



Vodafone / Hutchison 3G

Submission to the CMA evaluating potential remedies for the proposed merger of Vodafone and Hutchison 3G

27 September 2024

1. Executive summary

1. This is Sky UK Limited's ("Sky") response to the Competition and Market Authority's ("CMA") Notice of possible remedies ("Remedies Notice") in relation to the proposed agreement between Vodafone Group Plc and CK Hutchison Group Telecom Holdings Limited ("CKHGT"), to merge their UK telecoms businesses, Vodafone UK ("Vodafone") and Three UK ("H3G") (together "the Parties" and "the Merger").
2. Sky has focused its response on [REDACTED] the substantial lessening of competition ("SLC"), given this is where we believe our direct insights and experience can inform the CMA's thinking on remedies – and bearing in mind the very limited deadline to comment. [REDACTED] Sky considers that the Merger must be prohibited if the UK wants to retain a thriving and competitive mobile market for consumers with strong mobile virtual network operators ("MVNO") able to compete head-on with Mobile Network Operators ("MNOs"). If approved, the Merger effectively sets in stone the permanent, long-term structure of the UK mobile market, given that there will be no new market entry as all spectrum licences are allocated.
3. We strongly agree that prohibiting the Merger at this stage would be an effective remedy, and that a partial divestment would be ineffective as it would simply create a weak and subscale fourth player. [REDACTED]
4. As the CMA itself recognises, Sky is the largest independent mass-market MVNO and a key player in the mobile sector. Therefore, we are one of the MVNOs most at risk from this Merger, more than some of the smaller 'niche' MVNOs that are less likely to cannibalise MNO sales. However, Sky's ability to continue to compete vigorously and continue to expand its mobile offering as we have done in the past few years, relies on there being sufficiently strong remedies that properly address the wholesale SLC. [REDACTED]
5. If the Merger proceeds without strong remedies, Sky would be forced into a future where the wholesale supply to MVNOs is even more concentrated and therefore much less competitive. [REDACTED]
6. Sky would have very strong concerns if the CMA were to rely on generic 'sticking plaster'-type wholesale remedies, i.e., wholesale access terms and/or ring-fenced capacity. We do not consider that these remedies address the substantial competition concerns, will be effective or workable in practice:
 - These remedies cannot feasibly cover all the details in an MVNO agreement and reflect the different and evolving needs of MVNOs.
 - Pre-agreed public standardised wholesale offers could significantly distort the market by creating an anchor and focal point for MNOs, resulting in even more MNO pricing

alignment among the fewer remaining bidders, [REDACTED]. This would lead to even less room and/or ability for larger MVNOs like Sky to negotiate differentiated competitive deals. In Sky's experience, bespoke multi-round negotiating between more rather than less wholesale hosts, but with less rather than more predictability/transparency between MNOs is in fact what delivers the strongest competitive outcomes, not standardisation via reference offers.

- It will constrain the ability of MVNOs [REDACTED]
 - It will not 'stand the test of time' - the mobile market is continuously evolving meaning that 'static' measures such as these (with pre-defined terms/pricing) will lose relevance which undermines their effectiveness. [REDACTED]
 - These remedies have been tried and, for the most part, failed in other countries in the mobile sector, and it will be no different here in the UK.
7. Sky would have very serious substantive and procedural concerns if the CMA imposed these remedies on MVNOs, particularly given that fundamental aspects of their design and implementation remain unclear. Not only would these be ineffective, but such weak remedies could put Sky in an even worse position.

8. [REDACTED]

9. [REDACTED]

10. [REDACTED]

11. [REDACTED]

¹ CMA (2018), [Merger remedies](#), paragraph 3.49.

2. CMA's provisional findings rightly highlight significant wholesale concerns

12. We are pleased to see that Sky's concerns regarding the Merger's detrimental impact on wholesale competition (as well as evidence from our direct tendering experience) are clearly reflected in the Provisional Findings.

