

Vodafone/CK Hutchison joint venture merger inquiry BT's response to the CMA's Notice of Possible Remedies

1. In setting out BT's views on the CMA's Notice of Possible Remedies (**NPRs**), it is helpful to summarise the CMA's conclusions from its Provisional Findings (**PFs**) and NPRs. In short, the CMA provisionally found:
 - a. The Merger may be expected to result in a substantial lessening of competition (**SLC**) in the supply of retail mobile telecommunications services and wholesale mobile telecommunications services (the **provisional SLCs**). The CMA estimates the harm to UK consumers arising from the retail market SLC to be £328m to £1.1bn per year (which BT estimates equates to a net present value (**NPV**) of c.£3bn to c.£10bn over the 10-year period of the Parties' Joint Business Plan (**JBP**)) and has not quantified harm arising from the wholesale SLC.
 - b. It has doubts that rivalry enhancing efficiencies (**REEs**) would outweigh the retail SLC *even if* the parties deliver their JBP in full, and concludes REEs would have even less effect on the wholesale SLC.
2. In addition, the CMA has provisionally found that:
 - a. The Parties' JBP will not be delivered in full.
 - b. Mobile operators do not price to incremental cost, so even with greater scale and lower incremental costs, consumers would not benefit from lower prices given lost retail and wholesale competition.
 - c. Aspects of the JBP might increase network quality *if* delivered (though to a lesser extent than the Parties claim); but most customers prioritise price and are not willing to pay more for network quality.
 - d. The provisional SLCs are not time limited.
3. The CMA currently considers prohibition to be the only effective structural remedy. BT agrees.
4. As an alternative to prohibition, the CMA is seeking views on behavioural remedies, apparently on the premise these will all be time-limited despite there being no defined endpoint to the SLCs. The SLCs result from the structural loss of a retail and wholesale rival, and REEs from an Investment Commitment do not offset this. An Investment Commitment is a commitment to deliver the JBP. However, the CMA doubts that the JBP would fully address the SLCs and is right to do so. This means the CMA is consulting on time- and scope-limited remedies to an enduring, wide-ranging problem.
5. In this context, BT does not believe behavioural remedies would work:
 - a. Any Investment Commitment suffers from an irreconcilable tension between the need for detailed specification to reduce circumvention risk, and the market distortions resulting from a highly specified behavioural remedy.
 - b. Retail level behavioural remedies would need to be far broader and more complex than simply allowing customers to 'roll over' existing terms as proposed. More prescriptive price remedies like a retail price cap that could remedy the SLC would likely be impossible and would lead to serious, well-documented market distortions.
 - c. Any wholesale remedy set today risks replacing complex, dynamic market judgements marrying MVNO demand and supply with a one-time 'regulatory' imposition. Removing the industry's ability to make these judgements in future creates risks to efficient investment decisions, with material and lasting effects on all UK customers.
 - d. For retail and wholesale remedies, given the scope and absence of any identified time limit to the SLCs, there would be no end date. And even with detailed specification, significant circumvention risks remain.
 - e. There would need to be constant, ongoing monitoring and adjustment as technology/services evolve.
6. Behavioural remedies would therefore be ineffective in addressing the identified SLCs while also causing distortions affecting competition and ultimately consumers across the UK.
7. BT does not believe there are material Merger-specific Relevant Customer Benefits (**RCBs**) – let alone benefits capable of offsetting an annual cost to UK customers of *at least* £328m a year, falling disproportionately on lower-income households. The majority of benefits the parties claim would be delivered without the Merger: Vodafone and Three are already deploying 5G, Vodafone has already launched 5GSA (with a 5G core network to enable 5GSA already in place) and all 5G radio equipment already deployed is 5G SA capable.
8. Other remedies in the NPRs do not address BT's additional concerns regarding MBNL and capacity asymmetry (especially in low-band frequencies). The CMA has incorrectly dismissed these, as BT will explain in its response to the PFs.
9. Accordingly, prohibition is the only viable and proportionate remedy.

Section 1. Introduction and executive summary

- 1.1. BT agrees with the CMA's provisional finding that the Merger may be expected to result in an SLC in the UK market for the supply of retail mobile telecommunications services and in the UK market for the supply of wholesale mobile telecommunications services. BT will submit its comments on the PFs separately. Unless otherwise indicated, defined terms in this response have the same meaning as set out in the PFs.
- 1.2. BT considers that the possible remedies on which views are sought in the NPRs are not practicable and would not be effective in addressing the provisional SLCs or the resulting adverse effects that have been provisionally identified, and would lead to lasting market distortions, for the reasons set out below.
- 1.3. The starting point for the CMA's consideration of remedies must be the substantial and wide-ranging nature of the SLCs it has identified. The CMA has provisionally found that the customer harm resulting from the Merger would be at least £328m per year and as high as £1.1bn a year, even before taking into account the effects of the SLC at the wholesale level. BT estimates that this equates to a net present value of c.£3bn to c.£10bn over the 10-year period of the JBP. The SLCs would directly affect the Parties' 27m customers and, indirectly, every other individual consumer and business purchasing mobile services in the UK. The SLCs are also subject to no intrinsic time limit. This scale of consumer harm means an error in remedy selection could potentially erase a significant part, or indeed all, of the consumer savings achieved through the CMA's merger control work for years to come.
- 1.4. The NPRs correctly identifies that prohibition would be a comprehensive remedy without material risks to its effectiveness. Importantly, prohibition would also be proportionate to the scale of the SLCs – which plainly dwarf the adverse customer impacts identified in previous mergers the CMA has prohibited, including those where merging parties have offered behavioural remedies similar to those set out in the NPRs.¹ Indeed, it is not clear to BT why the CMA considers that anything other than prohibition could possibly be an effective remedy to those SLCs.
- 1.5. The NPRs also correctly identifies reasons why a partial divestiture would be ineffective and impracticable. In particular, BT agrees with the CMA's concerns around practicality arising from network sharing arrangements – it would be wholly impracticable and raise serious concerns for any divestiture package to include interests in MBNL.
- 1.6. The NPRs raises the possibility of a package of behavioural remedies as an alternative to prohibition – specifically, behavioural remedies aimed at controlling outcomes, in terms of the Merged Entity's investments and commercial offer. The CMA's guidance and previous decisional practice rightly recognises that such measures are subject to well-established and obvious disadvantages in terms of specification, distortion, circumvention and monitoring and enforcement risks, even compared with other behavioural remedies.
- 1.7. BT is not aware of any precedent in the CMA's decisional practice for accepting such remedies in circumstances equivalent to the present case. To do so would be clearly inappropriate given the scale of the SLCs, the size, complexity and rapidly-changing nature of the markets involved and the absence of any intrinsic time limit on the SLCs, therefore leaving a gap between the consumer harm and proposed remedy.
- 1.8. To give one simple example, the CMA itself notes that some of the claimed 'Day 1 benefits' of the MOCN will fall in geographic areas with little demand. This demonstrates the wider and more

