BT/EE

RESPONSE TO PROVISIONAL FINDINGS

DISSENTING OPINION

1. Introduction

1.1. The Parties are concerned that the dissenting opinion on wholesale mobile is based, in part, on a misunderstanding of the requisite legal and evidential standards.

1.2. First, the PFs state that the dissenting members considered that the merged entity "*would have the incentive to harm fixed-MVNOs, either by refusing to supply them, or, more probably, by restricting the range and quality of services offered*". The PFs further state that the relevant panel members expected that EE's putative total or partial withdrawal would lead to "*higher prices and/or reduced quality in MVNO contracts*" and that this is sufficient in itself to establish an SLC, "*irrespective of the effects downstream, which were harder to assess*".[1]

1.3. This does not appear to be consistent with the CMA's function, its policies set out in its guidance, nor the established practice of the European Commission (the ***Commission***). The Parties consider that it would not meet the required legal standard to find a putative SLC "*irrespective of the effects downstream*". The relevant downstream services, as defined in the PFs, are the retail supply of standalone mobile serviced and bundled/cross-sold fixed-mobile services. As set out in Section 2 below, an SLC cannot be found without an expectation, meeting the requisite evidential standard, of a material adverse effect on the relevant downstream retail market(s).

1.4. Second, the PFs then state that "*They nonetheless thought it likely that there would be adverse effects downstream as a result of reduced rivalry in the upstream market*." [2] The Parties consider that in order to find an SLC in wholesale mobile, the CMA must evaluate and quantify whether there are any adverse effects downstream in the retail market and must conclude that this would be the case on the balance of probabilities (i.e. *more likely than not*), based on a proper evaluation of all of the evidence. The CMA is not permitted simply to presume that effects on the retail market will follow any reduction in rivalry upstream.

1.5. It is not clear from the face of the PFs whether the dissenting members' expectation of "likely" adverse downstream effects meets the "more likely than not" standard. The Parties consider that the fact that the PFs state that their views are "*irrespective of the effects downstream*" suggests that this standard has not been met, which is further supported by the PFs' report that the dissenting members' acknowledged that downstream effects in this case were

[1] Paragraph 14.279 of the PFs.

[2] Ibid.

"*harder to assess*". In any event, the evidence does not support any conclusion, either on the balance of probabilities or at all, that the Transaction would lead to an adverse effect downstream in relation to the retail sale of standalone mobile services or bundled/cross-sold fixed-mobile services.

2. Guidance indicates a need to show effects on the downstream market

2.1. The CMA's Merger Assessment Guidelines state that "*To the extent that the merged firm has both the ability and incentive to increase prices so as to foreclose to some extent its rival manufacturers, the Authorities will consider the impact of such foreclosure on competition in the downstream market*."[3] The Merger Assessment Guidelines therefore state that the impact on competition in the downstream market will be considered.

2.2. The question of whether this effect could be presumed was considered in drafting the Merger Assessment Guidelines. The 2009 draft version of the guidelines which was published for consultation contained a statement that "*In practice, if the OFT—in its role as a first screen in merger control—concludes that there is a realistic prospect that the merged firm will have the ability and incentive to engage in input foreclosure, it may presume that such foreclosure will also have an adverse effect. However, this presumption may be rebutted if there is clear evidence to the contrary. By contrast, the CC—as the determinative body in merger control role—will instead assess what would be the likely adverse effect of a profit-enhancing customer foreclosure strategy*."[4] Thus, at Phase 2, it was clear that effects must be considered. In fact, the concept of effects not being considered at Phase 1 was "*strongly challenged*" by several respondents[5], such that the final version of the guidelines unambiguously state that downstream effects must be considered throughout the review process, as set out in paragraph 5.6.7 ("*all three questions [ability, incentive and effect] must be answered in the affirmative*") and in paragraph 5.6.12 ("*the Authorities will consider the impact of such foreclosure on competition in the downstream market*"), as set out above. The CMA therefore considered whether there was any scope for a presumption of adverse effects (even so, only at Phase 1) and rejected it.

2.3. This must also be considered in the context of the CMA's statutory objective which states that "*The CMA must seek to promote competition, both within and outside the United Kingdom, for the benefit of consumers*"[6] (emphasis added).

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[3] Paragraph 5.6.12, Revised Merger Assessment Guidelines (CC2/OFT1254).

[4] Paragraph 4.145, Merger Assessment Guidelines consultation document, April 2009, http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.competition-commission.org.uk/about_us/our_organisation/workstreams/analysis/pdf/mergers_guidelines.pdf.

[5] Paragraph 52, Summary of respondents' submissions and the Authorities' responses, http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.competition-commission.org.uk/about_us/our_organisation/workstreams/analysis/pdf/response_to_consultation.pdf.

[6] Section 25(3), Enterprise and Regulatory Reform Act 2013.

As recognised in paragraph 9 of the PFs, the CMA's role is to "*protect competition for the benefit of consumers, not the commercial interests of competitors*". The dissenting opinion, which does not rely on an effect on the downstream market to find an SLC, is not consistent with this acknowledged legal focus on consumers.

2.4. The UK Guidelines were published pursuant to section 106 of the Enterprise Act 2002, which states that: "Advice and information published under this section shall be prepared with a view to -

(a) explaining relevant provisions of this Part to persons who are likely to be affected by them; and

(b) indicating how the [CMA] expects such provisions to operate."

It would be irrational and unfair for the CMA to depart from its published guidance by failing properly to consider downstream effects. This is especially the case given that there is no indication that there are particular characteristics of this case which suggest that the policy set out in the Merger Assessment Guidelines should not apply.

2.5. Furthermore, the need to consider downstream effects is consistent with the approach followed by the Commission in assessing mergers subject to the EU Merger Regulation.

2.6. The Commission's Guidelines on the Assessment of Non-Horizontal Mergers (the ***EU Guidelines***) state that the Commission examines ability, incentive "*and third, whether a foreclosure strategy would have a significant detrimental effect on competition downstream".*[7] There is no suggestion in the EU Guidelines that an analysis of ability and incentive is sufficient, in itself, to establish a significant impediment to effective competition.

