THE PARTIES' RESPONSE TO THE NOTICE OF POSSIBLE REMEDIES

Case No. ME.7064.23

Vodafone UK / Three UK

SLAUGHTER AND MAY

Freshfields Bruckhaus Deringer

27 SEPTEMBER 2024

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1. INTRODUCTION AND EXECUTIVE SUMMARY

1.1 The Parties strongly disagree with the CMA's provisional view that the Transaction may result in a substantial lessening of competition ("**SLC**") in the retail and wholesale mobile markets. This response should be read in conjunction with the Parties' response to the Provisional Findings ("**PFs**"), which is due on 4 October 2024.

1.2 The response to the PFs will demonstrate that no SLC will arise and therefore no remedy will be required.

(i) The Transaction will not give rise to an SLC in the retail market:

(a) It will be pro-competitive as it will transform the network position of 3UK and VUK and their ability to meet the future needs of customers in the UK. Network investment is the bedrock of retail and wholesale competition. The Parties are currently constrained in their ability to invest to compete more effectively now and in the future against two market leaders that generate the lion's share of industry cashflows. The Transaction will transform the market from a low investment, low network quality equilibrium to a more dynamic high investment, high competition market.

(b) Among other things, the PFs fundamentally understate the importance of MVNOs, which act as a strong and growing competitive force.

(ii) Likewise, the Transaction will not give rise to an SLC in the wholesale market:

(a) This is effectively a three-player market today: [REDACTED]; 3UK cannot be characterised as a key player when MVNOs are not prepared to be hosted on the network.

(b) Three players will remain post-Transaction, but MergeCo and VMO2 will be better placed to compete: MergeCo due to its increased capacity and better network; VMO2 due to its increased capacity from the spectrum divestment and access to sites included as part of Beacon 4.1[1] (which is already akin to a wide-ranging structural remedy).

(iii) In any case, the very significant rivalry enhancing efficiencies ("**REEs**") arising from the Transaction would prevent any SLC. The Parties welcome the CMA's recognition that the Transaction "*could improve the quality of mobile networks and bring forward the deployment of next generation 5G networks and services.*"[2] However, the Parties disagree that they "*are not likely to realise the full extent of the REEs claimed*" as they "*are not likely to be commercially*

[1] "**Beacon 4.1**" is the agreement between the Parties and VMO2 on 5 June 2024 to revise the Beacon network sharing arrangement.

[2] PFs, Summary, paragraph 6.

incentivised to deliver the full [joint business plan]".[3] On the contrary, there will be a strong incentive to deliver the full REEs as they flow directly from the Parties' 'best-in-class' network strategy to maximise synergies, and are contractually reinforced by the binding deal documents and Beacon 4.1. The CMA has reserved its position for now as to whether the full extent of the REEs would offset all of the adverse effects on competition provisionally identified, however, it does not fully explain why. The response to the PFs will show clearly that they would.

1.3 The Parties' comments below on possible remedies, including those cited in the Notice of Possible Remedies (the "**NOPR**"), are entirely without prejudice to this position.

1.4 When considering remedies, the CMA is required to seek "*as comprehensive a solution as is reasonable and practicable to remedy the SLC*" but must "*select the least costly and intrusive remedy that it considers to be effective.*"[4] This includes taking into account any "relevant customer benefits" ("**RCBs**") that would flow from a transaction, by considering the extent to which alternative remedies may preserve such benefits.

1.5 In this case, as explained in section 2, it is critical that any remedy preserves the very significant RCBs – in the form of improved mobile connectivity for millions of customers, accelerated Advanced 5G use cases and improved fixed wireless access ("**FWA**") services, conservatively estimated to represent billions of pounds of value to UK consumers – that will be generated by the Transaction.[5] In this context, the Parties welcome the acknowledgment that "*this may be a case where RCBs may be present"* and that "*any structural remedy could possibly remove or reduce the value of RCBs*", whereas such RCBs may be "*preserved through a behavioural remedy*"[6] – although caution that this would only be the case where the behavioural remedy is very carefully designed to this end.

1.6 To the extent the CMA retains any concerns, the Parties consider that the proposed investment commitment outlined in section 4 (the "**Proposed Network Commitment**") represents the most appropriate, effective and proportionate remedy – and one that ensures the delivery of the structural and transformative benefits of the Transaction. The NOPR acknowledges that such a commitment would "*have the potential to enhance competition in the relevant markets*" and "[…] *may be an effective remedy in the long term*".[7]

1.7 The Proposed Network Commitment, which would apply across the full eight-year period of the joint network plan ("**JNP**"), involves a commitment to fully integrate a prescribed number of sites within MergeCo's joint network, and to deploy MergeCo's spectrum across specified frequency bands, over agreed areas in the UK. This commitment:

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[3] PFs, paragraph 14.200.

[4] NOPR, paragraphs 7 and 8.

[5] As set out in Annex 02, both direct and indirect benefits will accrue to a very large number of UK consumers.

[6] NOPR, paragraphs 24 – 27.

[7] NOPR, paragraph 32.

(i) would ensure the realisation of very significant REEs that would prevent both SLCs provisionally identified by the CMA, by legally binding the Parties to deliver the relevant elements of their JNP and the resulting substantial increase in network capacity;

(ii) could be reflected in a variation of MergeCo's spectrum licences – meaning Ofcom would be responsible for monitoring compliance, and empowered to impose significant sanctions for any breach – as well as in a final undertaking to the CMA under section 82 of the Act;

(iii) is best viewed as quasi-structural in nature: it would function as an "enabling measure" that delivers an irreversible structural change in network capacity and performance, permanently shifting the incentives of MergeCo and its rivals, and leaving market outcomes to be determined by the competitive process without further regulatory intervention; as such, it would avoid the risks the CMA typically identifies with behavioural remedies;

(iv) is supplemented by the impact of Beacon 4.1, which will further increase network quality and capacity in the market. The Parties welcome the CMA's recognition that Beacon 4.1 will *"provide a notable and rapid increase in network quality for wholesale and retail customers on the VMO2 network, which would further increase rivalry";*[8] and

(v) would preserve – and indeed ensure the delivery of – the very significant RCBs outlined above.

1.8 If the Proposed Network Commitment is given, then no other commitment is needed. Nevertheless, the Parties set out their detailed position on the other potential remedy options referred to in the NOPR.

1.9 The NOPR suggests "*there may [also] be a case for considering some time-limited protections to ensure that retail customers are appropriately protected during the initial years of network integration and roll-out under any Investment Commitment*".[9] The Parties strongly disagree: the CMA's merger simulation, which suggests that consumers on the lowest incomes might see the greatest falls in consumer welfare is flawed, taking no account of the substantial REEs that would be generated by the Transaction and accrue to the benefit of all customers, and the Proposed Network Commitment represents a comprehensive solution to any residual concerns. The CMA's position is also inconsistent with its own provisional finding that the bulk of the REEs would be realised in the early years. Without prejudice to this position, the Parties have developed three effective, workable retail customer protections that could be deployed (individually or in combination) to give further comfort for the first two years of network integration. As explained in section 4, these involve:

(i) a commitment to maintain prices for value-focussed customers;

[8] PFs, paragraph 14.203.

[9] NOPR, paragraph 38.

(ii) a commitment to maintain social tariffs; and

(iii) a commitment to exclude vulnerable customers in financial difficulty from mid-contract price rises (together, the "**Proposed Retail Customer Protections**").

1.10 The Proposed Retail Customer Protections:

(i) would be an effective remedy by ensuring that retail customers – and in particular those customers on low incomes, who are likely to be least able to afford mobile services – were protected against any hypothetical price increases during the initial years of the Proposed Network Commitment;

(ii) would be straightforward to implement, without delay;

(iii) could be effectively monitored and enforced by a monitoring trustee paid for by the Parties; and

(iv) would broadly preserve – or at least have a limited impact on – the RCBs of the Transaction.

1.11 The NOPR also refers to *"pre-agreed non-discriminatory wholesale access terms*" as one of two possible wholesale remedies that could "*potentially be combined with an investment commitment […] to protect MVNOs and their retail customers*".[10] The Parties do not consider there is any need for a specific remedy in the wholesale market – the Transaction is likely to increase rather than decrease competition due to the substantial increase in network capacity – and the Proposed Network Commitment would represent a comprehensive solution to any residual concerns. Nonetheless, the Parties would be prepared to commit that, for a period of three years following completion, MergeCo would make wholesale access to its network available to MVNOs with 2.5 million or fewer customers on pre-agreed terms (the "**Wholesale Reference Offer**").

1.12 As explained in section 6, the Wholesale Reference Offer would establish a competitive offer, with three different pricing tiers (depending on the MVNO's size), a future-pricing mechanism, protections around service equivalence, non-discrimination, access to new technologies etc. It would operate as a minimum standard, with scope to negotiate variations (including better terms) to terms on a bilateral basis. A robust dispute resolution mechanism would be built in.

1.13 The Wholesale Reference Offer:

(i) would be an effective remedy to any residual wholesale concerns, by guaranteeing the continued availability of competitive pricing to MVNOs (directly from MergeCo, and by the application of downward pressure on BTEE's and VMO2's offers); it would also further address any residual concerns in retail, as it would underpin participating and non-participating MVNOs' abilities to continue

[10] NOPR, paragraphs 40 and 41.

to offer highly competitive pricing to end customers, including those who might be particularly price-sensitive;

(ii) would not be unduly complex to implement – there are a number of precedents for reference offers in telecommunications markets (including the UK);[11]

(iii) could be effectively monitored and enforced by a monitoring trustee and independent adjudicator paid for by the Parties; and

(iv) has been carefully designed to minimise the impact on RCBs.

1.14 The NOPR also makes reference to "*MVNO network capacity ring-fencing*" as a possible wholesale market remedy. For the reasons explained in section 7, such a remedy – which the NOPR suggests "*could entail ring-fencing a proportion of [MergeCo's] network capacity exclusively for MVNOs*"[12] – would lead to significant inefficiencies and eliminate or reduce the REEs and RCBs flowing from the Transaction. Further, it could not be implemented for key technical reasons until at least three years after completion. As such, it does not warrant further consideration by the CMA.

1.15 As is the case in any anticipated merger, the NOPR also makes reference to prohibition as a possible "remedy" – although it acknowledges that "*in the current case, [any such remedy] could possibly remove or reduce the value of RCBs, to the extent any arise*".[13] The reality is much starker than that. Prohibition – or indeed the selection of any remedy that undoes the commercial logic of the Transaction and unwinds its benefits, which would include partial divestiture – would have severe and lasting effects on the development of competition in the retail and wholesale mobile markets. As explained in section 8, the UK would remain trapped in its current low investment, low competition equilibrium that has left it at the bottom of the class amongst European countries, ranking 22nd out of 25 countries for 5G availability and download speeds, and with the slowest data download speeds in the G7.[14] The Transaction represents a once-in-a-generation opportunity to change that, and to transform the landscape of UK digital infrastructure.

2. THE TRANSACTION WILL RESULT IN SUBSTANTIAL RCBs WHICH MUST BE PRESERVED BY ANY REMEDIES

2.1 The Transaction leads to wide-ranging benefits which constitute RCBs for the purposes of section 30 of the Enterprise Act 2002 (the "**Act**"). If the Transaction were not to proceed for any reason, these very significant RCBs would be entirely lost to the country's enduring detriment. If the CMA were to require remedies as a condition for approving the Transaction, this may also lead to a loss of RCBs (depending on the form and design of the remedy). Any remedies must therefore be designed to preserve the RCBs which arise

[11] Ofcom, *Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26*, 18 March 2021, available here.

[12] NOPR, paragraph 41.

[13] NOPR, paragraph 24.

[14] OpenSignal, *Mobile network speeds leaped ahead 2023, but some markets lag behind*, 1 February 2024.

from the Parties' transformational JNP and the network investment that will be enabled by the Transaction.

2.2 Certain RCBs overlap in substance with the REEs that will accrue as a direct result of the Transaction. Whilst RCBs and REEs involve conceptually separate legal tests, the network improvements resulting from the Transaction qualify under both tests.

2.3 The Parties welcome the CMA's acknowledgement that RCBs are highly relevant in this case. The NOPR accepts that "*this may be a case where RCBs may be present and preserved through a behavioural remedy*",[15] and that "*any structural remedy could possibly remove or reduce the value of RCBs*".[16]

2.4 The Parties have already provided extensive evidence of RCBs in their submission dated 23 July 2024 (the "**RCBs Submission**"). The efficiencies directly arising from the Transaction, including in the early years following completion, have also been fully described in the Parties' submissions dated 15 February 2024 ("**PCEP 1**") and 27 May 2024 ("**PCEP 2**"). The Parties have further described the benefits of the Transaction in terms of customer experience in their submission of 23 August 2024 (the "**Customer Experience Submission**"). In this section, the Parties build on this evidence to demonstrate that:

(i) the Transaction will result in RCBs which are substantial enough to outweigh any SLC;

(ii) the RCBs are merger-specific, likely and will be delivered in a timely manner for the purposes of section 30 of the Act;

(iii) the RCBs would be significantly reduced by any structural remedy involving partial divestiture; and

(iv) the RCBs would be preserved by an appropriate behavioural remedy. In particular, the Proposed Network Commitment would both preserve and ensure the delivery of the full RCBs. Any other behavioural remedy would need to be carefully designed to preserve RCBs.

2.5 The RCBs relate to three key categories, which are explored further below:

(i) improved mobile connectivity;

(ii) accelerated time to market of Advanced 5G use cases; and

(iii) improved FWA services.

[15] NOPR, paragraph 27.

[16] NOPR, paragraph 24.

i. MergeCo's improved mobile connectivity

2.6 As a result of the Transaction, a significant proportion of the UK population will enjoy better mobile services, in the form of greater coverage, more consistent and reliable connections, stronger signals, reduced congestion, faster speeds and lower latency.[17] We welcome the PFs' recognition of the benefits the Transaction will bring to network quality: "*Overall, we consider that the delivery of the JBP would improve network quality in ways that affect consumer experience*".[18]

2.7 This improved mobile connectivity will yield material benefits to mobile customers across the UK. The Parties' modelling estimates that consumers will enjoy benefits totalling £1.8 billion per year.[19] Either directly or indirectly, the Transaction will positively impact all UK residents and businesses. The positive effects of the Transaction will be felt by a much broader audience than just the Parties' 27 million subscribers. These benefits are large enough to offset any alleged harm identified by the CMA.

2.8 We list some of these key benefits below, in terms of availability, reliability (meaning primarily a reduction in, or elimination of, congestion), network performance, latency and speed below. These are expanded in further detail in section 3.1 of the RCBs Submission and in sections 7 to 31 of the Customer Experience Submission.

a) *Availability*

2.9 Many customers in the UK often struggle to get any mobile coverage. MergeCo will improve availability of mobile connectivity in the UK – both in terms of removing "not spots" (i.e., the areas of each of VUK's and 3UK's networks that do not currently have coverage) but also by improving indoor coverage.

2.10 In addition, 3UK's network still relies on 3G in a material part of the country and VUK still relies on 2G where it does not have 4G. For 3UK, only 73.03% of rural premises in the UK have 4G coverage, decreasing to 69.26% for Wales. For Vodafone, only 77.34% of rural premises in the UK have 4G coverage, decreasing to 71.58% in Wales. Outside these areas, 3UK users rely on 3G, and Vodafone users have to fall back to 2G to have any connectivity at all, following the switch-off of the Vodafone 3G network.[20]

b) *MergeCo will reduce "not spots" and will significantly improve coverage, particularly in rural areas and indoors*

2.11 MergeCo will remove 25% of "not spots" from Day 1 compared to the standalone networks. This means that – where a "not spot" is removed – customers who previously would not have obtained coverage from VUK or 3UK will do so from MergeCo. Removing

[17] RCBs Submission, Tables 1 and 2.

[18] PFs, paragraph 14.82.

[19] Quality-focused merger simulation, Annex A, slide 24. Note that this figure is net of any incentives to raise price driven by unilateral merger effects.

[20] Ofcom rural coverage data, January 2024.

"not spots" will significantly improve coverage, particularly in rural areas, including areas experiencing some of the highest levels of social deprivation in the UK.[21]

2.12 In addition, rural customers will get better coverage, as (alongside urban customers) they will benefit from MergeCo's improved network quality, as explained in this section. A RAND[22] report to the UK Government found customers place a high value (and have a high willingness to pay) for mobile service coverage being extended to "not spots" (including both residents in those areas as well as visitors to those areas).[23] Whilst the Parties consider that network quality is important for both rural and urban customers, it is particularly important for rural customers; this is supported by the CMA's UK population survey results, which found "*rural respondents were relatively more concerned with network related attributes*".[24]

2.13 In addition, as shown in Figure 2.1 below, the percentage of 4G coverage currently declines outside London. In areas where there is no 4G coverage, 3UK's network relies on 3G and the VUK's network relies on 2G only since the 3G switch off. This means that there is a material part of the country/population outside London that cannot use data applications or receive a good quality of service, given that 2G can only really do voice and text and 3G is being phased out.

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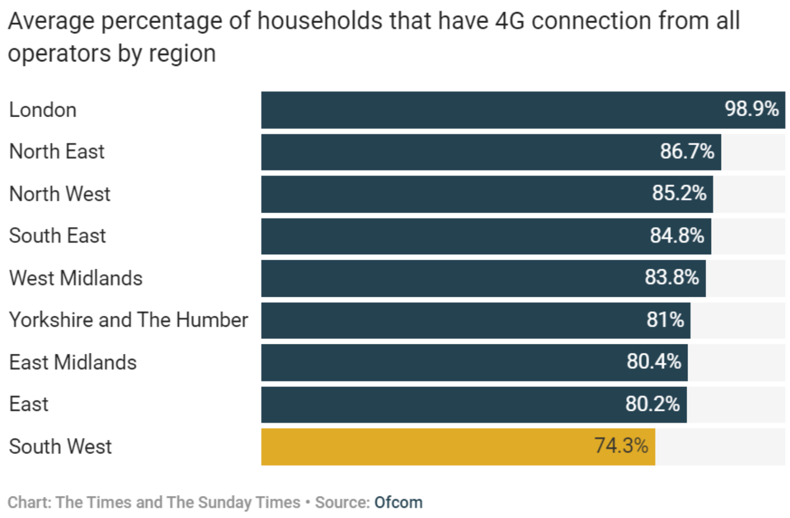
[21] Currently, 5G connectivity is largely absent across rural areas in the UK, with 99.4% of rural constituencies (approx.. 4.87 million people) either: (i) without any [5G] mobile coverage from any operator (a total "not spot"); or (ii) limited access to [5G] mobile coverage, i.e., access from one or more operators but not all (a partial "not spot"). This compares to 66.2% of "not spots" (total and partial) in urban constituencies. Many of the customers in the mid and low traffic areas that will benefit the most from the Transaction through the removal of total "not spots" are amongst those experiencing the highest levels of social deprivation in this country. Over half (46%) of the constituencies that are both rural and fall within the 40% most deprived areas in the country are classified as 5G total not-spots, compared to just 2.7% in predominantly urban constituencies with a similar degree of deprivation. See WPI Economics, Connecting the Countryside, November 2023, page 3.

[22] RAND Europe is an independent not-for-profit policy research organisation that aims to improve policy and decision making in the public interest, through research and analysis.

[23] RAND, *Estimating the value of mobile telephony in mobile network non-spots*, 2014.

[24] PFs, paragraph 8.31 and Figure 8.2.

Figure 2.1



Source: The Times and the Sunday Times. Data from Ofcom.

2.14 In addition to improving outdoor coverage, the Parties' joint network will also improve indoor coverage of 3.4-3.8 GHz band spectrum (also referred to as "**C-band**" spectrum) which, as the PFs recognise, is the optimal spectrum band to supply 5G.[25]

2.15 MergeCo will provide indoor C-band coverage to 95% of the population in the largest 20 cities compared to only [REDACTED]% and [REDACTED]% indoor C-band coverage from the 3UK and VUK standalone networks in 2032, respectively.[26]

2.16 Better indoor coverage means that customers can connect to a mobile service from every room in their house, including from locations deep indoors, without being disconnected or experiencing an extremely slow service. Better indoor coverage also means more opportunities for those who cannot afford or are unable to access fixed broadband. Ofcom has recently stated: *"Patchy coverage in some areas means some people struggle to make mobile phone calls or get online if they're using their mobile to do so. In addition, the materials used in the construction of some homes and business premises can affect indoor signal, for example traditional thick stone walls and slate roofs, and also newer glazing and materials used for insulation."*[27] An earlier report to the Government found that residents (under the age of 65) would be willing to pay £6 more per month over the cost of a normal contract to have a signal in their home (relative to having to go outside).[28]

[25] PFs, paragraph 5.69.

[26] PCEP 2, Figures 15-16 and paragraphs 4.11-4.12.

[27] Ofcom, *Improving your indoor coverage*, 2 June 2023.

[28] RAND, *Estimating the value of mobile telephony in mobile network non-spots,* 2014.

c) *Reliability*

2.17 Today, millions of customers are unable to use their mobile devices properly due to significant congestion or lack of 4G/5G coverage on both standalone networks.[29] This makes daily, routine tasks impossible or very slow to complete. With their current and forecast levels of congestion, on a standalone basis the Parties would often struggle to meet even basic customer needs, let alone more data-intensive applications such as video conferencing or streaming.

2.18 The minimum speed customers expect from mobile networks has increased significantly over time, and will continue to increase in the future, given the constant improvement in the volume and quality of content and services requiring faster data speeds being made available to consumers.[30]

2.19 The vast majority of mobile usage is impossible or unreliable in congested cells. A significant number of VUK[31] and 3UK[32] sites today are congested.

2.20 Absent the Transaction, given the rapid increase in data traffic as new applications emerge:

(i) 3UK expects congestion to [REDACTED] with around [REDACTED] ([REDACTED]%) customers being served by congested sites in Year 4 and [REDACTED] ([REDACTED]%) in Year 6;[33] and

[29] Network reliability is also crucial in underprivileged and marginalised communities, given the high costs of being digitally excluded. A report for the CMA notes that "*consumers who have unreliable internet access or who are less confident online have emerged as groups who are likely to be excluded from the full benefit of the internet as a gateway product. This includes consumers on low incomes who rely on their available mobile data rather than paying for a separate broadband connection, or those who are less confident online such as those with low levels of education. While not being completely excluded, these consumers would struggle to use services such as price comparison websites as it would take them too long to complete forms*" (Britain Thinks, [Getting a good deal on a low income](), 2018.

[30] PCEP 2, paragraph 2.24.

[31] As at March 2024, VUK estimates that: (i) At a 3 Mbps threshold, [REDACTED]% of users in the 'busy hour' ([REDACTED] users) are affected by congestion (corresponding to [REDACTED]% of sites). (ii) At a 5 Mbps threshold, [REDACTED]% of users in the busy hour ([REDACTED] users) are affected by congestion (corresponding to [REDACTED]% of sites). The busy hour is a metric used by VUK network planners to understand the peak demand on their infrastructure which then allows them to dimension and design the network capacity effectively. The busy hour in a given month is defined [REDACTED] It therefore reflects the periods where users on that cell have the highest demand for data over the period. For example, on 13 August 2024, [REDACTED]% of VUK-managed congested sites were congested for at least [REDACTED] hours per day, and [REDACTED]% were congested for at least [REDACTED] hours (at a threshold of 3 Mbps).

[32] In the case of 3UK, [REDACTED] million ([REDACTED]%) of its customers were located in areas served by [REDACTED] congested sites during the busy hour as at the week commencing 6 May 2024 (week 19).

[33] Based on a congestion threshold of 5 Mbps – PCEP 2, paragraph 2.16 and Figure 4, PCEP 2; WP Annex 3, Figure 5.1. By Year 4, around [REDACTED] ([REDACTED]%) of 3UK's customers are expected to experience congestion at a 2 Mbps congestion threshold – see PCEP 2, Figure 29. Even when congestion is measured at a cell level, almost [REDACTED] (i.e., [REDACTED]% or [REDACTED]) of 3UK customers are affected by congestion as of May 2024. The actual number of customers affected will be even greater because customers move between cells, sectors, and sites. Therefore, even a small number of congested cells can adversely affect the experience of a large number of customers. In other words, while the [REDACTED]% of customers affected by congestion is measured at a representative moment of the day, the fraction of customers connecting to a congested cell at least once during the day

(ii) VUK expects congestion to [REDACTED] to [REDACTED]% of sites by Year 4 and to [REDACTED]% of sites by Year 6 – this corresponds to [REDACTED] of VUK subscribers being in congested areas by Year 6 in the counterfactual.[34]

2.21 Post-Transaction, most customers – wherever they are in the country – will experience virtually no congestion when using the network. And these benefits will kick in fast. Up to **2.4 million** fewer customers will experience congestion in the first year and up to **5.3 million** fewer customers by Year 4, compared to the counterfactual. [35]

2.22 The PFs also recognise the impact of the Parties' JNP on congestion, in particular in relation to the deployment of MOCN and the addition of VUK's 1800MHz spectrum to 3UK's sites.[36]

d) Improved network performance

2.23 MergeCo's best network will result in improved network performance for UK customers, made possible by MergeCo's denser site grid and improved 5G stand-alone ("**5G SA**") coverage (as defined below). The Parties welcome statements in the PFs that Ofcom agrees with the benefits to network performance from the combination of a denser network and the expansion of 5G SA:[37]

(i) In terms of densification, MergeCo's network will be denser than either Party's standalone network, as it will have a larger number of sites. As the CMA has found in the PFs, *"[a] denser network is…likely to deliver a less 'patchy' and more reliable service to customers*".[38] This is because *"[s]ignal strength reduces with distance from the site and is further reduced by obstacles such as trees, hills or buildings".* [39] The PFs therefore accept that MergeCo's denser network will "*potentially improve reliability, particularly in rural (but populated) areas and in buildings*".[40] In fact, by 2032, the Parties have evidenced how, in the largest 20 cities, MergeCo will double signal strength for at least [REDACTED] ([REDACTED]% of those cities' populations) compared to 3UK on a standalone

will be greater. Customers are likely to consider a service poor if there is a period of poor quality as they connect to a congested cell (e.g., a Teams call being dropped or if they are unable to use the service when they want to because of congestion) even if the service works reasonably at other times.

34 Based on a congestion threshold of 5 Mbps – PCEP 2, paragraph 2.17; WP Annex 3, Figure 5.2.

35 RCBs Submission, paragraph 113(a).

36 PFs, paragraphs 14.74 – 14.75.

37 PFs, paragraph 14.78: "*Ofcom noted that C-band deployment in urban areas (together with densification – see below) would provide a contiguous outdoors coverage layer in many cases and better indoor coverage with the high-capacity high-bandwidth and low-latency capabilities of 5G SA*".

38 PFs, paragraph 14.79.

39 PFs, paragraph 14.79.

40 PFs, paragraph 14.79.

basis, and for [REDACTED]([REDACTED]% of those cities' populations) compared to VUK on a standalone basis.

