

CASE M.7064.23
Vodafone / CK Hutchison JV merger inquiry

[X] submission on Parties' response to CMA Issues Statement

1. INTRODUCTION AND EXECUTIVE SUMMARY

1.1 This paper sets out responses and observations from [X] to the initial submissions dated 12 June 2024 (the "**Initial Submissions**") made by Vodafone Group plc (together with all companies forming part of the same group, "**Vodafone**") and CK Hutchison Holdings Limited (together with all companies forming part of the same group, "**Three**" and together with Vodafone the "**Parties**") to the CMA's decision dated 4 April 2024 ("**Reference Decision**") to refer the anticipated joint venture between the Parties (the "**Proposed JV**") under section 33 of the Enterprise Act 2002.

1.2 [X]

1.3 [X]

1.4 The reason for submitting this paper is because [X] strongly disagrees with a number of statements made by the Parties in the Initial Submissions and to ensure that the CMA has access to all pertinent information as it continues its review of the Proposed JV. [X] does not, in particular, recognise the public statements made by the Parties that the Proposed JV will "*provide more choice in wholesale partners for the UK's already competitive MVNOs*",¹ which appear to [X] to be the diametrical opposite of the impact of the Proposed JV.

1.5 In particular, [X] submits that:

1.5.1 **Three is a strong MNO competitor:** contrary to the Parties' argument in the Initial Submissions, Three remains a strong competitor in the UK and is relied upon by MVNOs to ensure that tenders for wholesale access services are sufficiently competitive. Contrary to the Parties' statement in the Initial Submissions, [X] experience is that Three is a credible competitor and is not significantly weaker than EE/BT and Virgin Media/O2.

1.5.2 **The strength of the two alternative MNOs has been overstated:** as evidenced by [X] previous tendering processes, the competitive constraint imposed by EE/BT and Virgin Media/O2 has been overstated in the Initial Submissions. Therefore, while both are credible competitors to the merging parties, it is not correct to say that either EE/BT or Virgin Media/O2 have exhibited significantly greater competition than Three.

In [X] view all competitors are important, and the loss of any of the MNOs in this market would significantly reduce the level of competition and options available to [X]. Therefore, to the extent that the Parties are arguing that Three is a weak competitor, and that Virgin Media/O2 and EE/BT are sufficient to maintain competition in the market, [X] strongly disagrees.

1.5.3 **MVNOs lack bargaining power:** a key prerequisite for customers to be able to exert bargaining power over counterparties is the continued existence of a sufficient number of alternative providers to select from. [X] currently has little bargaining power. The Proposed JV would remove Three, [X], as an independent

¹ See <https://vodafoneandthree.uk/news/press-release>

MNO in the UK and therefore severely undermine the ability of MVNOs to exert countervailing buyer power.

1.5.4 [X]

- 1.6 Each is considered in detail below, but it is important to note at the outset that the Proposed JV impacts [an MVNO] not only as a customer of wholesale mobile services but also as a downstream competitor to the Parties at the retail level. [X] therefore faces a loss of competition between its upstream suppliers, liable to result in increased input prices, but because it competes with the Parties downstream [X] also faces additional incentives of the Parties to further increase wholesale mobile service prices in order to weaken [an MVNO's] ability to compete downstream.
- 1.7 The arguments in paragraphs 1.5.1 to 1.5.3, above, address [X] loss of choice as a customer resulting from the Proposed JV, whereas the argument in paragraph 1.5.4 considers the additional loss of competition and harm to [an MVNO] resulting from the fact that it is also a downstream competitor to the Parties [X].
- 1.8 For completeness, [X] has noted the press notice by Vodafone dated 3 July 2024 announcing an agreement between Vodafone Limited and VMEDdonstream O2 UK Limited to extend the network sharing arrangements between the two parties (the "**Announcement**"). [X],²[X] confirms that the Announcement does not affect the submissions made in this paper and [X] remains of the firm view that the Proposed JV will have a number of detrimental consequences on the UK mobile services market.
- 1.9 A fundamental concern with the Proposed JV is the reduction in the number of MNOs active in the UK from four to three. The fact that the agreement described in the Announcement would allegedly increase the spectrum and capacity of Virgin Media/O2 does not address this concern in any way. Given the proposed reduction of MNOs from four to three and the clear loss of competitive constraints that will entail at the wholesale level, it is not clear to [X] why potentially having access to more spectrum would result in Virgin Media/O2 offering competitive terms to [X] for future wholesale services.
- 1.10 [X] submits that the Proposed JV should not be permitted to proceed as proposed by the Parties and, in the event that it is cleared by the CMA, such clearance needs to be subject to appropriate conditions in order to ensure that competition is protected both at the wholesale and retail levels of the market.
- 1.11 To the extent helpful to the CMA at this stage, [X] would be very happy to discuss the Proposed JV and its impact on the UK market in further detail on a call or in a meeting.

