Response to the Notice of possible remedies for the anticipated joint venture between Vodafone Group PLC and CK Hutchison Holdings Limited concerning Vodafone Limited and Hutchison 3G UK Limited

Behavioural remedies

We would agree with the Remedies Notice where it notes at paragraph 28 that behavioural remedies are appropriate where the SLCs are expected to have a short duration. This is particularly significant in the Wholesale Market where the term, pricing and contractual restrictions of MVNO agreements operate to preclude the switching of MVNOs to a different MNO for prolonged periods of time to the extent that changing of hosts networks is a rare occurrence.

We would agree in principle with the CMA's position on the Investment Commitment as proposed by the Parties. While there are scenarios where an Investment Commitment could produce sufficient pro-competitive effects between the merged entity and existing MNOs, we do not believe that the Investment Commitment as constituted here is a suitable remedy, as ultimately the main beneficiary will be the merged entity and its Retail customers. We cannot identify any constraint on its behaviours in the Retail or Wholesale markets that arise from the investment commitment, if anything such an investment is likely to be deployed as an argument for prices to be increased or maintained by the merged entity.

Wholesale market remedies

In relation to the Wholesale market remedies as identified by the CMA, these do not offer a valid solution to the competition issues that this merger would generate. A key issue already present in the Wholesale market for network access for MVNOs is the limitations which MNOs seek to impose e.g. pricing limitations (depending on the nature of the MVNO), minimum purchasing commitments, reserving certain network technologies by the MNO for themselves for prolonged periods, price discrimination between 4G/5G radio technology and/or not permitting usage of certain technologies by the MVNO. While transparent Wholesale access terms could remove elements of the restrictions, it is unlikely that it can eliminate them all and/or prevent future barriers to pricing and/or innovation on the part of MVNOs. There is also the risk that any terms published by the merged entity will become a defacto market standard, particularly if they are less favourable to the terms offered by O2 and/or EE currently.

[✂] addresses below certain statements set out in the Notice of Possible Remedies:

With regards to a partial divestiture remedy, our initial view is that this remedy could enable a fourth MNO to enter the UK post-Merger and we therefore propose to explore this option further. However, our initial view is that it may not be effective for the following reasons (amongst others):

(a) To be comprehensive, the divestiture package would need to enable a suitable purchaser to compete effectively under separate ownership. However, a purchaser would likely only acquire a sub-set of the assets currently used by the Parties to compete in the relevant markets. This would lead to an MNO that is smaller than either of the Parties today. It is not clear that such an entity would be able to compete effectively to compensate for the loss of competition deriving from the Merger in both the Retail and Wholesale Markets where we provisionally identify SLCs.

(b) It would be difficult for the CMA to assess the financial resilience or expected performance of the new MNO with any degree of accuracy given the new MNO would obtain access to a package of assets that has never before operated as a stand-alone business.

(c) A partial divesture remedy would unwind economies of scale, potentially undermining the remedy's effectiveness. As a result, the remedy is likely to be reliant on the purchaser's attributes to address shortcomings of its design, increasing the purchaser risk.

(d) We are concerned about the practicality of such a remedy. The Parties do not own all of the assets that make up their own networks. Indeed, there are third parties who control access to sites and the Parties are both part of separate network sharing agreements with the two other MNOs, which significantly increases the complexity of the remedy.

[✂] would strongly agree with the CMA's initial view that a partial divestiture remedy could enable a fourth MNO to enter the UK market post-Merger and would welcome the opportunity to discuss in as much detail as the CMA requires as to how this could be achieved and address the SLCs.

We note the concerns flagged by the CMA at paragraph 23 (a)-(d) and feel that these concerns are misplaced.

In relation to (a), the new entrant will wish to [✂] as that will enable it to compete more effectively with the larger incumbents. For example, both Vodafone and Three are sitting on multiple layers of technology, in some cases going back decades which will not be suitable or required for transfer to a new entrant which is orientating itself to the latest or even future technology. The assets which would be required and useful to the new entrant would relate to [✂]. The new entrant should focus on scaling up its capabilities in certain areas (e.g. product, network and brand) but should not otherwise seek to otherwise replicate or copy the incumbents.

