Response on behalf of [✂] to the Provisional Findings Report ME/7064/23 13 September 2024 in relation to the anticipated joint venture between Vodafone Group plc and CK Hutchison Holdings Limited concerning Vodafone Limited and Hutchison 3G UK Limited

1. ✂welcomes the opportunity to comment on the Provisional Findings of the CMA in relation to the proposed merger between Vodafone Group plc and CK Hutchison Holdings Limited ("the Parties").

2. ✂ It is our position that the optimum method to address any substantial lessening of competition caused by the merger in the UK Wholesale and Retail mobile markets is competitive pressure in the form of a new entrant which proposes to compete aggressively in those markets, via providing 4G and 5G services on spectrum acquired through a "spectrum refarm" process mandated by the CMA. Please note [✂] we have limited our response to matters relevant to [✂].

3. In our view the SLCs as identified by the CMA in its Provisional Findings cannot be resolved through additional behavioural remedies and there is insufficient consumer benefit in any of the behavioural offerings made by the Parties.

4. [✂] is in broad agreement with the Provisional Findings of the CMA in relation to the UK Wholesale and Retail markets, and agree that the transaction should be expected to result in a substantial lessening of competition ("SLC"), absent suitable remedies being agreed by the Parties or imposed by the CMA. That said, the position of [✂] is that where sufficiently robust structural remedies can be put in place a new entrant MNO [✂] can act as a competitive constraint on the Parties and/or Merged Entity to prevent or deter any increase in prices or other which could distort competition in the UK marketplace.

International comparisons

5. We note the CMA's comments in Provisional Findings in relation to section 8.300 that the different characteristics of foreign mobile markets limit the probative value of any analysis of their circumstances in measuring the effects of the merger. However, the view which the CMA has reached in regards to the Retail Market for mobile services being at risk of price increases between 3.8 to 7% for customers of the Merged Entity would be compatible with the experience of customers in other 3 into 4 mergers in the mobile markets of Europe. As such, this would support the CMA following other competition authorities in examining a substantive remedy to mitigate or negate entirely the risk of such a consolidation triggering price rises.

6. We would also suggest that European Commission decisions on remedies for mobile mergers in Europe should have a probative value for the CMA in relation to what remedies have been pursued, including by the Parties. For example:

    a) Vodafone's departure from the Spanish market, which was completed in June of this year. As part of the approval of the sale they were willing to enter into long-term Support Agreements including for a 10-year brand licence, access to procurement, IoT, international Roaming and carrier services with the purchaser; [1]

    b) the European Commission decision related to mobile networks in Spain of 20 February 2024 which includes the divestment of spectrum by a Spanish MNO (which the Parties should be aware of this given a Vodafone company was in the process of exiting the

[1] see https://markets.ft.com/data/announce/full?dockey=1323-16188396-17SI2I4Q2TBOCUO9GT5SV0NJLJ

market at the time the merger was commenced); [2]

c) where a sister company to one of the Parties has been a party to the transaction where structural remedies have been sought or applied (such as those which have been dismissed out of hand in their submissions to the CMA:

a) the European Commission decision on the joint venture created between Hutchison 3G Italy and VimpelCom where the parties on 31 August 2018 accepted a divestiture of spectrum remedy as previously determined by the European Commission in a previous merger attempt with Hutchison 3G Italy; [3]

b) the European Commission decision on the acquisition of O2 Ireland by Hutchison 3G Ireland from 22 May 2014 which specifies details of an option for spectrum purchase by one of two MVNOs whose creation was mandated as a condition of approval from the European Commission. [4]

7. As the Parties should be aware in the context of the above cases of the relevance and applicability of structural remedies as a matter of competition law and policy particularly where reducing four MNOs to three, we can only infer that they have for their own reasons to not offer them to the CMA. It is also clear from the previous merger decisions that both of the Parties possess the will and capability to divest and execute the required agreements and activities to give effect to structural remedy when suitably motivated.

8. For the Wholesale Market, in our view the responses received by the CMA from MVNOs (see sections 9.255 – 9.264) on the extent of competition for MVNO access confirms our position that there is scope for a new entrant that specialises in wholesale services as part of its services, competing on the basis of cost and network quality. In doing so the new entrant would be able to generate revenues to support the development of its retail offering and customer base over time and mitigate the wholesale SLCs the merger may generate.

9. [✂] supports the CMA's view that there would be price increases for consumers and a reduced market and increased prices offered on a wholesale basis to MVNOs.

The Parties on Remedies

10. We also note the Parties Response of 27 September 2024 to the Remedies Notice. While we would agree with the Parties that prohibition of the merger would not be appropriate in this case, that is strictly conditional on the CMA adopting the proposed structural remedies of spectrum divestment to a new entrant along with some critical assets and agreements.

