Sky's additional comments on key aspects of the design of wholesale remedies

Four key changes to strengthen the wholesale remedy

(1) **Extend the offer** (4 years to express interest + 1 year to conclude + 1 to integrate) so Sky and more MVNOs can access it – Sky is most at threat so the CMA must be confident the offer will be available when our deal ends.

(2) **Lower Unlimited pricing** set at [✂] to allow MVNOs to compete with the Parties' own retail offers (e.g., H3G's Smarty – priced at £16).

(3) **Standard variable rate should be lower than** [✂] **and there should be no speed tiers**.

(4) **Option to extend** (5+5 years) – without a longer period of payback beyond a 5-year deal, the commercial investment case is much weaker (given the payback period for new customers can be around five years).

1. Sky thanks the CMA for the opportunity to discuss our suggested improvements to the proposed wholesale remedy ("Wholesale Access Terms"). Without prejudice to our overall concerns about the Merger, there are a number of relatively simple 'fixes' that the CMA can still make to strengthen the remedy and better protect MVNOs.

2. Following that call, this note briefly reiterates the four most crucial changes that need to be made, at a very minimum, to make this remedy workable and useful for MVNOs. For completeness a full list of our proposed changes is set out in Annex 1. [✂]. We would be very happy to discuss or clarify any other points if that would be helpful.

3. Sky is an experienced MVNO that has run many tenders: we know what will work, what is important commercially for an MVNO and what won't work. The CMA, as a competition regulator, naturally does not have the same commercial experience. It is also obvious from the Parties' and other MNO responses on remedies, that they are not – and never will be – incentivised to put forward a reasonable offer, one which fosters a long-term sustainable MVNO ecosystem capable of competing with MNOs. This is not surprising because, aside from very small niche MVNOs, it is not in their own financial interests to do so especially in a three-player market. That is why they will do everything they can during this merger review to undermine and minimise the strength of these Wholesale Access Terms: including designing or implementing it in such a way that it excludes Sky and other MVNOs from accessing it and making it commercially very difficult to compete with MNOs.

4. Following the competition problem you have identified; the CMA must protect the commercial feasibility of MVNOs by making sure this wholesale remedy is workable given we and other MVNOs will be wholly reliant on it. We have direct experience of the structures and incentives that work for MVNOs and those that will weaken our position [✂]. Without another credible MNO, we cannot expect there to be any negotiated improvements to this offer. Therefore, it is imperative the CMA make this offer as strong as possible.

1. Ways to strengthen the wholesale remedy

Change 1: Extend the offer – so Sky and others can access it

5. It is critical that Sky has access to the offer [✂].
6. An additional year (from three to four) will reduce the risk that the Merged Entity frustrates the process to try and exclude Sky – leaving us entirely unprotected. This extra year gives us and other MVNOs a buffer to negotiate and finalise any switch. The clock should be stopped if there is a dispute as this could be used as a further way to 'run down' the time and game the remedy. One extra year does not substantially increase the distortion risks, but it will make a big difference in making the protections available to the biggest MVNOs like Sky.
7. On a practical level, there also needs to be additional time to implement the switch (at least one year).

Change 2: Lower Unlimited pricing

8. The current Unlimited price ([✂]) is far too high to allow us to compete with other comparable offers in the market. Once you add in VAT and direct costs (£[✂]), just to break even – at a very minimum Sky would need to price this at £[✂]/month. Against prices like H3G's Smarty (at £16/month) this is too high to compete in the market (even assuming retail price increases in the market following the merger).
9. This immediately makes MVNOs uncompetitive with the Parties – undermining our retail position. As Sky has repeatedly told the CMA, consumers are increasingly moving to Unlimited deals. If MVNOs cannot offer these at competitive prices, they will be increasingly marginalised. To enable MVNOs to compete on a level playing field, the wholesale Unlimited price would need to be reduced [✂] – which would enable us to offer deals in line with equivalent brands like Smarty.
10. It also remains unclear to us how any Future Pricing Mechanism (FPM) will impact the unlimited price, as well as the standard prices. The easiest, simplest and fairest way would be to base the FPM on costs[1] [✂].

