Vodafone / Hutchison 3G

Submission to the CMA responding to the remedies working paper on the proposed merger of Vodafone and Hutchison 3G

12 November 2024

1. Executive summary

1. Sky is disappointed with the weak short-term wholesale remedy ("Wholesale Access Terms") proposed by the CMA in its Remedies Working Paper ("Remedies Working Paper") to address very significant ongoing structural wholesale competition concerns. The CMA is taking a significant risk by relying on this weak remedy in the hope that sustainable wholesale competition will emerge after the Network Commitment is implemented. The Merger will set the permanent structure of this critical market, which affects millions of consumers and small businesses and threatens the feasibility of UK MVNO businesses. It is, therefore, vital to get this right.

2. However, in the interest of time and without prejudice to Sky's position, we focus our response on specific suggestions about how the proposed Wholesale Access Terms could at least be strengthened. These are relatively easy 'fixes' that, at a minimum, would de-risk its effectiveness. As it stands, there are clearly various aspects designed to lock-out, or at least severely hamper and deter, Sky as well as other MVNOs, from accessing the remedy and any protections it provides. We summarise these below and provide more detail in the remainder of this submission.

3. **Duration is too short** – only making the offer available for three years (albeit with a potential to extend into a fourth year) is not sufficient [redacted] Furthermore, there is no evidence to suggest that any rivalry-enhancing effects ("REEs") would take immediate effect. [redacted]

   Sky's proposed improvements

   1) The offer should be open for at least the first 5-6 years i.e., 4 years to express an interest, plus 1 year to negotiate the contract - on the basis there may well be a lag before any material REEs take effect. The CMA must also ensure there is at least a further 1-year period from contract signing for implementation and system integration. This is a key area where Sky requests greater clarity in advance of the final decision.

   2) MVNOs should also have the option to extend their contract beyond five years for a further five years – many contracts are longer, and switching is disruptive and costly. Without the option of a longer period of payback this could significantly deter MVNOs from switching to the Merged Entity.

4. **Capacity and onboarding limits must also be strengthened** – Sky considers that these aspects as currently proposed have the potential to be gamed and will act as a barrier for MVNOs.

   Sky's proposed improvement

   There should be no pre-defined arbitrary capacity limit and certainly not one based on the Merged Entity's own take up; instead a third-party such as the Commercial Arbitrator should determine if there is sufficient capacity. Onboarding limits should also be increased to at least <u>three</u> Tier 3 MVNOs, but we also strongly consider there is no reason to hold up the largest MVNOs ([redacted] subscribers and above) from accessing this remedy given that the significant value associated with these deals far outweighs any additional technical resources required. We assume that once an MVNO is in any 'queue' it cannot be timed out from the offer, but this should also be clarified.

5. **Price terms must give meaningful protection** – [redacted] Only giving some additional protection to the Parties' current MVNO customers by enabling them to extend on current terms is not sufficient as all MVNOs will suffer as a result of the wholesale SLC. It would seem contrary to the CMA's legal duties to find a wholesale SLC and to accept as a satisfactory remedy a price cap **demonstrably** and **materially** above what was separately offered in a competitive tender pre-merger by the merging parties.

Sky's proposed improvements

1) Prices should be lower than [redacted], particularly given that the Parties claim costs will fall significantly as a result of the Merger efficiencies.

2) In relation to unlimited pricing, the pricing must allow MVNOs to sell at a similar level as current comparable unlimited deals i.e., H3G's Smarty unlimited offer. In November 2024 Smarty sold Unlimited and non-speed restricted plans for £16/month which would require a per customer wholesale rate **no higher than** [redacted] for an MVNO to sell at 0% margin.[1]

6. **Future Pricing Mechanism must not enable higher prices** – we are very concerned that this will be used to increase prices – the very thing the remedy is seeking to prevent.

Sky's proposed improvement

It should be amended to ensure that prices can only be adjusted <u>downwards</u> – [redacted]

7. **A new term permitting non-exclusivity would enable real continuous competition** – Sky strongly believes that the best way to 'de-risk' the wholesale remedy is to ensure there is a non-exclusivity clause included in the offer (such that MVNOs could also access deals from other MNOs in parallel). This would put the Parties under continuous competitive pressure to deliver, and create a very strong disincentive for them to 'game' the remedy throughout the contract. We note some MVNOs [redacted] appear to have this type of term today.[2]

8. In addition to the above critical changes, we have also suggested various other improvements to the proposed terms e.g., implementation costs should not be borne by large MVNOs – [redacted] – and there should not be a per-subscriber minimum revenue commitment (it should at most be a reasonably priced fixed monthly fee that does not scale as subscribers grow). We agree with the CMA's proposed changes to the service equivalence, non-discrimination and access to new technologies (nine months should be a maximum ceiling for launch and a roadmap shared with the MVNO).

[1] Per our previous submissions, Sky's non-data costs of £4.15 per sub per month include £3.19 of SG&A and £0.96 of interconnect and roaming.
[2] See https://join.honestmobile.com/smart-sim.

9. Sky wants to re-emphasise that we have very serious concerns about the weak, static and temporary wholesale price regulation remedy being proposed by the CMA. We do not consider that this remedy (even if improved) will be sufficient to properly and comprehensively address the wholesale SLC.