Where the incumbent MNOs will for various reasons continue to run legacy equipment, these come as integrated hardware and software, the licensing of which can only be granted directly from the supplier. Any upgrades, or associated maintenance and replacements come with supplier associated costs. Even related systems are additionally more expensive as they have to be compatible (and therefore licensed by the OEM supplier). What this means is that both Parties have a "Technical Debt" which develops over time, and if left unaddressed means an MNO (or any other major IT dependent company) cannot afford to update or replace its systems in a cost-effective way and has to simply maintain and incrementally add to its existing technology stack.

While it is correct that the divestiture package would have to consist of sufficient assets in order to compete effectively in both the consumer and Wholesale markets, the ability of a provider of consumer mobile services to compete effectively for a prolonged period is not determined solely by its size or efficiency. The freedom to price freely and effectively relative to actual or perceived competitors is also critical. The presence of the network-owned "fighting brands" targeting price-sensitive customers regardless of the market share of their main brands supports this view. Furthermore, MVNOs (excluding fighting brands or those otherwise connected to its host MNO) in the UK gain customers based on price competition and their success is ultimately determined by their ability to acquire and retain customers against such pricing.

[✂]

[✂]

[✂] option is better than the current options of disallowing the merger, as disallowing the merger will not resolve or otherwise incentivize Vodafone and Three to invest and resolve their technical issues and costs. [✂].

We agree that there is a challenge in assessing the financial resilience or expected performance of the new MNO, but it should be perfectly possible for the CMA to satisfy itself that a new entrant is credible (as discussed further below). Also, the CMA does not have to mandate the sale of a complete end-to-end set of network assets from the Parties. [✂] position is that the offloading of such a solution only

imposes costs on the new entrant which it will then have to address constantly as a distraction from competing in the market. [✂].

In relation to (c) we do not agree that there would be a complete loss of economies of scale, as a new entrant would not have to assume all of the costs associated with the relevant assets. If the CMA agrees that Vodafone can find savings and efficiencies within its own legacy business, it can also assume a new entrant, free of the higher debt, costs and Technical Debt of an existing MNO can achieve economies of scale against its own cost base. [✂].

As for (d), while the CMA is right to be concerned that a remedy is comprehensive, we would disagree that practically it is an issue, provided that the CMA applies a suitable test to accept a new entrant as purchaser of the assets.

All network operators use multiple vendors and elements of outsourcing in their day-to-day operations, as a function of controlling costs and using task-specific expertise. By way of example, an MVNO is no different to an MNO in that it will have to manage multiple vendors across its technology stack and anticipates adding rapidly additional partners as and when required to ensure it is competing by offering a full range of consumer and Wholesale offerings. That said, it is critical in relation to the subsequent operation of any of the assets purchased for the merging parties to be mandated to help the new entrant "to secure all necessary and material agreements with any third parties to give effect to the Remedies Decision" as issued by the CMA.

(a) To be comprehensive, the divestiture package would need to enable a suitable purchaser to compete effectively under separate ownership. However, a purchaser would likely only acquire a sub-set of the assets currently used by the Parties to compete in the relevant markets. This would lead to an MNO that is smaller than either of the Parties today. It is not clear that such an entity would be able to compete effectively to compensate for the loss of competition deriving from the Merger in both the Retail and Wholesale Markets where we provisionally identify SLCs.

In the view of [✂], the concern of the CMA in relation to the divestiture package only consisting of a sub-set of the assets currently used by the Parties in the Retail and Wholesale markets is misplaced. A new entrant should not seek to inherit all of one or more of the Parties assets to simply replicate that which the Parties claim is inefficient and/or uneconomic. [✂].

The critical components that will enable competition by a new entrant via having the technical and commercial means to do so (subject to the price proposed by the Parties) will relate to: [✂].

(b) It would be difficult for the CMA to assess the financial resilience or expected performance of the new MNO with any degree of accuracy given the new MNO would obtain access to a package of assets that has never before operated as a stand-alone business.

In the view of [✂], the CMA has little choice but to vet and mandate a potential new entrant in some form. The proposed alternative of leaving it to the Parties presents a real risk of them selecting a weak prospect and/or simply engaging in anti-competitive behaviours immediately either towards or with the connivance of the new entrant. In all other markets where this remedy was applied, the relevant competition authority has played a role in determining to varying degrees whether a proposed new entrant was an acceptable potential replacement to the acquired party. We would suggest that the CMA does not have to identify a single new entrant per se, but could limit itself to mandating a potential new entrant that comes forward as having the necessary resources to provide a source of effective competition which produces the desired consumer benefit. This would be against an objective and transparent criteria with such designation being granted prior to the completion of the final CMA report to the merger.