The proposed Merger will harm MVNOs - particularly Sky

13. As outlined in both our initial submission² and the Provisional Findings, the Merger would be particularly harmful to independent 'mass-market' MVNOs like Sky, whose successful existence depends on effective competition among MNOs.³

[REDACTED]

[REDACTED]

[REDACTED] Notwithstanding any network improvements arising from the Merger, this would significantly undermine any bargaining power we have and most likely prevent us from obtaining reasonable terms. There will be no competitive mechanism to ensure that any benefits from this Merger would be passed on to MVNOs and their customers. The result is that Sky would be a much weaker competitor and customers would be worse off; weak wholesale remedies of the sort set out by the CMA would do very little to address this and could even put Sky (and other MVNOs) in a worse position (as explained in Section 4).⁵

14. Moreover, given the mixed incentives of MNOs as both wholesale and retail providers and the cannibalisation risk, the long-term viability of MVNOs is already incredibly fragile (as described in our initial submission and reflected in the Provisional Findings).⁶ Therefore, strong long-lasting wholesale remedies are needed to safeguard wholesale competition – particularly larger mass-market players such as Sky competing directly with the MNOs in the retail market – and the wider consumer benefits that MVNOs bring to the mobile market.

3. CMA's remedies framework and lessons from other countries: experience shows risks with weak wholesale remedies

CMA's rigorous remedy framework must be applied here

15. The CMA has a sound and well-tested framework for considering remedies,⁷ informed by previous CAT judgments, ex-post assessments⁸ and appeals relating to remedies. Where the CMA concludes that there is an SLC, it is required to decide whether and what action should be taken to address the SLC and will *"in particular, have regard to the need to achieve as*

² Sky's Initial Submission, Section 3.

³ Provisional Findings, paragraph 9.208(b)(i) and 13.20-13.31.

⁴ The CMA considered the extent to which Vodafone and H3G competed against each other in relation to MVNO opportunities. Provisional Findings, paragraph 9.57(d)(i): "VUK and 3UK competed against each other in [%] (% of the MVNO opportunities that they were aware of. In particular, the Parties both took part in [%] (%/5) of the five largest MVNO opportunities."

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⁶ Provisional Findings, paragraph 9.268(i).

⁷ CMA (2018), [Merger remedies](#).

⁸ CMA (2023), [Merger remedy evaluations](#).

comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it" (emphasis added).⁹ Any remedy package must therefore sufficiently address the retail and wholesale SLC – both are important in terms of the harm arising from reduced competition.

16. The CMA will also first and foremost seek remedies that are **effective** in addressing the SLCs and the resulting effects, and *only once* it has identified several effective remedies, will it consider which is the least costly and intrusive remedy. This has recently been reiterated by the CMA's Chief Executive Sarah Cardell, who said:¹⁰

"The starting point with remedies is to remind ourselves what they are for. Under the UK statutory scheme, remedies aren't a bargain or a settlement - they must provide a comprehensive and effective remedy to the identified competition concern."

17. Therefore, the CMA must be satisfied that any remedies package will be sufficiently effective to address both SLCs. If there are doubts and/or uncertainties about the effectiveness of remedies (whether in relation to the risk profile, timing, practicality and distortionary effects), then the CMA must prohibit the Merger. Indeed, the CMA has already highlighted that prohibiting the Merger would offer the most comprehensive solution, stating:¹¹

"Prohibition of the anticipated Merger would prevent the provisional SLCs from arising in any relevant market. Our initial view is therefore that prohibition would represent a comprehensive solution to all aspects of the SLCs we have provisionally found (and consequently any resulting adverse effects) and that the risks in terms of its effectiveness are very low."

18. Given this sound framework, it would not be appropriate for the CMA to give serious consideration, in relation to the wholesale SLC, to two weak and ineffective wholesale remedies as those set out in the Remedies Notice. We recognise it is important for the CMA to keep an open mind on remedies, however, the CMA must ensure that any remedies package sufficiently and comprehensively addresses the SLCs and the magnitude of the harm arising. It also has a duty to consider its own guidance and the lessons directly learned from other countries about the risks arising from these types of ineffective and ill-defined wholesale remedies.

