

## Response to the remedies proposed by the CMA

### *Introduction*

3 is a longstanding mobile virtual network operator ('MVNO') with a significant customer base. 3 As an MVNO, it is important to have a sufficient number of wholesale providers to ensure there is competitive pressure on the things that matter most to MVNOs, prices and access to technologies and features.

We agree with the CMA's comment in its provisional findings report that the merger would negatively affect MVNOs who rely on wholesale access to the mobile network operators' (MNOs) networks to provide their own retail services. We consider that a reduction from four to three MNOs is significant and gives rise to the risk of lower levels of competitive pressure. 3

Below you find our views on the possible remedies identified by the CMA, focusing on those identified to address the reduction of competition in the wholesale market. We consider that the wholesale access terms remedy would be the most effective, in that it would provide both a price ceiling and a guaranteed wholesale provider, and therefore certainty.

### *Possible remedies*

The CMA identifies a number of structural and behavioural remedies to address the reduction of competition in the retail and wholesale markets.

#### Structural remedies

1. Prohibition of the merger;
2. Partial divestiture remedy.

#### Behavioural remedies

1. a network investment commitment
2. time limited retail protections; and
3. Wholesale Market remedies
  - a. pre-agreed wholesale access terms;
  - b. MVNO network capacity ring-fencing.

3 our main concerns relate to the reduction of competition in the wholesale market. 3

Below we discuss in turn the Partial divestiture remedy (which is considered to have an impact on both the retail and wholesale markets), and the two wholesale market remedies, Wholesale access terms and Capacity ringfencing.

#### *Structural remedy - Partial divestiture remedy*

The partial divestiture remedy is considered by the CMA to compensate for the loss of competition following the merger in both the retail and wholesale market. Parts of the assets

of the merged entity would be divested in a new entity, which would be able to become a separate MNO and offer services to retail and wholesale customers.

We agree with the CMA that a new entity would need to be of sufficient size to be able to effectively compete in the market and that it is unlikely that this would be possible without affecting the expected economies of scale and improved quality in service offered by the merged entity. In this context, we note that as part of the Beacon 4.1 network sharing agreement, spectrum will be divested from VUK to Virgin MediaO2 if the merger goes ahead. We also question whether the timescales for implementing the new entity would be too significant to be of practical benefit. Are the parties to the merger able to make any commitments around the timescales for achieving this?

In the case of a partial divestiture, we have no opinion on whether the assets should come from VUK or 3UK, as long as the new entity would be effective in competing in both the retail and wholesale markets, would have assets for a sufficient amount of coverage, through its own cell sites, combined with national roaming, and would have sufficient capacity (in terms of spectrum) to accommodate retail and wholesale customers.

Finally, in the current climate of consolidation and high levels of debt in the telecoms market, it may be hard to attract a purchaser that is willing and able to invest the required amount of money for an entity with the required size to effectively compete in the retail and wholesale markets.

*Behavioural wholesale remedies: Capacity ringfencing*

We consider that capacity ring fencing could meet the needs of some MVNOs, in particular some of the bigger and fuller ones, but that its success will depend on the details of the remedy, including price, access to technologies, features and speeds and duration. For smaller and lighter MVNOs, who mainly compete on price, the capacity model may be less attractive. Any unexpected changes in the market impacting on price could have a big impact on MVNOs. This could be positive, with MVNOs being able to lower the cost per customer if they grow the base, but also negative, because the capacity cost will remain the same irrespective of the number of customers. If capacity ringfencing is deemed to be an effective remedy, we consider that it should be offered in combination with wholesale access terms.

*Behavioural wholesale remedies: Wholesale access terms*

✂, we consider that wholesale access terms would be the best remedy to address competition concerns in the wholesale market. Wholesale access terms would provide MVNOs with certainty around pricing over a fixed time period and with a guaranteed wholesale provider, which will be important in a market with only three MNOs.

Wholesale access terms should include a number of parameters and conditions, including the following:

✂

Disputes regarding the Wholesale access terms could be dealt with by Ofcom. Ofcom already has jurisdiction to resolve certain types of disputes under the Communications Act 2003 and has experience and a clearly defined process for dealing with disputes.

*Questions with regards to wholesale remedies*

Questions in relation to pre-agreed wholesale access terms:

(i) Whether it would constitute an effective remedy capable of eliminating or preventing the provisional SLC and its adverse effects in the Wholesale Market.

In principle, we consider that wholesale access terms could be an effective remedy, but its extent will depend on the detailed terms. We have set out above some considerations in relation to price, benchmarking and access to new technologies and features.

(ii) What the key terms are that need to be offered to MVNOs.

Please see our response under Behavioural wholesale remedies.

(iii) How the CMA should determine what constitutes fair and reasonable terms, including concerning price.

Please see our response under Behavioural wholesale remedies.

(iv) Whether pre-agreed wholesale access terms should be offered up to a specified number of MVNOs or cover a proportion of the Merged Entity's network capacity.

We consider that it would be preferable to cover the proportion of the Merged Entity's network. This would prevent a situation where the Merged Entity would set up a number of its own MVNOs to meet a numerical threshold of MVNOs.

(v) How the CMA might determine the appropriate length of time for such a commitment.

The CMA could take into account the current duration of wholesale contracts, combined with any insight into timelines around the introduction of new technologies. As we set out above, it is important to include a clause in the contract that allows for changes in the case of unexpected events.

(vi) How disputes might be dealt with and what potential role the CMA or an independent adjudicator/monitoring trustee might take in this process.

As set out above, we consider Ofcom has the right expertise and experience to deal with disputes between the Merged Entity and MVNOs related to Wholesale access terms.