

CASE ME/7064/23
Vodafone / CK Hutchison JV merger inquiry

[X] response to CMA's Remedies Working Paper

1. INTRODUCTION

- 1.1 This paper sets out [X]¹ response to the CMA's Remedies Working Paper published 5 November 2024 (the "**Remedies Working Paper**") 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 As well as responding to the CMA's invitation for comments in its Remedies Working Paper, [X] reiterates its significant concerns about the effect of the Proposed JV on the UK mobile market – which pose a fundamental threat to competition on price, quality of service and innovation, materially damaging [X], other MVNOs like it and harming UK consumers.
- 1.3 [X] has sought to engage constructively with the CMA throughout the review process to protect its position and safeguard competition at the wholesale level to ensure that it, and other MVNOs, can compete effectively with the larger three remaining MNOs. The position taken in the Remedies Working Paper is not an outcome that [X]. In the event that the CMA were to approve the Proposed JV on the terms set out in the Remedies Working Paper, [X].

2. THE CMA'S DECISION ON THE PROPOSED JV IS OF CRITICAL IMPORTANCE

- 2.1 If approved, the Proposed JV will herald an irreversible sea change in the UK mobile market. As already provisionally identified by the CMA, the Proposed JV will result in a substantial lessening of competition ("**SLC**") on both the supply of wholesale and retail mobile telecommunication services.
- 2.2 Effective competition in the UK mobile telecommunications market depends entirely on the CMA reaching the right – and legally defensible – decision in its review of the Proposed JV. This involves weighing, on the fine balance of probabilities, the clearly identified SLCs against the Parties' claimed benefits of an ambitious investment plan to be delivered over close to a decade, together some proposed short-term protections offered to MVNOs and retail customers. [X] has significant concerns that the CMA is on a trajectory of reaching a decision which will not ensure continued competition in the UK mobile telecommunications market, which will materially harm what is currently a reasonably competitive MVNO market and which, most importantly, is emphatically not in the best interests of UK consumers.
- 2.3 Mindful that the CMA has asked for input from market participants only on select points, [X] does not intend to list each aspect of the Remedies Working Paper with which it has concerns. However, [X] notes the following:
- 2.3.1 The CMA has rejected a capacity ring-fencing remedy, either structural or commercial, but has not offered any detailed assessment or justification for doing so. The Remedies Working Paper merely notes that Ofcom has stated that such a remedy would lead to inefficiencies linked with perceived difficulties in planning how much capacity would need to be ring-fenced and specifying when and where that capacity can be used to enable the MNO to control demand and congestion.

¹ As the CMA may be aware, [X].

With respect, it is exceedingly difficult to reconcile the CMA's position that (1) concerns around planning difficulties and capacity congestion would arise from what [X] considers would be a straightforward commercial ring-fencing arrangement but (2) such concerns would not arise from a pre-agreed wholesale reference offer that would potentially require the Proposed JV to offer access to up to 10 MVNOs at the same time (as per the CMA's suggested Wholesale Access Terms, or "WATs", as that term is defined in the Remedies Working Paper). If the Proposed JV can be entrusted to plan appropriately for onboarding MVNOs pursuant to the WATs, there is no reason to think it would not be able to do so where access is granted pursuant to a capacity ring-fencing remedy. In addition, if the Parties and/or the CMA have genuine concerns around the ability of the Proposed JV to adequately manage capacity congestion issues, should it be made subject to a capacity ring-fencing obligation, it is difficult to understand the rationale behind the Proposed JV divesting spectrum to VMO2 and, in particular, why such divestment would not exacerbate any congestion concerns;