19. In light of the various dimensions the CMA considers when assessing the effectiveness of a remedy,¹² Sky believes there are some particular remedy risks worth highlighting:

- **Duration and timing: short-term vs long-term.** It is right that the CMA prioritises remedies that can take effect quickly, but ultimately it is essential to ensure these remedies sufficiently protect consumers and businesses, including MVNOs, in the short

⁹ CMA (2018), [Merger remedies](#), paragraph 3.3.

¹⁰ The CMA and Sarah Cardell (2023), [UK merger control in 2023, A speech delivered by Sarah Cardell, Chief Executive of the CMA, to the UK Competition Law Conference 2023](#).

¹¹ CMA (2024), [Notice of possible remedies](#), paragraph 22.

¹² CMA (2018), [Merger remedies](#), paragraph 3.5.

and medium to long-term. This transaction will shape the structure of the UK mobile market for the foreseeable future. Importantly, there is no realistic prospect of a new MNO entering the market, given the high barriers to entry and expansion. The ramifications of the CMA's decision will therefore have long-lasting impacts on competitors and customers alike.

- **Addressing the source vs mitigating the effects.** The CMA has a clear preference for remedies that focus on preserving competition rather than those that mitigate the effects from the loss of competition (the weak wholesale remedies set out in the Remedies Notice are only capable, at most, of mitigating some of the effects of the SLCs identified; they do nothing to address the source of those effects). Whereas, with the right structural capacity remedy in place, Sky's already growing competitive threat to the MNOs can be preserved and further strengthened as both a potential wholesale host and stronger retail competitor. This would be in line with the CMA's preference to use measures that "*work with the grain of competition*".¹³
 - **Stronger remedies address the SLC and reduce the risks.** The CMA seeks remedies with a high degree of certainty of achieving their intended effects. Weaker remedies where there is much less visibility and certainty over how they will play out, such as the potential wholesale remedies in the Remedies Notice, are inevitably much riskier and not sufficiently strong to address the wholesale SLC. If the CMA were to proceed with such weak wholesale remedies – and simply disregard these risks – it would also be inconsistent with the CMA's own guidance.¹⁴
20. The CMA stated in its Remedies Notice that it "will not conduct detailed consideration of proposed remedies unless the parties or third parties can demonstrate that their proposed remedy option will address effectively the provisional SLCs and the resulting adverse effects".¹⁵ On the basis of the above, the CMA should remain cautious about the likelihood of any remedy package meeting this high threshold.
21. Sky would have very fundamental concerns if the CMA were to depart from its established approach in this case, particularly given that there is likely to be very little evidence to demonstrate that such weak wholesale remedies would be effective and sufficient, and given the strength and weight of the competition concerns from MVNOs. Moreover, Sky considers that it is critical for the CMA to provide further opportunities for key stakeholders to comment meaningfully on any potential remedies, particularly MVNOs – whose future business would be very significantly and directly impacted by this. It is also incumbent on the CMA to ensure that the views of MVNOs on the effectiveness of the Parties' remedy proposals are given sufficient weight and consideration throughout the remaining stages of the CMA's investigation.

Lessons from other countries provides direct evidence about the risks of failed wholesale remedies in the mobile sector

22. The CMA's caution about the impact of mobile consolidation and the challenges of imposing remedies is also echoed by other regulators and the direct experience from weak wholesale mobile remedies tried and failed in other jurisdictions.
23. As is evident from the examples below, Sky believes that many of the problems arising from these wholesale remedies stemmed from uncertainty (i.e., the lack of identifying a suitable

¹³ CMA (2018), [Merger remedies](#), paragraph 3.49.

¹⁴ CMA (2018), [Merger remedies](#), paragraph 3.5 (a) and 3.48.

¹⁵ CMA (2024), [Notice of possible remedies](#), paragraph 45.

remedy-taker upfront), the generality of the remedies and the weakness and/or suitability of any remedy-taker. Therefore, we consider there is still a narrow path to preserving competition, provided the remedies are sufficiently strong, carefully designed and implemented, as explained in Section 4.