¹ E.g., *TVS Europe Distribution Limited / 3G Truck & Trailer Parts*, where the parties' aggregate total UK turnover was less than 20% of the lower bound of expected annual consumer harm in the present case.

fundamental challenge of defining meaningful network investment parameters that align with what consumers actually value over time, particularly in a market as dynamic as the UK retail and wholesale mobile telecoms sectors.

- 1.9. At best behavioural remedies of the nature set out in the NPRs may turn out to be ineffective in addressing the serious SLCs provisionally identified by the CMA; at worst they risk significantly distorting commercial innovation and long term investment decisions in markets that impact virtually every individual and business in the UK, effectively replacing the investment incentives inherent in a dynamic and competitive market with the Parties' 2024 view of likely future demand and supply conditions, ossified by the CMA's proposed investment remedy for the next ten years.
- 1.10. The proposed behavioural remedies would be impossible to specify in a way to secure the hoped for REEs, let alone monitor or enforce adequately, and therefore ineffective. Any attempt to address these risks by specifying desired outcomes more tightly and/or effectively regulating a wider range of the Merged Entity's conduct, would be both ineffective and, importantly, lead to even greater market distortions, and further risks to innovation and investment.
- 1.11. It is also notable that to entertain such remedies, the CMA would need to be confident that the Investment Commitment would fully replicate the lost competition within the time-limit set for the retail and wholesale behavioural remedies. Otherwise, there would be an obvious mismatch between the SLCs and the remedies. There appears to be no basis to consider that this would be the case, given the CMA's provisional findings that:
 - a. the Merged Entity would not have the incentive to fully deliver the JBP,² meaning delivery of any possible Merger-specific REEs and associated customer benefits would rely on effective design, monitoring and enforcement of an unprecedented outcome-controlling behavioural remedy, with all the challenges discussed above;
 - b. the Merger-specific benefits of those plans have been overstated by the Parties and would not directly affect the most important parameter of competition - price; and
 - c. crucially, even if implemented in full, the JBP would not offset the SLCs arising from the loss of dynamic competition that the Merger will bring about.
- 1.12. Contrary to the CMA's merger remedies guidelines, the retail and wholesale behavioural remedies under consideration in the NPRs would need to be both very broad and in place for an extended period of time (or, more likely, in perpetuity) to have any chance of their intended effect. The apparent rationale for the retail market protections as a 'bridge' while the Investment Commitment is implemented implies that they would have to remain in place for the 10-year duration of the JBP (equivalent to two full Ofcom market review periods), directly controlling outcomes for tens of millions of customers throughout this period and distorting the entirety of the UK retail and wholesale mobile telecommunications markets. Moreover, a 'bridge' only works if the Investment Commitment will eventually offset the harm identified. However, given the CMA's doubts that the Investment Commitment would offset the SLCs on the retail or wholesale markets, it appears that remedies would need to remain in place in perpetuity.
- 1.13. Indeed, BT presumes that the CMA must be assuming that increased investment by the Merged Entity brought about by the Investment Commitment would result in positive feedback effects that incentivise VMO2 and BT to increase investments in their own networks, resulting in iterative increases in network quality until a point at which price competition and MVNO supply options are restored to pre-Merger levels (and therefore any behavioural remedies can fall away). However, for the reasons set out in

²References in this response to the JBP include the Joint Network Plan (JNP) incorporated in the JBP.

more detail below, the Investment Commitment will not achieve this and the CMA has not set out a mechanism by which it could.

