Vodafone/CK Hutchison joint venture merger inquiry

BT's response to the CMA's Remedies Working Paper

12 November 2024

Section 1. Introduction

1.1. This response summarises BT's views on the CMA's Remedies Working Paper (**RWP**). Unless otherwise indicated, defined terms have the same meaning as set out in the RWP.

1.2. Without prejudice to BT's position set out in this response on the overall (lack of) effectiveness of any remedy other than prohibition, if the CMA accepts some version of the Network Commitment and the Time Limited Protections (together, the **Preferred Remedies**) , BT respectfully submits that the CMA should ensure that these are as limited as the CMA considers feasible to minimise their (potentially extremely) distortive effects. BT's focus, in Section 2 of this submission, is on the most obviously distortive effects that could arise from the Time Limited Protections.

1.3. BT agrees with the CMA's provisional conclusion in the RWP that prohibition would be an effective and proportionate remedy to the SLCs provisionally identified in the CMA's Phase 2 Provisional Findings (**PFs**). BT also welcomes the CMA's decision to not take forward for further consideration partial divestiture and/or capacity ring-fencing remedies that the CMA had invited views on in its Remedies Notice. However, BT continues to have serious concerns with the package of remedies that the RWP identifies as the least costly and intrusive effective remedy to the very significant SLCs arising from the Merger.

1.4. BT does not replicate in this response the evidence and concerns it submitted in response to the Remedies Notice, but does summarise in **Section 2** the most obviously distortive elements of the Time Limited Protections and in **Section 3** the ineffectiveness of the Network Commitment (and therefore the Preferred Remedies as a whole). BT's position remains that the Preferred Remedies would not represent an effective and comprehensive solution to the SLCs identified by the CMA but would give rise to potentially serious and long-lasting market distortions. BT therefore remains of the view that prohibition is the only effective remedy to the SLCs arising from the Merger.

Section 2. 'Time Limited Protections' will distort competition and if accepted, should be limited in scope

These 'protections' are not capable of addressing, nor contributing to addressing, the provisional SLCs

2.1. The CMA rightly does not suggest in the RWP that the Time Limited Protections can possibly, on their own, be effective in addressing the provisional SLCs. Instead, the CMA's provisional view is that these remedies may address a "*need to supplement a Network Commitment*" during the period for which the CMA has doubts that rivalry enhancing effects of the Network Commitment will manifest.[1] For the reasons outlined in Section 3 of this response and as previously detailed in BT's response to the Remedies Notice, BT does not believe that the Network Commitment could *ever* have the rivalry

[1] RWP, paragraph 1.133.

enhancing effects that the CMA has provisionally identified and therefore that the Time Limited Protections could ever be an appropriate means of addressing those SLCs.

The Retail Customer Protections will distort competition and are arguably not 'time limited'

2.2. BT noted in its response to the Remedies Notice that retail price protections are "*very unlikely to be appropriate in a market as dynamic as the retail mobile market, even if limited in duration*".[2] For the reasons detailed in that submission, the circumstances of this Merger are very different from the limited circumstances in which the CMA's guidance indicates behavioural (and particularly outcome-controlling) remedies may be effective. *Any* price commitments in this market of *any* duration, would raise the risk of market distortion, limiting price innovation and preserving or imposing prices and terms that may bear little or no relation to those that would have emerged absent the remedies or the SLC.[3]

2.3. BT does not see, in the RWP, any meaningful assessment of the distortive effect of the Time Limited Retail Customer Protections nor any aspects of the CMA's proposed specification, monitoring or enforcement in relation to these possible remedies that would properly address this. Instead, the CMA notes that there are potential distortion risks even where price protections have a relatively limited scope (paragraph 1.415 of the RWP) and dismisses this risk by briefly noting that the "*key protection against material distortion is to keep the duration short*" (paragraph 1.417 of the RWP). This is not accompanied by any assessment of whether a minimum duration of three years is sufficiently short to avoid material distortion in the particular market in which these remedies will be imposed. BT's own view is that the Time Limited Protections will create material distortions to competition that, given the pace of technological and price innovation in this market, are likely to last long after the end of that three year period. Further, BT notes that the Retail Customer Protections may in fact end up being in place for a much longer period than three years – potentially indefinitely – given the CMA's proposal that they should not fall away before "*it is corroborated by the CMA and Ofcom that the Parties have met their Year 3 obligation under the Network Commitment*".[4] To that extent, BT considers it is arguably misleading to refer to the proposed Retail Customer Protections as "time limited".

2.4. BT remains of the view that the Retail Customer Protections proposed in the RWP raise material distortion risks and are not an appropriate remedy (in combination with any other remedy) to address the provisional SLCs. Without prejudice to this view, if the CMA should accept a remedy that includes some version of the Retail Customer Protections outlined in the RWP, BT would urge the CMA to limit its distortive effects to the extent possible, at the very least by limiting the scope of the protections to the limited sub-set of tariffs proposed by the Parties and summarised in the RWP and setting an absolute duration limit of three years.

