

Project Manager
BT/EE merger inquiry
Competition and Markets Authority
Victoria House
Southampton Row
London
WC1B 4AD

19th, November, 2015

Dear Sir/Madam,

BT/EE merger inquiry - Responses to Provisional Findings

We write on behalf of the UKB Group, comprising UK Broadband Limited and UKB Networks Limited, in relation to your provisional findings in the BT Group/EE merger enquiry.

UKB's principle concerns with the provisional findings, each of which will be explored in more detail below, are as follows:

1. Retail Mobile Market, Theory of Harm 2 – Dynamic loss of competition through BT/EE's dominance in:
 - Wi-Fi hotspots
 - Spectrum holdings
2. Wholesale Mobile Market – potential restriction or degradation of services to MVNOs.
3. The CMA's and Ofcom's respective procedures, powers and duties.

1 A) Harm through BT's Dominance of Wi-Fi hotspots – dynamic loss of competition

UKB's concerns in this area were set out in detail in its previous submissions to the CMA¹ and are not repeated here in detail. In brief, UKB is concerned that the CMA's analysis fails properly to account for the fact that the mobile market is changing from voice-

¹ See Section 1 of Phase 1 submission on 26 May 2015 and Para 3.3 and Section 5 of Phase 2 submission on 3 July 2015.

centric to data-centric and that there is an increasing convergence of services provided over cellular networks with services provided over Wi-Fi.

Wi-Fi access is becoming increasingly integral to the mobile service offering, as customers consume more and more data-heavy applications. Thus, Wi-Fi access is an important element of competition in the mobile market in a way that it has not been until recently. It is not clear, despite the CMA's references in section 5 to trends in data consumption and fixed-mobile convergence that, in its analysis of the market, the CMA has taken adequate account of this factor. We also note that the telecoms regulatory framework struggles to keep up with important changes in market structure such as this.

The dominant scale of BT's Wi-Fi network

BT has over 5 million Wi-Fi connection points, which will give the combined entity greater Wi-Fi coverage than any other player. BT has explained the huge advantage their Wi-Fi network gives them as an MVNO in the following online and TV advertising:



Get the combined power of 4G and unlimited wi-fi in more places than any other mobile provider.

4G with BT Mobile is provided on the EE network. In Ofcom's latest Communications Market Report August 2015 (pg 258), Ofcom collected data from Mobile Network Operators (MNOs) EE, O2, Vodafone and Three for the Infrastructure Report 2015. This report shows EE had the highest 4G outdoor premises coverage in March 2015 (81%) compared to O2 (66%), Vodafone (65%) and Three (53%). Mobile virtual network operators such as Tesco Mobile, Giffgaff, Lebara and Lycamobile use 4G offered by their MNO partners.

Additionally, BT Mobile customers get unlimited access to our wi-fi network, with over 5 million hotspots in the UK. The table below sets out the number of wi-fi hotspots these mobile providers offer with their 4G plans. BT's wi-fi network is available to all its mobile customers.

For more information on 4G coverage, please visit http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr15/UK_4.pdf

For more information on wi-fi coverage, please see table below.

Mobile phone provider	March 2015 4G premises coverage (%)	Source / Date	Wi-fi network	Source / Date
BT (on the EE network)	81%	Ofcom Communications Market report Aug 2015 page 258	BT offers 5,400,000 wi-fi hotspots	Tefficient: Public industry analysis #6 2014 01/12/2014
Vodafone	65%		The Cloud offers 22,000 wi-fi hotspots	Tefficient: Public industry analysis #6 2014 01/12/2014
O2	66%		O2 offers 9,000 wi-fi hotspots	Tefficient: Public industry analysis #6 2014 01/12/2014
Three	53%		N/A	N/A

Can I use BT Wi-fi?

All BT Mobile plans come with unlimited access to BT Wi-fi.

BT Wi-fi is the UK's largest wi-fi network with over 5 million hotspots on-the-go.

Simply download the BT Wi-fi app to let you connect whenever you're in range of a hotspot so that you don't use your data allowance unnecessarily.

