# SUBMISSION TO THE EUROPEAN COMMISSION ON THE O2/H3G PROPOSED MERGER REMEDIES.

O2/H3G Merger- EUROPEAN COMMISSION- MARCH 30th, 2016

FCS/IMVNOX  Response to the EUROPEAN COMMISSION Proposed Merger Remedies

European Commission – DG Competition
C1 – Antitrust, Telecoms
Madou Tower, office 28/048, 1000 Brussels

30 March, 2016

# O2 / H3G Consultation

Attn: Eleni Gouliou

On behalf of the Federation Communication Services (FCS) and The International MVNOx Association (iMVNOx), I would like to thank you for your support during the course of the O2/H3G Consultation. This document serves as our non-confidential response to the remedies proposed on the HG3/O2 merger. This document only begins to clearly communicate the complexity of our objections to the commitments outlined.

The arguments, set forth here are only introductory, when compared to the depth of the expertise and experience our leadership and member base have in regards to the scope of these concerns.

We request that the EUROPEAN COMMISSION take serious consideration of this response, along with evidence and arguments presented to the EUROPEAN COMMISSION in other responses submitted during this investigation. As well as, market information and public knowledge which support the important objections we have established in our response.

These concerns are not solely those of the MVNOs and the wholesale industry alone; the current CEO of Ofcom, Sharron White has spoken on the topic, as well as previous conclusions from the Commission, and the ITU which highlight the value of MVNOs for competition, consumers, and innovation.

As a whole and individually, the FCS, the iMVNOx, and our members believe in the value of a healthy, supported wholesale market, where MVNOs are positioned as a positive force on competition. Indeed, we believe that MVNOs are and will continue to be important for consumer choice in the United Kingdom and across the European Union.

Therefore, the consideration by the EUROPEAN COMMISSION of our response to the proposed remedies, is of the utmost importance for our members and the market as a whole within the UK.

Should you have any questions or have any specific feedback to the response please feel free to let us know. We hope to support the EUROPEAN COMMISSION in defining conditions which will act as a catalyst for competition, consumers, and positive change within the wholesale mobile market in the UK.

Sincerely,

Ms. Frankie Spagnolo - Founder
*On behalf of our members world-wide*
The International MVNOx Association

**And**

Chris Pateman - CEO
*On behalf of our members at*
The Federation of Communication Services

## COMP/M.7612 - HUTCHISON 3G UK / TELEFONICA UK - Q 105 - Market test of remedies to non-MNOs

**Deadline:** 25/03/2016

**Business secrets and other confidential information concerning merger cases**

**CONFIDENTIALITY DECLARATION**

I hereby affirm that the document(s) sent by the Commission for the purpose of market testing (i.e. non-confidential version of the proposed commitments submitted by as well as all other related documents) in the above-referenced case (hereinafter "the Document") will not be disclosed to any third party and will not be used for any purposes other than in the above-referenced proceedings. I am aware that the Commission may bring legal action against me if the agreement is breached.

Specifically, I affirm that:
(i) the Document will be used solely for the preparation of further contributions in the context of these proceedings under the EC Merger Regulation before the European Commission in the above-referenced case;
(ii) the Document (or parts of it) will not be disclosed, transmitted, communicated or otherwise made available in any manner to any other person other than those to which the obligations have been extended as foreseen under paragraph iii below; and
(iii) I will procure the full compliance with the terms of this declaration by any and all persons who work with me in reviewing and analysing the Document, and will, if so requested, provide a list of all such persons to the Commission and their signed acceptance of the terms of this agreement.

On 11 September 2015, the European Commission received a notification of a proposed transaction by which Hutchinson 3G UK Investments ("**H3GI"**) acquires sole control over **O2 UK**, a wholly-owned subsidiary of Telefónica S.A.

**The Commission's investigation**

The **Directorate-General for Competition of the European Commission** (the "Commission") has conducted an initial investigation between 11 September 2015 and 30 October 2015 to assess the effects of this proposed transaction. As the Commission had serious doubts as to the compatibility of the proposed transaction with the internal market, it opened an in-depth investigation under the EU Merger Regulation on 30 October 2015 to further investigate the effects of the proposed transaction. The Commission's in-depth investigation has shown that the proposed transaction would combine O2 UK and Three, which are respectively the second and the fourth largest mobile network operator ("MNO") in the UK. This would create the largest MNO in the UK. The Commission's in-depth investigation has also shown that the proposed transaction may create significant competition concerns in relation to (1) the retail mobile telecommunications market; and (2) the wholesale market for access and call origination.

As regards the retail mobile telecommunications market, the Commission considers that O2 UK and Three are strong competitors and that the competitive constraint that they exercise on each other and on the market would be lost as a result of the merger. In addition, the competitive constraints exercised by MVNOs are limited.

As regards the wholesale market for access and call origination, the Commission considers that at present, Three is an active and growing competitor and it is particularly active in offering access to growing and new entrant MVNOs. The change in market structure would affect the merged entity's incentives to compete and the other MNOs would likely also have less incentives to host MVNOs post-transaction. Therefore, the proposed transaction would make it more difficult for MVNOs to obtain good wholesale terms.

Finally, the Commission considers that the proposed transaction would give rise to competitive concerns based on the network sharing situation in the UK. The Commission is concerned that, post-transaction, there would be a misalignment of interests within the network sharing arrangements, leading to a reduction in network investments and/or lesser network quality.

**Assessment of proposed remedies**

With a view to solving the competition concerns arising from the proposed transaction, H3GI submitted remedies on 15 March 2016 (the "Proposed Commitments"), consisting of 4 components. Attached to this questionnaire, you will find a non-confidential text of the Proposed Commitments. A summary of the Proposed Commitments and a detailed description of each of the relevant components are also included in the questionnaire below.

The Commission must now investigate whether the Proposed Commitments will remedy the adverse impact on competition that the proposed transaction is likely to have.

This questionnaire seeks to test the Proposed Commitments with relevant market participants, of which your company or organisation is one. In particular, the main purpose of this questionnaire is to gather your views on various aspects of the Proposed Commitments package and in particular:

- the suitability of the Proposed Commitments to remedy all the identified competition concerns;

- the possibility of the Proposed Commitments to be implemented in practice; and

- the likelihood that the Proposed Commitments would be effective in practice.

**Instructions on how to fill in the questionnaire**

**Detailed replies to the questions of this questionnaire are of great importance for the proper assessment of the transaction by the Commission.**

Please reply to this questionnaire on behalf of all companies belonging to your group. If this is not possible, please contact the officials mentioned in the "Contact Case Team" tab immediately.

Please reply only to those questions for which you feel that you have sufficient market knowledge. Should you consider that a given question is not relevant for your company's business, please indicate this and explain why in your reply.

Should you consider that a given question is based on incorrect assumptions or an incomplete understanding of the situation, we would be grateful if you could indicate the errors and correct them in your reply.
You are also invited to inform the Commission about any additional issues which should be taken into account in the assessment of this case, but are not covered in this questionnaire.

In responding to this questionnaire, please supply - to the extent possible - your company's own figures/estimates, as opposed to data coming from third parties (e.g. sector publications). When figures are requested without the indication of a specific year, please provide the data for 2015. Please state monetary figures in GBP. Annual and other GBP exchange rates can be found on: http://sdw.ecb.europa.eu/.

When filling in this questionnaire, you are asked to provide **your replies in two versions: (a) a confidential version and (b) a non-confidential version**. The **confidential version** will be treated as confidential within the Commission, in accordance with confidentiality rules set by the EU legislation. The **non-confidential version** consists of replies on which the Commission may rely in the decision(s) it will issue in this case and that may therefore be made available to the Parties of the transaction. In the non-confidential version you should redact only information (i) concerning specifically your business and (ii) the disclosure of which could harm the commercial interests of your company). For more precise instructions and information on what constitutes business secrets and other confidential information, please refer to section 3.2 of the Commission Notice on the rules for access to the Commission file (available at http://ec.europa.eu/competition/antitrust/legislation/access.html). It is of **utmost importance that you provide a meaningful non-confidential version**, where all your arguments can be clearly reconstructed, so that the Commission may rely on them in its reasoned decision(s) on this case. In this respect, when providing figures, please consider providing non-confidential ranges.

**Structure of the questionnaire**

The present questionnaire is structured as follows:

- **Section A** describes the Proposed Commitments.
- **Section B** includes general background questions about your company.
- **Section C** includes questions on the Tesco Mobile Commitment.
- **Section D** includes questions on the NEO Commitment.
- **Section E** includes questions on the Network Sharing Commitment.
- **Section F** includes questions on the Wholesale Market Commitment.

Finally, in **Section G** you are asked to provide your overall assessment of the Proposed Commitments.

Questionnaire signed by:
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## A. SUMMARY OF THE PROPOSED COMMITMENTS

The Proposed Commitments comprise the following four components: (1) the Tesco Mobile Commitment, (2) the New Entrant Operator ("NEO") Commitment, (3) the Network Sharing Commitment, and (4) the Wholesale Market Commitment. The main elements of the Proposed Commitments are summarised in the following paragraphs (for the full text, see the attachment).

### 1. Tesco Mobile Commitment

Under the Tesco Mobile Commitment H3GI commits, first, to divest Telefonica UK's ("O2 UK") 50% stake in Tesco Mobile.

Second, H3GI commits to offer a capacity based wholesale agreement to Tesco Mobile for a period of 10 years. H3GI would offer a capacity based wholesale agreement for 10% of capacity of the network operated and/or used by O2 UK (the "Network") in return for a fixed annual fee to be agreed by H3GI and Tesco Mobile. H3GI would make the capacity available provided that Tesco Mobile has its own core network. Until Tesco has its own core network, H3GI commits to continue the wholesale access arrangements currently in place between O2 UK and Tesco Mobile.

## 2. NEO Commitment

Under the NEO Commitment H3GI commits, first, to divest a perpetual fractional network interest, amounting to up to 20% of the capacity ("Capacity Share") in the Network to one or two NEOs. The minimum amount of capacity to be used by the NEO(s) varies over time. A NEO is prevented from reselling the capacity.

The NEO(s) will pay an agreed fixed price to H3GI in consideration for the network interest entitling it/them to the use of the Capacity Share. In addition, the NEO(s) will pay, on an annual basis, a share corresponding to the percentage of their interest of the running operating expenses, as well as ongoing capital maintenance and improvement costs incurred by H3GI for the Network plus a return on capital.

The NEO(s) will have non-discriminatory access to all elements of the Network and to all current and future radio technologies, features and services deployed in the Network. The NEO(s) will have to provide own core network(s).

The NEO(s) will be updated and consulted on H3GI's technology and network roadmap plans. H3GI will retain sole control over all decisions concerning the operation of the Network and investments in the Network. H3GI will discuss in good faith requests by the NEO(s) for network investments that are not part of the network roadmap. If no agreement can be reached on such investments, they will be implemented either entirely at the expense of the NEO(s) (if the investment can be technically segregated or partitioned on the Network for the NEO's own use) or with a capped financial contribution by H3GI (in return for a full right by H3GI to use such investment).

The network interest is non-transferrable for a period of 10 years. After this period, it can be transferred, subject to a right of first refusal by H3GI.

## (part 2 )

Second, H3GI commits to offer an option for one NEO to have the capacity provided over a total of 2x18.4 MHz spectrum in different spectrum bands currently owned by O2 UK ("Target Spectrum Use Option"). The Target Spectrum would be ring-fenced for the NEO's exclusive use. The Target Spectrum Use Option would be available as of year 5 following the acquisition of the network interest and be subject to a number of conditions.

Third, H3GI commits to offer an option for one NEO to acquire O2 UK ("O2 UK Divestment Option"). The O2 UK Divestment Option can be exercised by the NEO within 12 months following the divestment of the network interest and is subject to a number of conditions. If the NEO were to prefer to acquire a stake in Three instead, H3GI commits to discuss this request in good faith.