(ii) 5G SA coverage will be significantly improved post-Transaction. 5G SA uses dedicated 5G equipment in all parts of the network (i.e., a 5G core network and 5G RAN infrastructure). As noted in the PFs, "*5G SA can offer broader capabilities than existing NSA 5G networks, including very high responsiveness (ultra-low latency), advanced network slicing functions, and potentially improved coverage*".[41] Today, [REDACTED]. VUK has started to build a limited 5G SA network, principally in London, Manchester, Glasgow and Cardiff, but [REDACTED]. [42] Whereas, by FY32, MergeCo will provide 97.6% 5G SA geographic coverage and 100% 5G SA population coverage.[43] This means that every school and hospital in the UK will be covered by 5G SA by Year 6. This level of 5G coverage is in line with the Labour manifesto promise to fulfil "*national 5G coverage by 2030*".[44] Absent the merger, [REDACTED].[45]

(iii) MergeCo will be able to offer the highest-quality 5G SA coverage by 2032 to 86% of the UK population (i.e., customers in high traffic areas) through its extensive C-band deployment. Ofcom has noted that, coupled with densification, C-band deployment in urban areas would provide a contiguous outdoors coverage layer in many cases and better indoor coverage with the high-capacity high-bandwidth and low-latency capabilities of 5G SA.

e) Latency

2.24 MergeCo's latency is projected to drop by [REDACTED]% within four years, which will further support use cases where quick response times are critical.[46]

f) Speed

2.25 MergeCo customers will enjoy significantly increased data speeds from the early years of the network plan, at levels that neither standalone network could achieve even over a much longer term. This is made possible by MergeCo's extensive deployment of C-band spectrum.

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[41] PFs, paragraph 5.18.

[42] The material delta for each party's standalone case vs MergeCo was explained in detail to the CMA in PCEP 2, paragraphs 3.4-3.5 and chapter 4.

[43] Response to question 41 of s109(6) notice (submitted 3 May 2024); RCBs Submission, Figure 1.

[44] Labour Party, *Change – Labour Party Manifesto 2024*, last accessed 3 July 2024.

[45] A £1.8 billion Emergency Services Network tender was awarded to EE without a competitive tender due to the lack of a competitive alternative network. Poor network quality therefore has a real impact on competition across the market (*GOV.UK, ESMCP - Mobile Services Agreement for the Emergency Services Network, 31 July 2024*).

[46] PCEP 2, paragraph 2.4.

2.26 For instance, MergeCo's average maximum[47] available speed is forecast to reach [REDACTED] Mbps by Year 1 (a [REDACTED]% increase) and [REDACTED] Mbps by Year 3, which is [REDACTED].[48]

g) <u>These mobile connectivity benefits will have a huge impact</u>

2.27 MergeCo's improved mobile connectivity represents billions of pounds of value per year for all UK consumers and businesses. The Parties estimate that these benefits will total **£1.8 billion** per year.[49] The benefits are large enough to offset any alleged harm identified by the CMA. This estimate captures benefits to: (i) MergeCo's customers; (ii) customers of MVNOs using MergeCo's network; and (iii) customers of VMO2 and BTEE, as VMO2 / BTEE are likely to drop their prices on average in response to MergeCo's improved offering.[50] Additionally, customers will experience further benefits (not captured in this estimate) when VMO2 and BTEE accelerate investments in their networks post-Transaction (as recognised in the PFs).[51] As noted in the PFs, VMO2's customers will also experience a "*notable and rapid increase in network quality for its wholesale and retail customers, which would further increase network quality competition*", as a result of the Beacon 4.1 spectrum transfer.[52]

ii. Advanced 5G and 5G SA use cases

2.28 MNOs in the UK have predominantly been deploying 5G networks using 5G non-standalone technology ("**5G NSA**"), or "**Basic 5G**", which involves deploying 5G in the RAN alongside the existing 4G RAN and 4G core. 5G NSA / Basic 5G delivers mostly greater capacity and reduced congestion in urban areas. However, 5G NSA / Basic 5G cannot support the full range of capabilities that 5G can ultimately enable and which the UK needs. As noted in the previous Government's UK Wireless Infrastructure Strategy: "*We want to move beyond the basic 5G that is being deployed now over 4G networks to build higher quality, standalone 5G networks that do not rely on older infrastructure… We are therefore setting a new headline ambition for the UK to have nationwide coverage of standalone 5G to all populated areas by 2030*".[53] The manifesto commitment of the Labour Government proposes a similar (or potentially even greater) ambition than the Wireless Infrastructure Strategy.[54]

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[47] Average speeds during the busy hour will be lower than these.

[48] PCEP 2, paragraph 1.8(a). By 2032, MergeCo will achieve average speeds of [REDACTED] Mbps for customers in high traffic areas and [REDACTED] Mbps for customers in mid and low traffic areas, which is around a [REDACTED]fold and [REDACTED]fold increase respectively compared to what the Parties could deliver absent the Transaction.

[49] This figure also accounts for headline price increases. Quality-focused merger simulation, Annex A, slide 24.

[50] As set out at paragraph 2.7 above, the Transaction will also positively impact consumers and business across the UK.

[51] PFs, paragraph 14.202.

[52] PFs, summary, paragraph 62.

[53] UK Wireless Infrastructure Strategy Report, pages 8 to 16.

[54] Labour Party, *Change – Labour Party Manifesto 2024*, last accessed 3 July 2024. Page 30 of the manifesto commitment reads: "*in an ever more connected world, Britain's communication network is also vital. Under the Conservatives,*

2.29 Contrary to 5G NSA / Basic 5G, Advanced 5G (which involves a nationwide 5G SA network together with extensive C-band deployment, new antenna elements, enhanced mobile backhaul capacity and strengthening edge and core capability) can deliver the full potential of 5G, including large gains in network capacity, high data transfer speeds, high reliability, low latency, and all of these benefits at a much higher user density, which all contributes to supporting new use cases (amongst other network improvements). This is acknowledged by BTEE in its submission to the CMA, which notes that MergeCo's combined C-band holdings – which is one of the key inputs into Advanced 5G – will enable it to rapidly commercialise high-capacity and high-throughput use cases.[55]

2.30 Advanced 5G will enable transformational new functionalities and services across cornerstone industries and sectors, including healthcare, agriculture and transport which will, ultimately, be passed on to consumers. The UK Government has invested in a number of pilot projects, namely "5G innovation regions" and the "5G Testbeds and Trials Programme", aimed at exploring 140 5G use cases across a number of sectors, such as healthcare, agriculture, utilities, automotive, transport, and logistics.[56] These programmes have been instrumental in showcasing the success of small-scale 5G innovations, stimulating demand for new digital services while mitigating the commercial risks associated with these innovations.

2.31 However, these small-scale projects rely on a set of network capabilities which are deployed on a localised basis. A step change in UK mobile infrastructure is necessary for these use cases to scale up and achieve widespread adoption, as recognised by the ambitious 5G network roll-out targets set by both the previous and current Governments.

2.32 It is possible that, absent the Transaction, these scaled benefits would never be realised in the UK. This is due to the lack of investment competition that exists in the UK today, with BTEE and VMO2 generating the lion's share of mobile industry cashflows and profits, and being the only parties with the scale (but not currently the incentive) to invest what would be required to enable high-capacity Advanced 5G. However, in order to estimate the financial benefits of the Transaction in terms of revenues generated from Advanced 5G use cases, [REDACTED]:

(i) [REDACTED]:

(a) [REDACTED][57] [REDACTED]; and

(b) [REDACTED].

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investment in 5G is falling behind other countries and the rollout of gigabit broadband has been slow. Labour will make a renewed push to fulfil the ambition of full gigabit and national 5G coverage by 2030".

[55] BT, Response to Issues Statement, , last accessed 18 July 2024, page 38.

[56] Details of these projects are provided in Annex C to the RCB submission.

[57] Network slicing is a feature of 5G SA networks that allows an MNO to create multiple virtual networks (slices) on top of its common shared physical infrastructure. The virtual networks are then customised to operate with specific quality-of-service requirements, meaning each user is served through its own dedicated 'slice' tailored to its individual needs.

(ii) This analysis predicted that the market size for 5G use cases will be **£294 million** larger in the MergeCo scenario than in the standalone scenario in FY30, with the difference increasing to **£498 million** by FY34. This valuation should be viewed as a lower bound estimate of the wider economic impact since it is based on business revenues only and does not quantify any broader impacts of 5G use cases on the economy, including the consumer welfare generated by these use cases.

2.33 A wide range of Government and third-party studies have also evidenced the benefits that Advanced 5G could bring to the country.

(i) A UK Government trial in Liverpool demonstrated that 5G monitoring of patients could save the NHS nearly £1 billion per year.[58] 5G electricity smart grids are projected to save £3.4 billion annually.[59] It is expected that there will be £1.3 billion annually in productivity benefits from applications from road to rail transport.[60]

(ii) Improvements to mobile connectivity that will be delivered by Advanced 5G have been estimated by Barclays to increase annual aggregate UK business revenues by **£51.9 billion** by 2030, or up to **£89.6 billion** with accelerated 5G infrastructure roll-out and quicker adoption of 5G by the residential and business population.[61]

(iii) The broader economic impacts of 5G will be immense. Some studies estimate that 5G could be worth over £150 billion to the UK economy by 2030, but only if a nationwide 5G network is built.[62] However, these benefits are by no means guaranteed and require significant investment in 5G infrastructure, which will be unlocked by MergeCo's 'best-in-class' network.

iii. **Improved FWA services**

2.34 MergeCo's network will have significantly more capacity, with at least a 65% uplift compared to the sum of the Parties' standalone network capacities as at 2029. MergeCo will therefore have the excess capacity necessary to support FWA. As noted in the PFs, FWA is currently little used in the UK, compared to, for example, the U.S. "*where Ofcom noted that T-Mobile USA has about five million FWA subscribers on a network that is similarly dense to that envisaged for the Merged Entity*".[63] 5G FWA is growing rapidly in

[58] WPI Economics for Vodafone, *NHS set to lose out on £1bn of savings each year if 5G rollout slows*, 14 September 2023.

[59] Juniper Research, *The value of 5G for cities and communities*, 2018, page 13 (commissioned by O2).

[60] Ibid, page 8.

[61] Barclays, *5G: A transformative technology*, Barclays, 2019, page 15.

[62] RCBs Submission, Table 3. Two such studies are: (i) Analysys Mason, *Realising the benefits of 5G,* last accessed 15 September 2024, page 7; and (ii) Analysys Mason, *Realising the benefits of 5G*,last accessed 23 April 2024, page 7.

[63] PFs, paragraph 14.125.

many markets, including in the US (where it accounts for all subscriber growth in the US broadband market since mid-2022).[64]

2.35 MergeCo's greater capacity, through its extensive 5G C-band coverage and increased cell density, will provide FWA to more customers, as well as faster and more reliable FWA connections, supporting, on a conservative basis, [REDACTED] FWA customers by 2032.[65]

2.36 Historically, 4G FWA typically served customers in rural areas, where traditional fixed broadband deployments (fibre or cable) were not commercially viable. However, 5G has vastly improved quality-of-service, making 5G FWA competitive against traditional fixed broadband. 5G FWA adoption in countries like the US (where it is nearly as popular in urban areas as in rural ones) [66] shows that 5G FWA will benefit customers throughout the UK, including price sensitive customers in urban areas and customers in rural areas or other areas without access to full fibre.

2.37 FWA also does not need physical cable installations and can be installed more quickly than wired services as it simply requires a router to connect to the network. FWA therefore offers a higher degree of flexibility which is essential for many UK consumers, including, for example, those living in temporary and / or rented accommodation, students, renters whose landlords may not allow adaptations to the property that would permit broadband, or those who cannot afford a fixed broadband connection. FWA also does not require long-term contracts.

iv. The RCBs arising from the Transaction are merger-specific, likely and will be delivered in a timely manner

a) *Merger-specificity*

2.38 The Parties agree with the CMA's statements in the PFs that the REEs in the JBP would not be likely to be brought about by any means other than the Transaction and are therefore merger-specific. [67] As noted in paragraph 2.2 above, these REEs overlap in substance with the network improvement elements of the RCBs which are therefore also merger-specific.

2.39 In relation to the RCBs that do not overlap with the REEs, MergeCo's 'best-in-class' network, with extended coverage and improved capabilities, will provide the core foundation for Advanced 5G use cases and an improved FWA offering. None of these benefits can be attained without MergeCo's 'best-in-class' network, which would not be

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[64] 5G Fixed Wireless Access (FWA) Success in the US: A Roadmap for Broadband Success Elsewhere? | Opensignal.

[65] RCBs Submission, Figure 2, page 7. As described at footnote 137 of the RCBs Submission, the commercial benefits of enhanced FWA provided above (and taken from the JBP) are conservative as they only focus on the revenue potential from cross-selling of FWA to existing VUK mobile customers. However, in practice, MergeCo's FWA offering will compete for customers in the wider fixed broadband market and will benefit from MergeCo's wider C-band footprint and lower congestion.

[66] 5G Fixed Wireless Access (FWA) Success in the US: A Roadmap for Broadband Success Elsewhere? | Opensignal.

[67] PFs, paragraph 14.245.

deployed absent the Transaction. VUK's and 3UK's standalone networks would lack the capabilities necessary to deliver Advanced 5G use cases or FWA to the same extent as MergeCo. In other words, the RCBs are 'merger-specific'.[68]

b) *Likelihood*

2.40 The RCBs are likely, as MergeCo has a strong economic incentive to pursue its intended 'best-in-class' network strategy (via the JBP) which would deliver the full RCBs resulting from the Transaction. This is because the net benefits to MergeCo under the JNP are greater compared to alternative strategies. The full JBP delivers an additional **£1.5 billion** in value compared to an alternative hypothetical scaled-back scenario where MergeCo maximises cost savings only (the so-called "**SBS**").[69] The Parties' commercial incentives to deliver the JBP are also contractually reinforced by the Transaction Documents and the Beacon 4.1 Long-Form Agreements.[70]

2.41 Whilst the Parties welcome the findings in the PFs that the Parties have the incentive to deliver "*some*" of the claimed REEs, the Parties disagree with the PFs' view that the Parties "*are not likely to have the incentive to deliver the full JBP, and therefore the quantum of any REEs is likely to be less than claimed by the Parties*".[71]

2.42 However, in any event, the Parties note that any concerns relating to MergeCo's incentives to deliver the full JBP (and the resulting full REEs/RCBs) would completely fall away as a consequence of the Proposed Network Commitment, which will commit MergeCo to implement the key elements of the JBP and would mean that all REEs/RCBs are likely (see section 4 below).

c) *Timeliness*

2.43 The RCBs will be realised in a timely manner, with a large proportion realised in the short term (including from Day 1).

2.44 The Parties welcome the PFs' acknowledgment that a range of the REEs – which the Parties consider to represent a substantial part of the REEs (and, by extension, the RCBs) – would be timely.[72]

(i) The PFs find that the "*Day 1 benefits*" are likely to occur shortly after closing given that they will generate benefits for the Merged Entity and are relatively easy to

[68] The merger-specificity of each of the RCBs is set out in detail at section 4.1 of the RCB's submission.

[69] RCBs Submission, paragraph 110(a).

[70] The Parties' commercial incentives to deliver the JBP are contractually reinforced by: (i) the Transaction Documents – including the exit mechanisms under the Shareholders' Agreement (i.e., the respective put/call options) and the enforceability of the adopted Initial Business Plan (of which the JBP is a key input)(See WP Annex 3, paragraph 4.3 for further details.); and (ii) the obligations in the Beacon 4.1 Long-Form Agreements (as defined in the Parties' response to the REE Working Paper ("**WP Annex 3**")) that entrench aspects of the JBP, as well as incentivise its delivery via the agreement to transfer spectrum to VMO2 (see WP Annex 3, paragraph 4.13 for further details).

[71] PFs, paragraphs 14.189 – 14.190.

[72] PFs, paragraph 14.199.

implement. By "*Day 1 benefits*", the PFs include the benefits arising from implementation of MOCN and the deployment of additional spectrum through sharing the Parties' combined holdings (for example, in relation to 1800 MHz spectrum). [73] These "*Day 1 benefits*", which the PFs find are "*timely*", are substantial in and of themselves – for example:

(a) MOCN and spectrum sharing, which together with site integration and upgrades, deliver a step change in capacity and a steep reduction in congestion in Year 1.[74] By Year 1, the number of congested MergeCo sites will fall by between [REDACTED]% and the share of MergeCo customers served by congested sites will fall by seven to eleven percentage points.[75] This is equivalent to approximately 1.5-2.4 million fewer customers experiencing congestion in the first year.[76]

(ii) The PFs find that "*some degree of network integration*" will "*start once the Merger completes*" and will be "*timely, particularly given the inevitability of network integration*".[77] The benefits of this "*timely*" network integration in the early years period will alone be substantial – for example:

(a) More than [REDACTED] sites will be integrated into the MergeCo network in the first year alone, allowing customers of both Parties to gain access to all integrated sites.[78]

(b) MergeCo will be incentivised to upgrade sites "*in one go*" to their JNP end-state configuration as it integrates them.[79] As noted above, the integration (and upgrade) of sites in Year 1 will contribute to the significant Day 1 reduction in congestion.[80]

(c) Congestion will continue to fall sharply over the early years as MergeCo sites are integrated. By Year 4, the number of congested MergeCo sites is projected to fall by [REDACTED]% (from [REDACTED] to

[73] PFs, paragraph 14.192.

[74] PCEP 2, Figure 26 provides a breakdown of the decrease in number of congested sites attributable to site integration (and upgrade), MOCN and the sharing of the 1800 MHz spectrum, with spectrum sharing contributing a [REDACTED]% reduction in the number of congested sites and MOCN contributing a [REDACTED]% reduction in the number of congested sites. See also Figure 27 which provides this breakdown in relation to a different measure of congestion.

[75] Measured using a 5 Mbps threshold during the busy hour – PCEP 2, paragraph 1.7.

[76] RCBs Submission, paragraph 113(a).

[77] PFs, paragraph 14.197.

[78] PCEP 2, paragraph 1.7(a)(iii).

[79] For example, Phase 1 Decision Response, paragraph 6.29; PCEP 2, section 5; WP Annex 3, paragraph 2.16.

[80] As explained in PCEP 2, paragraph A.51 and Figure 26, site integration and upgrades in Year alone contribute to a 21 percentage-point reduction in the number of congested sites at busy hours (as compared with the expected number of congested sites given traffic growth, were MergeCo to maintain its starting network configuration).

[REDACTED]).[81] This is equivalent to approximately **5.3 million fewer customers** experiencing congestion by Year 4.[82]

(d) Network integration and site upgrades will contribute to MergeCo's ability to offer much faster speeds over the early years of the JNP. Customers will be able to experience average maximum speeds of [REDACTED] Mbps in the first year (a [REDACTED]% increase)[83], i.e., material speed improvements for all applications required in day-to-day life and in certain business applications. By Year 3, MergeCo will deliver [REDACTED].[84]

(iii) The PFs consider that "*likely rivalry-enhancing network quality improvements of the* spectrum *transfer to VMO2 pursuant to Beacon 4.1 are likely to occur within the short- to medium-term*".[85]

2.45 By finding that the early year benefits described in paragraph 2.44 above are both likely and timely, the PFs effectively acknowledge that the Transaction will generate substantial RCBs that are timely.

2.46 The PFs do not express a view on whether the remaining REEs claimed by the Parties are "*timely*", as the CMA provisionally did not consider them "*likely*". However, the Parties consider that the remaining benefits are indeed also "*timely*" for the purposes of the RCB legal framework:

(i) As regards benefits from Advanced 5G, incremental revenue from Advanced 5G use cases are expected to materialise **within [REDACTED]** following completion of the Transaction.[86] This is because MergeCo expects to have built up its network slicing capability within two years post-Transaction[87], such that use cases related to network slicing are expected to be launched earlier and generate incremental revenues from Year [REDACTED].[88]

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[81] PCEP 2, paragraph 1.7(b). WP Annex 3 sets out the reasons the CMA was incorrect to consider that the congestion relieving benefits of MOCN were limited in the REE Working Paper.

[82] RCBs Submission, paragraph 113(a).

[83] PCEP 2, paragraph 2.21.

[84] PCEP 2, paragraph 1.8(a).

[85] PFs, paragraph 14.198.

[86] RCBs Submission, paragraph 114 and Figure 12.

[87] Network slicing is possible within two years (and so can generate some revenue) but it is expected to take at least 3 years to be able to provide network slicing on a nationwide basis to allow ringfencing at the scale of – for example – the NOPR's capacity ringfencing proposal.

[88] Examples of network slicing applications across the healthcare, public sector and broadcasting verticals include; remote medical emergency assessment; robotics for assisted living; precision medicine; real-time smart surveillance; massive mission critical IoT; remote broadcast and production; temporary mass event broadcast; and on-site live experience.

(ii) With respect to **FWA**, MergeCo's capacity uplift will allow MergeCo to offer FWA to many more customers and to provide a much better 5G FWA quality of service as soon as 5G C-band is deployed.

(iii) As regards the longer term network quality benefits (i.e., outside the "Day 1 benefits"), the Parties welcome the recognition in the PFs that "*investment in mobile networks requires a long-term perspective, particularly with regard to the proposed integration of two of the four mobile networks in the UK, as is the case here*".[89] The Parties agree, as the mobile industry is highly capital intensive, requiring substantial upfront investments, and the assessment of these investments requires a long-term perspective beyond the early years. It is critical that the CMA is able to recognise RCBs in industries involving complex infrastructure, and apply its legal tests accordingly. The RCBs that accrue from the Transaction in both the short and the longer term are "*timely*" and therefore relevant to the CMA's assessment of RCBs.

2.47 The PFs make certain reservations about whether the RCBs will be useful or valued by customers.

2.48 The reservations in the PFs about the relevance of RCBs to customers are misplaced and the Parties will respond in this regard in their response to the PFs. For instance, in relation to improved mobile connectivity, the Parties will demonstrate in their response to the PFs why network quality is a critical driver of customer choice and that improvements in network quality (which leads to better mobile connectivity) matter to consumers.

3. PARTIAL DIVESTITURE WOULD BE DISPROPORTIONATE, DESTROY THE RCBS AND BE INEFFECTIVE

3.1 The Parties note that the CMA is evaluating a "*partial divestiture remedy requiring the divestiture of or access to certain mobile network assets and spectrum (from either VUK or 3UK) in the UK*".[90] The NOPR states that the aim of this remedy would be to enhance the competitive capability of an existing MVNO or provide sufficient assets to enable a new provider to enter the market as an MNO. The NOPR states that such a remedy would likely also require a national roaming agreement and on-going support from MergeCo at a minimum.[91]

3.2 The CMA's initial views are that a partial divestiture remedy will <u>not</u> be effective for a number of important reasons, as set out at paragraphs 23(a) – (d) of the NOPR and, as noted at paragraph 24 of the NOPR, due to the fact that any structural remedy could "*possibly remove or reduce the value of RCBs*" and would also result in a number of composition/purchaser risks, as set out in detail in paragraphs 3.12 to 3.18.[92] The Parties agree and consider that a partial divestment cannot be an effective remedy in addressing any residual SLC found by the CMA in the retail or wholesale markets, as explained in

[89] PFs paragraph 14.196.

[90] NOPR, paragraph 21.

[91] NOPR, paragraph 21.

[92] NOPR, paragraph 23.

paragraphs 3.12 to 3.18 below. For the avoidance of doubt, the Parties also wish to make clear that such a remedy is commercially unacceptable and would not be accepted under any circumstances, as it would undo the commercial logic of the Transaction and undermine the Parties' ability to deliver the JNP and therefore the REEs and RCBs.

i. A purchaser would need a substantial package of assets in order to enter as a fourth MNO

3.3 A purchaser would need the following assets in order to operate as a new fourth MNO in the UK. Lack of scale and the magnitude of the upfront investment required to acquire enough suitable spectrum, access to sites, a customer base, retail stores, and transitional arrangements (such as a national roaming agreement) while it builds its national network would pose insurmountable obstacles to the new operator establishing itself as a fourth MNO.

(i) **A significant customer base**. This is to act as a source of revenues to fund and justify network investments on an ongoing basis. As the Parties have explained, the fourth operator would need a customer base significantly larger than each Party has today to achieve the required scale and earn an adequate return on capital. Given the state of development of the UK mobile market, the Parties believe that a new entrant MNO starting from scratch would not be viable.

(ii) **Radio access sites**. Based on how current MNOs supply national coverage, the Parties would expect the purchaser to require access to at least 16,000 to 18,000 radio sites, assuming the purchaser had access to sufficient low-frequency spectrum to provide a thin coverage layer at a national level (if the new MNO does not have access to this low-frequency spectrum then they would be expected to require a larger number of sites so that they can build a denser network). However, the Parties note that most of the sites used by VUK and 3UK[93] are accessed via third party providers ([REDACTED], and [REDACTED]).[94][95] In particular, 3UK has sold [REDACTED] unilateral sites to Cellnex. Therefore, in order to access radio access sites, this would require the purchaser to negotiate a significant number of agreements with third party tower companies / infrastructure providers, (such as [REDACTED] and other WIPs/MSPs),[96] network sharing partners and individual landlords, as well as obtaining planning permissions from local authorities. In reality, a fourth operator would not be able to build a cost-effective national network of sites without entering into a site sharing agreement with one of the established MNOs as well.

[93] With limited exceptions, as set out in further detail in response to 3UK's response to Q42 of RFI3 and VUK's response to Q43 of RFI3.

[94] [REDACTED].

[95] Also known as Managed Service Providers. For further details on the Parties' site ownership, please see the responses to questions 42 and 43 of RFI 3.

[96] Also known as Managed Service Providers (MSPs) or Wireless Infrastructure Providers (WIPs). For further details on the Parties' site ownership, please see the responses to questions 42 and 43 of RFI 3.

(iii) **Spectrum**.

(a) In order to offer mobile coverage, the MNO would need an appropriate portfolio of spectrum – in terms of both quantity and type of spectrum.

(I) A minimum quantity of spectrum (MHz) - usually referred to as spectrum bandwidth – to provide enough overall capacity and average end user connection speed. A fourth MNO is likely to need significantly more than 10-15% of the total available mobile spectrum (i.e. between c.110MHz and 170MHz) to be viable, and there is no plausible scenario in which that amount of spectrum could be made available to it.

(II) The type of spectrum (i.e. the frequency band of the spectrum) can also impact the coverage provided by an MVNO, as different spectrum bands have different characteristics – it would be essential for a fourth MNO to have the correct mix of low frequency spectrum, (e.g. spectrum in the 700 MHz, 800 MHz or 900 MHz bands) to provide national coverage and coverage indoors. The fourth MNO would also need enough higher frequency spectrum to address the anticipated growth in data traffic and provide adequate capacity and speeds.

