

**The Competition and Markets Authority**

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12 November 2024

**Ref: [COMPANY Y]'s response to the CMA's Remedies Working Paper dated 5 November 2024 regarding the anticipated joint venture in the UK between Vodafone Group plc and CK Hutchison Holdings Limited**

Dear Madam/Sir,

Further to [COMPANY Y]'s correspondence with the Competition and Markets Authority ("**CMA**") dated [REDACTED], [COMPANY Y] wishes to submit observations specifically in relation to the CMA's Remedies Working Paper ("**RWP**") dated 5 November 2024 on the anticipated joint venture in the UK between Vodafone Group plc and CK Hutchison Holdings Limited concerning Vodafone Limited ("**VUK**") and Hutchison 3G UK Limited ("**3UK**") (together "**the Parties**", the "**Proposed Transaction**").

[COMPANY Y] continues to be of the view that the Proposed Transaction, as established by the CMA already in its Provisional Findings, will result in a substantial lessening of competition ("**SLC**") in the supply of retail and wholesale mobile telecommunications services in the UK. Further, [COMPANY Y] believes that the CMA should only accept a robust and comprehensive package of remedies in order to address the identified SLCs, consistent with the CMA's statutory duty.<sup>1</sup> **If the CMA is indeed minded to reject a veto and structural remedies – two remedy options that would prevent SLCs from ensuing**

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<sup>1</sup> According to Section 36(3) of the Enterprise Act 2002, the CMA "shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it."

– then the CMA must strengthen the behavioural remedies proposed by the Parties in the ways outlined in this submission. More specifically, the Parties must provide a capacity-based cost-plus Wholesale Access Terms for at least 10 years for the reasons given below.

[COMPANY Y] hopes that this submission in response to the CMA’s RWP will assist the CMA in its ongoing review process and will provide useful insights on the weaknesses of the behavioural remedy proposals by VUK and 3UK, and the minimum changes needed in order to try to limit the ensuing SLCs.

## **1. [COMPANY Y] respectfully disagrees with the CMA’s current approach to assessing and choosing the appropriate remedy package**

*First*, [COMPANY Y] would like to express its disappointment with the ongoing remedy selection process because despite its efforts, [COMPANY Y] was not provided with sufficient opportunity by the CMA to engage with the case team or with the members of the Inquiry Group.

[COMPANY Y] is an established [REDACTED]. Of particular relevance is its [REDACTED] experience [REDACTED], working closely with the European Commission (“**Commission**”), [REDACTED]. Despite [COMPANY Y]’s numerous attempts to arrange follow-up discussions [REDACTED], [COMPANY Y] [REDACTED]. [COMPANY Y] believes that more interactions with the CMA would have been helpful, especially in terms of providing further evidence relevant to the CMA process.

The CMA should have taken [COMPANY Y] more seriously as a potential divestiture purchaser and new entrant in the UK, i.e. a fourth MNO, following the Proposed Transaction, particularly given the benefits that this could bring for UK mobile customers in terms of restoring competition on the market. Given [COMPANY Y]’s [REDACTED]<sup>2</sup>, [COMPANY Y] believes that the CMA has not sufficiently explored the most appropriate remedy in the present case, namely a structural remedy, in order to allow new market entry to restore the loss of competition resulting from the Proposed Transaction.

*Second*, [COMPANY Y] is sceptical of the ability of the behavioural remedies provisionally accepted by the CMA to effectively address the identified SLCs, given the conclusions reached in the CMA’s Provisional Findings that the Proposed Transaction would lead to price increases for mobile customers.<sup>3</sup>

As already submitted, there is a whole body of industry research indicating that, in markets where four-to-three MNO (“**4-to-3**”) mergers were previously approved without structural remedies creating a new

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<sup>2</sup> [REDACTED]Orange/Masnovil/JV case approved by the Commission subject to structural remedies, see Case [M-10896](#).

<sup>3</sup> CMA Notice of Provisional Findings of 13 September 2024, paragraph 10.

fourth MNO, the approval led to direct price increases.<sup>4</sup> EU Member States with three MNOs have consistently higher average prices compared with countries featuring four MNOs. This difference in prices is likely to persist in the long run according to a report by the Commission which the CMA is now familiar with.<sup>5</sup>

[COMPANY Y] is surprised that the RWP does not take into account the compelling evidence from multiple EU 4-to-3 mobile mergers in comparable European jurisdictions, where new fourth players have successfully taken divested assets and established themselves as successful mobile network operators (such as Iliad in Italy) and previously where behavioural remedies have failed to restore competition (e.g. Germany, Austria and Ireland). Instead, the RWP cites a single 4-to-3 merger in a jurisdiction which is not comparable to the UK in terms of population size, population density, marketing strategies and other market features.<sup>6</sup>

On the other hand, historically, the most competitive mobile services markets in Europe are those where there is competition created as a result of new MNO entry in the market, for example: Italy, Romania, Poland, France and most recently, Spain. In these countries, new MNOs, such as Iliad and DIGI, are operating which has had a positive and direct impact on end-customer pricing as demonstrated by the graph extracted below<sup>7</sup>. In [COMPANY Y]'s opinion, there is no competitive market, at least not in the EU, where only MVNOs exercise sufficient competitive constraint on incumbent MNOs.