O2 UK would include the following assets: (i) 50% ownership in CTIL; all contractual interests and obligations of O2 UK in relation to the so-called “Beacon” network sharing arrangements with Vodafone; and (iii) all assets that enable O2 UK to satisfy their obligations in connection with the Beacon network sharing arrangements, including 2G, 3G and 4G equipment, employees, contracts etc. to enable O2 UK to run the O2 UK elements of the Beacon network and to benefit from it, and the Target Spectrum as described under the Target Spectrum Use Option. The NEO would assume all rights and obligations related to the Beacon network.

The spectrum would be sold to the NEO at fair market value. The remaining assets would be sold at book value.

If the NEO were to acquire O2 UK, it would have to offer a wholesale access agreement to H3GI for up to 5 years to facilitate transferring the O2 customers off the network.

Finally, H3GI can decide whether to provide the network interest to one or two NEOs. In case of two NEOs, the capacity share of one NEO would be at least 15%. The Target Spectrum Use Option and the O2 UK Divestment Option will have to be exercised by the NEO with the 15% network interest. H3GI can also decide to provide a network interest of only 15% provided that the capacity based wholesale access agreement offered to Tesco Mobile also extends to 15% instead of 10% of capacity

### 3. Network Sharing Commitment

The third component is the Network Sharing Commitment by which H3GI enters into a number of commitments related to the Beacon arrangements with Vodafone on the one hand and to the MBNL arrangements with BT/EE on the other hand.

### 4. Wholesale Market Commitment

Under the Wholesale Market Commitment, with respect to MVNOs that already have an MVNO agreement with either Three or O2 UK, and such agreements do not yet include access to 4G services, H3GI commits to offer to include 4G services on the same rates as charged for 3G services (i.e., at no extra cost).

With respect to MVNOs which do not have an MVNO agreement with either Three or O2 UK, H3GI commits to offer wholesale access (including 4G) to such new MVNOs. The terms and conditions will be benchmarked against the average of those offered by Three and O2 UK as at the date of closing taking into account the size and type of the MVNO, type of products and services, volumes, prices, commercial/operational model and other relevant commercial terms. This Commitment shall continue for 10 years after closing or such earlier date on which H3GI ceases to offer such technology to its own end customers.

## B. GENERAL BACKGROUND INFORMATION

### **(1)** Please specify whether your company/institution is a:

Non Confidential Reply:

( ) MNO active in the UK

( ) MNO outside of the UK

( ) MVNO active in the UK

( ) Service Provider active in the UK

( ) Branded Reseller active in the UK

( ) Government institution

(X) Other

#### **(1.1)** If other, please specify:

Confidential Reply:
(Not provided)

Non Confidential Reply:
Association representing the interests of MVNOs, MVNEs, MVNAs and the MVNx ecosystem worldwide.

**(2)** If you have not already provided this information in response to an earlier questionnaire, please describe the business profile and activities of your company, in particular in the UK. Please include a description of each of the following elements:

**(2.1)** Your business model:

Confidential Reply:
(Not provided)

Non Confidential Reply:
We are a not-for-profit organization funded by our members. As the iMVNOx, we represent over 100 MVNOs, MVNEs, and wholesale service providers operating in the UK. For the purpose of this investigation we are acting on for and on behalf of our strategic partnership and industry alliance with the FCS our comments serve to represent the views, insights and interests of more than 400 small telco and technology companies in currently in operation in the UK.

**(2.2)** Your focus customer groups (e.g. private, business, ethnic minorities, etc.) for mobile services in the UK:

Confidential Reply:
(Not provided)

Non Confidential Reply:
All. SMEs, Ethnic Subscribers, Travelers/Roamers, Early Adopters/Techies, Youth, Ex-Pats, SIM Only/Second SIM Subscribers, Cost-conscience Consumers, Frustrated Consumers, Pre-Paid/No-Contract Consumers, Data-Only Device Market, Global Brands, Banks, Utility Companies, Retailers

**(2.3)** Your focus segments in the mobile market (e.g. pre-paid, post-paid, data-only, etc.):

Confidential Reply:
(Not provided)

Non Confidential Reply:
All

**(2.4)** Any other relevant characteristics:

Confidential Reply:
(Not provided)

Non Confidential Reply:
The iMVNOx Association works together, in collaboration with other industry associations including the FCS, with whom this submission is made with and on behalf of; as well as, strategic alliances (ie. MVNO Dynamics, Preiskel & Co, and Virgin Management) to increase our combined expertise, industry relevance, and market influence. By providing exclusive access to and insights on the MVNx industry (previously under represented with the regulators and lacking in recognized,

credible sources for bench-marking and strategic planning) through member-driven intelligence, our objective, is to inform the direction of regulatory remedies during moments of carrier consolidation. Since our launch in 2013, we have participated in industry affairs and regulatory campaigns across the world. With executive leadership today, working together with national regulatory authorities in over 12 countries.

Major campaigns include:

* 2014. FCC (NRA- USA) (Sprint/TMO-USA)

o Investigation on the proposed market acquisition of T-Mobile USA by Softbank,

* 2015. IFT (NRA – Mexico) (Red Compartir)

o Strategic Network Sharing Strategy for the de-monopolization of the Mexican market

* 2015. CRA (NRA – Iran) (MVNO Licensing Requirements)

o Strategic investigation and regulatory planning for the wholesale market including requirements for the license applications.

* 2016. CMA (Competition Authority - UK) (BT/EE)

o Investigation on the proposed market acquisition of British Telecom by Everything Everywhere.

Because of our role as the industry trade body for the MVNx ecosystem globally, we are perfectly positioned to provide an environment in which important industry best practices and/or behavioral remedies can be mandated alongside any and all structural or commercial commitments outlined as remedies by the Commission.

Through these industry best practices, which may even have the potential (optimistically) to be driven by the independent (non-mandated) action of the requesting parties as an effort to show 'good faith' and a practical application of their proposed commitment in and towards the wholesale market. Perhaps encouraging other MNOs to participate but at a minimum, the merged entity would work together with the iMVNOx/FCS and our leadership to help mitigate the unknown risks associated with the proposed structural remedies, specifically addressing the lack of a clearly define terms that will support a flexibe, long-term commitment to the wholesale market. If, as expected this effort is not self-imposed by the 'good will' of both HG3I and O2 prior to the approval of the merger, these best practices can also be implemented as on-going behavioral remedies, mandated by the regulator.

For both the iMVNOx and the FCS, facilitating this environment for any market, at least opens the door for establishing cooperation between the newly merged entity and the MVNO market as a whole. In addition, this environment and the application of either industry best practices or ongoing behavioural remedies, allows for a method to monitor the continued fulfillment of the

agreed remedies and the support provided by the merged entity when neccassary to address the challenges that will, undoubtedly, arise over time from the final commitments and remedies mandated at the approval of any suggested merger.

In this case, the objective of the iMVNOx/FCS collaboration is simple – combine our influence and intelligence to establish both an environment for collaboration and industry standards that build an environment that helps bridge the gap between the carriers and their wholesale partners today. The outcome of this environment would be to support a healthy wholesale market and position MNVO's as a positive force in consumer choice and innovation.

Over time, the insights and development that these types of remedies can facilitate will allow the iMVNOx and our industry partners, like the FCS to provide valuable understandings to the EC and other national regulators which can be used to define a framework for 'fairplay' that successfully fosters wholesale competition, while creating opportunity for growth and innovation. Increasing the overall influence role and relevance that the wholesale market can exercise on consumer choice in the UK, driving advancement in network technology, mobile virtualization, and consumer services.

**(3)** Please indicate whether you have had any contacts with H3GI/Three in relation to the Proposed Commitments.

Non Confidential Reply:

( ) Yes

(X) No

**(3.1)** If "yes", please provide a detailed summary of these contacts until the date of the reply to this questionnaire.

Confidential Reply:
(Not provided)

Non Confidential Reply:
(Not provided)

## C. QUESTIONS ON THE TESCO MOBILE COMMITMENT

Under the Tesco Mobile Commitment H3GI commits, first, to divest O2 UK's 50% stake in Tesco Mobile.

Second, H3GI commits to offer a capacity based wholesale agreement to Tesco Mobile for a period of 10 years. H3GI would make available 10% of capacity of the O2 UK Network (based on a reasonable capacity glide path until year 5) in return for a fixed annual fee to be agreed by H3GI and Tesco Mobile.

H3GI would make the capacity available provided that Tesco Mobile has its own core network. Until Tesco Mobile has its own core network, H3GI commits to serve Tesco Mobile's customers on similar terms to the arrangements currently in place between O2 UK and Tesco Mobile. Tesco Mobile would have equivalent quality of service compared to non-NEO customers, as well as non-discriminatory access to all elements of the Network, current and future Network technologies as well as features and services deployed in the Network.

**(4)** In your view, in light of the way in which the offer to Tesco Mobile regarding a capacity based wholesale access agreement is structured, would you consider it likely that Tesco Mobile would actually enter into such an agreement?

Non Confidential Reply:

( ) Yes

( ) No

(X) Other

**(4.1)** Please explain your answer.

## Confidential Reply:

(Not provided)

## Non Confidential Reply:

There are two important factors to consider when addressing this question.

1. What are the common impacts of migrating from a lite to a full MVNO, as they relate to any type of wholesale partner.

2. Is Tesco Mobile, specifically, able to gain enough market advantage from the proposed remedy that it would justify the impacts that a divestment of their current JV structure would entail, as well as mitigate the risks that are created in 'growing' from a lite MVNO, with little responsibility in the technical enablement of it's current mobile services, to a full MVNO (specifically one) that requires significant investment and resources (including capital costs and human expertise) and has a historically low rate for both short and long-term success.

While no one can refuse a golden egg, ultimately the likelihood that Tesco Mobile will actually enter into such an agreement depends on the details of the offer and it's ability to address these risks.

However, Tesco willingness to accept the proposed remedy has other factors that will weigh heavily on their final decision. Based on confidential sources at the iMVNOx, it is our understanding that, the reason Tesco originally entered into a JV agreement, despite having significant market share and

other important assets essential to the successful launch of an MVNO, is because they were unable to find satisfactory commercial MVNO agreement with a single operator in the UK. Perhaps, the problem was they had too many assets and the carriers simply saw the competition that Tesco could create rather than the value they would provide. Perhaps not. Regardless, Tesco understood that because of the difficult nature of their MVNO efforts to date, that the smartest option for their MVNO strategy was to become a JV with one of the carriers.

Yes, this significantly changed their initial business model, as well as required them to relinquish full control and ownership of their subscriber base, and ultimately limited their choices for providers in the long term. It was the only option available to gain access to a wholesale partner, and mitigate their exposure to what was an obvious market reluctance on the part of the MNOs by allowing the MNO to be equally invested in the success of the venture. Some may say that this is the reason that Tesco Mobile is still here today and has been able to expand their model internationally. Others would say that this is the reason Tesco Mobile is not a stronger completion in the market. One that, on paper at least, had the potential to drive true consumer innovation in the retail MVNO model. Tchibo Mobile in Germany was similarly sidelined or selected by the carrier, and also chose a similar path to Tesco, as a JV with Telefonica.

However, despite the JV structure being positioned as a positive relationship with the MNO, to date we have not seen a truly profitable retail MVNO in any market. They may continue to generate enough revenue to support continued operations but there has been no breakout star who has proven the benefits of the JV structure provide any more access for the MVNO partner to become significant competition.

Therefore, the question we must has ourselves is whether, from a overall industry point of view, the JV structure is actually supporting or stifling these MVNOs.

To that point, we have further insight from another confidential source, that allows us to draw comparisons between the relationship between giffgaff/O2 (sub-brand) vs that of Tesco/O2 (JV). These comparisons show a substantially bias attitude from O2 towards giffgaff vs Tesco and

supports our assumption that the JV structure may actually be stifling wholesale competition rather than truly being a vested interest in supporting their partner as a valuable channel for subscriber acquisition.
If Tesco were to enter into such an agreement, they would have to justify the increased risks that arise from no longer having either, the added protection of their current JV structure or the vested interest, from 02 or the new merged entity, that their current JV structure guarantees. Clearly getting 100% ownership for Tesco could be attractive but they would presumably be wary and based on their reputation in wholesale negotiations, require a preferential deal. One far more substantial than what we understand has been defined here, in the broad strokes, of the suggested remedy regarding a capacity based wholesale access agreement for Tesco Mobile.

