

Competition and Markets Authority
25 Cabot Square
London
E14 4QZ

Consultation Response

Which? response to the CMA's notice of possible remedies on the proposed merger between Vodafone UK and Three UK

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Summary

Which? welcomes this opportunity to respond to the CMA's notice of possible remedies on the proposed merger between Vodafone and Three. Mobile is an essential service for UK consumers, and we welcome the CMA's careful scrutiny of whether the merger will deliver benefits or harms to consumers.

We agree with the CMA's provisional findings that, absent any remedies, the merger of two close competitors will likely lead to horizontal unilateral effects and higher prices for consumers. These could be at least partially offset by higher investment from the merged entity and rivalry-enhancing efficiencies (REEs), but the CMA is rightly sceptical of the parties' stated plans for investments post-merger and it is not yet clear whether, even if fully implemented, those plans would be enough to lead to overall welfare gains.

Nonetheless, we support the CMA looking into whether a package of remedies can be found which would credibly tackle the potential SLCs identified, while ensuring that efficiencies and higher investment delivers overall benefits for consumers. However, we share the CMA's general cautiousness with regard to behavioural remedies, and in summary have the following concerns on the risks involved with those outlined in the notice:

- **Monitoring and enforcement risks.** Having Ofcom oversee and enforce remedies may be preferable, but will not be sufficient in itself to ensure compliance. Mechanisms should be put in place to reimburse customers if remedies are breached, and a bespoke penalties regime may be needed to incentivise compliance.
- **Specification risks.** It is not yet clear how the CMA can design remedies which would effectively tackle the SLCs and REEs. There is considerable heterogeneity in customer contracts that could make any single retail remedy difficult to specify, while investment commitments may be difficult for Ofcom to monitor and enforce against.
- **Distortion risks.** There is some risk that time-limited retail protection could have distortive effects on competition. Protections shouldn't only apply on long contracts, and the CMA must be mindful of the risk of all providers raising prices on expiry of time-limited commitments.

Full response

We provide a number of general comments on the behavioural remedies and some specific views on the potential for time-limited protections for retail customers.

Behavioural remedies

We agree with the CMA's general cautiousness with regard to behavioural remedies, given the usual weakness in effectively addressing substantial lessenings of competition (SLCs). However, we also agree there is merit exploring in this case whether there is a package of behavioural remedies which would credibly minimise the likely consumer harm from horizontal unilateral effects in the retail and wholesale markets, while maximising the benefits from rivalry-enhancing efficiencies (REEs).

Nonetheless, given the provisional findings of a substantial reduction in consumer welfare, the CMA should have **a very high degree of confidence that any package of remedies will mean the merger delivers net benefits for consumers**. In particular, the CMA should be confident that the monitoring and enforcement of remedies will be effective in achieving the desired behaviours from the merged entity. This is where we have the most concern.

Ofcom having powers to oversee remedies may be preferable, but will not be sufficient in itself to ensure consumer benefits and compliance with remedies. The threat of enforcement and penalties must be sufficient to incentivise compliance and to ensure that any loss to consumers is returned to them. In the case of protections for retail customers, this should require any breaches of the remedies to lead to consumers being reimbursed for the breach without needing to make a claim. On top of this, there should be significant penalties for non-compliance to ensure that there is a sufficient disincentive to breach remedies.

In the case of investment commitments, we have major concerns around how monitoring and enforcement would successfully incentivise compliance and ensure any breaches result in customers being returned to their level of welfare absent the merger and the SLC. The provisional remedies notice suggests that Ofcom could introduce requirements into spectrum licences. However, it's not clear that Ofcom's current penalties guidelines would be appropriate for enforcing these remedies. For example, Ofcom says it will have regard to the 'degree of harm' in setting penalties,¹ which may present a challenge in this case as those harms would be hypothetical SLCs in the future. It would not be a surprise for any enforcement action to be open to challenge by the merged entity, weakening the compliance incentive. A bespoke penalty regime will likely be needed to ensure that fines or other penalties are sufficiently large to deter the companies from adjusting the investment plans, as the CMA believes they will have incentive to do.

