

Contrary to CMA's provisional speculative view – the entry of a new 4th MNO – is the only effective remedy for the Vodafone / Three merger

Dear Mr. McIntosh,

Concerning the critical question on the remedies (structural divestitures vs. behavioural commitments) that can eliminate the long-term competition concerns in their entirety **Rewheel categorically disagrees with CMA's provisional speculative view.**

If we can raise one and only one point as a counterargument to CMA's inexplicable view that behavioural commitments rather than structural divestitures could be effective remedies for the proposed Vodafone / Three merger *“CMA stated in the Notice of possible remedies...With regards to a partial divestiture remedy, our initial view is that this remedy could enable a fourth MNO to enter the UK post-Merger and we therefore propose to explore this option further. However, our initial view is that it may not be effective...In the present case, our initial view is that there are case specific facts that suggest behavioural remedies could be appropriate.”* it will be the following;

Did anybody from CMA's investigation team or the panel of independent experts bothered to read CMA's view – that fully supported the European Commission's 2016 decision to prohibit the 4 to 3 Three / O2 merger in the UK – on what remedy was deemed to be the only effective remedy that could have remove the long-term competition concerns entirely from the proposed Three / O2 merger?

Alex Chisholm, the CMA Chief Executive, wrote a public letter¹² to the European Commission on the 11th of April 2016 – during the investigation of Hutchison's proposed acquisition of Telefonica O2 in the UK (4 to 3 mobile merger) – where he rejected outright all behavioural remedies as ineffective and categorically stated that the only effective remedy for the Three / O2 merger is the upfront entry of a new 4th MNO.



Commissioner Margrethe Vestager
European Commission
1049 Bruxelles/Brussels
BELGIQUE/BELGIE

Alex Chisholm
Chief Executive
Competition and Markets Authority
United Kingdom

11 April 2016

Dear Margrethe,

Case M.7612 Hutchison 3G UK / Telefonica UK

As you are aware, the Competition and Markets Authority (CMA) has serious concerns regarding the proposed merger between Hutchison 3G UK and Telefonica UK. We believe this merger would give rise to a significant impediment to effective competition in retail and wholesale mobile telecoms markets in the United Kingdom. This letter briefly sets out our concerns regarding the merger and proposed remedies, which have also been thoroughly detailed by the CMA in a number of formal submissions to the Commission's case team.

While I appreciate the considerable efforts made by the Commission to explore remedies with the merging parties that seek to eliminate the adverse effects identified, it is clear that the remedies offered fall well short of what would be required to meet the relevant legal standard, as detailed in our case submissions.

The proposed remedies are materially deficient as they will not lead to the creation of a fourth Mobile Network Operator (MNO) capable of competing effectively and in the long-term with the remaining three MNOs such that it would stem the loss of competition caused by the merger. In addition, they fail to address concerns arising from the presence of the merged entity in both the network sharing arrangements, including the greater risk of coordination that this brings.

The only appropriate remedy that would meet the criteria that the Commission is bound to apply (ie that the remedies eliminate the competition concerns in their entirety, are comprehensive, effective and capable of ready implementation) is the divestment – to an appropriate buyer approved by the Commission – of either the Three or O2 mobile network businesses, in entirety, or possibly allowing for limited 'carve-outs' from the divested business. The divestment would need to include the mobile network infrastructure and sufficient spectrum to ensure a commercially viable fourth MNO in the UK. Absent such structural remedies, the only option available to the Commission is prohibition.

The CMA urges the Commission to act to prevent the long-term damage to the UK mobile telecoms market, and therefore to the interests of UK consumers, that both of our authorities have predicted will result from this merger.

Yours sincerely

Alex Chisholm
Chief Executive

The CMA Chief Executive emphatically stated in 2016 *“The only appropriate remedy...that...eliminate the competition concerns in their entirety... is the creation of a fourth Mobile Network Operator (MNO) capable of competing effectively and in the long-term with the remaining three MNOs...Absent such structural remedies, the only option available to the Commission is prohibition.”*.

What changed? Why such change of heart from the CMA?

¹<https://www.gov.uk/government/publications/proposed-hutchisontelefonica-merger-cma-letter-to-european-commission>

²https://assets.publishing.service.gov.uk/media/5a816cebe5274a2e87dbd8f6/CMA_letter_to_Commissioner_Margrethe_Vestager.pdf

Is the proposed 4 to 3 Vodafone / Three mobile merger less anti-competitive than the 2016 proposed 4 to 3 Three / O2 mobile merger? No, it is not. The opposite is true. Given that Vodafone and Three are more close competitors than Three and O2 were back in 2016 and given that Vodafone and Three as the no.3 and no.4 MNOs respectively offer the lowest prices in the market today their combination would lead to higher market symmetry and give rise to more serious competition concerns compared to the 2016 proposed Three / O2 merger.

Surely, the question on whether behavioural commitments (investment commitments, time limited retail protections, pre-agreed wholesale access terms and MVNO network capacity ring-fencing) constitute an effective remedy in 4 to 3 mobile mergers should not depend on who is heading the CMA (Mr. Chisholm or Ms. Cardell) or on who is heading the European Commission Directorate for Competition (Mr. Almunia or Ms. Vestager).

Mr. Almunia approved the Austrian, Irish and German 4 to 3 mobile mergers with behavioural MVNO access remedies while Ms. Vestager ruled out behavioural commitments as ineffective and requested structural divestitures for the UK (fully supported by CMA), Italian and Spanish 4 to 3 mobile mergers.

Politics aside, the UK merger regulations requires that remedies must eliminate all (short- and long-term) competition concerns in their entirety and as CMA has categorically argued, structural divestitures (i.e., the entry of a new 4th MNO) is the only effective remedy that can eliminate the long-term competition concerns in 4 to 3 mobile mergers.

Rewheel 4 to 3 mobile merger assessment studies in Germany³, the UK⁴ and Italy⁵ have shown beyond any doubt that under no circumstances MVNOs can fully substitute the competitive pressure exerted by no.4 MNOs and remedy in their entirety the long-term competition concerns from 4 to 3 mobile mergers.

The only effective remedy⁶⁷ that can eliminate the competition concerns entirely from the 4 to 3 Vodafone / Three merger, as required by law, is the upfront entry of new 4th mobile network operator.

The upfront entry of a new 4th mobile network operator in the UK requires the divestiture of substantial low frequency (sub 1 GHz), mid-band (1800-2100 MHz) and high frequency 3.6 MHz TDD spectrum coupled together with site divestitures and/or site collocation agreement/s and time-limited future-proof national roaming agreement/s at competitive wholesale rates.

Helsinki, 25th September 2024

Sincerely,



Antonios Drossos

Managing Partner Rewheel

³https://research.rewheel.fi/insights/2015_may_premium_drillisch/

⁴https://research.rewheel.fi/downloads/Effectiveness_MVNO_wholesale_access_remedies_25012016_PUBLIC.pdf

⁵https://research.rewheel.fi/downloads/Hutchison_WIND_merger_Italy_remedies_01092016_PUBLIC.pdf

⁶https://research.rewheel.fi/downloads/T-Mobile_Tele2_4_to_3_mobile_merger_effective_remedies_REDACTED_PUBLIC.pdf

⁷https://research.rewheel.fi/downloads/1&1_Drillisch_4th_MNO_entry_Germany_PUBLIC_VERSION.pdf