2.7. The Commission elaborates on the importance of effects on end consumers as follows: "*In the context of competition law, the concept of 'consumers' encompasses intermediate and ultimate consumers. When intermediate customers are actual or potential competitors of the parties to the merger, the Commission focuses on the effects of the merger on the customers to which the merged entity and those competitors are selling. Consequently, the fact that a merger affects competitors is not in itself a problem*"[8] (emphasis added). This makes it clear that the Commission considers effects on a downstream retail market, and not just an intermediate wholesale market.

[7] Paragraph 32, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07).

[8] Paragraph 16, EU Guidelines.

3. Any adverse effects must be evaluated to a standard of the balance of probabilities

3.1. The dissenting opinion states that the dissenting panel members "*nonetheless thought it likely that there would be adverse effects downstream as a result of reduced rivalry in the upstream market*." As set out above, there can be no presumption that this is the case purely as a result of conclusions that the merged entity would have the ability and incentive to operate an upstream foreclosure strategy. Therefore, any conclusion relating to downstream effects must be based on an analysis of the evidence and a decision that, on the balance of probabilities (i.e. a likelihood of greater than 50%) there would be a material adverse effect in the downstream retail market.[9] The Parties are concerned that the dissenting analysis has not met this standard, particularly in the light of the statement in the PFs that the dissenting members acknowledged that downstream effects in this case were "*harder to assess*". As set out in Sections 6 and 7 of the Parties' response to the PFs on wholesale mobile and mobile backhaul, a final finding that there would be an SLC would need to meet all of the necessary conditions on the balance of probabilities, both cumulatively and individually, which requires a far higher degree of certainty for each independent step in the analysis.

3.2. In addition, any assessment of the downstream effect would need to be consistent with the CMA's own analysis of competition in the retail mobile market (in relation to which no dissenting view has been expressed). For example, at paragraph 10.61 of the PFs, the CMA states that *"[a]lthough MVNOs have increased their share of revenue over time, individual MVNOs do not appear to be exerting very strong constraints…"*. Similarly, paragraph 13 of the summary of the PFs explains that *"[the CMA's] provisional view is that, pre-merger, the retail mobile market is competitive, with close competition among the four MNOs and with limited additional competition from the MVNOs"* (emphasis added). In paragraph 11.72, the CMA also states that "*the ability of BT to cross-sell to its fixed customer base would not provide BT with a unique strength which other MNOs, MVNOs or other service providers in both the residential and business sectors were unable to replicate by cross-selling in other ways*." As the CMA's theory of harm posits that the merged entity would have the incentive to foreclose certain individual MVNOs which also provide fixed services, any analysis of the merger's downstream effects on the retail sale of standalone mobile services or fixed-mobile bundles would need to take account of (among other things):

(a) the historic limited constraint of those individual MVNOs (as found by the CMA) either as mobile-only suppliers or fixed-mobile suppliers; and

[9] This is also the case in relation to the conclusions set out in paragraph 14.278 of the PFs in relation to the merged entity's incentives. The PFs states that the merged entity would have the incentive to harm fixed MVNOs "either by refusing to supply them, or, more probably, by restricting the range and quality of services offered." The relative probability between the scenarios is not relevant – such a conclusion should only be reached if it is more likely than not on the balance of probabilities.

(b) separately, the existence of other suppliers (ie. MNOs) which would remain able and incentivised to sell standalone mobile services or bundled/cross-sold fixed-mobile services.

3.3. Moreover, without doing a detailed, quantified analysis of the likelihood and scale of adverse downstream effects, it would not be possible for the CMA to identify appropriate remedies or evaluate the proportionality of potential remedies in resolving the (putative) SLC and its adverse effects. The CMA's Merger Remedies guidance states that, in deciding on whether any remedies are required, the CMA "*will seek to ensure… that no remedy is disproportionate in relation to the SLC and its adverse effects*."[10] In some circumstances, "*even the least costly but effective remedy might be expected to incur costs that are disproportionate to the scale of the SLC and its adverse effects (for instance if the costs incurred by the remedy on third parties were likely to be greater than the likely scale of adverse effects)*."[11] Given the speculative nature of many of the assumptions needed to reach an SLC finding in this case, and the fact that any remedy relating to wholesale mobile carries a material risk of creating market distortions, proportionality would be a very relevant consideration in this case.

4. Conclusion

4.1. The dissenting opinion on wholesale mobile in the PFs relies on an impact on competitors at the MVNO level and claims that "*this in itself established an SLC in the wholesale mobile market*". The Parties doubt this is consistent with the CMA's established practice and guidance as to its approach. In order to find an SLC, the CMA would need to find, on the balance of probabilities, that:

(a) the merged entity would have the ability to carry out a foreclosure strategy; and

(b) the merged entity would have the incentive to do so; and

(c) such a foreclosure strategy would have a quantifiable, and quantified, adverse effect on the downstream retail market for standalone mobile services or bundled/cross-sold fixed-mobile services.

4.2. The dissenting members' provisional conclusion does not appear to satisfy this test. In any event, the evidence does not support such a conclusion, as set out in preceding parts of chapters 13-14 of the PFs.

[10] Paragraph 1.9, Merger Remedies, CC9.

[11] Paragraph 1.12, Merger Remedies, CC9.

BT/EE

RESPONSE TO PROVISIONAL FINDINGS

WHOLESALE MOBILE AND MOBILE BACKHAUL

1.1 BT Group (***BT***) and EE Limited (***EE***) (together, the ***Parties***) welcome the CMA's provisional findings (***PFs***) that the proposed merger (the ***Transaction***) will not lead to a substantial lessening of competition (***SLC***) in any market in the UK.

1.2 The Parties operate in a highly regulated space and face vigorous competition from, among others, the numerous third parties who have contributed to the CMA's review to date. Against that background, and given that the Transaction brings together largely complementary businesses, the Parties consider that there can be no possible lessening of competition as a result of the Transaction in any relevant market.

1.3 The Parties provide below some additional information on the wholesale mobile and mobile backhaul chapters, which they consider will be helpful as the CMA continues with its review.

