

VODAFONE UK/THREE UK**VMO2 RESPONSE TO THE CMA REMEDIES WORKING PAPER**

12 November 2024

1 EXECUTIVE SUMMARY

- 1.1 Virgin Media O2 (“**VMO2**”) welcomes the opportunity to comment on the CMA’s Remedies Working Paper (“**RWP**”)¹ regarding the proposed merger between Vodafone Limited (“**VUK**”) and Hutchison 3G UK Limited (“**3UK**”) (the “**Merger**”). The Merger, together with the spectrum divestment and amended Beacon network sharing arrangements (the “**Beacon 4.1 Agreements**”), represents a once in a generation opportunity to deliver a considerable uplift to network quality and capacity, which will significantly benefit UK consumers and businesses.
- 1.2 The Beacon 4.1 Agreements are consistent with enabling the delivery of the Parties’ Joint Business Plan (“**JBP**”), which “*represents a unique opportunity to deliver a significant improvement in the quality of the Parties’ networks which is otherwise unlikely to be delivered by the market*”.² Moreover, as the CMA has provisionally concluded “*the additional spectrum acquired by VMO2 through Beacon 4.1 would provide a notable and rapid increase in network quality for its wholesale and retail customers which would further increase network quality competition*”.³ VMO2 strongly agrees with the CMA and Ofcom that the spectrum divestment and Beacon 4.1 “*will also lead to further material network quality improvements and an increase in capacity (and lower future costs of capacity) for VMO2, making it a stronger competitor*”.⁴ The Network Commitment represents an effective and proportionate solution to address any residual concerns the CMA may have regarding the full implementation of the JBP.
- 1.3 The benefits arising from the Merger and the Beacon 4.1. Agreements will materialise promptly. Significant progress has already been made on the deployment programme for the Consolidated Works Package (“**CWP**”).⁵ Agreement has also been reached on the detailed secondary measures required to implement the Beacon 4.1 Agreements (referred to as “**Beacon 4.2**”), including the timeline for the spectrum divestment.⁶ Given the pace at which the benefits will materialise, VMO2 considers that additional measures are unnecessary, as market players will, from the outset, be incentivised to compete strongly. Nevertheless, if these are required by the CMA, VMO2 agrees that the time-limited protections, as set out in the RWP, represent an effective and proportionate solution to complement the Network Commitment in the short term.

¹ See CMA, *Anticipated Joint Venture between Vodafone Group PLC and CK Hutchison Holdings Limited Concerning Vodafone Limited and Hutchison 3G UK Limited, Remedies Working Paper*, ME/70346/23, 5 November 2024. Defined terms are as set out in the RWP unless specified otherwise.

² RWP, paragraph 1.205.

³ Provisional Findings Report, paragraph 62; RWP, paragraph 1.14.

⁴ RWP paragraph 1.215.

⁵ See VMO2 Response to RFI dated 25 October 2024.

⁶ Ibid.

2 THE NETWORK COMMITMENT WILL COMPLEMENT THE MERGER AND BEACON 4.1 AGREEMENTS

- 2.1 VMO2 welcomes the CMA’s recognition that the Merger and the Beacon 4.1 Agreements will lead to a significant enhancement in competitive dynamics at both the retail and wholesale level. The Network Commitment will complement the Beacon 4.1 Agreements in ensuring the full delivery of the JBP and the associated benefits for UK consumers and businesses. VMO2 agrees that these, taken together, will comprehensively and effectively address the CMA’s concerns at both the retail and wholesale level.
- 2.2 At the retail level, VMO2 agrees with the findings of the CMA and Ofcom that the JBP represents a “*unique opportunity to bring forward the delivery of the higher network quality*”, which will be necessary to meet forthcoming increases in customer demand.⁷ VMO2 also agrees that the Merger and the Beacon 4.1 Agreements, complemented by the Network Commitment, will increase network capacity and lead to a lower incremental cost of adding further capacity compared to the counterfactual.⁸ As acknowledged by the CMA, these effects will not only positively affect the Merged Entity, but also VMO2, which will become a stronger competitor thanks to the Beacon 4.1 Agreements.⁹ This, in turn, will lead to downward pressure on prices, as mobile operators will have the incentive to fill the capacity by making more attractive offers to customers.¹⁰
- 2.3 At the wholesale level, VMO2 agrees that network quality is a key competitive factor for MVNOs in choosing MNO hosts.¹¹ In this respect, VMO2 welcomes the CMA’s findings that the large increase in the network capacity of both the Merged Entity *and* VMO2, as a result of the Merger and the Beacon 4.1 Agreements, will lead to lower cost of capacity, resulting in downwards pricing pressure compared to the counterfactual,¹² as well as to improved competitive dynamics, as a result of the increased ability and incentive of both the Merged Entity *and* VMO2 to compete for wholesale opportunities.¹³ In turn, this will ensure that MVNOs will continued to play “*an effective role on an ongoing basis*” on the market, particularly in pricing aggressively, which will further strengthen competitive dynamics on the retail level.¹⁴
- 2.4 As regards duration, VMO2 agrees with the CMA’s conclusion that the Network Commitment, which is aligned to the Parties’ JNP, should remain in force for eight years, namely until full completion of the network integration plan set out in the JNP.¹⁵ VMO2 agrees that the Network Commitment (and the Beacon 4.1 Agreements) will have a lasting impact on the market which will extend considerably beyond eight years.¹⁶ Together with the Beacon 4.1 Agreements, therefore, the Network Commitment is effectively structural in nature and will “*create a long-lasting shift in*

⁷ RWP paragraph 1.213.