**(5)** In your view, what is the maximum market share that Tesco Mobile could theoretically achieve with a capacity based wholesale access agreement for 10% of the capacity of the network of O2 UK?

## Confidential Reply:
(Not provided)

## Non Confidential Reply:
5%

**(6)** What market share would you expect Tesco Mobile to realistically achieve with a capacity based wholesale access agreement for 10% of the capacity of the network of O2 UK:

**(6.1)** After 2 years

## Confidential Reply:
(Not provided)

## Non Confidential Reply:
3-5% assuming the wholesale market conditions as described in the previous questions are correct and we (iMVNOx/FCS) find that there is significant information to substantiate this assumption. Therefore, in order for Tesco mobile to survive long enough under the suggested terms of the proposed remedies, and reach the 2 year mark specific to your question, than Tesco would require a far more significant commitment than what has been described here. The agreement would need to include clearly defined terms that future-proof against all the known challenges and loopholes that currently exist within the standard wholesale agreement and negotiation process.
However, based on the broad strokes of the current commitments made by H3Gi, we find there is no reason to assume that Tesco Mobile would be a viable entity by year two. To this point, we would like to call your attention to the more fundamental problem that our conclusion uncovers. In that without more clearly defined remedies and a regulated framework that protects the wholesale market from being undercut either by retail prices or converging service offerings, than regardless of the 10% capacity allotment, the market potential for Tesco Mobile under these conditions is no more than any other full MVNO.

Even with their current subscriber base, brand influence, and retail stores the fact remains all they have been offered, in reality is a fairly standard wholesale agreement, on a single national carrier, without any guarantees to that carriers continued investment in that network (in terms of quality, capabilities and coverage). In fact these conditions are subject to the approval, said carrier, being acquired by another carrier in the market, with whom this agreement will not allow Tesco to gain wholesale access from as well.

In fact, considering the added financial pressures Tesco would be under, from the commitments to fulfill under the proposed remedies. Tesco Mobile (UK) may even have less market potential than other full MVNOs. As the truth the proposed rememdies bring to light is that today, the reality of the market that Tesco must evaluate when making this decision, is one where an MNO, in March of 2016, has proposed providing access to 4G (under current 3G rates) to both their current and future MVNO, as a viable remedy for facilitate market competition through wholesale. While, that might have been a significant commitment in 2013, however in 2016 if it wasn't so sad, it would be laughable. The truly sad part is that is seemingly being considered as a viable option by the Commission and has been submitted to the market for review. This provides a grim outlook for the MVNO market in the UK.

### **(6.2)** After 5 years

#### Confidential Reply:
(Not provided)

#### Non Confidential Reply:
3-5% The impact of increased usage on capacity limitations vs the minimum subscribers and ARPU required for profitability, compounds annually for Tesco. Without more clearly defined remedies and a regulated framework that protects the wholesale market from being undercut either by retail prices, network coverage and speed, or converging service offerings, the challenge for Tesco Mobile to provide competition in the UK market, as a Full MVNO, increases each year, while the potential for growth decreases driven by the continued reluctance of the carriers towards wholesale as a retail strategy, rapid technology advancements, continual investment requirements, and the most important factor, changes in consumer behavior.

### **(6.3)** Please explain your answer.

#### Confidential Reply:
(Not provided)

#### Non Confidential Reply:
Assuming the O2 network could cover 50% of the market (which is dubious assumption but for the sake of simplicity - let's say they could) than a 10% capacity allotment allows for at best, a maximum market share of 5%, which based on current market intelligence, we can assume that Tesco is already close to reaching this total. Based on this model, if you took a conservative network capacity forecast and an optimistic traffic growth forecast, we could easily conclude that the remedy proposed here for Tesco Mobile, would face capacity issues in the near future.

It is possible that Tesco users are light users particularly of data (ie they are late adopters of certain types of data usage) and that means they need less network capacity per head. However, our assumption would be that usage by Tesco users would revert to the norm of the overall market over time.

### **(7)** In your view, is the limit of 10% of the capacity of the network of O2 UK sufficient to allow Tesco Mobile to grow in the short term and long term?

#### Non Confidential Reply:

( ) Yes

(X) No

( ) Other

**(7.1)** Please explain your answer.

Confidential Reply:
(Not provided)

Non Confidential Reply:
Despite guaranteed access to capacity, any platform development can be both expensive and high-risk. For Full MVNOs specifically, the challenges are ten-fold. Every functionality that requires carrier prioritization of resources towards a wholesale development activity, significantly compounds the potential for carrier-related delays and/or added development costs. For the MVNO, the result of which can be the loss of both market opportunity and capital investment. However in regards to the remedy suggested here for Tesco Mobile, we are looking at platform development, compounded by the structural change of an MNO who is divesting it's interest in a wholesale JV partner. A partner, who will no longer have the vested interest of their provider and who will then have to facilitate, as seamless a transition as possible, to operating as an independent Full-MVNO. They will then need to buy, build, and bring to market a unique and competitive-ly priced mobile service offering, in the face of major transformation in the market-place, historically high failure rates, and increasingly low margins. All while navigating the logistical and operational nightmare of multiple carrier consolidations and converging service technology. It doesn't take a rocket scientist or even a Cambridge economist to know.... that is a recipe for disaster. Forget short-term growth, as the watch their subscriber churn rate increase from common migration issues and integration/technology roadblocks, which will negatively impact the current value of their MVNO business and increase the time and investment costs in the development of the new platform. With this remedy, the chance for success in the short-term is very slim (ie the continued delay of the Sky MVNO launch) and when analyzing the possible competitive advantages, that the offer could provide Tesco (so far as the details here have defined) vs the risk of cost/time/ROI, we believe that, not only is it highly unlikely that this agreement would be accepted, but we find that the suggested remedy structure creates a low-chance for success in the long-term as well.

**(8)** In your view, is it possible to forecast sufficiently accurately how the total capacity of the network of O2 UK, and hence the 10% share that will be made available to Tesco Mobile will evolve?

Confidential Reply:
(Not provided)

Non Confidential Reply:
No, there is too much going on in the market with data consumption still rising rapidly; service convergence around quad plays; multiple devices etc. At the same time Tesco would have to be very conservative with its forecasting or risk having a cliff type situation.

**(9)** In your view, is the exit of Tesco Mobile's network host (O2 UK) from Tesco Mobile's shareholders likely to have any impact on the competitiveness and commercial performance of Tesco Mobile?

Confidential Reply:
(Not provided)

Non Confidential Reply:
As a holder of 50% stake in Tesco Mobile, O2 clearly had a strong incentive to see Tesco succeed. However, while in theory MNO hosts do have an interest in their MVNOs succeeding, in reality they are also wary of the competition MVNOs could create in the right environment.

To date, MNOs have continued to show obvious reluctance to both,

* strategically leverage the MVNO channel as a complimentary extension of their overall subscriber acquisition strategy, and

* give weighted recognition/value to the additional benefits that wholesale operations have on overhead costs (ie. marketing, sales, support, and retail space), spectrum utilization, time to market, and service innovation.

Utilizing subtle tactics, as discussed previously, the retail division, almost sub-conscientiously keep a tight reign on the wholesale channel, specifically MVNOs. Wholesale executives are often, under-resourced and fighting an internal battle against the old-school mentality of 'retail is king', which hides, sometimes in plain sight, at the very heart of these monolithic MNOS.

This obviously increasing the importance, that any and all MVNOs/wholesale providers, must place not only on their own market value and distribution channels, but more specifically, on the strength of either their financial value to the MNO, or their personal relationship and influence on their host operator, or (as in the case with a JV structure) the MNOs overall vested interest in their specific success.

There is market substantiation that supports the thinking that a JV structure provides at least one level of protection from the carriers lack of commitment to the business of wholesale. This small-scale thinking of wholesale, as a less valuable revenue stream than retail, that has been engrained in the carrier culture, from years of market monopolization, is no longer true. However, still today there is a strong if silent message from executives, sitting in the watch towers of the big incumbents to their teams on the battlefield.

Stifle the market potential of any one wholesale partner, through subtle control of the daily support and operational efforts prioritized or even allotted to wholesale development. Based on this market understanding, it is our conclusion that, if O2 is no longer a shareholder than, it would be less clear as to how, when, and why O2 interests would be aligned with the interests of Tesco Mobile. Considering the historical market evidence to support this theory, we believe that the suggested remedy will cause problems, both in the short and long-term, for Tesco Mobile.

## D. QUESTIONS ON THE NEO COMMITMENT

**(10)** Assuming the proposed transaction had been implemented, if a prospective entrant were to decide to enter the UK under the NEO remedy following the proposed transaction:

**(10.1)** Would additional assets be required? If so, which ones?

### Confidential Reply:

(Not provided)

### Non Confidential Reply:

It is of major concern to both the iMVNOx and the FCS that the EC, should need further input or insights as to the significant costs, risks, and resources necessary to launch a full-MVNO. Or, that there would be a need to provide evidence as to the challenges associated with the successful migration from a lite to a full MVNO.

However, to quickly address the question presented in Section D- Question 10/10.1 There are substantial assets, including significant financial resources and human expertise, which would would be required.
At a minimum we find the following to be necessary assets required by any prospective entrant

- MNC

• Numbering - they would significant numbering resources
• Core Network
• Additional OSS/BSS particularly the rating and billing systems
Possibly a complete customer care solution depending on their current business services and capabilities
• MNP
• Interconnects and Interworking's
• Handset relationships
• Distribution Relationship
• Marketing and significant consumer education budget

On average, the capital resources needed for a full-MVNO that wants to build an enablement platform, including a core network; specifically, if that platforms are capable of providing competitive services and key differentiation within its offerings services, is roughly 10-25m GBP.

That is no small chunk of change and today, full-MVNOs that are privately funded struggle in their attempts to both secure initial funding, as well as, maintain investor support long enough to capture a sustainable market share. Especially when investors are faced with the dim reality of the MVNO market valuation and its historical benchmarks for ROI. Both of which are as limited in their availability to investors, as they are lacking in their overall accuracy and credibility.

Because of the considerable challenges MVNOs face (especially full-MVNOs who are requesting increased independence from the MNO, as well as, increased ownership over the end subscriber which in turn, increases the carrier's reluctance in providing the support required) to implement even the simplest change request (i.e. SMS Short Code capabilities) in a reasonable timeframe. We can assume the percentage for success, any NEO would have in hitting both their initial launch timeframe and projected usage forecasts are extremely slim.

First, it would be necessary, as a condition imposed on the NEO to put in place a core network, which would not be an insignificant challenge. Especially for entrants from a market outside of the telecom sector who don't know have the knowledge or market experience to address these issues at the onset. (i.e. SSE)

In addition to the common challenges that any new entrant would face, we are concerned by the term defined in the proposed remedies, that would prevent the NEO (s) from reselling their capacity.

At a minimum this means that they would face a long period during which they would not be using the full amount of capacity for which they would be paying. At face value, this implies a substantial "cash burn" or working capital requirement to get started.

However, the condition draws attention to, a seemingly small issue within the standard commercial wholesale agreements that creates significant challenges for many MVNOs, as well as MVNEs, in the market today.

The iMVNOx and the FCS find, that this restriction on the ability to resell capacity is counter-intuitive to the role of the wholesale market as a path for competition and is a method to control the distribution channels that wholesale can target, in an effort to keep direct ownership over the most both the highest ARPU subscribers (i.e. Business/ Roamers), as well as, reduce the ability that Full MVNOs and MVNEs have create distribution relationship with hi-volume channels. This impacts their overall ability to achieve both their minimum commitments to the carrier, as well as access any benefits they may gain from volume discounts and breakage.

This limits the ability that MVNOs, today have to exercise competition on the market and would also create a significant barrier to entry for NEOs because of the need to find the resources to fill the capacity through their own sales and marketing activities.