Source: BT website, 3/11/15 <http://www.broadband.bt.com/moreplaces>

The following table from Ofcom's Phase 2 submission² details the number of the public Wi-Fi hotspots and indicates the growth of data usage over time. It is clear from both tables that BT's Wi-Fi coverage dramatically exceeds the number of public Wi-Fi hotspots available to other parties.

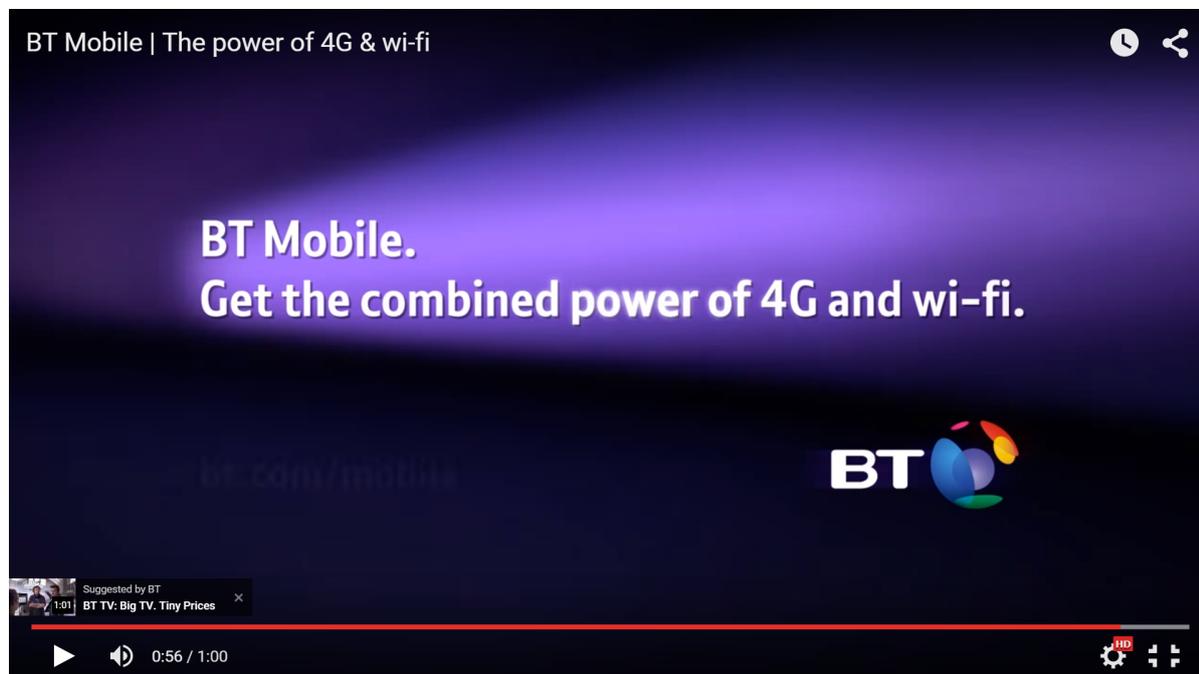
Table 2: Public Wi-Fi hotspots

	June 2012	June 2013	June 2014
No. of public Wi-Fi hotspots	16 000	33 851	41 798
Total data uploaded/downloaded (GB)	757 861	1 514 630	2 261 986
Data per Hotspot (GB)	48	45	54

Source: Ofcom, Infrastructure Report 2013 (update) and 2014

² https://assets.digital.cabinet-office.gov.uk/media/55cc79abe5274a547300002f/Ofcom_Phase_2_submission.pdf

BT has also recently launched a TV advertising campaign, as illustrated in the strapline below:



Source: *BT Mobile TV advertisement – November, 2015,*
https://www.youtube.com/watch?v=OPmxHO1_cvc

Although BT is offering this product feature now as an MVNO customer of EE (it has not yet built a network with its own 2.6GHz spectrum), the reality is, absent the merger, BT as an MVNO would not be able to guarantee its customers decent or reliable access to data on an MNO's network. Therefore BT's current product proposal, which relies so heavily on access to its 5m Wi-Fi hotspots, **only works** if it owns EE.

EE are already advertising 'Wi-Fi calling' as a service offered to both retail and business consumers³. Consumers will be able to rely on Wi-Fi network infrastructure for mobile connectivity. Wi-Fi calling is being promoted as a suitable alternative to mobile coverage in certain geographic areas. The merged entity will have unparalleled combined Wifi and mobile coverage.