WHOLESALE MOBILE

2. Introduction

2.1 The Parties support the CMA's provisional conclusion that BT's proposed acquisition of EE will not lead to an SLC in the wholesale mobile market.

2.2 In order to assist the CMA throughout the remainder of its review, the Parties provide below responses to certain aspects of the analysis in the PFs, which further strengthen the conclusion that there cannot be an SLC in wholesale mobile.

3. The approach to defining "fixed-mobile bundles" overstates the competitive importance of such "bundles"

3.1 The "prevalence" of "fixed-mobile bundles" is a necessary (but not sufficient) condition for both of the foreclosure strategies considered by the CMA. The PFs explain that the term "fixed-mobile bundles" has been used to encompass all scenarios where a customer purchases both mobile and fixed services from the same supplier.[1]

3.2 As set out in, *inter alia* BT's Initial Submission, the Parties intend, with good reason, primarily to cross-sell products to customers following the Transaction, rather than bundle fixed and mobile services under a single contract.[2]

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[1] See in particular paragraphs 13.18-19.

[2] The PFs acknowledge that in [**CONFIDENTIAL – DISCLOSED TO BT**] (paragraph 14.154). "BT One Phone", by contrast, is a "converged" service for business customers [**BT CONFIDENTIAL**].

3.3 Yet, as the PFs acknowledge, *"if a significant proportion of bundling is just cross-selling without a discount or contractual tie, then projections of the future level of bundling will tend to overstate the competitive importance of bundles."*[3] In turn, widely construing the term "fixed-mobile bundles" will tend to overstate both the ability and the incentive of the merged entity to engage in any of the foreclosure strategies outlined by the CMA, as well.

3.4 The CMA should therefore acknowledge in its final report that the approach taken to defining "fixed-mobile bundles" is conservative. Given the central importance of the "prevalence" of "fixed-mobile bundles" for both the CMA's total foreclosure and partial foreclosure theories of harm, this would further strengthen the CMA's "no SLC" conclusion.

4. "Fixed-mobile bundles" cannot be expected to become "prevalent" in the future and customers will continue to unbundle

4.1 Forecasts provided by operators and cited in the PFs indicating that "fixed-mobile bundles" will become "prevalent" are very tentative. For example, "*perhaps more than 40%*" of households will purchase fixed and mobile services from the same operator by 2019, as per paragraph 13.21 (emphasis added). They also do not reflect the experience of operators in the UK to date. Moreover, as recognised in the PFs at paragraph 11.62, 40% of households translates to *"a much smaller figure of around 15% when expressed as a proportion of mobile subscriptions"* (this could be acknowledged again in paragraph 13.21).

4.2 The PFs point to a number of demand-side and supply-side factors that might be expected to influence the prevalence of "fixed-mobile bundling" in future and by no means do all of these suggest that such "bundling" would increase.[4] Furthermore, by and large these factors are already present in the market pre-merger and yet the prevalence of bundling remains low. For further details of operators' experience to date, see the Parties' submissions in Annex L (*Bundles*) of the Merger Notice and in response to the hearing summaries of third parties.[5] It is also notable that Virgin Media – the operator with most experience of trying to sell "fixed-mobile bundles" in the UK – stated at its hearing with the CMA that "*its projections in the sector remained relatively modest*".[6] As noted in paragraph 8.3 below, Virgin Media has not sought to argue that there could be an uptake in "fixed-mobile bundles" (either within its current MVNO contract or in the longer term) sufficient to give rise to a change in incentives for the merged entity.

4.3 Whilst Appendix H to the PFs sets out a variety of evidence on the factors that could in theory drive the possible future uptake of "fixed-mobile bundles" and the CMA has correctly noted the uncertainty inherent in the predictions, it is

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[3] Paragraph 13.19.

[4] In particular, in paragraphs 14.140-14.155, which include evidence that no such increase is likely.

[5] In particular, see [**CONFIDENTIAL TO BT/EE]**

[6] Paragraph 51, Virgin Media hearing summary.

clear that there are a number of conflicting views and little consensus. Where there does appear to be a degree of consensus is in respect of the consideration that "fixed-mobile bundles" have only been successful where operators have been able to discount such "bundled" propositions heavily, compared to individual fixed and mobile products. However, such heavy discounting would not be possible in the UK, as the CMA acknowledges in paragraph 14.143.[7] Furthermore, the data included in the evidence presented to the CMA may not all be comparable and, as acknowledged in Appendix H, some evidence may also include data that are less robust.[8]

4.4 In respect of unbundling, the PFs state that the CMA has "received no direct evidence" on the economically relevant question of whether "current and potential future customers would unbundle their purchases in response to a price rise".[9] However, as noted in previous submissions, customers are attracted to bundled offers principally because of price.[10] Any undue price rise for bundled offers could therefore be expected to lead to customers unbundling. As acknowledged in the PFs, Ofcom's finding in its 2014 review of the wholesale broadband access market supports this view.[11]

4.5 In addition, research from BT suggests that buying fixed and mobile services from the same operator is the least important factor for users when buying mobile services (and that, instead, price is key): see [**BT CONFIDENTIAL**].[12]

4.6 There is no reason to believe that this would be different for potential future customers. [**BT CONFIDENTIAL**] which is indicative of the fact that customers would continue to be likely to unbundle in response to any undue rise in the price of the bundle.

4.7 As the evidence has shown that UK operators are unlikely to be able to offer significant discounts for "fixed-mobile bundles" – and price will continue to drive any uptake of such "bundles" – it is more likely than not that consumers will continue to "unpick" fixed and mobile components from "bundles".

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[7] *"Heavy discounting was a driver of take-up in France and Spain, whilst the evidence suggests that for most operators in the UK neither their existing profits nor the possible cost savings associated with bundling would provide substantial incentives for big discounts. This is reflected in the limited discounts for bundling that are seen at present in the UK, which do not generally imply mobile prices that are significantly cheaper than those available on a stand-alone basis from other mobile operators."*

[8] For example at footnote 36 of Appendix H.

[9] Paragraph 13.22. Although the PFs also note in paragraph 13.25 that the evidence presented to the CMA that "bundles will not be constrained by unbundling" is weak.