- 1.14. BT also notes that even if it were possible to set aside the material concerns with the viability of the Investment Commitment, and in particular if BT were to respond to investment by the Merged Entity with its own investment (which BT does not expect will be the case – again, for the reasons discussed below), this would not restore price competition. As such, an Investment Commitment would not benefit the large number of price conscious retail mobile consumers and could not address the SLC provisionally identified by the CMA arising from the Merger’s removal of one of only four competing MNOs.
- 1.15. Any wholesale remedy set today risks replacing complex, dynamic market judgements marrying MVNO demand and supply with a one-time ‘regulatory’ imposition. A judgement made today could set prices too high or too low, or define features incorrectly. Reserving capacity would pre-suppose the right balance of use between third parties and the Merged Entity’s own retail customers. It would also ossify the level of supply in the market. Removing the industry’s ability to make such commercial judgements in future creates risks to future efficient investment decisions by network operators. Less efficient investment decisions would have material and lasting effects on all customers across the UK.
- 1.16. Overall, BT is concerned that these retail and wholesale level pricing interventions risk material and inherently unpredictable distortions to competition in one of the most important sectors of the UK economy, while failing to address the provisional SLCs and the unprecedented scale of costs that will borne by UK households and business as a result. Effective remedies would by their nature be designed to inhibit or reduce commercial freedoms for the Merged Entity, and by extension will distort price competition, innovation and other competitive parameters throughout the market. This loss of dynamic competition will undermine the scope for differentiation, commercial innovation, technological innovation and investment. Inhibiting investment undermines the CMA’s belief that the market could ‘invest’ its way back to competitiveness, further entrenching the need for ongoing controls. This risks the de facto end-result being a move from largely unregulated competitive markets and to a long-term regulated market. This would not be a good outcome for competition, consumers or the UK economy.
- 1.17. BT does not consider that the Merger would give rise to RCBs of a scale or nature that should influence the CMA’s selection of a suitable remedy. Any Merger-specific benefits are likely to be very limited in scale: the Parties’ claimed RCBs relate primarily to 5G SA roll-out, which is already proceeding at pace, and availability of fixed wireless access (**FWA**), which is a service of interest to only a small pool of customers and where the CMA has found Three is already experiencing strong growth. It is plain that any RCBs that might accrue from the Merger and be foregone through prohibition must carry no material weight when set against the scale of the harm that would result from the provisional SLCs, which would be extensive, wide-ranging and fall disproportionately on the least well-off.
- 1.18. Accordingly, BT considers that prohibition is both proportionate and the only effective remedy to the SLCs that would arise from the Merger.
- 1.19. BT expands upon these points and responds to the CMA’s specific questions regarding possible remedies below.
- 1.20. As explained in the concluding section of this response, BT also disagrees strongly with aspects of the PFs that, in turn, have a bearing on the remedies required for the Merger. As well as disagreeing with the CMA’s provisional findings regarding its incentives to invest in response to the Merger, BT also disagrees with the CMA’s dismissal of its concerns about the Merged Entity’s ability and incentive to frustrate MBNL, and the capacity asymmetry created by the Merger. BT will develop these points in its response to the PFs and notes that, of the remedies in the NPRs, only prohibition would address these additional concerns.

Section 2. BT's comments on structural remedy options

- 2.1. In Section 2, BT sets out why it agrees with the CMA's view that:
- a. prohibition of the Merger would represent an effective and comprehensive solution to all aspects of the provisional SLCs (and consequently any resulting adverse effects); and
 - b. a partial divestiture remedy will not be effective in addressing the provisional SLCs and any adverse effects that have been provisionally identified.

A. Prohibition of the Merger

- 2.2. At paragraph 22 of the NPRs, the CMA observes that *"Prohibition of the anticipated Merger would prevent the provisional SLCs from arising in any relevant market. Our initial view is therefore that prohibition would represent a comprehensive solution to all aspects of the SLCs we have provisionally found (and consequently any resulting adverse effects) and that the risks in terms of its effectiveness are very low"*. BT agrees with this view: prohibition would be a wholly effective remedy to the provisional SLCs.
- 2.3. The CMA has provisionally found that, even before considering the effects of the SLC at wholesale level, price rises resulting from the Merger *"would lead to a harm to UK consumers which is equivalent to at least GBP 328 million per year, though our sensitivity analysis suggests that this could be as high as GBP 1.123 billion"*³ and that *"...those consumers on the lowest incomes would see the greatest fall in their welfare"*.⁴ When considered over the shortest – i.e., 10-year – timeframe that the CMA (and BT understands the Parties themselves) used to consider the NPV of the JBP, this equates to a provisional finding that the retail SLC alone will involve costs to consumers with an NPV of between c.£3 billion and c.£10 billion;⁵ a magnitude of harm that, to the best of BT's knowledge, is unprecedented in any previous UK merger control reviews. Given this, it is self-evident that prohibition would be a proportionate remedy.
- 2.4. Indeed, the CMA has on multiple occasions prohibited mergers where adverse effects amount to barely a fraction of the harm to customers provisionally identified in the present case. By way of example, in *TVS/3G Truck and Trailer Spare Parts*, while the CMA did not formally quantify the value of any expected price rises, the *aggregate total* UK turnover of both merging parties was less than £56.6m,⁶ or 20% of the lower bound of expected annual consumer harm in the present case. It is notable that in considering possible remedies in that case the CMA observed that *"the SLC is not time-limited, and there is no reason to expect it will have a short duration. We note the Parties' proposal of a short-term price cap to cover the period until new entry occurs; however we have not found a time-limited SLC and hence, setting aside the risks associated with designing an effective price cap, this remedy would fail to address the SLC through its expected duration"*.⁷ BT submits that precisely the same reasoning applies to the Merger.

³ PFs, paragraph 43.

⁴ PFs, paragraph 8.313.

⁵ £2.832 billion (corresponding to the CMA's lower bound estimate of £328 million per year) to £9.666 billion (corresponding to the CMA's upper bound estimate of £1.123 billion per year) calculated over a 10-year period from 2024 using the Social Time Preference Rate (STPR) of 3.5%, as published by HM Treasury (see the HM Treasury Green Book, available at: <https://www.gov.uk/government/publications/the-green-book-appraisal-and-evaluation-in-central-government/the-green-book-2020#a6-discounting>). This rate is used by the UK Government to assess the net present social value of policy interventions. The NPV is presented in real 2023 price terms (i.e., the year for which the CMA's annual harm estimates have been derived), with the CMA's nominal estimates deflated using HM Treasury's GDP deflator series (as per the guidelines set out in the HM Treasury Green Book).

⁶ On a highly conservative basis assuming the entirety of the worldwide turnover of the acquirer was generated in the UK.

