CMA CONSULTATION ON GUIDANCE ON JURISDICTION AND PROCEDURE IN RELATION TO MERGER CONTROL

VIRGIN MEDIA O2 RESPONSE

Virgin Media O2 (VMO2) welcomes the opportunity to respond to the CMA's consultation on the Draft Revised Guidance on Jurisdiction and Procedure in relation to merger control. VMO2 has lifted the questions from Section 5 of the CMA's consultation and responds to each in turn below.

Draft Revised Guidance

5.1 Overall, is the Draft Revised Guidance sufficiently clear and helpful?

VMO2 believes that the Draft Revised Guidance is clear and self-explanatory as it provides sensible and detailed guidance on what is expected to occur at every stage of the process and how and when both the merging parties and third parties can engage with the regulator throughout the process. Likewise, we welcome the proposed changes in the phase 2 process, although we believe there are still areas that need further clarification or improvement.

Overall, we find the more open approach taken by the CMA to be highly positive, fostering transparency and engagement in the discussions between the merging parties and decision-makers in an earlier stage of the phase 2 process. This approach will deliver new opportunities for the parties to discuss the theories of harm identified by the CMA in phase 1 at the beginning of phase 2, enabling merging parties to work through these concerns hand-in-hand with the Inquiry Group to determine the potential remedies, on a non-prejudicial basis, that could address these concerns at an earlier stage of the process. We also welcome the introduction of teach-in sessions with the Inquiry Group at the commencement of phase 2 as we believe this is a vital to bridge the knowledge gap and enable the merging parties to assist the Inquiry Group, as well as the case team, to understand the nuances that the different sectors and markets each have.

In relation to third parties, we welcome the CMA's recognition that third parties provide a vital contribution to the overall process and the importance of hearing third party views and concerns at an early stage. In that vein, we recognise that the Draft Revised Guidance provides clear details as to the different points of engagement throughout the process where third parties are able to provide comments and share views (especially in the information gathering process through RFIs, in the phase 1 decision and the interim report early in phase 2), as well as have meetings, calls and hearings with the CMA to provide further evidence.

However, it is less clear where third parties will be able to provide their insight or input at an early stage of the remedies' discussion. We firmly believe that the Draft Revised Guidance should recognise the importance of third-party input in remedies (at an early stage) and should be invited to make written submissions at the same time as the Inquiry Group commences its discussions with the merging parties regarding the proposed remedies. Moreover, we believe the Draft Revised Guidance should call out how the CMA will engage with not only those third parties that are potential remedy takers but also those who are in direct commercial relationships with the merging parties e.g. suppliers or customers and would be directly impacted by the proposed remedies. Those third parties should

have a greater opportunity to engage with the case team and the Inquiry team rather than just via written submissions to a public consultation which could be at a relatively late stage of remedies discussions.

Therefore, we believe the Draft Revised Guidance should set out a window of opportunity for third parties to engage with the CMA about remedies at the beginning of Phase 2 as well as when the CMA is engaging with the merging parties ahead of submitting the Phase 2 Remedies Form. This approach would ensure that the interests of all parties are heard in at an appropriate moment in the process, providing equal opportunities to share views and influence the Inquiry Group's decision-making process.

5.2 What, if any, aspects of the Draft Revised Guidance do you consider need further clarification or explanation, and why? In responding, please specify which Chapter and section (and, where appropriate, the issue) each of your comments relate to.

See response to Question 5.1 as to VMO2's views regarding the need for greater clarity on third party involvement. In this regard, VMO2 believes that the following paragraphs should be clarified accordingly:

- *Chapter 11 paragraph 47*: it should be clarified that third parties are also able to engage with the case team in the remedies discussion and be invited to make a written submission at the beginning of Phase 2 investigation, prior the issue of the interim report.
- *Chapter 12 - Phase 2 Remedies Form*: this section should recognise the possibility for the third parties to liaise with the CMA in the remedies' discussion, being able to make written submissions at the same time as the merging parties are engaging with the CMA and preparing the Phase 2 Remedies Form.
- *Chapter 13 - After provisional findings and Notice of possible Remedies*: this section should recognise third parties' ability to engage broadly in the remedies discussion, not only those that aim to be remedy takers, but also third parties that have direct commercial relationships with the merging parties, so that they are going to be impacted by the proposed remedies. Those third parties should have a greater opportunity to engage with the case team and the Inquiry team rather than just via written submissions to a public consultation which could be at a relatively late stage of remedies discussions.

5.3 Are there any other amendments which you consider ought to be made to the Current Guidance?

VMO2 believes that the principle of proportionality should be recognised in Section 9 in relation to the CMA's information gathering powers and in particular the issuance of requests for information (RFIs) throughout the pre-notification and formal merger process, applying equally to merging parties and third parties. Our experience over the past few years has been that the CMA's requests for information have become more burdensome for companies, especially for third party companies (i.e. non-merging parties) when they are required to commit unexpected resources to respond to questions, requiring granular data often within very tight timeframes.

