

CASE ME/7064/23
Vodafone / CK Hutchison JV merger inquiry
[X] response to CMA's Provisional Findings

1. INTRODUCTION AND EXECUTIVE SUMMARY

- 1.1 This paper sets out the responses and observations from [X] to the CMA's Provisional Findings Report dated 13 September 2024 (the "**Provisional Findings**") in relation to the anticipated joint venture (the "**Proposed JV**") between Vodafone Group plc (together with all companies forming part of the same group, "**Vodafone**") and CK Hutchison Holdings Limited (together with all companies forming part of the same group, "**Three**" and together with Vodafone the "**Parties**").
- 1.2 [X]
- 1.3 [X] has previously submitted the following to the CMA, in order to assist the CMA in its assessment of the Proposed JV:
- 1.3.1 A response dated 19 July 2024 to the initial submissions made by the Parties on the CMA's decision to refer the Proposed JV under section 33 of the Enterprise Act 2002 ("**19 July Submission**");
- 1.3.2 A submission prepared by [X] dated 16 August 2024 analysing [X] as a result of the Proposed JV (the "[X]"); and
- 1.3.3 A response submitted on 27 September 2024 to the CMA's notice of possible remedies that was published on 13 September 2024 (the "**Remedies Response**").
- 1.4 [X] acknowledges the CMA's provisional conclusion that the Proposed JV will result in a substantial lessening of competition ("**SLC**") in both the supply of retail mobile telecommunications services to end customers (the "**retail market**") and the supply of wholesale mobile telecommunications services (the "**wholesale market**") which are consistent with [X] own concerns.

2. CONCERNS OF [X] AS A [X]

- 2.1 As detailed in the 19 July Submission, [X] has significant concerns with various aspects of the Proposed JV and its impact on the ability of MVNOs to operate successfully in the wholesale market. In particular:
- 2.1.1 Access to a sufficient number of MNOs is critical in order to enable [X], and other MVNOs, to run effective and competitive tendering processes. At present, [X] can negotiate with four MNOs in order to secure a competitive wholesale contract. However, the Proposed JV will directly result in a reduction of the number of competitors for [X] business from four to three, providing the Parties with an increased ability to offer less favourable terms.
- 2.1.2 [X] believes that any competitive constraint imposed by EE/BT and Virgin Media/O2 is not sufficient to compensate for the loss of an independent fourth MNO, in particular the loss of Three, and disputes any suggestion, for the reasons it has explained, that the presence of EE/BT and Virgin Media/O2 would be sufficient to maintain competition in the wholesale market absent Three as an independent MNO.

- 2.1.3 [X] does not have significant countervailing bargaining power, as its scale means it can only offer to purchase a limited fraction of the capacity of each of the four MNOs. Moreover, whatever bargaining power [X] does have, is intrinsically dependent on having continued access to suitable alternatives. The loss of Three as an independent MNO will invariably and negatively affect this.
- 2.1.4 As further detailed in the [X], the Merged Entity would have [X].
- 2.2 For these reasons, it is imperative that the SLCs provisionally identified by the CMA in the Provisional Findings are fully addressed, in order to ensure continued competition in the UK's mobile telecommunications market for the benefit of end-users.
3. **[X] VIEW ON SELECT ASPECTS OF THE PFs**
- 3.1 [X] supports the main findings made by the CMA in the Provisional Findings, including in particular:
- 3.1.1 [X] accepts the CMA's observation that Three has improved its network quality rankings relative to other MNOs and that it is particularly strong in non-standalone 5G.¹ As noted in the 19 July Submission, Three provides a very competitive offering in the UK and helps MVNOs thrive in the UK market.
- 3.1.2 While MVNOs do exert some competitive constraint on the MNOs, especially in the value segment of the retail market, such constraint is limited overall.² More generally, the Proposed JV would reduce the number of MNOs in the UK from four to three, which would make it more difficult for independent MVNOs to run competitive tender processes in order to secure competitive terms for wholesale access. This, in turn, would restrict their ability to offer the best deals to retail customers. The limited competitive constraint that MVNOs are able to impose on MNOs is further evidence of the need for a clear and comprehensive remedies package to be imposed in order to address the wholesale SLCs identified in the Provisional Findings.
- 3.1.3 The [X]. By contrast, [X] has not undertaken any detailed assessment of the possible direct impact of the Proposed JV on retail pricing as a result of eliminating competition between Vodafone and Three for end customers. However, even in the absence of such assessment, [X] is of the view that the reduction in the number of MNOs, the significant and detrimental impact on the wholesale access market and the Parties' materially increased retail presence means that the Proposed JV gives rise to a significant risk of price increases for end customers in the UK.³ For completeness, while [X] agrees with the CMA's overarching conclusion that retail price increases are likely to follow as a result of the Proposed JV, [X] is unable to comment on the specific annual cost to UK consumers suggested by the CMA (predicted to be equivalent to at least £328 million per year, and possibly as high as £1.1 billion per year).⁴
- 3.1.4 [X] shares the CMA's scepticism that the Parties are as weak as they have submitted to the CMA. In particular, [X] concurs with the CMA's finding that both

¹ Provisional Findings, paragraph 8.194(c).

² Provisional Findings, paragraph 8.253(c).

³ Provisional Findings, paragraph 14.207.

⁴ Provisional Findings, paragraph 14.207.