(b) In practice, in order to offer mobile coverage and capacity at a national level, as a minimum, the Parties consider the spectrum portfolio would need to include the following spectrum, which would not be achievable without a complete restructuring of spectrum across all MNOs:

(I) 2 x 10 MHz of a low frequency FDD band (e.g. 800 MHz or 900 MHz), to offer basic services such as voice calls, messaging and low speed internet access with adequate national 4G coverage. Annual spectrum licence fees would amount to **£13.85 million** for 2 x 5 of 900 MHz spectrum, or **£27.70 million** for 2 x 10 of 900 MHz spectrum (in addition to the initial cost to acquire the spectrum from another MNO).[97] Equivalent spectrum fees will apply for 800 MHz spectrum from 2033;

(II) 2 x 10 MHz of low frequency spectrum or mid-frequency FDD spectrum bands (e.g. 700 MHz and/or 1800 and 2100 MHz) to offer basic services over 5G technology. Annual spectrum licence fees would amount to **£10.20 million** for 2 x 5 MHz of 1800 MHz spectrum, or **£6.82 million** for 2 x 5 MHz of 2100 MHz spectrum (in addition to the initial cost to acquire the spectrum from another MNO). Equivalent spectrum fees will apply for 700 MHz spectrum from 2041;

[97] In 2024, noting that spectrum licence fees increase in line with inflation each year.

(III) 2 x 20 MHz of mid frequency spectrum bands (1800 – 2600 MHz) to provide additional capacity to 4G and 5G data services in dense customer areas with higher population density. Annual spectrum licence fees would amount to **£13.64 million** for 2 x 10 MHz of 2100 MHz spectrum (in addition to the initial cost to acquire the spectrum from another MNO). Equivalent spectrum fees will apply for 2600 MHz spectrum from 2023; and

(IV) 20 to 40 MHz of 3.4-3.8 GHz band (C-Band) TDD spectrum to provide high speed 5G services. Spectrum fees would apply for this spectrum from 2038.

(iv) **An extensive web of other network assets and capabilities required to run a mobile network, including**:

(a) **access to a national aggregation and transport network.** This includes access to a high-capacity fibre network for transport and access transmission (which may need to be built). This could either be self-built (although this would be very capital intensive, with long build lead times) or accessed via a third-party provider, which requires negotiation;

(b) **a core network.** A virtualised, highly cyber-secure, edge-based mobile core network able to offer voice and high-speed data services. The mobile core network would need to be uniformly distributed nationally and placed in several locations in different parts of the UK to ensure network resilience and meet low end-to-end latency requirements to compete with other MNOs for low-latency based services;

(c) **data centres.** Access to strategically placed data centres across the country in order to host OSS, IT and data capabilities;

(d) **ability to offer mobile services over 4G and 5G technologies,** which would require different radio and core active electronic equipment and different network architectures. Temporary access to legacy technologies, such as 2G or 3G, might also be required if customer base does not have access to latest generation handsets;

(e) **a network operation centre**, which is necessary to manage and maintain an MNO's network infrastructure, to ensure reliable and constant connectivity to critical infrastructure. This would need to be at a central location from which the network can be operated;

(f) **access to qualified engineering and deployment skill sets** in order to build the mobile network, and maintenance and field engineering capabilities in order to maintain it on an ongoing basis;

(g) **international roaming agreements**, so that customers are able to use their phones when they travel abroad;

(h) **national, international and internet peering interconnections**, so that customers are able to make and receive domestic and international voice calls and access the internet and data both in the UK and across the world; and

(i) **technical tools and support** for networks, retail and wholesale teams, to enable them to be able to offer retail and wholesale services to their customers.

(v) **A full Business Support System** capable of supporting, among other things, billing, charging, customer relationship management (CRM), provisioning, inventory management, digital, retail channel support, financial reporting.

(vi) **A nationwide network of retail stores and customer care services**, including supporting regulatory mandate systems such as mobile number portability and mobile switching.

3.4 Access to the network assets described in paragraph 3.3 above are very costly, and so the purchaser would need access to large-scale, cost-effective vendor procurements in order to achieve favourable network unitary costs, such as radio equipment. In addition, in order to share the extensive costs of running a nationwide mobile network in the UK, the Parties consider that the purchaser would need to enter into a network sharing arrangement with another MNO, as all the MNOs currently do today. The Parties consider that it would be challenging for a network sharing arrangement to function in practice, in particular due to the degree of asymmetry and differing incentives between a new entrant and the incumbent MNOs.

3.5 The purchaser is also likely to require extensive support arrangements from MergeCo due to complexity or services and assets required. For example, MergeCo would likely need to enter into a national roaming agreement, or an MVNO-like agreement to grant the purchaser access to its network. However, restrictions under existing network sharing arrangements could impact MergeCo's entry into such a national roaming agreement and its terms. This would also only be a temporary measure – in the longer term, the purchaser would need to build its own network in order to act as a mobile network operator and not as an MVNO.

3.6 Procuring the assets necessary to enable a fourth MNO to enter the market would also be subject to material regulatory and financial hurdles. For example:

(i) **SRN obligations**: As the CMA is aware, spectrum licences in the UK require MNOs to meet specified coverage obligations, including data coverage obligations, geographic coverage obligations and the MNOs' Shared Rural Network ("**SRN**") obligations agreed with the UK Government. [98] The SRN inserts conditions in MNOs' 900 MHz and 1800 MHz spectrum licences that require all MNOs to provide good quality data and voice coverage to 88% of the country's landmass by 30 June 2024, and 90% by 31 January 2027. As set out above, the

[98] Mobile coverage obligations - Ofcom.

Parties expect that a new entrant would require at least 16,000 to 18,000 radio sites to meet these targets and compete effectively as an MNO.

(ii) **Regulatory fees**: MNOs are required to pay regulatory fees to Ofcom to operate a network based on their turnover.

(iii) **Regulatory compliance obligations**: including under the Telecoms Security Regulations 2022 and Regulation of Investigatory Powers Act 2000.

(iv) **Spectrum licence fees**: Annual spectrum licence fees must be paid for the use of 900 MHz, 1800MHz and 2100MHz spectrum bands each year. Please see paragraph 3.3(iii)(b) above for examples of the magnitude of these significant, annual costs, which must be borne by all MNOs.

(v) **Other spectrum licence obligations**: The new entrant would need to comply with frequency-specific licence conditions, which would require skilled technical resource. Specifically, in relation to: (i) 700MHz and 800MHz spectrum, the requirement to mitigate any interference to Digital Terrestrial TV (i.e., Freeview) services; (ii) 900MHz spectrum, the requirement to coordinate any deployment with the GSM-R system operated by Network Rail; and (iii) 2600MHz and 3400MHz spectrum, the requirement to coordinate any deployment so as not to interfere with aviation radar capability.

ii. **Partial divestiture would destroy the RCBs directly attributable to the Transaction**

3.7 In order to be reasonable and proportionate, the CMA must select the least costly remedy, or package of remedies, of those remedy options that it considers will be effective. [99] The CMA must seek to ensure that no remedy is disproportionate in relation to the SLCs identified and their adverse effects.

3.8 A partial divestiture remedy would destroy the RCBs that would otherwise result from the Transaction.

(i) A partial divestiture remedy would prevent MergeCo from executing its JBP and JNP in full. This is because it would involve the loss of access to network assets and spectrum which would prevent MergeCo from being able to plan the delivery of a ‘best-in-class’ network. As the JNP would no longer be able to be delivered in full, consumers and businesses would also no longer benefit from: the extensive improvements to mobile connectivity in MergeCo’s network (including the improved coverage, reliability, signal strength and signal speeds); the acceleration of the availability of Advanced 5G use cases; and the greater availability of FWA as evidenced extensively in paragraphs 2.28 –2.37 above.

(ii) The loss of the ‘best-in-class’ network crown would undermine the rivalry-enhancing effects of the Transaction, as it would no longer lead to greater investment competition for and from BTEE.

[99] CMA’s Merger Remedies Guidance, paragraph 3.6.

(iii) The inability to deliver the JNP would also detrimentally affect VMO2 and its customers (including MVNOs like Sky Mobile and Tesco Mobile), as well as prevent it from benefitting from the work programmes developed under Beacon 4.1.

3.9 As explained in paragraph 3.2, the loss of RCBs means that the CMA should not accept a partial divestiture remedy, and that an effective behavioural remedy would be more appropriate – in particular, the Proposed Network Commitment.

3.10 In addition, at the centre of the commercial rationale for the Transaction is to bring together the assets of two sub-scale MNOs to deliver a step change in the network capacity and quality, and hence the competitiveness, of the Parties – creating a new, even more sub-scale fourth MNO makes no sense. The Transaction (and the REEs it creates) is the only route to achieving a long-term sustainable future for both businesses. The Transaction creates a third MNO with the scale and ability to compete sustainably and deliver a 'best-in-class' network.

3.11 A partial divestiture – which would presumably include assets including significant spectrum holdings – would reduce or remove the scale benefits of the Transaction and therefore undermine the very commercial rationale for the Transaction.

iii. **Partial divestment gives rise to more risks than behavioural remedies in the context of this case (due to fundamental lack of scale and other substantial risks)**

3.12 Even if MergeCo were to transfer the assets referred to in paragraph 3.3 above to the purchaser (e.g., spectrum and a package of sites owned by the Parties), the purchaser would still require significantly more assets in order to operate as a fourth MNO. This is because the Parties would not be able to provide them with the assets listed in paragraph 3.3 above. The purchaser would therefore likely require on-going support from MergeCo, including in the form of a national roaming agreement for a temporary period whilst the purchaser builds out its network.

3.13 However, even considering any on-going temporary support from MergeCo, the purchaser would be unable to operate effectively in the UK market due to their fundamental lack of scale.

(i) Scale is a critical driver of an MNO's ability to compete effectively, as mobile is a capital-intensive industry characterised by economies of scale. Both Parties have provided extensive evidence to demonstrate why, given the future challenges facing the mobile market in the UK, they do not have sufficient scale[100] (in terms of assets and ability to earn ROCE > WACC) and do not generate sufficient cashflows today to compete effectively. Indeed, the PFs recognise the importance of scale in this market: "*We provisionally consider, that the mobile telecommunications industry is characterised by the need to make significant*

[100] The type of scale needed is in relation to each network deployment (i.e., the number of customers utilising each network asset deployed / the number of subscribers over which to spread fixed costs). Sufficient profitability and return on investment can only be improved by having more customers using and paying for the benefits of the network assets locally / nationally, as opposed to simply having a greater total number of customers, regardless of location. See Ofcom, *Ofcom's future approach to mobile market and spectrum*, February 2022, available here.

infrastructure investments, the presence of high fixed costs, and economies of scale".[101] This is also supported by several third parties cited in the PFs: "*A number of mobile operators and stakeholders told us that, as a result, having sufficient 'scale' (ie sufficient subscribers providing sufficient revenue to (i) cover a high fixed cost base, and (ii) maintain and improve network infrastructure) is important to an MNO's ability to operate effectively*".[102] The CMA also acknowledges in the PFs (see Appendix C, Importance of scale) that BTEE's internal documents suggest that it views operating at scale as an important factor in providing a competitive mobile offering. Similarly, VMO2's internal documents suggests that it also views operating at scale as an important factor in providing a competitive mobile offering. Ofcom has also recognised that scale economies are currently a feature of mobile markets.[103]

(ii) Any suitable purchaser would clearly not be able to achieve the scale needed to compete effectively. As the Parties have extensively evidenced, each Party is currently sub-scale today,[104] and the purchaser would necessarily be smaller than each Party today in terms of customer numbers (as they would either be a new entrant with no pre-existing customers or an existing MVNO, all of whom currently have less subscribers than each of the Parties). They would therefore generate significantly less subscriber revenues than the Parties do today, and so would be unlikely to be able to cover the capital-intensive costs of building and running a mobile network.

(iii) The purchaser's network would also necessarily involve a sub-set of assets currently used by the Parties.[105] As recognised in the NOPR, this would "*unwind economies of scale, potentially undermining the remedy's effectiveness*".[106] Even if some sites could be divested, the assets that MergeCo could divest to the purchaser would not be sufficient to make a contiguous network or to enable the purchaser to operate a credible nationwide mobile network. As noted in paragraph 3.6, the Parties would expect the purchaser to require access to at least 16,000 to 18,000 radio sites. The Parties already lag behind in terms of coverage and would need more sites to be able to compete on coverage.[107] Given the purchaser would only receive a sub-set of the Parties' assets, they would not be able to receive a package of network assets that would match the VUK and 3UK standalone networks today, and it is highly unlikely that any such

[101] PFs, paragraph 8.114.

[102] PFs, paragraph 8.110.

[103] Ofcom's future approach to mobile markets and spectrum Conclusions paper, 6 December 2022, paragraph 4.20.

[104] See the Parties' response to RFI3, Q1.

[105] NOPR, paragraph 23(a).

[106] NOPR, paragraph 23(c).

[107] For example, OpenSignal's coverage experience data shows the Parties significantly behind the coverage experience of VMO2 and BTEE (Source: OpenSignal, "Vodafone and 3 set to create UK's leading mobile coverage network post-merger", 26 March 2024). The coverage experience score is calculated as the area where OpenSignal users on a given operator's network have seen signal of any generation (2G to 5G) as a share of the total populated regions within the country where users have taken readings.

package would be in the requisite locations and form the requisite site density to enable the purchaser to compete effectively.

3.14 3UK's experience is proof of these points: a fourth MNO created via divestment of sites to a network that would be smaller than 3UK's current network would not be a workable solution, given 3UK currently already experiences the highest churn of all MNOs, mostly due to its network quality. The Parties expect that the new entrant's network would be of worse quality and scale than either Party, meaning it would therefore not be a viable operator, or an effective competitive constraint.

3.15 A new fourth MNO could not realistically roll-out a new network while trying to build a large enough customer base in a mature mobile market. As explained to the CMA, [REDACTED]. 3UK's market share has been stagnant since 2016. Finding growth would be even more difficult for the new operator. The mobile market is more mature today (in terms of subscriber penetration rates) than in 2003 and the new MNO would be more dependent than 3UK was on building its customer base by taking customers from much larger MNOs.

3.16 Other risks or challenges the purchaser would face include the following:

(i) financial resilience and network performance challenges necessarily resulting from the creation of a new business involving a complex web of assets. As noted in the NOPR, "*the new MNO would obtain access to a package of assets that has never before operated as a stand-alone business*" and so it would be difficult to assess "*the financial resilience or expected performance of the new MNO with any degree of accuracy*";[108]

(ii) there would also be regulatory requirements to factor in, given MNOs operate in a highly regulated industry. In addition to significant ongoing compliance costs, the purchaser would need to obtain an extensive set of licences from Ofcom. For example, obtaining the licences required to hold the spectrum holdings the Parties described in paragraph 3.3(iii)(b) above as being the minimum spectrum allocation to enter the market, would represent a significant cost. Such licences would then be subject to significant annual licence fees, for example, **£27.70 million** for 2 x 10 of 900 MHz spectrum and **£13.64 million** for 2 x 10 MHz of 2100 MHz spectrum. The purchaser would likely be required to meet the SRN PNS obligation, which all other MNOs are subject to, which would similarly entail significant costs; and

(iii) further, in order to deploy equipment on sites (and potentially build new sites), the purchaser would need to navigate the UK's planning system, negotiate for landlord consents and overcome physical constraints on site. This would take many years to deploy a network nationally.

3.17 As a result, due to (i) the purchaser's fundamental lack of scale; (ii) the practical challenges of building a customer base and obtaining access to an extensive web of assets beyond just spectrum and a temporary nationwide roaming agreement; and (iii)

108 NOPR, paragraph 23(b).

the substantial composition risks from creating a mobile network that has not previously acted as a standalone business, the Parties do not consider it possible for a partial divestiture to enable a purchaser to act as an effective competitive force in retail or wholesale mobile markets, or to address the SLCs identified in the PFs.

3.18 The Parties do not consider there to be any suitable purchaser for such a package of assets that could compete effectively in the UK. As explained in paragraph 3.13 above, whether they were a new entrant (with no subscribers) or a pre-existing MVNO in the market (with less subscribers than each Party today), the purchaser would be unable to operate effectively as an MNO due to their fundamental lack of scale. The Parties also are not aware of any suitable purchaser that would be interested in acquiring a partial divestiture package and have not been approached by any such potential remedy taker. This is not surprising due to the well-publicised financial challenges VUK and 3UK have faced running complex mobile infrastructure businesses whilst being sub-scale.

iv. **The RCBs would be preserved by a behavioural remedy – in particular, the Proposed Network Commitment. Any other behavioural remedy would need to be carefully designed to preserve RCBs**

a) *The Proposed Network Commitment*

3.19 The substantial RCBs from the Transaction could be fully or largely preserved by a behavioural remedy, as there need be no loss of sites and spectrum that would prevent MergeCo from being able to plan the delivery of a 'best-in-class' network. In particular, the Proposed Network Commitment (described in section 4 below), which is quasi-structural (or "*quasi-behavioural*", in the terms of the NOPR), would preserve and ensure the delivery of these RCBs.

3.20 In relation to the other behavioural remedies the NOPR considers – namely, the time-limited retail market customer protection (described in section 5 below), the pre-agreed wholesale access terms (described in section 6 below) and the capacity ring-fencing remedy (described in section 7 below) - these would need to be carefully designed to preserve RCBs.

b) *Time-limited retail market customer protections*

3.21 If appropriately calibrated and time-limited, retail market customer protections would largely preserve RCBs. However, such customer protections will inevitably erode RCBs to some degree by impacting MergeCo's revenues, and its ability to invest in its network.

3.22 As set out in further detail at section 5 below, the Proposed Retail Customer Protections have been designed to maximise their positive impact on the retail customers that are least able to afford mobile services. By focusing on helping those who are most likely to need financial assistance, the potential impact on RCBs is reduced, as the revenue lost through these commitments is less likely to undermine MergeCo's ability to invest in its network.

c) Pre-agreed wholesale access terms

3.23 To preserve RCBs, any pre-agreed wholesale access terms must be carefully designed to: (i) preserve MergeCo's ability to deliver the JNP; and (ii) protect the network experience of MergeCo's customers. The Wholesale Reference Offer proposed by the Parties at section 6 below reflects the terms that would best support the delivery of the JNP and preserve the substantial RCBs for MergeCo's customers and the UK.

3.24 Any proposal would also have to preserve the customer experience for MergeCo's customers. The number of MVNOs who could sign up, or the proportion of capacity allocated to MVNOs, would have to be subject to a reasonable limit, to ensure MergeCo could provide the best possible customer experience, both for the customers of its MVNOs, and for its own customers. Any proposal that undermines MergeCo's ability to offer 'best-in-class' network quality to its retail and wholesale customers would undermine the RCBs.

d) Capacity ring-fencing remedy

3.25 The Parties understand that the capacity ring-fencing remedy would require capacity to be segregated for the exclusive use of MVNOs that would not be used by MergeCo to serve its retail customers. As set out in further detail in section 7 below, there are material technical limitations preventing this remedy from being implemented for at least three years after completion. Even if it were possible, it is an inherently inefficient use of capacity that will lead to a reduction in mobile quality experienced by MergeCo's customers and which would undermine the RCBs.

(i) There is a real risk that potentially significant volumes of the ring-fenced capacity will remain unused by MVNOs for significant periods of time, resulting in congestion and lower speeds for MergeCo's customers.

(ii) Even if the ring-fenced capacity were fully utilised by MVNOs, the ringfencing of capacity itself introduces inefficiencies and would affect network performance for MergeCo's customers. As explained in the FMN, pooled capacity allows MergeCo to utilise the same capacity across its entire retail and MVNO bases with different demand patterns and busy hours.[109] Ringfencing capacity would prevent this as it limits the ability to utilise spare capacity from one part of the network in relieving congestion on another part of the network. Therefore, **any** ringfencing will lead to inefficient use of capacity and increased congestion on the MergeCo network.

4. THE PROPOSED NETWORK COMMITMENT IS THE MOST APPROPRIATE, EFFECTIVE AND PROPORTIONATE REMEDY AVAILABLE WHICH PRESERVES SIGNIFICANT RCBS

4.1 The NOPR identifies an "***Investment Commitment***" as a potential remedy. The NOPR describes the Investment Commitment as follows: [110]

[109] FMN, paragraphs 24.32-24.33.

[110] NOPR, paragraph 30.

"…a commitment from the Parties to deliver the network investments set out in the Joint Network Plan (JNP) / Joint Business Plan (JBP) they have developed for the Merged Entity. Such a commitment could potentially:

i. guarantee the implementation of the Parties' JNP/JBP within a specified time period;

ii. be implemented by way of an undertaking and also incorporated into the Merged Entity's spectrum licence through a variation of that licence for Ofcom to monitor and enforce;

iii. be verified by an independent third party such as a monitoring trustee; and

iv. be time limited such that no further involvement from the CMA or Ofcom would be needed after the end of the specified investment period."

4.2 The NOPR states that the CMA's initial view is that an Investment Commitment would "*have the potential to enhance competition in the relevant markets*" and *"[if] the Investment Commitment were to enhance rivalry in a way that counteracts the anti-competitive effects we have provisionally found, then this may be an effective remedy in the long term*". [111]

4.3 The Parties have made clear from the outset they are committed to delivering the full JBP / JNP, thereby delivering the 'best-in-class' network which locks in the Transaction's transformational benefits and addresses the CMA's provisional concerns. The Parties consider the Proposed Network Commitment, in addition to the Beacon 4.1 agreement, to be the most appropriate, effective and proportionate remedy available should one be required. The Parties do not believe any additional commitment is required, for the reasons explained below.

4.4 In this section, the Parties explain:

(i) the key features of the Proposed Network Commitment;

(ii) why the Proposed Network Commitment, together with Beacon, would be an effective remedy capable of eliminating or preventing the provisional SLCs and their adverse effects;

(iii) why the risks the CMA typically considers when considering behavioural remedies (namely, specification, circumvention, distortion and monitoring and enforcement risks) do not apply in relation to the Proposed Network Commitment;[112] and

[111] NOPR, paragraph 32.

[112] NOPR, paragraph 58.

(iv) how the Proposed Network Commitment preserves all RCBs and is a reasonable and proportionate remedy.

i. Description of Proposed Network Commitment

4.5 The Parties consider that their Proposed Network Commitment is a workable and effective version of the Investment Commitment discussed in the NOPR. The following table sets out the key features of the Proposed Network Commitment:

Number of sites and spectrum configuration in JNP	The Parties would commit: (1) to fully integrate a combined site grid of no fewer than [REDACTED] sites in the UK within MergeCo's joint network; (2) in order to ensure that the benefits of the Transaction are delivered on a nationwide basis, to integrate a minimum number of sites in: a) rural areas, including a specified number of high-, mid-, and low-configuration sites; and b) urban areas, including a specified number of high-, mid-, and low-configuration sites.
Duration	8 years (i.e., until full completion of the network integration plan set out in the JNP)
Reporting mechanisms	Reporting to Ofcom and a monitoring trustee, leveraging existing Connected Nations reporting which is submitted three times a year.
Monitoring mechanisms	Monitoring trustee appointed under the Act and funded by MergeCo (reporting to Ofcom and the CMA)
Measurement points	Years 4 and 8[113]
Implementation	Inserting conditions in MergeCo's spectrum licence, alongside an undertaking to the CMA under the Act

a) <u>*Key features*</u>

4.6 The Proposed Network Commitment comprises two key elements:

(i) a commitment to fully integrate within MergeCo's joint network a prescribed number of sites as set out in the JNP and as described in PCEP 1; and

[113] "Year 4" and "Year 8" reflect the end of the 4th and 8th year following completion of the Transaction, respectively.

(ii) a commitment to deploy MergeCo's spectrum across specified frequency bands set out in the JNP,[114]

in each case across urban and rural areas in the UK. [REDACTED]. The Parties set out the form of these targets in Annex 01. [REDACTED].

4.7 [REDACTED]. An inputs-based commitment to sites and spectrum means that the metrics are clear and unequivocal. They are readily measurable, simple and easy to monitor in practice, and do not impose a significant administrative burden. It is clear that these two inputs will have a transformative impact in terms of capacity and network quality compared to either Party's standalone networks or VMO2/BTEE's today, and will result in MergeCo's achieving a 'best-in-class' network. The Parties also anticipate that – once the spectrum and sites in the Proposed Network Commitment are delivered – all of the benefits of the JNP are achievable. However due to the difficulties with measuring and monitoring such "output" KPIs, an inputs-based commitment is more practicable. [REDACTED]. Specifically:

(i) the increased deployment of spectrum (i.e., the combination of 3UK's and VUK's spectrum holdings) will largely eliminate the [REDACTED] congestion that is experienced on both Parties' networks now and in the counterfactual (see paragraphs 2.17 to 2.20 above), and will create a more consistent high-speed, low-latency network in the UK;[115]

(ii) the densification of sites will lead to greater consistency of performance across the whole network – i.e., more reliable connections, more consistent speeds, lower latency and better indoor coverage;[116] and

(iii) together, the increased spectrum and the site densification will deliver at least a 65% capacity uplift by 2029, compared to the sum of the standalone network capacities for both Parties. This will create a strong incentive for MergeCo to compete across all customer segments in the retail and wholesale markets compared with the counterfactual in which both Parties are, and will increasingly be, required to manage demand on their networks by reducing their competitive intensity.

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[114] The spectrum deployment targets take into account, and can be met by, spectrum considered by Ofcom as mobile spectrum (currently, from 700MHz to 3.4-3.8GHz spectrum), including the Parties' current spectrum holdings. For the avoidance of doubt, this would not include mmWave spectrum (26GHz and 40GHz). Provided there is no impact to RCBs, this approach would allow the Parties to meet the commitment with mobile spectrum to be auctioned in the future (e.g. Ofcom's proposed release of 25MHz of 1400MHz and 6GHz spectrum) as well as spectrum released to other Parties (e.g. as part of the Parties [REDACTED]).

[115] As described in the PCEP 2, Figure 10 at page 23, latency will sharply drop on MergeCo's network from Years 0 to 5. By Year 8, latency on 3UK's network could be as high as [REDACTED]ms, and [REDACTED]ms on VUK's network. By contrast, the MergeCo's network will experience lower latency ([REDACTED]ms) and decreased jitter – or fluctuations in latency – across all times and locations (RCBs Submission, paragraph 82).

[116] The vast majority of 5G C-band site densification, and the associated improvements in coverage, will occur in the early years, with 55% of MergeCo's C-band site upgrades completed by Year [REDACTED] and 79% by Year [REDACTED] (PCEP 2, paragraph 4.5). By Year 8, MergeCo will provide indoor coverage for 95% of the population of the UK's 20 largest cities, compared to [REDACTED]% from 3UK and [REDACTED]% from VUK in the counterfactual standalone scenario (PCEP 2, paragraph 1.21).