Wholesale Access Terms will give rise to inherently unpredictable market distortions

2.5. As BT observed in its response to the Remedies Notice "*[a]ny wholesale remedy set today risks replacing complex, dynamic market judgements marrying MVNO demand and supply with a one-time 'regulatory' imposition. A judgement made today could set prices too high or too low, or define features incorrectly. Reserving capacity would pre-suppose the right balance of use between third parties and the Merged Entity's own retail customers. It would also ossify the level of supply in the market. Removing the industry's ability to make such commercial judgements in future creates risks to future*

[2] BT's response to the Remedies Notice, paragraph 3.41.
[3] BT's response to the Remedies Notice, paragraph 3.41.
[4] RWP, paragraph 1.381.

efficient investment decisions by network operators. Less efficient investment decisions would have material and lasting effects on all customers across the UK".[5]

2.6. BT welcomes the CMA's decision to not continue to assess a capacity reservation-based remedy to the wholesale-level SLC provisionally identified. However, BT continues to have serious concerns about the wholesale-level remedies considered in the RWP, including the Wholesale Reference Offer proposed by the Parties and the Wholesale Access Terms proposed by the CMA. The CMA's proposed intervention in accepting or imposing this remedy would replace complex dynamic judgments in price setting and risk very significant market distortions that the CMA does not appear, in the RWP, to have assessed. BT notes, by way of example, that:

a. The Wholesale Reference Offer and Wholesale Access Terms would both affect market developments for at least up to **nine years**, as the CMA acknowledges in paragraph 1.481 of the RWP, rather than, for example, being available for a five year period if accepted shortly after the remedies become effective, shortening over time if accepted later. They may last even longer than nine years given the CMA's suggestion that the Parties would be required to offer the Wholesale Access Terms until the CMA is satisfied that the Merged Entity has met its 'Year 3' obligations under the Network Commitment (paragraph 1.474(e) of the RWP). This will give rise to market distortions over a long period of time, with numerous future market developments expected in the intervening period including (but not only) the launch of 6G and other technological, commercial innovations and possible further future market structure changes.

b. The RWP raises concerns about the effectiveness of the Parties' proposals in the Wholesale Reference Offer to enable MVNOs to offer unlimited data contracts (because the Parties' proposal would involve significant costs to MVNOs) and invites views on how the Wholesale Access Terms could be structured to allow MVNOs to compete in the unlimited data segment (paragraph 1.474(f) of the RWP). BT cannot see how Wholesale Access Terms designed today could adequately anticipate the likely future customer demand of MVNOs who take the offer up in the next four years, and any investment that would need to be made by the Merged Entity over the next nine years to meet these. If any Wholesale Access Terms remedy did not include some mechanism to ensure that MVNOs bear the cost (in customer experience or investment) of very high 'unlimited data' customer usage during their contract, this could have an enormously distortive effect across the wholesale mobile market. To the extent that the CMA may seek to address this risk through a cap of the sort proposed by the Parties (who suggested a cap calculated on a pooled basis across all of an MVNO's unlimited customers of 150% of the average data usage of the Merged Entity's subscribers using unlimited data contracts), great care would need to be exercised in ensuring that cap was not set too high. Without the right caps in place MNOs would be exposed to additional costs required to carry MVNO traffic and customer experience issues for both retail and wholesale customers, particularly in urban and other areas of high usage where mobile network economics for high penetration of high usage customers is prohibitive and challenged by the finite capacity resources available, including spectrum.

c. The Wholesale Reference Offer and Wholesale Access Terms each include a 'Future Pricing Mechanism' (or 'FPM'), which introduces a pricing mechanism that would be entirely novel and have unpredictable market effects. The FPM proposed by the Parties "*uses a formula which means that when the Merged Entity's data usage per customer increases, or when the Merged Entity's ARPU decreases, the wholesale price paid by the MVNO is reduced proportionally*".[6] The

[5] BT's response to the Remedies Notice, paragraph 3.74.
[6] RWP, paragraph 1.435(b).

CMA provisionally concludes in the RWP that the FPM "*would ensure that pricing and terms do not become outdated (ie changes in retail pricing and data usage will automatically feed into updated terms*)" (paragraph 1.469). The intention of the CMA appears to be that the FPM in the Wholesale Access Terms would be used only to *decrease* wholesale prices (i.e. they could not increase in response to retail market developments – implied at paragraphs 1.435(b) and 1.518(c)(ii)). A novel pricing mechanism that cannot adequately respond to market developments – that may exert either upward or downward pricing pressures - in a dynamic and unpredictable market over a nine-year period raises very serious risk of market distortion. BT sees nothing in the RWP that assesses or addresses this risk.

2.7. More generally, including a set of uniform terms in the Wholesale Access Terms available widely to MVNOs risks undermining the ability of MNOs to negotiate and offer differentiated MVNO wholesale services. The CMA's intervention would therefore reduce choice and differentiation in the market, creating (as noted at paragraph 1.500 of the RWP) a "focal point" for the market.