24. Critically, in almost all the cases where remedies have been most effective, a specific credible remedy-taker was identified at the outset. For instance, Iliad was agreed upfront as the remedy-taker in the *Wind/Hutchison* (Italy, 2016)¹⁶ European Commission merger decision, and has emerged as a growing disruptive player in the Italian market exerting significant downward pressure on retail prices. Most recently, in *Orange / MásMóvil* (Spain, 2024),¹⁷ the European Commission accepted a remedy on the basis of having a concrete remedy-taker in place agreed prior to approving the merger.¹⁸
25. There are important learnings from the following previous cases that should inform the CMA's approach here:
 - In *H3G / Telefónica* in Ireland (May 2014), two weak MVNOs were granted network access with fixed payment agreements. Remedy-takers were approved before the closing of the deal, with full capacity access incrementally provided over five years.¹⁹ However, both remedy-takers struggled as they were both weak players – as warned by ComReg at the time.²⁰ iD Mobile folded after failing to attract sufficient subscribers, while Virgin Media only has a small subscriber base (<0.1m subs) and continues to play only a very limited role.²¹ Ofcom's 2020 economic paper subsequently found that investment in Ireland was lower than in the counterfactual scenario absent the merger.²² The market remains heavily concentrated today.²³
 - In Germany, following the merger of *Telefónica / E-Plus* (July 2014), new MVNO Drillisch has struggled and reported challenges in obtaining favourable terms for MVNO access

¹⁶ In *H3G / Wind / JV* (Italy, 2016), the Commission implemented a 'fix-it-first' solution, requiring Iliad to establish itself as a disruptive fourth MNO before clearance. The remedies package included spectrum divestments across various bands, transfers (or colocation) of thousands of base station sites, and a transitional roaming agreement. The Commission approved the merger based on Iliad's agreement to acquire necessary assets from H3G, enabling it to operate as a fourth MNO and sustain market competition. It has been a successful remedy, and it has led to competition and challenging revenue growth for the operators. Although in this case part of the success has hinged on Iliad as a disruptor entrant (with a successful track record in France). See European Commission (2016), [Mergers: Commission approves Hutchison/VimpelCom joint venture in Italy, subject to conditions](#), and OECD (2021), [Emerging Trends in Communication Market Competition](#), page 33.

¹⁷ European Commission (2024), [Joint venture between Orange and MásMóvil](#). The merger included an upfront remedy-taker, Digi, to establish a fourth MNO.

¹⁸ In its decision, the Commission stated "structural commitments are preferable from the point of view of the Merger Regulation's objective, in as much as such commitments prevent, durably, the competition concerns which would be raised by the merger as notified, and do not, moreover, require medium or long-term monitoring measures. In this respect, the Commission considers that the Commitments are structural in nature, and have the objective of creating a fourth MNO capable of compensating for the loss of competition deriving from the Transaction (namely the elimination of MásMóvil as an independent MNO and important competitor operating in Spain)." European Commission (2024), [Case M.10896 - ORANGE / MASMOVIL / JV](#), paragraphs 1804-1805.

¹⁹ Remedies included (i) Upfront MVNO commitment (ii) MVNO access to up to 30% of merged entity's capacity to two MVNOs (iii) divest spectrum, available for ten years, and (iv) Amendments to the network sharing agreement between Meteor (third largest player) and O2.

²⁰ ComReg expressed reservations that the remedies would be insufficient to preserve competition in the Irish mobile market. See also WIK Consult (2021), [The role of MVNOs in evolving mobile markets](#). It is worth noting that this report highlights the importance of the existence of rivals with smaller market shares acting as disruptors and that more generally markets with three players tend towards oligopolistic outcomes which in the long-run fail to deliver good outcomes for consumers.

²¹ See Irish Times (2017), [MVNOs fail to shake up mobile market](#).

²² Ofcom (2020), [Market structure, investment and quality in the mobile industry](#), paragraph 8.10.