[10] In particular, see [**CONFIDENTIAL TO BT/EE]** which the PFs support in paragraph 14.143.

[11] Paragraph 13.23.

[12] [**BT CONFIDENTIAL**]

5. The merged entity would not have the ability to effect a total foreclosure strategy, as it could not credibly commit to withdrawal from supplying fixed-MVNOs

5.1 The analysis set out in the PFs of the merged entity's ability to effect a total foreclosure strategy includes an assessment of whether the merged entity could "credibly commit to withdrawal".[13]

5.2 The CMA's Merger Assessment Guidelines elaborate on what it means to "commit" to withdrawal: *"In evaluating the ability of the merged firm to engage in total input foreclosure, the Authorities may consider how easily the merged firm can commit not to re-enter the input market, for example by adopting an input technology that is incompatible with the production techniques of rival manufacturers of the final product."*[14]

5.3 As an evidential matter, the PFs make it clear that the merged entity could not commit in this way to withdrawal from the wholesale mobile market in respect of fixed-MVNOs. As explained in the PFs, *"even if [the merged entity] attempted to pursue a total foreclosure strategy against fixed-MVNOs, it would likely remain present in the overall wholesale mobile market (i.e. supplying mobile-only MVNOs) and therefore there would be few or no technical barriers to prevent it from supplying fixed-MVNOs".*[15]

5.4 The CMA should therefore explicitly conclude that the merged entity would not have the ability to "commit" to withdraw from supplying fixed-MVNOs, on the basis of the analysis in the Merger Assessment Guidelines.[16] Moreover, even if the merged entity was to make statements that it intended to withdraw from supplying fixed-MVNOs, or not to bid for particular fixed-MVNO contracts,[17] it would be able to "re-enter" at any time.

5.5 Therefore and as the PFs recognise in paragraph 14.120, even if the merged entity chose not to bid for a particular fixed-MVNO contract, rival MNOs would continue to be constrained by the presence of the merged entity as a "perceived"

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[13] In paragraphs 14.24-14.29, in particular.

[14] Merger Assessment Guidelines (OFT 1254), paragraph 5.6.13, first bullet (emphasis added).

[15] Paragraph 14.28. Indeed, even if (hypothetically) the merged entity was not present in the wholesale mobile market at all, MVNO access is supplied using the same assets that the merged entity will maintain to compete in the retail mobile market. Therefore, the merged entity would still be able to easily re-enter any part of the wholesale mobile market.

[16] Because of the opaque nature of the wholesale mobile market, the PFs suggest that it is "questionable" whether the merged entity could credibly commit to withdrawal (paragraph 14.28). However, the merged entity's ability to easily re-enter the wholesale mobile market in respect of fixed-MVNOs would entirely prevent it from being able to "commit".

[17] In any event, as noted in paragraph 13.42, not all the MNOs bid for each contract and *"the fact that an operator has not bid for a particular MVNO's contract is [not] necessarily strong evidence that it would not do so in future."*

competitor; and fixed-MVNOs would continue to benefit from market rivalry and obtain competitive terms for MVNO supply.

5.6 The PFs also observe that pre-merger [**EE CONFIDENTIAL**][18] but that *"the perception of EE bidding appears to have acted as a constraint on rival MNOs"* (paragraph 14.115). Moreover, the CMA has found that [**CONFIDENTIAL – DISCLOSED TO BT**][19] and that EE itself [**CONFIDENTIAL – DISCLOSED TO BT**].[20]

5.7 In light of this evidence, it is apparent that without the ability to commit to withdrawal, the merged entity would continue to act as a competitive constraint, whether as an actual or perceived competitor. It is therefore wrong that the PFs conclude that there is *"considerable uncertainty over whether [the merged entity would still exert some constraint]"*.[21] Furthermore, as the merged entity will continue to exert a competitive constraint, this should be sufficient to conclude that it could not cause harm to fixed-MVNOs.[22]

5.8 Notwithstanding the above, even if it was considered that the merged entity might be able credibly to commit to withdrawal, it would only have the incentive to do so if it knew that it was able thereby to cause sufficient harm to fixed-MVNOs and in turn to downstream competition. However, the merged entity could not cause such harm even at the intermediate level, principally for the two reasons set out in paragraph 14.122:

(a) due to the nature of the tender process for wholesale mobile services, fixed-MVNOs will still be able to obtain competitive terms with the participation of two MNOs; and

(b) given that the "prevalence" of "fixed-mobile bundles" is a necessary (but not sufficient) condition for the theory of harm, it can be expected that all of the MNOs will have stronger incentives to bid aggressively to supply fixed-MVNOs than they have done prior to the Transaction, in order to indirectly benefit from the fixed-MVNO's mobile customer base.

5.9 As the merged entity would not be able to harm fixed-MVNOs, its incentive would not be to withdraw from supplying fixed-MVNOs, but to compete strongly to supply them. That way, the merged entity would benefit from the

[18] Paragraph 14.39.

[19] Paragraph 14.29.

[20] Paragraph 14.40.

[21] Paragraph 14.115.

[22] As recognised in the PFs at paragraph 14.12, any attempted refusal to supply fixed-MVNOs *"would only constitute an ability to foreclose if it causes harm to fixed-MVNOs"*. The merged entity's inability to credibly commit would therefore not merely "dampen" the effect of a total foreclosure strategy, as suggested in paragraph 14.29, but eliminate the effect.

wholesale revenues they provide, rather than allowing those revenues to go to another MNO.[23]

6. The CMA's assessment of the merged entity's incentive to pursue a total foreclosure strategy relies upon a chain of cumulative, necessary conditions, each of which is individually unlikely and, therefore, highly remote when considered cumulatively

6.1 A number of hypothetical future developments would need to occur for the merged entity to have an incentive to pursue a total foreclosure strategy.[24] These are developments that the CMA considers would make such a strategy profitable. As outlined in paragraph 14.178, these developments are as follows:

(a) "fixed-mobile bundles" become prevalent;[25] and

(b) mobile services become a major driver of customers' choice of fixed service provider;[26] and

(c) the merged entity recaptures a high proportion of those customers lost by the fixed-MVNO that choose to continue purchasing "fixed-mobile bundles".