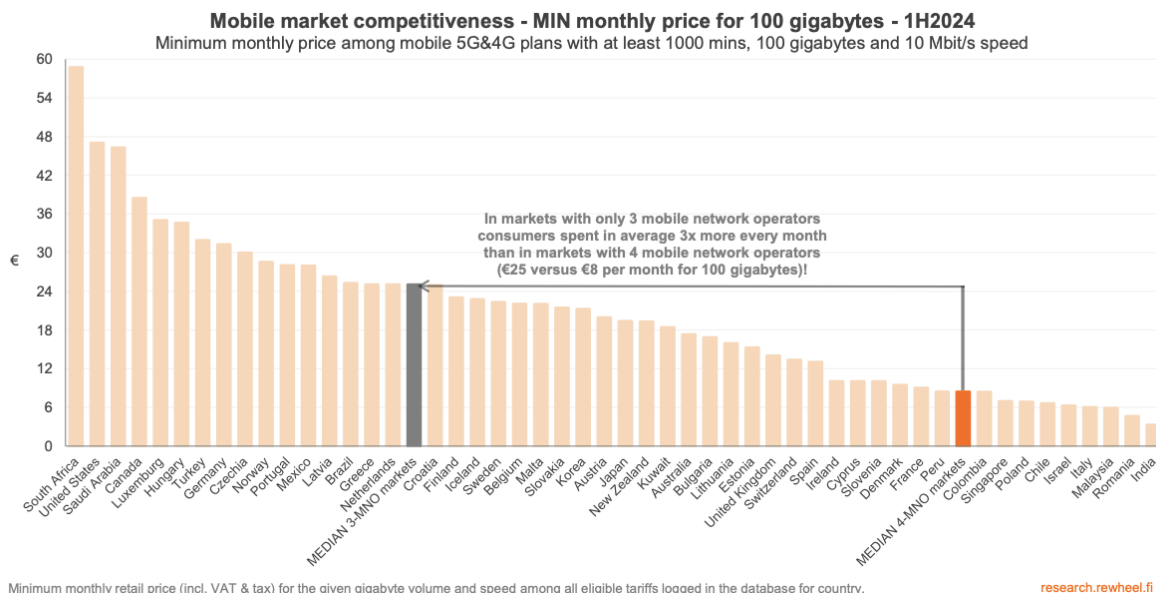
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<sup>4</sup> Examples include: *Protecting competition in a changing world – Evidence on the evolution of competition in the EU during the past 25 years*, European Commission Report, 2024 (the “**Commission Report**”); [The 4 to 3 Vodafone / Three mobile merger in the UK will lead to substantial 26% to 51% monthly price increases](#), Rewheel Research PRO Study, 2024 (the “**Rewheel Report**”).

<sup>5</sup> The Commission Report, p. 125.

<sup>6</sup> RWP, para. 1.68, footnote 71. For example, the US has a population of more than 330 million people, compared with the UK's 67 million, and a population density of 98 people per mile – the UK has 720 people per mile. US operators face challenges from the low-density, expansive geography that increases the cost of achieving comprehensive national coverage, necessitating higher prices and operational investments. Far more so than European countries like the UK, Italy and Spain. Furthermore, US operators have higher ARPU than the UK, Italy and Spain, driven by expansive coverage needs and less aggressive price competition. CapEx is higher because of the need to cover vast rural areas and upgrade networks more frequently for technological leadership. Another key differentiator is in marketing: the UK, Italy and Spain have a heavy focus on value-added services, such as bundled offerings (e.g., media subscriptions, multiplay), as a way to differentiate. There are frequent promotions to gain market share in saturated markets. By contrast, US operators have marketed primarily on network reliability and coverage, highlighting extensive geographic reach and infrastructure, with less emphasis on bundled services.

<sup>7</sup> [The state of mobile and broadband pricing – 1H2024](#), Rewheel Research PRO Study, April 2024.



