fcs federation of communication services
making sense of converging markets

iMVNOx international mobile association

SUBMISSION TO THE CMA FROM THE FCS and IMVNOX REGARDING THE PROPOSED MERGER BETWEEN BT AND EE

This paper is a joint 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, and IMVNOx, the global trade association for mobile virtual network operators (MVNOs). We have worked together to ensure that we reflect the views of wholesale service providers, B2B CPs and their partners in the UK as well as UK based MVNOs.

Together we are taking this early opportunity to put our concerns to the CMA about the impact on future competition should the merger of BT and EE go ahead. This is the prime purpose of this paper, but we also wish to flag the additional issues that could arise if the acquisition of O2 from Telefonica by H3G proceeds. We believe the two mergers cannot be considered in isolation, even though we understand that the latter is likely to go to DG Comp.

BT/EE merger issues:

The FCS and IMVNOx are 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.

Operator with dominance in two markets

The new entity will operate across two different markets: fixed line which has been closely controlled and regulated by Ofcom, and mobile which has traditionally experienced lighter touch regulation in order to encourage market entry and investment. Regulation of fixed line services, together with the Undertakings provided by BT Group a decade ago (provided to avoid a referral by Ofcom of the wider market to the Competition Authorities), has helped to ensure that that regulated wholesale products are available on an "equivalence of inputs" basis for new entrants and service-only providers. Where those products are available, for example for fixed-line telephony over copper access networks, the retail services can be economically provided by a range of service providers and indeed many hundreds of service providers exist.

There is no equivalent regulated wholesale access in the mobile markets. Companies who wish to provide mobile communications services but who are not one of the main mobile network operators (MNOs) can become MVNOs through commercial negotiation for network access and associated services with the MNOs.

A combined BT/EE is likely to be able to use its cross-market position to its advantage in a way that other operators cannot. BT would, via this transaction, buy its way into the mobile market. Other fixed line operators do not have the ability to do the same and therefore this merger would adversely affect them, particularly if provision of stand-alone fixed services becomes unviable.

BT has shown in the way that it has handled the roll-out of fibre that it does not view this as a necessary network upgrade, to replace failing copper, but as an opportunity to consolidate their market position through first-mover advantage, primarily in residential areas. They have been slow to roll it out in areas where there are high concentrations of businesses, where it might offer a viable and much cheaper alternative to other business connectivity products. A strategy of this kind cannot be beneficial for business growth: businesses of all sizes need the best connectivity possible in order to be able to compete in a worldwide market. We would be concerned should this sort of approach to business growth become even more widespread should the merger proceed.

It should be noted that BT is currently a player in the mobile market, through its MVNO, and EE is a player in the residential fixed line market. A merger would therefore eliminate these competitors from each market place. Ofcom designed the 2012 'digital dividend' spectrum auction with the specific intention of encouraging an additional player into the market by ring fencing one block of spectrum for a new entrant, yet now the level of competition is likely to reduce as a result of this merger.

MVNO status

The MNOs currently exercise a great deal of control over the MVNO market in order to protect their interests. Vodafone has recently announced that it will not allow any new MVNO entrants and has confirmed that existing MVNOs will not have access to 4G technology. O2 has stated that it will only host large (full) MVNOs in vertical markets. Many EE MVNOs still do not have access to 4G and have not been given a firm date for this. They also face obstacles in that other functionality commonly regarded as "standard" such as short-code texting is unavailable to them/their customers.

We are concerned that BT/EE's incentive to support its existing MVNOs may change or disappear; if MVNOs are not able to provide offerings at the highest level of existing technological standards they will be unable to attract new customers and will lose existing ones.

Many MVNOs find it difficult to launch innovative services as they require flexible Operating and Business Support Systems (OSS/BSS) environments. If this is not offered on an open basis to MVNOs, the lack of availability can be solved by introducing an 'enabler' which acts as an interface between the MVNO and MNO. The inclusion of an OSS/BSS enablement layer on a mandatory basis could help competition to ensure that services are provided openly and equally to the retail community, and make the ability to change the host MNO easier.

A change to EE's current policy combined with the strategy changes of other MNOs outlined above could be detrimental to new entrants to the MVNO market.

Service offerings

We are moving into a converged world where apps and data are becoming increasingly important; even voice is now a data output thanks to the growth of Voice over Internet Protocol (VoIP) calling. It is easy for this to become a discussion about voice, because that is the legacy position, and that is how the present regulatory framework grew up. But the future (and indeed the present) is not voice, but data. Data volumes are growing every day, while voice minutes continue to decline. Data can be delivered effectively and price-efficiently over either platform.

So we have a growing demand for connectivity which can be delivered either over a price-regulated wholesale equivalence fixed line platform or a non-regulated monopoly mobile platform where a handful of players control not only price and terms of wholesale access, but whether there is even any wholesale access at all.