⁷ At paragraph 10.90(b).

- 2.5. Another way to contextualise the scale of the consumer harm resulting from the Merger is to compare it with the CMA's estimates of the annual consumer savings achieved through its merger control work: £685.2m per year for 2021-22 and 2023-24. This means an error in remedy selection could potentially erase a significant part, or indeed all, of the consumer savings achieved through the CMA's merger control work for years to come.⁸
- 2.6. Paragraph 24 of the NPRs considers whether "*any structural remedy could possibly remove or reduce the value of RCBs, to the extent any arise*". As explained in Section 5 of this response, BT considers that the RCB claims made by the Parties (relating to 5G SA and FWA roll-out) are largely not Merger-specific and, for FWA, also relate to very narrow or time-limited use-cases. Any potential costs of prohibition in terms of RCBs foregone would therefore be small and entirely immaterial when set against the scale of consumer harm provisionally identified by the CMA.
- 2.7. Further, for the reasons set out in Section 6 below, prohibition is the only remedy identified in the NPRs that would be effective in addressing BT's additional competition concerns relating to capacity asymmetry and MBNL (which BT considers remain valid, despite the CMA's provisional findings on these points).

B. A partial divestiture remedy

- 2.8. BT agrees with the CMA's provisional view that a partial divestiture remedy (requiring a divestment of assets and spectrum to enhance the capabilities of an existing MVNO or to facilitate a new MNO entrant) would not be an effective remedy for the reasons identified at paragraph 23 of the NPRs.
- 2.9. In particular, BT strongly agrees with the CMA's concerns regarding the practicality of such a remedy, in light of the fact that the Parties do not own all of their own network assets and participate in network sharing arrangements.
- 2.10. Given the Parties' intention to use the Vodafone network as the basis for the Merged Entity's network going forward, BT assumes such a remedy would be likely to have a significant impact on MBNL, either because the Parties would seek to divest Three's stake in MBNL or because they would look to give the remedy-taker access to MBNL sites through other means.
- 2.11. BT would have very serious concerns about any such proposal, as it would make BT's ability to compete effectively dependent on the co-operation of an unknown third party with whom BT has no prior working relationship and (in the case of a new entrant) a questionable long-term commitment to the UK. BT could also have no confidence that there would be a sufficient alignment of interests between it and the relevant third party in terms of network development. Without this, MBNL would quickly become unworkable.
- 2.12. More generally, such a proposal would face insurmountable practical difficulties. To give just one example, major MBNL contracts are tripartite contracts with MBNL, BT and 3UK as signatories. Under those contracts, 3UK could not simply be swapped out for another party. Rather, the contracts would need to be renegotiated at significant time and cost to BT and MBNL (as well as the third party), with no guarantee that any agreement would be reached between the three parties.

⁸ CMA Impact Assessment 2023 to 2024, 30 July 2024. This estimate of consumer savings does not include wider benefits such as deterrence (i.e., preventing anticompetitive mergers from being pursued). However, an error in remedy selection is likely to impact on those wider benefits as well, by creating an expectation that anticompetitive mergers may be cleared with much lighter remedies than the CMA's guidance and prior decisional practice would suggest is appropriate.

- 2.13. This would add significantly to the already extensive complexity and risk associated with any partial divestiture remedy involving a carve-out rather than an existing standalone business. It is therefore also highly unlikely that any divestiture could be achieved within a reasonable timeframe, if at all.
- 2.14. Given such a partial divestiture remedy would clearly be both ineffective and impracticable, BT has not commented on the specific questions regarding the design of such a remedy set out at paragraphs 47-56 of the NPRs.

Section 3. BT's comments on behavioural remedy options

- 3.1. BT explains below why it considers that none of the potential behavioural remedies set out in the NPRs would be effective in addressing the provisional SLCs or their adverse effects. Section A discusses the extensive challenges and risks common to all the behavioural remedies, in terms of specification, circumvention, monitoring and enforcement and distortion. Sections B, C and D expand on these risks by reference to the specific behavioural remedies set out in the NPRs.

A. Design, monitoring and enforcement of behavioural remedies

- 3.2. As set out in both the NPRs and the CMA's remedies guidance,⁹ behavioural remedies are subject to inherent risks to their effectiveness, in terms of specification, circumvention, monitoring and enforcement. They also risk distortions to the market. There are therefore only limited circumstances in which behavioural remedies can be appropriate as the primary source of remedial action – where structural remedies are not feasible; the SLC is expected to have a short duration; and/or behavioural measures will preserve substantial RCBs.
- 3.3. As the CMA's guidance also recognises, these points apply even more strongly to behavioural remedies of the kind under consideration here: those that seek to control outcomes. These suffer from additional significant disadvantages even relative to other behavioural remedies. In particular, they tend to be onerous to operate and monitor, may create significant market distortions and do not address the causes of an SLC, so are unlikely to be appropriate other than for a limited duration, unless there is no effective or practical alternative remedy (which there clearly is here – prohibition).¹⁰
- 3.4. Consistent with this, so far as BT is aware, since its formation the CMA has accepted outcome-controlling behavioural remedies in only the very specific circumstances of a handful of rail franchise mergers that bear no comparison with the circumstances of the present case. In these previous decisions, by imposing fare cap requirements (to be monitored by the Department for Transport (DfT)) the CMA effectively accepted remedies involving a modest extension of existing statutory price caps that applied to individual rail franchises. By contrast, the behavioural remedies proposed in the NPRs would amount to the imposition by the CMA of an *ex-ante* price regulatory regime on fully competitive markets that serve virtually all of the GB adult population. Moreover, in rail franchise mergers, SLCs are inherently time-limited to the duration of a particular franchise, allowing the outcome-controlling remedies also to be limited in duration. In contrast, there is no inherent time limit to the SLCs the CMA has provisionally identified, as the CMA very clearly recognises: "*In this Merger, the SLCs provisionally identified are not time limited*".¹¹

⁹ CMA87: Merger Remedies, December 2018 (CMA87).