10. The CMA has also failed to consider the feasibility of alternative remedies – in particular the [redacted] remedy proposed by Sky – which it dismissed with only a cursory few paragraphs in its response. This is a material error.

11. If the CMA has misjudged the effectiveness of these weak remedies, it will threaten the feasibility of the UK's MVNO businesses. [redacted]. **It is therefore, at the very minimum, imperative that the remedy is designed in such a way that Sky, as well as other MVNOs, are legitimately able to access it - we must not be timed out or limited in any other way.**

2. The proposed wholesale remedy has substantial flaws but should at least be strengthened

12. Without prejudice to our objections to the CMA's proposed remedies, in this section Sky considers each of the elements of the proposed Wholesale Access Terms - setting out the components of its specification which must be significantly strengthened and how this can be achieved in a relatively straightforward way.

Figure 2.1: Summary of Sky's proposed changes to strengthen the wholesale remedy

	Proposed Terms	Sky Changes to Strengthen Remedy
Enabling MVNO access	**Timeframe** • 3 years to express interest + 1 to conclude contract • 5-year maximum contract length • Removed after Year 3 network commitments are met	• 4 years to express interest + 1 year to conclude contract (with clock stopped if arbitration is requested) • At least 1 year for implementation • 5-year term with further 5-year option and 24-month run-off • Only remove after Ofcom / CMA satisfied with level of wholesale competition, but no sooner than 5 years

	Proposed Terms	Sky Changes to Strengthen Remedy
	Capacity Limits • No obligation to offer if more than [15-20]% of Parties' network capacity • Limited to [10-20]% of Parties' total network capacity	• Third-party commercial arbitrator to determine if sufficient capacity exists
	Onboarding Limits • Onboard 8 'Tier 1' MVNOs, and up to 2 'Tier 2' or 'Tier 3' MVNOs at any one time	• Increase to 3 Tier 3 MVNOs, excluding existing Vodafone partners • Propose new tier 4 of [redacted] subs with no gating
Commercial viability	**Price** • Three tiers on a per-GB basis, with pricing proposed by Parties • Per-sub price for unlimited tier, with usage limit at 150% of MNO average, beyond which additional pricing applies	• Pricing must be lower than previous terms offered by the Parties to Sky for 2025 and 2026 • Unlimited tier must allow Smarty £16 price to be matched – [redacted]
	Future Pricing Mechanism • Price changes according to Parties' ARPU and data usage	• Ensure only downward adjustment • [redacted]
Additional terms to protect MNVOs		**Non-exclusivity** • Must-permit non-exclusivity (enabling MVNOs to use multiple MNO providers)

Terms that currently undermine the accessibility of the remedy

Duration (availability and term)

13. The timeframe of the proposed Wholesale Access Terms is the most important element of the terms that will have a significant impact on its feasibility and take-up. This goes to the very core of the strength and durability of this remedy as a protection for MVNOs.

14. Therefore, we strongly urge the CMA to err on the side of caution and extend the timeframe of this protection. There is a significant risk that if this is too short, MVNOs will simply be left unprotected. We accept that the longer this remedy is in place, the more ongoing compliance will be needed. However, given that these systems/processes will already be in place, we consider that the opportunity cost for extending the timeframe substantially outweighs any ongoing costs. We also recognise the potential distortion risks arising from this type of remedy. However, if the CMA is nevertheless going to pursue this form of risky time-limited

remedy, this is not a reason to curtail the much-needed protections. The most significant concern for the CMA should be the risk that MVNOs are not given a sufficient opportunity to access this protection and for those that happen to fall outside this timeframe, they are left entirely exposed to materially worse terms once this remedy is withdrawn.

15. More generally we see no reason why the CMA necessarily needs to link the duration of this remedy as precisely to the timings of the Network Commitment remedy. There is a serious risk that it will take longer for any competition benefits from the REEs to materialise. We strongly consider the CMA should leave a bigger 'buffer' given that it has no evidence this investment will immediately trigger sufficient competition to *fully address* the wholesale SLC within three to four years.

16. **Availability – current proposal**

- Available (on first-come-first served basis) for three years plus MVNOs would have until the end of the fourth-year post-completion to conclude a contract, provided they express interest within the first three years.
- Sky is not clear from the Remedies Working Paper what 'concluding a contract post-completion' precisely means in practice in terms of how and when the timeframes kick-in. We have interpreted this as follows: the Merger completes in January 2025 – meaning MVNOs have until January 2028 to express an interest in the offer, and then up to a further year (maximum January 2029) to finalise and sign the contract. We also presume that within this timeframe there is no deadline for starting to serve customers on the Merged Entity's network but that is another aspect that is not explicitly clear.
- Given the importance of this, [redacted], **we would ask the CMA to provide us with additional clarity on this key aspect as soon as possible** [redacted]
- CMA also proposed that the Parties should be required to offer until the CMA is satisfied that the Merged Entity has met its 'Year 3' Network Commitment obligations.