This dominance in access to Wi-Fi hot-spots would make it very difficult for a new entrant, such as UKB, to compete with a mobile offering. An appropriate remedy would be to require BT/EE to provide access for its competitors to its Wi-Fi network via the provision of an SSID. Thus, a customer of Relish, for example, would see "Relish" in the list of Wi-Fi networks available to it when he or she was in range of a BT Wi-Fi hotspot, such as a BT hub.

³ See, for example, <http://ee.co.uk/ee-and-me/network/why-ee/wifi-calling> and the recent TV advertisement campaign

The development of and investment in Wi-Fi (or other broadband) infrastructure networks should therefore be considered in detail in any analysis of markets which are related to mobile networks.

BT has a position of market power in the provision of its Wi-Fi services. Since BT Wi-Fi is not provided as part of Openreach infrastructure this issue is not addressed by telecommunications regulation.

Any consideration of mobile markets needs to be undertaken in light of the respective market power in the market for the provision and supply of Wi-Fi with particular reference to the increasing use of Wi-Fi and increasing demand for mobile data by retail customers. The CMA's provisional findings report does not consider these converged markets in any detail and therefore does not undertake a thorough assessment of the likely effects of the concentration on these affected markets. UKB considers that this is a factor that any reasonable authority should take into account and the failure to take it into account is a critical omission in the CMA's analysis.

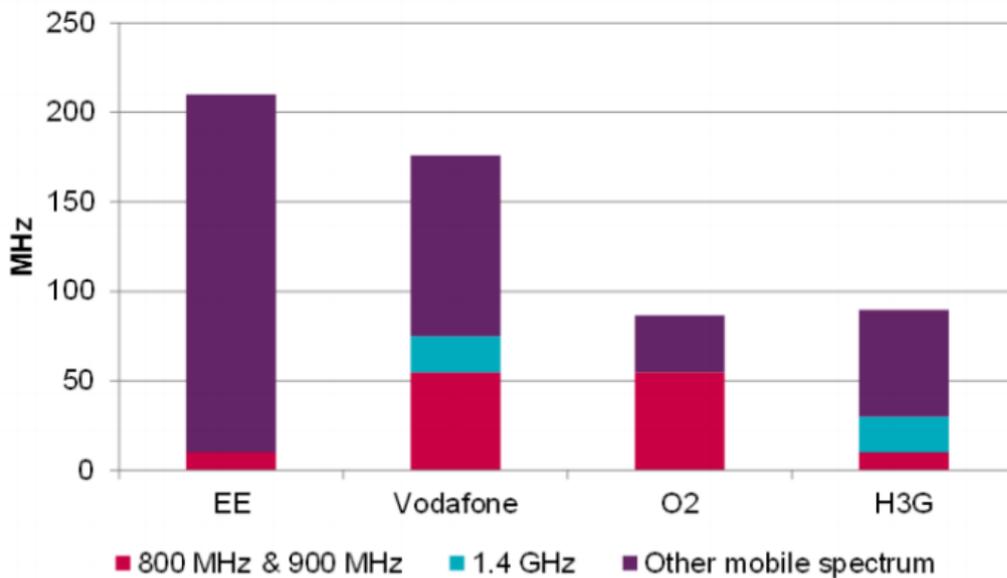
1. B) Harm through BT/EE's dominance in spectrum holdings – dynamic loss of competition

In our view, the CMA has failed to give adequate consideration to the effect of BT/EE's dominant share of relevant (i.e. suitable for mobile) spectrum holdings (as defined by Ofcom).