¹⁰ CMA87, paragraph 7.34-35.

¹¹ NPRs, paragraph 28.

- 3.5. Since there is no time limit to the SLCs, the CMA's initial view that behavioural remedies could be appropriate in principle to address its concerns with the present Merger rests on two possibilities, set out in paragraph 27 of the NPRs:
- a. that Ofcom may be able to play a role in the implementation, monitoring and enforcement of behavioural remedies; and
 - b. that RCBs may be present and preserved through a behavioural remedy.
- 3.6. As to RCBs, the CMA's remedies guidance (acknowledged at paragraphs 16 and 27 of the NPRs) indicates that one or more of three conditions should typically be met in order for behavioural remedies to be appropriate. These are that:
- a. Divestiture and/or prohibition is not feasible, or the relevant costs of any feasible structural remedy far exceed the scale of the adverse effects of the SLC.
 - b. The SLC is expected to have a relatively short duration (e.g., two to three years) due, for example, to the limited remaining term of a patent or exclusive contract.
 - c. RCBs are likely to be substantial compared with the adverse effects of the Merger, and these benefits would be largely preserved by behavioural remedies but not by structural remedies.
- 3.7. In light of the scale of the customer harm provisionally identified by the CMA (between £328 million and £1.123 billion per year, with an NPV of c.£3 billion and c.£10 billion respectively,¹² excluding any adverse effects arising from the SLC at the wholesale level) BT understands that the CMA is not suggesting the relevant costs of any feasible structural remedy would far exceed the scale of the adverse effects of the SLC. Likewise, the CMA is very clear in the NPRs that the second of these three conditions for behavioural remedies to be appropriate is also not met: *"the SLCs provisionally identified are not time limited. This means that to comprehensively address the provisional SLCs, the behavioural remedies would need to have a lasting impact on competition in the relevant markets"*.¹³
- 3.8. As such, BT understands that the CMA has provisionally found only one of three conditions for behavioural remedies to be appropriate can possibly be met in the present case – that RCBs are likely to be substantial compared with the adverse effects of the Merger, and these benefits would be largely preserved by behavioural remedies but not by structural remedies. For the reasons set out in Section 5 of this response, BT submits that the evidence set out in the PFs clearly shows that the adverse effects of the Merger will dwarf any possible Merger specific RCBs.
- 3.9. BT also notes that the SLCs identified in the PFs raise long-term adverse effects. This makes them particularly ill-suited to behavioural remedies. Indeed, as noted above, the CMA's view is that to even stand a chance of being effective, any behavioural remedies imposed would *"need to have a lasting impact on competition in the relevant markets"*.¹⁴ However, the CMA's own reports on the effectiveness of past remedies clearly show that imposing long-term behavioural remedies gives rise to significant risks including the following.
- a. There is a high risk of misspecification when remedies are not time limited. The CMA has noted, in particular, that *"the likelihood of misspecification grows the longer a behavioural remedy is in place. If the remedy has not tackled the underlying cause of the SLC, this means the CMA may be faced with a choice of continuing to maintain an ineffective remedy, with risks for consumers,*

¹² See paragraph 2.3 above.

¹³ NPRs, paragraph 28.

¹⁴ NPRs, paragraph 28.

or seeking to improve outcomes, for example through conducting a review of the remedy at a later date”.¹⁵

- b. It is also “very unlikely to be possible to design behavioural remedies that will be effective indefinitely without creating substantial distortion risks. It needs to be clear, at the time of accepting a behavioural remedy, that a future event is likely to arise that would remove the need for the remedy”.¹⁶
- c. The “very limited” circumstances in which behavioural remedies might be effective included “where a merger takes place in a technologically mature sector with an established and well-resourced regulatory regime and where there is clear evidence that the remedies will only be required for a limited period.”¹⁷ This is in direct contrast to the present case where: (i) it is self-evident that technological developments underpin competition in the markets affected by the Merger (indeed, the RCBs considered by the CMA consist of potential developments in network technologies); (ii) while there is a telecoms regulator, there is no price-based regulatory regime or wholesale access requirements in the relevant markets; and (iii) and the NPRs explicitly accept that behavioural remedies in this case will need to have a “lasting impact” so cannot plausibly be said to be required for only a limited period of time.

3.10. Moreover, even if the presence of a regulator in the broader telecoms sector could be said to be a relevant factor in the consideration of potential behavioural remedies in the present case, the mere existence of a sector regulator is not identified in the CMA guidance or any of its decisional precedents as a basis, in and of itself, to accept behavioural remedies. Rather, that guidance merely observes that “Behavioural remedies can operate satisfactorily in limited circumstances, especially where the company operates in a regulated environment and where there are expert monitors... The likelihood of effective monitoring will be significantly increased if it is possible to involve a sectoral regulator in the monitoring regime”.¹⁸ However, the relevance of Ofcom in the present case must be distinguished from that of the DfT in the previous rail franchise decisions in which the CMA has accepted price-based behavioural remedies. In the latter cases, the DfT was already heavily involved in regulating and monitoring specific fare caps imposed on rail franchisees under the terms of their franchise agreements (as the franchisees in those cases effectively operated as regulated local monopolies).¹⁹ In contrast to rail franchises, the retail mobile telecoms market is a highly differentiated product market and fast moving in terms of technological advances. Ofcom has never previously been asked to regulate retail prices (or other commercial terms of operators’ offers to customers) in mobile markets.²⁰ For these reasons, BT submits that notwithstanding the CMA’s guidance that the presence of a sector regulator may increase the *likelihood* of effective monitoring, there is no good reason to believe that Ofcom (or indeed the CMA) would in fact be able to effectively monitor the behavioural remedies set out in the NPRs.