2. THREE IS A STRONG COMPETITOR FOR WHOLESALE SUPPLY TO MVNOS

2.1 In their Initial Submissions, the Parties argue that Three is not a strong competitor in the UK for the supply of wholesale access services to MVNOs. In particular, the Parties argue that:

2.1.1 Three is a "*sub-scale [MNO] that would [...] continue to earn insufficient return and generate a negligible share of mobile cashflows*" which would limit its ability to "*challenge the market leaders*";³ and

² [X]

³ Initial Submissions, paragraph 1.3(ii).

2.1.2 Three's market position is overstated⁴ where its "poor network quality has been publicly cited by comparison websites for consumers as a reason not to choose ID Mobile at the retail level".⁵

2.2 While the relevant sections of the Initial Submissions have been significantly redacted for confidentiality reasons, to the extent that the Parties are suggesting that Three does not constitute a strong competitor in the supply of wholesale mobile services to MVNOs, this is wholly inaccurate and contrasts with [X] own experience of the market.

Three's participation in previous [X] tendering processes

2.3 [X]

2.4 At the outset, it is important to note that the very fact of being active in the market and able to participate in tenders (depending on the precise scope / requirements of such tenders) means that Three is exerting a competitive constraint on the remaining MNOs. In particular, the uncertainty caused by the fact that other MNOs will be unaware of whether a particular competing MNO elects to accept an invitation to participate in a tender and (if so) the terms of its proposal, helps ensure that the other MNOs which do participate are appropriately incentivised to submit proposals that are as competitive as possible (or risk losing to competing MNOs).⁶

2.5 The Proposed JV will therefore, by its very nature, reduce the level of competition in the market for the supply of wholesale supply of mobile services by reducing the number of MNOs that could theoretically participate in such tenders and therefore the level of uncertainty experienced by the participating MNOs.

2.6 The importance of Three as a credible [X] supplier to [X] is further supported by contemporaneous evidence of [X]. For example [X].

2.7 The above demonstrates very clearly that Three is an actual and credible potential provider of wholesale mobile services and a critical source of competitive tension in tendering processes – something which would be removed by the Proposed JV. [X]

Three offers a highly competitive pricing proposition

2.8 As noted above, the mere presence of Three as a potential participant in future MVNO tenders (something which Three has directly stated its intention to do) will add to the competitive tension in a process, increasing uncertainty for other participants and in so doing, ensuring that participants provide competitive proposals. This is the case irrespective of whether Three does in fact participate in any particular tender or submit a competitive bid, a fact which [X] does not expect will be known to other MNOs.

2.9 Contrary to the position in the Initial Submissions, Three also offers very competitive pricing and enables the MVNOs on its network to offer an aggressive pricing proposition to consumers. [X].

⁴ Initial Submissions, paragraph 4.1(i).

⁵ Initial Submissions, paragraph 4.2.

⁶ The CMA itself recognised in its report on the *anticipated acquisition by BT Group plc of EE Limited* (15 January 2016) that "the MNOs involved in the [wholesale mobile bidding] process would not always be aware of which other MNOs were bidding" (paragraph 13.35).