²³ In its August 2023 report, ComReg observed that "[a]lthough a number of MVNOs and sub-brands provide additional competitive pressure, this market remains the most heavily concentrated market within the sector." ComReg (2023), [Electronic Communications Strategy Statement](#), paragraph 3.22.

following the expiry of the merger remedies,²⁴ highlighting the long-term risks of time-limited remedies once they expire. Drillisch remains a small market player.²⁵

- In the *H3G Austria / Orange* merger in Austria (December 2012), the remedy required the merged entity to offer spectrum to a new entrant MNO and grant wholesale access to part of its network under pay-as-you-go (PAYG) wholesale terms. No firm bought the spectrum and the wholesale terms were deemed too onerous for MVNOs. The Austrian Federal Competition Authority (BWB) criticised the remedy as ineffective.²⁶ This demonstrates the risks of complex and uncertain wholesale terms, which can act as a significant deterrent to MVNOs.
26. These cases provide clear evidence that weak wholesale remedies carry significant risks, with only limited examples where the remedies have worked as intended due primarily to the strength and credibility of the upfront remedy-taker. There have been significant challenges in implementing remedies aimed at protecting MVNOs, including their ability to compete with established MNOs. MVNOs have struggled to obtain competitive terms from MNOs and scale, with limited take up of generic wholesale offers. However, once a market transitions into a dynamic that is less competitive, as Sky fears will be the case in wholesale, it becomes exceedingly difficult to restore competition – something the CMA itself has found.²⁷

Sky agrees that recreating a fourth MNO will be very challenging

27. Sky does not support a remedy package that aims to fully replicate and enable a new fourth MNO. Should the CMA consider that a fourth full MNO is needed to replace the competition lost from this Merger, then the easiest, least complex and risky – and ultimately most effective – solution would simply be to prohibit the Merger.

4. Sky's views on wholesale remedies: "light touch" is not sufficient

28. [REDACTED]
29. Given the strength of the wholesale competition concerns, 'light touch' wholesale remedies, such as those suggested by the CMA, will not be sufficient. [REDACTED]

²⁴ Reuters (2020), [Drillisch slumps after profit warning on Telefonica Deutschland spat](#); TelcoTitans (2020), [O2 bill prompts Drillisch profits warning](#).

²⁵ As at May 2024, Drillisch had a market share of around 7%, which suggests that it has remained a fringe player. The Platform Law Blog (2024), [Vodafone/Three switcheroo: would the introduction of a different fourth player get the merger through?](#)

²⁶ Bundeswettbewerbsbehörde (2016), *The Austrian Market for Mobile Telecommunication Services to Private Customers: An Ex-post Evaluation of the Mergers H3G/Orange and TA/Yesss! Sectoral Inquiry, BWB/AW-393*.

²⁷ A joint statement by the CMA, ACCC, and Bundeskartellamt stated, "[g]iven the long-term structural effects of mergers, ineffective merger control that does not properly scrutinise mergers can cause long-term negative consequences for businesses and end consumers. It can be very difficult, and in some cases impossible, to reverse the loss of competition by taking enforcement action after a merger has taken place. Equally, it can take considerable time for markets to adjust to recover the competition lost through a merger". CMA (2021), [Joint statement on merger control enforcement](#).

30.