4.8 In order to ensure that the benefits of the JNP are delivered in all regions of the UK, the Proposed Network Commitment will expressly set out the number of sites and spectrum configuration of these sites to be deployed across urban and, separately, rural areas (i.e., as well as the cumulative national total). This will ensure that MergeCo's network will generate efficiencies and RCBs across the whole of the UK – delivering a true 'best-in-class' nationwide network helping address the urban/rural digital divide.[117]

4.9 The Parties consider that separate commitments for rural and urban areas provides the CMA and Ofcom with comfort that MergeCo will deliver strong outcomes for customers throughout rural and urban areas in the UK, addressing the CMA's concern that MergeCo may retain fewer sites in low and mid traffic areas.[118] MergeCo faces roughly the same incentives to invest within each type of area and must achieve consistent network quality across geographical areas to achieve nationwide best network status. There is no incentive for MergeCo to hold back investment in any one region. A more granular geographic commitment would be unnecessary.

b) Implementation

4.10 The Proposed Network Commitment could be reflected in a variation of MergeCo's spectrum licences. [REDACTED]. The Parties consider that this could be accomplished promptly, [REDACTED]. [REDACTED]. Similarly, the MNOs' SRN obligations were also formalised by way of licence variations.[119]

4.11 The Parties envisage that the Proposed Network Commitment would also be reflected in a final undertaking to the CMA under section 82 of the Act.[120] Following a Final Report from the CMA which determines that the Proposed Network Commitment is a suitable remedy, Ofcom would vary MergeCo's spectrum licences to incorporate the commitment to meet the targets specified in each of Years 4 and 8 as binding and enforceable terms of the licence.

c) Duration

4.12 The Proposed Network Commitment will apply throughout the eight-year integration period envisaged by the JNP.

4.13 Eight years is the appropriate duration for the commitment as this is how long it will take to implement the JNP in full. There is no need for a duration longer than eight years as, after this period, the positive effects of the commitment, including the increased capacity,

[117] As the Parties have explained across past submissions, achieving 'best network' status is the only credible strategy to generate reasonable returns and secure a long-term sustainable future for both businesses (see, for example, WP Annex 3, paragraphs 2.1 and 7.33).

[118] PFs, paragraph 14.185.

[119] Ofcom, *Ofcom's notice of compliance verification methodology for the 2020 coverage obligations*, last updated 20 February 2024.

[120] If the Proposed Network Commitment were enshrined in a spectrum licence variation, the Parties consider it may not be necessary for any remedy to be imposed under the Act. This is because in such circumstances the CMA may take sufficient comfort as a matter of fact that the JNP / JBP would be delivered, ensuring that the REEs will materialise, thereby preventing any SLC.

enduring reduction in MergeCo's incremental costs of further network enhancement, and the rivalry enhancing effects of stronger network competition, will have resulted in a pro-competitive, structural transformation in competition in both the retail and wholesale markets, to the benefit of UK consumers and businesses.

4.14 As set out in further detail in paragraphs 4.30 to 4.35 below, the commitment ensures a transformative structural change in MergeCo's network capacity and performance, resulting in an irreversible and enduring shift in the incentives of MergeCo and its rivals to compete. It would be irrational to reduce the number of sites or spectrum deployment after Year 8 after significant time and investment has been spent in rolling out the JNP and achieving best network status. MergeCo would have no incentive to remove spectrum from sites after Year 8, as it would only lead to decreased service for further additional cost (being the cost of recovering the equipment). Every commercial incentive would be to fully commercialise the full size and extent of the network that has been rolled out.

4.15 Additionally, as the Parties have already explained:

(i) **Capacity**: demand for data will have significantly increased. [REDACTED]. [121] [REDACTED]. As explained in section 4.4.3 of the PCEP 1, however, when MergeCo eventually needs additional capacity beyond the capacity provided by the JBP, MergeCo will benefit from lower unit costs to expand capacity than the costs faced by the standalone networks; and

(ii) **Coverage**: one of the basic commercial requirements in mobile provision is not to lose existing coverage. As the Parties have explained, [REDACTED]. The same will apply to the MergeCo network after Year 8. In order to meet that requirement and retain 'Best Network' position, MergeCo will need to retain all [REDACTED] sites to maintain its coverage position relative to the other MNOs who are both expected to increase the coverage and density of their networks over this period. The reality of the UK mobile market is that all MNOs' grids have increased (not decreased) over time.

d) *Monitoring and reporting*

4.16 As the Proposed Network Commitment would be reflected in conditions in MergeCo's spectrum licence, Ofcom would be responsible for monitoring compliance with these conditions. Consistent with CMA precedent and guidance, the Parties envisage that there would also be an independent and appropriately qualified monitoring trustee.[122] The Parties would be responsible for remuneration of the monitoring trustee.

4.17 While MergeCo's compliance with the Proposed Network Commitment would be formally measured at Years 4 and 8, the Parties would also provide detailed reports three times a year to provide clear visibility over the progress of the network roll-out. This will ensure that Ofcom and the CMA have sufficient visibility to satisfy themselves that the roll-out is proceeding in a satisfactory manner in line with the Proposed Network Commitment (and

[121] See PCEP 2, Figure 2 and paras. 2.11-2.13.

[122] The Parties consider that there are a range of suitably qualified candidates who possess relevant, in-depth telecoms experience.

MergeCo's amended licence obligations) and enabling, if required, any mitigating actions to be implemented ahead of the formal assessment of compliance at each of Years 4 and 8. More particularly:

(i) MergeCo would be required to provide reports to the monitoring trustee and Ofcom detailing information on all sites that have been integrated into the MergeCo network. For each site, the report would contain the:

(a) **location of the site** – this could be verified by visiting the site;

(b) **physical site characteristics**, including its height and orientation – this could be verified by visiting the site;

(c) **number of sectors** – this could be verified by visiting the site (as this is visible); and

(d) **spectrum deployment of each sector** – this could be verified by a third party, using a spectrum analyser (for example, Ofcom has a spectrum enforcement team that measures spectrum with a spectrum analyser),

together with a general description of all actions taken by MergeCo, and progress made, to meet the Proposed Network Commitment;

(ii) the Parties consider this information would be straightforward to verify, in particular as it is already provided to Ofcom as part of the Connected Nations reporting. As such, Ofcom is familiar with processing such information;

(iii) the existing Connected Nations reports, which are submitted to Ofcom three times a year, could be leveraged for this purpose. The Parties currently provide two separate reports in respect of mobile for the purposes of Ofcom's Connected Nations report:

(a) The network performance report – this includes spectrum deployed by band on each individual site live on the Parties' networks and is provided to Ofcom once a year (typically in August).

(b) The network coverage report includes coverage details by band on each individual site live on the Parties' networks – this report is provided to Ofcom three times per year.

(iv) These are detailed reports which contain – for each site in the operator's network – verifiable information regarding each site's spectrum configuration, bandwidth and location (amongst other details). It will be possible for MergeCo to indicate which sites have been integrated into the MergeCo network, so that it is clear what the total number of sites integrated into the joint network at the date of the report is in urban and rural areas. It will also be possible to use the reports to determine the total amount of spectrum deployed at specified frequencies across the collective urban and rural areas. In addition, the Site Planning Tool and Inventory Management Tool (which the Parties currently use on a standalone basis and would use during consolidation) are the information source for the number of sites actually deployed and live. An independent auditor would be able to verify the accuracy of the data provided to Ofcom and the monitoring trustee by reviewing extracts from these tools to confirm they match the submitted data. MergeCo will be able to provide further KPIs from these tools (such as traffic over a specific period and network availability) to confirm whether the sites are active; and

(v) following the reports received from MergeCo, and any additional information collected through follow up requests or discussions with MergeCo, the monitoring trustee, in consultation with Ofcom, would submit reports to the CMA within two months of MergeCo's provision of data, setting out whether MergeCo is meeting its obligations under the Proposed Network Commitment. To enhance the ability to track MergeCo's progress, the Parties have included indicative yearly milestones to show the path by which MergeCo expects to progress towards meeting the Year 4 and 8 commitments.

e) *Compliance*

4.18 As noted above, MergeCo's compliance with the Proposed Network Commitment would be formally measured at Years 4 and 8. [REDACTED].

4.19 If the monitoring trustee, in consultation with Ofcom, observes that MergeCo has not met the Proposed Network Commitment targets at the ends of Years 4 and 8, this (together with Ofcom's recommendation) will be contained in its report to the CMA. The CMA will then, in consultation with Ofcom, inform MergeCo that it has 12 months to meet the targets that have been missed (the "**Cure Period**").[123] During this Cure Period, MergeCo shall submit monthly reports to the monitoring trustee and Ofcom setting out its progress to implement Ofcom's recommendation to bring the network roll-out back towards compliance with the annual targets set out in the Proposed Network Commitment. If, at the end of the Cure Period, the monitoring trustee, in consultation with Ofcom, observes that any of the Years 4 and 8 targets have still not been met, it will inform the CMA of Ofcom's further remedial recommendations.

4.20 The Parties consider that the legal commitment to meet the targets at Years 4 and 8, and not any earlier, is appropriate. In short, Year 4 is a natural point at which to measure the progress of rolling out the sites and spectrum, while allowing for a degree of operational flexibility in the first four years when the integration process is in its most labour-intensive phase.[124] To meet the Year 4 targets, there is no possibility of the Parties delaying the JNP in the early years – significant work must be undertaken every year to meet these goals. As the sectoral regulator, Ofcom will have full visibility of progress towards these

[123] The concept of a Cure Period has certain benefits including avoiding a cliff edge whereby the Parties could be determined to be non-compliant even if the targets are missed by only a small amount which would not take long to rectify. They also avoid potential operational delays which are outside of the Parties' control but which are not significant enough to be captured by the guardrails of unforeseen events (discussed in paragraphs 4.26- 4.27 below) from triggering a breach of the commitment, when these operational delays can be quickly "cured".

[124] The inclusion of an interim target is consistent with the approach adopted in *T-Mobile / Sprint* FCC 19-103, where the investment commitment included an interim milestone at year three, which was halfway through the six-year commitment.

goals via MergeCo's reports that are produced three times a year and is well placed to raise any concerns to the CMA. This is discussed further at [REDACTED].

f) *Enforcement*

WTA and the spectrum licence variation

4.21 MergeCo will have a very strong incentive to ensure that it complies with the Proposed Network Commitment in all respects. Failure to meet the thresholds set out for urban or rural areas in any of Years 4 and 8 would be a breach of MergeCo's spectrum licences.

4.22 A spectrum licence variation carries significant benefits from an enforcement perspective. Importantly, Ofcom's civil enforcement powers are administrative in nature – it does not need court approval to bring enforcement action. The sanctions for potential breach of a spectrum licence are very significant and will strongly incentivise MergeCo to ensure that it complies with the Proposed Network Commitment in full. Ofcom could enforce compliance by:

(i) issuing a financial penalty of up to 10% of relevant annual gross revenue (sections 42 and 43(2A) of the WTA);

(ii) bringing civil proceedings, including injunctions or specific performance (section 108 of the WTA);

(iii) revoking or varying MergeCo's spectrum licence (paragraph 7 of Schedule 1 of the WTA); and/or

(iv) there is the possibility of criminal prosecution for unauthorised use of wireless telegraphy apparatus under section 35 of the WTA, which can be punishable by up to two years imprisonment and a fine.

4.23 Ofcom also has extensive information gathering powers under the Communications Act 2003[125] and the WTA. Under section 32A WTA, Ofcom can require MergeCo to provide all such information as Ofcom considers necessary for the purposes of carrying out their radio spectrum functions, including information they require to ascertain whether a contravention of a term of MergeCo's spectrum licence has occurred. Ofcom can impose financial penalties if it has reasonable grounds for believing that a person has contravened the requirements of the information request.[126] There is the possibility of criminal prosecution in certain circumstances if MergeCo provides information that is false.[127]

[125] Communications Act 2003, section 135.

[126] WTA, sections 32C and 32D.

[127] WTA, section 33. A person commits an offence if they provide information which is "*false in any material particular*" and "*at the time he provides it, he knows it to be false or is reckless as to whether or not it is false*".

Additional enforcement mechanisms under the Act

4.24 In addition to the strong and effective enforcement mechanism that would follow from relevant licence variations, the CMA would retain its full suite of standard enforcement powers for final undertakings and orders. Any failure on the part of MergeCo to achieve the relevant target set out in Years 4 and/or 8 that is not rectified in line with Ofcom's recommendations to bring the network roll-out back towards compliance with the annual targets set out in the Proposed Network Commitment during the Cure Period would be enforceable by civil proceedings brought by the CMA, under section 94 of the Act. Under section 94 of the Act, the CMA has the power to apply for an injunction, interdict, or for any other appropriate relief or remedy.

4.25 The Parties consider this suite of enforcement mechanisms would fully support the delivery of the Commitment.

(i) The Parties note that this is the framework that the legislation provides for the CMA to enforce remedies (whether provided in the form of final undertakings or final orders).

(ii) The risk of court proceedings (with associated costs, reputational damage, and the potential for subsequent damages claims from third parties) serves as a very strong deterrent against breaching the Proposed Network Commitment, making it highly unlikely that such measures would be needed in practice. Indeed, since 1 April 2020 (when the CMA began compiling a register recording breaches of remedies), there has been no enforcement of undertakings offered under the Act in court.[128]

(iii) In this case it is proposed that the CMA's standard enforcement powers would be supplemented by the stringent enforcement powers available to Ofcom under the licensing regime (as set out above).

g) Unforeseen events

4.26 The Proposed Network Commitment would contain limited guardrails to account for unanticipated circumstances outside MergeCo's control (e.g., acts of God, such as fire, flood, earthquake, pandemics or other natural disasters; terrorist events, riots, insurrections, war, strikes or national emergencies; significant changes in political, legal, fiscal or regulatory conditions and/or significant supply chain disruptions).

4.27 It is reasonable and standard practice for circumstances outside of a mobile network operator's control to be taken into account when assessing their regulatory obligations.[129]

4.28 The Parties do not anticipate any changes in technology that would create a need for any material alterations to the plan. For example, the UK is currently near the beginning of the standalone 5G technology life cycle, so it is unlikely there will be new technology developments during the eight-year period of the Proposed Network Commitment that

[128] CMA, *Register of breaches of the CMA's markets and merger remedies*, 5 August 2024.

[129] See Parties' response to RFI25, Q14(iii).

would prompt a material change in MergeCo's network plan. Nonetheless, the Parties consider that the commitment should provide Ofcom with the discretion to make minor updates to the relevant site number and spectrum configuration targets in the event that there are significant technological changes.[130] An update would be considered minor if the Parties could satisfy Ofcom that any proposed changes would not result in a material adverse change to the JNP.

ii. **The Proposed Network Commitment is an appropriate and effective remedy that addresses the SLCs the CMA has provisionally identified**

4.29 The Parties explain below why the Proposed Network Commitment would be an effective remedy capable of eliminating or preventing the provisional SLCs and their adverse effects. The Parties welcome the CMA's initial view in the NOPR that *"an Investment Commitment would have the potential to enhance competition in the relevant markets",* and that it therefore may *"be an effective remedy in the long term."* [131] The Parties also welcome the CMA's recognition that "*there are case specific facts that suggest behavioural remedies could be appropriate*", including that: (i) MNOs operate in a regulated market; and (ii) RCBs may be present and preserved through a behavioural remedy.[132]

a) *Impact on the SLCs*

4.30 The Proposed Network Commitment will prevent the SLCs provisionally identified by the CMA by ensuring that the Transaction will generate very significant REEs.

4.31 The Parties welcome the CMA's finding that *"in principle the claimed REEs could be rivalry enhancing"*, as the Transaction will: (i) improve MergeCo's and (via Beacon 4.1) VMO2's network quality, making both parties *"stronger rivals"*; and (ii) by lowering MergeCo's incremental costs, therefore increasing its *"incentive to provide a better quality of service and/or lower prices."*[133]

4.32 However, the CMA has provisionally determined that "*the Parties are not likely to realise the full extent of the REEs claimed*." [134] This is because the CMA provisionally considers the Parties "*are not likely to be commercially incentivised to deliver the full JBP."*[135] The CMA provisionally considers that only more limited REEs are likely to occur, and that these would not be "*sufficient to countervail the adverse competitive effects identified*".[136]

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[130] Significant technological changes could be defined as advancements that enable delivery of the RCBs in a more efficient manner e.g. (i) new spectrum being made available, (ii) advances in antenna technology that enhance how spectrum can be used.

[131] NOPR, paragraph 32.

[132] NOPR, paragraph 27.

[133] PFs, paragraph 14.173 to 14.175.

[134] PFs, paragraph 14.200.

[135] PFs, paragraph 14.200.

[136] PFs, paragraph 14.202.

The Parties strongly disagree with the CMA's interim view, and have provided significant evidence that demonstrates that it is "*likely*" the Parties will implement the full JBP, and therefore realise the full extent of REEs (see paragraph 2.42 above).

4.33 Nevertheless, to eliminate any concern that MergeCo would not likely deliver the full claimed benefits of the Transaction, the Parties have offered to be legally bound to deliver key elements of the JNP in the form of the Proposed Network Commitment.

4.34 The Parties note that the CMA is also yet to reach a view as to whether "*any REEs from full delivery of the JBP would be sufficient*" to offset the SLC.[137] The Parties consider the Proposed Network Commitment will ensure the creation of significant REEs that prevent any SLC provisionally identified in the retail and wholesale markets. This is because the Proposed Network Commitment would:

(i) generate a significant uplift in MergeCo's coverage and capacity, with the largest uplift realised in Year 1. This will incentivise MergeCo to make attractive retail and wholesale offers in order to fill its available capacity with new customers. In the wholesale market in particular, the Parties face capacity constraints which limit the extent to which they can compete for MVNOs. Acquiring additional wholesale customers on a capacity-constrained network is costly, as it triggers the need for additional network investments to avoid increased congestion and/or leads to a deterioration in quality for existing customers. These costs are a key driver in wholesale pricing decisions and will restrict the Parties' ability to offer attractive pricing to MVNOs absent the Transaction. The PFs cite evidence that demonstrates "*that the incremental cost of capacity is taken into account"* by MNOs when bidding for MVNO contracts in the wholesale market;[138]

(ii) lower MergeCo's incremental costs of expanding capacity, incentivising MergeCo to provide lower prices and/or a better quality of service to retail and wholesale customers. As the PFs recognise in principle:[139]

"combining networks enables more spectrum to be deployed at each site, and may therefore reduce the unit cost of expanding capacity; and, given that mobile operators need to increase capacity to meet growing demand, this reduction in unit cost of capacity may represent a reduction in long-term incremental cost which could potentially give the Merged Entity (all else being equal) an incentive to provide a better quality of service and/or lower prices".

These incremental cost reductions fully offset any material upwards pricing pressure, as the Parties' modelling has extensively evidenced;[140]

(iii) substantially improve MergeCo's network quality, which will benefit MergeCo's retail and wholesale customers. As set out at paragraph 9.22 of the PFs, price

[137] PFs, paragraph 14.200.

[138] PFs, paragraph 14.145.

[139] PFs, paragraph 14.22.

[140] WP Annex 2, paragraph 2.26.

and network quality are important to MVNOs, with six stating that price was the most important factor, and five stating that network quality was the most important factor;

(iv) increase the competitive pressure on VMO2 and BTEE to make better offers to wholesale and retail customers, in terms of prices and quality, and to invest in their networks, to stem the loss of customers to MergeCo. This likely competitive response is recognised in the PFs, which state that the rivalry enhancing network quality improvements "*would in turn likely elicit a competitive response (for example, by way of further network investment) from BTEE and VMO2 to also improve their respective network quality*".[141] As noted in the PFs, "*network quality factors are competitive variables in the mobile industry*" and "*such quality improvements may make the Merged Entity a stronger rival and therefore represent rivalry-enhancing efficiencies*";[142] and

(v) increase VMO2's strength as a competitor by improving its network quality and reducing its cost of increasing capacity through Beacon 4.1, which will only be implemented if the CMA approves the Transaction. This would benefit VMO2's existing retail and wholesale customers, as well as increasing its incentive to compete for new MVNOs and retail customers to fill its newly-acquired spare capacity. The PFs express concerns about weak competition in the wholesale market as VMO2 is selective in participating in wholesale tenders, likely due to lack of capacity.[143] Several MVNOs have expressed particular concerns to the CMA about VMO2's network quality falling behind.[144] The rivalry enhancing impact of Beacon 4.1 is also recognised in the PFs, which "*consider that the spectrum transfer agreed through Beacon 4.1 would provide a notable and rapid increase in network quality for wholesale and retail customers on the VMO2 network, which would further increase rivalry*".[145]

4.35 The Parties consider that these REEs would <u>fully</u> offset the anti-competitive effects the CMA has provisionally identified in retail and wholesale markets, such that no further remedy beyond the Proposed Network Commitment is necessary.

b) <u>Appropriate duration and timing</u>

4.36 The Parties welcome the statement in the NOPR that, provided that the Investment Commitment does counteract the anti-competitive effects of the Merger, then it would do so in the "*long term*".[146] The Parties have also explained why the duration of eight years is sufficient in paragraphs 4.12 to 4.14 above.

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141 PFs, paragraph 14.202.

142 PFs, paragraph 14.21.

143 PFs, paragraph 9.62.

144 PFs, paragraph 9.257.

145 PFs, paragraph 14.203.

146 NOPR, paragraph 32.

4.37 However, the NOPR expresses some reservations as to whether the Investment Commitment would counteract the anti-competitive effects from the outset, stating that *"[it] may also take some time for the rivalry enhancing effects of an Investment Commitment to manifest*".[147]

4.38 The Parties do not accept this, and indeed submit that this view is inconsistent with the CMA's own findings in the PFs, which acknowledge that the bulk of REEs will be realised in the early years. As explained further in paragraphs 2.46 and 2.47 above:

(i) the PFs find that the "*Day 1 benefits*" *are likely to occur shortly after closing given that they will generate benefits for the Merged Entity and are relatively easy to implement*". By "*Day 1 benefits*", the PFs includes the benefits of the combination of MOCN and the deployment of additional spectrum through sharing the Parties' combined holdings (for example, in relation to 1800 MHz spectrum). [148] These "Day 1 benefits" alone, which the PFs finds are "*timely*", are substantial – see paragraph 2.46(i) above for evidence of the impact of these benefits;

(ii) the PFs find that "[s]*ome degree of network integration*" will "*start once the Merger completes*" and will be "*timely, particularly given the inevitability of network integration*".[149] The benefits of this degree of network integration in the early years period will alone be substantial – see paragraph 2.12 above for evidence of the impact of these benefits in terms of, for example, removing "not-spots"; and

(iii) the PFs consider that "*likely rivalry-enhancing network quality improvements of the spectrum transfer to VMO2 pursuant to Beacon 4.1 are likely to occur within the short- to medium-term*".[150] The benefits from the spectrum transfer alone are substantial, with VMO2 gaining [REDACTED]% more spectrum than its current holding. VMO2 will also get access to [REDACTED]. This will contribute to a transformational market-wide increase in capacity which will intensify competition in both wholesale and retail markets.

4.39 It is therefore not clear to the Parties how the PFs could accept that the Investment Commitment would counteract any anti-competitive effects from the Transaction in the longer term but express doubts as to whether the Investment Commitment would counteract any anti-competitive effects in the short term.

4.40 In addition, even before the full benefits of MergeCo's network roll-out are achieved, the Proposed Network Commitment would provide certainty from the outset of MergeCo's impending capacity uplift and network improvements and therefore incentivise VMO2 and BTEE to compete more aggressively from Day 1; they will not wait for MergeCo's network improvements to come online before taking action.

[147] NOPR, paragraph 36.

[148] PFs, paragraph 14.192.

[149] PFs, paragraph 14.197.

[150] PFs, paragraph 14.198.

c) *Practicality*

4.41 The Parties consider the delivery of the JBP/JNP, within the network integration timeframes, to be highly achievable. To demonstrate this, the Parties have included indicative yearly milestones to show the path by which MergeCo can reach the Year 4 and 8 commitments. The Parties agree with the PFs' position that the JBP is a *"credible integration plan, reflecting detailed due diligence by external consultants and significant time and resource investment by the Parties"*.[151] The PFs also note that Ofcom considers that any potential technical or practical constraints to delivering the JBP are not likely to be material.[152] This is partly a result of how, as recognised in the PFs, "*the network improvement plans in the JBP involve the consolidation and upgrading of existing mobile sites, to rationalise down rather than scale up the total number of sites held by the Merged Entity"* which contrasts with having to identify the location for and subsequent construction of new sites which would likely be "*significantly more practically challenging*".[153]

iii. Typical risks the CMA associates with behavioural remedies do not apply

4.42 The CMA's remedies guidance identifies a number of risks that can typically arise with behavioural remedies. However, the Proposed Network Commitment is not truly a behavioural remedy – rather, it can be better characterised as "*quasi-structural*" or, in the NOPR's terms, "*quasi-behavioural*".[154]

4.43 The Proposed Network Commitment is what the NOPR describes as an "*enabling measure*", which is the CMA's preferred starting point when considering remedies. [155]

4.44 The Proposed Network Commitment is an "*enabling measure*" because it delivers an irreversible, structural change in network capacity and performance, by ensuring the delivery of MergeCo's 'best-in-class' network under the JNP. The creation of significant capacity and network quality enhancements will enable a permanent shift in the incentives of MergeCo and its competitors. Market outcomes will thereafter be dictated by the competitive process, with no need for further regulatory intervention in an attempt to control market outcomes. This structural effect on capacity is amplified by the Beacon 4.1 agreements and VMO2's own increase in capacity.

4.45 The Parties also explain why the risks the CMA typically considers when exploring behavioural remedies (namely, specification, circumvention, distortion and monitoring and enforcement risks) do not apply in relation to the Proposed Network Commitment.

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[151] PFs, paragraph 14.180.

[152] PFs, paragraph 14.180.

[153] PFs, paragraph 14.181.

[154] NOPR, paragraph 29.

[155] NOPR, paragraph 31.

a) <u>Specification risks</u>

4.46 Specification risks do not arise. The Proposed Network Commitment sets out clear and simple input metrics based on site numbers and spectrum configurations [REDACTED]. These are clearly specifiable inputs which provide an effective basis for monitoring.

4.47 The prospect of any specification risks arising is further decreased by the long-term investment horizons that characterise mobile markets. Investment plans are developed years in advance of implementation – mobile markets are therefore not subject to unpredictable changes over the short-term.

4.48 As the Parties explain above at paragraph 4.28, the Parties do not expect there to be any changes in technology that would create a need for any material alterations to the plan. Nevertheless, the Parties consider that the Proposed Network Commitment should provide Ofcom with the discretion to make minor updates to the relevant targets in the event that there are significant technological changes. With the inclusion of this discretion, the commitment is specified in a way that accounts for any technological changes in the mobile markets (with Ofcom, an expert regulator, controlling any changes, as opposed to the Parties themselves).

b) <u>Circumvention risks</u>

4.49 The simple inputs-based targets (with which Ofcom are familiar from existing reporting) leave no room for circumvention and are easy to monitor. Importantly, the targets are the essential elements of the network roll-out. Achieving the sites and spectrum deployment targets under the Proposed Network Commitment ensures the delivery of the JNP and the creation of MergeCo's 'best-in-class' network.

4.50 In addition, the Proposed Network Commitment ensures that the roll-out benefits set out in the JNP are delivered in rural and urban areas, such that no types of area can be neglected in favour of reaching nationwide targets.