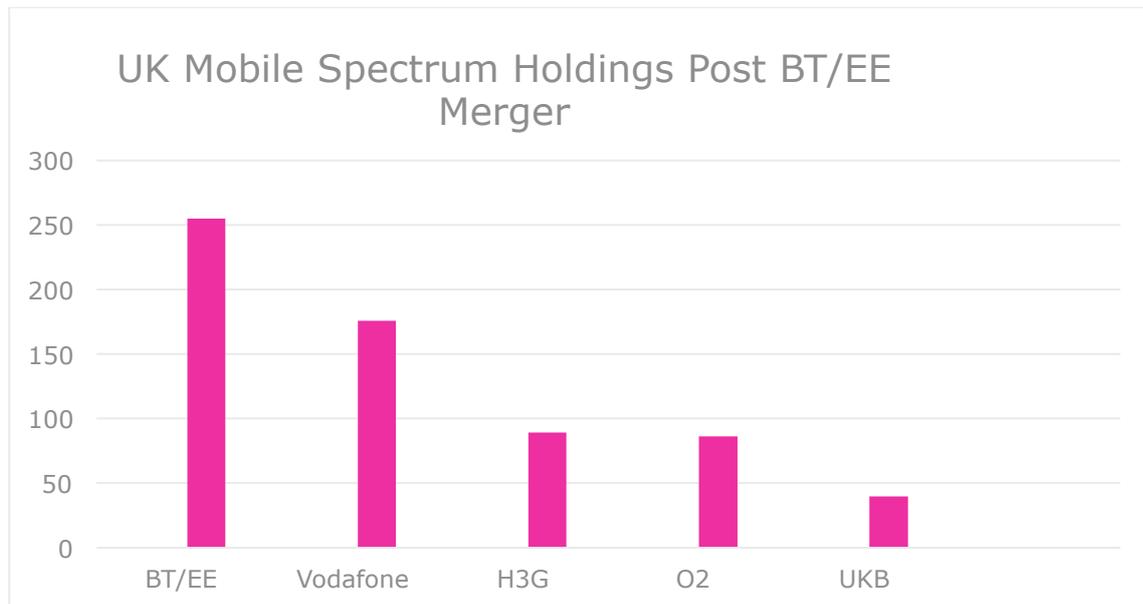
In figure 5.2 of the provisional findings report, the CMA purports to set out the holdings of spectrum after the 1452 – 1492 MHz trades, as of September 2015. However, the CMA has inexplicably failed to include BT's 2.6GHz spectrum holdings, despite the fact that Ofcom includes all 2.6 GHz Spectrum as "relevant spectrum" in its November consultation on the auction format⁴ and all 2.6GHz spectrum is included in the mobile trading regulations. The CMA has also omitted UKB's spectrum from the chart. We believe the true picture changes the chart from this:

⁴ Paragraph 7.66

http://stakeholders.ofcom.org.uk/binaries/consultations/2.3-3.4-ghz-auction-design/summary/2_3_and_3_4_GHz_award.pdf



...to this:



This chart illustrates how imbalanced the market will become, particularly if the H3G/ O2 merger does not proceed.

We believe that it is vital to include the 2.6GHz spectrum in the analysis of the spectrum holdings, because this spectrum (being higher frequency) is particularly suitable for data traffic and thus its importance in the portfolio will grow, as compared with lower frequency spectrum.

The CMA has to assess the market against a reasonable factual context. EE and BT will together hold a hoard of spectrum unavailable to others and the transaction is likely to give rise to a substantial lessening of competition.

Ofcom has pointed to the ability of others in the market to acquire additional spectrum in the forthcoming spectrum auction. However, this should not be taken into account because there is no certainty in the ability of any player to acquire spectrum in the auction. We are aware of at least two completely new entrants who have indicated an intention to bid, in addition to existing spectrum licensees.

Having initially proposed spectrum caps for the forthcoming release of public sector spectrum (which approach would be in line with the most recent previous spectrum auctions in the UK), Ofcom has now surprised the market by announcing, with very little justification or explanation, that no spectrum caps will be imposed. Ofcom's principle justification appears to be that the market may be about to become more consolidated. However, we note that it is by no means clear that the H3G/O2 merger will be cleared.

The Ofcom position on this is will therefore cause competition issues. Ofcom themselves admit that very asymmetric spectrum holdings could give rise to competition concerns⁵.

The previous position, whereby spectrum was shared and capped so as to maintain a competitive balance in the market appears to have changed. The absence of spectrum capping will contribute to an imbalance in the available spectrum and an alteration to the competitive position in the market in favour of the player or players with greater spectrum (and the greatest ability to acquire new spectrum) than others.

The CMA considered potential strategic bidding by BT/EE in the upcoming spectrum auction but took a provisional view that this would not lead to a SLC.

