

Anticipated joint venture between Vodafone Group Plc and CK Hutchison Holdings Limited concerning Vodafone Limited and Hutchison 3G UK Limited

OVERVIEW OF THE CMA'S DECISION

1. The Competition and Markets Authority (**CMA**) has conducted a phase 1 investigation into the anticipated joint venture between Vodafone Group plc (**Vodafone**) and CK Hutchison Holdings Limited (**CK Hutchison**) that will combine their UK telecoms businesses, respectively Vodafone Limited (**VUK**) and Hutchison 3G UK Limited (**3UK**) (the **Merger**). After examining a range of evidence, the CMA believes that the Merger meets the threshold for reference to an in-depth phase 2 investigation, because it gives rise to a realistic prospect of a substantial lessening of competition (**SLC**) in the supply of retail mobile services and wholesale mobile services in the UK.
2. Vodafone and CK Hutchison are together referred to as the **Parties**. For statements relating to the future, the Parties' UK telecoms businesses are together referred to as the **Merged Entity**.
3. As a result of the initial concerns found in the phase 1 investigation, the Parties have until 2 April 2024 to offer an undertaking to the CMA that will remedy the competition concerns identified. If no such undertaking is offered, then the CMA will refer the Merger for an in-depth phase 2 investigation pursuant to sections 33(1) and 34ZA(2) of the Enterprise Act 2002 (the **Act**). This would enable the CMA to investigate the impact of the Merger on competition in more detail before reaching a final decision on whether or not the Merger gives rise to an SLC.

About the businesses

4. Vodafone – listed on the London Stock Exchange – is the holding company of a group of companies providing mobile and fixed telecommunication services (such as broadband), principally across Europe and Africa. In FY2022, Vodafone generated global turnover of over €45 billion. In the UK, Vodafone supplies retail mobile services to consumers and businesses and wholesale mobile services

through its wholly-owned subsidiary VUK and operates under the Vodafone brand and the VOXI and Talk Mobile sub-brands.

5. CK Hutchison – listed on the Stock Exchange of Hong Kong – is a multinational conglomerate operating in about 50 countries across four core businesses: ports and related services, retail, infrastructure and telecommunications. In FY2022, CK Hutchison generated global turnover of approximately £47 billion. In the UK, CK Hutchison supplies retail mobile services to consumers and businesses and wholesale mobile services through its wholly-owned subsidiary 3UK and operates under the Three brand and the SMARTY sub-brand.

About the UK mobile industry

6. Mobile services play an integral role in the daily lives of consumers and businesses in the UK. Mobile internet access has become an essential service. Ofcom – the sectoral regulator overseeing mobile communications in the UK – expects demand for mobile data to grow to meet changing customer needs. Operating a mobile network involves high fixed costs and Ofcom anticipates that significant investment in mobile networks will be required to increase capacity and provide the network quality needed to meet these future needs.
7. There are currently four mobile network operators (**MNOs**) in the UK – BT Group plc (**BTEE**), VMED O2 UK Limited (**VMO2**), VUK, and 3UK. All four MNOs are party to one of two network sharing arrangements in the UK: BTEE and 3UK have a network sharing arrangement, and VUK and VMO2 have a separate network sharing arrangement. This allows BTEE and 3UK on the one hand, and VMO2 and VUK on the other, to share – to some degree – the costs of rolling out and maintaining their networks while continuing to compete with each other at the retail and wholesale level. Although certain network infrastructure is shared between the parties to each arrangement, other infrastructure is not, and so each of the four MNOs is able to differentiate its network quality to some degree (for example regarding 5G roll-out).
8. In addition to the four MNOs, there are a number of mobile ‘virtual’ network operators (**MVNOs**) active in the supply of retail mobile services in the UK, including Sky Mobile, Tesco Mobile, Lebara, and Lyca Mobile. These MVNOs do not own the underlying mobile radio network infrastructure they use to provide mobile services to UK consumers (and so – to a large extent – cannot influence the network quality they offer customers), instead entering into agreements with one of the MNOs to access their network.