¹⁵ CMA186, paragraph 5.32(b).

¹⁶ CMA109, paragraph 1.5(b)(ii).

¹⁷ CMA109, paragraph 4.

¹⁸ CMA87, at paragraphs 3.48 and 7.6.

¹⁹ E.g., Arriva Rail North and the Northern rail franchise, A report on the completed acquisition by Arriva Rail North Limited of the Northern rail franchise, CMA 2 November 2016 at paragraphs 2.29 (“**The DfT, through its Rail Group, is the franchising authority responsible for the majority of franchise agreements entered into with respect to services on the rail network in England, Wales and cross-border routes. In addition, it is responsible for fare regulation and other consumer protection aspects...**”) and 8.53 (“**Where enforcement of the agreement may be required, it is the DfT which is responsible for monitoring the delivery of franchise agreements on behalf of the Secretary of State**”) (emphasis added).

²⁰ In contrast, in the rail franchise cases, DfT was able to monitor and enforce fare remedy compliance as an extension of its existing role in monitoring and enforcing compliance with fare caps imposed by regulation (see Section 8 of the CMA’s final report in *Arriva/Northern Rail*).

- 3.11. In this context, and as developed below, BT has serious concerns about the effectiveness of each of the behavioural remedies proposed in the NPRs. In summary:
- a. The Investment Commitment suffers from an irreconcilable tension between the need for detailed specification to reduce circumvention risks, and the fact that any specification would ossify markets, severely limiting customer benefits from future investment as demand and supply conditions change. In other words, serious market distortions are the most likely outcome.
 - b. Retail remedies would need to be far broader and more complex than allowing customers to 'roll over' existing terms and/or committing to offer a social tariff as proposed in the NPRs. For example, they would need to cover the full portfolio of features and services offered by the Parties. It is important in this context to note that there is no such thing as a 'retail price for mobile', but rather a complex mix of services and features offered at multiple price points. Specifying effective remedies would likely be impossible and in any event lead to serious market distortions.
 - c. For both retail and wholesale commitments, given the scope and absence of any identified time limit to the SLCs, there would be no end date. And even with detailed specification, there would remain significant risks of circumvention.
 - d. There would need to be constant, ongoing monitoring and adjustment as technology/services evolve.

B. The Investment Commitment

- 3.12. In summary, BT considers that an Investment Commitment would be an ineffective remedy (even if fully delivered). Either a remedy would be too simple to be effective, or if sufficiently designed would be incapable of being monitored or enforced effectively (so carrying a high risk that it would not in fact be fully delivered) and would create significant distortions of competition.
- 3.13. The premise behind an Investment Commitment appears to be that requiring the Parties to fully implement the JBP will lead to the realisation of REEs which, over time, will compensate for the immediate loss of competition resulting from the Merger. However, the CMA's own analysis in the PFs leaves it with "*some doubts as to whether the full JBP/JNP would – if delivered – be sufficient to offset the adverse effects on competition in the retail and wholesale markets provisionally identified*".²¹
- 3.14. This makes the viability of an Investment Commitment as a remedy dependent upon whether the additional retail and wholesale behavioural remedies set out in the NPRs are workable and would make up the 'gap' left by an Investment Commitment. For the reasons explained below, they are not and would not.
- 3.15. Crucially, the effectiveness of an Investment Commitment is also dependent on it leading to a competitive response from BT and VMO2. The CMA states at paragraph 42 of the NPRs that: "*in order to accept such remedies, we would need to be confident that in the longer term the quality improvements delivered through an Investment Commitment would lead to a sufficient increase in competition to counteract the SLC we have provisionally found*". However, BT strongly disagrees with the CMA's provisional finding that this would occur.²²

²¹ PFs, paragraph 14.205.

²² PFs, paragraph 62: "*We currently consider that these overall network quality improvements would in turn likely lead to some competitive response (for example, by way of further network investment) from BTEE and VMO2 to also improve their respective network quality, increasing the extent of network quality competition in the retail market.*"