## **(10.2)** How much capital would need to be invested?

## Confidential Reply:
(Not provided)

## Non Confidential Reply:
First, we can assume it is unlikely any NEO would, based on the proposed terms, just go out and buy equipment without significant diligence and strategy in place. We will also assume they are either experienced market players or under the advisement of a market expert(s). We can then assume that any prospective NEO(s) would be more likely to build some type of managed service solution or at least some sort of manages service/hybrid platform.

Based on these assumptions and our considered market expertise, we can forecast the capital investment required to realistically be in the range of 10-25m GBP over three years.

This forecast includes consideration around the cost associated with, specifically assets that would be required in the design and development of any platform, including investment associated with the Core Network, the OSS/BSS module, and on-going fees related to each active SIM.

However, since it is not clear as to whether the NEO(s) chosen would start from scratch or have an existing customer base we have provided our assumptions on capital costs in both scenarios. Either way, the most considerable investment required, will be allocated towards the NEOs successful distribution and customer acquisition strategy.

If we assume the NEO start from scratch, in regards to building their subscriber base, there would be a considerably higher investment required for successful distribution and customer acquisition.

This is in comparison to the impacts on capital requirements, if we assume the NEO has an existing customer base. In this case, there are two additional factors that will impact the forecast models. One, these customers must be migrated. Two, how would this be executed?

We have already established in previous questions the challenges related to migration and its impact on churn rates. Now we must address the fact that there will be a cost to this migration process. A cost, that regardless of the price, comes with no guarantees to the NEO that they will even still have a subscriber base, after the 'pound of flesh' is taken from each of their customers during the process.

If, as is most common, a seamless migration cannot be facilitated easily via OTA, the costs to the NEO would not be strictly a capital cost, but are compounded by the value lost in customer churn and resources spent on incentivizing the remaining subscribers to complete the migration. Any impact from customer churn or migration cost can not be underestimated and these costs must be accounted for when modeling any forecast for these assumptions.

It is our conclusion that, even with existing assets such as brand influence, market share, and significant revenues streams from other core business channels, that the cost of launching a full MVNO is significant and possibly prohibitive (at least to smaller market entrant, who are more likely to be innovative and forward-thinking) even to global brands, when combined with the low success rates of MVNOs and the additional risks associated with launching a full MVNO.

In addition, if the NEO doesn't not,
• accurately predict or rapidly adapt to the cost and challenges associated with customer acquisition, and
• has not already either secured commitments from distribution channels or,
• have an existing customer base, both loyal enough to facilitate significant uptake of the new mobile services offering and large enough to survive a migration process and still take advantage of negotiated volume discounts

Than even attempting to pursue wholesale as a mobile strategy could be disastrous. There are historical examples of even experienced market entrants (i.e. Helio/Earthlink, Disney, ESPN), who have invested capital, as high as 400m USD and still failed to launch.

There must be a more substantial and clearly outline commitments, than are defined here for any prospective NEO to consider launching in the UK, under the commitments HG31 has proposed as market remedies, especially when reviewing the stability of the current wholesale market. There is far too much uncertainty around how the wholesale market, as well as, the current consumer offerings will evolve for both MVNOs and MNOs in response to on-going transformation of the converging mobile marketplace.

### **(10.3)** What would be a realistic time frame for entry?

#### Confidential Reply:
(Not provided)

#### Non Confidential Reply:
6months – 36 months

"You have thirteen hours in which to solve the labyrinth, before your baby brother is mine forever."

Today, the process of acquiring a wholesale access agreement, let alone successful implementing the technical and operational requirements needed to launch (even a lite-MVNO), is in reality, the wholesale markets twisted version of the 80's film, The Labyrinth. (starring David Bowie, Jennifer Connelly, and of course, Jim Henson's' Muppets –).

An epic quest, a determined hero battling the all-powerful Goblin King, and an ominous countdown to a point in time at which the hero's journey has come to an end, whether they have succeeded or not.

Let me explain.

• The epic quest is the path to becoming an MVNO,
• The NEO is our determined hero Sarah, and of course,
• The MNO is the Goblin King,
• The ominous countdown to complete the labyrinth and 'save our baby brother' is the amount of time it takes from MVNO concept to launch that is an acceptable commercial timeframe, (i.e. 6-12 months) in our rapidly changing industry, before either the concept is no longer a viable consumer product, the NEO runs out of money/support, or the MNO has convinced our carrier to become a branded reseller (i.e.Univision/TMO-USA) or a JV (ie.Tesco/02 UK) instead of an MVNO, keeping the concepts and/or the customers base i.e. 'the baby brother' all to themselves.)

Oh yes…I can't forget one other important character, the Muppets.

• The Muppets in the movie are the creatures of Goblin City and in the comparison to the MVNO market play the role of the MNO wholesale executives. Some, like Hoggle, a creature from the movie, may try to help but most are fearful of the Goblin King and the possibility of being thrown in the Bog of Eternal Stench (the punishment for any creature of Goblin City), should they become too 'helpful' to our hero in making their way through the Labyrinth.

In the world of MVNOs, wholesale executives who act as these types of champions or 'Hoggles' for their potential MVNO partners, face a similar threat. If they push too hard for any one project, these Hoggles (wholesale executives) may find themselves being pushed out of the safety of the MNO environment, and into the MVNO market in which they seemed to be so concerned. While, this threat may not exactly be the Bog of Eternal Stench, it is a method of deterring wholesale executives to risk their neck for any MVNO.

Although, those who do find themselves in this situation have often tried to launch MVNOs/ MVNEs of their own, thinking that they would have an easier time in the Labryinth, after all they had lived in the Goblin City for so long, surely they could find their way back. However, in the reality of the wholesale market, this has not been as easy as it seems despite their previous roles. (ie. Viacloud). For once you are outside of the Goblin City and facing the labyrinth without the support of the Goblin King, your chances of success are just as slim.

Like the Labyrinth, the long and winding road towards launch is filled with detours, dead-ends, and despair. An NEO will need a their own 'Hoggle' to help them, a wholesale executive who believes in the NEOs quest and has inside knowledge of both the Labyrinth and the location of the Goblin City.

Sarah: I have to solve this Labyrinth. But there aren't any turns or any openings or anything, it just goes on and on!

NEOs who want to become an MVNO, MVNE, or other type of wholesale partner must not under-estimate the difficulty of navigating this labyrinth. And, like all who enter, the NEO must beware the consequences of remaining in the labyrinth to long.

Goblin King (to Sarah). "I ask for so little. Just let me rule you, and you can have everything that you want."

NEOs must avoid the illusions of perfection that will distract the weak of mind with from finding their path through fantasy to reality.

Goblin King (to Sarah). "Do not be afraid, it is a crystal. Nothing more. But if you turn it this way and look into it, it will show you your dreams.

Those who have manage to see past these hallucinations of grandeur, must solve riddles designed as roadblocks, fight off foes masquerading as fairies, and avoid the helping hands along the way that do more harm, in the end, than good.

Depending on how well prepared the NEO is at the commencement of the implementation, and depending on how helpful their 'Hoggle' is, our hero could potentially complete their heroic quest in as little as, six months. That, is just what our perspective NEOs need to hear to feel as if they might be able to make it through to the other side. Some may even be over confident because of their current size or power, however, it is not as easy as it may seem. It requires co-operation from other parties which cannot be guaranteed. As well as significant motivation from the MNO is to launch in a timely manner, which is not easy to get and even harder to guarantee.

Goblin King (to Sarah). "So, the Labyrinth's a piece of cake, is it? Well, let's see how you deal with this little slice!"

With the challanges they will face we doubt any of our perspective heroes would willing want to commit to navigating the labyrinth in less the 12 months, there is nothing uncommon for the long road to launch to take 2 years.

That is assuming the NEO launched at all, considering the dismal success rates of MVNOs prior to launch. The NEOs significantly increase their chance for failure, every moment past month 24, that they remain trapped in the labyrinth.

Hoggle to Sarah: Take this Labyrinth: even if you get to the centre, you'll never get out again.

In addition, based on the suggested remedies there do not seem to be provisions for back up solutions assuming market failure of the NEO. There are no benchmarks or standards based on minimum commitment levels on behalf of the MNO to execute the remedy under fair and reasonable terms which support potential market success.

Goblin King (to Sarah). "Beware. I have been generous, up until now. But I can be cruel. "

Sarah. Generous? What have you done that's generous?

Goblin King. Everything that you wanted, I have done. I have reordered time, I have turned the world upside down, and I have done it all for you! I am exhausted from living up to your expectations of me. Isn't that generous?

At the end of the film version of The Labyrinth, our heroine must only choose to claim back her power, in order to defeat the magic of the Goblin King.

Sarah. "Through dangers untold and hardships unnumbered, I have fought my way here to the castle beyond the Goblin City, for my will is as strong as yours, and my kingdom as great — You have no power over me."

Unfortunately for our perspective NEO's, without a more substantial framework for supporting the wholesale market, than even if they succeed at navigating through the Labyrinth before the time runs out (ie. 6-24months), the Goblin King will always have power over them, both as a partner and as a competitor.

## D.1 Capacity

Under the Proposed Commitments, the "Network" is defined as the "mobile network radio access network operated and/or used by O2 UK in the United Kingdom […] subject to any limitations contained in national roaming or infrastructure (including site) sharing agreements with third parties". According to paragraphs 25 (c) and 25 (d) of the Proposed Commitments, the NEO would commit to use its 20% of the Network Capacity ("Capacity Share") as follows (referred to as "Elected Capacity Share"): If the NEO does not require to utilise the full 20% Capacity Share in year 1, it may elect a reasonable path leading to a 20% Capacity Share in Q4 of 2021 (year 5).

For years 6 to 10, the NEO shall elect a minimum Capacity Share equivalent to the Capacity Share in Q4 of 2021 specifically measured in Gbps and Erlangs (the Gbps element being at least 200 Gbps). From year 11 onwards, any minimum Capacity Share shall be as agreed between H3GI and the NEO, provided that the NEO shall at all times be entitled to utilise the full Capacity Share as the Network Capacity changes over time. H3GI commits to make available a Capacity Share (Gbps element) of at least 200 Gbps as of Q4 of 2021 on an ongoing basis and then at least 300 Gbps from Q4 of 2026 onwards provided the NEO's Elected Capacity Share is 20%.

**(11)** In your view, considering that NEO is offered a Capacity Share of O2 UK's network subject to any limitations contained in national roaming or infrastructure (including site) sharing agreements with third parties, do the Commitments allow to assess what capacity will actually be made available in actual terms for a given capacity share and how such capacity will evolve over time?

Non Confidential Reply:

( ) Yes

( ) No

(X) Other

**(11.1)** Please explain your answer.

## Confidential Reply:
(Not provided)

## Non Confidential Reply:
Broadly speaking you could potentially forecast capacity either by GBPS and/or Erlang, so long as O2 provided all the relevant information including historical data, as well as, their own forecasting assumptions – and- so long as the auditing process was handled by an un-biased, outsourced entity with independent reporting to both parties. However, there are a couple of important variables to point out here. One is that this relies mainly on the cooperation of the carrier, and the second is the carrier's ability, either as 02 individually or the newly merged entity, to provide this information in a transparent and timely manner. The impact of this reality, further increases the uncertainty associated with this remedy as a solution for competition in the UK.

It is important to consider that historically, it is not uncommon for an MVNO to go out of business (i.e. Ovivo) while in the midst of a commercial dispute with their host operator over usage charges. This is specifically challenging around data usage and with wholesale agreements when the wholesale partner has a low-level integration with the MNO's network (i.e. lite-MVNOs/resellers) as their ability to view their real-time subscriber activity is limited. In addition, as the payment terms in most wholesale agreements are strongly positioned in the MNOs favour. Since the MVNO is at the mercy of their host operator (as explained in detail in our previous answers and through our continued submission and comments to Ofcom, the CMA, and the Commission), and more often than not, in need of a continued relationship with their host. Therefore, MVNOs have limited recourse for a fair review of the issue or disputed charges, which is compounded by both a lack of options to switch providers and the significant risk associated with carrier migration.

