

## REQUEST FOR FURTHER CONSIDERATION OF PROVISIONAL FINDINGS RE MERGER OF BT AND EE

### SUBMISSION TO THE CMA FROM THE FEDERATION OF COMMUNICATION SERVICES

This paper is a submission from FCS, the UK trade body for businesses which deliver professional voice and data communications solutions to business and public sector customers in the UK. It has been prepared in consultation with IMVNOx, the global trade association for MVNOs.

FCS seeks to reflect the concerns of wholesale service providers, B2B CPs and their partners in the UK as well as UK based MVNOs.

We are grateful for this further opportunity to put our concerns to the CMA about the impact on future competition should the merger of BT and EE go ahead without proportionate remedies. We appreciate the uncertainty surrounding the additional issues that could arise if the acquisition of O2 from Telefonica by H3G proceeds. But we believe there are grounds for re-examining the CMA's provisional conclusions purely on the basis of EE and BT, and irrespective of the potential further loss of competition and dilution of choice which might arise through consolidation of the O2 and Three networks.

#### **BT/EE merger issues:**

The FCS is concerned that the new entity created would be overly dominant to the detriment of others in the market. We believe that the merger would reduce competition for other industry players and for consumers.

Because of the way the telecommunications industry is regulated in the UK, the effect will be that we will find ourselves with one operator able to offer identical products over different technical platforms; platforms which currently enjoy different regulations regarding wholesale access, price control and competition. This is why everyone in our industry expected the Competition and Markets Authority to attach some statutory remedies to any merger approval.

BT is required to offer access to its fixed infrastructure and networks on a wholesale basis. Up to now, mobile operators have not been required to do so, a position that dates from the early days of mobile regulation, when the key driver was to encourage networks to take a high risk and build them from scratch.

The position has changed out of all recognition since then, with mobile becoming ever more important. Some mobile networks are pulling back from supplying wholesale markets (witness Vodafone's withdrawal from Sainsbury's Mobile recently, leading to its closure), and this limits the choice available to mobile virtual network operators (MVNOs). We had therefore expected that the proposed BT acquisition of EE would trigger measures to

protect and support the wholesale mobile market in the same way as current Ofcom controls on BT protect the wholesale fixed line market. In the event, none were proposed in the CMA's preliminary findings.

We believe this merger should not be allowed to proceed without remedies to protect and support a healthy wholesale market.

In particular, we would draw your attention to the following points:

- While the regulation of BT's fixed infrastructure means that mobile operators are able to offer services seamlessly across fixed and mobile networks, the same is not true for fixed service providers, because they have no right of access to mobile networks, and are able to buy their services wholesale only if the MNOs agree to it, and on terms dictated by the MNOs. This creates unjust asymmetry which is distorts free competition.

Issues raised by FCS reseller members (in their own words) include:

1. Oppressive Contract Terms, including terms that basically mean your customer base can be taken over by the mobile operator under certain circumstances
2. Difficult to get API access to MNO system to allow stream lining of service provision and reduction in potential fraud and human error and innovation in service provision.
3. Because the MVNO model is at the whim of the MNO, it's very difficult to invest with confidence. And in the case of actually trying to complete an MVNO it really only seems to be for the big boys like supermarkets and utilities who have the scale to make it work
4. Because Cloud and VOIP work across any device, without having the mobile element within the portfolio as a main stream product this gives the MNO an unfair advantage in the Cloud market as they have all the elements (fixed, IP, Access, Mobile) whereas most other providers are missing the Mobile element.
5. Typically the pricing given in the current mobile MVNO market is very often more expensive than we can go down the road to Tesco's or the Vodafone shop and buy as an end user.
6. Restrictive practice (for example, [ ]), again restricting true choice.

Beyond these very specific concerns, we would cite the following, more wide-ranging issues which particularly affect businesses wishing to trade as MVNO operations:

- The CMA’s investigation followed market definitions from the current UK Communications Act. This Act dates back to 2003. Today’s market is very different.
- BT was successful in obtaining a 4G license, and was therefore expected to enter the mobile market as a network operator in its own right. A merger with EE reduces the number of future operators. Despite this being a significant and universally-known fact impacting on the market, it appears to us the CMA approach has focused entirely on the historical definitions and functionings of the market, not the market as it currently is, or is likely to be in the future.
- The CMA’s judgment on SLC in the wholesale mobile market appears to make the assumption that MVNO operators have access to a competitive wholesale market, and can easily switch their business from one MNO to another in the event of anti-competitive behaviour. Recent correspondence between IMVNOx and the Secretary of State talks of the “competition provided by MVNOs”, confirming that the UK Government similarly believes there is an effective and competitive market place.
- This is not the case in reality. Not only are there technical and commercial barriers, but the MNOs are often reluctant to supply wholesale services at all, and can withdraw them at their own discretion. In reality they see MVNOs as sales channels, not as competition.

Taken as a whole, we submit the above concerns constitute grounds for the CMA panel to look again at the specific question of mobile wholesale access. We do not consider this merger should proceed without remedies to align the provision of wholesale access on the EE mobile network with that for wholesale access to BT’s fixed line network.

FCS would be happy to provide further, more detailed evidence, or to bring a delegation of concerned members to discuss the issues with the CMA team. We look forward to helping inform your further deliberations in whatever way would be most helpful to allow you a more detailed understanding of the realities of today’s market, in the hope of helping you reach a more balanced decision about the competitive landscape of tomorrow’s.