17. **Availability – Sky's proposed improvements**

- At least **5 years** (up by 1 year) to finalise the contract i.e., 4 years to express an interest, then a further 1-year period to negotiate the contract.
- In terms of the timeframe to implement, there **must be at least a 1-year period for implementation** (if this is not unlimited as presumed above).
- This would mean that MVNOs have up to 5-6 years in total in which to move over to the Merged Entity's network. This gives much greater flexibility for MVNOs that happen to be locked in contracts to access the remedy and enables a longer 'buffer' period.
- Furthermore, we would expect the 'clock' to be stopped if the MVNO escalates for dispute resolution with the Commercial Arbitrator to prevent any gaming by delays from the MNO.
- A further potential way to strengthen the remedy could also be to ensure that it is only removed once demonstrable competition is occurring following the Merged Entity's network investments. The CMA and/or Ofcom would not just assess whether the network investment obligations have been delivered, but also could – more importantly and critically for MVNOs – also assess whether this investment has generated sufficient

competition in the wholesale market (i.e., focus on the evidence of competition, not simply whether the Parties have delivered their investment). This provides a backstop such that if, for whatever reason, sufficient competition has not yet emerged then the remedy can be extended.

18. **Duration – current proposal**

- Maximum term of five years with the ability to only request a shorter term.

19. **Duration – Sky's proposed improvements**

- **The option for an equivalent contract extension (i.e., 5+5 years)** should be available automatically (not just as currently proposed for MVNOs to be able to request a shorter term). Many MVNOs typically extend their contracts and end up staying with their MNO host for a much longer duration of time. This is because switching is disruptive and costly and MVNOs need to make significant investments themselves to use a particular network and transfer over their customers. There is no need to artificially truncate the period for the contract, simply to 'fit' with the Parties' investment period. [redacted]
- **Exit period** – there should also be a 24-month run-off period included within the contract to avoid a damaging, blunt contractual 'cliff-edge'. It can be complex and time-consuming to exit and therefore this would provide MVNOs with additional protection. Allowing enough time to migrate also reduces the risk of customer disruption (e.g., by allowing an MVNO to stagger its customer migration).

<u>Additional protections for the Parties' current MVNO customers don't help other MVNOs</u>

20. The CMA has explicitly recognised that MVNOs have different commercial strategies and priorities, and therefore that standardised 'blueprint' terms (as offered by the Wholesale Access Terms) "*could be less attractive*" than what they would otherwise have negotiated.[3] We agree and raised this very issue with the CMA in our previous response, emphasising that each MVNO is different and has very different strategies, resulting in potentially very different approaches that are impossible to capture in this type of static short-term remedy. We are therefore pleased to see that the CMA has recognised this concern.

21. However, while allowing existing customers of the Parties to extend their current terms provides some additional protection to the MVNOs that happen to be customers of the Parties, it does nothing to address this concern for the remaining MVNOs who will face the prospect of standardised 'take it or leave it' terms, without any competitive pressure to offset and strengthen our negotiating hand. There is nothing in the CMA's Provisional Decision to suggest that the wholesale SLC only applies to the Parties' MVNOs, or that those MVNOs would be 'harder hit' than any other MVNOs when having to retender. It is, therefore, not sufficient for the CMA to partially address this distortion only among a subset of MVNOs – it is duty bound to address this for *all* MVNOs, particularly those most at risk from the reduced competition such as Sky.

[3] Remedies Working Paper, paragraph 1.474(c).

Capacity limit

22. [redacted]

23. Sky is concerned that the 'capacity limit' as currently designed, which is based on data used on the network rather than available capacity, could easily end up becoming another mechanism which restricts the availability of the remedy and reduces any protections for MVNOs.

24. Notably, the Parties have said that they expect at least a 65% uplift in their network capacity (compared to the sum of the Parties' standalone network capacities as at 2029). This is a very significant uplift which will be potentially underutilised given the current growth trajectories observed in the mobile market. E.g., recent BTEE data shows that its mobile data usage per post-paid subscriber shrank (1%) year-on-year between H1 FY24 and H1 FY25, following a period of 25% YoY growth.[4]

25. The Merged Entity will not be motivated to release any unutilised capacity to those MVNOs, like Sky and others, if it puts its own retail revenues at risk.

26. It is fundamentally important that this element of the remedy cannot be used as a 'gaming' tool which ends up excluding some MVNOs, most likely larger ones such as Sky, particularly given the 'first come first serve' nature of the proposed remedy. There is a significant risk that if this limit is underestimated and the Parties curtail access to this remedy (even if there is still sufficient spare capacity), only a proportion of MVNOs affected by the SLC will be covered by this protection. This makes the remedy entirely ineffective and not sufficiently comprehensive.

27. It is imperative that all MVNOs have a reasonable opportunity to access the remedy (so long as the Merged Entity has sufficient capacity available).

28. **Current proposal**

- The Merged Entity would not be obliged to offer the Wholesale Access Terms to any MVNO when the aggregate forecasted MVNO mobile data traffic for the coming 12 months is more than [15-20]% of the total capacity of the Merged Entity's network.
- In effect this limits the offer to [10-20]% of the Merged Entity's total network capacity.

29. **Sky's proposed improvements**

- **Independent third-party e.g., the commercial arbitrator, should determine if the Merged Entity has sufficient capacity** – this would ensure that it cannot be used to prevent MVNOs from taking advantage of the remedy if there is spare capacity even if the Parties' own data usage has not increased.
- Any determination of capacity should not be based on the Merged Entity's *usage* of its capacity but **with respect to its overall levels of *available* capacity** – this would be a fairer and more transparent way to determine whether the Merged Entity is capable of offering additional deals to MVNOs.