We believe that it would be possible for the CMA to set objective criteria against which to assess the suitability of a potential new entrant as a viable divestment purchaser. [✂]. In this way, the CMA could determine the parameters for a new entrant to meet, and grant candidate new entrants the ability to meet those criteria to the CMA's satisfaction. This stepped approach would achieve the goal of providing a source of effective competition. It is entirely possible for the CMA using its own discretion and expertise to set out such criteria, or seek independent external support to address that question. [✂].

Possible structural divestiture remedy

[✂].

We agree that the divestiture package would have to be attractive to potential purchasers. In terms of the points where views were invited:

(a) the package of assets

[✂] initial view of the agreements and assets that would both enable a new entrant to meaningfully compete and accelerate deployment of its services in the place of the Parties would include as a minimum (but not solely be limited to):

[✂].

A further option in terms of assets which could be made available to the new entrant would also include:

[✂].

(b) how the CMA might determine the appropriate number and location of sites

The CMA in evaluating the total number of sites to be sold to the new entrant and where these should be located should aim to do an evaluation prioritising population density and overage in the first instance as it has been established that network coverage (and to a lesser extent, quality) are key drivers in consumer choice of network providers. Using the Parties data it should be possible to determine where there is overlapping site coverage (and hence redundancy) of sites within major urban areas which could be transferred to the new entrant at an appropriate point.

[✂].

(c) whether the Parties can propose the assets and spectrum to be divested, subject to the consent of the CMA;

[✂] view is that while it is open for the Parties to propose assets and spectrum to be divested, the new entrant as purchaser should be free to mandate its specific requirements to the Parties.

We submit that while the Parties should be willing sellers to the new entrant, any agreement on what spectrum should be made available must be done as part of the merger inquiry and should form part of the final decision.

In relation to the assets, a key risk we see is that the Parties would bundle critical components required along with legacy or surplus items and services into any offering made to the new entrant, thereby reducing the Parties' cost base and increasing that of the new entrant. In our view a new entrant will only be able to grow through robust management of its costs and allowing the Parties to offload costs to it increases the risk of the new entrant failing.

In relation to radio spectrum our position is that while the Parties should be free to indicate to the CMA an initial view of what spectrum it is willing to offer, it should also be for the new entrant to identify the spectrum which is held by the parties and is best suited to their business model.

We note that Vodafone has already signed a conditional agreement as announced in July 2024 to "refarm" spectrum between the merged entity and Virgin Media O2. This is in addition to the agreement as announced by Vodafone to further develop their network sharing arrangements, also with Virgin Media O2. The two arrangements give the Parties a very large incentive to only offer small elements of bandwidth which either is in spectrum which operates with a lower efficiency or is already promised outside of the merger inquiry process to Virgin Media O2.

(d) whether there are risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective MNO in the provision of mobile services to Retail and Wholesale customers in the UK;

[✂]. There is a rich tradition in the telecommunications industry of incumbent operators gaming regulatory and commercial constraints to eliminate or reduce competition. [✂] would suggest that some form of monitoring of the behaviour of the Parties, whether by the CMA or a merger trustee would be appropriate in relation to the divestment and their subsequent treatment of the new entrant as a beneficiary of the assets and as a customer for network services.

(e) whether there are risks that a suitable purchaser is not available or that the Parties will divest to a weak or otherwise inappropriate purchaser;

[✂]

We would submit that there is a risk that in the absence of the CMA mandating in some form a suitably independent purchaser [✂], the Parties will sell to a weaker player (or at least one disinterested or otherwise constrained from offering substantial price competition in the consumer markets and being uncompetitive in the Wholesale markets).

(d) what on-going support the purchaser is likely to require;

If the CMA means on-going support means support from the Parties, then for certain areas there will be live commercial agreements (such as [✂]) on which the new entrant and the Parties will have to rely. These will endure and would be a standard agreement within the industry. The new entrant will be far more exposed to the risk of poor performance or breach of these agreements than the Parties.

[✂].

If on-going support means a third party acting as an arbitrator between the parties on certain matters under any remedies decision, then it is likely that such support would be limited in time, and be based around getting the Parties to abide by any commitment made as part of the remedies process and subject to the authority of any merger trustee.