- 2.3.2 The WATs, which largely reflect the terms suggested by the Parties, will appreciably restrict pricing competition amongst MVNOs and essentially freeze competition, by including prescriptive parameters around pricing and other features which go to network quality. By design, the WATs will govern many of the most important features for MVNOs when negotiating wholesale access. As such, the WATs will materially reduce the ability of MVNOs to offer differentiated products and/or target specific customer segments, ultimately giving UK consumers less choice and ossifying competition. The guaranteed price point ostensibly offered as a remedy by the Parties will distort the market further – such price points should be protected by competition in the market, underpinned by competition at a wholesale level – not fixed price points from the merging parties;
- 2.3.3 Simply put, [X] competes strongly with [X] on the basis of the provision of a high quality service at excellent value to the benefit of UK consumers. [X]. An effective tender process in the UK market envisages four MNOs competing for [X] (and other MVNOs') business, and critically relies on Three, with its aggressive approach to pricing, to drive price competition in the process. The removal of Three undermines such a process, leaving only three MNOs – all of which continue to demonstrate strongly aligned economic interest in substantial, parallel annual retail price increases over the past two years, with the corresponding incentive also to increase wholesale pricing levels;
- 2.3.4 The CMA has correctly provisionally identified an SLC at wholesale level if the Proposed JV proceeds. It is incumbent on the CMA to ensure an effective remedy if the Proposed JV is to proceed, which fully addresses such SLC concerns. The WATs, as set out in the Remedies Working Paper, is not an effective remedy to the SLC;
- 2.3.5 If the WATs are introduced, [X]²
- 2.3.6 Crucially, [X] notes that a remedy which included a ring-fencing of capacity solution would allow such an outcome [X] and, as such, would lead to far less distortion of competition in the market than a remedy based on the proposed WATs. [X]

² [X].

- 2.3.7 It is important to note that [X] does not seek an “advantage” from the CMA process/remedies, but merely seeks to ensure that whatever remedies are adopted, [X] is left in a similar situation that it would have been in absent the Proposed JV [X];
- 2.3.8 [X]:
- 2.3.8.1 [X].
- 2.3.8.2 [X].
- [X]
- 2.3.8.3 [X].
- 2.3.8.4 [X].
- 2.3.8.5 [X].
- 2.3.9 The CMA is rightly sceptical that the Parties will deliver the full extent of their investment and business plan for the Proposed JV in the absence of a binding requirement to do so (in the form of the CMA accepting a final undertaking or imposing a final order and/or by amending the spectrum licence(s)). Conversely, the CMA also appears to be content to accept that full delivery of this plan will resolve the SLC concerns on the grounds that it will trigger a competitive response (presumably involving further investments) from VMO2 and BTEE. It is entirely unclear how the CMA has been able to conclude (1) that there is a need to impose a binding requirement on the Parties in order to ensure that the full investment plan is actually delivered but (2) that the SLCs will be fully remedied in the long term due to the competitive response on the part of the other MNOs even though those MNOs would not be under any obligation to actually take such actions (e.g. by reference to a final order or the terms of their spectrum licence(s)). It is not clear to [X] why the Parties must be subject to a requirement in order to ensure delivery, but the CMA is able to accept "on faith" that the remaining MNOs will deliver a response on their own volition – this is a gamble that cannot on any reasonable grounds be thought more likely than not; and
- 2.3.10 While increased capacity and improved network quality of the Proposed JV, both of which will allegedly be delivered by the investment plans, may give the Proposed JV the ability to participate in more MVNO tender opportunities and enable it to offer better terms, the CMA has failed to demonstrate why the Proposed JV would have any incentive to do so (rather than, for example, expand its own position on the retail market). On the contrary, the risk to the Proposed JV of losing wholesale revenue if it does not participate in MVNO tenders (or does so on uncompetitive terms) is reduced by the Proposed JV, simply by virtue of the fact that post-completion there would be fewer alternative MNO providers available to the relevant MVNO.
- 2.4 Any UK merger control review process is concerned with determining whether a relevant merger situation may be expected to give rise to an SLC (and, if so, the appropriate actions to remedy such SLCs). While [X] submits that it is entirely inappropriate to subsume within the merger control framework any broader policy aims with regards to the future development and international status of the UK mobile market, it is incumbent on the CMA, to the extent that it

has been influenced by any such broader policy aims, to clearly articulate any such non-merger specific considerations that may have influenced its review.

3. SPECIFIC COMMENTS ON THE WHOLESALE ACCESS TERMS

3.1 Notwithstanding [X] considerable concerns about the apparent trajectory of the CMA's investigation in the Proposed JV, in the interest of mitigating the damage to competition the proposals outlined in the Remedies Working Paper can be expected to entail, [X] makes the following observations on the WATs ([X]):

3.1.1 **Pricing:** following an access request to the CMA,³ a very limited number of [X] business representatives and external advisors, forming part of [X] confidentiality ring, has been provided with the unredacted pricing tiers proposed under the WATs. The pricing charged for wholesale access is a key commercial term in any negotiation, [X]. As such, [X] is unable to comment specifically on the suitability of the CMA's approach to pricing as a fixed ceiling under the WATs and their suitability for other MVNOs. As previously communicated to the CMA, the WATs will have the effect of freezing pricing for wholesale access granted by the Proposed JV, and thereby distort competition.