[4] See BT H1 FY25 KPIs spreadsheet (available here https://www.bt.com/bt-plc/assets/documents/investors/financial-reporting-and-news/quarterly-results/fy25/h1/bt-group-h1-fy25-kpis.pdf). Note: Vodafone restated its network usage data at the Q2 FY25 release today – following this, we are unclear whether its un-restated prior-year data is comparable to restated data, so we have opted not to use it.

30. Given the sizeable redactions made to the description of this aspect of the proposal, it is not clear how much leeway the current capacity limit would provide in practice. But the CMA should also bear in mind not only the MVNOs' current needs but the likely forecast growth for existing MVNOs (as well as capacity for new entrants). While the Parties submit that other MVNOs can contract on separately negotiated terms outside of this capacity limit[5], this offers no comfort for those MVNOs. Rather it is clear from the design of this capacity limit that it is simply a way to limit the availability and reach of the intended protections offered to MVNOs.

31. Just because the Merged Entity may not choose to utilise their capacity themselves, this should not impact the amount of capacity that is made available to MVNOs. There is a significant risk that the Merged Entity may not choose to utilise all the additional capacity and may simply hold this in reserve – this would significantly limit the supposed network benefits arising from the Merger. Ensuring greater flexibility on the amount of capacity that is made available to MVNOs will generate much stronger incentives for the Parties to utilise this capacity themselves (or otherwise offer it to MVNOs).[6]

32. We are concerned that this aspect has been designed to significantly disadvantage larger MVNOs such as Sky – very similar to their previous exclusion of MVNOs over a certain subscriber size.

Onboarding limits

33. While this may seem like a point of detail, Sky is also very concerned that this element of the remedy would be used as a tool to 'game' the market by excluding and/or limiting some MVNOs. Indeed, it is clearly designed to disadvantage larger MVNOs – who are more at risk from reduced MNO competition, such as Sky – and prevent or delay their ability to access the remedy. The CMA appears to explicitly recognise this risk in its Remedies Working Paper[7] and therefore it is incumbent on the CMA to address this weakness and any other ways this point of detail could be used to deter and/or limit access to the remedy.

34. **Current proposal**

- Onboard simultaneously between 3-10 MVNOs – comprising up to 8 Tier 1 'light' MVNOs, and up to 2 'full/hybrid' MVNOs in Tiers 2 or 3 – and the CMA proposes to simplify this by removing the limits contingent on being 'light' or 'full/hybrid'.
- MVNOs can join a 'queue' if the limit has been reached, allowing MVNOs to subsequently join in the order that interest was expressed in writing, with this process being overseen by the monitoring trustee.
- Sky assumes that once an MVNO has joined the queue then it cannot be 'timed out' of accessing the offer if it has to wait beyond the agreed period that the offer can be accessed. **However, it is not clear from the Working Paper that this is the case, and therefore this is something that must be clarified and explicitly set out by the CMA.** This will be critical in preventing the Merged Entity from using the onboarding process to 'game' and reduce the opportunity for Sky (and other MVNOs) from accessing the remedy.

[5] Remedies Working Paper, paragraph 1.435(k).
[6] There is no reason why the Parties would object to this, given what they said in their response to the Provisional Findings that *"[t]he Transaction will substantially increase both MergeCo's and VMO2's network capacity so both operators will be incentivised to monetise their spare capacity by competing for more wholesale traffic"* (paragraph 3.2).
[7] Remedies Working Paper, paragraph 1.474(d).

35. **Sky's proposed improvements**

- At a minimum the Parties should be required to **onboard simultaneously up to three MVNOs from Tier 3** at any one time (i.e., 8 from Tier 1, 2 from Tier 2 and 3 from Tier 3). We assume that these limits exclude any existing MVNOs (who would not need to be 'onboarded' given they are already a customer). The Parties are clearly underestimating how many MVNOs they can onboard at any one point to restrict the impact of this remedy.
- **Create an additional tier (for onboarding purposes) for MVNOs over 4m subscribers,** who would be able to onboard regardless of how many other MVNOs applied i.e., would be excluded from this restriction. This would ensure that the largest MVNOs - with the greatest number of customers and therefore having the largest impact on the downstream consumer market - could access the offer as quickly as possible and would not have to wait in a (potentially long) queue. [redacted]

Terms that impact the commercially viability of the offer

Price

36. The price levels in the proposed Wholesale Access Terms are the most critical commercial driver behind whether the offer is attractive and viable for an MVNO. Sky has provided some high-level comments on this aspect in the main body of its submission [redacted]

37. **Current proposal**

- Three tiers based on MVNO customer base size – with pricing based on per GB (though price rates for each level have been redacted).
- Pricing rates based on current prevailing market terms as observed by the Parties.
- Option of a per-subscriber wholesale price for MVNOs to offer unlimited data contracts to consumers – but this is subject to a usage limit at 150% of MNO average data usage of the Merged Entity's unlimited subscribers and anything beyond this is charged at a rate per GB (though the rate is redacted).

38. **Sky's proposed improvements**

- Price rates should be **lower than** [redacted] to reflect the significant Day 1 network efficiencies the Parties claim will arise.[8]

[8] [redacted]

[redacted]

39. [redacted] In fact, prices should be materially lower since the whole premise of the Merger is the creation of significant efficiencies, increased capacity and lower unit costs according to the Parties.