- 2.10 [X]
- 2.10.1 [X]
- 2.10.2 [X]
- 2.10.3 [X]
- 2.10.4 [X]
 - 2.10.4.1 [X]
 - 2.10.4.2 [X]

2.11 [X]

2.12 Contrary to the apparent assertions made by the Parties in the Initial Submissions, Three provides a very competitive offering in the UK and helps MVNOs thrive in the UK market. Its competitive pricing, in particular, acts as a significant competitive constraint on other MNOs.

3. THE STRENGTH OF EE/BT AND VIRGIN MEDIA/O2 HAS BEEN OVERSTATED

3.1 In their Initial Submissions, the Parties argue that they will experience significant competitive constraints from EE/BT and Virgin Media/O2 even following the Proposed JV and that the Reference Decision does not sufficiently take into account such competitive constraints. In particular, the Parties argue that:

3.1.1 EE/BT has won almost all of the recent wholesaler tenders (including those of large MVNOs);⁷ and

3.1.2 Virgin Media/O2 hosts the largest MVNOs on its network, and will have an *"enhanced ability and increased capacity to compete more aggressively in the wholesale market"* after the Proposed JV.⁸

3.2 [X] disagrees with the above comments by the Parties for the following reasons:

3.2.1 The focus on the current shares held by EE/BT and Virgin Media/O2 of the wholesale mobile services market misconstrues the relevant indicators of competitive constraints in bidding markets;

3.2.2 [one third-party MNO] did not submit a bid to provide wholesale mobile services to [X] in [X];

3.2.3 While [one third-party MNO] did submit a bid to provide such services to [X] in [X], its bid was uncompetitive; and

3.2.4 MVNO pricing is typically higher where the MVNO uses the networks of EE/BT and Virgin Media/O2, as compared to MVNOs using Vodafone's network.

3.3 Each of these observations are considered in turn.

⁷ Initial Submissions, paragraph 4.1(iii)(a).

⁸ Initial Submissions, paragraph 4.1(iii)(b). **NB** the reasons for why Virgin Media/O2 would be able to compete more aggressively after the Proposed JV have been redacted from the publicly available version of the Initial Submissions.

Market shares are not indicative of market power in markets characterised by tenders

3.4 The Initial Submissions attach significant weight to the fact that EE/BT and Virgin Media/O2 allegedly currently host 90% of all MVNOs and have a combined share of "[70-80]%" by hosted subscribers.⁹ The emphasis placed by the Parties on the market shares of EE/BT and Virgin Media/O2 as a way of demonstrating the market power of these two MNOs is misconceived. In particular, in order to ensure sufficient competition in a bidding market, the number of credible alternative providers for future tenders is a more important metric than the current market shares.

3.5 In tender markets, competition authorities have recognised that the number of credible remaining competitors is more important than the current market share figures, a position with which [X] strongly agrees. For example, the European General Court has noted that:

*"[...] the fact that a particular company has had a number of recent 'wins' does not necessarily mean that one of its competitors will not be successful in the next competition. Provided that it has a competitive product and that other factors are not heavily weighted in the first company's favour, a competitor can always win a valuable contract and increase its market share considerably in one go" and it is therefore "insufficient to examine market share figures alone [because] they only take into account the activity of the winners of a given contract but do not show how many credible competitors actually participated as bidders and thus created competitive constraints"*¹⁰

3.6 The Proposed JV will invariably reduce the number of MNOs active in the UK market and, as such, reduce the competitive constraints facing the remaining MNOs when competing for the provision of wholesale mobile services to MVNOs (essentially having one fewer MNO to worry about in formulating their bids). The Parties' assertion that EE/BT and Virgin Media/O2 have significant current market shares is some indication of success in past tenders (as regards only very few operators which have not been acquired), and does not address the fundamental concern that the Proposed JV will reduce competition for the supply of wholesale mobile services to MVNOs in *future* tenders - by removing one independent MNO from the market.