MVNOs must navigate usage or other commercial disputes, including implementation of technology and daily operational issues, with a considerably light-touch. In order to even address the dispute, let alone come to a fair and equitable solution without negatively impacting their current carrier relationship and therefore, potentially, impact their subscriber base, on-going service offerings, and their wholesale business, overall.

In the past, this challenge, which we find is present in the suggested remedy here, has had a considerable effect on consumers, allowing for service interruptions, where the MVNO subscribers are without warning (normally overnight) left 'dis-connected'. Today, there are no processes in place which address even the minimum level of consumer rights, let alone provide quality solutions for subscribers, who find themselves in this situation (i.e. refund process for lost top-up balances, guarantee around mobile number allocation, or even a seamless subscriber migration path to the host network in the cases where service to the wholesale provider is being switched off).

This creates both frustration and a lack of trust from consumers towards the MVNO market as a whole. Further limiting the constraint that, MVNOs in general, can exercise on competition within the market, regardless of or despite the specifics of any one dispute. However, the commonality in which this issue has occurred to date, specifically within the UK, supports our concern that 02 would (if not at the outset, then long-term) not willingly cooperate by provide full and transparent access to this information. In addition, at this moment specifically, when considering the rapidly changing landscape of the UK market and the convergence of industry sectors. Including broadband, mobile, and content offerings, which allows for the bundling of services and single billing to consumers, we find that this creates additional opportunity for the carriers to blur the lines around the true costs of voice, text and data, as they relate to wholesale. Highlighting the uncertain nature of how the wholesale pricing strategy will need to evolve over the coming months and years.

Based on the current remedy suggested by HG3I, the ability to successful forecast capacity usage would only have bite if it came to a question of the NEO actually bumping up against capacity constraints. We find that would need to be a lot more details to be defined here in order to implement a successful remedy under this type of competition strategy.

It is important to note that, currently MNOs can't partition off individual pieces of the network for the specific analysis of any one wholesale partners' individual usage, so in reality the suggested remedy will have to rely on an entire analysis of the network traffic. Transparent and real-time access to this information is completely controlled by the carrier, and both their willingness and technical abilities to facilitate this sort of usage analysis.

Based on this significant position of power the MNOs hold, as well as the historical behavior of the carriers, it is easy to conclude that the NEO will not have the visibility to ensure they are being treated fairly and in order to gain that visibility they may incur both delays in their market launch and additional costs (as outlined in other terms associated with this suggested remedies) as well as damage their overall relationship with the host MNO.

**(12)** Considering that the commitments relate to access to O2 UKs network only rather than the networks of both merging parties or a potential consolidated network, is it in your view sufficiently certain that assets (such as access to sites, equipment and in particular spectrum) will remain in the O2 UK network as opposed to being transferred to other networks (co-)owned by H3GI and that sufficient investments are made to improve the O2 UK network in the future?

## Confidential Reply:

(Not provided)

## Non Confidential Reply:

There seems to be not only no guarantee but a positive incentive to for the acquiring MNO would invest, the majority of its capital in the network which will deliver 100% returns to H3GI rather than the network they would be sharing as the merged entity.

The question here is why would the NEO be limited to only a part of the new entities entire network. Exclusive network agreements, and lack of choice, (when in need of changing service providers, increasing coverage or building a network of extended roaming service) are two of the key factors limiting growth in the wholesale market. It compounds the issues outlined above during moment of commercial dispute and it continues to support the current environment, in where the MVNOs are stuck with a lack of cooperation from their MNO and because of the challenges associated with migration, if and only if the MVNO is able to find another suitable host and can manage the switch in networks, as well as avoid any unforeseen cost and delays, can the MVNO migrate without irreparable damages to their current business.

**(13)** How do you expect the capacity of the Network as defined in the Commitments to evolve?

## Confidential Reply:

(Not provided)

## Non Confidential Reply:

Spectrum management and capacity forecasting is complex. However, with the increase deployment of virtualized network services, even at the carrier level, as well as the increase in the number of connected environments via wi-fi/broadband solutions we believe that MVNOs, if supported by the correct regulatory framework are perfectly positioned to help the network operators manage capacity and optimize their spectrum (i.e. through wi-fi offloading solutions or price based offers around off-peak usage for MVNOs that reducing the impact that the stability and quality of such services could have on their retail brands)

However, we believe that the question misses the point, as it will not be the evolution of a single network that defines the success of the remedy but the evolution of the landscape as a whole, and the viability that said remedy has to successfully address the competition issues of that landscape.

In the UK specifically, both O2 and the new merged entity will have to adapt to the market pressures from the newly formed BT/EE operations, as well as the response from market competitors (i.e. Vodafone, Virgin, UK Broadband, CPW/DG) to these pressures. There are far too many unknowns to accurately comment on how this will impact the strategy of either O2 and/or the new merged entity, sufficed to say, that there will be changes. Big changes. Ultimately, we find that the suggested remedy does not provide significant safeguards against this uncertainty and or an understanding of how this evolution could/will impact its role as either a short or long term solution for competition.

**(14)** In your view, considering that the commitments relate to access to O2 UKs network only rather than the networks of both merging parties or a potential consolidated network, can a NEO be sufficiently certain to obtain access to a network that allows it to compete effectively in the future (e.g. in terms of coverage and quality)?

Non Confidential Reply:

( ) Yes

(X) No

( ) Other

**(14.1)** Please explain your answer.

Confidential Reply:
(Not provided)

Non Confidential Reply:
This has been addressed in a variety of ways throughout the previous comments most recently as Question 13.
"In the UK specifically, both O2 and the new merged entity will have to adapt to the market pressures from the newly formed BT/EE operations, as well as the response from market competitors (i.e. Vodafone, Virgin, UK Broadband, CPW/DG) to these pressures. There are far too many unknowns to accurately comment on how this will impact the strategy of either O2 and/or the new merged entity, sufficed to say, that there will be changes. Big changes. Ultimately, we find that the suggested remedy does not provide significant safeguards against this uncertainty and or an understanding of how this evolution could/will impact its role as either a short or long term solution for competition

**(15)** In Annex 1 to the Commitments it is specified that the Elected Capacity Share of the NEO is applied to the "Realisable Capacity" of the Network: The Realisable Capacity is defined as the peak throughput in the Network busy hour that maintains the desired customer experience and is the sum of the uplink throughput and the downlink throughput. Realisable Capacity is limited by the need to ensure that the number and duration of customers experiencing unacceptable data speeds stays within defined parameters. The Realisable Capacity is evaluated every 3 months (Share Period). The revised Realisable Capacity will take into account: Increases in capacity during the preceding Share Period; [the] Sum of actual uplink and downlink throughput measured in the preceding Share Period; Actual customer experience measured in the preceding Share Period; [and] Target customer experience for the next Share Period. The Elected Capacity Share of NEO (which is expressed as a percentage) is applied to the Realisable Capacity of the Network for the next Share Period (expressed in Gbps and Erlangs) in order to establish a revised Realised Capacity figure (expressed in Gbps and Erlangs) to be provided to the NEO for that next Share Period.

In your view, is this process sufficiently clear and capable of being effectively implemented and monitored?

Non Confidential Reply:

( ) Yes

( ) No

(X) Other

**(15.1)** Please explain your answer.

Confidential Reply:
(Not provided)

Non Confidential Reply:
This misses the point. The NEO will need to make long term planning decisions based on assumptions of capacity. For that they need guaranteed capacity rather capacity which may move depending on what people on the rest of the network do. They also need much longer visibility than quarter to quarter.

**(15.2)** In your view, does the concept of Realisable Capacity to which the Elected Capacity Share applies takes account of any spare capacity on the Network and, if so, how?

Non Confidential Reply:

( ) Yes

(X) No

( ) Other

**(15.2.1)** Please explain your answer.

Confidential Reply:
(Not provided)

Non Confidential Reply:
The mechanism does not seem to take into account seasonal variations or external factors that could impact quarterly variations in spare capacity

**(15.3)** Do you have any other comment on the determination of the NEO capacity as described above?

Confidential Reply:
(Not provided)

Non Confidential Reply:
(Not provided)

**(16)** In your view, what share of retail subscribers would the NEO be theoretically able to serve without running into capacity limitations?

**(16.1)** with a 20% Capacity Share of O2 UK's Network in 2016 (year 1)?

Confidential Reply:
(Not provided)

Non Confidential Reply:
Without access to much information it is very difficult to estimate. However it is unlikely to be more than 10% and could easily be less

**(16.2)** with a 20% Capacity Share of O2 UK's Network in 2021 (year 5)?

Confidential Reply:
(Not provided)

Non Confidential Reply:
Probably less than in 2016

**(16.3)** with a 20% Capacity Share of O2 UK's Network in 2026 (year 10)?

Confidential Reply:
(Not provided)

Non Confidential Reply:
Probably less than in 2021

**(16.4)** with the minimum guaranteed data throughput capacity of 200Gbps during the years 2022 to 2026 (years 6 to 10)?

Confidential Reply:
(Not provided)

Non Confidential Reply:
We don't think we have enough data to forecast

**(16.5)** with the minimum guaranteed data throughput capacity of 300Gbps from year 2027 onwards (year 11)?

Confidential Reply:
(Not provided)

Non Confidential Reply:
We don't think we have enough data to forecast. however

**(16.6)** Please explain any assumptions you are applying in answering these questions.

Confidential Reply:
(Not provided)

Non Confidential Reply:
If we assume that the O2 Network could theoretically support 50% of the market (which again is a pretty dubious assumption) then 20% should, theoretically, allow 10%. However, the O2 network will likely suffer less investment particularly in spectrum so the percentage of the market it support will likely decline. This risk will compound annually.

**(17)** In your view, what market share could the NEO realistically attain from a commercial perspective following the commercial launch:

**(17.1)** after two years:

Confidential Reply:
(Not provided)

Non Confidential Reply:
This depends entirely on whether it brings an existing user basis, a user base that can be easily cross sold or if it will have to start from scratch. Unless it brings an existing base or an unlimited customer acquisition budget then unlikely to get to 5%. The other thing that is key (which has been explained in detail throughout the previous questions and which, has also been compared to the plot of a brillant film, in an effort to provide a vivid picture of the point I am about to make), is that you are assuming that the NEO will actually launch. Remember? The long and winding rode towards launch is a bit like navigating a labyrinth.

The more important aspect to focus on defining a framework that will address more significant issues for the successful launch, as well as, the long-term growth of the NEO.

Without far more clearly outlined and equitable commitments, that address the reality of the challenges that face the MVNO/wholesale market in the UK, today, we can not even begin to future proof competition through wholesale. Let alone, accurately predict the market share of an unknown NEO, launching in the UK, considering the uncertainty of the market today and the impacts, still unknown, of the merger between BT/EE, as well as, the outcome of this investigation.

**(17.2)** after five years:

Confidential Reply:
(Not provided)

Non Confidential Reply:
Again unless it brings an existing base or an unlimited customer acquisition budget then very unlikely to get close to the 10% capacity constraint

**(17.3)** after ten years:

Confidential Reply:
(Not provided)

Non Confidential Reply:
Again unless it brings an existing base or an unlimited customer acquisition budget then very unlikely to get close to the 10% capacity constraint

**(18)** In your view, would it be possible for the NEO to effectively monitor the compliance of H3GI with its obligation to provide the specified Capacity Share?

Non Confidential Reply:

( ) Yes

( ) No

(X) Other

**(18.1)** Please explain. If no, please provide further details on the arrangements that would be necessary to ensure H3GI's compliance.

Confidential Reply:
(Not provided)

Non Confidential Reply:
We think this would be difficult. The NEO would need to have extensive access to H3GI network monitoring records, probably for both the existing O2 and H3GI networks to ensure the network is being running in a way that is compliant and fair to the NEO. As we have discussed in previous questions, ensuring the NEO has timely and transparent access to this information would require far more detail and commitments on behalf of H3GI in order to conclude that the NEO would be able to effectively monitor this process.