40. In addition to this improvement on the main price, Sky also suggests that:

- The terms should also always allow for a "thick" MVNO solution i.e., MVNO that own SIM cards and own core network.
- There should **not be a charge for Voice and Text for Thick MVNOs that terminate their own calls** – [redacted]

41. In relation to unlimited prices, Sky proposes the following improvements:

- **Unlimited prices should be offered to enable direct competition with H3G's Smarty (or equivalent/successors) i.e., unlimited pricing on an equivalent basis as the Merged Entity**. As of 7 November 2024, Smarty is selling Unlimited for **£16/month** – see Figure 2.34 below and other similar deals in Figures 2.5-2.6. This offer also includes various other benefits such as EU roaming and no speed caps. An MVNO would need input costs of [redacted] provide this plan (excluding VAT, direct costs etc).
- [redacted]

[redacted]

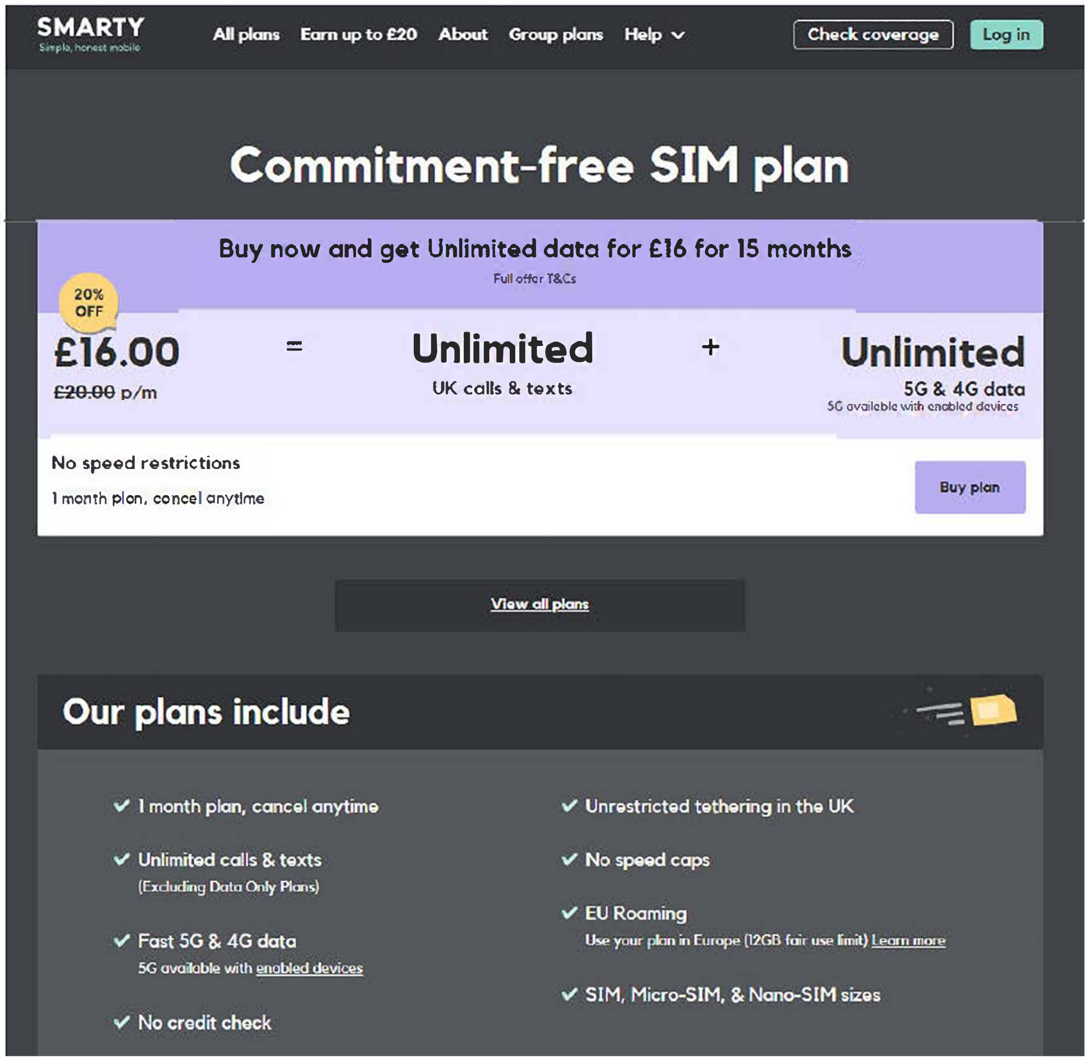
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]

[redacted]

[redacted]	[redacted]	[redacted]

42. We agree with the CMA that the Parties' pricing proposals for Unlimited are unlikely to be effective as they will result in significant costs for MVNOs and are overly complex, which would act as a significant deterrent. **Sky believes that it must be provided with a further opportunity to comment on any alternative proposed structure – given that it is such an important area** [redacted].

