ITSPA

Internet Telephony Services Providers' Association

ITSPA position to the Competition Market Authority surrounding the proposed merger of BT Group plc ("BT") and EE Limited ("EE)

About ITSPA

The Internet Telephony Services Providers' Association (ITSPA) represents over 80 UK businesses involved with the supply next generation communication services over data networks to industry and residential customers within the UK. Our traditional core members are VoIP providers. ITSPA pays close attention to both market and regulatory framework developments on a worldwide basis in order to ensure that the UK internet telephony industry is as competitive as it can be within both national and international markets.

A full list of ITSPA members can be found at http://www.itspa.org.uk/

Introduction

This paper provides an overview of views expressed by the membership, concerning the merger of BT EE. Whilst BT is a member of ITSPA, for obvious reasons, this submission is not to be taken as representative of BT's views. The following has been compiled as the common position of those ITSPA members engaged with the merger process; some members have reserved their ability to make their own comments and may also wish to build upon this themselves in their own submissions.

At the outset three procedural points need to be made. The first is that this case should go to a full second phase review at the CMA. Secondly, the merger needs to be considered alongside the other proposed merger in the telecommunications markets of Three and H3G for its effects on competition to be properly understood. Finally, the current lack of a timetable at the CMA benefits the parties to the transactions and not third parties or consumers. Timetables need to be established and the system needs to be seen to fairly allow the views of all to be considered.

Summary of Horizontal and Vertical Effects

As should be clear from the businesses and interests of our membership, we are dependent upon a level playing field in the distribution system (data networks) with a liquid market for consumers (ease of switching) in order to compete and innovate. The proposed mergers of BT and EE as well as O2 and H3G present a significant structural change in a market upon which we rely. Each transaction raises horizontal anticompetitive effects, BT/EE compounds these problems with considerable risks of a substantial lessening of competition through vertical foreclosure.

BT has a dominant position and controls infrastructure both in access and backhaul on which all other operators depend. The risk of BT foreclosing third parties is well understood and BT is subject to competition law undertakings and regulation that are intended to act as remedies. However, the undertakings and regulation are outmoded and were not designed for the issues that are created by the fixed and mobile convergence currently operating in the market and effected through the transaction with EE.

In particular, current regulation and BT's undertakings do not address mixed packages of fixed and mobile and media products and essential non-price factors of competition such as quality of service, which are critical for modern packages of communications and media to both enterprises and consumers. BT will gain massive competitive benefit if the deal with EE goes through without conditions to address the following six issues:

1) ***access:*** to fixed access and backhaul for third parties. The merged BT/EE will have an increased incentive to discriminate against other downstream operators: all downstream players are likely to be adversely affected. BT/EE will have an increased incentive to discriminate against downstream players in mobile, fixed, consumer, business packages, broadband and quad play services, to name a few.

2) ***wholesale***: the vertical integration of fixed and mobile means that there will be two Mobile Network Operators, ("MNOs"), (Vodafone and BT) who are converged fixed/mobile players operating on their own networks, and a third that is the combined 02 and three ("03"). This is both a vertical and a horizontal concentration. Access for Mobile Virtual Network Operators ("MVNOs") to MNO supply will be restricted, and current trends by which MNOs are restricting MVNO competition are likely to increase.

3) ***packages and bundles***: Consumers are increasingly being offering "Quad-play" packages and enterprise customers need combinations of many different types of technology. The BT/EE transaction creates a fixed mobile technology platform that is more geographically and technically extensive than any other in the UK. BT's returns from its Openreach business are measured against an increasingly risky

asset base, well beyond the low risk utility access business that is Openreach. Competition may appear to be effective but is in fact distorted because of the misallocation of resources caused by ineffective regulation. The BT/EE transaction threatens to compound this problem, and provide BT with significant competitive advantage in packaged product markets.

4) ***IPV4***: there aren't enough IP addresses for broadband demand. BT/EE has a lot because of history. The amount they have between them is not known. Their addresses were provided to them free of charge. Because there is now a shortage, later players have to buy addresses. The lack of addresses is acting as an impediment to competition and a barrier to entry.

5) ***reduction of direct mobile/mobile competition***: BT competes with EE. This happens both because BT mobile is offered in direct competition and because BT uses FON/ WiFi and has a very large countrywide WiFi coverage. That coverage supports mobile data apps such as What's App that are substitutes for consumer data and voice services.

6) ***spectrum shortages* (for some players):** Combinations of different frequencies of spectrum are understood to be an additional issue because some entities may not have enough to enable it to compete on a level playing field with other players.

Our collective experience.

Our members have often struggled to gain access, at a wholesale level, to radio and mast infrastructure in order to provide innovative and disruptive services in the UK; this was the case when there were 5 operators let alone a proposed 3. We also note that the market for MVNOs at a wholesale level is being restricted; some of our members have noted that Vodafone is actively trying to disengage from this market, leaving, if the mergers were to take place, a duopoly in this area with an inherent hazard to restrict access to new technologies (such as 4G and Voice over WiFi) to their own retail benefit. This in turn would, evidently, reduce competition and result in an upward pricing pressure to the detriment of consumers and innovation and provide only BT/EE with a platform upon which to provide truly converged products.

Furthermore, the mast infrastructure in the UK is a duopoly; BT is *de facto* dominant in backhaul markets and a merged BT/EE can exploit that position to the detriment of the mast infrastructure entity upon which it does not depend, and with H3G and O2 merged having a stake in both, the risk to others that depend on the infrastructure is clear.