6.2 These are all necessary conditions under the logic of the CMA's theory of harm.[27] As acknowledged by the CMA, it would require *considerable*

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[23] The same analysis also applies to the theory of harm for partial foreclosure by bidding weakly for new or renewed fixed-MVNO contracts, set out in paragraphs 14.190-195. As the merged entity would not be able to harm fixed-MVNOs by bidding weakly, it would have the incentive to bid strongly to win fixed-MVNO contracts.

[24] Notwithstanding the fact that the merged entity would not have the ability to effect a total foreclosure strategy, as explained in Section 5.

[25] In paragraph 13.7, the PFs specify that, *"if fixed-mobile bundles did not become prevalent, it* ***would be much less clear*** *that the merger would change EE's incentives to supply fixed-MVNOs, relative to the counterfactual"* (emphasis added). However, the wording "would be much less clear" does not properly follow the logic of this theory of harm: if (as is the case) the prevalence of "bundles" is a necessary but not sufficient condition, then any evidential doubt as to whether "fixed-mobile bundles" will in fact become prevalent has the effect of bringing down the entire merger-specific theory of harm, rather than simply making it "much less clear". If adopted by the CMA in its final report, this chain of reasoning would further strengthen the "no SLC" conclusion as regards wholesale mobile services. See also Sections 3 and 4, above, in respect of the conservative approach taken by the PFs in relation to "fixed-mobile bundles" and the weakness of the evidence suggesting that they could become "prevalent".

[26] Despite the lack of evidence presented in the PFs to suggest that this would be the case. As noted in paragraph 14.179, the evidence suggests that *"fixed providers are cross-selling mobile to their existing customers, rather than using mobile to attract new customers"*.

[27] The theory of harm also requires that the merged entity would consider itself likely to recapture a sufficiently high proportion of the customers lost by the fixed-MVNO, such that it would be willing to forego more certain wholesale revenues in exchange for the uncertain possibility of recapturing the fixed-MVNO's lost customers. This additional necessary (but not sufficient) condition is considered further in Section 7, below – see in particular paragraph 7.5 on the probability of all four necessary

speculation to accept that all of these developments will occur.[28] Whilst the PFs do not reach a firm conclusion on each of the developments, the PFs do note that *"there were strong arguments against the likelihood of many of those future developments occurring"*.[29]

6.3 This is indeed the case and the evidence suggests that these developments will not emerge during the relevant time period.

6.4 Furthermore, for the CMA to find an SLC, it would have to consider that these future developments would be more likely than not to occur, *both individually and cumulatively*: any finding that an *individual* link in the chain of necessary market developments was less than 50% likely to occur would crisply preclude a finding that the set of market developments necessary to reach an overall SLC finding were *cumulatively* "more likely than not". (In fact, as Section 7 demonstrates, in order to support an overall SLC finding on the balance of probabilities, the CMA's levels of confidence about each individual market development in the chain of reasoning would need to be considerably in excess of 50%.)

7. The uncertainty of the cumulative, necessary conditions would prevent the merged entity from pursuing a total foreclosure strategy

7.1 In addition to the three hypothetical future developments outlined in Section 6, above, the merged entity would itself need to believe that such developments would occur in order to have an incentive to pursue a total foreclosure strategy. Otherwise, it could not be expected to forego the more certain revenues from winning a wholesale contract in exchange for the highly uncertain possibility of recapturing any customers that the fixed-MVNO may lose as a result of the merged entity's refusal to bid.[30]

7.2 In this respect, the merged entity would face similar difficulties to the CMA in attempting to determine the likelihood of the above future developments and the recapture rate it could expect. As with the PFs' assessment, the merged entity would find it difficult to determine the likely effect (if any) of refusing to supply and would similarly be unable to quantify the extent to which it could recapture customers downstream.[31] The PFs' conclusion on incentives (correctly) notes

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conditions occurring. Whilst paragraph 14.180 of the PFs take this further condition into account, paragraphs 28-31 of the summary do not, which is a significant omission.

[28] Paragraph 14.182. The Parties also note that paragraphs 14.277-14.279 do not indicate whether the two dissenting group members consider conditions (b) or (c) to be more likely than not. If the dissenting members do not consider that (b) and (c) are sufficiently likely, they should support the "no SLC" finding in the PFs.

[29] ibid

[30] In addition, the merged entity will want to avoid conferring scale on its MNO rivals by withdrawing from the wholesale market. [**EE CONFIDENTIAL**] This is therefore also an important disincentive for the merged entity to withhold services.

[31] See in particular paragraph 14.122: *"we found that the extent of any price rise (or quality degradation) was difficult to quantify, and would depend on the bidding strategies of the other MNOs."*

that: *"this would tend to discourage the merged entity from pursuing such a strategy".*[32] This conclusion is in fact key to the incentives analysis, as the merged entity would not be able to conclude with sufficient certainty that it would be profitable to pursue a total foreclosure strategy.

7.3 Furthermore, as the CMA has concluded: *"it is probable that, in a scenario in which the merged entity aimed to foreclose rival fixed-MVNOs, it would continue to face multiple competitors that could offer customers both fixed and mobile services. This will tend to reduce the proportion of fixed-mobile customers that the merged entity could recapture through following a foreclosure strategy, and hence reduce its incentive to do so."*[33]

7.4 The evidence therefore suggests that, even if the CMA considered that all three of the developments outlined in Section 6 were more likely than not, the significant uncertainty of the outcome of a total foreclosure strategy would still make it unlikely that the merged entity would take the decision to pursue such a strategy. It should therefore be recognised that this is also a necessary (but not sufficient) condition for the theory of harm.