4.51 MergeCo will have a strong commercial incentive to provide a good user experience so can be expected to deploy its spectrum to generate the largest benefit for its customers. It would not be in MergeCo's interest to provide poor coverage but good capacity (or the other way around) and it would not be possible to trade-off capacity for coverage anyway: it will also be part of the commitment that all sites will have 700 MHz, 800 MHz and 900 MHz spectrum bands deployed, regardless of whether they are a high-, mid- or low-configurated site. Given 700 MHz, 800 MHz and 900 MHz are generally lower frequency bands, which have better propagation characteristics, this means that MergeCo will be able to offer better network coverage and higher throughput in wider geographic areas throughout urban and rural areas.[156]

[156] The Parties consider it operationally necessary to retain flexibility to substitute 1400 MHz spectrum with other mid-configuration spectrum bands, where it is not possible to deploy 1400 MHz on certain low-configuration sites. This will only be done where the RCBs are preserved.

c) Distortion risks

4.52 The Proposed Network Commitment cannot distort the market in a way that would undermine its effectiveness. On the contrary, delivery of the JNP, as formalised by the Proposed Network Commitment, will:

(i) trigger a pro-competitive response from BTEE and VMO2 – they will be incentivised (and VMO2 will also be enabled by Beacon 4.1) to invest in their networks and compete harder (as accepted in the PFs);[157] and

(ii) generate a substantial capacity uplift, the anticipation and realisation of which will drive increased competition across all competitive variables from Day 1, including price and quality, compared to the counterfactual.

4.53 The net effect is that the Proposed Network Commitment will generate positive market outcomes that reinforce its effectiveness in improving customer welfare.

d) Monitoring / enforcement risks

4.54 There are no particular risks / challenges associated with the monitoring and enforcement of the Proposed Network Commitment. As explained above, the Transaction takes place in a regulated market, with a highly experienced and sophisticated regulator (Ofcom) that already carries out significant monitoring, including to track MNOs' compliance with their SRN obligations and produces its own reports charting the UK's evolving communications infrastructure (known as the Connected Nations reports)[158], [REDACTED]. The CMA itself recognises that *"[t]he likelihood of effective monitoring will be significantly increased if it is possible to involve a sectoral regulator in the monitoring regime*",[159] as referenced at paragraph 17 of the NOPR.

4.55 The appointment of a monitoring trustee, which will be remunerated by MergeCo, will ensure no unreasonable demands are placed on CMA or Ofcom resources.[160]

4.56 The site and spectrum targets are clear and simple to monitor. The amount and frequency of spectrum deployed can be easily measured at any time and is measured by MergeCo

[157] PFs, paragraph 14.202.

[158] Available at *Connected Nations and infrastructure reports - Ofcom,* last updated 4 September 2024.

[159] CMA Merger Remedies Guidance, paragraph 7.6. The CMA has previously acknowledged the relative benefit in terms of compliance culture and enforcement mechanisms of behavioural remedies being implemented in a regulated environment (see paragraph 5.35(a) of the CMA's merger remedy evaluations (24 October 2023) (CMA186)). Specifically, see page 64 of the Appendices to the CMA's merger remedy evaluations (24 October 2023) (CMA186) on *Centrica plc / Dynegy Inc* (2003).

[160] Monitoring behavioural commitments does not necessarily impose an unreasonable demand on regulators, particularly those who are experts in the relevant industry. For the undertakings given for *Centrica plc / Dynegy Inc* (2003), Centrica directly sent its compliance reports to Ofgem. In the CMA's evaluation of the remedy, it noted that, even with several members of Ofgem's staff assessing these reports in some depth, the Ofgem's monitoring team probably amounted to slightly less than one full-time equivalent. With the addition of a monitoring trustee, this burden would be further alleviated (as is proposed for the Commitment). See page 61 of the Appendices to the CMA's merger remedy evaluations (24 October 2023) (CMA186).

in the ordinary course of business. The existing Connected Nations reports, which are submitted to Ofcom three times a year, could be leveraged for this purpose.

iv. The Proposed Network Commitment preserves all RCBs and is a reasonable and proportionate remedy

4.57 The Proposed Network Commitment preserves and, in fact, ensures delivery of all of the RCBs generated by the Transaction. As set out at paragraph 4.11 above, the Proposed Network Commitment represents a legally binding guarantee that MergeCo will deliver the full JNP, which will ensure that the RCBs described in section 2 will arise. Specifically, the Proposed Network Commitment would ensure the delivery of the very significant mobile connectivity improvements, bring forward and unlock new advanced 5G use cases; and free up sufficient capacity to support an expanded and improved FWA offering.

4.58 By preserving and ensuring the delivery of, these very significant RCBs, the Proposed Network Commitment is a reasonable and proportionate remedy that is the least costly effective remedy option available to the CMA and is sufficient alone to counteract any SLC.

5. TIME-LIMITED RETAIL CUSTOMER PROTECTIONS

5.1 The NOPR states that "*there may be a case for considering some time-limited protections to ensure that retail customers are appropriately protected during the initial years of network integration and roll-out under any Investment Commitment*".[161] The NOPR also states that such protections might encompass, for example, "*allowing the Parties' existing customers to 'roll over' their existing contract terms - price, data allowance etc - for a pre-defined period*".[162] The NOPR notes that *"[i]ncluded within this, or separately, there could also be a commitment by the Parties to protect social tariff terms and conditions*".[163]

5.2 In this section, the Parties explain:

(i) why time-limited retail customer protections are not necessary;

(ii) without prejudice to this position, the Parties' Proposed Retail Customer Protections and the key features each of these Proposed Retail Customer Protections would need to have to make this remedy workable and effective;

(iii) why the Proposed Retail Customer Protections would be an effective remedy capable of eliminating or preventing the provisional SLCs in the retail market and their adverse effects;

(iv) why the risks the CMA typically considers when considering behavioural remedies (namely, specification, circumvention, distortion and monitoring and

161 NOPR, paragraph 38.

162 NOPR, paragraph 39.

163 NOPR, paragraph 31.

enforcement risks) would not apply in relation to the Proposed Retail Customer Protections;[164] and

(v) why the design of any time-limited retail customer protections, both as a standalone remedy and as part of a wider remedy package, would need to preserve the substantial RCBs that would be generated from the Transaction. The Proposed Retail Customer Protections have been designed in a way that would achieve this.

i. Time-limited retail customer protections are not necessary

5.3 The Parties disagree with the PFs that the Transaction gives rise to an SLC in the retail market (or any part of it) and, as such, believe that there is no need for any specific remedy to address this provisional SLC. As the Parties will set out further in their response to the PFs, the reality is that the Transaction will be pro-competitive for this market as it will improve the competitive position of both 3UK and VUK, which are currently constrained in their ability and incentive to compete sustainably against two market leaders, which generate the lion's share of the industry's cashflows.

5.4 To the extent the CMA has any residual concerns regarding the retail market, the Proposed Network Commitment (supported by the pro-competitive effects of the Beacon 4.1 agreements) presents a comprehensive solution by ensuring that the Transaction will generate very significant REEs that would fully offset any SLC (see paragraphs 4.30 to 4.34 above).

5.5 The Parties strongly disagree with the notion that retail customers are not already adequately protected from price increases and service degradations during the initial years of network integration and roll-out under the Proposed Network Commitment. As explained above at paragraph 4.38, the Proposed Network Commitment prevents the SLCs provisionally identified from Day 1, by creating significant REEs throughout the early years. The PFs (set out in paragraph 4.38) acknowledge REEs, which the Parties consider to be the bulk of the REEs, will indeed be realised in the early years.

5.6 Further, as outlined in paragraph 4.40 above, the Proposed Network Commitment would, from the outset, incentivise each of MergeCo, VMO2 and BTEE to compete even more strongly. VMO2 and BTEE would compete more aggressively from Day 1 with the knowledge that the Proposed Network Commitment is in place – particularly with VMO2's upcoming increased network capacity from the Beacon 4.1 spectrum divestment. This will drive competition in the market that will benefit retail customers.

5.7 The above applies equally to low-income customers, who are further protected in the current market by social tariffs offered by MNOs. The Parties note that the CMA's merger simulation suggests that consumers on the lowest incomes would see the greatest fall in consumer welfare,[165] and that the CMA has stated that they have particular concerns

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[164] NOPR paragraph 58.

[165] PFs, paragraph 8.318.

about the impact of the Transaction on those customers least able to afford mobile services.[166] These concerns are fundamentally misplaced for the following key reasons:

(i) it is important to note at the outset that the CMA's merger simulation entirely fails to account for the substantial REEs that would be generated by the Transaction (including those elements of the REEs that are accepted in the PFs), and the significant improvements to network quality across the UK directly arising from the Transaction. The Parties have repeatedly emphasised that the REEs are at the heart of this Transaction and for the CMA to ignore REEs in its economic modelling is a significant error;

(ii) the Parties fundamentally disagree that good quality connectivity is only important for customers that are better off. In fact, access to good quality connectivity that works for accessing online services and applications is essential for everyone in the modern digital world, perhaps even most especially for underprivileged and marginalised communities. Nearly one in five internet users only go online via a smartphone, and, critically here, this proportion is even higher amongst those in lower socio-economic groups (27%).[167] Therefore, improvements to mobile network quality across the whole country (not just in London and other big cities) have become increasingly important for this customer group;

(iii) the importance of network quality will only increase as demand for data continues to grow.[168] Even Ofcom's "low" demand scenario implies a more than seven-fold increase in traffic within the next decade.[169] Ofcom recognises that MNOs will have to invest to increase capacity and provide the network quality needed to meet future customer needs;[170] and

(iv) the Transaction will also result in benefits that will particularly help price-sensitive customers and customers in rural areas or other areas without access to full fibre (through FWA - see above at paragraph 2.36).

5.8 On this basis, the Parties do not believe that any retail customer protections are necessary.

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[166] PFs, summary, paragraph 66.

[167] Ofcom, *Adults' media use and attitudes 2023: interactive report*, last accessed 20 September 2024.

[168] According to Ofcom data, data demand has continued to grow strongly, at a rate of 24.1% between 2022 and 2023. This follows a consistent trend of high growth rates, with 28.8% between 2020 and 2021, 34.9% between 2019 and 2020, and 34.3% between 2018 and 2019. See Ofcom's Telecommunications Market Data Update Q4 2023, page 14, Table 2, and Telecommunications Market Data Update Q4 2022, page 14, Table 2; Telecommunications Market Data Update Q4 2021, page 14, Table 2; Telecommunications Market Data Update Q4 2020, page 14, Table 2; and, Telecommunications Market Data Update Q4 2019, page 14, Table 2.

[169] Ofcom, *Ofcom's future approach to mobile markets and spectrum Conclusions paper*, 6 December 2022, paragraph 4.5. Under the low-growth scenario, traffic increases by 25% until 2030 and then by 20% between 2030 and 2035.

[170] Ofcom, *Ofcom's future approach to mobile markets and spectrum Conclusions paper*, 6 December 2022, paragraph 1.8.

ii. Description of Proposed Retail Customer Protections

5.9 Without prejudice to the Parties' position above and to the extent that the CMA has any residual concerns, the Parties have considered the CMA's suggestions in the NOPR and outline below three effective Proposed Retail Customer Protections and explain what each of these would entail. These three Proposed Retail Customer Protections are:

(i) a commitment to maintain prices for value-focussed customers on SMARTY (the "**SMARTY Pricing Commitment**");

(ii) a commitment to maintain social tariffs (the "**Social Tariffs Commitment**"); and

(iii) a commitment to exclude vulnerable customers in financial difficulty from mid-contract price rises (the "**Vulnerable Customers Commitment**").

5.10 The Parties are prepared to commit to each of these Proposed Retail Customer Protections, to the extent that the CMA deems necessary (i.e., cumulatively or in the alternative).

a) The SMARTY Pricing Commitment

5.11 The Parties are prepared to commit to maintain prices on SMARTY for 24 months from Day 1 for all tariffs that are currently £10 or under per month.[171] These are the lowest contract-free tariffs that the Parties offer and are aimed at the value-focussed customer group which the CMA has identified as potentially requiring further protection in its PFs. These tariffs are listed below in Table 1.

Table 1 – SMARTY Tariffs covered by the SMARTY Pricing Commitment[172]

Data (GB/month)	Price/month (£) (including VAT)
5GB	6.00
8GB	7.00
16GB	8.00
40GB	10.00

[171] For completeness, it is noted that this only applies to standard rates across SMARTY's voice plans (i.e., plans that do not only include data) and does not include any tariffs that would be £10 or under during short-term trading offers / promotions.

[172] SMARTY, *All Plans*, last accessed 20 September 2024.

5.12 This SMARTY Pricing Commitment has been designed to guarantee that customers – particularly those customers least able to afford mobile services – continue to have access to low prices for retail mobile plans on terms currently available in the market.

5.13 The Parties consider these SMARTY tariffs to be the most appropriate subject of any time-limited commitment as:

(i) the commitment should be implemented on a brand that has contract-free flexible tariffs with no annual price rises to ensure customers have flexibility to change tariffs should there be better deals in the market while still benefitting from the stability offered by SMARTY'S rolling one month plan (i.e., certainty of knowing how much you are paying each month);[173]

(ii) per the CMA's own PFs, SMARTY is a significant value player that, across Q3 and Q4 of 2023, offered tariffs with the lowest price per GB across the range of data allowances for capped pre-paid;[174] and

(iii) [REDACTED]% of SMARTY's subscribers are on plans that are £10 or under (as at August 2024, [REDACTED]), demonstrating that SMARTY is attracting price-sensitive customers. The CMA specifically acknowledged [REDACTED].[175]

5.14 As can be seen in Table 1, this SMARTY Pricing Commitment includes plans with data allowances that go up to 40GB. This exceeds average customer use of data across the market. Accordingly, the SMARTY Pricing Commitment ensures that retail customers are able to take advantage of these tariffs with packages that offer data access that significantly exceeds current average usage. Ofcom's data from 2022 shows that the average consumer across the UK mobile market used 7.1GB of data per month.[176]

5.15 SMARTY will also be able to offer cheaper tariffs than those listed in Table 1 – including for short-term trading offers / promotions (e.g., Black Friday) – which ensures that customers can benefit from even better deals (given customers can cancel or change SMARTY contracts at any time), without sacrificing the protections offered by this SMARTY Pricing Commitment. SMARTY customers can easily move onto promotional tariffs by contacting the SMARTY webchat team and requesting that change. The promotional tariffs are also often made available to SMARTY customers on their online dashboard. SMARTY promotions apply from the customer's next billing date.

5.16 The SMARTY Pricing Commitment will guarantee a low price and will be available to all retail customers, not just those who are currently customers of the Parties. Existing SMARTY customers are on a rolling 30-day commitment, and it will be clear that these

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[173] Ensuring this flexibility is in place helps address the CMA's particular concerns about the impact of the Transaction on those customers least able to afford mobile services. These customers are more likely to want flexibility in their mobile tariffs / plans.

[174] PFs, paragraph 8.141(d)(i).

[175] PFs, paragraph 8.134(c).

[176] For average monthly handset / SIMO data use across all users. See Ofcom's Communications Market Report 2023: Interactive data, 28 November 2023.

lower prices are guaranteed to continue to be available to them for the 2-year duration of the SMARTY Pricing Commitment. The SMARTY Pricing Commitment would be effective immediately after the Transaction closes, as these tariffs already exist in the market.

b) The Social Tariffs Commitment

5.17 In line with the CMA's suggestion that the Parties "*protect social tariff terms and conditions*"[177] the Parties would commit to maintaining the comprehensive social tariffs currently offered by both VOXI and SMARTY for a period of 24 months after Day 1:

(i) **VOXI**: VOXI's current social tariff – called VOXI For Now – is available for those who are receiving government benefits, such as: (i) jobseeker's allowance; (ii) universal credit; (iii) employment and support allowance; (iv) disability allowance; and (v) personal independence payment. Those who are on the social tariff pay £10 per month on a rolling 30-day fixed-term plan for unlimited 5G-ready data, calls and texts for six months.[178] [179]

(ii) **SMARTY**: SMARTY's current social tariff is available for those who are in receipt of income-based employment support, income-based job seekers, income support, pension credit or universal credit. Those who are on the social tariff pay £12 per month for unlimited UK calls, texts and 5G-ready data on a rolling monthly plan. A social-tariff customer is subject to a validation check at least once every 12 months – so long as they continue to meet the requirements for the social tariff, they will stay on the social tariff terms.[180]

5.18 The Parties believe that committing to maintain the social tariffs currently offered by VOXI and SMARTY is the most effective route to protecting customers who are least able to afford mobile services: the tariffs are already in the market and well-known, including being listed on consumer comparison sites.[181]

5.19 The Social Tariffs Commitment could also start immediately after the Transaction closes, as these tariffs already exist.

5.20 The social tariffs are currently, and will continue to be, advertised prominently by the Parties, such that information is easy for vulnerable customers to find:[182]

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[177] NOPR, paragraph 39.

[178] VOXI, *VOXI For Now*, last accessed 20 September 2024. After six months, the customer will transition to VOXI's standard plan at £10 per month, which includes unlimited social media, calls and texts, with the flexibility to change, pause or cancel at any time.

[179] For completeness, the Parties note that Vodafone also has a social tariff for broadband (full details can be found here).

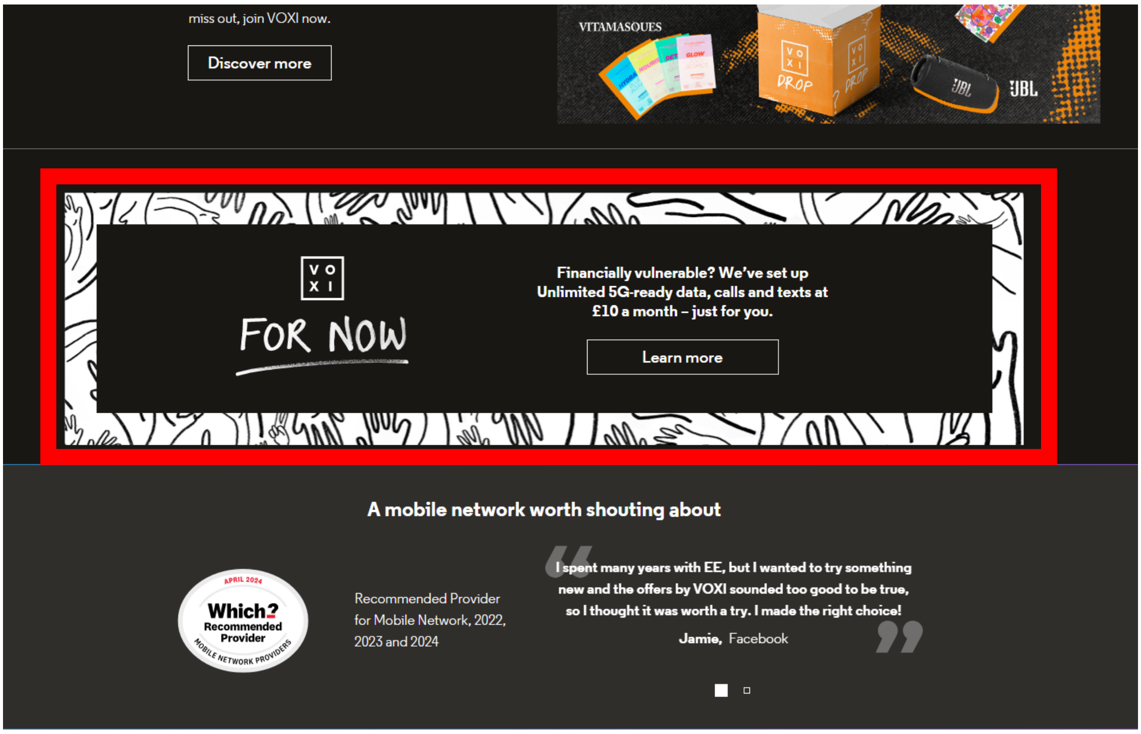
[180] SMARTY, *SMARTY social tariff*, last accessed 20 September 2024.

[181] For example, GoCompare, last accessed 20 September 2024.

[182] VOXI was identified as an outlier in 2023 for promoting its VOXI For Now package on its homepage, in contrast to other communications providers, which made social tariffs harder to find. See The Guardian, UK broadband and mobile firms accused of burying cheaper deals, 10 July 2023.

(i) VOXI For Now is displayed on VOXI's website on the main landing page[183] (see Figure 1 below) and in the website footer.[184] Information about VUK's range of social tariffs, including VOXI For Now, are linked under "Cost of living support" on VUK's main brand's landing page for customers seeking financial support[185] (see Figure 2 below). VUK's customer service teams will recommend VOXI For Now as a financial support option if a customer is in receipt of government benefits and struggling to pay their bills.

Figure 1 – Screenshot of VOXI For Now ad on VOXI's main landing page

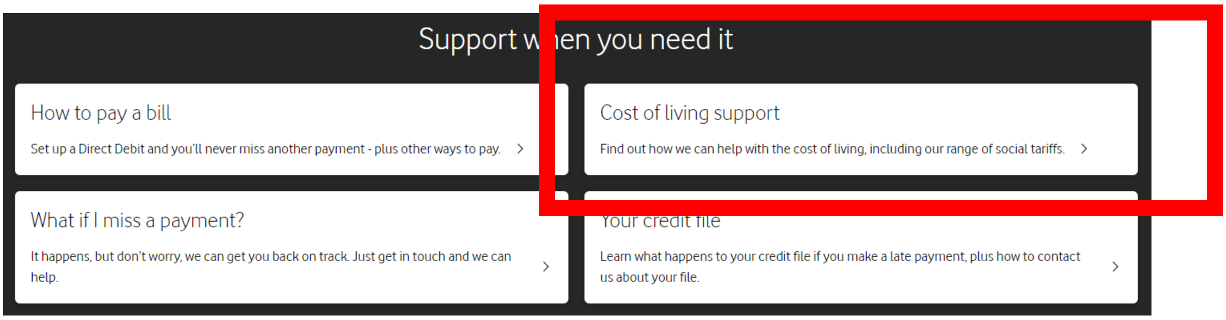


[183] See VOXI, last accessed 24 September 2024.

[184] See VOXI, last accessed 24 September 2024.

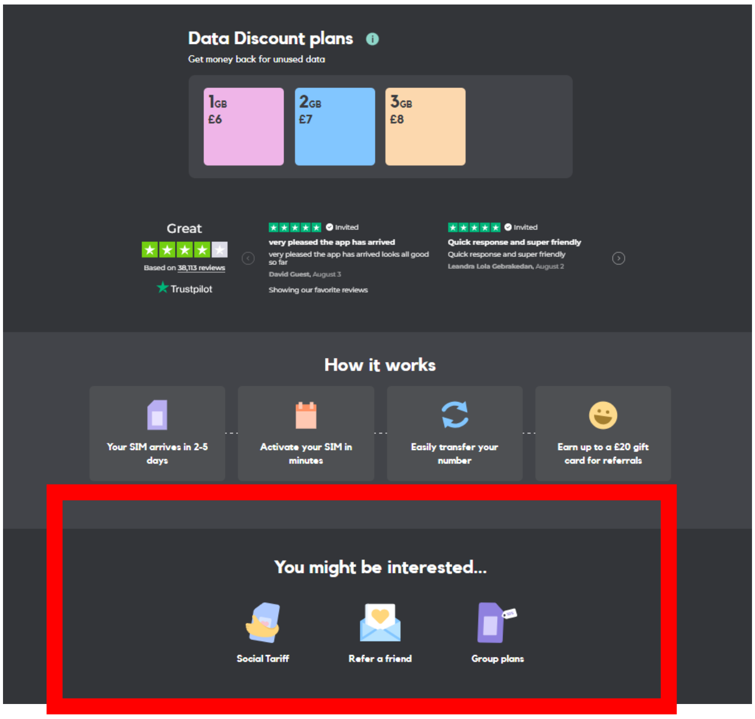
[185] See VUK, Bill and payment support, last accessed 24 September 2024 and Supporting through cost of living crisis, last accessed 26 September 2024.

Figure 2 – Screenshot of cost of living support link on VUK's "Bill and payment support" page



(ii) Similarly, the SMARTY social tariff is displayed on SMARTY's website, on the "All Plans" page[186] (see Figure 3 below) and in the website footer, including on the homepage.[187] SMARTY's social tariff is also promoted on 3UK's main brand's "Financial Support" landing page.[188] SMARTY's accessibility and complaints teams promote the social tariff in line with the Vulnerable Customer Policy. 3UK's customer wellness team provide support to those in financial hardship by offering the SMARTY social tariff, where appropriate.

Figure 3 – Screenshot of social tariff link on "All Plans" page of SMARTY website



5.21 The Parties will ensure that the continued provision of social tariffs is an effective remedy by maintaining a clear and simple process for claiming the social tariffs. For example, for

[186] See SMARTY, All Plans, last accessed 24 September 2024.

[187] See SMARTY, last accessed 24 September 2024.

[188] See 3UK, Financial support, last accessed 24 September 2024.

VOXI For Now, the eligibility process is run by VOXI's third party partner, Moneyhub. Moneyhub will simply check the relevant customer's bank account for the eligible government benefits and advise VOXI as to the customer's eligibility. The Parties will also continue to use third-party charity partnerships to promote social tariffs.

c) The Vulnerable Customers Commitment

5.22 As further protection for customers who are least able to afford mobile services, the Parties are also willing to commit to exclude existing vulnerable customers from mid-contract price rises for 24 months post Day 1 across the main brands and all sub-brands. For the purposes of this Commitment, 'vulnerable customers' are those experiencing financial difficulty as flagged by VUK's and 3UK's processes. VUK customers have the option of adding a flag to their own account, either themselves through their online portal or through customer-facing employees. 3UK customers can register their vulnerability via 3UK's Customer Contact centre, retailer advisors or on the "My3" app.

d) General terms of the Proposed Retail Customer Protections

5.23 The terms below apply across each of the Proposed Retail Customer Protections.

Other contractual terms

5.24 The Parties do not consider that there is a need to fix any non-price terms of retail customer contracts as:

(i) core non-price terms are part of standard terms and conditions that exist across tariffs and are not individually negotiated with customers; and

(ii) non-price terms also do not determine what quality of mobile service the customer receives.[189]

Implementation and enforcement

5.25 The Proposed Retail Customer Protections would each be implemented as a final undertaking under section 82 of the Act. The CMA would have its full suite of standard enforcement powers for final undertakings and orders. Any failure to comply with the Proposed Retail Customer Protections would be enforceable by civil proceedings brought by the CMA, under section 94 of the Act. Under section 94, the CMA has the power to apply for an injunction, interdict, or for any other appropriate relief or remedy.

Monitoring

5.26 Consistent with CMA precedent and guidance, and in line with the Parties' proposal for the Proposed Network Commitment, the Parties will establish an independent and appropriately qualified monitoring trustee to monitor compliance with these conditions and

[189] For completeness, the Parties note that some contracts will have different download speeds, but this is reflected in the price of the tariff.

report to the CMA.[190] The Parties will be responsible for remuneration of the monitoring trustee.

5.27 MergeCo will provide reports on a regular basis to ensure that the monitoring trustee and the CMA have sufficient visibility to satisfy themselves that the Proposed Retail Customer Protections are being implemented and observed. Specifically, MergeCo will provide a report confirming that each of the relevant Proposed Retail Customer Protections have been implemented correctly.