Figure 2.4: Smarty's current Unlimited pricing is only £16/month[10]



[10] Smarty's current Unlimited Plan offer accessed by Sky on 7 November 2024: 800616-29 T&C Update August 2019 V4.indd (smarty.co.uk) – with details of the offer found here: Best Unlimited Data SIM Plan with (No Speed Restriction) (smarty.co.uk), and https://www.superdrugmobile.com/register/.

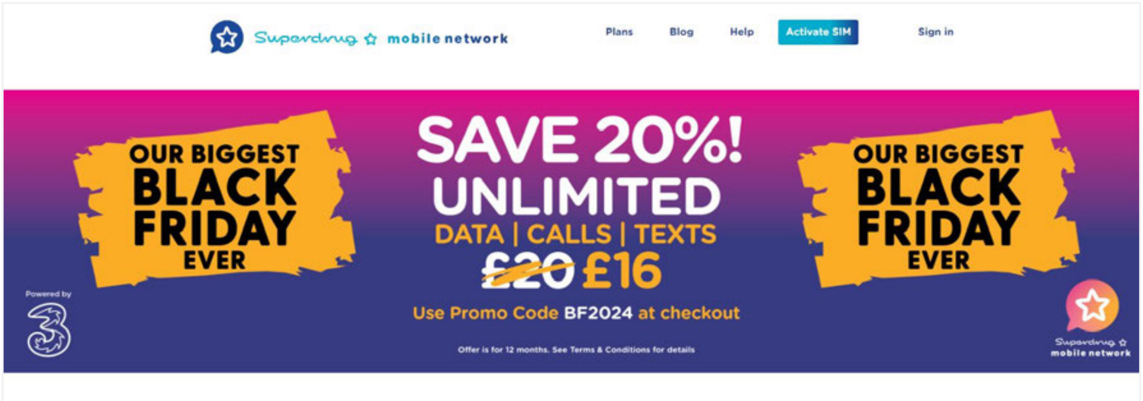


Figure 2.5: Smarty Pricing via USwitch is £15 per month[11]

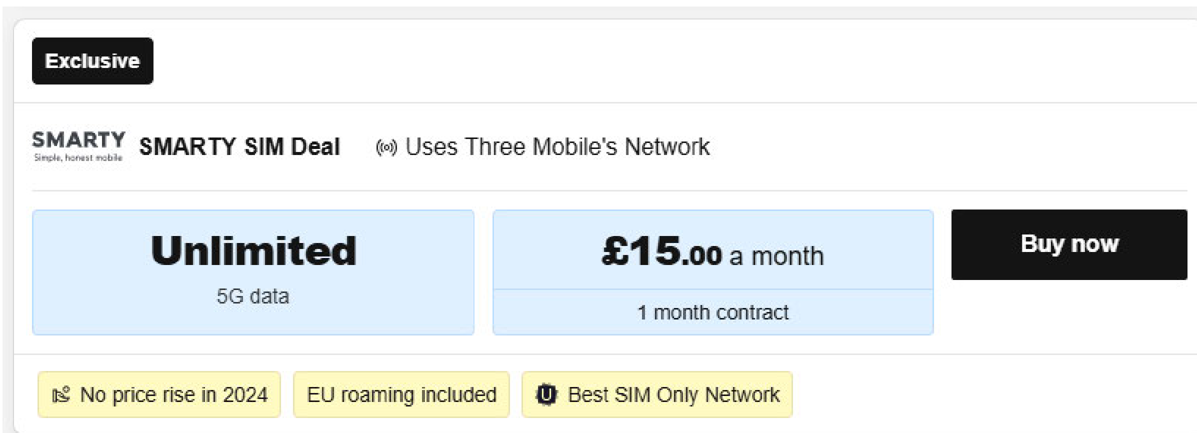
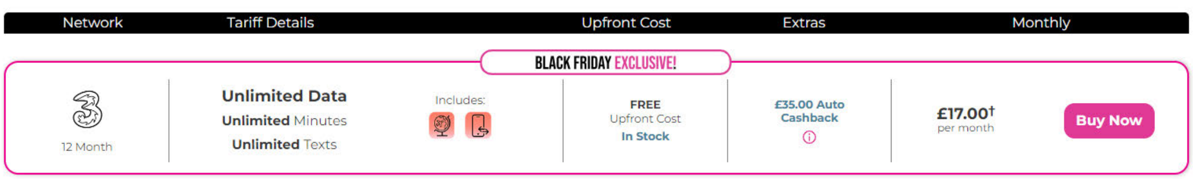


Figure 2.6: Three Unlimited Priced at £17 per month via affiliate sites[12]



Future Pricing Mechanism

43. The current design of the Future Pricing Mechanism means that MVNO input costs will essentially move automatically in sync with the Merged Entity's retail pricing. There is a significant risk that this becomes a tool which directly creates unison MVNO / Merged Entity price movements and limits the ability for MVNOs to price competitively and differentiate themselves. MVNOs should act to constrain MNO prices – not simply and automatically raise their costs (and therefore prices) in lockstep.

44. **Current proposal**

[11] https://www.uswitch.com/mobiles/compare/sim_only_deals/smarty/ (accessed by Sky 12th November 2024).
[12] https://www.fonehouse.co.uk/sim-only-deals/three (accessed by Sky 12th November 2024).

