

# CityFibre

**Response to the CMA's Provisional Findings regarding the anticipated acquisition by BT Group Plc of EE Limited**

**Response submitted by CityFibre Infrastructure Holdings Limited**

**November 2015**

**CityFibre's response to:**  
**The CMA's provisional findings in the review of**  
**The Anticipated Acquisition by BT Group plc of EE Ltd.**

**1 Introduction**

CityFibre Infrastructure Holdings (CityFibre) has made submissions for Phases 1 and 2 of the CMAs review of the proposed acquisition (the Acquisition). This submission is brief and builds on previous submissions. We therefore do not repeat background information which has been previously submitted. We would naturally be pleased to answer any queries arising from this or earlier submissions.

CityFibre is disappointed in the CMA provisional findings and in the parts of the underlying analyses that are included in the provisional findings document.

CityFibre remains of the strong view that SLC will result from the Acquisition in the context of the Theory of Harm: Mobile backhaul – Customer Foreclosure. We have previously submitted our rationale for this and have participated in hearings with the CMA. However, in the provisional findings, it appears that the CMA dismisses our arguments based on relatively light evidence, primarily a small number of statements from other third parties as well as from the parties to the Acquisition.

In this brief document, we highlight our key concerns and where we believe, from the content of the provisional findings document, that the CMA has erred in its analysis.

We discuss three main areas:

- The CMA's market analysis – we believe that the CMA needs to complete its geographic market analysis and consider the impact on geographic markets with different competition characteristics of the national minimum quantity commitments in the existing contracts between mobile network operators (MNOs) and BT Wholesale (BTW);
- The review of the likelihood that EE and MBNL would have purchased dark fibre from CityFibre, absent the merger – the analysis presented by the CMA is not convincing and ignores the substantial benefits from dark fibre and the substantial efforts both MBNL and EE had gone through to establish detailed contracts and roll-out plans of CityFibre's network to replace BT connections; and
- The impact on CityFibre (and other infrastructure builders) of losing EE and MBNL as national anchor tenants – The CMA's rationale for finding that companies like CityFibre could replace MNOs as national anchor tenants with individual anchor tenants on a city-by-city basis appear weak and unsubstantiated.

Throughout our submissions to the CMA and in this submission, we have focused on the anticompetitive effects of the long-term contracts between MNOs and BTW and the minimum quantity requirements in those contracts.

It is our strong view that the effect of these anticompetitive contracts will be strengthened by the Acquisition and we urge the CMA to highlight the impact of those contracts and to instigate further investigation into them.

## 2 The CMA's analysis relative to Mobile backhaul - customer foreclosure

### 2.1 Mobile backhaul - Market definitions

#### 2.1.1 Product markets

The CMA concludes that there are two markets in relation to the provision of mobile backhaul services in the UK; namely the provision of managed Ethernet mobile backhaul services and the general provision of backhaul connectivity (including dark fibre). The managed Ethernet mobile backhaul (also known as MEAS) is dominated by BT Wholesale (BTW) with a much smaller presence of Virgin Media, whereas general backhaul services are provided by a number of different Communications Providers (CPs) including dark fibre providers.

CityFibre does not dispute this conclusion, in fact we believe that it highlights the very powerful market position held by BTW. The CMA refers in several places to the impact of BTW's existing long duration contracts with substantial minimum quantity commitments and the impact these have on the MNOs' ability to change supplier. CityFibre contends that, despite the theoretical ability of another CP to purchase BT Openreach EAD and EADLA services and use its own national transmission network to compete with BT in the managed Ethernet mobile backhaul market, the existence of these long term contracts and the high levels of minimum quantity commitments in these contracts, restricts competition and makes this an extremely difficult task. It is our view that these contracts represent a restrictive practice and should be unenforceable.