Change 3: Competitive standard pricing and no speed tiers

11. [✂].
12. [✂].
13. [✂].
14. [✂].
15. More precisely, as explained in more detail in Annex 2, [✂].
16. [✂].
17. We also fundamentally disagree with the Parties' newly proposed two-tier price – with a [✂] premium for speeds above 150Mbps. There is no justification for any premium given there are no additional costs associated with delivering this speed – [✂]. This is simply another way

[1] [✂].

to ensure that MVNOs are boxed into lower speed segments of the market, not in direct competition.

Change 4: Option to extend (5+5 years)

18. While not all MVNOs may want or need a longer term, larger MVNOs such as Sky, will need the right to extend the offer for a further 5 years. [✂].

19. If, contrary to what we expect, there is strong competition in the wholesale market after five years then Sky (and other MVNOs) may not choose to exercise the additional five-year extension. But that is enormous risk to take, particularly given that the Parties have already signalled that they will not allow MVNOs to roll over their existing terms. We strongly urge that this right to extend be explicitly included in the offer now.

2. Already warning signs from the Parties, BT and VMO2

20. It is already evident from the responses by the Parties and other MNOs, that they have no desire to support MVNOs in the future. For example:

- The Parties' [✂] premium for speeds above 150Mbps, despite having promised 'service equivalent' terms, is clearly designed to box MVNOs into the slower speed segment of the market and undermine MVNOs' abilities to compete by offering higher speeds.
- By merely publishing 'speed tiers' this will set the 'focal point' for MVNOs in future deals – as will the price points of the offer that will inevitably become common knowledge in the industry.
- The Parties argue that rolling over existing terms will 'fossilise' historical agreements as it will not reflect the market conditions – there is no other economic reason that the types of deals MVNOs should get as of today would be materially worse than their previous terms (in fact the reverse as the Parties claim they will be making significant savings from the claimed efficiencies) – except for the fact that following the Merger, competition will have been lost.

21. This should be a significant warning sign for the CMA of what is in store for MVNOs when attempting to have a reasonable negotiation with the Merged Entity. The CMA has the power to pre-empt these problems now by at least strengthening the baseline offer and protecting against this type of 'game playing'.

22. The responses from BT and VMO2 also clearly show their lack of interest in MVNOs:

- BT is arguing for changes that would only make the deal worse for MVNOs, i.e., ensuring prices could move upwards and reducing the duration of remedy to minimise how many MVNOs can access and use this remedy. [✂].
- [✂].

3. Serious and material legal errors – potential appeal/s

23. The CMA is legally obliged to address a wholesale SLC to a *"high degree of certainty"* – the current weak remedies fall very short of this, and this exposes the CMA to serious legal risk. There have also been a number of material procedural errors during this merger review process that further put the CMA in a very risky position, in particular:

- very little time to engage in the design of complex remedies;
- failure to adequately consider with an open mind the feasibility of alternative remedies proposed by others such as Sky; and
- failure to take into account the weight of evidence demonstrating the weakness of these remedies, and the concerns raised by many MVNOs.

24. Having reviewed the other responses from stakeholders, it is evident that many others have raised similar substantial concerns and if the CMA do not make several key improvements to the remedy, Sky, among possibly others, will be forced to consider appealing the decision.

Annex 1 – Full list of Sky changes to strengthen the Wholesale Access Terms

	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
	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 >4m 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	• [✂] • Unlimited tier must allow Smarty £16 price to be matched – i.e., c. £[✂], after non-data costs
	Future Pricing Mechanism • Price changes according to Parties' ARPU and data usage	• Ensure only downward adjustment • [✂]
Additional terms to protect MNVOs		**Non-exclusivity** • Must-permit non-exclusivity (enabling MVNOs to use multiple MNO providers)