(19) According to paragraph 25(c), the NEO has to purchase a 20% Capacity Share during the last quarter in year 5 (Q4 2021). For the next five years, the NEO has to purchase at least the same amount of Gbps and Erlangs as in Q4 2021. From year 11 onwards, there are no minimum purchase obligations for the NEO. However, the NEO is entitled to use the full 20% if it elects to. Do you consider that the NEO will be incentivised to utilise its full Capacity Share of 20% after Q4 2021?

Non Confidential Reply:

( ) Yes

( ) No

(X) Other

**(19.1)** Please explain your answer.

Confidential Reply:
(Not provided)

Non Confidential Reply:
It will depend on the commercials of the offer and, the broad evolution of the wholesale market as to what options the NEO will have at that time. If we answer the question as asked without compounding the reply with the significant issues associated with said NEO being able to maintain successful operations for even 2 years, let alone 11. However, should manage to escape the labryinth and then maintain both a large and loyal enough subscriber base to defeat the odds, than, given the investment and the risks of migrations, the NEO (who at that point will no longer be an NEO and based on historical examples of the exit strategy for the most successful MVNOs will most likely have sold their MVNO (ie Virgin/Sprint US) to the host operator (ie O2) should have strong incentives to stay on the same network. More plausible however, is that it may well be that the NEO has no other options. Therefore, it is far more plausible that the NEO ends up in one of the other possible outcomes that we have highlighted here (ie. failure to launch, failure to maintain operations past 2 years, acquisition by their host MNO) so the question may be mute.

More importantly, ask yourself, how many MVNOs can you name who have been in business (specifically of running an MVNO) for more than 10 years? Maybe the concern should be more focused on, how and at what cost will the NEO be able to make it to year 11?

## D.2 Commercial terms

According to paragraphs 25(b) and 25(e) of the Proposed Commitments, the NEO shall pay (i) an agreed fixed price for the Network Interest; and (ii) on an ongoing annual basis, a proportion of the running operating expenses and ongoing capital maintenance and improvement costs incurred by H3GI plus a return on capital. Such proportion shall be at least equivalent to the Elected Capacity Share of the NEO as well as any costs arising from unilateral investments made by the NEO.

(20) In your view, is the proposed structure of ongoing annual payments consisting of a proportion of the running operating expenses and ongoing capital maintenance and improvement costs incurred by H3GI plus a return on capital sufficiently clear and capable of being effectively implemented and monitored?

Confidential Reply:
(Not provided)

Non Confidential Reply:
It is a useful starting point but would need considerable work on the details. In addition, we feel the NEO should be concerned with the details of this term.

**(20.1)** Would, in your view, the NEO also have to pay a share of cost incurred by H3GI to consolidate the current networks of O2 and Three?

Confidential Reply:
(Not provided)

Non Confidential Reply:
That would be up to commercial negotiation but we do not think that appropriate, even if they had access to both networks.

**(21)** Please indicate if and how the cost determination is likely to work and whether the NEO would be able to effectively monitor Ongoing Charges, in light of the audit mechanism in paragraph 25(f) of the Proposed Commitments.

Confidential Reply:
(Not provided)

Non Confidential Reply:
It would depend on the level of audit rights the NEO would be granted. We think it unlikely H3GI would be willing to give sufficient access.

**(22)** In your view, would this cost structure (upfront payment plus proportion of OPEX and CAPEX plus a return on capital) allow the NEO to compete effectively, including on price, against MNOs?

Non Confidential Reply:

( ) Yes

(X) No

( ) Other

**(22.1)** Please explain commenting on each of the different elements of the commercial terms (agreed fixed price, annual charges for a proportion of (i) the running operating expenses, (ii) ongoing capital maintenance and improvement costs incurred by H3GI, and (iii) a return on capital).

Confidential Reply:
(Not provided)

Non Confidential Reply:
The NEO is 100% dependent on H3GI for providing services. That puts it at a considerable disadvantage to an MNO.

However the model is put together it still never amounts to anything more than a full MVNO and it is very hard for MVNOs to compete with MNOs

**(23)** In your view, would the proposed terms allow the NEO to compete effectively in the long term and on a cost basis similar to that of an MNO (e.g. in light of expected technology improvements, such as 5G, or cost changes of MNOs to produce mobile services)?

Non Confidential Reply:

( ) Yes

(X) No

( ) Other

**(23.1)** Please explain your answer.

Confidential Reply:
(Not provided)

Non Confidential Reply:
As above, it is nothing more than a full MVNOs and full MVNOs cannot compete directly with MNOs

This will depend on the contractual arrangements between the NEO and the MNO, and on whether the MNO invests in the O2 UK network or treats it as a legacy asset. The NEO is also potentially exposed to the success or otherwise of the MNO on obtaining licenses for future new technologies, and to the cost of those licenses. These factors further underline the risk that only a very large operator with a considerable appetite and capacity for risk would be in a position to enter such an agreement. The lack of control over costs and investment decisions for the NEO is also a factor which may deter potential NEOs from entering into such an arrangement.

**(24)** Do you consider that it is possible to devise the agreements for the purchase of the Network Interest in such a way that they account for possible issues that could arise in the future in relation to the commercial terms and conditions for the NEO as set out in the Proposed Commitments?

Non Confidential Reply:

( ) Yes

(X) No

( ) Other

**(24.1)** Please explain your answer.

### Confidential Reply:
(Not provided)

### Non Confidential Reply:
Any NEO or MVNO in the market today or in the future, regardless of whether they are a full or lite MVNO, will always be 100% dependent on the host operator for the provision of services.

Indeed, the experience of our MVNO members suggests that this fact, while in theory can be address through commercial terms, this not always easy to achieve fair and equitable terms. In fact, many MVNO comprise significantly, to their ultimate demise, during the negotiation in order to push through the process of launching and avoid an additional delays. (Remember, the NEO has only a certain amount of time to make it through the labrayinth and complete their quest before they and their MVNO ambitions are lost forever). Even if the contract was balanced in the favour of the MVNO and outlined every possible issue that may arise, the challenge is in the practical application of these terms and the remedies that an MVNO has to enforce them, should a dispute resolution be needed. Because of the SMP of the host operator, as well as, the risks associated with migration, the lack of remedies for an MVNO to come to a dispute resolution with their carrier, without damaging the long-term relationship with the host or having service turned off at some point during the dispute, destroying the customer there will be signifigant difficultly to address every issue that may arise, even if the contract seeks to ensure this.

## D.3 Quality of service, network planning and investments

According to paragraphs 25(g) and 25(h) of the Proposed Commitments, the NEO would have equivalent quality of service compared to non-NEO retail customers, as well as non-discriminatory access to all elements of the network, current and future network technologies as well as features and services deployed in the network.

According to paragraphs 25(i) to 25(m), the NEO will regularly be provided with and consulted on H3GI's technology and network roadmap plans. Subject to the exceptions listed in paragraphs 25(k) to 25(m), H3GI will retain sole control over all decisions concerning the operation of the network and investments in it. The NEO remains free to implement features on its own core and RAN networks. Paragraphs 25(k) and 25(l) provide that the NEO can request an investment in the network that is not part of the roadmap. H3GI commits to discuss this request in good faith with a view to reaching an agreement on whether to proceed with the investment. If no such agreement can be reached, H3GI commits to implement the investment subject to the NEO obtaining all relevant consents and agreements from third parties. If the investment can be technically segregated or partitioned on the network for the NEO's own use, H3GI will implement the investment and the NEO shall bear all the costs for such investment. If the investment cannot be technically segregated or partitioned on the network for the sole benefit of the NEO, H3GI will implement the investment and the associated costs will be shared on a pro-rata basis, with H3GI's annual contributions for investments requested by the NEO being capped at GBP 25 million in incremental capex costs and GBP 5 million in incremental opex costs. H3GI will have a full right to use and access the investments at no additional cost. Paragraph 25(m) clarifies that the NEO shall be entitled to differentiate its network quality by building its own supplemental network using its own spectrum or unlicensed spectrum. Subject to paragraph 25(l)(i) and at the expense of the NEO, H3GI will provide all reasonable technical assistance that may be required to ensure seamless handover.

**(25)** In your view, is the commitment to provide NEO customers with equivalent quality of service as non-NEO retail customers capable of being implemented and effectively monitored?

Non Confidential Reply:

( ) Yes

(X) No

( ) Other

**(25.1)** Please explain your answer.

Confidential Reply:
(Not provided)

Non Confidential Reply:
Our experience as an MVNO suggests that it is not always easy to achieve this, even if the contract seeks to ensure this. The terms appear reasonably equitable but the reality may prove more complex. Also, the viability of any investment by an NEO will depend on the way in which the O2 UK network is regarded by H3G. If it is seen as a legacy network with a limited lifespan, any investment in new features etc will become less attractive, as it will have to be amortised over a shorter period.

**(26)** In your view, is the commitment to provide the NEO with non-discriminatory access to all elements of the Network and all current and future radio technologies, features and services as deployed in the Network capable of being implemented and effectively monitored in practice, considering all relevant factors (such as terms and conditions (e.g. price), timing of access, etc.)?

Non Confidential Reply:

( ) Yes

(X) No

( ) Other

**(26.1)** Please explain your answer.

Confidential Reply:
(Not provided)

Non Confidential Reply:
NO. NO. NO. NO. NO

A thousand times NO. For any and all of the reasons established throughout the rest of the questionairre.

**(27)** In your view, is a commitment to regularly consult the NEO on Three's technology and network roadmap plans as set out in paragraph 25(i) of the Proposed Commitments be sufficient for the NEO to plan sufficiently ahead and be a viable and effective long term competitor

Confidential Reply:
(Not provided)

Non Confidential Reply:
(Not provided)

( ) Yes

( ) No

( ) Other

**(27.1)** Please explain your answer.

Confidential Reply:
(Not provided)

Non Confidential Reply:
(Not provided)

**(28)** Do you consider the last paragraph of Clause 25(l) of the Proposed Commitments (regarding the need to agree on appropriate safeguards to ensure service quality and the absence of material adverse effect) to be appropriate and to allow the NEO sufficient freedom to implement its investments?

Confidential Reply:
(Not provided)

Non Confidential Reply:
(Not provided)

( ) Yes

( ) No

( ) Other

**(28.1)** Please explain your answer.

Confidential Reply:
(Not provided)

Non Confidential Reply:
(Not provided)

(29) In your view, in light of the way in which the rules on network planning and investments are set up, would the NEO be able to compete on quality and innovation?

Non Confidential Reply:

( ) Yes

(X) No

( ) Other

(29.1) Please explain your answer.

Confidential Reply:
(Not provided)

Non Confidential Reply:
The quality of just the O2 network will always be less than the combined H3GI an O2 network.

On innovation it will depend on NEO's strategy,appetite for risk, and financial resources, as well as influence with their host operator (remember, the NEO could fall into the Bog of Eternal Stench and be lost, with all ideas and possible innovation stolen by the Goblin King) The more important question is, what other assets could they bring to their service. We must assume, to achieve the market share needed to successful compete and fulfill the commitments set out in the proposed remedies, therefore, the NEO will have to address the mainstream market not niche services. Unless the NEO brings some unique selling point the MNOs cannot copy it will be extremely difficult to compete against MNOs on as they will just copy strategies and will have the advantage of scale.

(30) In your view, would the NEO be able to differentiate its service offerings from those of H3GI?

Non Confidential Reply:

( ) Yes

(X) No

( ) Other

(30.1) Please explain your answer.

Confidential Reply:
(Not provided)

Non Confidential Reply:
Not based on mobile telephony. They would need to bundle other exclusive services such as content, banking services, or loyalty programs. Potentially, the NEO would be able to do this, as

even a lite-MVNO can do today.. There are many components of the services offering. of which technical infrastructure is only one element/

**(30.2)** If your answer is yes, please explain:

**(30.2.1)** what differentiation would the NEO be able to implement (e.g. in terms of coverage, service quality (e.g. data speed), innovative products (VoLTE, multimedia services, etc.)). Please specify when this depends on the type of entrant (e.g. fixed operator).