**Third, regarding the wholesale mobile market in the UK, [COMPANY Y] agrees with the CMA’s Provisional Findings that the Proposed Transaction would result in both the merged entity and its competitors having less of an incentive to bid for wholesale business, and/or offer less competitive prices and terms to MVNOs, thereby making it more difficult for independent MVNOs to offer competitive deals to retail customers.<sup>8</sup>**

Indeed, removing one MNO competitor would significantly reduce the competitive pressure and weaken MVNOs’ ability to negotiate favourable MVNO agreements, which in turn would restrict both the entry of new operators into the market and the ability of MVNOs to compete effectively with low prices and an independent product portfolio. More details on these specific points are included in the following sections of the present submission.

Competition in the supply of wholesale mobile services is already rather limited, as there are only four MNOs capable of hosting MVNOs and not all of them bid for all tenders.<sup>9</sup> A number of MVNOs have already told the CMA that they experienced limited competition when negotiating wholesale access contracts.<sup>10</sup> As such, removing one of four competitors will reduce the MVNOs’ ability to negotiate effectively with the remaining MNOs.<sup>11</sup>

<sup>8</sup> CMA Notice of Provisional Findings of 13 September 2024, paragraph 10.

<sup>9</sup> CMA Decision of 22 March 2024, ME/7064/23, paragraph 586.

<sup>10</sup> Ibid, paragraph 616.

<sup>11</sup> Ibid, paragraph 718.

**Fourth, as already established by the Commission in its decisional practice to date, MVNOs exert a weak competitive constraint upon MNOs and cannot compete on price due to the wholesale terms they are offered.<sup>12</sup>**

Moreover, when MVNOs have no alternative options from MNOs for better wholesale terms, MVNOs are unable to improve their retail offerings, thereby preventing the possibility to offer discounts to customers and achieve any product innovation.

Only MNOs, if operating in a competitive environment, can positively influence competition as innovation, optimisation and improvements in CAPEX and OPEX primarily occur on the network side (controlled by MNOs), while the commercial and marketing aspects are largely handled by MVNOs. Therefore, limited competition at the MNO level results in less competition across both wholesale and retail levels.

**These arguments reinforce the need for significantly improved terms (including price and duration) under the suggested remedies in [COMPANY Y]’s opinion, as outlined further below in this submission.** Moreover, empirical evidence shows that in the three 4-to-3 mobile mergers approved conditionally with only behavioural commitments in the EU, prices increased without any network improvements or other technological developments.<sup>13</sup> In [COMPANY Y]’s view, the type of behavioural commitments envisaged and the wholesale terms as currently formulated to be offered to MVNOs will result in a detriment to end customers in terms of higher bills, less choice, less innovation and worse quality of service.<sup>14</sup>

## **2. The suggested behavioural remedies cannot prevent the SLCs in the wholesale and retail UK mobile markets**

The CMA’s RWP presents a combination of three behavioural remedies which the CMA is minded to accept instead of prohibiting the Proposed Transaction or imposing a partial divestiture remedy. As an experienced [REDACTED], [COMPANY Y] would like to express its views in relation to: (i) the Wholesale Reference Offer to provide MVNOs pre-agreed access terms; and (ii) the Network Commitment to invest and deliver a specified number of sites and spectrum in the UK.

### **A. The Wholesale Reference Offer and the Wholesale Access Terms**

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<sup>12</sup> Please see p.128 of the Commission Report.

<sup>13</sup> Commission decisions in 4-to-3 mergers cleared subject to behavioural remedies in Austria, Ireland, Germany; please also see the Rewheel Report, p.3.

<sup>14</sup> Please also see section 2.3, in particular, of the most recent report by Rewheel (“**Rewheel Report #2**”), already provided to the CMA [REDACTED].

**Regarding the Wholesale Reference Offer, [COMPANY Y] is convinced that the current terms of the offer will not “achieve as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it”<sup>15</sup>.** As such, the CMA is unlikely to fulfil its statutory duty in terms of remedying the identified SLCs if it accepts the proposed Wholesale Access Terms, for the following reasons.

**First,** different MVNOs have different technical needs and business requirements in order to be in a position to take advantage of the terms of the Wholesale Reference Offer. As such, a set of pre-agreed terms, especially in their current form, will likely lead to difficulties and tensions in practice between a prospective MVNO entrant and the merged entity. This will significantly increase the friction in relation to specifying and agreeing appropriate terms, and additionally, it will likely prove difficult for the CMA to monitor and enforce the behavioural remedy package as a whole. The scope of the behavioural remedies under the Wholesale Reference Offer must not only enhance the competitive capabilities of the existing MVNOs in the UK market, but also they must be capable of creating a non-discriminatory environment which will allow the successful entry of new MVNOs, improving competition on the market and quality of services for consumers.