Lighter generic wholesale remedies won't be sufficient

31. Sky has presented the CMA with compelling evidence about the importance of having a choice of MNOs when retendering based on its direct experience – this is particularly important for MVNOs such as Sky that provide the strongest potential threat to MNOs. While MVNOs may not currently be able to act as a strong constraint to the MNOs, they nevertheless still play an important role in the market offering additional choice and variation. The effects of the Merger if it were to go ahead with provably weak wholesale remedies, such as those referenced in the Remedies Notice, would be substantial for Sky's Mobile business and its growing base of customers. As the CMA recognises, wholesale competition already hangs in the balance and is subject to the strategies each MNO decides to take²⁸ – therefore without proper wholesale remedies this Merger would severely restrict any ability to create competitive tension at a retendering, particularly for Sky.
32. We consider that there are a number of fundamental problems with the more basic wholesale remedies, such as pre-agreed wholesale access terms, generic ring-fencing of capacity, and any other types of weak remedies such as wholesale must-offers.
33. Before getting into the specific risks of these wholesale remedies, it is important to reiterate that in our experience, **wholesale competition relies on a dynamic non-transparent tendering process**. This cannot be replicated through static pre-agreed offers or an overarching ring-fenced capacity. The benefit of wholesale competition – and what helps to drive its success – is that the MVNO is free to determine the tender rules based on what each MVNO is looking for and their own different circumstances and aspirations. This then creates the necessary competitive tension by playing MNOs off against each other through each tender round. Put simply, it is the fact there is imperfect information between MNOs that improves their incentives to compete. In a world where the terms and/or capacity have been determined upfront (and not by the MVNO) – any chance of competition will be undermined.

Pre-agreed wholesale access terms

34. Sky strongly considers that pre-agreed wholesale access terms will not be an effective remedy – and could risk significant market distortions and substantially undermine and change the nature of the competitive negotiations when tendering. Based on our experience to date in negotiating deals, such a standardised offer cannot possibly cover all the complexities of a bespoke MVNO agreement, will create more MNO pricing alignment among fewer bidders and will constrain the ability of MVNOs to create any more innovative commercial structures.

²⁸ Provisional Findings, paragraph 9.268.

35. There are a number of challenges and drawbacks in trying to define upfront a set of pre-agreed non-discriminatory wholesale access terms that would presumably apply across all the different MVNOs. For example:
- It is not always obvious in advance what terms will be critical and this may change over time e.g., a range of price and non-price terms mattered to Sky but the nature of these and their comparative importance evolved as the market and Sky's position changed. [REDACTED]
 - It will also be impossible for such pre-agreed terms to be sufficiently exhaustive – covering all eventualities – such that there would inevitably be gaps requiring negotiation with the Parties, where MVNOs would remain highly vulnerable.
 - Determining what is 'fair and reasonable' – particularly on price but also on various important non-price terms – will be very challenging and there is no clear agreed economic framework for doing so. Indeed, it is unclear what a 'fair' price might be given the zero marginal cost for MNOs. Therefore, this is likely to be subject to significant manipulation and 'game playing' by the Parties. These challenges have been recognised by the CMA, for example in its decision on the ICE/Trayport merger (October 2016) the Parties proposed to offer Trayport's products on a FRAND basis, but this was dismissed by the CMA because of its "*unacceptable risk profile*".²⁹
 - Pre-agreed terms would need to be agreed with, at least, the most significant MVNO players in the market (including Sky) but this could still be a very difficult, protracted and time-consuming process. If the CMA left this to after the Merger, then this could cause delays and/or serious uncertainties for MVNOs and create significant risks.
 - In practice, our experience is that during an MVNO negotiation many dimensions of the contract and specification of the precise terms will be hammered out and subject to long and detailed 'back and forth'. In contrast, the risk will be that what MVNOs will instead be presented with is a pre-defined 'take it or leave it' standardised deal that would only act to box in MVNOs from the start, leaving little room for renegotiation or differentiation.³⁰
 - If these terms were time-limited,³¹ then this will only provide 'protection' for a period of time before – as seen in other cases there are serious risks for MVNOs when these come to an end – potentially leaving them very exposed (see Section 3). This also reduces MVNOs' long-term incentives to invest and/or develop their businesses. [REDACTED]
 - There would inevitably be disputes on how the terms are set and then applied by the Parties – an ongoing dispute resolution process and body with sufficient knowledge, would need to oversee this on a continued basis. This would be costly and burdensome

²⁹ In particular, the CMA highlighted that with respect to a FRAND remedy that there were "*a number of specific difficulties in specifying FRAND terms*" and that even if these could be specified "*it would remain extremely difficult, if not impossible, to specify FRAND principles that were sufficiently clear and comprehensive, and catered for all future eventualities*". CMA (2016), [Intercontinental Exchange and Trayport](#), paragraphs 12.131-12.134.