Why did the CMA review this merger?

9. The CMA has a statutory duty to promote competition for the benefit of consumers. This includes a duty to investigate mergers that could raise competition concerns in the UK where it has jurisdiction to do so. The CMA believes that it has jurisdiction to review the Merger: each of VUK and 3UK is an enterprise, as a result of the Merger 3UK will cease to be distinct from Vodafone and, conversely, VUK will cease to be distinct from CK Hutchison, and the turnover test is met given VUK and 3UK together generated more than £70 million turnover in the UK in FY2023. This means that arrangements are in progress or contemplation which, if carried into effect, will result in the creation of a relevant merger situation.
10. The Parties announced the proposed combination of their UK telecoms businesses on 14 June 2023. The Merger is subject to certain regulatory conditions, including merger control clearance from the CMA and approval under the UK National Security and Investment Act 2021 (**NSI Act**). National security concerns are a matter for the UK government, which may choose to intervene under the NSI Act if it finds concerns.

What evidence has the CMA looked at?

11. At phase 1, the CMA must establish whether there is a *realistic prospect* of an SLC which merits a reference to an in-depth phase 2 investigation, carried out by an independent panel. This is a lower threshold than that used during a phase 2 investigation, which requires the CMA to determine whether it is more *likely* than not that an SLC will result from the merger.
12. To understand the impact of the Merger on competition, the CMA considered a wide range of evidence in the round. The CMA received multiple submissions and responses to information requests from the Parties. As part of its phase 1 investigation, the CMA gathered data (including on shares of supply, switching by customers, tenders for MVNO contracts and prices) and reviewed a large number of internal documents from Vodafone and CK Hutchison to understand their businesses, financial performance, competitive strategies and plans, and the competitive landscape in which VUK and 3UK operate. The CMA also gathered evidence from other sector participants, including MNOs and MVNOs, as well as the Parties' retail business customers, which included both written and oral submissions as well as relevant data.
13. Throughout its phase 1 investigation, in line with its guidance in relation to merger investigations involving regulated sectors, the CMA also engaged with Ofcom given its sector expertise.

What did the evidence tell the CMA...

...about the effects on competition of the Merger?

14. The CMA looked at whether the Merger would lead to an SLC in the supply of retail mobile services and wholesale mobile services in the UK, comparing the competitive effects of the Merger against the conditions of competition that would exist without the Merger. The Parties submitted that, compared to BTEE and VMO2, VUK and 3UK are both sub-scale and do not currently generate sufficient returns to invest sustainably in their networks. The CMA's phase 1 analysis of the Parties' recent financial performance and internal strategic documents suggests that both VUK and 3UK are currently viable and competitive businesses and that they would continue to invest in their networks absent the Merger. The CMA therefore believes that if the Merger did not go ahead, 3UK and VUK would continue to compete with each other, as well as with other mobile operators, in a broadly similar way as today.
15. The CMA found that the Merger raises significant competition concerns based on three theories of harm (ie hypotheses about how the Merger could harm competition):
 - (a) First, as a result of **horizontal unilateral effects in the supply of retail mobile services to both consumers and businesses in the UK.**
 - (i) In general terms, the concern under horizontal unilateral effects essentially relates to the elimination of a competitive constraint by removing an alternative that customers could switch to. The CMA's main consideration is whether there are sufficient remaining good alternatives to constrain the merged entity post-merger. Where there are few existing suppliers, the merger firms enjoy a strong position or exert a strong constraint on each other, or the remaining constraints on the merger firms are weak, competition concerns are likely.
 - (ii) In the present case, the CMA is concerned that the Merger would eliminate competition between two major players in the supply of retail mobile services, whose smaller scale – in particular 3UK's – relative to the other MNOs currently gives them a strong incentive to compete aggressively for new customers. This is because the CMA believes that smaller MNOs have stronger incentives to increase their revenue, either through competing aggressively to achieve subscriber growth or seeking to find additional revenue streams, in order to be able to maintain and invest in their network. Evidence seen by the CMA suggests that 3UK, although the smallest MNO, is also the lowest priced MNO, and in the last four years has been pursuing growth strategies while improving its network quality and investing in 5G

capability. Evidence seen by the CMA suggests that VUK has a strong brand, sustained network ambitions – including in relation to 5G – and a strategy to position itself as a converged challenger to VMO2 and BTEE, by offering both mobile and fixed telecommunication services.