**Second,** it is currently not possible for interested third parties, such as [COMPANY Y] and any other MNOs/MVNOs, to assess the effectiveness of the Wholesale Reference Offer, given some of the most important key terms are heavily or entirely redacted in the RWP. In particular, with regard to price, [COMPANY Y] is not in a position to make an informed and well-rounded submission at this crucial stage in the CMA’s review process as the pricing tiers are not available to it, meaning that [COMPANY Y] does not know whether the suggested prices would be reasonable and acceptable to a new entrant. Moreover, there is no mention of a FRAND commitment or similar, or indeed any mention of the underlying methodology used to arrive at the particular prices. This already constitutes a barrier to new entrants, such as [COMPANY Y], which [REDACTED] as they would not be able to make an informed business decision on whether they would be able to take advantage of the remedy in the future or not. Further, the envisaged pricing tiers could potentially act as a barrier to entry for new players as they might not receive competitive rates based on limited number of customers in the short term. Hence, the current price terms are unlikely to increase competition on the market and will need to be changed in order to be effective. [COMPANY Y] has made concrete proposals to that effect in the following section of the present submission.

**Third,** the proposed duration of 3 years for the Wholesale Reference Offer is unreasonably short. Such duration would not provide sufficient time for interested parties to obtain and assess the terms, negotiate a comprehensive wholesale agreement with the merged entity, create a business plan on that basis, conclude the regulatory process to enter the UK market, and launch and market the service UK-wide. Only the technical implementation of a full MVNO could take around one year, not to mention the preparation for commercial and marketing activities. Simply put, any time limit on this remedy,

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<sup>15</sup> Section 36(3) of the Enterprise Act 2002.

especially this short duration given the complexity of the industry, would diminish the ability of any MVNOs to invest and meaningfully compete on the UK market, hence rendering the remedies useless. As a result, the wholesale market remedy would need to be in place permanently in order to be effective, as otherwise there would be a clear gap between the permanent, structural loss of competition resulting from the Proposed Transaction, and the envisaged time-limited remedy package. [COMPANY Y] has made concrete proposals in that regard as well in the following section of the present submission.

**Fourth**, the dynamic and fast-paced nature of the telecoms industry in general means that the market conditions in which the UK MNOs and MVNOs operate constantly change and evolve. Consequently, the terms and economics of the Wholesale Reference Offer may become untenable very quickly and turn out to be ineffective in practice, especially in light of the price squeeze mechanisms that the Parties (and MNOs in general) often use. Thus, the parameters once agreed with the CMA will need to be reviewed at least annually to ensure they are in line with market dynamics, which will further complicate the resource-heavy process of monitoring and enforcing behavioural remedies in the first place. In reality, this would mean that there will be a semi-constant regulatory review process (by the CMA or Ofcom, or both) happening at the same time as MVNOs will be trying to negotiate more reasonable terms with the merged entity. [COMPANY Y] is at this stage unsure if this would be at all possible as such level of complexity would likely discourage any new entrant MVNO to invest and achieve successful launch on the UK market.

**Fifth**, pre-agreed wholesale access terms like the present ones will not be an effective remedy in [COMPANY Y]'s view, given that there is a serious risk that these terms will lead to market distortions, including price symmetry and, in turn, undermine competition overall. This is because standardising terms would decrease additional competitiveness brought to the market by MVNOs as they would lose a competitive edge and appeal for UK consumers. This would be particularly detrimental for new entrants and less well-known MVNO brands in the UK, while it could commercially benefit 'super brands' within the MVNO market.

## **B. The Network Commitment**

Regarding the Network Commitment, [COMPANY Y] is of the view that although such a significant investment commitment by VUK and 3UK may seem very attractive on paper, it does not constitute an adequate and sufficient remedy in this case, even if combined with the Retail Customer Protections and the Wholesale Reference Offer. This is due to the following reasons, some of which have already been brought to the CMA's attention in a number of submissions by various interested third parties.

**First**, the Network Commitment in its proposed form is unlikely to directly address the identified SLCs even if it were fully delivered in the envisaged timeframe because the underlying remedy design methodology is flawed. In particular, VUK and 3UK have only proposed and relied on input-metrics in order to formulate the package of investment commitments, namely specified numbers of sites and spectrum, without any output commitments or guarantees regarding important metrics, such as

coverage rates and network/data speeds. As a result, UK customers may not appreciably benefit from the Network Commitment, as its actual impact and ultimate results are not guaranteed, or indeed – not even specified. It should be also thoroughly assessed whether the Parties have complied with their previous coverage and quality of service obligations towards Ofcom under their respective spectrum licence agreements.