7.5 As a result, there are, in fact, four necessary conditions for this theory of harm (continuing to assume *quod non* that the merged entity had ability). In order to find that the chance of all four conditions occurring is more than 50% (i.e. more likely than not), the CMA would need to be confident that the probability of each individual event occurring is significantly greater than 50%. From a purely mathematical perspective, the probability of each condition would need to be greater than 84% (on average) if it is assumed that the chance of each of the events occurring is independent of the others. By contrast, if each event is expected to occur with probability 50% (a conservative assumption on the evidence), then the chance of all four occurring would be only 6.25% (again, assuming independence). While the probabilities may not in fact be independent, these figures are illustrative of the general point that the cumulative satisfaction of a series of necessary conditions requires each to be satisfied with probabilities greatly in excess of 50%.

7.6 While merger assessment cannot realistically be reduced to such precise quantification, the Parties nonetheless suggest that this sum illustrates the very high levels of evidential confidence the CMA would need to have in order to reach an overall SLC finding on wholesale mobile services. Put another way: given the extent to which the PFs have stressed that these developments are uncertain, speculative and difficult to quantify – which the evidence confirms is the case – it is clear that the merged entity would not have an incentive to pursue a total foreclosure strategy.

7.7 Moreover, even if all of the above developments were to crystallise, it would still be far from clear that BT/EE would have the incentive to withhold wholesale mobile services. In the PFs' most conservative version of the vertical arithmetic (which assumed an implausibly high bundle proportion of 80%, a

[32] Paragraph 14.180.

[33] Paragraph 14.169.

low unpicking rate of 20% and a very high recapture rate of 90%[34]), the required wholesale cost increase was still 85%. This in itself would be a huge increase; and the PFs have not shown that the merged entity would be able to bring about this cost increase and has in fact recognised that there would be strategic responses (such as two part tariffs) to defeat it.[35]

8. The theory of harm for partial foreclosure of Virgin Media does not take into account the timing of any increased prevalence of "fixed-mobile bundles"

8.1 The PFs note that, as with total foreclosure, *"the merger is likely to significantly increase [the merged entity's] incentives to harm Virgin Media only if fixed-mobile bundles become a significant part of consumer demand and mobile services become a significant determinant of consumers' choice of fixed and pay TV service provider."*[36]

8.2 However, the PFs also explain that *"most effects would apply only within the current contract".*[37] Logically therefore, the CMA's theory of harm on partial foreclosure of Virgin Media would require "fixed-mobile bundles" to become prevalent within the exclusive term of Virgin Media's current contract (i.e. before [**EE CONFIDENTIAL**]).

8.3 Moreover, Virgin Media itself has not sought to argue that there could be an uptake in "fixed-mobile bundles" (either within its current MVNO contract or in the longer term) sufficient to give rise to a change in incentives for the merged entity. And the CMA has specifically rejected Virgin Media's submissions on the merged entity's incentives to pursue a foreclosure strategy, based on its increased spectrum holding.[38]

8.4 The Parties agree with the CMA's conclusion (in relation to total foreclosure) that the evidence does not suggest that "fixed-mobile bundles" are likely to become prevalent during the relevant time period for the CMA's assessment. On the basis of that conclusion on a longer timescale, it is even less likely that "fixed-mobile bundles" will become sufficiently prevalent in the next [**EE CONFIDENTIAL**]. Therefore, the merged entity will not have an incentive to pursue a partial foreclosure strategy against Virgin Media.

8.5 As the PFs acknowledge, such a strategy would only serve to reduce the merged entity's chances of retaining Virgin Media on contract renewal (as well as damaging the merged entity's wider reputation in the wholesale market). With [**EE CONFIDENTIAL**] if the merged entity were, hypothetically, to attempt to engage in partial foreclosure post-merger.

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[34] [**BT CONFIDENTIAL**]

[35] Paragraph 14.61 and footnote 389.

[36] Paragraph 14.253.

[37] Paragraph 14.257

[38] Paragraph 14.8; Virgin Media Phase 2 submission paragraph 7.19.

8.6 The PFs suggest that the merged entity might not wish to retain Virgin Media as a customer when EE, pre-merger, would have.[39] However, there is no basis for such a hypothesis, given the CMA's provisional conclusion on the total foreclosure theory of harm. It would clearly be inconsistent for the CMA to find, on the one hand, that the merged entity would not have the ability or incentive to engage in a total foreclosure strategy towards fixed-MVNOs, whilst, on the other, finding that the merged entity would not be incentivised to bid to retain Virgin Media as a customer on contract renewal.

9. All fixed-MVNOs have current wholesale contracts and will be able to negotiate in the future with stronger buyer power

9.1 In addition to Virgin Media, the PFs acknowledge that all of the fixed-MVNOs have current wholesale contracts.[40] The fact that all fixed-MVNOs have current wholesale contracts is important, as it:

(a) undermines the hypothesis that mass-market players could not negotiate reasonable terms; and

(b) suggests that all fixed-MVNOs – in particular Sky and TalkTalk – will negotiate in the future from a position of even more effective bargaining strength, based on their established future subscriber/user bases.

9.2 Any question about possible post-merger foreclosure therefore needs to be tested by reference to a (putative) future point in time *after* these operators have acquired a greater degree of countervailing buyer power than they have at present. Viewed this way, the merged entity can have no credible ability to foreclose.

10. Vodafone would have incentives to compete more strongly post-Transaction

10.1 The PFs state that it is *"difficult to conclude"* whether Vodafone's incentives would make it a stronger or weaker competitor post-Transaction.[41] However, the only argument that the PFs present in support of the view that Vodafone would be a weaker competitor is that *"an express refusal by EE to bid could theoretically also discourage Vodafone from bidding, should it wish to reach, as TalkTalk suggests, a tacit understanding among its competitors not to bid for MVNO contracts".*[42]

10.2 This incentive, based on an alleged "tacit understanding", is not plausible – all the more so as the PFs expressly state that the CMA has *"seen no evidence to suggest that the merger would increase the possibility of coordinated effects in the retail market, or in any other market".*[43] Moreover, Vodafone has strongly

[39] Paragraph 14.429.

[40] Paragraph 13.49.

[41] Paragraph 14.85.

[42] Paragraph 14.82.

[43] Paragraph 22.3.

refuted TalkTalk's claims that it has withdrawn from the wholesale mobile market,[44] which is clearly inconsistent with a desire to reach any such tacit understanding not to bid for MVNO contracts.