5.28 The SMARTY Pricing Commitment and the Social Tariffs Commitment will be particularly easy to monitor as the details of the relevant tariffs will be published on the SMARTY or VOXI websites. The Parties will also continue to set out on each of the relevant websites the rights of vulnerable customers. Indeed, customers can currently access the rights of a 3UK vulnerable customer at three.co.uk/vulnerability or by contacting the 3UK wellness team (with that team's dedicated number and email address published online).[191] Customers can access information on VUK's support for vulnerable customers online at Supporting Vulnerable Customers.[192]

Dispute resolution

5.29 Under the Proposed Retail Customer Protections, a customer can raise a dispute against MergeCo if they believe that MergeCo has:

(i) wrongfully denied their access to the Proposed Retail Customer Protections; or

(ii) not provided them with the correct contractual terms under one of the Proposed Retail Customer Protections.

5.30 An appropriate dispute resolution process could be established. For example, this could involve an independent adjudicator appointed by the monitoring trustee. Alternatively, it might be possible to leverage an existing Ombudsman process. For example, if disputes are not resolved via MergeCo's internal complaints process, MergeCo can refer the customer to one of the two Alternative Dispute Resolution schemes approved by Ofcom for complaints.[193]

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[190] The Parties consider that there are a range of suitably qualified candidates who possess relevant, in-depth telecoms experience.

[191] Three, Vulnerable Situation Support, last accessed 25 September 2024.

[192] For example, Vodafone, Supporting Vulnerable Customers, last accessed 25 September 2024.

[193] VUK currently uses the Communication & Internet Services Adjudication Scheme. 3UK currently uses the Communications Ombudsman.

iii. The Proposed Retail Customer Protections would be an effective remedy that addresses any residual SLC the CMA has provisionally identified in the retail market

5.31 The Parties explain below why the Proposed Retail Customer Protections would be effective remedies capable of eliminating or preventing the provisional SLC and its adverse effects in the retail market.

a) *Impact on the SLCs*

5.32 The Parties do not believe that the Proposed Retail Customer Protections are necessary as: (i) the Transaction does not give rise to any SLC in the retail market; and (ii) in any event, the Proposed Network Commitment (supported by the effects of the Beacon 4.1 agreements) resolves the retail SLC by ensuring the generation of significant REEs in full that counteract any anti-competitive effects across the short- and long-term (see paragraphs 4.30 to 4.34 above).

5.33 However, should the CMA have any residual concerns relating to the initial years of network integration and roll-out under the Proposed Network Commitment as it believes that the REEs may take some time to manifest,[194] the Proposed Retail Customer Protections would resolve any such concerns by providing retail customers with price protections across the duration of the Proposed Network Commitment's initial years. We explain below how each of the Proposed Retail Customer Protections addresses the CMA's concerns in the retail market:

The SMARTY Pricing Commitment

5.34 The SMARTY Pricing Commitment addresses the CMA's concerns in the NOPR that it may "*take some time for the rivalry enhancing effects of an Investment Commitment to manifest*"[195] and the CMA's concerns in the PFs regarding "*the impact of the Merger on the large number of retail customers who might have to pay more for improvements in network quality [that] they do not value*"[196] by providing a time-limited price freeze of SMARTY's standard tariffs at £10 and below, which the PFs found had the lowest price per GB in the market across the range of prepaid capped tariffs for Q3 and Q4 of 2023.[197] This guarantees that retail customers will continue to have access to affordable plans with no price rises during the initial years of the Proposed Network Commitment (should the rivalry enhancing effects of the Proposed Network Commitment not manifest within the timeframe expected).

5.35 Customers will be able to either directly benefit from the SMARTY Pricing Commitment by purchasing a tariff from SMARTY or indirectly benefit as the pricing in the commitment will influence the pricing of other brands in the retail market and ensure that rates remain

[194] NOPR, paragraphs 36 and 38.

[195] NOPR, paragraph 36.

[196] PFs, Summary, paragraph 65 and paragraph 14.210.

[197] PFs, paragraph 8.141(d)(i).

affordable. As the PFs recognise, brands are influenced by competitors' pricing when deciding on their own tariffs.[198]

5.36 Due to the low prices in the SMARTY Pricing Commitment, this also protects customers who are less able to afford mobile services, but do not meet the eligibility requirements under the Social Tariffs Commitment or the Vulnerable Customers Commitment. The SMARTY Pricing Commitment ensures that such customers continue to have affordable and attractive mobile tariff options in the market.

The Social Tariffs Commitment

5.37 The Social Tariffs Commitment addresses the CMA's particular concerns about the impact of the Transaction "*on those customers least able to afford mobile services*".[199] By ensuring that, for two years post-completion of the Transaction, the social tariffs under VOXI For Now and SMARTY are maintained at their current levels, the Parties will be protecting those who are least able to afford mobile services from hypothetical price rises, should they occur.

5.38 Social tariffs are widely acknowledged as a potential solution to the issues around low-income households affording essentials.[200] Ofcom surveys have found that "*those in receipt of benefits…continue to be among those most likely to have difficulty affording communications services*".[201] Social tariffs can, in the view of Ofcom, "*help ensure that mobile internet services remain affordable for customers on low or no income who struggle to pay their bills*":[202]

(i) social tariffs are cheaper than regular packages and are available to those on a variety of benefits. Although VOXI For Now and SMARTY's social tariff have slightly different eligibility requirements (see above at paragraph 5.17), they are both broadly available to all those who receive income-based benefits and financial support (such as universal credit). Standard rates remain unaffordable for some low-income households;[203] and

(ii) the prices for VOXI For Now and SMARTY's social tariff are not subject to mid-contract price rises and the plans are flexible (i.e., they cost nothing to cancel), which make them ideal for low-income households who may have unstable income or expenses from month to month.

5.39 Customers on VOXI For Now and SMARTY's social tariff will also benefit from MergeCo's significantly improved network quality post-Transaction, including in rural areas (see paragraphs 2.11 and 2.12). This means these customers will get a better-quality service

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[198] PFs, paragraph 14.151.

[199] PFs, Summary, paragraph 66 and paragraph 14.211.

[200] Social Market Foundation (supported by Citizens Advice), [Social tariffs and the cost of living](), August 2023.

[201] Ofcom, [Ofcom's communications affordability tracker](), last accessed 26 September 2024.

[202] Ofcom, [Ofcom's letter to MNO CEOs](), 7 July 2023.

[203] Ofcom, [Ofcom's communications affordability tracker](), last accessed 26 September 2024.

for the same price as the existing social tariff on the Parties' standalone networks. This will include unlimited data.

The Vulnerable Customers Commitment

5.40 Like the Social Tariffs Commitment, the Vulnerable Customers Commitment addresses the CMA's particular concerns about the impact of the Transaction "*on those customers least able to afford mobile services*"[204] as it specifically protects consumers who are financially vulnerable from mid-contract price rises for a period of 24 months.

5.41 The Vulnerable Customers Commitment captures customers who are in a state of financial difficulty. This may correlate with those on the lowest-incomes, but it could also capture middle or higher income customers who have been identified as experiencing financial difficulties and are therefore having problems paying their bills. It also captures customers who may not be eligible for the Social Tariffs Commitment and may want a different tariff that is not protected under the SMARTY Pricing Commitment. This ensures such customers are still protected during the initial years of the Proposed Network Commitment, despite falling outside of the other Proposed Retail Customer Protections. Between the three Proposed Retail Customer Protections, customers experiencing financial difficulty are comprehensively protected.

b) *Appropriate duration and timing*

5.42 The Proposed Retail Customer Protections will address any residual SLC and its effects from Day 1 of the Transaction as they will be in force from the outset and do not require a long period of implementation.

5.43 The duration of each of the Proposed Retail Customer Protections is 24 months post-Day 1. A typical duration for a mobile contract in the market is 24 months, with customers typically considering mobile offerings to meet their needs for up to a 12- or 24-month period. This is an appropriate duration as the Proposed Network Commitment (supported by the pro-competitive effects of the Beacon 4.1 agreements) will address the SLC in the long-term by ensuring the generation of significant REEs. These Proposed Retail Customer Protections are intended to act as time-limited protections – as the NOPR recognises at paragraph 38 - should the CMA have residual concerns about the early years of the implementation of the Proposed Network Commitment. Given the Parties expect the bulk of the REEs to manifest relatively early as per paragraphs 5.5 and 5.6, a 24-month duration is appropriate for each of the Proposed Retail Customer Protections.

c) *Practicality*

5.44 The Proposed Retail Customer Protections are practically achievable. The Parties have experience in delivering both social tariffs[205] and protections for vulnerable customers.[206] As such, both Parties have the structures and resources in place to implement these

[204] PFs, Summary, paragraph 66 and paragraph 14.212.

[205] Such as VOXI For Now and SMARTY's social tariffs.

[206] See, for example, items under Financial Support in Vodafone, Supporting Vulnerable Customers – Ways we can help.

remedies effectively. The SMARTY Pricing Commitment is also straightforward from an implementation perspective – the tariffs are part of SMARTY's standard offering and will continue to be treated as such. As such, there are no legal, financial or structural impediments for MergeCo to implement all three of the Proposed Retail Customer Protections.

5.45 Moreover, as outlined in paragraphs 5.26 to 5.28, monitoring and enforcement of the Proposed Retail Customer Protections can be effectively undertaken by a monitoring trustee. Indeed, as the SMARTY Pricing Commitment and the Social Tariffs Commitment will be detailed and can be accessed on the relevant websites, these Proposed Retail Customer Protections should pose a limited burden on the monitoring trustee.

iv. Typical risks the CMA associates with behavioural remedies do not apply

5.46 The Parties explain below why the risks the CMA typically considers when exploring behavioural remedies (namely, specification, circumvention, distortion and monitoring and enforcement risks) do not apply in relation to the Proposed Retail Customer Protections. At the outset the Parties note that, as explained above at paragraph 4.29, and as the CMA acknowledges in the NOPR (paragraph 17), behavioural remedies are appropriate for this Transaction given its context in a highly regulated sector.

a) Specification risks

5.47 The Proposed Retail Customer Protections are clearly specified and form an effective basis for monitoring and compliance. It is the price and data allowance of the tariffs that form the key metric for the Proposed Retail Customer Protections – both price and data allowance are unequivocal metrics that are easy to understand. Also, the Proposed Retail Customer Protections relate to tariffs that already exist in the market and are therefore already specified.

5.48 Given the time-limited nature of the Proposed Retail Customer Protections, they do not need to be specified in a way that accounts for technological changes in the retail market.

b) Circumvention risks

5.49 No circumvention risks arise from the Proposed Retail Customer Protections. For the SMARTY Pricing Commitment and Social Tariffs Commitment, the key terms are public.[207] For the Vulnerable Customers Commitment, this will also be public. A monitoring trustee will have a role in monitoring in all of these commitments.

5.50 In the unlikely event of a dispute, an independent dispute resolution process will ensure that a fair and efficient resolution is reached.

[207] SMARTY, *Terms and Conditions for using SMARTY*, last accessed 22 September 2024 and VOXI, *Terms & Conditions for VOXI For Now*, last accessed 22 September 2024.

c) *Distortion risks*

5.51 The Proposed Retail Customer Protections cannot distort the market in a way that would undermine its effectiveness.

5.52 MergeCo is able to amend the relevant prices downwards as the Proposed Retail Customer Protections only act as a price cap, as opposed to a strict restriction on future pricing for retail tariffs. This price cap will help to drive competition in the market by setting benchmarks for affordability.

5.53 Moreover, social tariffs and certain protections for vulnerable customers are already in place across the market – indeed, social tariffs have been strongly encouraged by Ofcom.[208] Rather than distorting the market, these Proposed Retail Customer Protections are in line with good market practice and could encourage competitors to adopt similar measures (to the extent not already in place).

d) *Monitoring / enforcement risks*

5.54 The Proposed Retail Customer Protections would not be subject to any monitoring or enforcement risks. They are each easy to monitor as the exact commitments are clear and can be tracked via the brand websites.

5.55 Moreover, the appointment of a monitoring trustee that will be remunerated by MergeCo will ensure no unreasonable demands are placed on CMA resources.

v. The design of any time-limited retail customer protections would need to preserve the substantial RCBs generated by the Transaction

5.56 The design of any time-limited retail customer protections, both as a standalone remedy or as part of a wider remedies package, would need to preserve the substantial RCBs that would be generated by the Transaction (as per section 2 above). The Proposed Retail Customer Protections have been designed to maximise their positive impact on the retail customers that are least able to afford mobile services. By focusing on helping those who are most likely to need financial assistance, the Proposed Retail Customer Protections preserve the RCBs of the Transaction as the revenue lost through these commitments will not undermine MergeCo's ability to invest in its network.

5.57 However, inevitably, freezing prices and maintaining social tariffs will have some impact on the revenue generated by MergeCo and its ability to invest in its network. As such, unlike the Proposed Network Commitment, the Proposed Retail Customer Protections, either together or separately, are not the least costly effective remedy option.

[208] Ofcom, *Ofcom's letter to MNO CEOs*, 7 July 2023.

6. PRE-AGREED WHOLESALE ACCESS TERMS

6.1 The NOPR has identified "*pre-agreed wholesale access terms*" as one of two "*Wholesale Market remedies*". The other identified remedy – the "*MVNO network capacity ring-fencing*" is considered at section 7 below. [209]

6.2 The NOPR states the "*pre-agreed wholesale access terms*" could involve "*pre-agreed non-discriminatory wholesale terms, including prices, being made available to MVNOs, subject to a reasonable limit (number of MVNOs or network capacity utilisation)*".[210]

6.3 The NOPR records further that the "*pre-agreed wholesale access terms*" and/or "*MVNO network capacity ring-fencing*" remedy could "*potentially be combined with the Proposed Network Commitment (and time-limited protections of retail customers, as described above) to protect MVNOs and their retail customers, recognising that many MVNOs price aggressively, often focusing on value segments of the retail market*". [211] This remedy should be considered alongside the Proposed Network Commitment and Beacon 4.1, which will have a pro-competitive effect on the wholesale and retail markets by significantly increasing VMO2's capacity.

6.4 In this section, the Parties explain:

(i) Why a "*pre-agreed wholesale access terms*" remedy is not necessary.

(ii) Without prejudice to the above position, the proposed key features of a remedy comprising pre-agreed wholesale access terms that could be a workable and effective basis for a remedy, if needed. (the "**Wholesale Reference Offer**" or "**WRO**").

(iii) Why the Wholesale Reference Offer would be an effective remedy that would eliminate or prevent any SLC in the wholesale market.

(iv) Why none of the risks the CMA typically considers when considering behavioural remedies – namely, specification, circumvention, distortion and monitoring and enforcement risks – apply in relation to the Wholesale Reference Offer.[212]

(v) Why the design of any "*pre-agreed wholesale access terms*", both as a standalone remedy or as part of a wider remedy package, would need to preserve the substantial RCBs that would be generated from the Transaction, and why the Wholesale Reference Offer would achieve this outcome.

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[209] NOPR, paragraph 29.

[210] NOPR, paragraph 41.

[211] NOPR, paragraph 40.

[212] NOPR, paragraph 58.

i. Pre-agreed wholesale access terms are not necessary

6.5 The Parties disagree with the provisional conclusion in the PFs that the Transaction gives rise to an SLC in the wholesale market. The Parties' response to the PFs will provide detailed representations in that respect. Accordingly, the Parties primary position is that there is no need for any remedy in the wholesale market since the Transaction is likely to increase, rather than reduce, competition in the wholesale market.

6.6 Today, 90% of MVNOs are hosted by BTEE or VMO2. [REDACTED]. These facts speak for themselves. It is not credible for MVNOs to assert that 3UK is an essential player in the wholesale market when they are evidently not prepared to be hosted on 3UK's network and 3UK's track record in the market is known to other MNOs. In assessing the evidence on this issue the CMA must have greater regard to MVNOs' incentive to seek to use the CMA to advance their own commercial positions. The CMA should accord greater weight to the objective evidence of which MNOs are invited by MVNOs to tender for their business and ultimately choose to contract with. The objective evidence demonstrates clearly that MVNOs do not significantly value 3UK's participation in the wholesale market.

6.7 If the CMA were to find that there is scope for an SLC in the wholesale market, REEs generated by the Transaction will prevent the SLC. The Transaction will substantially increase both MergeCo's and VMO2's network capacity and quality; as a result, MergeCo's MVNO customers will benefit from access to MergeCo's 'best-in-class' network, with significant additional network capacity. This additional capacity will incentivise MergeCo to offer competitive access terms and pricing. The PFs acknowledge the link between additional capacity and wholesale pricing, stating that the CMA has seen evidence "*that the incremental cost of capacity is taken into account in bidding"* (alongside other factors). [213]

6.8 VMO2 will also benefit from a significant acquisition of spectrum from the Parties and access to additional sites under Beacon 4.1 and will be enabled to further improve its network (contingent on completion of the Transaction) delivering a significant increase in capacity. Both MergeCo's and VMO2's abilities and incentives to compete more aggressively to win wholesale traffic will be significantly increased as a direct consequence of the Transaction. The PFs acknowledge that "*VMO2 told us that it considers that the Beacon 4.1 Agreements, including the spectrum transfer, will improve its competitiveness in the wholesale market*".[214] The PFs go on to acknowledge that "*the Beacon 4.1 Agreement between VUK and VMO2 will improve VMO2's network quality, enabling it to become a stronger competitive constraint post-Merger*" in the wholesale market.[215] The Parties therefore strongly believe that the Transaction does not result in any SLC in the wholesale market.

6.9 To the extent the CMA is concerned that the Transaction benefits delivering the full REEs may not be achieved, the Parties' commitment to deliver MergeCo's JNP in full addresses

[213] PFs, paragraph 14.145.

[214] PFs, paragraph 9.265.

[215] PFs, paragraph 9.267.

that concern (see section 4). The effect of this commitment is that the CMA can be certain that the increased network capacity forecast in the JNP will be delivered. Together with Beacon 4.1 (which significantly enhances the existing Beacon arrangement and provides for the transfer of spectrum to VMO2), the Parties believe that the Proposed Network Commitment represents a compelling remedy that comprehensively and effectively addresses any potential SLC in both the retail and the wholesale market. No further remedy is necessary.

6.10 Without prejudice to the above position, to the extent that the CMA still has residual concerns in the wholesale market, the Parties have considered the suggestion in the NOPR that pre-agreed access terms may be a suitable remedy. The Parties outline below the terms of a proposed "Wholesale Reference Offer" to supplement the Proposed Network Commitment that would be an effective further remedy, if needed. If required, this would clearly resolve any residual concerns in relation to the wholesale market and ensure that MVNOs continue to be in a position to access attractive wholesale terms.

ii. Description of Wholesale Reference Offer

6.11 The Parties are prepared to commit to make the Wholesale Reference Offer available to MVNOs with 2.5 million or fewer customers (**Requesting Parties**)[216]. The following table sets out the key features of the Wholesale Reference Offer. Further explanation of these key features is set out below.

Wholesale Reference Offer to MVNOs	(1) Wholesale Reference Offer made available to MVNOs (with 2.5 million or fewer customers) on the basis of pricing which is competitive based on prevailing market rates. The Parties propose three pricing tiers according to the size of the MVNO customer base in line with currently prevailing market terms. (2) MergeCo will commit to enter into wholesale contracts on the basis of the Wholesale Reference Offer for up to [REDACTED]% of MergeCo's mobile network capacity creating a significant increment of additional MVNO subscribers on MergeCo's network.
Duration	Up to 8 years. Requesting Parties will be able to seek access pursuant to the Wholesale Reference Offer during the first three years. MVNO contracts agreed pursuant to the Wholesale Reference Offer will have a term of up to 5 years.
Non-discrimination/ Technology access	MergeCo shall supply the same quality of service and coverage to MVNOs as it does to its own customers and to those of other MVNOs on the MergeCo Network.

[216] "Requesting Party" means an MVNO or MVNA/Aggregator (excluding M2M or IoT MVNOs) seeking wholesale access to the MergeCo network for the purposes of offering retail mobile communications services to end customers as an MVNO in the UK and which does not directly or indirectly control, is not controlled by or is not under common control with or is not otherwise affiliated to a mobile network operator active in the United Kingdom.

	MVNOs will benefit from access to new technologies on MergeCo's network in line with the approach in the Parties' current wholesale contracts. 5G SA will be available to MVNOs hosted on MergeCo's network when 5G SA is enabled on MergeCo's network.
Reporting mechanisms	Reporting to a monitoring trustee on the number and identity of MVNOs requesting wholesale access under the Wholesale Reference Offer and agreements reached with MVNOs.
Monitoring mechanisms	Monitoring trustee appointed under the Act and funded by MergeCo (reporting to the CMA).
Implementation	An undertaking to the CMA under the Act.
Dispute resolution	Appointment of an independent adjudicating body, reporting to the monitoring trustee or Ofcom, to resolve any disputes arising between Requesting Parties and MergeCo, regarding the terms of access provided under the Wholesale Reference Offer. The independent adjudicator could alternatively be subsumed within the same role as the monitoring trustee. Alternatively, adjudication of disputes could be performed by a panel of experts (appointed by MergeCo and the Requesting Party), or by Ofcom.

6.12 The Wholesale Reference Offer will include the following terms, which the Parties consider to be the key terms in MVNO wholesale contracts:

(i) **Price and a future pricing mechanism**: there will be three different pricing tiers, depending on the MVNO's size with pricing based on currently prevailing terms in the market. The offer will contain a future pricing mechanism to protect MVNOs (see paragraph 6.30 below).

(ii) **Service equivalence**: providing a mobile service to MVNOs' customers on the same basis as the service is provided to the MNO's own customers. The WRO provides that 5G SA technology will be made available to MVNOs under the Wholesale Reference Offer, subject to MVNOs having the required network capabilities to avail themselves of technologies or services provided under the WRO (and subject to speed tiering explained at paragraph 6.13 below).

(iii) **Non-discrimination**: the offer will contain a term that MergeCo will supply the same quality of service, technical operational and performance standards and coverage to MVNOs in respect of the MVNOs' customers as MergeCo does to MergeCo's own customers and to those of other MVNOs on the MergeCo

Network, including with respect to suspension of services for maintenance (including repairs, upgrades and modifications to the MergeCo network) and emergencies.

(iv) **Access to new technologies**: the offer will contain a term to govern the provision of access of new technologies related to the mobile services being purchased (for example, future generations of mobile technology). This will allow for the MVNO to gain access to new technology on MergeCo's network where it is technically feasible (including based on the MVNO's capabilities) within a reasonable period after MergeCo has implemented the new technology.

(v) **Implementation costs**: Implementation costs to be borne by the MVNO with a minimum of 50% of these being paid upfront; the remainder would be offset against the minimum revenue commitment (see below).

(vi) **Contract duration**: 5 years with the ability to request a shorter term.

(vii) **Minimum revenue commitment**: in line with current market practice, MVNOs will be required to commit to minimum revenue levels to cover remaining implementation costs, demonstrate their commitment and support their business case and incentivise growth.[217] Each pricing tier will have an associated minimum revenue commitment which is set at a level to incentivise growth without creating any risk of a barrier to new entry.

(viii) **Payment terms**: Depending on perceived degree of risk of the MVNO, MergeCo could ask for payment in advance, although 30 day payment terms are typical.

6.13 The WRO will apply to speeds of up to 150mbps on MergeCo's network. The Wholesale Reference Offer will also contain a term allowing for access to the highest network speeds/quality to be negotiated separately, outside the WRO terms. Such terms are increasingly offered in the market today as very high speeds become more available in the market. For example, speeds above 150mbps would require separate negotiation with MVNOs, while the standard Wholesale Reference Offer terms would apply to speeds up to 150mbps without any separate negotiation.

6.14 The proposed terms in the Wholesale Reference Offer will represent a competitive offer based on the pricing the Parties have observed in the market. The terms in the Wholesale Reference Offer represent a minimum standard that MergeCo will offer (and in terms of pricing, a price cap); MergeCo and a Requesting Party will be able to negotiate variations to the terms in the Wholesale Reference Offer (including better terms). The Wholesale Reference Offer does not preclude MergeCo from entering into MVNO agreements which are not subject to the terms of the Wholesale Reference Offer, if the prospective MVNO chooses not to base their contract on the Wholesale Reference Offer. Likewise, the Wholesale Reference Offer does not prevent the MVNO from engaging with other MNOs in parallel to secure more favourable terms and the Parties envisage that MVNOs will do this as part of the competitive bargaining process.

[217] For example, Vodafone has a minimum revenue commitment in its current contracts with [REDACTED].

6.15 Other typical elements of a wholesale contract might include terms regarding technical change requests (including who bears the cost), or terms regarding complementary services (including Interconnect Services, International Call routing, call termination services). These will not be covered by the Wholesale Reference Offer and can be negotiated freely by MergeCo with Requesting Parties.

6.16 The Parties do not expect significant developments in the non-price related terms in MVNO agreements during the next 8 years absent the Merger.

a) *Availability of the Wholesale Reference Offer*

6.17 The Parties procure that for a period of 3 years following completion, MergeCo will make wholesale access to the MergeCo Network available to Requesting Parties on the basis of the Wholesale Reference Offer, with the expectation that existing MVNOs who take up the WRO will migrate their entire customer base to MergeCo's network. MVNOs will be able to agree contracts with a term of up to 5 years so that the overall duration of the WRO terms is up to 8 years. The Wholesale Reference Offer would not need to be made available to MVNOs with more than 2.5 million customers (such as Sky)[218] as these MVNOs have particularly significant bargaining power, they are protected by long term contracts, use formal tender processes and will always receive bids from all MNOs that enable them to secure attractive terms. The PFs acknowledge (at paragraph 9.184 and 9.192) that large MVNOs experience greater competition from MNOs, typically obtain parity of service and can achieve better offers from their host MNOs by negotiating with other MNOs, and by using the threat of offers (even where no actual offer has been received) from other MNOs.

6.18 MergeCo will not be obliged to offer the Wholesale Reference Offer to any MVNO when the aggregate forecasted MVNO mobile data traffic for the coming 12 months at any point in time over the 3-year duration of the Wholesale Reference Offer is more than [REDACTED]% of the Total Capacity of the MergeCo Network.

6.19 Total Capacity of the MergeCo Network means the amount of mobile data carried over the MergeCo Network per month, measured in Petabytes per month. **Table 2** (which will apply from completion) sets out for Years 1-3 (i) the Total Capacity of the MergeCo Network, which is based on the JBP forecast,[219] and (ii) the maximum amount that can be used by MVNOs, corresponding to [REDACTED]% of the Total Capacity of the MergeCo Network, above which MergeCo will not be obliged to offer the Wholesale Reference Offer. The aggregate forecasted MVNO mobile data traffic includes the 12 month traffic forecasts of all MVNOs (except any MVNO with more than 2.5 million subscribers) on MergeCo's network as at the time of the request by a Requesting Party.

[218] The PFs note that "*Sky Mobile's status also provides it with significantly more resources and leverage in negotiations with MNOs*" (paragraph 9.192 (c)(i)).

[219] There will be an adjusting mechanism to increase the Total Capacity of the MergeCo Network in any given year if MergeCo has exceeded its expected capacity as at that year.