[X]

3.7 [X]

3.8 [X]

3.9 While EE/BT is an important source of competitive constraint in future tender processes, by virtue of ensuring that the UK market has at least four independent MNOs which *could* participate in a tender, the Parties are incorrectly characterising EE/BT as a particularly strong competitor in the supply of wholesale mobile services. [An MVNO's] experience is that in fact EE/BT provides a relatively weak constraint (at least for some such projects).

[X]

⁹ Initial Submissions, paragraph 4.10.

¹⁰ *General Electric Company v Commission* - (T-210/01) [2005] E.C.R. II-5575

3.10 [REDACTED]^{11 12}

3.11 [REDACTED]

Table 1: [REDACTED]

3.12 [REDACTED]

3.13 Similar to EE/BT, as discussed in paragraphs 3.7 to 3.9 above, the Parties' characterisation of Virgin Media/O2 as a particularly strong competitor in the supply of wholesale mobile services does not align with [an MVNO's] actual experience of the strength of Virgin Media/O2 and the competitiveness of its participation in previous tenders.

MVNO pricing is typically higher when using the networks of either EE/BT or Virgin Media/O2

3.14 As Table 2 and Table 3 in the Annex to this paper make clear, the pricing of MVNOs which are operating on EE/BT or Virgin Media/O2's networks tend to be higher than MVNOs which operate on Vodafone's network.

3.15 In particular, the MVNOs which are operating on Virgin Media/O2 (i.e. Tesco Mobile, Sky and Giffgaff) are not nearly as aggressively priced when compared to the MVNOs which operate on the networks of Vodafone or Three (i.e. ID Mobile, TalkMobile and Smarty).

3.16 Therefore, should MVNOs lose the possibility of using Three as an independent provider of wholesale mobile services as a result of the Proposed JV, the only available alternatives to the Parties would be EE/BT and Virgin Media/O2. As noted above, both of these alternatives are more likely to lead MVNOs to adopt less aggressive / competitive pricing as compared to using either Vodafone or Three. [REDACTED] submits that this is due to the worse terms of supply of wholesale access being offered by Virgin Media/O2 and EE/BT.

4. [REDACTED] MVNOS LACK BARGAINING POWER

4.1 In their Initial Submissions, the Parties argued that MVNOs have substantial and increasing bargaining power, which constrain MNOs currently and which will continue to constrain the Proposed JV.¹³

4.2 The assertion that [REDACTED] MVNOs, have substantial countervailing bargaining power is incorrect and any such power will reduce further as a result of the Proposed JV.

4.3 In particular, as discussed above, the Proposed JV will remove Three [REDACTED] as an independent MNO. As such, even to the extent that [REDACTED] has any bargaining power currently, it will be reduced significantly in the future given the removal of a significant alternative. This is supported by the CMA in its *Merger Assessment Guidelines*¹⁴ ("MAG") which note that:

"[m]ost other forms of buyer power that do not result in new entry – for example, buyer power based on a customer's size, sophistication, or ability to switch easily – are unlikely to prevent an SLC that would otherwise arise from the elimination of competition between the merger firms. This is because a customer's buyer power depends on the

¹¹ [REDACTED]

¹² [REDACTED]

¹³ See paragraphs to 4.14 to 4.16 of the Initial Submissions.

¹⁴ CMA129 dated 18 March 2021.

availability of good alternatives they can switch to, which in the context of an SLC will have been reduced. In that sense, market power and buyer power are two sides of the same coin, and an SLC can be interpreted as a substantial lessening of customers' buyer power"¹⁵