⁸ RWP paragraph 1.214, 1.187.

⁹ RWP paragraph 1.215.

¹⁰ Ibid.

¹¹ RWP paragraph 1.222.

¹² RWP paragraph 1.227.

¹³ RWP paragraph 1.232-1.235.

¹⁴ RWP paragraph 1.220.

¹⁵ RWP paragraph 1.255.

¹⁶ RWP paragraph 1.247 and 1255.

network quality that would drive competition".¹⁷ VMO2 agrees that the Network Commitment aligns to the CMA's preference for using enabling measures that 'work with the grain of competition'.

- 2.5 VMO2 agrees that the Network Commitment will not raise credible risks in terms of monitoring and enforcement.¹⁸ As the Network Commitment will be incorporated as conditions in the Parties' spectrum licences, VMO2 agrees that the remedy will be capable of being monitored and enforced in a timely, accurate and efficient manner. Ofcom has extensive information gathering and enforcement powers under the Wireless Telegraphy Act 2006.¹⁹ These, together with the CMA's enforcement powers under the Enterprise Act 2002 ("Act"), will ensure the effective monitoring and enforcement of the Network Commitment. VMO2 also agrees with the CMA's conclusion that MNOs take compliance with their license obligations seriously.²⁰
- 2.6 Nor does the Network Commitment raise any credible risks in terms of specification, circumvention and market distortion (which affect the overall likelihood of a remedy achieving its intended effect). As the Network Commitment will be based on (i) the number and location of sites on which spectrum is to be deployed, and (ii) the spectrum to be deployed at each of the sites, VMO2 agrees that the remedy is simple in its design²¹, and capable of being appropriately specified to avoid any residual circumvention risks, in line with the further guidance provided by Ofcom²² and the CMA.²³ VMO2 agrees that that, rather than distorting competition, the Network Commitment will enhance rivalry. As recognised by the CMA, "*the delivery of the Parties' JNP (through the implementation of the Network Commitment), alongside Beacon 4.1, is likely to lead to a competitive response from the other two MNOs (for example to invest in their networks), and thus enhance rivalry compared to the counterfactual*".²⁴

3 TIME LIMITED PROTECTIONS PROVIDE EFFECTIVE INTERIM SAFEGUARDS

Time Limited Retail Customer Protections

- 3.1 VMO2 agrees with the Parties that the Merger together with the Beacon 4.1 Agreements will ensure that competition continues to be effective in the retail market. Insofar as the CMA is minded to require time-limited protections to ensure that certain retail customers are protected during the initial integration period, VMO2 agrees with Ofcom's advice that the CMA should seek to make these as simple as possible to avoid market distortion.²⁵ VMO2 also agrees with the CMA that, as a design concept, "*the time limited protections should focus on providing customers options and require customers to make active decisions about what is in their best interest*".²⁶ The proposed

¹⁷ RWP paragraph 1.248.

¹⁸ The CMA is aware that the delivery commitments under the Beacon 4.1 Agreements were agreed prior to the Network Commitment. [§<].

¹⁹ RWP paragraphs 1.136 and 1.280.

²⁰ RWP paragraph 1.283.

²¹ RWP paragraph 1.298.

²² RWP paragraph 1.300.

²³ RWP paragraph 1.309.

²⁴ RWP paragraph 1.316.

²⁵ RWP paragraph 1.346.

²⁶ RWP paragraph 1.367.

short-term pricing commitment aimed at guaranteeing the availability of, maintaining the terms and conditions of, and capping the prices of a selected range of the Parties' existing tariffs strikes an appropriate balance and addresses any residual concerns.