VMO2 also notes that RFIs often pose questions which appear very broad and not directly related to the company's activities or relies on information that is not readily accessible by the company. This is true both of (i) quantitative data – as company systems and processes often do not mirror or translate into the way the CMA can sometimes want data to be presented (e.g. cut by different customer segments, across nuanced metrics or across long time periods (both forward and backward looking))

and (ii) qualitative data. This can involve engaging with the CMA on multiple occasions to clarify, re-scope or redefine what is being requested (to the extent this is possible within the CMA timelines) but this still places significant burden on internal teams to engage in this process in a meaningful way and deliver on the request in a robust and timely manner (bearing mind potential sanctions can be imposed for incorrect responses) whilst balancing this against their day to day work responsibilities.

We believe the CMA has a responsibility to formulate RFIs in such a way that the questions posed are both reasonable and proportionate to the scale and scope of the third-party organisation, their level of concern in the potential transaction and the time scales involved. Third parties should be able to answer only those questions about which the company has certain knowledge, about which the company is genuinely concerned and/or it can really contribute to the regulator's analysis. This approach would provide more meaningful contributions while reducing the administrative burden for companies. In this vein, the CMA should place greater reliance on market data companies to provide some of the wider market analysis rather seeking such granular data from third party companies.

Likewise, merging parties can be faced with an overly burdensome task of submitting internal documents as part of the information gathering process. This is especially meaningful for industries such as the telecoms. In many cases, the number of documents requested by the CMA through RFIs is excessive (often numbering hundreds of thousands of documents). This requires the instruction of forensic experts to help the merging parties manage the gathering procedure (increasing workload and procedural economic costs). In addition, sometimes not all information requested is relevant for the review and exceeds the object of the investigation (e.g. (i) information which does not add necessary data that contributes to the CMA making a thorough analysis of the transaction; (ii) some documents required can contain highly sensitive and/or confidential information, and sometimes do not contribute to the investigation) which again adds to the complexity of the confidentiality ring process.

Therefore, a more flexible approach taken by the CMA in the gathering process would be welcomed, providing broader and manageable time periods to respond to RFIs, especially when statutory timelines on the CMA are not as tight (such as in the pre-notification phase). With regard to RFIs, they should be proportionate in terms of scope and sensible in the time horizon requested for the forensic investigations (it might be enough to provide forensic document trawls for the past one to two years rather than five or more).

Lastly, we believe that the proposed reform on the Phase 2 process might have more limited impact on transactions going forward if the CMA does not change its decisional practice and continues to accept (arguably far reaching/impractical) structural remedies, putting less weight in the acceptance of behavioural remedies. VMO2 believes that that the imposition of structural remedies could, in certain cases, undermine the synergies achieved by the merging parties as a result of the transaction and imposing operational hurdles in order to make the necessary divestments. VMO2 is of the view that the CMA should be more open and willing to accept behavioural remedies in those cases where the behavioural remedies are straight-forward in terms of implementation and effective in terms of solving the competition concerns which arise as a result of the transaction. We hope that the proposed reform, together with a more constructive approach in terms of seeking more suitable and less burdensome remedies in appropriate cases, would make this approach a success for both the CMA and businesses.

5.4 Are the requirements of the Phase 2 Remedies Form sufficiently clear? Are there any comments you wish to make on the proposed Phase 2 Remedies Form?

VMO2 is of the view that the requirements of the Phase 2 Remedies Form are clear and detailed. As stated in the previous questions, we recognise and welcome that the Draft Revised Guidance sets out a fair engagement of third parties in every stage of the discussion once the merging parties have issued the Phase 2 Remedies Form. Nonetheless, we strongly believe that third parties should be able to share their own views (and concerns) about potential remedies in the same statutory period given to the merging parties to submit the Phase 2 Remedies Form.

In the same vein, as merging parties are encouraged by the CMA to engage in the remedies discussion even before the issue of the interim report, this same opportunity for engagement should be also granted to third parties particularly those that are likely to be remedy takers or commercial counterparts to the merger parties that are likely to be impacted by the remedies offered.

Draft Revised Merger Notice

5.5 Are the proposed amendments to the Current Merger Notice sufficiently clear?

The proposed amendments are clear and self-explanatory.

5.6 Are the proposed amendments to the Current Merger Notice appropriate in order to provide the CMA with the necessary information to conduct an initial assessment of a merger in line with the Merger Assessment Guidelines?

We are of the view that the proposed amendments are appropriate and fit for purpose.

5.7 Are there any other amendments you consider ought to be made to the Current Merger Notice to bring it in line with the current Merger Assessment Guidelines?

No further comments.

5.8 Do you have any other suggestions for additional or revised content of the Current Merger Notice you would find helpful?

No comments.

Draft Revised Template Waiver

5.9 Are the proposed amendments to the Current Template Waiver sufficiently clear?

No comments.

5.10 Are there any other amendments which ought to be made to the Current Template Waiver

No comments.