11. The Parties submissions on Remedies does not offer any meaningful remedies against the SLCs nor do they reflect an accurate picture of how a new entrant MNO should behave if it is given the opportunity to participate in the structural remedies. While there will no doubt be detailed negotiations, none of the things required for structural remedies are new or beyond the knowledge of any would be new entrant or the Parties to deliver in a timely fashion as part of any process with the CMA.

12. We do not propose to address all statements made by the Parties in their Response. We limit ourselves to certain points made by the Parties on the relevant Wholesale and Retail

[2] Case M.10896 – Orange / Masmovil / JV
https://ec.europa.eu/competition/mergers/cases1/202426/M_10896_10132275_5929_5.pdf
[3] COMP/M.7758 - Hutchison 3G Italy/Wind/JV see Case M.9041 - Hutchison/Wind Tre, Annex 1:
https://ec.europa.eu/competition/mergers/cases/decisions/m9041_263_7.pdf
[4] Case M.6992 – Hutchison 3G UK / Telefónica Ireland see paragraphs 13 – 20 of the Commitments to the European Commission: https://ec.europa.eu/competition/mergers/cases/additional_data/m6992_4894_3.pdf

Markets, the proposed Asset Package and the relationship between the Merged Entity and any prospective new entrant. On this basis we would note:

a) at 1.2 (ii) (a) the Parties assert that the wholesale MVNO market is "a 3-player market". This is inconsistent with publicly available information, including such details as Three wining Best Wholesale Service & Solution Provider for 2024 from the Mobile Industry Award on 19 September 2024 (as organised by Future Publishing Limited) and the evidence contained in the market analysis of the CMA in Provisional Findings;

b) in section 2 of the response by the Parties, they make several assertions in relation to both the rivalry enhancing efficiencies ("REEs") and relevant customer benefits ("RCBs"). We would submit that the Parties arguments in relation to these are flawed, and that the CMA is correct where it states in the Provisional Findings at paragraph 15.3 and 92 that the SLCs found in the Wholesale and Retail Markets are not offset by the presence of REEs. Specifically, the Parties argument is flawed in that it attempts to argue that notwithstanding the expense of investing in a higher quality larger and denser network, that the focus of the Merged Entity will be on competing on price. While there may be RCBs in terms of improved network quality, we find it unlikely that this will in turn incentivise the Merged Entity to price competitively at the Wholesale and Retail layer. We believe it far more likely that it will attempt to raise prices in an attempt to recover investment costs and maximise profits given the reduced competition at the MNO level;

c) the assertion at 2.9 that "many customers in the UK often struggle to get any mobile coverage" is not compatible with the Ofcom position of a high level of geographic coverage for at least one network operator, [5] or the data compiled by OpenSignal showing high levels of mobile connectivity (on 2,3,4 or 5G in some form) in excess of 97.3%.[6] Similarly, the fact that one of the Parties is still reliant on 3G ignores that other operators have completed or are in the course of switching off their 3G networks and have high outdoor and in0-buildingcoverage across the UK for 4G and 5G services. While there is absolutely a need for network coverage in the UK to be improved and completed for 4G and 5G networks (particularly in rural areas), the Parties argument is weakened by such under-estimating the available network reach. A consumer's main remedy to this or dissatisfaction with Three's 3G-based coverage should be to switch provider and not only to await some potential solution in the next 8 years as part of an undertaking for a behavioural remedy;

d) "Not spots" as noted by the Parties at 2.9 are typically present in the geographic coverage of a mobile operator for one of the following reasons: a) it is viewed as uneconomic or not cost-effective by an MNO to install capacity covering the area in question; b) there is a planning or other restrictions in place (or planning permission has not been granted for varying reasons) in relation to the necessary infrastructure; and/or c) there are difficulties with relaying services to a suitable mast site (e.g. the absence of sufficient capacity for backhaul). While it is possible that the merger may generate some efficiencies in site planning under a), it is noticeable that the Parties do not specify either the cause of the not spots or any indication of the extent to which they will be resolved as a result of any behavioural undertaking by the Parties (other than the network will be improved through various means);

e) we find the Parties approach to the idea of a structural remedy in their response to be contradictory. The Parties state at Section 3.2 that a partial divestiture remedy would

[5] see Connected Nations Spring 2024: Interactive report at https://www.ofcom.org.uk/phones-and-broadband/coverage-and-speeds/connected-nations-spring-2024-interactive-report
[6] see https://www.opensignal.com/reports/2023/09/uk/mobile-network-experience

be commercially unacceptable and detail their opposition to structural remedies, then appear to suggest that divestiture to VMO2 via Beacon 4.1 alone somehow resolves the SLCs in some oblique way (but is not a remedy), only to then state at 9.1 that they accept the proposed divestiture to VMO2 can be viewed as a form of structural remedy.