- (iii) Combined, VUK and 3UK would become the largest mobile operator by revenue with a share of more than 30%, in a concentrated market. The CMA believes that due to its increased size, the Merged Entity may have less incentive to compete aggressively compared to each Party on a standalone basis, and in particular 3UK. The CMA believes that this may, in turn, reduce the competitive pressure faced by other mobile operators, in particular BTEE and VMO2, and that the remaining competitive constraints, including those posed by MVNOs (which are individually very small and some of which serve niche segments of the market), are insufficient to offset this loss of competition. As a result, the CMA believes that the Merger may lead to higher retail mobile prices for consumers and businesses, and MNOs investing less in network quality.
 - (iv) The CMA's competition concerns in the supply of retail mobile services are compounded by the loss of competition at the wholesale level – on the basis that the ability of MVNOs to compete effectively at the retail level depends on competition between MNOs at the wholesale level – and disruption to network sharing arrangements resulting from the Merger. Regarding the latter, the CMA is concerned that the Merged Entity may have the ability and incentive to disrupt the effective functioning of the two network sharing arrangements which could have the effect of limiting the constraint exerted by BTEE and VMO2.
- (b) Second, as a result of **horizontal unilateral effects in the supply of wholesale mobile services in the UK.**
- (i) As noted above, the concern under horizontal unilateral effects essentially relates to the elimination of a competitive constraint by removing an alternative that customers could switch to.
 - (ii) In the present case, the CMA is concerned that the Merger would reduce the number of MNOs competing to host other mobile operators on their networks from a maximum of four to a maximum of three (in circumstances where not all MNOs compete for all opportunities to host an MVNO on their network). Evidence seen by the CMA also suggests that both 3UK and VUK are regarded as credible wholesale suppliers and constrain each other when competing for tenders.

- (iii) The CMA therefore believes that the loss of 3UK and VUK as independent competitors would diminish prospective and existing MVNOs' ability to leverage competition between MNOs, thereby placing them in a weaker negotiating position to obtain favourable wholesale access terms.
- (c) Third, the Merged Entity may gain access to its competitors' commercially sensitive information through its **participation in both MNO network sharing arrangements**.
- (i) Compared to the current situation, whereby each of VUK and 3UK are only party to one of the two MNO network sharing arrangements in the UK, the Merged Entity would be party to both network sharing arrangements. Although information sharing protocols exist, the CMA is nonetheless concerned that by participating in both network sharing arrangements, the Merged Entity may gain access to commercially sensitive information of both its remaining MNO competitors. This could include data on investments, information on deployment plans, technical specifications, or any other commercial strategy information.
 - (ii) The CMA is concerned that in the context of a concentrated market with only three remaining MNOs, the Merged Entity may be able to use this information to compete less aggressively because, for example, it may be able to predict its MNO competitors' commercial strategies and therefore tailor its own commercial strategies in response, such as by reducing its network investment to the minimum necessary to match its rivals. This may in turn deter the Merged Entity's rivals from making significant network investments, adversely affecting consumers.

...about any entry or expansion?

16. The CMA has seen no evidence of any scope for entry by MNOs due to high costs and the availability of spectrum. As regards MVNOs, the CMA believes that there are barriers to entry and/or expansion for MVNOs, including the high costs involved and challenges with negotiating and obtaining competitive commercial terms from MNOs. In any case, the CMA has not received evidence to indicate that any entry or expansion in response to the Merger would be timely, likely and sufficient to prevent the SLCs from arising.

...about the Parties' claimed efficiencies?