Confidential Reply:
(Not provided)

Non Confidential Reply:
It is unlikely that coverage could be differentiated favorably from the MNOs offering. Indeed, unless H#G allows the NEO subscribers to roam on the Three network, than the differentiation very well may be that the NEO will have poorer coverage than the consumers on H3GI, who will have access to both networks. however the proposed arrangement involves the NEO having it's own core network, in which important elements of these functionalities will be located. This would enable the NEO to implement features such as Fixed/Mobile convergence, content services, ect.

**(30.2.2)** at what level of the network (e.g. RAN network, core network, transport network) the NEO could implement differentiation.

Confidential Reply:
(Not provided)

Non Confidential Reply:
As previously mentioned, if we assume that the NEO will have it's own core network it could implement differentiation at that level of the platform.

**(31)** According to your understanding, to what extent (if any) is the NEO likely to require technical cooperation of H3GI to implement any differentiation in NEO's service offerings?

Confidential Reply:
(Not provided)

Non Confidential Reply:
This would be highly dependent on the initial set up. All traffic would go through H3GI core unless you implemented a non-standard solution. Any changes to the H3GI core, traffic flows, rating or CDRs would require cooperation. Geographic data on users would be under the control of H3GI.

Hosts can make it very difficult for full MVNOs and I would assume it would be similar.

**(32)** In your view, in light of the way in which the rules on network planning and investments are set up, would you consider it likely that the NEO would request investments that are not part of the technology and network roadmaps?

Non Confidential Reply:

( ) Yes

(X) No

( ) Other

**(32.1)** Please explain your answer.

Confidential Reply:
(Not provided)

Non Confidential Reply:
We do not believe the NEO can not expect to gain an advantage by investing over and above the roadmaps. If they gained an advantage the MNOs would simply copy the strategy but with additional scale.

**(32.2)** If your answer is yes, please explain what type of investments the NEO is likely to request.

Confidential Reply:
(Not provided)

Non Confidential Reply:
(Not provided)

## D.4 Reselling of the Network Interest and the Capacity Share, Transfer of the Interest

According to paragraph 25(n), the NEO may not transfer the Network Interest or its Capacity Share to any third party, whether on a wholesale, resale, agency or other distribution basis. According to paragraph 25 (o), the Network Interest will be non-transferrable for a period of 10 years. Thereafter, the Network Interest may be transferred (in whole) to a third party that needs to fulfil certain criteria, with H3GI having a right of first refusal.

**(33)** Please explain whether, in your view, the fact that the Network Interest is non-transferrable for a period of 10 years provides the NEO with sufficient ability and incentives to effectively compete on the market.

Confidential Reply:
(Not provided)

Non Confidential Reply:
The ability to transfer or resale is a useful but would be unlikely to be central to the NEO strategy. However the lack of a very strong wholesale market to give the NEO alternatives to its host operator will make it difficult to remain competitive and therefore risky to enter the market. The ban on resale or disposal points to the MNOs desire to retain tight control of wholesale markets.

## Target Spectrum Use Option

According to paragraphs 29 and 30 of the Proposed Commitments, the NEO has the option to have the network capacity provided over 2x18.4 MHz spectrum in different spectrum bands (2x7.6 MHz of 900 MHz frequency spectrum, 2x5.8 MHz of 1800 MHz frequency spectrum and 2x5 MHz of 2100 MHz frequency spectrum – the "Target Spectrum") currently owned by O2

UK, as of year 5. This spectrum would be ring-fenced for the NEO's exclusive use. The Target Spectrum Use Option is subject to a number of conditions listed in paragraph 29.

**(34)** Please explain, what, if any, in your view, would be the difference between the NEO operating based on the Capacity Share and the NEO operating based on the Target Spectrum in terms of:

**(34.1)** Network capacity available to the NEO

Confidential Reply:
(Not provided)

Non Confidential Reply:
Assuming that the spectrum bands deliver an equivalent original base capacity and if H3GI retain ownership of the spectrum then, there would not much difference initially. However, over time it would become difficult to match services to their ideal spectrum bands. Going forward NEO could look to purchase additional spectrum but there is no guarantee suitable spectrum would be available at reasonable prices.

**(34.2)** Network quality

Confidential Reply:
(Not provided)

Non Confidential Reply:
As a whole the MVNx ecosystem, specifically MVNOs, do not have the expertise to comment on spectrum usage. However, the considerable understanding of the iMVNOx/FCS is that large bands of spectrum are preferable to small chunks and that the NEO may be at a disadvantage with smaller bands. Over time it may be difficult to measure use of spectrum in narrow bands to evolving service profiles.

**(34.3)** Ability of the NEO to differentiate its offerings from those of the MNOs active in the UK

Confidential Reply:
(Not provided)

Non Confidential Reply:
It would depend on how the spectrum is ring fenced. If all the traffic still goes through the H3GI core it makes no difference.

**(34.4)** Ability of the NEO to differentiate its offerings from those of the MVNOs active in the UK

Confidential Reply:
(Not provided)

Non Confidential Reply:
It will be the same as a full MVNO technically however because the wholesale pricing is not unt based the NEO will be in a better place to offer unlimited or big bundles.

**(34.5)** If you consider that there would be other differences, please explain.

Confidential Reply:
(Not provided)

Non Confidential Reply:
(Not provided)

**(35)** Do you have any further comments on the conditions listed in paragraph 30(a) to 30(g)?

Confidential Reply:
(Not provided)

Non Confidential Reply:
(Not provided)

**(36)** In your view, does the NEO have to pay a price to H3GI for exerting the Spectrum Use Option?

Non Confidential Reply:

( ) Yes

(X) No

( ) Other

**(36.1)** Please explain your answer.

Confidential Reply:
(Not provided)

Non Confidential Reply:
Spectrum is the crown jewel for MNOs. However, it has this value simply because it is the ability to provide service, therefore this is nothing more than capacity. We can assume with a significant degree of certainty that H3GI will not be willing giving up spectrum which has any privileged status so, this is simply just another mechanism to give capacity.

**(36.2)** If your answer is yes, do the Commitments specify the price which the NEO in your view has to pay to H3GI for exerting the Spectrum Use Option?

Confidential Reply:
(Not provided)

Non Confidential Reply:
(Not provided)

( ) Yes

( ) No

( ) Other

**(36.2.1)** Please explain your answer.

Confidential Reply:
(Not provided)

Non Confidential Reply:
(Not provided)

**(37)** How likely would you consider it that the NEO would exercise the Target Spectrum Option?

Non Confidential Reply:

( ) Very likely

( ) Likely

( ) Less likely

(X) Unlikely

**(37.1)** Please explain your answer.

Confidential Reply:
(Not provided)

Non Confidential Reply:
Unless the NEO brings other assets or the ability to augment with additional spectrum then the NEO is just getting capacity. The spectrum bands do nothing to help the NEO with product differentiation.

## O2 UK Divestment Option

According to paragraphs 31 to 37, H3GI commits to offer the NEO to acquire 100% of the shares in O2 UK which holds or will hold (i) 50% ownership in CTIL; all contractual interests and obligations of O2 UK in relation to the so-called "Beacon" network sharing arrangements with Vodafone; and (iii) all assets that enable O2 UK to satisfy their obligations in connection with the Beacon network sharing arrangements, including 2G, 3G and 4G equipment, employees, contracts etc. to enable O2 UK to run the O2 UK elements of the Beacon network and to benefit from it, and the Target Spectrum as described under the Target Spectrum Use Option. The NEO would assume all rights and obligations related to the Beacon network.

In consideration for the transfer of O2 UK the NEO shall pay (i) the fair market value of the Target Spectrum; and (ii) the book value of the remaining assets. The O2 UK Divestment Option would be available to the NEO for a period of 12 months following the divestment of the Network Interest and O2 UK would be transferred within 12 months following the exercise of the O2 UK Divestment Option by the NEO. The NEO would have to grant wholesale access to H3GI for maximum 5 years from the transfer of O2 UK to the NEO. Under certain conditions

H3GI would have the right to re-acquire parts or all of the Target Spectrum. If the NEO prefers to acquire an ownership stake in Three, H3GI will enter into good faith discussions with a view to a divestment of a stake in Three.

**(38)** In your view, would the Target Spectrum be sufficient for the NEO to operate and effectively compete on the market as an MNO?

Non Confidential Reply:

( ) Yes

(X) No

( ) Other

**(38.1)** Please explain your answer.

Confidential Reply:
(Not provided)

Non Confidential Reply:
Being a mini MNO with small amounts of spectrum is unlikely to be a successful strategy

**(38.2)** If your answer is no, please explain how much and what spectrum the NEO would need at least to effectively operate on the market as an MNO.

Confidential Reply:
(Not provided)

Non Confidential Reply:
At least 10% in all key bands and a path to increase this.

**(39)** In your view, would the NEO require any additional assets to those included in the O2 UK Divestment Option to be able to compete on equal footing with MNOs in the UK?

Non Confidential Reply:

(X) Yes

( ) No

( ) Other

**(39.1)** Please explain. If your answer is yes, please list the assets required.

Confidential Reply:
(Not provided)

Non Confidential Reply:
Probably further elements to get it up and running as a fully functioning network - Core network, additional OSS/BSS, NOC
Sales and Distribution
Customer base - this will not just magically appear

**(39.2)** If you consider that further assets are required, could those assets be acquired realistically and cost effectively independently of the Proposed Commitments?

Confidential Reply:
(Not provided)

Non Confidential Reply:
The key is the customer base - where are these subscribers going to come from and how are you going to keep them. Unless you can get to 15-20% of the market, and considering the historical data on MVNOs this is unlikely. Therefore, it will be difficult to compete.

**(40)** Would you consider that the timeframe within which the NEO would have to decide on whether or not to exercise the O2 UK Divestment Option is appropriate?

Non Confidential Reply:

( ) Yes

(X) No

( ) Other

**(40.1)** Please explain your answer.

Confidential Reply:
(Not provided)

Non Confidential Reply:
It will be a huge commitment and risk to exercise the option and the time frame is too short to gain sufficient clarity. The danger is the option is worthless because the NEO will simply never take the risk after just 12 months experience.

**(40.2)** If your answer is no, please explain how much time a NEO would require following divestment of the Network Interest before it were able to decide whether or not it would like to become an MNO by acquiring the assets offered under the O2 UK Divestment Option.

Confidential Reply:
(Not provided)

Non Confidential Reply:
At least 2 years and preferably 3 years

**(41)** Do you have any further comments on the terms and conditions O2 UK Divestment Options?

Confidential Reply:
(Not provided)

Non Confidential Reply:
You can dress it up in different ways but it is still just a hosted a capacity deal so the fundamentals are the same as a full MVNO which chooses to buy a big chunk of capacity rather than pay on a unit basis.

**(42)** In light of the Target Spectrum and assets offered and the prices at which the Target Spectrum and assets would be sold, how likely would you consider is it that the NEO would exercise the O2 UK Divestment Option?

Non Confidential Reply:

( ) Very likely

( ) Likely

( ) Less likely

(X) Unlikely

**(42.1)** Please explain your answer.

Confidential Reply:
(Not provided)

Non Confidential Reply:
Too risky for very little genuine upside

Clarity of the terms of the NEO Commitment

**(43)** In your view, are the terms and conditions of the NEO Commitment, in particular those relating to the way in which the capacity is made available over time and those relating to the costs to be borne by the NEO set out in a sufficiently clear way that allows you to assess its viability?

Non Confidential Reply:

( ) Yes

(X) No

( ) Other

**(43.1)** If your answer is no, please list the aspects that are unclear.

### Confidential Reply:
(Not provided)

### Non Confidential Reply:
We only have very broad concepts, no detail to understand viability. However, as already stated there are many uncertainties, including:

a) The entry costs to acquire the capacity
b) The future maintenance costs
c) Future development costs
d) The rate of return on capital
e) The potential impact of merging the two networks (O2 UK and H3G), and the way in which costs would be allocated if that were done

## E. QUESTIONS ON THE NETWORK SHARING COMMITMENT

The Network Sharing Commitment contains a number of commitments in relation to (i) the MBNL agreements between Three and BT/EE; and (ii) the Beacon arrangements between O2 UK and Vodafone.