It stated as follows:

"Our provisional view

12.38 From the evidence available to us, we do not find that the merged entity is likely to attempt to implement a strategy of strategic bidding. This is because of the likely high cost of such a strategy and the uncertain payoff. In particular, it may be unclear to the parties how successful any strategic investment may be in frustrating rivals, given that rivals could have effective commercial responses to not obtaining spectrum.

12.39 Even if the merged entity perceived that it would be profitable to engage in strategic bidding, our provisional view is that Ofcom has sufficient experience and regulatory power to discourage, monitor and prevent such conduct.

12.40 Accordingly, our provisional view is that this concern would not be expected to result in an SLC."

⁵ Para 3.35 of Ofcom's October 2015 Information Memorandum, available at <http://stakeholders.ofcom.org.uk/binaries/consultations/2.3-3.4-ghz-auction-design/information-memorandum/info-memorandum.pdf>

However, absent spectrum caps, BT/EE has the ability to acquire large amounts of spectrum in the auction. Indeed, this is what Ofcom foresees:

"... a cap could prevent the operator most constrained by the cap from obtaining a large block of contiguous spectrum which may be required to deliver very fast download speeds. Such services may be highly valued by some consumers in future..."⁶

Even if the merger between H3G and O2 were to take place the combined holdings and those of other spectrum holders would still be much smaller than BT/EE's.

The CMA did not accept that there are likely to be capacity constraints in the market and also stated that MNOs could increase capacity without acquiring new spectrum. We do not accept that there is adequate evidence of the technical and economic feasibility to do so on which the CMA can make such a finding.

UKB is concerned by the differing approach to the issue of spectrum between the CMA and Ofcom. The availability and allocation or capping of spectrum is an important factor in the development of the market and in the circumstances should be addressed where the merger gives rise to unassailable competitive advantage and where there is likely to be a substantial lessening of competition⁷.

2. Wholesale Mobile Market

UKB is concerned that the CMA has failed to appreciate the importance of spectrum and capacity in the provision of retail mobile services and in the provision of wholesale services by MNOs to MVNOs.

UKB notes that the CMA was split on the issue of whether the merged entity could cause a SLC in MNO wholesale markets. It is noted that the CMA had a difficult task in its analysis of this market and that, in such a dynamic market, there is some degree of uncertainty over the future behaviour of MNOs and MVNOs and, ultimately, the expected behaviour, preferences and expectations of end consumers.

We note that market participants such as H3G and Vodafone, which intend to continue as MVNO service providers, both agree that capacity is important to the provision of service to customers⁸. We are not clear that evidence from third parties such as these operators has been given due consideration.

UKB remains convinced (as were two members of the CMA panel)⁹ that the merged entity will increase the likelihood of SLC in the MNO wholesale market (and consequently

⁶ Para 3.39 *ibid*.

⁷ See for commentary and by way of example, submissions by BT/EE, Telefonica, H3G as listed in the Appendix C of the CMA Provisional Findings report.

⁸ See Vodafone submission to CMA, paragraph 3.6, page 35 and Three summary of a hearing at the CMA, para 13, page 2.

⁹ See paras 14.276-14.279, page 191 Provisional Findings report.

affect the quality and service provided to MVNOs and ultimately to end consumers of mobile products).

The CMA noted the following issues in the wholesale mobile market. We believe the two members who were in the minority were correct in identifying the importance of the control over quality of service that MNOs have. The issue they identify is compounded by BT's integration of Wi-Fi with mobile, enabling it to offer customers high quality of service within a geographic footprint unavailable to others. We provide below the relevant part of the CMA's finding with the concern over quality of service highlighted:

"Two group members did not provisionally agree with the view that the merger would not be likely to give rise to an SLC in one or more markets.

These 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. They believed that fixed-mobile bundles were likely to become increasingly prevalent and that the merged entity would not wish to assist major competitors by giving them access to a high-quality mobile service and thereby extinguishing any competitive advantage they might enjoy from EE's network and other assets. The MVNOs, for their part, would be reluctant to risk their long term security of supply by being hosted by their main rival in mobile and fixed telecom markets.