- The price changes according to Merged Entity's average ARPU and average data usage i.e., if there is less competition (as is expected at least by the CMA for a period of time), the Parties ARPU will go up and MVNOs will need to pay more.
- Pricing "*can [redacted] be adjusted downwards*"[13] – a key part of the description here is redacted and therefore we cannot tell how this mechanism is designed to work, [redacted]

45. **Sky's proposed improvements**

- At a minimum the mechanism should be designed such that **prices can only be adjusted downwards**.
- [redacted]

[redacted]

[redacted]

- [redacted] By comparison, the proposed Future Pricing Mechanism also includes the retail price charged by the Parties. While the detail of this is redacted, we assume this will act to ensure MVNO pricing moves up as the Parties take price on their main networks post-merger increases, substantially limiting the impact of MVNO competition by forcing them to follow suit.

[13] Remedies Working Paper, paragraph 1.518(c)(ii).

- [redacted]

[redacted]

	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	
[redacted]	[redacted]	
[redacted]	[redacted]	
[redacted]		[redacted]

- [redacted]
- Network costs should be audited independently and hosted MVNOs should have access to data on the % change in network costs and % change in traffic.
- We also suggest the inclusion of a margin squeeze mechanic – [redacted]

46. The CMA have found that there is a significant risk that the Merger will result in increased prices for consumers, therefore it is critical that any such mechanism prevents automatic price rises from occurring to protect consumers.

New term of non-exclusivity to enable ongoing competition

47. Sky considers that it will be very important for the proposed Wholesale Access Terms to **explicitly set out that the contract is non-exclusive** i.e., that MVNOs can contract with other MNOs and place capacity on their networks as and when required. Without this protection, an MVNO which has signed up to the Wholesale Access Terms remains exposed to the reduced competitive pressure arising from the wholesale SLC – there will still be ways that the Merged Entity can 'game' the remedy on an ongoing basis such that it significantly

[14] FWA i.e., the usage of mobile networks to deliver home internet connectivity – is not a significant part of Vodafone's base, given they also operate as a fixed broadband provider. However, we believe it has been a significant growth area for H3G in recent years, as they have looked to leverage their investments in 5G infrastructure and spectrum.

deteriorates the offer for the MVNO (e.g., frustrate it through one of the technical points or introduce some other mechanisms in the contract that leaves the MVNO worse off).

48. At this point the MVNO has no real protection other than potentially reverting to the Monitoring Trustee or Commercial Arbitrator, but this would be burdensome, slow and uncertain. Ensuring that contracts with the Merged Entity are not on an exclusive basis will give the MVNOs significant additional bargaining power to offset any temporary SLC, by enabling them to threaten or access capacity from other competing MNO hosts (assuming the competitive tension remains post-merger). If the CMA is right that the competitive rivalry among MNOs will remain, this possibility would substantially shift the ongoing incentives for the Merged Entity – who would need to compete on an ongoing basis to retain its business with the MVNO rather than on a one-off static basis through the fixed, standardised Wholesale Access Terms thereby offering extra protection to the MVNOs.

49. Furthermore, if the REEs end up triggering additional investment by the other MNOs that is then offered to the wholesale market, MVNOs trapped in the Wholesale Access Terms with the Merged Entity will not be able to benefit from the benefits of this competition.

50. Ultimately the inclusion of this additional term will help to ensure that there is continuous and ongoing dynamic wholesale competition – and that this can flow through as quickly as possible to an MVNO's downstream mobile customers (even for MVNOs with long-term contracts).

51. We also consider it will be important for **other terms to more generally be in line with market norms applicable to MVNOs of an equivalent size** to each MVNO remedy taker. Including this general requirement within the remedy order, while fairly general, will nevertheless help the CMA to set the right expectations in how it expects the Merged Entity to deal with each MVNO.

Other improvements

Implementation costs

52. Much like other terms, we agree with the CMA[15] that there is some risk that the implementation costs could act as a deterrent for MVNOs, particularly new entrants or MVNOs switching from another network, to take up the remedy. Thus again, artificially limiting the availability and take-up of the offer.

53. **Current proposal**

- Borne by MVNO with a minimum of 50% paid upfront.

54. **Sky's proposed improvements**

- No costs should be paid by the MVNOs for deals valued at [redacted]

55. [redacted] This is a further sign that the Merged Entity is not actually that interested MVNO deals, particularly with larger partners. Despite an MNO's mixed incentives to deal with MVNOs, these deals do provide the MNO with a sizeable margin from which to draw back any implementation costs.

56. Furthermore, our view is that the ability to agree longer deals (as proposed above), would also reduce the impact of any integration costs.

[15] Remedies Working Paper, paragraph 1.495.

57. It is also worth bearing in mind that thick MNVOs also face their own sizeable implementation costs that they must bear when integrating with an MNO network.

Minimum revenue commitment

58. **Current proposal**

- Sets a monthly rate for each tier - based on number of subscribers of an MVNO in a given month (with estimated amounts redacted – these have been disclosed to Keystone who has provided additional comments on this in Annex 2).
- Sky is not clear from the description in the Working Paper if the amount each MVNO pays is a set fixed amount (depending on which tier the MVNO falls into based on its number of subscribers), or whether the amount paid by each MVNO will vary within each tier depending on the number of subscribers i.e., the precise level of the proposed minimum revenue commitment is on a per subscriber basis. **This is a critical distinction and therefore Sky requests that the CMA provide it with further clarity on this component. More generally it is not clear from the current Working Paper how and on what basis any fee commitment would be calculated.**

59. **Sky's proposed improvements**

- [redacted]
- [redacted]
- [redacted]

60. We agree with the CMA[16] that otherwise it would be possible for this to significantly influence and even prevent some MVNOs from being able to take up the remedy. Any fee that is linked to the number of subscribers would also act to disincentivise subscriber growth.