We are surprised that such plainly restrictive agreements, containing volume commitments, are accepted and relied on by the CMA rather than roundly condemned. Such agreements allow BT to benefit from its extensive network reach. They limit and foreclose the opportunity available to third parties to provide fibre to cell sites and towers in competition with BT. They appear to have the effect of discounting for volumes of cell sites and towers purchased, aggregating the provision of service within BT's wide geographic footprint, together with sites in competitive areas. This plainly enables BT to benefit from its economies of scale and unparalleled network reach and anticompetitively restrict competition. As anticompetitive agreements the CMA cannot rely on them as a factual matter; illegal agreements should be regarded as void. At the very least the CMA should raise issues about their validity and indicate its difficulty in placing reliance on them as a matter of evidence.

In its phase 1 report, the CMA found that MNOs purchase the large majority of BT mobile backhaul services from BTW, rather than from BT Openreach.

#### 2.1.2 Geographic markets

The CMA concluded that the managed Ethernet mobile backhaul market is national and whilst it observed that there are geographic differences in the level of competition in the unmanaged backhaul market, it did not pursue this further, stating that the geographic market definitions within the unmanaged backhaul market would not affect the CMA's findings. CityFibre disagrees with this view.

The CMA left its analysis of geographic markets unfinished, stating that the definition of geographic markets would not influence its findings. CityFibre believes it is important to understand that whilst the market for managed Ethernet mobile backhaul may be national (in fact we understand that the BTW minimum quantity commitments are national), the market for local connectivity is not. There are significant variations in competitive intensity for the supply of local connectivity across the country.

We consider that the CMA has failed to properly analyse the geographic component of market definition. This failure cannot be discharged with reference to another regulatory authority's jurisdiction. The CMA's jurisdiction in mergers is something that Ofcom cannot discharge as a Regulator nor is it within its regulatory jurisdiction; Ofcom's regulatory goals, its powers and procedures are different from the goals powers and procedures under which the CMA operates.

Furthermore we take the view that in the BCMR Ofcom has failed to discharge its obligations to properly investigate and determine geographic markets [CityFibre Confidential].

It would be plainly wrong both for the CMA to place any reliance on Ofcom's approach under the BCMR, and it would be wrong for the CMA to fail to properly examine competition in geographic markets in the context of the BT/EE merger.

## 2.2 Competition issues relating to the market for managed Ethernet mobile backhaul

CityFibre contends that the nature of the BTW contracts are causing the market structure observed by the CMA<sup>1</sup> as they are plainly anticompetitive and cause market foreclosure through long duration and minimum quantity commitments. It seems clear that the BTW contracts constitute a substantial barrier to competition and market entry, and that this is to the detriment of the MNOs and to the potential competitive suppliers of managed Ethernet mobile backhaul services. CityFibre recognises that this is not a situation caused by the Acquisition, but it is nevertheless a significant competition problem. However, CityFibre believes that the Acquisition is likely to lead to EE cell sites and towers being provided by BT and it will further entrench the dominant position of BTW in the managed Ethernet mobile backhaul services market. The combined entity will capture the consumption by EE (and possibly MBNL) and therefore substantially lessen competition.

With respect to CityFibre's role in the provision of mobile backhaul services, we have until now addressed the market for local access circuits which is today dominated by Ethernet circuits from BT Openreach. These circuits form upstream inputs to the managed Ethernet mobile backhaul services. BTW's dominance in the downstream market (which aggregates upstream inputs), effectively means that a provider of local access connectivity to the mobile backhaul markets needs to become a supplier to BTW. The CMA has noted in several places that it is uncertain how much appetite the MNOs have to procure separate local access connections and then manage the aggregation and national transmission themselves.

It therefore follows that a competitive supplier of local access connectivity should look to inclusion of its services into the managed services solutions sold by BTW. It is, however, extremely unlikely that BTW will source local access connections from providers that compete with its own upstream business. BT's economic incentive is to utilise its own assets and not provide revenues and profits to

---

<sup>1</sup> That is the highly concentrated managed Ethernet mobile backhaul services.

its competitors. BTW's dominance in the aggregator market makes it a gatekeeper for the upstream local access connectivity market for mobile backhaul services, but it has a strong economic interest, which causes it to not consider alternative supply of the upstream inputs.

As noted above, the Acquisition will strengthen BTW's position further by removing EE (and potentially MBNL) from the market for competitive supply and this has an effect not only in the managed Ethernet mobile backhaul market but also in the upstream local access connectivity (unmanaged backhaul) market, whether Ethernet or dark fibre.