As IP becomes all-prevailing in providing both voice and data services to enable a competitive and innovative market that offers UK plc the best choice of application and service, service providers must have equal access to the mobile market in the way they already have within the IP Softswitch Market. Without this equal access the big three MNOs will have a massively unfair advantage in being able to provide bundled mobile and IP services. It has already been seen that the big MNOs are not good at innovation; they try and protect revenues by providing service that benefit their bottom line at the expense of innovation and customer benefit. One example is the cost of sending a picture message - using the MNO offers, consumers will be paying 35p per message, this compares to an over the top applications like What's App that provide this service at almost zero cost. We need to make sure this opportunity to innovate at all levels in the Mobile market is available to all as ultimately this benefits UK plc

Ability of smaller players to compete

This proposed merger would give BT access to the largest 4G base in Europe as currently owned by EE. A dominant operator that is able to offer triple and quad play packages to new and existing customers will make it more and more difficult for smaller, independent players to enter and continue in the market.

BT and EE will be able to mine each other's UK customer databases (c32m between them) to offer new services, at costs which other players will not be able to match. This cannot be good for the continued economic growth that UK plc needs or for the expansion of the entrepreneurial SME base.

Summary of concerns with the proposed merger

We believe that expected BT/EE activity post merger could lead to:

- provision of new sorts of retail services that no other entity would be able to replicate economically
- reduction in competition as competitors cannot provide such new services
- reduction in competition between MNOs (change in MVNO behaviour) leading to worsening treatment of such MVNOs as exist and inability of any new ones to become established and thrive
- bundling of mobile with other retail products adversely affecting switching rates due to Losing Provider Led switching being the norm in the mobile market - thus chilling competition
- increasing market concentration
- inability of smaller players to compete

O2/Three merger

Reduction in competition

H3G was brought into the mobile market to help shake it up and encourage competition. The number of operators was expected to increase to five when BT acquired mobile spectrum. Now that number looks likely to reduce to three MNOs if the O2/Three merger proceeds.

This could easily lead to a path of viable acquisitions that would give all three operators quad play abilities, leaving little room for competition.

Access to mobile network

With network sharing agreements in place between EE and Three, and Vodafone and O2, a merger between Three and O2 would create asymmetry by giving the new entity access to the entirety of the UK's mobile network, giving a structural advantage that others could not match. The possibility of this underlines the need for greater separation between infrastructure ownership and service provision and a merger should not be permitted to take place without such a separation as a condition.

Experience in other countries

In countries where there are a limited number of players, the result on the consumer is lack of service choice and high prices. For example, in the UAE market, the limited number of incumbents and the restrictions in MVNO launches and regulatory stickiness in pricing means that prices are kept high and segmented offerings are limited. A further example where pricing and service development could be improved is Turkey: whilst MVNOs are accepted, the double taxation burden on MVNOs means launching MVNOs is not economically viable, hence limiting the competition possibilities.

Globally, open MVNO access is seen as a way of stimulating competition, such as in Mexico where plans are being made to develop an open access wholesale platform to allow new entrants into market, which is dominated by one main incumbent.

It is too early to fully see the result of moving from four operators to three in Germany and Ireland last year, but in Austria which made a similar move in 2013, prices have gone up for consumers.(1)

Possible Remedies

As a condition of either the BT/EE or O2/Three mergers proceeding we request that there must be an undertaking on both Groups to provide an open, transparent and equivalent wholesale offer which would allow CPs of all sizes to compete on a level playing field and allow sustainable and effective competition in service provision.

As part of this requirement we also request that an obligation should be placed on both merged groups to provide National Roaming within 24 months of these agreements being in place. At this stage Vodafone would be excluded from this but by forcing 75% of the mobile market into national roaming it could be suggested that Vodafone would want to become part of it anyway, otherwise their network coverage could be seen as limited compared to the other two operators.

In order to give confidence and help resolve other issues of transparency and sustainability, this should be accompanied by a form of separation between the network infrastructure and service activities of the EE entity.

We would advocate separation of the mobile physical infrastructure from the retail provision to ensure that true competition can be maintained. This would allow for the creation of a BSS/OSS platform as outlined above.

We understand that even the MNOs are concerned about the continuing availability of wholesale products that BT currently provides for mobile backhaul being offered on a non-discriminatory basis should the merger proceed. Functional separation would mitigate against potential problems. We would also favour a new requirement for Ofcom to regulate the mobile wholesale market more closely to ensure competition is enabled.

Conclusion

We believe there are good grounds to expect a merger between BT and EE to have major impacts on the market. Additionally these impacts will work generally to the constraint of competition and to the detriment of an open, transparent and competitive communications market. We therefore hope the CMA will conclude a phase 2 consideration is appropriate in this case. We would welcome the opportunity to bring some of our members to meet with you to discuss these issues further.

(1)
http://m.ft.com/cms/s/0/dba557c8-9c91-11e3-b535-00144feab7de.html

http://www.fiercewireless.com/europe/story/austrias-consumer-prices-rise-following-mobile-market-consolidation/2015-01-12