³⁰ In practice, the types of elements that are negotiated over typically cover the extent to which MVNO's source handsets from MNOs, roaming, network capabilities, level of technical integration and complexity, access to new technologies, protections around unit rates (now and in the future), speed tiering, term and exit rights, protections around marketing changes and a variety of complex network KPIs, SLAs and other consequences built into the contract ideally in advance.

³¹ The CMA guidance indicates that it may specify a limited duration for measures designed to have a transitional effect. CMA (2018), [Merger remedies](#), paragraph 7.11. Although we note that in this case there is no evidence of stronger wholesale competition emerging (arising from the network investments, for example). Therefore, there is no case for these measures to be transitional.

- some costs would fall to the MVNOs in terms of their engagement in this dispute process.³² As noted in Section 3, there have been instances of MVNOs struggling to negotiate reasonable terms following weak wholesale remedies, as seen in Germany where the MVNO Drillisch has been in dispute with their host MNO (Telefónica Deutschland) following the expiry of the merger remedies.
36. Overall, Sky strongly believes that there is a very strong risk that any reference offer (however designed) will be gamed. The gaming risks are particularly significant in the wholesale market because, in essence, the MNOs (including the Parties) do not ultimately want or need to support MVNOs, even more so for strong, scaled MVNOs such as Sky, due to the cannibalisation risk.
37. Furthermore, it is unclear on what basis the CMA could feasibly conclude these would be effective remedies based on the undisputable evidence from previous mobile mergers. In fact, it is the reverse, as there have been several cases where these types of remedies have been tried and suffered significant challenges (as noted in Section 3).
38. More fundamentally, far from improving competition, we are also concerned **this remedy would instead encourage greater price symmetry** - and that the minimum baseline will become the only offer out there for MVNOs. This will simply provide an 'anchor' to all the MNOs and remove any real tendering pressure. It will create more MNO pricing alignment but amongst fewer bidders and therefore significantly undermine the potential for any dynamic competition when tendering. Indeed, this type of distortionary risk arising from pricing remedies has been recognised previously.³³
39. Therefore, not only would these types of weak wholesale remedies be ineffective, but there is a **serious risk that these distort the wholesale market and further undermine competition.**³⁴

Generic capacity ring-fencing remedy

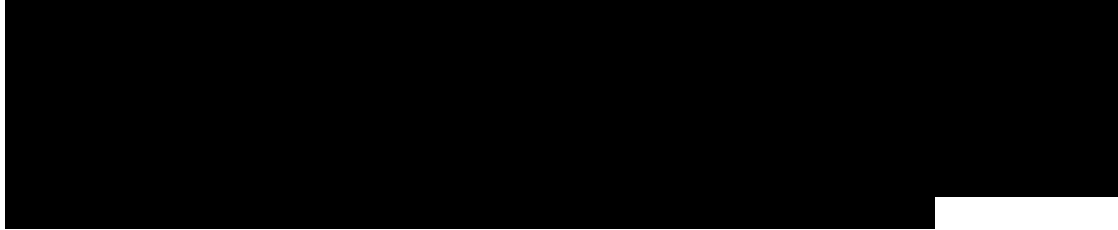
40. [REDACTED]
41. [REDACTED]

³² We note that the CMA's guidance is clear that, as the merger parties have the choice of whether or not to proceed with the merger, the CMA will generally attribute less significance to the costs of a remedy that will be incurred by the merger parties than the costs imposed by a remedy on third parties, the CMA and other monitoring agencies. CMA (2018), [Merger remedies](#), paragraph 3.8.

³³ The Competition Commission raised concerns about the potential for unintended price effects arising from price caps, noting: "In markets where bidding is involved there is a risk that revealing the level of the cap will result in bids coalescing around that level". Competition Commission (2007), [Understanding past merger remedies: report on case study research](#), paragraph 31(b).