**Second**, the proposed behavioural remedy is generally too complex to be effectively monitored and enforced. The CMA has long been a proponent of structural versus behavioural remedies<sup>16</sup> for these same reasons, thus [COMPANY Y] is somewhat surprised that the CMA is minded to accept a behavioural commitment in a case of this magnitude, and in an industry which is heavily regulated, inherently complex and constantly changing due to market conditions and technological developments.

**Third**, [COMPANY Y] believes that there is a material scope for circumvention and disputes, including litigation, arising as a result of this commitment, given the complexity and the envisaged duration. This is because specification and circumvention risks are inherent in the Network Commitment which does not address the source of the SLC, namely the permanent loss of competition due to 4-3 consolidation of the market. Moreover, these risks will be reinforced by inevitable technological changes within the telecom industry which will diminish the effectiveness of the proposed remedy over time.

**Fourth**, both responsible regulators for the implementation of the Network Commitment, Ofcom and the CMA, are likely to incur additional material costs because monitoring and enforcing a technology type of commitment for a duration of 8 years will be complex, problematic and resource-intensive.

### **3. Vital changes to the current terms of the Wholesale Reference Offer are necessary in order to make the remedy effective**

**In [COMPANY Y]'s view, the terms of the Wholesale Reference Offer as currently proposed do not constitute a new behavioural commitment as such, given the fact that VUK and 3UK are essentially replicating commercial terms already available on the UK market, meaning the Parties are simply repackaging the existing MVNO terms offered to market players in the UK.**

Ofcom has made a similar submission to the CMA, stating that “the terms of the Wholesale Reference Offer do not seem to differ greatly from what is currently offered by the Parties”<sup>17</sup>. As a result, the Parties are not actually addressing the permanent loss of competition ensuing from the Proposed Transaction. Instead, they are trying to be seen as offering a remedy, although in reality it consists of their current terms reframed in an attempt to appear to address the identified SLCs. Thus, [COMPANY

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<sup>16</sup> CMA's Merger Remedies Guidance (CMA87), paragraphs 3.46-3.48.

<sup>17</sup> RWP, para. 1.448.



Y] strongly believes that certain amendments are essential and need to be made to the formulation of the key terms put forward by the Parties.

#### **A. Pricing terms**

**Given its previous experience [REDACTED], combined with well-established operations in various telecommunication markets around Europe, [COMPANY Y] believes that the Wholesale Reference Offer should not be based on pre-agreed pricing per unit, meaning MVNOs paying amounts reflecting minutes and data used by the MVNOs' customers.**

Such prices, even if adjusted according to the specified tiers<sup>18</sup>, would not provide MVNOs with competitive terms and conditions in order to enter the UK market and take advantage of the Wholesale Reference Offer. **This is because an MVNO cannot meaningfully compete in this space as it is bound by the fixed prices per unit used, resulting in margin squeeze and leaving very little room to offer better prices to customers.**

Competition in the supply of wholesale mobile services is already rather limited, as there currently are only four MNOs capable of hosting MVNOs and not all of them bid for all tenders.<sup>19</sup> A number of MVNOs have already submitted to the CMA that they experienced limited competition when negotiating wholesale access contracts.<sup>20</sup> As such, the pricing under the Wholesale Access Terms is likely to further exacerbate the existing problem, especially in combination with the fact that the Proposed Transaction removes one of four competitors which significantly reduces the MVNOs' ability to negotiate effectively with the remaining MNOs in the first place. Thus, the current pricing essentially continues to support the existing market conditions whereby most MVNOs are constantly squeezed out on price, with little negotiating power vis-à-vis the MNOs. Moreover, MVNOs will continue to experience these conditions, or even degraded conditions, in a market where the Proposed Transaction leaves only three MNOs to negotiate with.

**As a result, [COMPANY Y] requests that the pricing terms be fundamentally revised in a way which would allow MVNOs and their customers to actually benefit from the wholesale remedies package. In [COMPANY Y]'s view, the only effective way to formulate the price terms would be to base them on a capacity cost-plus model. What this means in practice is that an MVNO would be paying a price based on the usage by its customers as a percentage of the total usage of the merged entity, based on the available spare capacity on the network of the merged entity. The price will of course also include a reasonable margin payable to the Parties and reflect the costs incurred by the merged entity for providing and maintaining the capacity which has been used by the customers of the MVNO. When an MVNO pays a percentage of the network cost plus reasonable margin the efficiency**

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<sup>18</sup> Table 1.1 of the RWP.

<sup>19</sup> CMA Decision of 22 March 2024, ME/7064/23, paragraph 586.

<sup>20</sup> Ibid, paragraph 616.