¹ Ofcom (2023), '[Penalty guidelines](#)'

Time-limited protections for the Parties' retail customers

(i) How price protections might be designed.

One challenge to designing price protections is the considerable degree of heterogeneity between contract types. Consumers pre-pay or pay monthly, have standalone contracts or bundled with handsets, contracts of differing duration, and with differing allowances of data and call minutes.

Some level of price protection could be delivered by allowing existing customers to roll over the price or other elements of their contracts terms. However, this would not offer protection to pre-pay customers nor to those on monthly rolling contracts - who are also overrepresented among customers of sub-brands VOXI and Smarty. Such a remedy would also be complicated by customers who have handsets bundled with their contracts, who should not continue paying for a handset after the initial contract duration. It is notable that Three was not among the providers who made commitments to Ofcom to reduce its out-of-contract prices for customers with contracts bundled with handsets.²

Given the level of heterogeneity between contracts, it is not clear how the CMA or Ofcom would design price protections that cover all customers but without carrying a significant risk of distortion. For example, even if time-limited price protections are fairly stringent, there is still a distortive risk that all three remaining MNOs increase their prices simultaneously at the remedies' expiry. As outlined in the provisional findings, recent experiences with mid-contract price rises suggest that MNOs respond to price increases from their rivals, even prior to the number of MNOs reducing from four to three. Most remedies would be expected to affect the competitive process in setting prices.

(ii) What other retail customer terms need to be protected.

The CMA is right to highlight price and data allowances. In our own surveying, 40% of Three customers and 22% of Vodafone customers selected price as a reason for choosing their network provider. 28% of Vodafone customers and 27% of Three customers gave a good services plan as a reason.³ A further factor to consider in retail protection is contract length, especially when price rises are typically allowed during the contract period. We found 7% of Vodafone customers and 10% of Three customers chose their contract due to 'flexibility in contract terms and options.' The CMA should ensure that protections aren't only offered on long-duration contracts, which could have a negative impact on customers and carry a substantial risk of distorting competition.

Mobile providers also typically differentiate their offerings by the cost of roaming in the EU or other countries, and whether 5G internet comes as standard. Both of these may need to be considered if retail protections are designed to keep customers no worse off than currently.

² Citizens Advice (2019), '[Citizens Advice calls for Three to stop ripping off its loyal customers](#)'

³ Online poll conducted by Opinium on behalf of Which? with 2,000 consumers responsible for their mobile network service, from 7th-13th July 2023

(iii) Whether the protection should apply to all of the Parties' existing retail customers or only a subset; and, if the latter, how that subset would be determined.

This should depend on the nature of the SLC identified by the CMA. If the SLC is expected to lead to a welfare loss for all the parties' retail customers, then protection should apply to all customers.

(iv) Whether social tariffs provide sufficient protection to low-income households.

Social tariffs from Vodafone and Three currently offer lower core subscription prices and greater contractual flexibility than commercial tariffs. Vodafone offers a mobile social tariff under the VOXI brand while Three offers a social tariff under the Smarty Brand. To receive a social tariff, customers need to be in receipt of eligible benefits, and the provider will conduct eligibility checks at least once a year.

- The Smarty social tariff is a monthly rolling plan and there are no annual price rises. The core subscription price is £12 a month and this includes unlimited call and data allowances.
- The Vodafone mobile social tariff is offered under the brand name of 'Voxi For Now'. The core subscription price is £10 per month and this includes unlimited 5G data for the first six months. After six months, customers will be transferred to a standard tariff which is offered at the same subscription price with unlimited data for social media, but not for general web browsing or video/ audio streaming.

We agree that the CMA's remedies should ensure that social tariff customers are provided with sufficient protection in the event of a merger, particularly in light of the provisional findings that lower income consumers may see the highest price rises for the least benefit. This will require a bespoke remedy as current social tariffs protections are not already enforceable by Ofcom. Instead, social tariffs are offered voluntarily by communications providers. We would support remedies to protect the existing terms and conditions for social tariff customers including those relating to eligibility, price, call and data allowances/speeds, service levels and contract flexibility.