10.3 By contrast, if the prevalence of "fixed-mobile bundles" was to grow (or Vodafone was to consider that they would become more prevalent in the future), the ability to benefit from such growth would be an incentive for Vodafone to become a *stronger* competitor, as the PFs acknowledge.[45]

10.4 In addition, if (hypothetically and contrary to the evidence) the merged entity was able and incentivised credibly to commit to withdraw from the wholesale mobile market and this was to cause wholesale mobile prices to rise, Vodafone would forego greater wholesale profits if it also was to withhold supply from fixed-MVNOs. This would give Vodafone an incentive to cheat and would threaten the internal stability of any putative tacit agreement.

10.5 Therefore, an analysis of Vodafone's incentives suggests that, if the merged entity was to withdraw from the market, Vodafone would have an *increased* incentive to supply fixed-MVNOs and therefore, more likely than not, Vodafone would become a *stronger* wholesale competitor.

10.6 The same analysis applies – and with even greater force – to the incentive for O2 and H3G to supply fixed-MVNOs, as if "fixed-mobile bundles" became prevalent, these two MNOs would have irresistible incentives to supply fixed-MVNOs, as O2 and H3G do not have their own "in house" fixed service offerings (unlike Vodafone).

11. Discussions are ongoing with Virgin Media regarding its transition to become a full MVNO

11.1 By way of update: the PFs refer to [**EE CONFIDENTIAL**][46] [47]

11.2 [**EE CONFIDENTIAL**]

11.3 [**EE CONFIDENTIAL**]

11.4 [**EE CONFIDENTIAL**]

11.5 [**EE CONFIDENTIAL**]

[44] See, for example: http://www.techweekeurope.co.uk/networks/carriers/vodafone-talktalk-mvno-exit-173034.

[45] See paragraphs 14.83 and 14.84, in particular.

[46] Paragraph 14.207.

[47] [**EE CONFIDENTIAL**]

MOBILE BACKHAUL

12. Introduction

12.1 The Parties welcome the CMA's provisional conclusion that the Transaction will not lead to an SLC in relation to mobile backhaul. There will not be any change in the structure of backhaul supply to mobile operators. Furthermore, the framework of regulation of Openreach combined with competition in backhaul services prevent any prospect of the merged entity foreclosing backhaul customers or competitors as a result of the Transaction.

12.2 One key factor which the CMA has not considered in relation to backhaul is whether BT could credibly commit not to supply MNOs with backhaul. This is a factor identified in the Merger Assessment Guidelines[48] and which the CMA evaluates in relation to Wholesale Mobile. In order for the CMA's theory of harm 4 to lead to an SLC, it is necessary that BT could credibly commit not to supply backhaul to MNOs either at all, or at a competitive price. This is not the case given that BT will retain the capability to supply backhaul, which in itself shows that the theory of harm cannot possibly lead to an SLC.

12.3 Furthermore, in order to assist the CMA throughout the remainder of its review, the Parties provide below some additional details on features of the market which further strengthen the conclusion that there cannot be any SLC in mobile backhaul.

13. Credibility of commitment

13.1 The CMA's Merger Assessment Guidelines recognise that the CMA "*may consider how easily the merged firm can commit not to re-enter the input market, for example by adopting an input technology that is incompatible with the production techniques of rival manufacturers of the final product*"[49] in evaluating ability to engage in foreclosure. This is also relevant to partial foreclosure strategies, not just total foreclosure.

13.2 It is clear that BT could not credibly commit to withdraw from offering backhaul services either at all or on competitive terms, at contract renewal (Strategy 4 in relation to mobile backhaul, as set out in the PFs): the prospect of customers switching to alternative providers, particularly at a higher price, would persuade BT to re-enter, given that it would retain its supply capability. The CMA has recognised and evaluated the prospect of credible commitment to withdraw in relation to wholesale mobile,[50] but not in relation to mobile backhaul. The relevant considerations are as follows.

13.3 The assets used for the supply of mobile backhaul are also used for the supply of other services (such as the shared 21CN network) or are obtained on arm's length terms (Openreach inputs and off the shelf inputs such as cell site

[48] Merger Assessment Guidelines, paragraph 5.6.13, first bullet.

[49] ibid

[50] Paragraphs 14.24 to 14.29 of the PFs.

gateways). BT Wholesale will continue to maintain and upgrade its assets over time in order to serve its own requirements and other non-mobile customers. It will have a strong continuing incentive to supply backhaul to third parties to make full use of these assets, such as the 21CN network.

13.4 At the request of customers, backhaul contracts are generally negotiated for long contract periods. If competitors were to increase prices based on an expectation of BT Wholesale bidding at higher prices (or not at all), then the long duration of the contracts would only increase BT Wholesale's potential gain from bidding and undercutting those prices as BT/EE would earn higher prices for a long period. Rival suppliers would therefore assume that BT Wholesale was a likely bidder at a competitive price and therefore would not increase their own costs for supplying.[51]

14. Regulatory framework

14.1 The CMA has provisionally concluded that it is possible that BT would have the ability to discriminate in terms of investments in favour of its own divisions,[52] but that there is no significant change in this regard as a result of the merger. The CMA also provisionally concludes that BT would be unlikely to have the incentive to do so,[53] having evaluated whether any incremental incentive to discriminate against rival MNOs would be sufficient to influence Openreach's investment decisions.

14.2 BT agrees that it does not have any incentive to discriminate via its investments. However, beyond this, BT does not agree that it would have an ability to discriminate in the manner considered possible by the CMA. BT is subject to a number of regulatory controls that constrain its ability to discriminate in this manner with intensive scrutiny from Ofcom, the Equality of Access Board and from third party communications providers themselves, who have the ability to escalate disputes to Ofcom if they consider that issues have arisen. The Undertakings ensure that Openreach provides exactly the same products on an Equivalence of Inputs basis (***EOI***) to BT's customer-facing divisions and to all third party communications providers. The CMA recognises at paragraph 16.78(c) of the PFs the role that BT's EOI obligations play in preventing discrimination in favour of BT's downstream divisions: such discrimination against rival MNOs would be considered a breach of such obligations which could lead to a formal dispute being brought to Ofcom.[54] This is not only relevant to incentive, but also to ability, and clearly demonstrates that BT would not have the ability (nor the incentive) to discriminate in favour of its downstream divisions, either pre- or post-Transaction.