- 4.4 Given that [X] is self-evidently not in a position to sponsor new entry into the MNO market, the Proposed JV will clearly reduce buyer power in line with the section of the CMA's MAG quoted above.
- 4.5 While not determinative, it is important to put the size and scale of operation of the four MNOs active in the UK into perspective [X]:
- 4.5.1 **BT group:** as per its 2024 annual report, the group generated revenues of £20.8 billion serving approximately 30 million global customers. In 2024, the group employed over 97,000 employees with over 77,000 of those being in the UK.¹⁶
- 4.5.2 **Three:** as per its 2023 full year results generated revenues of £2.59 billion, with a total customer base of 10.6 million. It claims to carry more mobile data traffic on its network than any other UK operator.¹⁷
- 4.5.3 **Vodafone:** the group operates mobile and fixed networks in 17 countries and has stakes in further five countries through joint ventures and associates. It partners with mobile networks in 46 countries outside its footprint. The Vodafone Group plc has approximately 104,000 employees and contractors globally, helping it to serve its 323 million global mobile customers. According to its 2023 annual report, the group generated approximately €45.7 billion from 19 markets.¹⁸
- 4.5.4 **Virgin Media/O2:** in the first quarter of 2024 alone, the Virgin Media/O2 group reported having 45.1 million total mobile connections and generated approximately £2.6 billion in revenue (or £10.4 billion when extrapolated to a full calendar year).¹⁹ As noted above, Virgin Media/O2 is a 50:50 joint venture between Liberty Global and Telefónica, amongst the world's largest TV and broadband companies and telecommunication service providers (respectively).
- 4.5.5 [X]²⁰
- 4.6 While the geographic scope of operations as well as the business areas may differ both between the MNOs themselves, as well as between the MNOs and [X] (and other MVNOs), it is difficult to reconcile the Parties' assertions regarding [X] material bargaining power with the significant difference in the scale of operations between the MNOs, on the one hand, and [X], on the other. The fact is, [X] notably assisted by the very unattractive price rises of recent years imposed by the MNOs on their customers (in some cases in excess of 17%). The MNOs could do without [an MVNO] – and likely do not welcome competition from [an MVNO] – but [an MVNO] cannot do without the MNOs and continued access to wholesale mobile services on commercially acceptable terms is a critical requirement for [an MVNO].

¹⁵ CMA129 paragraph 4.20.

¹⁶ See: https://www.bt.com/about/annual-reports/2024summary/assets/pdf/bt_annualreport_2024.pdf

¹⁷ See: <https://www.threemediacentre.co.uk/content/three-uk-publish-2023-full-year-results/>

¹⁸ See: <https://investors.vodafone.com/sites/vodafone-ir/files/2023-05/vodafone-fy23-annual-report.pdf>

¹⁹ See: <https://news.virginmediao2.co.uk/2024-financial-results/q1/>

²⁰ [X]

4.7 [REDACTED] lack of ability to exercise countervailing buyer power against the large MNOs is aptly illustrated by [REDACTED]

4.7.1 [REDACTED]

4.7.2 [REDACTED]

4.7.3 [REDACTED]

4.7.4 [REDACTED]

4.7.5 [REDACTED]

4.8 [REDACTED]

4.9 [REDACTED]

5. [REDACTED]

5.1 [REDACTED]

5.2 [REDACTED]²¹

5.2.1 [REDACTED]

5.2.2 [REDACTED]

5.2.3 [REDACTED]

5.3 [REDACTED]

~~[REDACTED]~~

5.4 [REDACTED]

~~[REDACTED]~~

5.5 [REDACTED]

5.6 [REDACTED]

5.6.1 [REDACTED]^{22 23}

5.6.2 [REDACTED]

5.7 [REDACTED]

5.7.1 [REDACTED]

5.7.2 [REDACTED]

²¹ [REDACTED]

²² [REDACTED]

²³ [REDACTED]

5.8 [~~⊗~~]

5.9 [~~⊗~~]

5.10 [~~⊗~~]

~~⊗~~

5.11 [~~⊗~~]

5.12 [~~⊗~~]

5.13 [~~⊗~~]

ANNEX – [REDACTED] OVERVIEW OF SIM-ONLY OFFERS

Table 2: [REDACTED]

Table 3: [REDACTED]