Social tariff protections are particularly important in light of affordability challenges in the market, and the associated effects on consumers' lives. The Ofcom affordability tracker reports that in April 2024 9% of consumers experienced an affordability issue with their mobile service.⁴ This can have significant impacts on people's lives, particularly for the 31% of DE social grade households who only access the internet via a mobile phone.⁵

However, the extent to which social tariffs can protect low-income consumers is limited by low levels of take-up, as explained in our response to point (v) below.

⁴ Ofcom (2024), '[Affordability Tracker](#)'

⁵ Ofcom (2024), '[Adults media use and attitudes 2024](#)'

(v) How eligible customers might be notified of such social tariff protections.

Which? has had persistent concerns about the low levels of take-up of social tariffs in the mobile market. Ofcom research from October 2023 found that 380,000 households had signed up to fixed or mobile social tariffs, representing just 8.3% of eligible households.⁶ In part, we believe this low take-up is because providers have not been active enough promoting social tariffs to existing or potential customers. Ofcom's research found that 55% of eligible consumers were aware of social tariffs but only 9% had heard about them from their provider.

We support the CMA's suggestion that remedies to protect retail customers 'might be accompanied by promotion to encourage uptake amongst those consumers who are eligible'.

However, there is again some monitoring and enforcement risk around this. To date, we have been concerned about Ofcom's ability to effectively change provider behaviour to promote their social tariff offerings. In July 2023, Ofcom wrote to communications providers to recommend actions to promote social tariffs to eligible consumers.⁷ Ofcom's recommendations related to the communication of social tariff products on provider websites, the use of social media to advertise social tariffs and ensuring customer service staff were fully briefed and empowered to suggest social tariffs, where appropriate. Despite the letter, there is little evidence of providers putting all of the suggestions into practice. To be effective, the CMA's should consider whether it could use its remedies to make the suggestions in Ofcom's letter enforceable.

(vi) How retail customer protections might be monitored.

Ineffective monitoring is one of the most significant risks of introducing time-limited protections. We do not have any specific suggestions for monitoring mechanisms, but the CMA should be highly confident of *exactly* how protections will be monitored before putting any remedy in place. If Ofcom is charged with monitoring, then it should report regularly and publicly on the firms' compliance.

(vii) How a dispute resolution process might be designed.

We would urge that any remedies are enforceable to incentivise compliance, and that there is a mechanism in place to reimburse customers if remedies are not adhered to. Consumers should not need to claim any reimbursement manually, and the parties should have mechanisms in place to credit customers should they be found not to have complied. Consumers should also have a route to complain and receive redress if they suspect their provider is not complying with the remedies.

⁶ Ofcom (2023) '[Pricing Trends report, 2023](#)'

⁷ Ofcom (2023) '[Melanie Dawes Letter on Social tariffs](#)'

(viii) How the CMA might determine the appropriate length of time for such protections and what factors it could take into account.

The duration of the remedies should be commensurate with the duration the CMA believes SLCs will last and over which REEs are predicted to accrue.

We also suggest that some flexibility is introduced into the timing of any remedy. Our understanding is that retail protections would be put in place in conjunction with investment commitments so that consumers have protections prior to the full REEs becoming apparent. Even with enforceable investment commitments, there is still a substantial risk it takes the merged entity longer than planned to deliver on its commitments. In this case there should be measures to extend retail protections if the investment schedules take longer to deliver.

About Which?

Which? is the UK's consumer champion, here to make life simpler, fairer and safer for everyone. Our research gets to the heart of consumer issues, our advice is impartial, and our rigorous product tests lead to expert recommendations. We're the independent consumer voice that works with politicians and lawmakers, investigates, holds businesses to account and makes change happen. As an organisation we're not for profit and all for making consumers more powerful.

For more information contact:

Matt Gardner or Stephen McDonald

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