17. When announcing the proposed Merger, the Parties publicly made a number of claims about pro-competitive efficiencies and consumer benefits which they said would result from it. For example, the Parties said that from 'day one' (ie within the first 12-months from closing of the Merger) millions of customers of VUK and 3UK

would enjoy a better network experience with greater coverage and reliability at no extra cost. They also said that the combined business would invest £11 billion in the UK over ten years to create one of Europe's most advanced standalone 5G networks, and that the Merger would create a third mobile operator with scale, levelling the competitive playing field, and thereby increasing competition to the UK's two leading converged operators (BTEE and VMO2).

18. Cost and revenue synergies often form part of the rationale for mergers, and it is not uncommon for firms to make efficiency claims in merger proceedings. Some studies have found that firms often do not fully realise the expected synergies from their mergers and, even for the synergies that they do realise, firms do not always pass on the benefits to their customers. Merger efficiencies therefore must be likely to be realised so as to ensure that customers in the UK do benefit overall from a merger; this means that the evidence supporting claimed future efficiencies needs to be verifiable.
19. If the CMA finds that a merger gives rise to competition concerns (as is the case here), it must then assess whether there are any 'countervailing factors' which prevent or mitigate any SLC arising from a merger, including potential efficiencies. There are two categories of efficiencies: (1) rivalry-enhancing efficiencies and (2) relevant customer benefits:
 - (a) **Rivalry-enhancing efficiencies.** These are efficiencies resulting from a merger that make the merging firms stronger competitors. These efficiencies may prevent an SLC by offsetting any anti-competitive effects of the merger.
 - (b) **Relevant customer benefits.** These are specified benefits to UK customers that result from a merger. For example, a merger may lead to new innovations as a result of the combination of the unique assets of the merging firms. Relevant customer benefits can be taken into account in two ways: (1) as an exception to the duty to refer a merger for an in-depth phase 2 investigation (if the benefits outweigh the SLC and any adverse effects caused by the merger) and (2) in considering remedy options (for example, if an effective remedy option preserves benefits that alternative remedies do not).
20. Part way through the formal 40 working day phase 1 investigation, the Parties made detailed submissions to the CMA, including by providing economic modelling, which they submitted substantiated both rivalry-enhancing efficiencies and relevant customer benefits that the Merger would give rise to. The CMA has assessed the Parties' modelling within the time constraints of a phase 1 investigation and has identified a number of potential issues which it considers limit the extent to which the CMA can rely on the modelling to substantiate the claims made, particularly in a phase 1 context.

21. For example, the CMA notes that the modelling relies on a number of assumptions (including about the number of sites and amount of spectrum to be deployed by the Merged Entity and the financial returns that the Merged Entity would generate from network investment, particularly in relation to standalone 5G). The Parties' Joint Business Plan and Joint Network Plan are cited as evidence of the Merged Entity's intentions but these plans do not take into consideration the competitive landscape post-Merger. In light of the competition concerns that the CMA has identified, the CMA believes that the Merged Entity may in fact have a strong commercial incentive to maximise its profits by rationalising and limiting investment in its network and raising its prices.
22. For these reasons, the CMA does not believe that there are sufficiently evidenced rivalry-enhancing efficiencies or relevant consumer benefits which either prevent the realistic prospect of an SLC or mean that the CMA should exercise its discretion not to refer the merger for an in-depth phase 2 investigation.

What happens next?

23. As a result of these concerns, the CMA believes the Merger gives rise to a realistic prospect of SLCs in the supply of retail mobile services and wholesale mobile services in the UK.
24. The Parties have until 2 April 2024 to offer an undertaking which might be accepted by the CMA to address the SLCs. If no such undertaking is offered, or the CMA decides that any undertaking offered is insufficient to remedy its concerns to the phase 1 standard, then the CMA will refer the Merger for an in-depth phase 2 investigation pursuant to sections 33(1) and 34ZA(2) of the Act.
25. Following such a further detailed investigation, the CMA would reach a final decision as to whether or not the Merger gives rise to an SLC.