Whilst it may be said that there are a number of MVNOs in the UK, some with market shares some would argue as significant, it is important to distinguish between those that are mere resellers of a mobile operator's retail product (such as GiffGaff and Tesco Mobile) and those, which are of a more limited nature, that have their own infrastructure and switching capability. It is this latter form of MVNO that has the ability to differentiate and innovate to the betterment of consumer pricing and functionality and is the type of MVNO that we find is most constrained at a wholesale level. All are ultimately dependent on the underlying terms and conditions of MNO supply, and those terms are likely to become more restrictive when the market for wholesale supply is reduced, with attendant increases in market power to the remaining MNOs consequent on the concentration that the mergers are creating.

Switching costs can be reduced and competition enabled if customers can easily swap and change products and services among as wide a variety of suppliers and as diverse a set of technology as possible. Incumbent mobile operators have increased customers' switching costs through limiting numbers to old technologies. This, we find, could have been avoided if essential resources such as access to numbers, had been made available to new entrants providing new services with different technologies, rather than being reserved through regulatory intervention to the benefit of old technologies and the previous generation of service providers.

Lack of competition has thus been compounded by the Office of Communications acting in what we have argued is a protectionist manner in relation to resources in the National Telephone Numbering Plan designated for Mobile Services[1], creating an environment in which we already feel is foreclosed to competition and new entrants, let alone if it were to consolidate further.

[1] We can provide copies of correspondence and notes of meetings to substantiate our concerns if the CMA wishes.

Horizontal and Vertical Concerns in Fixed Line

At a retail level, the current practice of including a "landline" with any package, even if it is unwanted or unused i.e. no Naked Digital Subscriber Line offering of any economic usability[2] for a new entrant which also forecloses the market to applications services providers commonly called "over the top" voice providers. With the inclusion of mobile within BT's retail offering and the ability for it to bundle packages at a retail level below the price at which an efficient new entrant could achieve from wholesale inputs, the threat to our members is clear.

Our members currently experience, as a result of the undertakings that created functional separation of Openreach , that there is an inherent "stickiness" of customers to the BT brand as a result of customer perception that improved service is delivered by BT Openreach to BT Retail. This consumer perception is critical – especially as it is, in no small part, driven by customers need for better performance. If Openreach met consumer expectations on behalf of their business and network customers, this perception would not be a competitive factor.

For clarity, our membership does not have a common position on the efficacy of structural separation of Openreach, noting that there are many issues that structural separation, in itself, would not solve, such as quality of service delivery. However, it is a common position that the BT undertakings are not currently an effective remedy. There are thus existing problems 10 years from the creation of the undertakings that require resolution and are now thrown into sharp relief given that the merger of BT and EE will increase its incentives to discriminate and foreclose third parties.

The inherently high switching costs for consumers to change supplier accrue to BT's benefit today and will be increased following the merger with EE. The "stickiness" of consumers to BT is derived from BT being able to automatically set up a landline or broadband service because of its nationwide preinstalled base. Lack of cross platform number portability (a pro-competitive remedy to promote a liquid market in consumer switching enshrined in European Law) means that there is already an illiquid market for consumer switching which requires additional redress. If BT were allowed to add the largest mobile operator to this stable, along with exclusive content, leveraged in a "quad play" bundle, we foresee a significant reduction in competition of others to offer the elements of the package.

[2] BT will argue that local loop unbundling facilitates this; however, that can require a capital investment of over £250m for an operator to gain access to the c650 exchanges alone, plus backhaul costs.

Our members are voice over data network specialists and use wholesale product that are supplied by BT for business use. They provide a set of competitive and tailored solutions that are valuable to the business sector and by extension to the GDP and productivity growth in UK plc – which risk being eliminated as a consequence of the transaction and will require remedies to ensure that competition is protected.

Proposed Remedies

If the mergers were allowed to take place, we would suggest that, among other things the following remedies would serve to, at least partially, address our concerns;

- Wholesale access to radio and mast infrastructure – a remedy requiring dominant providers (which we submit are the two child entities of the proposed mergers) to provide access on fair and reasonable, preferably cost orientated terms on request, to those that have the required switching and integration equipment. We believe this would be sufficient to also ensure the market offers competitive products to those that just wish to resell, just as the market for fixed line wholesale call origination has done historically.

- Further improvements (which include significant service delivery improvements) to the BT undertakings that created the functional separation of Openreach to ensure that BT does not distort the market, and protections to ensure the market for consumer switching is appropriately liquid; i.e a process for easily switching components of a bundle without service interruption or artificial barriers imposed by the incumbent provider.

- Protection to ensure that services run "over the top" such as our members' primary offerings in the Voice-over-IP space are not restrained or interfered with. The risk is that, for example, BT blocks Vodafone SureSignal femtocells on its networks to force users into moving to its own mobile product. This is especially pertinent given we understand the next generation of BT Hubs may voice over wifi capability and their default configuration is to extend the BT FON WifI network with each installation. This in itself would not be a problem if there were statutory protections around an "open internet" which at the time of writing, there are none.

Conclusion

ITSPA's members believe that the two proposed mergers create significant new barriers to entry, competition and innovation in the market if allowed without condition whilst simultaneously compounding existing structural issues in the market which inhibit competition and innovation. We would welcome the opportunity to meet with the CMA to discuss these concerns in more detail at the opportune time.