We would additionally submit that [✂] could go as far as to aggravate the SLCs if they serve to frustrate [✂]. The underlying issue being if the parties have optimised certain bands for their exclusive use, there is no scope for capacity to be accessed by a new entrant in those bands and they will then not be able to economically produce sufficient coverage;

f) the Parties appear to suggest (first at 2.4 and then elsewhere) that it is an absolute obligation on the CMA to preserve the RCBs of the proposed merger and in doing so ignore the obligation under Section 36 (3) of the Enterprise Act to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it.

The Asset Package

13. The Parties list a series of items in section 3 of their response which they specify would be required by a new entrant. We would broadly agree with the items identified (although would observe that the spectrum allocation they use for an example is if anything too small and a nationwide network of own stores would be something which could be rolled out over time).

14. The list as supplied by the Parties at 3.3. can be split into three broad categories:

a) compulsory - without which a new entrant is not an MNO [✂];

b) technical - which are common to MNOs and any "full" MVNO [✂]; and

c) commercial – which are again common to MNOs and MVNOS but are reliant on the company's business model [✂].

15. It is self-evident that securing spectrum and elements of a RAN will be costly and unavoidable to become an MNO. Where we would disagree with the Parties includes at 3.3 where they assert:

a) access is very costly for the technical and commercial elements;

b) that large-scale vendor procurement is required; and/or

c) that they would prove to be insurmountable to a new entrant.

16. We would agree that the new entrant should have financial stability and resilience to compete effectively in the marketplace, but as per our previous submission it does not have to (and should not try to) replicate the large-scale structures of Vodafone or Three, simply because from day one it will not be supporting the IT legacy or millions of customers of both networks. Furthermore, for the purposes of the CMA's merger report, should it find that SLCs must be resolved a structural remedy, the role of the new entrant is to be a sufficient competitive threat to the prospective Merged Entity. This is with a view to ensuing the Merged Entity continues to compete on price and quality of service at or above its current levels. The practical threshold for that is very different to recreating an MNO in the image of one of the Parties.

17. None of the technical and commercial elements have a single methodology to produce a stable, secure and high-quality network. The new entrant can - through planning, design and operational processes - optimise its network and business operations for efficient scaling.

18. A new entrant can instead use current best practice [✂]. To single out one of the items listed by the Parties, [✂].

19. We would also agree with the Parties that a significant customer base would act both as a source of revenues and justify ongoing investment. One straightforward way to achieve this goal is for a new entrant to adopt an approach similar to [✂]. Alternately, as we proposed in our previous submission that [✂].

20. In this context it is interesting that the Parties appear to only be offering pricing guarantees at 5.11 in relation to its fighting brand (the SMARTY Pricing Commitment) which they propose to retain, so the offer of a continuing existing pricing or ensuring a low tier price remains only applies to the Fighting Brands (Voxi and Smarty) to be inherited by the Merged Entity. The commitment to the Social Tariffs, is no more than that which all operators (MNOs and MVNOs) are obliged to offer under the General Conditions of Entitlement and Ofcom guidance, so would not impacting upon the RCBs as outlined by the Parties, as they are not a material commitment to pricing for the purposes of seeking the CMA's approval but appear to be simply complying with their regulatory obligations.

The Merged Entity and the proposed new entrant

21. The Parties devote a substantial amount of time of time hypothesising between sections 3.12 to 3.18 as to the requirements for a new entrant. In order for any of these suggestions to be valid, a series of assumptions have to be made which are contradictory. At 3.8 (i), 3.10, 3.11, and 3.12 the Parties assert that partial divestiture would involve the loss of access to network assets and spectrum which would somehow prevent the Merged Entity from being able to plan the delivery of a 'best-in-class' network. However:

    a) [✂]; and

    b) it is unclear what access to assets it would lose that would prohibit it developing a "best in class" network. On the basis that it assumes divestiture of assets to the new entrant, it is far more likely that a new entrant would want access to capacity on network assets via a "National Roaming" arrangement for an initial period (and certainly no longer than the proposed integration period of 8 years as outlined by the Parties). We do not see a case for purchasing outright any transmission or network components from the Parties at this point in time;

    c) [✂];

    d) We would agree that the ability to both grow a customer base quickly in parallel with scaling the network is critical in operating an MNO. Where we disagree absolutely with the Parties is the manner in which this is achieved, the investment required and how funds are deployed to produce a meaningful competitor to the existing MNOs;

    e) The purpose of both the merger decision and any remedies is for the CMA to be reasonably satisfied that any SLCs have been identified and addressed, not to generate an artificial barrier to entry for alternative operators. It is possible for the CMA to have reasonable confidence that the presence of the new entrant will adequately address the SLCs it has found likely if the merger is approved and not have to allow for the commercial concerns of the Parties as part of that analysis.

22. We therefore submit that the most reasonable and proportionate way for the CMA to be satisfied that any SLCs can be prevented or mitigated is to select a structural remedy featuring divestiture and suitable commercial agreements where the new entrant needs them to offer effective competition. Such a remedy is achievable, reasonable and proportionate for the purposes of the CMA discharging its obligations in this inquiry.