of 6th June 2002 case T-342/99

We note that this is proceeding at a reasonable pace and we expect a consultation from Ofcom in the coming weeks. There is, obviously and understandably, currently significant overlap in the matters we consider the CMA and Ofcom should be looking at. As a general point of order, it would be useful for a clear signal of demarcation, when and if appropriate, from the CMA and Ofcom so that we avoid duplication in submissions and engagement.

Finally on this point, we note that the powers conferred to the CMA during a transaction such as the Acquisition afford it more flexibility to enact remedies than Ofcom in a “business as usual” context; we have previously raised the issues of the performance of BT’s Openreach division and the competitive impact it has – whilst Ofcom’s Strategic Review of Digital Communications may appear to be a more suitable forum for some of these concerns to be aired and analysed, it is likely that the CMA will be more empowered to deal with them in the context of the Acquisition and we urge Ofcom and the CMA to give this homogeneity of powers due consideration if dividing responsibilities at some point.

We trust this submission was useful and look forward to working with the CMA further as the investigation proceeds.

Yours sincerely,

Peter J Farmer
Head of Regulatory Affairs

Cc Brian Potterill, Ofcom
Enc Technical Specifications Document

Appendix 1 Definition of Wholesale Mobile Access

For some time Gamma has been advocating “Wholesale Mobile Access” as a remedy for increasing market influence of a small number of MNOs in the UK.

The current round of proposed consolidation in the marketplace means that it is imperative wholesale competition is protected to provide the right outcomes at a retail level.

The attached paper, prepared by specialists from Altran, shows the options available that have been deployed in a number of countries around the world to varying degrees.

Some of these options are already deployed in the UK by the MNOs themselves to support their Radio Access Network sharing agreements through Mobile Broadband Network Limited and Cornerstone Telecommunications Infrastructure Limited.

Gamma recommends that option 2 in the attached paper, Multi-Operator Core Network is the best immediate remedy to open wholesale mobile access to a significantly broader base than the 3 MNOs that will exist by the end of 2016, each of whom will have significant market power.

In the case of remedial action involving distribution of spectrum to other players in the market, or as additional spectrum is allocated by Ofcom, option 1, Multi-Operator Radio Access Network could also be mandated to enable access to the existing national mobile footprint, and allow innovative use of the supporting radio infrastructure to significantly extend reach and penetration of mobile signals across the UK.

We stress that this paper is focussed on a third-generation mobile network and we may make a further, short, technical submission on the required changes to make it compatible with a fourth-generation radio and mast infrastructure.