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[51] See also [**CONFIDENTIAL TO BT/EE**]

[52] Paragraph 16.76.

[53] Paragraph 16.79.

[54] This is in addition to the particular features the CMA identifies in paragraph 16.78 about fibre infrastructure and MNOs' capacity needs acting as a further constraint on BT's incentives to discriminate.

14.3 In addition, the CMA has not provided any evidence in support of the proposition in paragraphs 16.76 and 16.77 that it is possible that BT would have an ability to discriminate in relation to strategic decision-making to favour its own mobile division. This has rather been cited as a theoretical concern were MNOs to have different investment strategies requiring different product developments from Openreach. In fact, the regulatory controls in place mean that Openreach deals with Statements of Requirements requests for product developments under a regulated process, with the result that any product innovations will be available to all MNOs on equal terms, leading to greater progress and technological advances for mobile. Overall, it is not only the case that the merged entity would not have the incentive, but also that it would not have the ability to influence investment decisions to favour the BT downstream divisions because all developments would be available to all MNOs.

14.4 Furthermore, even if BT *had* the ability and incentive to discriminate via its investment strategies (which, as set out above, it would not), there could not be any material effect. The only scenario in which it would be possible to benefit EE at the expense of its rivals would be the case where EE had unique requirements which conferred a material advantage over the other MNOs. There is no evidence that this is the case.

15. Competition in backhaul

15.1 The CMA considers various alternative sources of backhaul supply individually, but does not consider the aggregate competitive constraint from the prospect of MNOs using two or more suppliers as part of a multi-sourcing strategy (as is already the case in practice). The likelihood of MNOs using more than one supplier only strengthens the CMA's conclusion that there cannot be an SLC either at contract renewal or within contract.

15.2 Indeed, in addition to BT MEAS, EE/MBNL already uses a patchwork of suppliers in its backhaul network including Virgin Media, City Fibre (in Hull) and self-provide microwave. [**EE CONFIDENTIAL**]

15.3 Limited minimum volume commitments within the MEAS contracts do not prevent MNOs from using third party suppliers. Any loss of business to third parties would both reduce BT Wholesale's revenues for backhaul and, in turn, reduce its aggregation benefits through its 21CN network, affecting the relative competitiveness of its offering in other (non-mobile) service areas.[55] As reflected by the CMA's vertical arithmetic, the cost increase required to make a foreclosure strategy profitable would be extremely high. Even if some alternative suppliers might not constitute complete substitutes for BT Wholesale, or might involve higher cost, the MNOs could still switch significant proportions of their requirements to such alternative suppliers at a price much lower than that necessary for BT/EE to have an incentive to foreclose. This

[55] The CMA recognises this point in paragraph 182 of Appendix K of the PFs. BT considers that, even if this only led to a decrease in competitors' marginal costs, as claimed in footnote 79, this would have a material effect on its competitiveness.

supports the CMA's conclusions that BT Wholesale would not have an incentive to attempt a foreclosure strategy.

15.4 Against the background of any possible price increase, both TalkTalk and Vodafone (who would not need to make any significant investments on top of their existing capability) would have an increased incentive to expand their services to offer backhaul to third party MNOs, to take advantage of the higher prices. The CMA has assessed the likelihood of expansion by Vodafone and TalkTalk only in the context of pre-merger prices. However, the relevant scenario is actually one of higher prices, assuming that BT Wholesale attempts and is somehow able credibly to commit to a foreclosure strategy, which would increase Vodafone's and TalkTalk's incentive to supply.

15.5 Moreover, just as BT Wholesale could not credibly commit not to supply backhaul, particularly at a higher price, it is not credible that Vodafone and TalkTalk could commit not to offer backhaul supply to the MNOs in the event of a price increase which would increase the profits foregone. As shown in [**BT CONFIDENTIAL]** Vodafone is already in a strong position to offer third party supply (as it has all of the capability needed, for self-supply purposes), while TalkTalk would need only limited investment due to its position and experience in providing wholesale Ethernet services.

15.6 The Parties have not seen the sections of the PFs relating to Vodafone and TalkTalk expanding supply into mobile backhaul to third party MNOs. To the extent that the CMA decided that there would be an SLC in mobile backhaul and this evidence was material to that conclusion, the Parties would expect to have an opportunity to respond. In any event, regardless of any evidence internal to Vodafone or TalkTalk, the key factor is whether any purported commitment not to offer backhaul services to MNOs would be credible to other suppliers. The Parties do not believe that this is the case. The Parties believe that both Vodafone and TalkTalk have previously entered into discussions with MNOs about supplying backhaul. BT could not, therefore, bid for backhaul contracts, particularly at an increased price, on the assumption that neither Vodafone nor TalkTalk would not offer a competitive bid. This is further supported by the fact that, as recognised by the CMA, the MNOs have a strong negotiating position in relation to backhaul contracts and can be expected to use the prospect of shifting to alternative suppliers in order to ensure a competitive offer from BT.

16. Bargaining power

16.1 The CMA provisionally concludes that the MNOs will have a sufficiently strong bargaining position to impose terms on BT Wholesale which provide protection in relation to quality and price. In BT Wholesale's experience, this is certainly the case. [**CONFIDENTIAL TO BT/EE]**

(a) [**CONFIDENTIAL TO BT/EE]**

(b) [**CONFIDENTIAL TO BT/EE]**

(c) [**CONFIDENTIAL TO BT/EE]**

(d) [**CONFIDENTIAL TO BT/EE]**

16.2 Similarly, [**BT CONFIDENTIAL]**

(a) [**BT CONFIDENTIAL]**

(b) [**BT CONFIDENTIAL]**

16.3 These examples support the CMA's conclusion in paragraph 16.129 that technological developments can be taken into account at the outset of a contract. Note also that the minimum volume commitments are not significant enough to prevent the MNOs from sourcing particular innovations from other providers, if they decided to do so.