2.8. BT continues to have serious concerns about the Wholesale Access Terms. Without prejudice to this view, if the CMA should accept some version of the Wholesale Access Terms, BT would urge the CMA to limit its distortive effects to the extent possible. This would include at the very least that it should allow prices to respond dynamically – both upward and downward - in response to market developments and should not impose a requirement to offer MVNOs the ability to compete in the unlimited data segment without MVNOs bearing appropriate costs (in terms of price or customer experience) in the event that unlimited data demand is greater than expected. At minimum, the CMA should also consider reducing the duration for which the Wholesale Access Terms will be in place, through offering a five year term only if accepted in the first year during which the Wholesale Access Terms are available, with the term shortening over time thereafter.

Section 3. Network Commitment not capable of addressing provisional SLCs

3.1. BT's response to the Remedies Notice noted that the Network Commitment would suffer from "*an irreconcilable tension between the need for detailed specification to reduce circumvention risks, and the fact that any specification would ossify markets, severely limiting customer benefits from future investment as demand and supply conditions change. In other words, serious market distortions are the most likely outcome*" (paragraph 3.11(a)).[7] The proposal in the RWP for specification and monitoring of the Network Commitment does not address the concerns and evidence submitted by BT in its response to the Remedies Notice.

3.2. The RWP frames the Network Commitment as working "*with the grain of competition*", thereby suggesting that it is an *enabling* measure of the sort which the CMA's guidance says it will generally prefer. The CMA also suggests that its view is now that although the Merger will lead to upward retail pricing pressure in the *short-term*, in the long-term the increased capacity in the market as a result of the Network Commitment is likely to have the opposite effect, including because of the competitive response that the CMA expects from other MNOs. The competitive response envisaged by the CMA in paragraph 1.187 of the RWP is that VMO2 will fill the additional capacity that it will have access to following completion of Beacon 4.1 (and therefore, following completion of the Merger) by making more attractive offers to customers and BT will respond by increasing the attractiveness of its own offers. This reasoning stands at odds with:

a. the CMA's own provisional conclusion that the Parties are unlikely to deliver the JBP and JNP in full in the absence of an undertaking or order requiring them to do so, backed up by regular

[7] BT's response to the Remedies Notice, at paragraph 3.11(a).

monitoring and enforcement mechanisms, "*given their ability to pursue a range of commercial strategies, which may evolve over time in response to changing market circumstances*";[8] and

b. the evidence that the CMA has received that the Merged Entity will have the ability and incentive to use its substantial capacity advantage to engage in strategic conduct to the detriment of other MNOs' long-term incentives to invest.

3.3. On the latter point, although the CMA briefly summarises BT's submissions on this issue in the RWP (paragraph 1.153), BT sees nothing in the description of possible specification or monitoring of the Network Commitment set out in the RWP that could address this concern. As BT noted at paragraph 3.16 of its response to the PFs, the Merger will place BT in a position whereby if BT sinks investment into building new sites (the only means through which BT can add capacity), the Merged Entity will be able to move quickly to render this investment unprofitable. In this context, BT does not see how the CMA could conclude that BT would be likely to respond to investment by the Merged Entity by making increased investments of its own, offering lower prices or improving customer service as compared to the counterfactual

3.4. Notwithstanding the CMA's position in the RWP that "*we agree with a number of third parties that there is value in […] output measures. In particular, the impact of the Network Commitment forms a key part of our assessment of its effectiveness*",[9] the CMA has also provisionally dismissed the need to specify, monitor and (in the event of non-compliance) enforce against output metrics in connection with the Network Commitment. The CMA's provisional approach appears to place weight on submissions by Ofcom that it "*does not consider output measures to be necessary and that the inputs of sites and spectrum are strongly linked to the outcomes of customer experience in terms of network quality*"[10] and by Vodafone that the relationship between inputs and outputs is "*one-to-one*".[11] BT believes it is overly simple to say the relationship between spectrum and sites to customer experience in terms of quality is 'one-to-one'. The quality that customers experience is heavily influenced by spectrum deployed and number / location of sites, but will also be affected by choice of radio technology, quality and capacity of backhaul links, power output levels and interference. This means the CMA cannot have confidence the network plan being proposed will deliver the quality improvements being suggested without measuring and monitoring more factors than purely sites and spectrum deployed. Even if there was a strong link between sites/spectrum and network quality, in the scenario under consideration – where the CMA has provisionally found that the Merged Entity would not be commercially incentivised to deliver the JBP/JNP in full – the CMA cannot rationally rely on input-based monitoring.

3.5. In this context, BT's view is that the Preferred Remedies cannot address the provisional SLCs, nor the Merged Entity's ability and incentive to deter network investment.

[8] RWP, paragraph 1.14.
[9] RWP, paragraph 1.306.
[10] RWP, paragraph 1.147
[11] RWP, paragraph 1.119.