These members did not believe that such foreclosure, and the consequent reduction of competition in the wholesale mobile market, would be neutralised by the other three MNOs offering better terms either out of a desire to play a part in fixed-mobile bundling or in any event. Rather, they expected EE's total or partial withdrawal to lead to higher prices and/or reduced quality in MVNO contracts. They believed that this in itself established an SLC in the wholesale mobile market, irrespective of the effects downstream, which were harder to assess. They nonetheless thought it likely that there would be adverse effects downstream as a result of reduced rivalry in the upstream market."¹⁰

As discussed above, the central issue created by the transaction for the MNO wholesale market is that the merger creates a very strong integrated player that can offer end to end quality of service over its own wireless and wireline facilities in a way that is simply unavailable to other operators. Vodafone has some capability to offer end to end services in certain limited geographies in the UK using its own wireless and fixed networks. O2 and H3G lack fixed networks and there is only a limited geographical coverage of alternative fixed infrastructure. BT/EE is ubiquitous. This creates a problem in the provision of end to end services to retail consumers because BT/EE can engineer quality of service on an end to end basis across its own networks. It creates a problem in the wholesale mobile market because, in a data driven world¹¹, BT and EE will be able to

¹⁰ Provisional Findings Report, Page 191 – paras 14.276 onwards

¹¹ See, for example, CMA findings at paras 5.3-5.5 and fig 5.1 of the Provisional Findings report.

cross-market 4G products where BT's copper network is inadequate and use 4G mobile as a substitute for fixed broadband, to all of BT's installed base of customers for any BT product. Others do not have equivalent mobile assets or equivalent mobile/fixed assets through which to compete, nor do others have the ability to use BT's extensive unregulated assets in an equivalent way.

3. The CMA's and Ofcom's respective procedures, powers and duties.

In addition to those points raised above, UKB has additional, procedural concerns over the approach taken more generally by the CMA.

Whilst it is accepted that the CMA and Ofcom should (and rightly so) cooperate on matters in which its competencies overlap, the BT/EE merger has initiated the formal CMA phase 1 and phase 2 procedure under the CMA. Detailed representations and submissions have been made and a detailed (albeit incomplete (see above Wi-Fi section) and in some cases inconclusive (see above MNO wholesale section)) market investigation has been carried out.

Ofcom undertake different market analysis and (as can be seen from their BCMR consultation) clearly follow a different framework to the EU Commission/CMA guidelines on market assessment in merger control in such cases. The BCMR is arguably anti-competitive in places and this is a clear indication that Ofcom is not the appropriate forum in which any SLC likely to be brought about by the merged entity should be handled.

This can also be seen in the differences between the approach of the CMA and Ofcom on strategic bidding (see further above). For example, the Ofcom decision regarding spectrum caps is perplexing as it ignores that:

1. the merger assessment is against a legal test, rather than an objective/policy of Ofcom being pursued for regulatory goals against the duties applicable under telecommunication regulation, which are different from the competition law test and duties imposed on the CMA;
2. the CMA's decision is based on a counterfactual where the H3G/O2 merger does not happen (or is conditioned in a way where the market is as if the merger did not happen);
3. the CMA's decision is based on Ofcom being able to regulate / prevent strategic bidding

Ofcom is not subject to the same timescales and requirements as the CMA. Implementation of Ofcom remedies tends to take a significant period of time and, in any event, have proven to be unsuccessful and backward thinking in many product market areas.

UKB are of the view that the CMA has a different set of powers and duties from Ofcom and throughout it has unduly deferred to Ofcom, thereby failing to take into account relevant factors and facts in conducting its assessment. This has limited its decision making. Ofcom has no merger control powers and is not assessing competition against the substantial lessening of competition test that is required of the CMA under its jurisdiction.

For Ofcom to deal with competition issues that should have been addressed by the CMA will lead to material unfairness. The parties to the transaction will be able to proceed with the transaction and third parties that have given evidence and provided information, where problems identified should have been addressed and remedies will not have been fairly treated within the timeframe dictated by merger control. Given the dynamic nature of the telecommunications markets, any such delay is likely to have a disproportionately high effects.

We therefore trust that the CMA will re-consider the points we have highlighted in this letter.

Yours sincerely,

Nicholas James
Chief Executive
The UKB Group