Table 2 – Total Capacity of the MergeCo Network for Years 1-3

Year	Total Capacity of the MergeCo Network (Petabytes/month)	Maximum proportion of capacity after which MergeCo will not be obliged to offer the WRO ([REDACTED]% of Total Capacity) (Petabytes/month)
Year 1	[REDACTED]	[REDACTED]
Year 2	[REDACTED]	[REDACTED]
Year 3	[REDACTED]	[REDACTED]

6.20 The WRO will be effectively on a "first come, first served" basis, although a Requesting Party merely requesting access but not yet having executed an MVNO Agreement with MergeCo will **not** count towards the proportion of MergeCo's network capacity forecasted as being used by MVNOs. Therefore, it is open to a broad group of Requesting Parties to seek to take advantage of the Wholesale Reference Offer, including in their negotiations with BTEE and VMO2, even if an MVNO Agreement is not executed with MergeCo. Further, the maximum proportion of MergeCo's network capacity limit only relates to whether MergeCo is **obliged** to offer the terms of the Wholesale Reference Offer. It does not prevent MergeCo from negotiating with additional MVNOs above this level (including negotiating on the basis of the terms of the Wholesale Reference Offer).

6.21 The Parties consider the relevant **maximum proportion of MergeCo's network capacity** for the WRO to be [REDACTED]%. Whenever the aggregate forecasted mobile data traffic of MVNOs on MergeCo's network (excluding mobile data traffic for any MVNO with more than 2.5 million customers) accounts for more than [REDACTED]% of MergeCo's network capacity, MergeCo will not be required to offer the Wholesale Reference Offer to a Requesting Party. The Parties have determined this proportion based on their current network usage by MVNOs and allowing for sufficient additional capacity to attract a number of additional larger and smaller MVNOs with 2.5 million or fewer customers, without any material increase to congestion or degradation of the network experience and ensures the RCBs are delivered. As forecast at completion, the [REDACTED]% maximum proportion represents sufficient network capacity to attract additional MVNOs with significant volumes of retail customers onto MergeCo's network (approximately [REDACTED]), and their demand will only continue to grow and will be accommodated by MergeCo's growing network capacity.

6.22 Technical implementation requirements mean that it is not practicable to onboard more than 3 MVNOs (and/or MVNAs) at any one time; therefore, MergeCo will not be required to onboard more than 3 MVNOs (and/or MVNAs) at any one time.

6.23 The Wholesale Reference Offer would not require capacity to be 'ringfenced'. When an MVNO approaches MergeCo seeking wholesale access, MergeCo will refer to the Total Capacity of the MergeCo Network, the current aggregate forecasted mobile data traffic for the coming 12 months of MVNOs on MergeCo's network (excluding traffic for any MVNO with more than 2.5 million customers), and whether the Requesting Party's traffic projection would cause the maximum proportion to be exceeded in the coming 12 months. If the maximum capacity would be exceeded, MergeCo is not obliged to offer to host the

Requesting Party pursuant to the Wholesale Reference Offer, although it is free to negotiate with the Requesting Party (including on the terms in the Wholesale Reference Offer). If the maximum capacity would not be exceeded, MergeCo would be obliged to offer to enter into an agreement with the MVNO on the basis of the Wholesale Reference Offer. Failure to do so would allow the Requesting Party to use the dispute resolution mechanisms or report the alleged non-compliance to the CMA. As MergeCo's network capacity will grow over time, it is possible that even if the maximum proportion is reached in Year 1 (for example), if additional MVNO capacity exists by Year 3, MergeCo will again be obliged to offer the Wholesale Reference Offer terms to Requesting Parties.

6.24 MergeCo will be required to offer wholesale access on the terms of the Wholesale Reference Offer subject to the usual criteria currently applied by the Parties in the ordinary course of business such as creditworthiness and technical capabilities that meet MergeCo's integration requirements.

b) <u>Pricing structure</u>

6.25 MergeCo will offer Requesting Parties access to the MergeCo Network according to MVNO size per a tiered pricing structure. The Wholesale Reference Offer includes three tiers, with each tier having a wholesale price / GB as a reference rate:

(i) **Tier 1**: will be offered to MVNOs with fewer than 0.5 million subscribers (including new entrant MVNOs) with a commitment period of up to five years.[220]

(ii) **Tier 2**: will be offered to MVNOs with between 0.5 million and 1 million subscribers with a commitment period of up to five years.[221]

(iii) **Tier 3**: will be offered to MVNOs with between 1 million and 2.5 million subscribers with a commitment period of up to five years.[222]

6.26 The pricing in each tier is set out below and operates as a maximum price that MergeCo could offer to Requesting Parties:

Tier	**Structure**	**Pricing per Gigabyte**
	MVNO customer base	**Year 1**
Tier 1	<0.5m customers	[REDACTED]
Tier 2	0.5-1m customers	[REDACTED]
Tier 3	1-2.5m customers	[REDACTED]

220 MVNOs that would currently sit within Tier 1 include Utility Warehouse, Asda Mobile, and TalkTalk.

221 The Parties are not aware of any MVNOs that currently sit in Tier 2.

222 MVNOs that currently sit within Tier 3 include Lyca Mobile and iD Mobile.

6.27 The Parties individually consider these rates to be competitive based on the pricing the Parties have observed in the market (i.e. prevailing market rates).

6.28 The pricing will not be made public, but will be provided to requesting MVNOs under NDA to keep the pricing confidential.

6.29 The pricing has been structured across three tiers in recognition that larger MVNOs would typically be offered lower prices due to the greater volume of customers. The Parties chose the three tiers based on the customer bases of new entrant or smaller MVNOs (Tier 1), mid-sized MVNOs (Tier 2), and larger MVNOs (Tier 3). The rates in each tier are competitive based on what the Parties would expect for an MVNO with that volume of subscribers. The pricing tiers were selected to incentivise the MVNO to compete and grow its base to benefit from the lower pricing should they move into the higher tier. For example, if a Requesting Party enters an MVNO agreement with MergeCo as a Tier 1 MVNO but after two years grows its base to 510,000 subscribers, it will then receive Tier 2 pricing.

6.30 The price will be subject to a Future Pricing Mechanism ("**FPM"**). These mechanisms are commonly observed in the market,[223] acting to protect MVNOs and account for the likely future evolution of retail pricing and customer data usage in the market. The FPM will use a reference margin calculated using three elements: (i) MergeCo's retail mobile ARPU (PAYM including SIMO); (ii) MergeCo's average monthly data usage (PAYM including SIMO); and (iii) the WRO rate used in that period. The reference margin would be calculated annually, and the MVNO's WRO rate adjusted accordingly. The reference margin formula will be:

[REDACTED]

Where:

- [REDACTED].
- [REDACTED].

6.31 Under the FPM formula, when MergeCo's data usage per customer increases, or where MergeCo's ARPU decreases, the MVNO wholesale rate is reduced proportionally, protecting the MVNO. [REDACTED]. As data usage per customer continues to increase year after year, the Parties expect that the reference margin will lead to a **decreasing** wholesale price over time. The FPM therefore allows the rates to remain competitive and, consequently, that MVNOs on the MergeCo Network continue to compete effectively in the downstream retail market.

223 For example, VUK's contracts with [REDACTED] are subject to FPM mechanisms.

c) Technological equivalence

6.32 MergeCo will supply the same quality of service and coverage to MVNOs under the Wholesale Reference Offer as it does to its own customers and to those of other MVNOs on the MergeCo Network. In particular, MVNOs will benefit from access to new technologies related to the mobile services being purchased (for example, future generations of mobile technology), on MergeCo's network in line with the approach in the Parties' current wholesale contracts. This typically involves making new technologies available to the MVNO within 9 months of the new technology being commercially launched by MergeCo, provided the MVNO has the necessary technical capabilities and subject to a negotiation between MergeCo and the MVNO of the terms and conditions, including any implementation costs to be contributed by the MVNO.[224]

6.33 For the avoidance of doubt, under the terms of the Wholesale Reference Offer, 5G SA will be available to MVNOs hosted on MergeCo's network when 5G SA is enabled on MergeCo's network without requiring a separate agreement.[225]

d) Implementation

6.34 The Parties propose that the Wholesale Reference Offer would be reflected in a final undertaking to the CMA under section 82 of the Act.

e) Duration

6.35 The Wholesale Reference Offer will have a duration of up to 8 years. MVNOs can seek access under the Wholesale Reference Offer during the first 3 years, for MVNO contracts of a term of up to 5 years.

f) Monitoring and reporting

6.36 Consistent with CMA precedent and guidance, the Parties will establish an independent and appropriately qualified monitoring trustee to monitor compliance with these conditions and reporting to the CMA.[226] The Parties will be responsible for remuneration of the monitoring trustee.

6.37 MergeCo will provide reports on a regular basis to ensure that the monitoring trustee and the CMA have sufficient visibility to satisfy themselves that all eligible Requesting Parties are receiving access to the terms of the Wholesale Reference Offer. The reports would include:

[224] For example, VUK's contracts with [REDACTED] require potential further discussions / agreement of terms prior to implementing new technology.

[225] For the avoidance of doubt, future capabilities such as network slicing and RAN configurability are separate services and will be subject to separate negotiation.

[226] The Parties consider that there are a range of suitably qualified candidates who possess relevant, in-depth telecoms experience.

(i) details of the number and identity of Requesting Parties seeking and being granted access to the MergeCo Network on the terms set out in the Wholesale Reference Offer; and

(ii) confirmation that all eligible Requesting Parties requesting terms in the Wholesale Reference Offer have received those terms (or better).

6.38 Ofcom could be involved in overseeing MergeCo's compliance with the commitments including verifying that MergeCo has offered access to eligible MVNOs and that the terms of MVNO agreements concluded under the Wholesale Reference Offer comply with the terms of the Wholesale Reference Offer. Ofcom will not be required to determine prices.

g) Enforcement

6.39 The Wholesale Reference Offer would be implemented as a final undertaking under s82 of the Act. The CMA would have its full suite of standard enforcement powers for final undertakings and orders. Any failure to comply with the Wholesale Reference Offer would be enforceable by civil proceedings brought by the CMA, under section 94 of the Act. Under section 94, the CMA has the power to apply for an injunction, interdict, or for any other appropriate relief or remedy.

h) Dispute resolution

6.40 Under the Wholesale Reference Offer, if MergeCo and a Requesting Party have not agreed upon the terms of a wholesale agreement within a period of 5 months[227] of MergeCo's receipt of the written request from the Requesting Party that they want to contract with MergeCo under the terms of the Wholesale Reference Offer, and provided that the CEO of MergeCo and the Requesting Party have not resolved the matters in dispute within 4 weeks of the matter being escalated to them in writing by either party, a fast track dispute resolution procedure shall apply.

6.41 The fast-track dispute resolution procedure will require a prescribed adjudication process and timeline to be followed. The Parties consider that the adjudication could be performed by any of the following:

(i) a panel of experts appointed by MergeCo and the Requesting Party;

(ii) an independent adjudicator appointed by the monitoring trustee or Ofcom; or

(iii) Ofcom.

6.42 The fast-track dispute resolution process will be such that a Requesting Party will have access to an independent, effective and efficient means of resolving the dispute with MergeCo.

[227] The Parties consider 5 months to be a reasonable period of time to enter into the contract, taking into account aspects of technical implementation or integration.

6.43 Other disputes that may be referred immediately to dispute resolution (by one of the three bodies above) include, for example, disputes regarding the eligibility of a Requesting Party to access the terms in the Wholesale Reference Offer, determining whether a refusal by MergeCo to provide access is a breach of the Wholesale Reference Offer, or determining whether all of the individual terms have been offered during negotiation of the MVNO Agreement. The adjudicating body will not be required to set prices.

6.44 Overview of the adjudication process:

(i) Once the fast-track dispute resolution procedure becomes applicable, either MergeCo or the relevant Requesting Party may initiate the procedure by giving written notice to the other party, copied to the monitoring trustee or Ofcom. A body shall then be appointed within 15 calendar days to hear the dispute (the "**adjudicating body**"). The adjudicating body shall then decide within 5 calendar days of its appointment the procedure to be followed.

(ii) The process shall be conducted in private and shall be confidential but under the supervision of the monitoring trustee or Ofcom. The adjudicating body will have extensive powers as set out in paragraph 6.45 below to assist in its determination of the dispute.

(iii) The adjudicating body shall make its determination within 3 months of its appointment by giving a written decision setting its reasons. Its decision shall be final and binding on MergeCo, which shall comply immediately with the decision and any relevant directions issued by the adjudicating body. The decision of the adjudicating body may be enforced in a summary manner.

6.45 The adjudicating body will have extensive powers to request and access the relevant information from MergeCo and the Requesting Party, including the ability to request information from the parties in dispute and to question them. Specifically:

(i) The adjudicating body may request any documents and information (subject to legal privilege) as it reasonably requires from MergeCo and the Requesting Party, including any written submissions. It may meet with and question MergeCo and the Requesting Party.

(ii) The adjudicating body may obtain and consider representations, submissions and external information as it requires, including from Ofcom or the CMA, and appoint experts, assessors or legal advisers.

(iii) The adjudicating body may give directions as to the procedure and timetable for the adjudication and any deadlines. The adjudicating body may draw adverse inferences from a failure by MergeCo or the Requesting Party to comply with its directions, and make a decision based on the information available.

6.46 The adjudicating body will report to the monitoring trustee or Ofcom, who will report to the CMA on recent disputes, any instances of non-compliance with the Wholesale Reference Offer, and any recommendations on the operation of the Wholesale Reference Offer. Additionally:

(i) The adjudicating body may disclose any information received by it to Ofcom and the CMA (subject to a requirement to allow the interested party to make representations prior to disclosing, where that party considers the information should not be disclosed).

(ii) Ofcom or the CMA may issue guidance regarding the fast-track dispute resolution process, to be followed by the adjudicating body.

(iii) Ofcom or the CMA, upon the relevant Requesting Party's request, review a decision by an adjudicating body (if the CMA considered that such an appeal right were necessary to include).

6.47 The CMA will not need to play a role in dispute resolution between MergeCo and Requesting Parties. However, it will be open to the CMA to take enforcement action for a breach of the Undertaking or to take any action in relation to the recommendations on the operation of the Wholesale Reference Offer provided by the monitoring trustee or Ofcom.

iii. The Wholesale Reference Offer would be an effective remedy that addresses any residual SLC the CMA has provisionally identified

6.48 The Parties explain below why the Wholesale Reference Offer would be an effective remedy capable of eliminating or preventing any SLCs and their adverse effects.

a) *<u>Impact on the SLCs</u>*

6.49 In accordance with section 41 of the Act, the Wholesale Reference Offer would "*prevent the SLC"* by guaranteeing the continued offer of competitive pricing terms to MVNOs (subject to conditions). The Parties have provided considerable evidence on the pro-competitive effects of the Transaction on the wholesale and retail market.[228] REEs generated by the Transaction, as underwritten by the Proposed Network Commitment, will be enough to prevent the SLCs, including in the Wholesale market.

6.50 The Parties do not agree with the CMA's initial view in the Remedies Notice that the Investment Commitment is likely to have a greater impact on competition in the retail than the wholesale market.[229] The Transaction is expected to have a particularly significant impact on the wholesale market. The PFs find limited competition in wholesale, as not all MNOs bid for all opportunities. VMO2 is selective in participating in wholesale tenders,[230] likely due to its lack of available network capacity – several MVNOs have expressed particular concerns to the CMA about VMO2's network quality falling behind,[231] in circumstances where MVNOs agree that quality is important (similar numbers of MVNOs rank quality and price as the most important factor when selecting host).[232] In addition,

[228] Including Annex 2 – Response to TOH2 Working Paper.

[229] NOPR, paragraph 37.

[230] PFs, paragraph 9.62.

[231] PFs, paragraph 9.257.

[232] PFs, paragraph 9.257.

MVNOs do not consider 3UK a credible network host in practice (despite their submissions to the CMA).

6.51 In comparison, the Transaction will substantially increase both MergeCo's and VMO2's network capacity and quality; as a result, MVNOs will benefit from access to MergeCo's 'best-in-class' network with significant additional network capacity leading to improved access terms and competitive pricing. The PFs agree that (i) MergeCo will deliver an increase in network capacity and improved quality;[233] (ii) that some reduction in the incremental cost of capacity is likely;[234] and that (iii) the Parties do take into account any additional cost of capacity from hosting MVNOs in their wholesale bids (even if the evidence did not indicate the precise effect on the price ultimately agreed with MVNOs).[235] Since MergeCo can therefore be expected to pass on incremental cost reductions and resulting capacity and quality improvements to their MVNOs' customers as integration of the two networks progresses over time and because MergeCo's better quality will trigger competitive responses,[236] any wholesale remedy should be appropriately limited in its duration.

6.52 VMO2 will benefit from a significant acquisition of spectrum from the Parties under Beacon 4.1 (contingent on completion of the Transaction). Both MergeCo's and VMO2's abilities and incentives to compete more aggressively to win wholesale traffic will therefore be significantly increased. The PFs acknowledge that "*VMO2 told us that it considers that the Beacon 4.1 Agreements, including the spectrum transfer, will improve its competitiveness in the wholesale market*".[237] The PFs consider that "*the Beacon 4.1 Agreement between VUK and VMO2 will improve VMO2's network quality, enabling it to become a stronger competitive constraint post-Merger*" in the wholesale market.[238] The Proposed Network Commitment guarantees the delivery of the key elements of the JNP, such that the Parties' view is that no further remedy is required.

6.53 However, to the extent the CMA has any residual concerns, the Wholesale Reference Offer would provide further guarantees that the CMA's concerns relating to the retail market and the wholesale market do not materialise. We address the Wholesale Reference Offer's effect on both markets in turn.

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[233] PFs, paragraphs 14.212, 14.227, 14.190 - 14.194.

[234] PFs, paragraph 14.242.

[235] PFs, paragraph 14.243.

[236] The Parties' response to the PFs will explain that the CMA's view that the rate of pass through would be reduced due to the loss of competition is wrong. Economists have long understood that significant firm-specific cost-pass through can be expected even in concentrated markets and indeed can increase with the degree of concentration.

[237] PFs, paragraph 9.265.

[238] PFs, paragraph 9.267.

Wholesale market

6.54 The NOPR raises a concern that – despite the Investment Commitment – the Transaction might "make it more difficult for independent MVNOs to secure competitive terms".[239] The NOPR notes that the Investment Commitment would have the potential to enhance rivalry in the relevant markets, but that the CMA considers it may take some time for the rivalry enhancing effects of an Investment Commitment to manifest.[240] The Parties consider that Beacon 4.1 will significantly increase VMO2's capacity and therefore ability and incentive to compete for wholesale business.

6.55 The Wholesale Reference Offer comprehensively addresses the CMA's concern by ensuring MVNOs continue to benefit from access terms that are competitive, based on the prevailing competitive terms in the market. The PFs noted, for example, concerns from a potential new entrant MVNO that it was "unable to enter the supply of wholesale mobile services owing to failed negotiations".[241] Under the Wholesale Reference Offer, MergeCo would be committed to making the Wholesale Reference Offer available to all Requesting Parties (subject to the [REDACTED]% network capacity cap), including new entrant MVNOs. This commitment represents a significant improvement to competition in comparison to the counterfactual.

6.56 To the extent the CMA has any residual concerns with TOH2, these should be fully addressed by the Proposed Network Commitment and Beacon 4.1, as the Transaction will substantially increase both MergeCo's and VMO2's capacity and quality; as a result, (i) MVNOs will benefit from access to MergeCo's 'best-in-class' network, with significant additional network capacity leading to improved access terms and competitive wholesale pricing and, as a consequence, (ii) MergeCo will be a substantially stronger competitor to BTEE and VMO2 than either VUK or 3UK in the counterfactual, and (iii) MVNOs will benefit from access to VMO2's improved network and increased capacity. Evidence from MVNOs provided to the CMA supports the perceived benefits the Transaction would bring to the wholesale market.[242] However, if required, the Wholesale Reference Offer would remove any possibility that MergeCo could offer less competitive wholesale terms to MVNOs as the Wholesale Reference Offer guarantees an upper bar of rates that are competitive based on prevailing market rates. This will guarantee that MVNOs will continue to obtain competitive wholesale contracts and that there cannot be a reduction in competition in the wholesale market compared to the counterfactual.

6.57 This upper bar in the Wholesale Reference Offer will impact the terms that BTEE and VMO2 offer to MVNOs. Even if a prospective MVNO does not ultimately contract with MergeCo, the existence of the Wholesale Reference Offer means that BTEE and VMO2 will know that the MVNO will be able to obtain competitive terms from MergeCo, which

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[239] NOPR, paragraph 37.

[240] NOPR, paragraphs 32 and 36.

[241] PFs, paragraph 9.256(h).

[242] For example, one MVNO told the CMA that in its view costs may remain the same but that "*its customers would have access to better coverage, benefitting the MVNO's offering*" (PFs, paragraph 9.262(d)). A large MVNO told the CMA that Beacon 4.1 "*was a positive development, as it should result in rebalancing of spectrum and improving VMO2's network in terms of capacity and network quality*" (PFs, paragraph 9.264(a)(ii)).

puts downwards pressure on the terms that BTEE and VMO2 offer in order to attract or retain MVNO customers. BTEE and VMO2 will know that – if they do not offer competitive terms to the MVNO – that MVNO will contract with MergeCo, resulting in a loss in revenue opportunities for BTEE and VMO2.

6.58 The incentive of BTEE and VMO2 to match, or improve upon, MergeCo's wholesale reference offer will be in addition to the increased incentive BTEE and VMO2 will have to price competitively in the wholesale market post-Transaction given they will have invested further in their own network capacity and quality following the Transaction (as the Parties have extensively submitted previously).[243]

6.59 Finally, the Wholesale Reference Offer also addresses any concern by the CMA that MVNOs (in particular, new entrants) may be left without **any** MNO options.[244] Under the Wholesale Reference Offer, MergeCo would be committed to making the Wholesale Reference Offer available to all Requesting Parties (subject to reasonable network capacity limits), including new entrant MVNOs. This represents a significant improvement to competition in comparison to the counterfactual.

Retail market

6.60 The Wholesale Reference Offer addresses the concern in the NOPR that, post-transaction, "the Merger would lead to price increases for mobile customers".[245]

6.61 As per paragraphs 6.51 and 6.52, any potential harm to consumers should be fully addressed by the Proposed Network Commitment. However, in addition to directly addressing TOH2, the Wholesale Reference Offer would further address TOH1: MVNOs will continue to have access to competitive wholesale prices, with rates in the Wholesale Reference Offer being competitive based on prevailing market rates; these rates will enable MVNOs to continue to offer highly competitive prices to end customers, including to any end-consumers of MVNOs who are considered price-sensitive.

6.62 Furthermore, the Wholesale Reference Offer's tiered pricing structure will incentivise MVNOs to compete aggressively and grow the size of their customer bases to take advantage of better pricing available in higher tiers. The tiered structure will ensure increasingly favourable wholesale rates as MVNOs grow their subscriber base, with MVNOs incentivised to obtain sufficient customers to move to the next tier.

6.63 MVNOs on MergeCo's 'best-in-class' network will be able to receive improved, high network quality for the benefit of their customers. MVNOs are therefore empowered to compete more effectively in the retail market, ultimately benefiting consumers in the form of most cost-effective and higher-quality product offerings.

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[243] See, for example, Annex 1 – Response to TOH1 Working Paper, paragraph 9.5.

[244] For example, the PFs at paragraph 9.257(j)(i) refer to feedback from a potential MVNO entrant who reported being unable to enter the market due to failed negotiations with all four MNOs.

[245] NOPR, paragraph 10(a).

6.64 As such, the Wholesale Reference Offer removes any prospect of an SLC arising as a result of horizontal unilateral effects in the retail and wholesale markets, by guaranteeing MergeCo's offer of competitive wholesale pricing terms to MVNOs and thereby allowing MVNOs to continue to compete hard for customers, including price sensitive consumers, in the retail market.

b) Appropriate duration and timing

6.65 The implementation of the JNP, as underwritten by the Proposed Network Commitment, will itself address any SLC because MergeCo will be incentivised to fill the significantly increased capacity on its network. In the event the CMA has a residual concern about the timing of additional capacity on MergeCo's network becoming available to MVNOs in the short term, the Wholesale Reference Offer would come into operation immediately and so would impact negotiations for new MVNO contracts with immediate effect.

6.66 The Parties consider that offering the Wholesale Reference Offer for a period of 3 years will provide MVNOs with sufficient protection for the duration of any potential SLC. The Parties expect that many MVNOs will still be under their existing contracts with either the Parties or their competitors during this 3 year period and so would be protected from the impact of any hypothetical price rises immediately following completion of the Transaction in any event.

6.67 For those MVNOs whose contracts do come up for tender during this period, or who would be a prospective new entrant during this 3-year period, the WRO will be available to them. Three years is an appropriate duration for the commitment because the Parties understand that – to the extent the CMA has any residual concerns in the wholesale market – these concerns apply in the early years whilst the network integration is underway.[246]

6.68 New entrant MVNOs would be able to benefit from the Wholesale Reference Offer immediately. In addition, in the Parties' experience, MVNOs do not tend to wait until their contract formally expires before seeking to negotiate new terms from their incumbent MNO or a new MNO. The PFs accept this, noting that Sky submitted that MVNOs "*engage with MNOs on possible contract extensions or renegotiations during the contract term*" and that these negotiations "*which may take the form of informal discussions, are an important part of the competitive process before and during contract renewals*".[247] Negotiations therefore typically start long before the formal expiry date, and the existence of the Wholesale Reference Offer will significantly increase the bargaining power of MVNOs from this earlier point in time.

c) Practicality

6.69 The Parties consider the Wholesale Reference Offer to be highly practicable. CK Hutchison has previously successfully delivered a wholesale mobile reference offer in a

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[246] NOPR, paragraph 32.

[247] PFs, paragraph 9.17.

telecommunications merger,[248] and the Parties have set out a clearly articulated proposal for the Wholesale Reference Offer. Reference offers are already in operation in telecommunications markets – for example, in the UK, BTEE is required by Ofcom to publish reference interconnection offers.[249] There are no legal, financial or structural impediments for MergeCo to implement the Wholesale Reference Offer. On the contrary, the step change in network capacity and quality that the Joint Business Plan / JNP delivers will enable and incentivise MergeCo to offer competitive terms to MVNOs in any event, in accordance with the Wholesale Reference Offer.

6.70 As outlined in further detail in paragraphs 6.36 to 6.47 above, monitoring and enforcement can be effectively undertaken by a monitoring trustee and, in case necessary to resolve any disputes, an independent adjudicator, with minimal administrative burden.[250]

iv. Typical risks the CMA associates with behavioural remedies do not apply

6.71 The Parties explain why the risks the CMA typically considers when exploring behavioural remedies (namely, specification, circumvention, distortion and monitoring and enforcement risks) do not apply in relation to the Wholesale Reference Offer:

a) Specification risks

6.72 Specification risks do not arise. The Wholesale Reference Offer will clearly specify all terms necessary for MVNOs to access MergeCo's network and continue to compete effectively in the retail market. All such terms are readily specifiable given they are akin to terms that are already in wholesale contracts in the market today and will therefore be familiar to MVNOs and monitoring / adjudicating bodies.