(e) whether there are risks that the competitive capability of a divestiture package will deteriorate before completion of divestiture;

[✂] to the extent of its knowledge of the systems operated by the Parties does not currently believe that the network assets and spectrum that it would require in order to be an effective competitor against the merged entity would be impacted before completion of the divestiture. This is without prejudice to any due diligence that it will need to complete on those assets and spectrum. An obvious issue would be the leases of mast and network sites which may expire or need to be renewed.

[✂].

(f) whether there are regulatory requirements to be aware of

At this stage [✂] is unaware of any immediate regulatory concerns in relation to the proposed structural remedies and makes no comments on whether the behavioural remedies would introduce regulatory issues.

[✂]

(g) any other elements that may be required.

Effective divestiture process

We invite views on the appropriate timescale for.

In terms of the timescales for achieving a divestiture [✂] would suggest that:

1) any analysis and/or assessment of potential new entrants should be carried out before the issuing of the final report. This is on the basis that the CMA should be satisfied that the remedy has some prospect of success before issuing the final decision.
2) [✂].
3) [✂];
4) Any movement of customers from spectrum bands will require time to plan, organise and put into effect. As noted above, arrangements will have to be put in place to ensure coverage and service quality over time.

We will consider what, if any, procedural safeguards may be required to minimise the risks associated with a divestiture.

[✂] agrees that procedural safeguards should be put in place.

As noted above, we do not believe that the Parties should be allowed to select or prefer their own candidates for being a new entrant. We also believe that as part of the work in preparing the divestiture package, suitable confidentiality safeguards should be put in place by the Parties and the merged entity to ensure confidentiality on behalf of any new entrant and its commercial partners.

At this stage, given the nature of a partial divestiture, we expect that it would be necessary to require an up-front buyer and that any divestiture(s) is contractually committed before the Merger is allowed to complete due to the potential risks involved.

We would suggest that there are several elements to the divestiture being able to be "contractually committed".

The first relate to the competition law framework in which such a divestment would be completed including:

1) A clear mandate being given by the CMA as to:
    a. The overall scope of the divestiture [✂] This could be defined by over-arching principles to the sale, but there may be some elements which are open to question;
    b. A set of assets [✂];
    c. An enforceable dispute escalation / resolution process (e.g. to the CMA or a merger trustee) to be established and committed to by the Parties;
    d. A timeframe for any due diligence and / or final negotiations to be completed, with suitable sanctions on the Parties for breach or delay not otherwise agreed with the new entrant and / or the merger trustee.

[✂]

We would anticipate that subject to the above being clearly specified by the Parties and subject to commercial agreement with the Parties, a new entrant would be able to sign a framework agreement prior to the competition of the merger inquiry and issuing of the final report.

This is subject to any outstanding matters (e.g. [✂]) having [✂]. Against the above requirements and assumptions (and barring any difficulties with the Parties or merged entity), [✂] currently believes it would be possible for [✂].

We invite views on whether the Parties should be required to appoint a monitoring trustee to oversee the divestiture(s) and to ensure that the business / assets to be divested are maintained during the course of the process. Our initial view is that a monitoring trustee would be required given the potential complexity of the transaction.

We would agree with the CMA's view that an independent divestiture trustee would be appropriate and should be mandated to help resolve any disputes between the new entrant and the merged entity.

The CMA would have the power to mandate an independent divestiture trustee to dispose of the divestiture package if: *(a)* the Parties fail to procure divestiture to a suitable purchaser within the initial divestiture period; or *(b)* the CMA has reason to expect that the Parties will not procure divestiture to a suitable purchaser within the initial divestiture period.

As noted above, we do not believe it appropriate for the Parties (or the merged entity) to be solely responsible for identifying and securing the sale of the divestiture package to a new entrant as there is no incentive on the Parties to select the most viable or most motivated competitor. If the CMA does not wish to participate in vetting of potential new entrants, the wisest course of action may be to mandate an independent divesture trustee to select a main candidate who proceeds to negotiations against a defined scope with the Parties before the issuing of the final decision. The independent divesture trustee should be mandated to arbitrate between the parties on commercial issues on the basis of whether an option accelerates entry to, and competition in, the marketplace.

In unusual cases, the CMA may require that a divestiture trustee is appointed at the outset of the divestiture process. We invite views on whether the circumstances of this Merger necessitate such an approach.

Please see our answer above.

On behalf of [✂]