- 3.16. Instead, as BT has explained in previous submissions, its ability and incentive to increase investment would be limited, because (i) as set out in more detail at Section 6 below, the Merged Entity would have both the incentive and ability to use excess capacity strategically to harm BT; (ii) Three would have the ability and incentive to frustrate BT's ability to upgrade MBNL sites; and (iii) after 2031, BT would be the only MNO not in a network sharing arrangement, and therefore have a materially higher cost base than the two remaining competitors. BT also notes that VMO2's incentive to increase investment in response to investment by the Merged Entity would be limited, to the extent that it already stands to gain from those investments through its participation in Beacon. BT will make further submissions on these points in its separate response to the PFs.
- 3.17. In any event, it appears highly unlikely that any Investment Commitment would be fully implemented. The CMA has found that the Parties would not have the incentive to fully implement the JBP, for example given the cost savings that could be achieved through retaining fewer sites and/or deploying less spectrum.²³ By extension, the Parties would not have the incentive to deliver a commitment to implement those plans, other than as a result of external constraint in the form of monitoring and enforcement by the CMA and/or Ofcom. In practice, this will be unworkable.
- 3.18. Further, if the intent of an Investment Commitment is to assure claimed REEs are delivered, this is not a simple remedy to measure and monitor. In particular, it will not be sufficient to simply monitor that the merging Parties retain 26,000 sites and invest £11bn. This is expanded on in relation to the specification and circumvention risks in paragraphs 3.20 – 3.21 below but BT notes in particular that, according to the Parties' own claims, REEs are not just going to be realised simply as a result of the number of sites, but also the launch of MOCN, the deployment of spectrum and the deployment of new kit on sites, as well as the location of sites being retained amongst other factors. This is why outcome measures are as important as inputs.
- 3.19. More generally, it is clear that any Investment Commitment would suffer from all of the risks associated with behavioural remedies identified in the CMA's guidance, and that these risks would be extensive.
- 3.20. As regards **specification risks and circumvention risks**, as discussed below, in order to reduce the scope for circumvention, an Investment Commitment would need to be specified in very granular detail, covering every individual element of the JBP, and that plan would in turn need to cover all relevant aspects of investment and network development at a similarly granular level. However, it seems inevitable that there will remain ambiguities and gaps in even a very detailed plan, which may be exploited by the Merged Entity and/or lead to disputes with the body tasked with monitoring and enforcing compliance. As discussed further below, there are also significant challenges (which Ofcom itself has struggled with) in identifying reliable and usable metrics (or 'key performance indicators' (**KPIs**)) that correspond to the network experience customers care about, and which will remain appropriate despite the fast pace of innovation, technological development and customer preferences that characterise the UK mobile telecoms sector. This means an Investment Commitment will inevitably be unable to drive investment to match demand in the way that competitive pressure between MNOs would have done absent the Merger.
- 3.21. The challenges of specifying and avoiding circumvention of an Investment Commitment remedy are reinforced by technological change. For example, 6G technology is expected to emerge within the next 10 years. BT assumes the JBP does not contain commitments around implementation of 6G. If that is correct, an Investment Commitment does nothing at all to address the loss of dynamic competition between the Parties which, absent the Merger, would have helped drive 6G roll-out.

²³ PFs, paragraph 14.183- 14.189.

- 3.22. Even assuming the above hurdles could be overcome, the need for the remedy to be specified in great detail would inevitably lead to **monitoring and enforcement risks** and costs. Just as an Investment Commitment would need to be specified in detail, monitoring would need to be at a corresponding level of detail. This process would involve extensive volumes of complex information, imposing a corresponding burden on the CMA/Ofcom's resources. While some elements might be capable of external verification (e.g., through drive-testing), at additional cost to the public, there would remain considerable information asymmetries, with the CMA/Ofcom relying on accurate and timely reporting by the Parties. Given the JBP appears to cover a period of 10 years,²⁴ this monitoring would also need to continue for a significant period.
- 3.23. It is hard to conceive of a proposed remedy that more closely encapsulates the kinds of monitoring and enforcement risks set out in the CMA's own guidance, namely that: *"even clearly specified remedies may be subject to significant risks of ineffective monitoring and enforcement. This may be due to a variety of causes, such as the volume and complexity of information required to monitor compliance; limitations in monitoring resources; asymmetry of information between the monitoring agency and the business concerned; and the long timescale of enforcement relative to a rapidly moving market"*.²⁵
- 3.24. Moreover, an Investment Commitment will also create **distortions**, by requiring the Merged Entity to follow a pre-determined investment plan over an extended period (BT presumes at least 10 years given the PFs) in fast-moving markets, overriding market signals.²⁶ As the CMA notes in the PFs, absent an Investment Commitment, *"the Merged Entity would in reality re-assess the pace and prioritisation of the integration and upgrade programme in light of future market circumstances, which may differ from what they project currently in the JBP"*.²⁷ The Investment Commitment (if it could be effectively designed and monitored, which for the reasons set out above it could not) might lead to the JBP being delivered, but the resulting network may be implemented at locations or in ways that no longer meet customer needs in changed market circumstances.²⁸ The need for an Investment Commitment to be specified in extensive detail to mitigate circumvention risks therefore inevitably results in a greater risk of harm to customers arising from distortion of market signals over an extended period of time in a sector characterised by significant and rapid changes in both technology and consumer preferences.
- 3.25. For these reasons, BT submits that an Investment Commitment cannot be an effective alternative to prohibition.
- 3.26. Without prejudice to this, BT sets out below responses to the CMA's specific questions with regard to an Investment Commitment (at paragraphs 59-60 of the NPRs).
- (a) **Whether an Investment Commitment from the Parties could constitute an effective remedy capable of eliminating or preventing the SLCs and their adverse effects in (i) the Retail Market and/or (ii) the Wholesale Market respectively, as described in the PFs.**
- 3.27. For the reasons explained above, an Investment Commitment could not constitute an effective remedy capable of eliminating or preventing the SLCs and their adverse effects.

²⁴ E.g. PFs paragraph 14.114, noting that the JBP explicitly models the years 2025-2034.

²⁵ CMA87, paragraph 7.4(d).

²⁶ CMA87 paragraph 7.4(c).

²⁷ PFs, paragraph 14.184.

²⁸ It appears this has already been identified as a risk. In particular, the CMA has identified that the Day 1 benefits of MOCN largely fall into areas where there is not customer demand for them: see paragraph 57 of the Summary of PFs: *"In addition, it does not appear that the additional capacity that would be delivered by the Merger (in the Parties' modelling) is necessarily well targeted to meet future demand for usage, as the modelling implies that capacity at some sites would be expanded despite there being no foreseeable prospect of congestion at those sites"* (emphasis added).

