26 September 2024

REDACTED

ANTICIPATED JOINT VENTURE BETWEEN VODAFONE GROUP PLC AND CK HUTCHISON HOLDINGS LIMITED CONCERNING VODAFONE LIMITED AND HUTCHISON 3G UK LIMITED

Introduction

[redacted] is pleased to submit comments on the CMA's Notice of possible remedies under Rule 12 of the CMA's rules of procedure for merger, market and special reference groups.

We are broadly supportive of the economic case for the anticipated Joint Venture between Vodafone Limited ("VUK") and Hutchison 3G UK Limited ("3UK"). With appropriate regulatory oversight, it should lead to additional investment in network infrastructure and performance, including the nationwide rollout of 5G. This will benefit UK consumers. However, we do share the concerns of the CMA that the merger has the potential to result in a substantial lessening of competition (the "provisional SLCs") in the supply of retail and wholesale mobile services in the UK.

In this submission, we provide comments on possible remedies proposed by the CMA to address the SLCs.

Our interest in the proposed Merger

[redacted]. We are therefore an interested party in the proposed merger between VUK and 3UK.

While we are supportive of the merger, this major structural change to the mobile market needs to be managed carefully so that the competitive environment for existing MVNOs, and new entrants, is protected and customer benefits are secured.

Our view of the risks resulting from the Merger

We see two main risks with the merger. Both would result in poorer customer outcomes and less choice for UK consumers.

Firstly, the Merged Entity will have less of an incentive to offer competitive wholesale pricing, as the competitive intensity of the mobile wholesale market reduces with the reduction of MNO wholesale suppliers from four to three. 3UK in particular, as a relatively new entrant and challenger in the wholesale access market, has a track record of providing innovative and competitive access terms to MVNOs.

Secondly, we are concerned that the Merged Entity may favour, through wholesale access pricing and terms post-merger, its own wholly owned retail brands and sub-brands (Voxi for VUK, Smarty for 3UK) over third party MVNOs. The risk is that third party MVNOs are "squeezed" via uncompetitive wholesale terms post-merger and are unable to profitably offer compelling deals to customers.

Lastly, building on the concerns outlined above, we believe this environment could stifle innovation and hinder the development of new service models. These restrictions may prevent the introduction of differentiated technological and commercial offerings, ultimately limiting the choices available to consumers.

The CMA has set out possible remedies to the provisional SLCs in the retail and wholesale markets that are either structural or behavioural. Below we set out our comments on these in the order they are presented in the Notice.

Structural remedy options

The Notice states that "it is unlikely that there is a standalone business or business unit capable of being divested". We believe it is worth considering whether Voxi or Smarty, or both, should be divested as they are separately branded entities that could be separated from the Merged Entity with appropriate transitional service agreements in respect of the shared applications and platforms (e.g. billing, BSS, customer support) used to deliver services to customers.

We do not support the "prohibition of the merger" remedy option as the challenges faced by 3UK as a sub-scale MNO in the UK are real as evidenced by 3UK's low Return on Capital Employed, below their cost of capital. We consider this a legitimate and credible driver for the merger of 3UK and VUK.

A "partial divestiture remedy" is presented as an option. We are not in favour of this. The acquisition of a sub-set of network assets, in whatever combination, would be insufficient to support a fourth challenger MNO at scale in the UK mobile retail market. In this scenario, the acquirer of assets would face worse challenges in respect of economies of scale than 3UK is facing today. There are also complexities in the current network sharing arrangements which would make this remedy complex and impractical to deliver in a timely manner.

Behavioural remedies

We are more supportive of behavioural remedies. If designed correctly, and with appropriate oversight, they could underpin the long-term competitiveness of MVNOs. One of the major risks to the sustainability of an MVNO is that the underlying wholesale terms from the MNO are not sufficiently competitive, or of sufficient duration, to allow MVNOs to plan, invest and profitably compete in all value tiers of the market on a long-term basis. The history of the UK MVNO Wholesale market illustrates this. Wholesale pricing "cliff edges" are common whereby MVNOs face potential increases in wholesale pricing, or wholesale pricing that is not appropriately benchmarked to the retail market evolution and/or increases in customer data usage. Such wholesale pricing cliff edges directly undermine the ability of an MVNO to deliver compelling and competitive offers to consumers.

We believe the merger could and should address this as part of a package of remedies through a long – term wholesale access agreement for a limited number of MVNOs. This agreement would provide wholesale pricing and terms that allow third party MVNOs to compete profitably and sustainably across all value tiers of the retail market. This is in our view the best way to mitigate the potential retail and wholesale competition impacts from the merger.