**of the merged entity is transferred to the MVNO as well, and will be passed onto consumers in the form of lower and more competitive prices in the long term.**

Proposed capacity-based model for MVNO access to the mobile network of the merged entity (the “Merged Network”):

- An MVNO shall have the right to access the Merged Network for all data, voice and SMS services provided by the MVNO without limitations in terms of usage or capacity of the Merged Network.
- The actual monthly level of usage of the Merged Network (“**Network Capacity Usage (%)**”) should be based on the following rules:
  - **Network Capacity Usage (%) = MVNO Traffic / Total Traffic of the Merged Network**

Where:

- **MVNO Traffic** is the sum of the volume of data usage of all the data traffic sessions generated within the territory of the UK and under the coverage of the Merged Network by all MVNO in any given month.
- **Total Traffic of the Merged Network** is the sum of the volume of data usage of all data traffic sessions generated under the coverage of the Merged Network, including the traffic generated by the Parties, the new MVNOs, and by any other existing wholesale relationships of the Parties (e.g., existing MVNOs).
- For each calendar month, an MVNO shall pay to the merged entity a “Monthly Capacity Fee” applicable for the actual Network Capacity Usage, as follows:
  - **Monthly Capacity Fee = Network Capacity Usage (%) \* (Yearly cost of operation of the Merged Network plus reasonable margin/12)**

The yearly cost of operation of the mobile network of the merging Parties needs to be defined and established by CMA and Ofcom yearly at a reasonable threshold, as such for an efficient operator, as it is the base for the entire economics of the model. Any costs’ inflation, which cannot be controlled, of course, by the MVNOs, will be prone to create a margin squeeze pressure which can lead to exclusion from the market of the MVNOs.

Further, this pricing methodology is also supported by the vast availability of spare capacity within the respective network of each Party, and in turn within the future network of the merged entity. The current network utilisation is estimated to be less than 38% in the case of VUK and less than 47% in the case for 3UK.<sup>21</sup> As a result, the merged entity’s projected network utilisation will be approximately 35%

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<sup>21</sup> Vodafone & Three UK mobile radio network capacity in 2024 and Vodafone-Three capacity in 2030-2034; Rewheel Research Report, 2024 (the “**Spare Capacity Report**”), p.3.

in the medium-term (i.e. by 2030) and 39% in the long-term (i.e. by 2034).<sup>22</sup> As a result, the merged entity could easily offer approximately half of its radio network capacity to third-party operators in the short-term, as well as its 5G standalone network in the medium to long-term (for further details, please see the table on p.3 of the Spare Capacity Report attached to this submission). The actual and future capacity of the Merged Network allows for the delivery of a long term, sustainable, capacity based offer for MVNOs, even considering a conservative usage of the spectrum, as demonstrated by the Spare Capacity Report. In [COMPANY Y]'s opinion, there is nothing to prevent the Parties to comply with a capacity based wholesale offer, in order to enhance competition and innovation in the market.

Given the CMA is minded to approve the Proposed Transaction without the creation of a fourth MNO, the CMA should at least require the Parties to commit to make their significant spare capacity available to MVNOs at prices based on the capacity cost-plus model as described above.

Otherwise, paying a price per minute or per GB of data would make it very difficult or even impossible for a new entrant, such as [COMPANY Y], to successfully deploy its services in the UK market and meaningfully compete.

In terms of existing examples, [COMPANY Y] cites the recent Orange/MasMovil JV in the Spanish market where the Commission accepted a remedy for the wholesale market which includes pricing based on capacity within the framework of an optional national roaming agreement ("**NRA**").<sup>23</sup> Although the remedies in that case are different as they include a structural divestment of assets to allow a new MNO entry, the pricing mechanism under the NRA is aimed to offer fair and competitive pricing in order to allow the new entrant to become operational in Spain and attract retail customers by using the merged entity's network initially:

*"The pricing under the NRA Option would be **capacity-based**. i.e., **based on the Network Capacity Usage of the New MNO**. Defined tranches of capacity of the JV's network will be available to the New MNO at defined annual fees."*<sup>24</sup>

*"The pricing mechanism for the Optional NRA included in the New MNO Commitment is capacity-based. **When the New MNO first launches its own mobile network, it would depend on the JV for the provision of its retail services**. The Commission considers that **the capacity-based cost structure is set at a level that gives the New MNO an incentive** to complete its own network and keep the traffic of its customers to its own network."*<sup>25</sup>

The capacity-based prices in Spain have been determined in the following way (with some details redacted in the Commission's decision)<sup>26</sup>:

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<sup>22</sup> Ibid.

<sup>23</sup> Case M.10896, see paras. 1762-1763.