6.73 The Parties do not expect that there will be material new technological developments during the period of the Wholesale Reference Offer, noting that the UK is currently near the beginning of the standalone 5G technology life cycle. This further reduces the prospect of any specification risks arising. The CMA Merger Remedies Guidance recognises that access remedies are less suited to markets that are subject to frequent technological change / wide-ranging market developments, which is not the case here.[251]

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[248] See the commitments given in Case M.6497 - Hutchison 3G Austria / Orange Austria (2012). The Austrian mobile market in 2012 was very different to the current UK mobile market, with no MVNOs present in Austria. Therefore, it took around two years for a new MVNO to enter the Austrian market with the reference offer facilitating the new entry of multiple MVNOs over its duration. In total, [REDACTED] parties made an initial request to Drei for wholesale access, [REDACTED] of which concluded an MVNO Agreement with Drei. Of the [REDACTED] parties, Drei is aware of at least [REDACTED] MVNOs who, having decided not to proceed with Drei, ultimately entered the market hosted by another MNO. Therefore the reference offer both facilitated new entry by MVNOs hosted on the Drei network as well as allowing MVNOs to negotiate better terms with Austria's other MNOs.

[249] See Ofcom's Wholesale Local Access Market Review Statement – Volume 3.

[250] For example, [REDACTED].

[251] CMA Merger Remedies Guidance, paragraph 7.19.

b) *Circumvention risks*

6.74 The Wholesale Reference Offer will leave no room for circumvention, given the wholesale price cap is set from the outset within the Wholesale Reference Offer (and is subject to the operation of the FPM which has a pre-defined formula, or any lower rates negotiated by the MVNO). All terms will be clearly stated and not open to interpretation. In the unlikely event of disputes, the independent adjudicator will ensure that resolution is reached. CK Hutchison's recent experience in Case M.6497 in Austria supports this position: over the 10-year duration of the Reference Offer [REDACTED].

c) *Distortion risks*

6.75 The Wholesale Reference Offer cannot distort the market in a way that would undermine its effectiveness. As discussed in paragraphs 6.54 to 6.59 above, the Wholesale Reference Offer will ensure that competitive pricing and terms remain available on the wholesale market post-Transaction. The pricing rates and terms of the Wholesale Reference Offer will be competitive based on the prevailing terms in the market and the FPM allows the price to adjust based on market pricing and usage levels. The pricing will also be confidential, and provided to requesting MVNOs under NDA, so that there is still a level of uncertainty from the MNOs as to the pricing in the WRO. In addition, rather than distorting the market, the Wholesale Reference Offer will trigger a pro-competitive response from BTEE and VMO2 in terms of both their offerings to MVNOs and investment in their networks, reinforcing the benefits of the Wholesale Reference Offer for retail customers.

6.76 Moreover, the Wholesale Reference Offer will not lead to distortion risks as the terms of the Wholesale Reference Offer will only act as an upper bar for future MVNO contracts – rather than as a strict restriction on future wholesale contract terms.

6.77 The net effect is that the Wholesale Reference Offer will generate positive market outcomes that reinforce its effectiveness in improving customer welfare in both the wholesale and retail markets.

d) *Monitoring / enforcement risks*

6.78 There are no particular risks / challenges associated with the monitoring and enforcement of the Wholesale Reference Offer.

6.79 Similar to the position for the Proposed Network Commitment, the appointment of a monitoring trustee and independent adjudicator (which could alternatively be subsumed within the same role) will be remunerated by MergeCo will ensure no unreasonable demands are placed on CMA resources.

6.80 Compliance with the Wholesale Reference Offer is simple to monitor. Actual offers made by MergeCo to Requesting Parties, in particular pricing terms, can be easily compared against the Wholesale Reference Offer. In the event of a potential dispute, Requesting Parties negotiating with MergeCo will be able to refer any deviation from the Wholesale

Reference Offer to the independent adjudicator, under supervision of the monitoring trustee or Ofcom[252] (or, to a panel appointed by the MVNO and MergeCo, or Ofcom).

v. **The design of any pre-agreed wholesale terms remedy option would need to preserve the substantial RCBs**

6.81 The Wholesale Reference Offer will preserve the substantial RCBs resulting from the Transaction. In making capacity on its network available to Requesting Parties under the Wholesale Reference Offer, MergeCo will not distort or undermine the delivery of the significant REEs and RCBs outlined in section 2. The Wholesale Reference Offer does not materially restrict or limit MergeCo's investment in greater capacity.

7. MVNO NETWORK CAPACITY RING-FENCING

7.1 In addition to the "*pre-agreed wholesale access terms*" (considered in section 6 above), the NOPR describes "*MVNO network capacity ring-fencing*" as one of two potential "*Wholesale Market remedies*".

7.2 The NOPR states that the MVNO network capacity ring-fencing option could involve "*ring-fencing a proportion of the Merged Entity's network capacity exclusively for MVNOs*" (the "**Capacity Ring-fencing Proposal**").[253]

7.3 As noted in paragraph 6.3 above, the NOPR states that the "*MVNO network capacity ring-fencing*" remedy and/or "*pre-agreed wholesale access terms*" could "*potentially be combined with an Investment Commitment (and time-limited protections of retail customers, as described above) to protect MVNOs and their retail customers, recognising that many MVNOs price aggressively, often focusing on value segments of the retail market*". [254]

7.4 In this section, the Parties explain why:

(i) The Capacity Ring-fencing Proposal remedy is not necessary.

(ii) The Capacity Ring-fencing Proposal would lead to inefficient use of capacity and reduce the efficiencies that may be realised as a result of the Transaction.

(iii) The Capacity Ring-fencing Proposal would not be capable of implementation for technical and practical reasons until at least three years after completion.

7.5 Accordingly, while a Wholesale Reference Offer could be an effective and proportionate remedy (if needed), a Capacity Ring-fencing would be both ineffective and disproportionate. This potential remedy proposal does not need to be considered further by the CMA.

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[252] Alternatively, the independent adjudicator could be subsumed within the same role as the monitoring trustee.

[253] NOPR, paragraph 41.

[254] NOPR, paragraph 40.

i. An MVNO network capacity ring-fencing remedy is not necessary

7.6 For the reasons set out in paragraphs 6.5 to 6.9 above, the Parties disagree with the PF's assessment about the impact of the Transaction in the wholesale market which would require a remedy and, to the extent the CMA is concerned that the Transaction benefits may not be achieved, the Proposed Network Commitment would provide certainty that the increased network forecast under the JNP will be delivered.

7.7 In addition to the pre-agreed wholesale access terms, the Parties have also considered the CMA's suggestion that a proportion of MergeCo's network capacity may be exclusively ring-fenced for MVNOs. Whereas the Parties consider that pre-agreed access terms may – if required – be a suitable remedy to supplement the Proposed Network Commitment, the Parties do not consider that a Capacity Ring-fencing Proposal would be appropriate.

ii. A potential Capacity Ring-fencing Proposal would lead to the inefficient use of capacity and reduce the efficiencies which may be realised as a result of the Transaction

7.8 Based on paragraph 41(b) of the NOPR, the Capacity Ring-fence Proposal "*could entail ring-fencing a proportion of the Merged Entity's network capacity exclusively for MVNOs*."

7.9 Whilst the scope of such a remedy is unclear, the Parties interpret this proposal to require that MergeCo "segregates" a proportion of its capacity to be used "exclusively" by MVNOs, thereby creating an 'incentive' for MergeCo to fill the capacity with MVNOs because MergeCo would not be able to use the ringfenced capacity to serve its own retail customers.

7.10 The Parties consider that the remedy is not workable, as it would lead to the inefficient use of capacity and eliminate, or at the very least materially reduce, the efficiencies and RCBs that will be realised as a result of the Transaction.

(i) The Capacity Ringfencing Proposal requires that a specified proportion of MergeCo's network capacity be ringfenced for the exclusive use by MVNOs and this capacity could not be used by MergeCo – either for a limited time period or potentially indefinitely.

(ii) However, there is a real risk that even with attractive pricing, sufficient MVNOs do not move onto MergeCo's network to fill that ring-fenced capacity (e.g. because of the timing of the end of their current contracts, or because the MVNO uses the MergeCo pricing to negotiate a better deal with BTEE or VMO2). It is likely that MVNOs will use the Wholesale Reference Offer to negotiate a better deal with their current MNO. This would result in significant unused capacity that cannot be used to serve MergeCo's customers. This would reduce MergeCo's ability to compete in the retail market leading to reduced competition, inefficiency and significantly reduced customer benefits. <u>Any</u> spare capacity that MergeCo would be prevented from using would lead to inefficiencies. This would result in more congestion and lower speeds.

(iii) Even if the ringfenced capacity were to be fully utilised by MVNOs on MergeCo's network, the ringfencing of capacity itself introduces inefficiencies. As explained in the FMN, pooled capacity allows MergeCo to utilise the same capacity across its entire retail and MVNO bases, which results in a more efficient use of capacity to serve different demand patterns and busy hours across the broadest user base. MergeCo will only need to invest in sufficient capacity to meet the sum of total demands from all uses during the network peak.

(iv) Ringfencing would prevent MergeCo from utilising its full capacity efficiently, as it would limit the ability to utilise spare capacity from one part of the network in relieving congestion on another part of the network. MergeCo would need to invest not only to deliver enough capacity to meet peak traffic demands from its own set of customers, but also separately from traffic in the ringfenced capacity. MergeCo would forgo pooling efficiencies which enable MNOs to serve more subscribers with a given amount of capacity. Therefore, **any** ringfencing will lead to inefficiency and increased congestion on the MergeCo network. By contrast, serving all of MergeCo's customers with its pooled resources (without ring-fencing) delivers better service than if resources are segregated.

7.11 Ring-fencing capacity would leave MergeCo with less useable capacity and would require MergeCo to squeeze its non-MVNO demand into the non-ringfenced part of the network. The Parties have modelled the impact for a hypothetical 15% proportion of ringfenced capacity, which would leave MergeCo needing to squeeze its non-MVNO demand onto only 85% of the network. As a result, the Parties estimate that, in 2032, MergeCo would have [REDACTED]% more congested sites and a [REDACTED]% degradation in average headline speed reducing the RCBs.

7.12 Additionally, as a result of imposing ringfencing on MergeCo's network, the MVNOs would only have access to their ringfenced capacity network slice. Therefore using the scenario above, MVNOs would only have access to their 15% ringfenced capacity which would result in MVNOs being unable to achieve competitive KPIs, particularly in relation to peak speeds. The Parties have estimated that, in 2032, if MVNOs generated 20% of MergeCo's traffic demand, and this was confined to their 15% ringfenced network slice, this would lead to [REDACTED]% more congestion with almost [REDACTED] sites congested across MergeCo's network, and average headline speeds below [REDACTED]Mbps.

7.13 Therefore, ringfencing capacity would lead to inefficiencies, reduced network performance for both MergeCo's retail and wholesale customers and a reduction in the RCBs.

7.14 The Parties have submitted a substantial volume of evidence to demonstrate that the Transaction will generate significant REEs and RCBs (including in PCEP 1, PCEP 2, the RCBs Submission and the Customer Experience Submission). In its PFs, the CMA has accepted the Parties are likely to deliver some of the claimed efficiencies although it considers these efficiencies are overstated.[255] The Parties maintain that the substantial REEs the Transaction will generate are not overstated (which will be comprehensively explained in the Parties' response to the PFs). As noted in paragraphs 2.2 and 2.38 above, RCBs overlap in substance with the REEs and, for the reasons set out in section 2 above, the Parties consider the RCBs to be merger-specific, likely and timely as are the

[255] For example, PFs Summary, paragraphs 55-59 and 61-62; PFs Chapter 14, paragraphs 14.190-14.199.

REEs. In order to be reasonable and proportionate, the CMA must select the "least costly" effective remedy option[256] and as part of this proportionality assessment it may have regard to the effect of any remedy on RCBs.[257] The Capacity Ring-fence Proposal will lead to inefficiencies and reduce the quantum of RCBs that will accrue from the Transaction. As such, it would not be the least costly effective remedy.

7.15 It follows that the Parties have significant concerns with the Capacity Ring-fencing Proposal being required for <u>any</u> duration.

iii. **The Capacity Ring-fencing Proposal would not be capable of implementation for technical and practical reasons until at least three years after Transaction completion**

7.16 From a technical standpoint, there are limitations to ringfencing a set proportion of capacity across MergeCo's network, and this will not be possible upon completion.

7.17 Ringfencing a proportion of capacity in a way that would offer a consistent and performant nationwide service via that committed capacity would require:

(i) MergeCo to have a 5G SA core to enable a network 'slice' to be ring-fenced; and

(ii) MergeCo to have upgraded a large part of the RAN to 5G SA and integrated sufficient 5G sites to provide a consistent coverage footprint in order to make this 'slice' work.

7.18 Based on the Parties' extensive modelling of MergeCo, the Parties' best estimate is that this will not occur until at least 3 years after completion.

7.19 Therefore, in addition to the inefficiency that the Capacity Ring-fencing Proposal would create, MergeCo will be unable to implement such a remedy for some time after completion.

8. PROHIBITION WOULD BE WHOLLY DISPROPORTIONATE

8.1 The NOPR states that prohibition of the anticipated Transaction would prevent the provisional SLCs from arising in any relevant market.[258]

8.2 The CMA's remedies guidance at paragraph 3.6 provides that, in order to be reasonable and proportionate, the CMA must select the "*least costly*" effective remedy option. Under section 41(5) of the Act, the CMA may have regard to the effect of any remedy on RCBs as part of this proportionality assessment. If remedies extinguish RCBs, then the benefits foregone may be considered to be a relevant cost of the remedy. The CMA's remedies guidance states that, if the CMA is choosing between two remedies which it considers will be equally effective, it will select the remedy that imposes the least cost. The CMA will

[256] CMA's Merger Remedies Guidance, paragraph 3.6, as acknowledged at paragraph 69 of the NOPR.

[257] Section 41(5) of the Act, as acknowledged at paragraph 70(c) of the NOPR.

[258] NOPR, paragraph 21(a).

seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.

8.3 This section sets out why prohibition would be disproportionate in relation to the SLC provisionally identified by the CMA. In particular, the Parties explain that:

(i) prohibition would have severe adverse effects on the retail and wholesale mobile markets;

(ii) prohibition would result in the loss of all of the RCBs / REEs that would be generated by the Transaction; and

(iii) there are other less costly and intrusive remedies available that would be effective in addressing the SLC and any resulting adverse effects, while realising the Transaction's benefits for customers.

i. **Prohibition would have severe adverse effects on the retail and wholesale mobile markets**

8.4 Network investment is the bedrock of current and future retail and wholesale competition. Prohibition of the Transaction would have severe adverse effects on the development of competition in the retail and wholesale mobile markets as the UK's mobile markets would remain trapped in a low investment, low competition equilibrium. This equilibrium has resulted in the unsatisfactory position facing the UK today – millions of customers are unable to use their mobile devices properly due to significant congestion or lack of 4G / 5G coverage. The UK ranks 22nd out of 25 European countries for 5G availability and download speeds and has the slowest data download speeds in the G7.[259] Put simply, the prevailing conditions of competition are not good enough to meet the significant future needs of customers in the UK, and the counterfactual without the Transaction is weaker competition. This CMA's decision will have significant ramifications for both economic growth and the Government's 5G strategy, as it represents a once-in-a-generation opportunity to transform UK digital infrastructure. It is notable that in August the Government awarded a £1.85 billion contract to EE for the Mobile Emergency Services Network without a competitive tender due to the inadequate network quality and coverage of the other three MNOs.[260]

8.5 The Transaction will directly lead to stronger competition across both retail and wholesale markets given MergeCo's increased ability to invest to compete (as opposed to the Parties in the standalone counterfactual, where they are sub-scale and will continue to struggle to invest to compete with BTEE and VMO2, the two largest converged challengers). This stronger competition will transport the UK mobile industry's dynamic to a high investment, high competition equilibrium, which will unlock the improvements required to resolve mobile connectivity concerns across the UK.

8.6 Prohibition would have a significant impact on VMO2 and its customers as Beacon 4.1 is conditional on the Transaction. Therefore, VMO2's customers (both its retail customers

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[259] OpenSignal, *Mobile network speeds leaped ahead 2023, but some markets lag behind*, 1 February 2024.

[260] *GOV.UK, ESMCP – Mobile Services Agreement for the Emergency Services Network, 31 July 2024.*

and its wholesale customers such as Sky Mobile and Tesco Mobile) would not get the anticipated benefits that would accrue as a result of the spectrum divestment and access to sites under Beacon 4.1.

ii. **Prohibition would result in the loss of all of the REEs / RCBs generated by the Transaction**

8.7 The PFs recognise that the Transaction would result in REEs / RCBs. The PFs acknowledge that "*network quality is important for customers*" and that "*the Merger, by integrating the VUK and 3UK networks, could improve the quality of mobile networks and bring forward the deployment of next generation 5G networks and services, as claimed by VUK and 3UK*". [261]

8.8 Prohibition would result in the loss of the REEs / RCBs generated by this Transaction, which represent billions of pounds in value to the UK, as evidenced in detail in section 2 above.

8.9 Whilst the Parties welcome the NOPR's recognition that any "*structural remedy*" could "*possibly remove or reduce the value of RCBs",* [262] prohibition would necessarily eliminate all RCBs.

8.10 As explained in section 2 above, the CMA is required to treat the loss of RCBs as a result of a particular remedy option to be a cost of that remedy option. Prohibition would therefore come at a substantial cost to UK customers.

iii. **There are other less costly and intrusive remedies available that would be effective in addressing the SLC and any resulting adverse effects, while realising the Transaction's benefits for customers**

8.11 In order to be reasonable and proportionate, the CMA must select the least costly remedy, or package of remedies, of those remedy options that it considers will be effective.[263] The CMA must seek to ensure that no remedy is disproportionate in relation to the SLCs identified and their adverse effects.

8.12 Due to the loss of all RCBs, prohibition would not be the least costly effective remedy. There are less onerous remedies available that would be fully effective in addressing the SLCs identified by the CMA – in particular, the Proposed Network Commitment, which would not only preserve the RCBs but ensure that they are delivered in full (as explained in section 4 above).

[261] PFs, Summary, paragraphs 6 and 46.

[262] NOPR, paragraph 24.

[263] CMA's Merger Remedies Guidance, paragraph 3.6, as acknowledged at paragraph 69 of the NOPR.

9. BEACON 4.1 AGREEMENTS WITH VMO2 ARE ALREADY AKIN TO A WIDE-RANGING STRUCTURAL REMEDY

9.1 As mentioned in various contexts in the preceding sections, the Parties entered into an agreement with VMO2 on 5 June 2024 to revise Beacon 4.1. Beacon 4.1 includes several elements that are akin to a wide-ranging structural remedy that will have long-term beneficial effects on the retail and wholesale mobile markets. The Parties welcome the CMA's view that "*the Beacon 4.1 Agreement between VUK and VMO2 will improve VMO2's network quality, enabling it to become a stronger competitive constraint post-Merger.*"[264]

9.2 Specifically, Beacon 4.1 involves the following key elements.

(i) **The divestment to VMO2 of significant spectrum assets** (which is contingent upon the Transaction completing), increasing VMO2's spectrum holdings by [REDACTED]%. This will significantly reduce the current degree of spectrum asymmetry in the market, as recognised by the CMA at paragraph 8.291 of the PFs. Tesco Mobile recognised that this spectrum rebalancing has significant implications for competition in the wholesale market, noting that it is "*a positive development*", which will improve "*VMO2's network in terms of capacity and network quality*".[265]

(ii) **Providing VMO2 access to an expanded network grid.** VMO2 will gain access to more radio sites, improving its network capacity and therefore improving the network quality it offers to its retail and wholesale customers.

(iii) **The formalisation of the Parties' commitment to undertake the network upgrade works required to implement the JNP**. This commitment (known as the Consolidated Works Programme) sets an achievable timetable for delivery of the network upgrades over an [REDACTED]-year period, [REDACTED]. In this way, Beacon 4.1 both underpins and incentivises the delivery of the full JBP/JNP.

(iv) **Providing VMO2, its MVNO customers and its end-customers access to MergeCo's improved network infrastructure**. The Parties welcome the CMA's recognition that Beacon 4.1 will *"provide a notable and rapid increase in network quality for wholesale and retail customers on the VMO2 network, which would further increase rivalry".*[266]

9.3 Beacon 4.1 will result in permanent shifts in how both MergeCo and VMO2 compete due to their improved networks and increased capacity (particularly for VMO2 who will benefit from additional spectrum). They will both be incentivised to compete more aggressively for both retail and wholesale customers to fill their additional network capacity. VMO2 recognises that Beacon 4.1 will enable it to compete harder, and has told the CMA that *"it*

[264] PFs, paragraph 9.267.

[265] PFs, paragraph 14.240.

[266] PFs, paragraph 14.203.

considers that the Beacon 4.1 Agreements, including the spectrum transfer, will improve its competitiveness in the wholesale market."[267]

9.4 As mentioned above in Section 6, Beacon 4.1 will have a particular impact in the wholesale market. In the PFs, the CMA notes that *"VMO2 has told us it is selective in participating for MVNO opportunities*".[268] The CMA considers that this will be partially mitigated by Beacon 4.1, noting that it considers *"that the Beacon 4.1 Agreement between VUK and VMO2 will improve VMO2's network quality, enabling it to become a stronger competitive constraint post-Merger."*[269] It will also significantly increase VMO2's network capacity, increasing its ability and incentive to compete for wholesale business.

9.5 The Parties welcome the CMA's recognition in paragraph 14.193 of the PFs that the REEs realised through Beacon 4.1 are "*likely to be realised*". The CMA has also recognised that these REEs will be realised in a timely manner.[270]

9.6 The CMA must therefore fully take into account the impact of Beacon 4.1 when assessing what further remedies (if any) are required.

10. CONCLUSION

10.1 No remedy is necessary in this case. The Transaction will have pro-competitive effects in both retail and wholesale mobile markets, by unlocking substantial investment that will deliver a transformational shift in network capacity and quality. The PFs rightly acknowledge many of the benefits that will flow from the Transaction, but the CMA has reserved its position for now as to whether the REEs would fully offset any adverse effects on competition that might arise. The Parties' response to the PFs will clearly demonstrate that they would. In addition, and as demonstrated by the Parties' substantial and detailed evidence, substantial RCBs will be created that will not materialise in the absence of the Transaction. In further considering possible remedies, it is essential that options that preserve the full extent of these RCBs are prioritised.

10.2 The Parties have been clear from the outset that they are committed and commercially incentivised to build the 'best-in-class' network which lies at the heart of the Transaction, and which will deliver these REEs in accordance with their carefully prepared JBP and JNP. To the extent the CMA has any residual doubts, the Proposed Network Commitment provides an appropriate, effective and proportionate remedy. It will bind the Parties to implement their network investment by fully rolling out all elements of the JNP in all areas of the UK, ensuring the delivery of significantly enhanced network coverage, capacity and speeds and the rapid implementation of 5G SA benefiting all UK consumers and businesses. The Proposed Network Commitment will bring about an irreversible structural change in mobile network capacity and performance for MergeCo and will immediately stimulate enhanced competition between MNOs. It is an "enabling measure" that – working with the grain of competition – ensures the delivery of a permanent shift in the

[267] PFs, paragraph 9.265.

[268] PFs, paragraph 9.268(g).

[269] PFs, paragraph 9.268(g).

[270] PFs, paragraph 14.198.

incentives of MergeCo and its rivals, leaving market outcomes to be determined by the competitive process without any need for further regulatory intervention. These pro-competitive effects of the Proposed Network Commitment are bolstered by the spectrum divestment and network enhancement opportunities afforded to VMO2 that are conditional on completion of the Transaction under the Beacon 4.1 Agreement (and recognised in the CMA's PFs). This is a further structural change in the market that will only be brought about by the Transaction which must be fully taken into account in the CMA's further consideration of possible remedies. Critically – and in contrast to a partial divestment remedy, which is not a realistic option on the facts of this case – it would not undo the commercial logic of the Transaction, and would preserve very significant RCBs, in the form of improved mobile connectivity for millions of UK customers, accelerated Advanced 5G use cases and improved FWA. As noted above, this remedy can be clearly specified and is straightforward to monitor and enforce.

10.3 With the Proposed Network Commitment in place, the Parties firmly believe that no further remedy would be required. Without prejudice to this position, the Parties have developed a suite of Proposed Retail Protections that would ensure that retail customers – in particular those consumers least able to afford mobile services – were protected against any hypothetical price increases during the initial years of network integration. They have also designed a Wholesale Reference Offer that would guarantee the continued availability of competitive pricing and non-discriminatory access terms to MVNOs, ensuring that there continues to be strong competition between MNOs in the wholesale market and that MVNOs, in turn, are able to continue to offer highly competitive pricing and services to end customers. In each case, the proposals would be straightforward to implement and could be readily monitored and enforced. They have also been carefully designed to minimise any impact on the RCBs. Taking their cue from the NOPR, the Parties have developed these additional commitments to buttress the Proposed Network Commitment and to assuage any residual concerns on the CMA's part, removing any potential obstacle to clearing a transaction that represents a once-in-a-generation opportunity to transform the landscape of UK digital infrastructure. Given the availability of the effective, low-risk Proposed Network Commitment (and the additional commitments to buttress the Proposed Network Commitment), it is clear that the Transaction must be cleared by the CMA and that it is not necessary to further consider any partial divestment that would destroy the commercial rationale for the Transaction and the RCBs that it unlocks.

Annex 01 – Network Commitment template

	Annual Cumulative JNP Volume Target (No. of Sites)							
FY	**Urban areas**			**Rural areas**				
	High-config sites	**Mid-config sites**	**Low-config sites**	**High-config sites**	**Mid-config sites**	**Low-config sites**	**YoY Total**	**Total Cumulative**
Y1	[•]	[•]	[•]	[•]	[•]	[•]	[REDACTED]	[REDACTED]
Y2	[•]	[•]	[•]	[•]	[•]	[•]	[REDACTED]	[REDACTED]
Y3	[•]	[•]	[•]	[•]	[•]	[•]	[REDACTED]	[REDACTED]
Y4 Target	[•]	[•]	[•]	[•]	[•]	[•]	[REDACTED]	[REDACTED]
Y5	[•]	[•]	[•]	[•]	[•]	[•]	[REDACTED]	[REDACTED]
Y6	[•]	[•]	[•]	[•]	[•]	[•]	[REDACTED]	[REDACTED]
Y7	[•]	[•]	[•]	[•]	[•]	[•]	[REDACTED]	[REDACTED]
Y8 Target	[•]	[•]	[•]	[•]	[•]	[•]	[REDACTED]	[REDACTED]

Notes: [1] [REDACTED]

Spectrum configuration table

RAN **Spectrum Configuration post-VMO2 divestment**			
Target configuration	**Frequency bands (MHz)**	**Spectrum holding (MHz) (anticipated)**	**Sub-totals (subject to commitment)**
High	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
Mid	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
Low	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	
	[REDACTED]	[REDACTED]	

Notes: [1] [REDACTED]

[2] [REDACTED]

Annex 02 – [REDACTED]

[REDACTED][REDACTED].

[REDACTED][REDACTED].