The Notice refers to an “Investment Commitment” from the Parties to deliver the investments set out in their Joint Network Plan. Conceptually we are supportive. However, we do not believe that this commitment alone will deliver an enhancement of competition at retail or wholesale levels. An investment commitment will ensure the Merged Entity delivers improved network performance and quality and achieves specific KPIs. However, it will not address the more behavioural and commercial dynamics in the retail and wholesale markets. It is quite possible that the Merged Entity could still chose to offer uncompetitive wholesale terms to third party MVNOs despite delivering the Investment Commitment. We therefore suggest additional measures are required.

A potential behavioural remedy set out in the Notice is “time-limited retail market customer protections’, such as allowing retail customers to roll-over their existing contract terms. We are not in favour of retail market interventions of this kind. In our view, this is not sustainable in the long term and can lead to retail market distortion. We believe it is much more effective to target intervention at the wholesale level, to ensure the underlying wholesale access terms are attractive and secure enough to allow retail market competition – either from established players or new entrants - to flourish in a sustainable and long-term way. We believe this is much more likely to result in better customer outcomes and customer benefits.

Wholesale market remedy is our preferred option

We therefore support wholesale market remedies as a means to address the provisional SLCs in both the retail and wholesale markets, in additional to the Investment Commitment.

Our preferred option for a wholesale access remedy is that a set of wholesale access terms is made available by the Merged Entity to a limited number of third party MVNOs. The selection of these MVNOs could be based on criteria such as: each candidate’s UK retail track record, their potential to deliver compelling offers and service to customers over the duration of the remedy, their commitment to long term customer growth in the UK market, and customer proposition. Access to these terms would be limited to those parties already partnered with either 3UK or VUK, such as ourselves, thereby avoiding the customer disruption of a network migration. The set of terms would effectively provide third party MVNOs with network economics and pricing on a long-term basis thereby ensuring that MVNOs can compete profitably and sustainably in the retail market across all value tiers from low data inclusions to unlimited. This remedy would mitigate the potential “Substantial Lessening of Competition” in the retail market that the CMA has highlighted.

Under this arrangement the wholesale pricing would evolve with the Merged Entity’s own underlying cost base post-merger to ensure the benefits of any network synergies flow through to the third party MVNOs and their end customers. Inevitably the Merged Entity would need to ring-fence a proportion of network capacity for MVNOs as a result of this arrangement.

Access to these terms would be on a non-discriminatory basis and would be long term (e.g. 10 years), avoiding the typical cycle of negotiation on wholesale terms every 12-24 months which is common for UK MVNOs. In these MVNO-MNO discussions, commercial leverage usually favours the MNO given the relative size of the businesses, wholesale pricing models that are typically usage based, and contractual exclusivity clauses. This proposed duration of 10 years would allow third party MVNOs sufficient certainty to plan and invest in the mobile retail market. It also avoids the risk that the Merged Entity gradually de-prioritising wholesale access and supply, in favour of its own retail brands, in the years following the merger.

In order for this remedy to have the maximum customer impact, the terms would not discriminate based on current base size. The same terms would be available to MVNOs regardless of their starting position at the point of merger, and should not provide commercial advantage to the larger more established players. This would deliver a “level playing field” between MVNOs and the Merged Entity, and among qualifying MVNOs. With this remedy, market dynamics, innovation, and competitive retail supply would protect customer outcomes rather than retail pricing protections or regulatory intervention.

The design principles for this agreement could include:

- A 10 year set of “network parity” wholesale terms, with pricing to be benchmarked annually to the evolution of the Merged Entity’s own cost base post Merger
- No punitive contractual clauses or onerous commitments such as Minimum Revenue Guarantees (MRGs), or any clauses that could cause wholesale pricing to increase during the duration
- The contractual terms cannot be worse than those terms in the existing wholesale agreements between the qualifying MVNOs and VUK or 3UK
- The same pricing would be offered to the qualifying MVNOs, regardless of base size
- No spectrum or network assets would be offered
- Value added services (e.g. international roaming) would be provided at cost by the Merged Entity
- Simple wholesale pricing model that allows the qualifying MVNOs to profitably across all value tiers of the market
- Annual oversight by Ofcom and/or CMA to ensure compliance with the agreement

Of the remedies mentioned by the CMA, our view is this behavioural wholesale remedy would be the most effective and practical way to protect retail competition in mobile and customer interests should the merger be approved. We are keen to declare our interest in forming part of the solution to the risks identified by the CMA, and would welcome a discussion on this matter before any remedy package is finalised.

Signed by ____________________ ....

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