Parties have strong brands⁵ and that, even absent the Proposed JV, the Parties would be likely to continue to invest in their respective networks to improve quality.⁶ However, it is important to note that improvements in network quality will only benefit MVNOs, and ultimately UK consumers, if the MNOs are subject to sufficient competitive constraints to ensure that a significant proportion of such improvements are passed on. The reduction in the number of independent MNOs by the Proposed JV, from four to three, will reduce the competitive constraint experienced by the Parties and, in turn, reduce the proportion of purported gains in terms of network quality, speed and reliability actually being passed on to consumers. This is particularly acute given that the Proposed JV's incentive to pass on any network improvements to MVNO's will be greatly diminished given the Proposed JV is a direct competitor of the MVNO's downstream. Indeed [X], for example, notes the [X].

- 3.1.5 While it can only speak definitively on the factors which are important to it, [X] suspects that most MVNOs will consider price, customer service and network quality as important considerations when selecting between MNOs, but acknowledges the CMA's recognition that there may be some differences between MVNOs in the relative importance that they attach to each.⁷
- 3.1.6 Contrary to the Parties' submissions,⁸ the Parties are self-evidently close competitors in most segments in the UK telecommunications market and both credible options for MVNOs when it comes to obtaining wholesale access services. [X] further agrees with the CMA that the closeness of competition between the Parties is evidenced by the fact that they have competed against each other more often for the five largest MVNO opportunities,⁹ which collectively account for a significant proportion of all MVNO subscribers (at [80-90]%).¹⁰ [X].
- 3.1.7 For the reasons set out in the 19 July Submission, [X] does not agree with the Parties' suggestion that [X].¹¹ In particular, in connection with [X].¹²
- 3.1.8 [X] agrees with the CMA's characterisation of the wholesale SLC as having two distinct aspects *viz* the Proposed JV either bidding for fewer MVNO opportunities or offering less competitive terms¹³ and that it is important that any remedy purporting to address the wholesale market SLC covers both these aspects.¹⁴ [X] further agrees with the CMA's recognition that the reduced incentive for the Proposed JV to bid for wholesale business, which is exacerbated by the Parties' expanded presence in the supply of retail mobile services, may result in the Parties' MNO competitors experiencing a corresponding increase in demand for their services. This increase in demand may also provide competitors with incentives to compete less aggressively, leading to an overall reduction in competition.¹⁵

⁵ Provisional Findings, paragraph 8.177.

⁶ Provisional Findings, paragraph 48.

⁷ Provisional Findings, paragraph 9.22.

⁸ Provisional Findings, paragraph 9.60(d).

⁹ Provisional Findings, paragraph 9.62(c).

¹⁰ Provisional Findings, paragraph 9.61(b).

¹¹ [X].

¹² 19 July Submission, paragraph 2.3

¹³ Provisional Findings, paragraph 77.

¹⁴ As further discussed in the Remedies Response, paragraphs 5.7 to 5.14.

¹⁵ Provisional Findings, 9.268(i).

- 3.1.9 For completeness, [X] agrees with the CMA's provisional view that the Proposed JV will result in an SLC in the retail market, where price-sensitive customers are particularly at risk.¹⁶
- 3.2 [X] cannot comment on the specific claims made by the Parties in relation to their joint business plan or on the efficiencies which the Parties claim will result from the Proposed JV. However, [X] notes the CMA's finding that the Parties would continue to invest in infrastructure even absent the Proposed JV to improve customer experience. Additionally, [X] notes that the CMA has disputed the Parties' claim that they would be unable to compete effectively on a standalone basis.¹⁷ In any event, [X] does not consider that the harm caused by the reduction in the number of MNOs from 4 to 3 (and its impact on the wholesale market) can be outweighed simply by claimed benefits.¹⁸ Further, there is no guarantee that the distribution of claimed benefits across mobile subscribers will be similar to distribution of harm. For example, customers with low disposable incomes are likely to be the most affected by the Proposed JV, but also less likely to capture the benefits of a better and faster 5G SA roll out. Such customers are not only less likely to value such benefits over cheaper prices, but also less likely to be able to afford the devices, or the higher product tariffs, that will allow them to benefit from those quality improvements.¹⁹
- 3.3 Finally, [X] does not know whether the claimed benefits are genuine additional benefits as against the counterfactual, whether such benefits would ultimately materialise in the event the Proposed JV is approved, how achievement of such benefits would be monitored and, if the Proposed JV did not meet the commitment in the future, to what extent action could be taken – or whether such remedial action could retrospectively address the consumer harm arising from the SLC.
4. **CONCLUSION**
- 4.1 [X]. The Proposed JV risks materially damaging [X]. In fact, [X], [X] characterised the Proposed JV as a potentially existential threat to [X] future operations. In particular, as per the 19 July Submission, the "*MNOs could do without [X] – and likely do not welcome competition from [X] – but [X] cannot do without the MNOs and continued access to wholesale mobile services on commercially acceptable terms is a critical requirement for [X]*".²⁰
- 4.2 It is therefore imperative that the SLCs identified by the CMA are clearly and comprehensively addressed before the Proposed JV can be permitted to proceed. As discussed in the Remedies Response, [X] preferred remedy for the wholesale SLC is a capacity ring-fencing obligation on the Parties, together with a set of basic minimum commitments and divestment of the Parties' fighting brands. However, for the avoidance of doubt, if the CMA ultimately concludes that all of the proposed remedies short of prohibition are unlikely to be effective and/or would give rise to disproportionate monitoring requirements, [X] submits that the Proposed JV should be prohibited.

¹⁶ Provisional Findings, paragraph 14.211.

¹⁷ Provisional Findings, paragraph 14.217.

¹⁸ Provisional Findings, *Summary*, paragraph 63.

¹⁹ [X] also notes that the claimed benefits to fixed wireless access subscribers cannot be traded off against harm to mobile subscribers given that retail provision of mobile subscription services and retail provision of fixed wireless services are distinct antitrust markets.

²⁰ 19 July Submission, paragraph 4.6.