CityFibre considers that the CMA has substantially underestimated the effect of the BTW contractual terms on the ability of other CPs to compete in the managed Ethernet mobile backhaul market, which in turn has a direct impact on the market for local access connectivity as an upstream input to that market.

It is CityFibre's view that the BTW contracts with minimum quantity commitments at a national level, cause severe problems for the upstream local connectivity market by foreclosing the access to the mobile backhaul market. There are parts of the country where it is likely that MNOs will remain dependent on BT for connectivity and by locking the MNO into large minimum quantity contracts BTW secures that the MNO has a strong incentive to procure all its mobile backhaul services from BTW, thereby excluding competitive supply in the towns and cities where this is available.

In addition to provision of local access connectivity, CityFibre is in the process of acquiring substantial national transmission assets and intends to compete with BTW in the managed Ethernet mobile backhaul market, but has severe concerns that the existing barriers to entry would be further strengthened through the Acquisition. CityFibre therefore urges the CMA to reconsider its findings.

### 2.3 The CMA's analysis of the market for unmanaged mobile backhaul services

Without prejudice to the benefits CityFibre could obtain from being a supplier to BTW for the managed Ethernet mobile backhaul service, CityFibre remains of the strong view that MNOs do recognise the benefits of using dark fibre connections and that MNOs can play an irreplaceable role as national anchor tenants for the roll-out of competitive fibre networks in towns and cities across the countries.

In its analysis the CMA asked three questions, whether:

- (a) EE or MBNL would have purchased from a new supplier absent the merger;
- (b) the merged entity would be able to influence MBNL's decision making in this regard, to prevent or limit purchases it would otherwise have made from dark fibre suppliers; and
- (c) the loss of EE and/or MBNL would have affected the roll-out of fibre networks, taking into account its importance as a customer and the presence of alternative potential anchor customers.

The CMA refers to the uncertainty caused by the Ofcom proposals and that this may delay purchase decisions by MNOs for dark fibre products, CityFibre does not dispute that fact, but also does not recognise that should be is a significant factor in the CMA's deliberations. The market distortions resulting from the Acquisition would have significant long-term consequences – a delay for perhaps six or nine months due to regulatory uncertainty should not be considered a significant factor to demonstrate that MNOs are unlikely to purchase dark fibre connections to replace active Ethernet connections. We also do not believe that it is reasonable that the CMA uses as a counterfactual the

situation that current proposals by Ofcom are implemented without change. [CityFibre Confidential] CityFibre therefore does not recognise that these points provide valid reasons supporting the CMA's conclusion that EE and/or MBNL would not purchase dark fibre products from CityFibre or other providers.

Further, the CMA refers to the long term contracts currently in place between BTW and the MNOs as another reason why MNOs would not take up dark fibre connections in large number in the short term. The impact of the potentially anticompetitive BTW contracts is discussed above and is known to CityFibre. In its negotiations with MNOs, the MNOs have shared the expiry dates of their contracts in different locations and the roll-out plans of CFH's dark fibre services were synchronised to these. Whilst CityFibre is acutely aware of the anticompetitive impacts of the BTW contracts, the detailed plans developed with EE, H3G and MBNL demonstrate that the additional value of dark fibre connections were considered sufficiently high to endure the short-term penalties from BTW. CityFibre does therefore not accept that the existence of the BTW contracts would cause the MNOs to would not wish to purchase dark fibre connectivity to gradually replace Ethernet connectivity. The anticompetitive effect of the BTW contracts are clearly causing significant problems for CityFibre and other providers entering the market, but it is our experience that the MNOs consider the benefits of using dark fibre to be sufficiently large to tolerate the substantial penalties they will incur by not meeting minimum quantity levels in the contracts. CityFibre also does not recognise this as a valid reason to support the CMA's conclusion that EE and/or MBNL would not purchase dark fibre products from CityFibre or other providers.