- 3.2 While the Parties are best placed to further specify the Time Limited Retail Customer Protections, VMO2 agrees with the CMA's framework of assessment and provisional views. In particular, VMO2 agrees that the commitment should only relate to a limited subset of tariffs from across the brands to keep the protections simple, easy to understand for customers and manageable.²⁷ VMO2 also agrees that by Year 3, significant improvements in the Merged Entity's coverage, reliability and capacity will have been delivered and the benefits of Beacon 4.1 on VMO2's quality and capacity will have started to take effect.²⁸ As such, VMO2 agrees with the CMA that a three year period strikes an appropriate balance in terms of cost and risks and "*the protections should be tied to the delivery of the Year 3 Network Commitment*".²⁹
- 3.3 VMO2 agrees that monitoring and enforcement risks can be addressed by the Merged Entity appointing a monitoring trustee, presenting the tariffs 'clearly and prominently' on their websites, making them available through price comparison websites and providing a dispute resolution process.³⁰ Given the time-limited and targeted nature of these measures, VMO2 does not consider that specification, distortion, or circumvention risks credibly arise. Moreover, VMO2 agrees that the protected tariffs would act as constraint on the pricing decisions of the Parties, as well as other market players.³¹

Time Limited Wholesale Access Terms

- 3.4 The Merger and Beacon 4.1 Agreements will automatically deliver substantial benefits to the largest MVNOs, Tesco Mobile and Sky Mobile, which will be protected by the provisions in their long-term agreements with VMO2.³² VMO2 will have a strong incentive to compete aggressively to win new wholesale customers both at the larger and smaller end of the scale from day one, in order to fill its quickly expanded capacity. This clear path to capacity expansion makes VMO2 a stronger host network post-Merger. Consequently, VMO2 does not see a need for additional protections aimed at wholesale customers. However, should the CMA require time limited wholesale protections, a Wholesale Reference Offer aimed at providing MVNOs with competitive access terms during the initial integration period would be capable of striking an appropriate balance and addressing any residual concerns.
- 3.5 While the Parties are best placed to further specify the Wholesale Access Terms, VMO2 agrees with the CMA's framework of assessment and provisional views. In particular, VMO2 agrees that Wholesale Access Terms which are representative of pricing and terms across the market 'today' would ensure MVNOs can operate with terms that allow them to compete effectively in the retail market.³³ Moreover, VMO2's

²⁷ RWP paragraphs 1.374 – 1.376.

²⁸ RWP paragraph 1.382.

²⁹ RWP paragraphs 1.383 and 1.385.

³⁰ RWP paragraphs 1.389 and 1.392.

³¹ RWP paragraphs 1.371 and 1.410.

³² RWP paragraph 1.452; VMO2 Response to the Remedies Notice, 27 September 2024, paragraph 3.9.

³³ RWP paragraph 1.469(a).

expectation is that MVNOs will use the Wholesale Access Terms to negotiate competing offers with other MNOs.³⁴

- 3.6 The FPM mechanism will ensure that pricing and terms remain dynamic and will not be known to other MNOs (thereby ensuring that MVNOs will be able to use the Wholesale Access Terms to secure better terms from competing MNOs). There are ample commercial incentives for the Merged Entity to capture as much traffic as possible, in order to take advantage of its own capacity expansion enabled by the Merger.
- 3.7 VMO2 agrees that by Year 3, significant improvements in the Merged Entity's coverage, reliability and capacity will have been delivered and the benefits of Beacon 4.1 on VMO2's quality and capacity will have started to take effect.³⁵ As such, VMO2 agrees with the CMA that a three year period (with MVNOs able to take up Wholesale Access Terms by the fourth year post completion) strikes an appropriate balance in terms of cost and risks.³⁶ As each MVNO contracting under the Wholesale Access Terms able to contract for up to 5 years, the remedy will have continued effects for a total period of 8-9 years.³⁷
- 3.8 Given the short duration of the commitment, no significant distortion or circumvention risks arise in connection with the Wholesale Access Terms, which represent a credible and workable solution. In particular, the measure could be adequately monitored and enforced through a monitoring and dispute resolution mechanism, which may be effectively overseen, respectively, by a monitoring trustee and a commercial arbitrator.³⁸ Furthermore, given the greater ability for VMO2 to compete for new MVNO business from day one, the market will be more competitive than it is today. As such, VMO2 considers that this measure would work in effect as a price 'cap' or 'ceiling', as it would not prevent the Merged Entity or other MNOs offering better conditions. Indeed, unlike normal bidding scenarios, VMO2 and BTEE would have to compete more aggressively knowing that *as a minimum* the Merged Entity will be offering CMA approved competitive terms.

4 PROHIBITION WOULD BE DISPROPORTIONATE

- 4.1 VMO2 agrees with the CMA's conclusion that prohibition of the Merger would be disproportionate and highly costly compared to the Network Commitment.³⁹ Whilst prohibition would leave the market structure unchanged, it would also destroy the substantial REEs and RCBs arising from the Merger and the Beacon 4.1 Agreements, and would therefore be more costly and intrusive than accepting the Network Commitment. VMO2 welcomes the CMA's reasoned view that prohibition would be more costly, intrusive, and disproportionate compared to the Network Commitment, supported by time limited protections, and would fail to deliver the best outcome for UK consumers and businesses contrary to the CMA's mandate under the Act.

³⁴ RWP paragraph 1.469(b).

³⁵ RWP paragraph 1.480.

³⁶ RWP paragraphs 1.482 -1.483.

³⁷ RWP paragraphs 1.481.

³⁸ RWP paragraph 1.486.

³⁹ RWP paragraph 1.589.