3.1.2 **FPM (as defined in the Remedies Working Paper):** any FPM included in the WATs must work to adjust pricing downwards only. Further, it is important that any FPM applies across the entire customer base of the relevant MVNO or otherwise as appropriate for that MVNO's particular commercial strategy, including any unlimited or high-allowance data packages offered, rather than being confined to a subset thereof or only certain data packages.

3.1.3 **Termination rights:** the WATs enable the MVNO to contract on terms of up to five years. While this creates some commercial certainty, it also exposes MVNOs to the risk of being constrained to continue with a contract that may, over time, restrict its ability to compete effectively. The WATs must include robust termination rights on the part of the MVNO, enabling the MVNO to terminate and switch MNO by giving reasonable notice – such as 24 months - to the host. Further, the terms of the WATs contract should continue to apply in the same way during any notice period (including, in particular, any price reductions or discounts available to the MVNO).

[X].

3.1.4 **Access to new technology / features:** [X] submits that MVNOs' access to new technology and features shall be guided solely by a principle of technical feasibility. Where it is technically feasible for an MNO to make such technology / features available to MVNOs, it shall be required to provide such access immediately or, where it can demonstrate that immediate access is not technically feasible, as soon as reasonably practicable. Importantly, the access requirement shall not operate by reference to any arbitrary minimum time period. Disputes around technical feasibility shall be subject to the dispute resolution process under the WATs. MVNOs should also not be prevented from adding third party technology to their service offering where this is technically feasible, and should not be required to acquire all services from the Proposed JV – this is all the more

³ Letter to the CMA [X]

important if the Proposed JV is seeking a delay between making new technology available to MVNOs from when it first offers it to its own retail customers.

3.1.5 **Unlimited bundles:** [X] views the ability of MVNOs to compete in high and unlimited data package segments as imperative in ensuring that UK consumers continue to have access to a range of suitable alternative providers, regardless of the particular pricing point in question. In order to enable the MVNO to compete effectively in this segment over time, pricing must also be subject to annual review by the contracting parties (including use of the dispute resolution process if required). All else aside, however, [X].

3.1.6 **Minimum revenue commitments:** [X] recognises that it is reasonable to have some form of minimum revenue guarantee in the WATs, as a concession to the cost of MNOs of onboarding new MVNOs and to ensure that new MVNOs seeking to enter the UK market undertake sufficient due diligence and develop sustainable business plans before doing so (which will help avoid a proliferation of uncompetitive MVNO brands on the market). However, such minimum revenue commitments must operate in an equitable manner – for example, where an MVNO has exceeded the minimum revenue commitment in a particular month (or whatever the time period is), that excess should be rolled-over to subsequent months and count towards the minimum revenue commitment in subsequent months until the excess has been fully depleted. Further, where the MVNO fails to reach a minimum revenue commitment in a particular month, it shall be permitted to spread payment of such commitment over a pre-determined number of months.

3.1.7 [X].

4. SUMMARY

4.1 As discussed above, [X] notes that the CMA has rejected a capacity ring-fencing remedy in the Remedies Working Paper (for reasons which are not entirely clear or convincing), and therefore reiterates its previous position that:

"if the CMA has any residual concerns regarding the effectiveness and appropriateness of [X] proposed remedies package, the way to address such residual concerns has to be a prohibition of the Proposed JV. It cannot be to dilute or make the remedies package proposed by [X] less robust, or ossifying the market in endless regulatory disputes by relying on a pre-agreed wholesale access offer remedy."⁴

4.2 The CMA has identified clear SLCs stemming from the Proposed JV and it is not appropriate or rational, against that backdrop, to conclude that such SLCs can be fully remedied in the long term simply by reference to a set of highly speculative efficiency claims advanced by the Parties in combination with an entirely unsupported assumption on the part of the CMA that such efficiencies will trigger a response (let alone a sufficiently material response) from the remaining MNOs (which, again, are not subject to any requirement whatsoever to do so). Where entirely speculative efficiencies are being weighed against very demonstrable and materially detrimental SLCs, a significant concession is required to account for the risk that the former may end up never materialising - something which the CMA has failed to do in the Remedies Working Paper.

⁴ See Confidential – [X] – response to Vodafone-Three's submission on the CMA Remedies Notice ([X]).