The CMA has acknowledged the incentive of the merged company to self-supply, as well as the possibility of a substantial influence on the purchasing decisions of MBNL. It is CityFibre's view that the CMA has not demonstrated that the uncertainty caused by Ofcom's current consultations or the existence of the BTW contracts (despite their anticompetitive nature) constitute evidence that MNOs, EE and MBNL in particular, would or could not start using dark fibre instead of Ethernet local connections, absent the merger.

The CMA also presents statements from MNOs to help shed light on the likelihood that they would start incorporating dark fibre links into their backhaul networks. Only one of the four MNOs (O2) said it considered the possible complications of managing dark fibre connections to be deterrent. With regards to Statements made by EE, it should be expected that it would argue that it has not serious intentions to purchase dark fibre from CityFibre, despite having invested considerable efforts in the MBNL negotiations with CityFibre [CityFibre Confidential]. The CMA should not place undue weight on statements by the parties to the Acquisition, but review such statements critically. The level of time and effort invested in these negotiations belies such a statement. H3G confirmed its desire to use dark fibre services and it should be noted that H3G is the acquiring party in its proposed merger with O2, so it is likely that the H3G view would prevail if the merger were to be go ahead.

The heavily redacted statements included in the provisional findings do not appear to lend clear support to the CMA's conclusions and CityFibre's direct experience from long-standing relationships with both EE and H3G clearly support the view that they were both very committed to the use of dark fibre.

CityFibre does not consider that the CMA has undertaken the necessary analyses to ascertain the substantial benefits MNOs can derive from the use of dark fibre instead of Ethernet connectivity. Our experience is that the levels of use of data services can multiply, when the restrictions caused by slow connections from insufficient backhaul capacity are removed. [CityFibre Confidential]. In a market driven by data consumption, the MNOs are severely restricted by the lack of speed and capacity of existing Ethernet connections and the steep increases in costs to increase the speed of the Ethernet

connections. The CMA refers to BT's launch of a 10gbit/s Ethernet product and states that the presence of this product would reduce the attractiveness of dark fibre connections. The price increase for an MNO to upgrade for 1Gbit/s to 10Gbit/s is substantial. The dark fibre product is a fixed price, regardless which speed it is used for. This means that the MNOs invest once in the dark fibre, rather than having to pay for installation of ever increasing Ethernet speeds over time.

#### 2.4 Anchor tenancy

With regards to the question of whether the absence of MNOs as anchor tenants for the roll-out of fibre networks could be readily replaced by other large customers, CityFibre strongly disagrees with the CMA's finding that this is possible and that therefore the absence of MNOs as anchor tenants is unlikely to have a significant impact on the roll-out of competitive fibre networks in the UK.

CityFibre has direct experience in negotiating with potential anchor tenants across the country to provide the initial revenue stream to justify building fibre networks to all business and residential premises in towns and cities. These negotiations are long and protracted, if the anchor tenancy candidate is a public authority, then the contract will be subject to public tendering and can often be delayed considerably. [CityFibre Confidential]

The CMA's analysis refers in several instances to the need for competitive suppliers to have scale in order to be able to offer effective competition to BT, whether BTW or BT Openreach [CityFibre Confidential]. This delay will have significant detrimental effects on the availability of a competitive open wholesale fibre network platform, based on which CPs can innovate significantly beyond what is feasible (commercially and technically) if they were limited to using the BT Openreach network.

CityFibre cannot see that the CMA has undertaken sufficient factual analysis of the impact of removing MNOs as anchor tenants. The initial findings report refers only to the subjective views of a small number of interviewees and we do not consider this sufficient evidence to support the CMA's conclusions.

### 3 Conclusion

CityFibre is disappointed in the seemingly shallow analysis undertaken by the CMA into the potential SLC with reference to the Theory of Harm of Mobile Backhaul – Customer Foreclosure. We strongly encourage the CMA to take into account the points outlined in this letter and undertake additional factual analysis. We are confident that the analysis will show that there is a considerable risk of SLC and that the main cause of this is the nature of the contracts in place between BTW and MNOs. The already anticompetitive nature of these contracts will be substantially strengthened by the Acquisition and the CMA should consider remedies that could be imposed to remedy this situation.