**(44)** Please provide your views as to the suitability of each of those elements )both individually and as a whole) to address the competition concerns identified in the SO. Please substantiate your answers with facts and figures, where possible.

### Confidential Reply:
(Not provided)

### Non Confidential Reply:
We do not have enough information to answer this question definitively. However, we would note that it is clearly unacceptable for one operator to have access to the entire mobile infrastructure (as the combined H3G/O2 would) while the other MNOs only have access to half of it. Our view is that regulators should work towards an infrastructure/service provider split (as outlined in our previous submissions, as well as independent submissions for our members who are actively participating in this investigation), and a position where all of the network is available to all operators, and anyone who meets the technical requirements can own part of the network, or become a service provider on that infrastructure.

## F. QUESTIONS ON THE WHOLESALE MARKET COMMITMENT

With respect to Existing MVNOs hosted by either Three or O2 UK, and which do not yet have access to 4G services, H3GI commits to offer to include 4G services on the same rates as charged for 3G services (i.e., at no extra cost). The access to the 4G services would be implemented in accordance with an agreed implementation plan (with reasonable implementation costs to be borne by the Existing MVNO). This Commitment shall continue until the date that falls 10 years after the date of closing or such earlier date on which H3GI ceases to offer 4G to its own end customers.

With respect to New MVNOs not hosted by either Three or O2 UK, H3GI commits to offer wholesale access (including 4G) to them. The terms and conditions will be benchmarked against the average of those offered by Three and O2 UK as at the date of closing taking into account the size and type of the MVNO, type of products and services, volumes, prices, commercial/operational model and other relevant commercial terms. This Commitment shall continue for 10 years after closing or such earlier date on which H3GI ceases to offer such technology to its own end customers.

H3GI will not be required to (a) offer wholesale access to any New MVNO who does not commit to (or make a minimum revenue commitment of) £5 million over a 4 year term; or (b) provide wholesale access to a third party if it would result in more than 50% of its Network Capacity being committed to third parties (including the NEO, Tesco Mobile, MVNOs, MVNAs, MVNEs, M2Ms, OTTs and branded resellers) at any point in time.

**(45)** In your view, and in light of your expectations on the evolution of 4G data usage, is offering 4G services to Existing MVNOs on the same rates as charged for 3G services adequate to allow these MVNOs to provide competitive 4G services in the future?

Non Confidential Reply:

( ) Yes

(X) No

( ) Other

**(45.1)** Please explain, distinguishing, where relevant, between near term competitiveness and competitiveness in the medium to longer term.

Confidential Reply:
(Not provided)

Non Confidential Reply:
MVNOs are out of the market in terms of pricing their existing data services compared to MNOs. 4G is important to have so MVNOs are not seen as second class service providers. However it does nothing to address the problems MVNOs have with pricing. It is extremely unlikely MVNO customers will pay more for 4G - the days it could be marketed as a premium service are long gone. MVNOs should already have been given 4G as a standard part of the evolution of the wholesale market.

MVNOs business models are different to MNOs. There is not the emphasis on investment but there is considerable investment in building the user base. MNOs benefit from MVNOs investment by way of the per unit price they receive. The users expect to receive a service similar to MNO users, at comparable prices. H3GI gave 4G to its users without additional charges as they recognised that user didn't care about names they just cared about a data service that met their needs. MVNO customers similarly expect a quality data service and that means including 4G at no extra cost.

Not providing MVNOs with 4G on reasonable terms could be seen as anti-competitive behavior so belatedly offering 4G as part of the standard data package is necessary but clearly insufficient to address the problems with data in the wholesale market.

What about future technology improvements?

**(46)** In your view, are the provisions of the Wholesale Access Commitment on terms and conditions to be offered to New MVNOs sufficiently clear and capable of being implemented?

Non Confidential Reply:

( ) Yes

(X) No

( ) Other

**(46.1)** Please explain your answer.

Confidential Reply:
(Not provided)

Non Confidential Reply:
It is very difficult to compare MVNO agreements on an apples to apples basis as there are many factors such as minimums, initial fees, volume discounts which are as important as the headline pricing. Ad in confidentiality issues and this will be very difficult to monitor.

**(47)** In your view, and in light of your expectations on the evolution of data usage, will benchmarking of the terms for New MVNOs against terms in current contracts with existing MVNOs at the time of closing allow new MVNOs to offer competitive services (including 4G services) in the future?

Non Confidential Reply:

( ) Yes

(X) No

( ) Other

**(47.1)** Please explain, distinguishing, where relevant, between near term competitiveness and competitiveness in the medium to longer term.

Confidential Reply:
(Not provided)

Non Confidential Reply:
It will be difficult even to compare offers at the out set. However more importantly pricing, volume commitments and volume discount evolve over time. With data usage increasing the per unit price continues to fall meaning just having current pricing will not allow MVNOs to be competitive going forward. Moreover, someone looking at a MVNO Agreement needs to already be planning two years in advance where the pricing will go because they need to think about an implementation and growth phase to get up to volume discount and volume commitments. Guaranteeing existing pricing does not even give near term assurance of competitiveness.

**(48)** Do you consider the commitment of H3GI to grant access to 4G services to Existing and New MVNOs sufficient to allow such MVNOs to compete in the long run?

Non Confidential Reply:

( ) Yes

(X) No

( ) Other

**(48.1)** Please explain your answer.

Confidential Reply:
(Not provided)

Non Confidential Reply:
It is a necessary but not a sufficient commitment.

## G. OVERAL ASSESSMENT OF THE PROPOSED COMMITMENTS

**(49)** Do you consider that the Proposed Commitments as a whole, that is to say the NEO Commitment, the Tesco Mobile Commitment (and the Network Sharing Commitment), are sufficient to eliminate the competition concerns:

**(49.1)** in relation to the retail mobile telecommunications market stemming from the elimination of competition between the parties and from the impact on BT/EE, Vodafone and the market as a whole of the post merger network sharing situation?

Non Confidential Reply:

( ) Yes

(X) No

( ) Other

**(49.1.1)** Please explain your answer.

Confidential Reply:
(Not provided)

Non Confidential Reply:
They are piecemeal attempts to replace an MNO with in effect two full MVNOs. Tesco, NEO or MVNOs would all be dependent on their host to some extent. There is nothing in the package taken as a whole that strengthens the overall wholesale market. This would almost inevitably lead to a lose of competitiion.

**(49.2)** in relation to the wholesale market for access and call origination?

Non Confidential Reply:

( ) Yes

(X) No

( ) Other

**(49.2.1)** Please explain your answer.

Confidential Reply:
(Not provided)

Non Confidential Reply:
There is nothing in the proposal other than a recognition that data these days includes 4G. I will say it again. There is nothing in the propsed commmitments, other than the recognition that data these days includes 4G

**(50)** Would you be interested in becoming a NEO?

Non Confidential Reply:

( ) Yes

(X) No

( ) Other

**(50.1)** Please explain your answer.

Confidential Reply:
(Not provided)

Non Confidential Reply:
(Not provided)

**(51)** Should you be interested in becoming a NEO, how likely is it that you would exercise the Target Spectrum Use Option?

Confidential Reply:
(Not provided)

Non Confidential Reply:
(Not provided)

( ) Very likely

( ) Likely

( ) Less likely

( ) Unlikely

**(51.1)** Please explain your answer.

Confidential Reply:
(Not provided)

Non Confidential Reply:
(Not provided)

**(52)** Should you be interested in becoming a NEO, how likely is it that you would exercise the O2 UK divestment Option?

Confidential Reply:
(Not provided)

Non Confidential Reply:
(Not provided)

( ) Very likely

( ) Likely

( ) Less likely

( ) Unlikely

**(52.1)** Please explain your answer.

Confidential Reply:
(Not provided)

Non Confidential Reply:
(Not provided)

**(53)** Would you be interested in acquiring O2 UK's 50% stake in Tesco Mobile?

Confidential Reply:
(Not provided)

Non Confidential Reply:
(Not provided)

( ) Yes

( ) No

( ) Other

**(53.1)** Please explain your answer.

## Confidential Reply:
(Not provided)

## Non Confidential Reply:
(Not provided)

**(54)** Do you have any other comments that you wish to draw to the attention of the Commission?

## Confidential Reply:
(Not provided)

## Non Confidential Reply:
We are deeply concerned at the fundamental lack of original thinking in this process.

MNOs behave, throughout Europe, not as participants in free and competitive markets, but as participants in a series of complex monopolies. The Commission risks unintentionally aligning itself with this historical status quo by asking questions purely against points of reference determined by the MNOs.

Hutchison's proposed 'remedies' perpetuate the current presumption that consumers in the mobile market can only efficiently be served by very large market entities. But this completely ignores the evidence from the fixed telephony market, where highly competitive SME participants (especially in the business-to-business arena) are competing and thriving by delivering differentiated service offers to meet the specific needs subscribers, often to quite small groups of specialist business customers.

We contend that consideration of 'remedies' should extend beyond perpetuating the historical market predisposition to moving large blocks of connectivity between highly-geared corporate participants. In particular, the history of mergers, take-overs and insolvencies within the European telecommunications market over even the last five years give no cause for confidence that even Tesco will continue to play and perform within the UK market in the year 2020 as it does at present. Still less that potential NEOs could be relied upon to remain competitive and independent for a period exceeding 10 years. Witness the UK 'digital dividend' auction of radio spectrum suitable for 4G IMT applications as recently as 2012, which insisted on ring fencing spectrum for a new market participant. That reserved spectrum was acquired by British Telecommunications PLC, who have since merged with EE.

To future-proof consumer choice and to protect against further monopolization of the market, solutions should be sought which will deliver for consumers of mobile telephony the same mix of choice which they take for granted when consuming voice and data solutions delivered over copper or fire infrastructure. Three's proposed NEO solution, for example, could be ring-fenced for an aggregator platform specifically to deliver equivalence of wholesale access to the combined Three/O2 network, along the lines of British Telecom's current 'Undertakings' to Ofcom for access to the UK fixed line network. The cost to Three of making that change from their current proposals would be negligible. The potential benefit to the UK market incalculable. The rate-determining step the Commission's willingness to listen to the articulate and experienced voice of the MVNO community and the business customer base.

The iMVNOx along with the FCS, would like to share with the Commission an opportunity that was identified during the regulatory investigation by the FCC in the Sprint/T-Mobile (USA) merger proposal process. This opportunity was outlined by the iMVNOx and was facilitated through collaboration with the Competitive Carriers Association and their role in this specific industry affair. The basic concept was that the CCA, along with the iMVNOx, provide an environment through which, industry best practices combined with a framework of mandated behavioral remedies, could be monitored on a more operational basis by the CCA/iMVNOx, as independent industry tradebodies. Through a set of terms and commitments set out in the remedies, the association (in collaborations) would facilitate these commitments to the wholesale/competitive market place and allow for the on-going nature of this support to be based on structure insights and benchmarks both set forth in the remedies but also as they develop, in real-time, accounting for the fluid nature and rapid growth of the market. The terms promoted transparency, fair and reasonable pricing structure, dispute review, minimum commercial terms, and shared network access (The CCA Data Hub). We believe that there is significant potential for the iMVNOx in collaboration with the FCS, to provide this environment within the UK. In addition, we believe that by including a set of behavioral remedies in the commitments required by HG3I, there is far higher chance of long-term success for both the wholesale partners involved in the specific commitments outlined, but also for the MVNO market across the UK and ultimately the on-going role that the wholesale market can and should have on consumer choice and innovation. We understand that this is a bit out of the box. However, in conclusion, it is exactly that bit of original thinking, that is just what's needed here, specifically now during this major crossroad for the mobile market in the UK.

## Attachment

(Not provided)