<sup>24</sup> Ibid, para. 1763.

<sup>25</sup> Ibid, para. 1840.

<sup>26</sup> Ibid, see pp. 5-6 of the Annex with Commitments.

20. [...] **Defined tranches of capacity of the JV's network will be available to the New MNO at defined annual fees.** In accordance with the fee grid set out in Schedule 2, the MNO will pay [details on fees]. **The NRA Option will not include any capacity cap.** For the avoidance of doubt, and as set out in paragraph 22 below, **capacity usage will be calculated exclusively by reference to the volume of customers and traffic in the JV's network.**

SCHEDULE 2 - Additional Details of the NRA Option Economic terms

1. Starting from the Commercial Launch Date, **the New MNO will pay a monthly Capacity Fee equal to the applicable yearly Capacity Fee for a given interval of Network Capacity Usage divided by twelve, as set out in Table 1 below.**

The advantages of the capacity-based price model have also been recognised by the EU legislative bodies in their impact assessment and in existing regulations. For instance, the Wholesale Roaming Markets Regulation states that:

***In order to allow for the development of more efficient, integrated and competitive markets for roaming services, when negotiating wholesale roaming access for the purpose of providing retail roaming services, operators should be given the alternative to negotiate innovative wholesale pricing schemes which are not directly linked to volumes actually consumed, such as flat payments, upfront commitments or capacity-based contracts, or pricing schemes that reflect variations of demand across the year.***<sup>27</sup>

Separately, in an impact assessment conducted prior to the conclusion of the above regulation, the Commission has expressly recognised the competitive features and “built-in incentives that bring a positive impact to the wholesale market”, not only for MVNOs but also for MNOs.<sup>28</sup> In particular, capacity-based contracts “**under which visiting operators buy a percentage of an MNO's mobile network capacity, allow the visited operator to have a better estimation of the visiting operator's estimated initial needs, thus optimizing its network investment strategies.** Moreover, capacity-based contracts provide **stable revenue commitments to the visited network, which can incentivise both visited and visiting networks to include risk variables in their contracts**”.<sup>29</sup> [COMPANY Y] specifically notes that this impact assessment was conducted in 2016, and even then it was already recognised that “**wholesale tariffs on a per-unit basis are becoming problematic and obsolete because the majority of domestic retail mobile packages today are “flat” offers including large or even “unlimited” volumes of minutes, SMS and MBs**”.<sup>30</sup>

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<sup>27</sup> Regulation (EU) 2017/920 of 17 May 2017 amending Regulation (EU) No 531/2012 as regards rules for wholesale roaming markets, para. 11.

<sup>28</sup> Commission Staff Working Document, Impact Assessment, Proposal for a Regulation as regards rules for wholesale roaming markets, Section 6.5, [link](#).

<sup>29</sup> Ibid.

<sup>30</sup> Ibid, Section 7.1.

Thus, it is somewhat surprising that almost a decade later, the Parties are offering terms based on an outdated methodology which is unlikely to improve the competitive conditions in any material way and it essentially preserves the status quo instead of addressing the newly created SLCs in the UK market.

Other jurisdictions which support cost-plus pricing models include developed economies, such as South Korea and Japan<sup>31</sup>. In those countries, the respective regulators have mandated that incumbent MNOs should provide wholesale services to MVNOs at prices calculated using a cost-plus approach “in order to promote competition and consumer choice in the mobile market”.<sup>32</sup> These frameworks are designed “to facilitate market entry and encourage service diversity”.<sup>33</sup> For instance, to ensure such a competitive pricing methodology in Japan, a particular pricing formula is used where the “Network Access Fee is calculated by ‘Fair cost’ plus ‘Fair profit’ divided by ‘Demand’”<sup>34</sup>.

**Bearing in mind all of the above arguments and examples and in the interests of due process, [COMPANY Y] respectfully submits that the CMA should carefully reconsider the pricing methodology underpinning the Wholesale Access Terms in their current form, taking into account this submission and others, and request that the Parties propose an alternative pricing structure based on the capacity cost-plus method discussed above.**

## **B. Pricing and role of Ofcom**

**First**, [COMPANY Y] believes that Ofcom must be closely involved in the process of agreeing the pricing terms and the future pricing mechanism with the Parties in order to minimise margin squeeze risks and otherwise ensure competitive pricing. In particular, the CMA should consult Ofcom on all aspects of this part of the remedy, and not just on technical feasibility, given Ofcom’s expertise, experience and knowledge regarding current prices offered to MVNOs in the UK. Given that Ofcom possesses all underlying data and the different sets of terms offered by MNOs at present, including pricing, the CMA should use Ofcom’s data in order to compare whether the terms currently proposed by the Parties are in any way better than, or indeed different from, what the Parties are currently offering in terms of pricing and other related key terms of their respective wholesale offers. This would also help to minimise procedural irregularity issues.