Elements where Sky broadly agrees with the CMA

61. There are also some elements where Sky broadly agrees with the CMA as set out below.

62. **Service equivalence** – we agree with the CMA that there should be parity of access to the network and no speed tiering limit, to enable MVNOs to offer competing products as the MNOs.

[16] Remedies Working Paper, paragraph 1.495.

63. **Non-discrimination** – the same quality of service to MVNOs' customers as the Parties' own customers. It is important that this works for a 'thick' MVNO.

- **Access to new technologies** – we agree with the CMA that this requires more clarity i.e., MVNOs should be enabled to provide their customers with access to ***any new technology*** **on a non-discriminatory basis at the same time as it is made available to *any customer* of the Parties, but no later than 9 months** after that time. This should be a backstop rather than the target and the Merged Entity should be required to share a roadmap with the MVNO ahead of time.
- **Dispute resolution** – we agree with the CMA that this should be overseen by a commercial arbitrator, appointed at the outset and approved by the CMA. In terms of timescales for accessing this mechanism, we suggest that this is **shortened and simplified such that if the MVNO and Merged Entity have not agreed on terms within three months then the MVNO has the option to escalate** to the commercial arbitrator and this would be concluded within three months. A referral to the arbitrator should also stop the clock on any timeframe which was running prior to referral.
- **Ongoing compliance with the Wholesale Access Term remedy** – there should be ongoing monitoring and reporting to ensure that the Merged Entity is complying with its obligations e.g., individual compliance reports for each MVNO Wholesale Access Terms. MVNOs should also have the ability to escalate a complaint if they consider that the Merged Entity is failing to comply with any of its contractual obligations and/or otherwise 'gaming' the contract to disadvantage the MVNO. More generally we suggest that the CMA could include a general term about engaging with MVNOs 'in the spirit of the remedy' i.e., not to frustrate the ability of MVNOs to compete with MNOs.
- **Broader monitoring** – we also agree with the proposed annual report by the Merged Entity on progress and network performance and for this to be audited by a monitoring trustee, with output measures included and assessed against expectations. We agree that such key output metrics should include, for example, coverage, capacity and speed. Specifically, the Merged Entity should include both actual capacity and the level of utilisation – future capacity is something that the Parties have shown they are capable of setting out in advance; therefore, this should be included as well as the current throughput on the network.

3. The CMA is making a serious error of law

64. Sky is concerned that the CMA is proposing a package of remedies that fall very far short of what is needed to protect competition at the wholesale level. In doing so, the CMA is failing to meet its statutory duties to protect consumers and ensure that it comprehensively and effectively addresses the substantive SLCs it has provisionally found.

65. The CMA accepts that it is under an obligation to remedy the SLCs it has identified *"to a high degree of certainty"* [17]. This seems entirely inconsistent with the amount of risk the CMA is accepting as to the delivery and outcome of the Network Commitment, the likely effectiveness of the time-limited wholesale remedies and the likely rivalry at the wholesale and retail level in a future three-player market ([redacted]).

[17] Remedies Working Paper, paragraph 1.217.

66. The CMA has failed to provide any specific evidence that the proposed remedies would be effective and comprehensive – relying instead on conceptual arguments about likely effects while seemingly not taking into account actual evidence that these type of wholesale remedies have been tried and failed in the same market in other jurisdictions with very similar market structures.

67. More than this, the CMA has failed both to consider the feasibility of alternative remedies such as the pooled capacity remedy proposed by Sky – which it dismissed with only a cursory few paragraphs in its response; and the weight of legitimate concerns raised by many different stakeholders, which the CMA seems to have dismissed with little consideration. This is a material error.

68. It is evident that the CMA has now essentially run out of time to have a genuine consultation on remedies. While there have been some small changes, overall there have been very little improvements from the Parties' initial weak opening offer on remedies. [redacted]

69. It is imperative that the CMA considers the concerns raised in responses to the Remedies Working Paper and the CMA must either significantly strengthen the proposed remedies or failing that, block the Merger. Failure to do so would be entirely inconsistent with its own legal framework and a serious error of law. In the absence of this, Sky reserves all of its legal rights including the right to take further steps to protect Sky's legitimate commercial interests.

70. Sky emphasises again that there is a **significant amount at stake for UK consumers**. If the CMA accepts this form of incredibly weak and risky remedy proposed by the Parties (albeit with some changes to make it stronger), and competition does not materialise as expected and/or the remedy fails to sufficiently protect MVNOs – there is no way of undoing the harm created by the CMA in allowing this Merger.

71. This Merger will set the structure of the market for years to come – and once the currently competitive market is lost and/or dampened it cannot be reversed. The CMA must have overwhelmingly strong evidence to demonstrate its remedies would offset and/or prevent this harm. The Remedies Working Paper does not, as far as Sky can see, contain this evidence.