³⁴ Notably, a similar set of concerns regarding weak wholesale market commitments arose during the European Commission's review of the previously proposed *H3G/Telefonica* merger. The merging parties offered specific Wholesale Market Commitments, which included providing 4G access to existing MVNOs and offering wholesale access to new MVNOs. However, the Commission identified several issues: (i) it was uncertain whether these commitments would be commercially attractive to MVNOs; (ii) even if they were, the impact would be limited in both the short and long term; and (iii) the commitments did not extend to future technologies like 5G, and the pricing structure could prevent MVNOs from offering competitive retail prices compared to MNOs. Ultimately, the Commission concluded that the competition concerns raised by the transaction were too significant for the proposed commitments to fully address. European Commission (2016), [CASE M.7612 - HUTCHISON 3G UK / TELEFONICA UK](#), paragraphs 2728-2730, 2864-2874, and 3139-3148.

³⁵ In *Telefónica/E-Plus*, Germany (Jul 2014), Telefónica committed to offering wholesale 4G services to all interested players in the future. The Commission's view was that the opportunity to be granted access to 4G services, even if not taken up, could be used by MVNOs and Service Providers active in Germany to improve their negotiating position vis-à-vis Deutsche Telekom



42. We note that, as mentioned in our previous submission, there are some circumstances/types of MVNO where the MNO is not as threatened i.e., the risk of customer cannibalisation is much lower. In these cases, MNOs would be more incentivised to provide capacity to these MVNOs above the more 'mainstream' mass-market MVNOs – most notably Sky as the largest independent MVNO.



43. In relation to the specific design of this form of general capacity remedy, it is not clear to us how this would work in practice, for example:
- How might capacity be ringfenced for future use? Would the Parties be required to hold it unused until an MVNO agrees a deal with them, or could they utilise it in the interim?
 - How would the 'correct' level of total capacity be determined? For example, if set too high (and not available for MNO use) it would risk leading to inefficiencies if some of the capacity is left unused. However, if set too low then MVNOs will struggle to deliver their services and/or have no potential for any expansion, and it would reduce the competitive tension.
 - How would the capacity be split among the MVNOs and how would the CMA ensure that all MVNOs were allocated sufficient capacity?
 - Would any individual MVNO be subject to a cap on the share of capacity they could take, to leave room for others?
 - Would the ring-fenced capacity need to be adjusted over time and on what basis? Like our other concerns, this implies that demand and/or requirements will be static - but the mobile market and customer needs are continuously evolving and therefore what may be suitable now, may become highly inadequate in a year's time.
 - Would the ring-fenced capacity only be available to the Parties' existing MVNOs or to other MVNOs? If the former, how would this provide any protection to other MVNOs that will also be suffering from the loss of wholesale competition when retendering?

and Vodafone. In February 2019, the Commission issued an SO against Telefónica for an alleged breach of the wholesale 4G access obligation. The Commission preliminarily concluded that Telefónica failed to implement its obligation "by not including certain existing wholesale agreements in the benchmark" used for assessing prices of the provision of wholesale 4G services. It considered that this led to less advantageous conditions for wholesale 4G access and may have reduced the ability of MVNOs and Service Providers to compete in the German market for mobile communication services. While Telefónica ultimately avoided a fine in that case, this indicates the potential concerns around the enforceability of these types of provisions.

[Redacted]

44. [Redacted]

45. [Redacted]

- [Redacted]
- [Redacted]
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38 [Redacted]

39 [Redacted]

- [REDACTED]

58. [REDACTED]

59. [REDACTED]

60. [REDACTED]

61. [REDACTED]

[REDACTED]

62. [REDACTED]

63. [REDACTED]

[REDACTED]

64. [REDACTED]

65. [REDACTED]

66. [REDACTED]

[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

67. [REDACTED]
- [REDACTED]

[REDACTED]

5. [Redacted]

68. [Redacted]

69. [Redacted]

70. [Redacted]

71. [Redacted]

72. [Redacted]

- [Redacted]
- [Redacted]
- [Redacted]

[Redacted]

73.

[Redacted]

[Redacted]