**Second**, as already submitted by Ofcom, there is material risk that the Wholesale Access Terms will “become a focal point, which could lead to higher prices than anticipated”.<sup>35</sup> Hence, Ofcom further pointed out to the CMA that “the adjudication process would have to be straightforward and ‘brightline’”, otherwise it will be “difficult to enforce” the proposed terms.<sup>36</sup> [COMPANY Y] completely agrees with these submissions made by Ofcom and believes that Ofcom must have a greater role in the

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<sup>31</sup> 4G LTE network access system and pricing model for IoT MVNOs, [link](#).

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> See slides 3 and 101 of *Verification of mobile connection charges*, 18 April 2023 (in Japanese), available here: [https://www.soumu.go.jp/main\\_content/000876833.pdf](https://www.soumu.go.jp/main_content/000876833.pdf)

<sup>35</sup> RWP, para. 1.450.

<sup>36</sup> Ibid.

design and implementation of the wholesale remedy. More specifically, Ofcom should be able to review the pricing terms and underlying methodology proposed by the Parties, and actively assist the CMA in assessing whether MVNOs are indeed offered better rates than currently in order to put them in a position to exercise sufficient competitive constraint upon the merged entity.

### **C. Duration term**

In terms of duration, as already noted in the preceding section of this submission, [COMPANY Y] believes that the Wholesale Access Terms should not be limited in time, given the permanent loss of competition on the market as a result of the Proposed Transaction. In case the CMA still decides to accept a limited duration, [COMPANY Y] submits that three years will be not at all sufficient to ensure that this behavioural remedy helps restore competition in the UK wholesale market. **Therefore, a minimum duration of ten years would be appropriate in [COMPANY Y]'s view, given the characteristics of the industry and the complexity of achieving a successful new entry.** Otherwise, a duration shorter than ten years would likely diminish the ability of MVNOs to invest and meaningfully compete on the UK market by serving consumers based on a sustainable, long-term strategy for affordably priced services. By way of example, the pricing terms discussed above under the optional NRA accepted by the Commission in Orange/MasMovil/JV will be available to the new entrant on the Spanish market until [2033-2038]<sup>37</sup> which ensures at least 10 years of duration of the agreed remedy package.

## **4. Concluding remarks**

**Bearing in mind all of the above, together with the CMA's own conclusion and identification of barriers to entry and/or expansion for MVNOs in the UK, such as the high costs involved and challenges with negotiating and obtaining competitive commercial terms from MNOs<sup>38</sup>, [COMPANY Y] urges the CMA not to accept the terms of the Wholesale Reference Offer as it currently stands. In particular, the CMA should require a capacity-based cost-plus mechanism for a duration of at least 10 years.**

As stated in the CMA's Merger Remedies Guidance<sup>39</sup>, behavioural remedies are less likely to address an SLC and its resulting adverse effects directly and comprehensively at source by restoring rivalry. Thus, behavioural remedies would only be appropriate in limited circumstances, none of which apply to the Proposed Transaction, and relevant customer benefits would not be preserved by such behavioural remedies. As a result, the proposed remedy package in the form of the Network Commitment and the Wholesale Access Terms considered by the CMA would give rise to specification challenges, could be readily circumvented, would risk leading to market distortions and would be difficult and burdensome for the CMA, Ofcom and a monitoring trustee to monitor and enforce.

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<sup>37</sup> Case M.10896, see p. 5 of Annex with Commitments.

<sup>38</sup> CMA Decision of 22 March 2024, ME/7064/23, paragraph 427.

<sup>39</sup> CMA87, paragraphs 3.46-3.48.

When assessing the proposed remedy package, it is important to remember that behavioural commitments accepted by the Commission in the 4-to-3 mergers in Germany, Ireland and Austria, all failed to restore effective competition post-merger in those countries.<sup>40</sup> Instead the mergers led to supra-competitive prices, reduced service quality and choice, and lower customer satisfaction – without any discernible increase in investments or other benefits in terms of network roll-out or quality.

In the interests of due process, [COMPANY Y] requests a meeting with the CMA at your earliest convenience in order to provide further details and any additional information the CMA may require.

Sincerely yours,

[COMPANY Y]

**Enclosures:**

1. [REDACTED]

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<sup>40</sup> *Telefonica / Deutschland / E-Plus*, Case M.7018; *Hutchison 3G Ireland / O2*, Case M.6992; *Hutchison Austria / Orange*, Case M.6497.