- (b) Whether an Investment Commitment should be based on inputs the joint network must have (e.g. the sites and spectrum to be deployed on those sites) or outputs the network must achieve (e.g. minimum speeds), and any views on what those inputs/outputs should include.
- 3.28. At paragraph 58(c) of the NPRs (concerning circumvention risk), the CMA invites views on the potential risk that *"if only certain metrics were controlled under the Investment Commitment (e.g., number of sites)... the Merged Entity could reduce other metrics"*. BT agrees that this is a very real risk, in light of the CMA's provisional view that the Merged Entity's incentives would be to realise cost savings rather than fully implement the JBP. For example, if an Investment Commitment specifies a number of sites, but not their location, the spectrum and technologies deployed on them and other relevant metrics, the Merged Entity would be free to build sites where it is cheapest to do so, rather than where they would generate meaningful improvements to network quality, while withholding investment on other parameters.
- 3.29. Consequently, in order to reduce circumvention risk, it would be necessary for an Investment Commitment to be based on the complete range of inputs relevant to network development, not necessarily limited to those included in the JBP (if the JBP refers only to a limited set of metrics, a commitment to comply even with every aspect of those plans would still leave significant circumvention risk). BT would expect these to include, at a minimum, sites, towers, sectors on masts, electronics, spectrum bands deployed and activated at sites, technology deployed (e.g., 5G SA) and the timeframe in which technology in specific bands is deployed. It would also need to be clear what investments are not part of the JBP (e.g., future rounds of technology upgrades), so the Merged Entity cannot use incremental investments outside that plan to reduce its obligations under it. In BT's view, any remedy specifying only inputs (sites, technology deployment at a certain number of sites, etc) would suffer from a broken link between demand and what the market delivers due to a lessening of competition; where previously competitive pressure incentivised MNOs to innovate where, when and at what price customers demand it.
- 3.30. To guard against the risk that the inputs contemplated in the JBP would not in fact achieve the outputs claimed by the Parties, the Merged Entity should therefore also be required to meet detailed output-based metrics. At a minimum, these should include minimum speeds (peak, median, 5th percentile and average, overall and split between peak and non-peak hours), coverage (including by technology), and latency.
- 3.31. However, taking a step back, it is entirely unclear how an Investment Commitment could compensate for the loss of dynamic competition arising as a result of the Merger, particularly in a market characterised by fast paced innovation and constant changes in consumer demand. In accepting a long-term Investment Commitment, specified to enough detail to be meaningful and not circumventable, the CMA would face two flawed options:
- a. hold the Parties to the investment set out in the JBP, reducing the dynamics of network investment and competition by limiting the Parties' ability to adapt or react to market developments and respond to changes in congested areas, traffic patterns, usage patterns, technology²⁹ and input costs, willingness to pay and other competitive parameters; or
 - b. put in place a change management process that allows plans to adapt to changing market conditions.
- 3.32. The first approach above would ossify a 2024 view of the dynamic benefits a competitive mobile market should achieve absent the Merger. The second raises significant risks of circumvention.

²⁹ E.g. small cell densification, 6G, mmWave deployment.

3.33. In conclusion it is important to note that any metrics a long-term Investment Commitment might be pinned on are highly imperfect at best and do not correlate well with real-world network experience of customers, so will not be able to replace the competitive dynamics and investment incentives lost due to the Merger. Nor could they capture whether an Investment Commitment had actually generated REEs.

(c) *What the most appropriate role for Ofcom is in such a remedy.*

3.34. If the CMA takes the view that Ofcom should be responsible for monitoring and enforcing the remedy, it is clear Ofcom would need to take a very hands-on role. Ofcom would have to intensively monitor all aspects of the Merged Entity's investments and network performance on an ongoing and regular basis (e.g., with formal reviews every quarter) for the duration of the Investment Commitment (which would appear to be at least 10 years to align with the duration of the JBP), and take rapid enforcement action in respect of any non-compliance. This would presumably require Ofcom to obtain additional resourcing and incur material costs.

(d) *Whether there are any concerns with incorporating such a commitment into the Merged Entity's spectrum licence.*

3.35. Any Investment Commitment would need to be backed by strong enforcement mechanisms commensurate with the scale of the investment required under it. However, BT has serious doubts that such mechanisms would be practicable.

3.36. In principle, incorporating the Investment Commitment into the Merged Entity's spectrum licences might be appropriate if the CMA decides to implement this remedy, since it would (at least in theory) allow Ofcom to impose financial penalties or revoke spectrum licences for breach. However, incorporating such a commitment in this way would be unprecedented, and the CMA would need to consider carefully whether this would be compatible with the relevant legislative framework under the Wireless Telegraphy Act 2006.

3.37. There is also a significant question as to whether the possibility of such action would translate into a real and effective incentive towards compliance. While Ofcom could impose financial penalties for breach instead, this seems unlikely to be effective. BT is not aware of any past precedent to rely on in relation to Wireless Telegraphy Act 2006 licence fines, and the Merged Entity may suspect that the regulator will be reluctant to impose penalties at a level sufficient to be dissuasive, since paying these could reduce resources available to invest in its network or ultimately be passed through to consumers.

3.38. As such, to adequately incentivise compliance, there would need to be a realistic prospect that any breach would be sanctioned by Ofcom withdrawing licences to operate a material proportion of the Merged Entity's total spectrum holdings. It would therefore be necessary to include the Investment Commitment in licences of sufficient value to Merged Entity.

3.39. However, even then, it is very unlikely that the possibility of revocation would be seen by the Merged Entity as a realistic prospect and therefore have any incentive effect. Ofcom has never revoked national mobile network spectrum licences for breach of licence conditions in the past, presumably given the significant impact this would have on consumers. The Merged Entity can be expected to conclude this is not a real risk here, for the same reason.

(e) *Whether there are additional conditions that could be included to ensure the Investment Commitment is delivered.*

3.40. BT is not aware of additional measures that could be taken. BT notes that given the inherent difficulties in designing, monitoring and enforcing a complex remedy in the face of the Parties' reduced commercial incentives to compete, it is unlikely that any condition could ensure the Investment Commitment becomes a meaningful replacement for a competitive process that after the Merger will

no longer drive competitive investment and innovation, and even if it was possible that it would be delivered in full.

C. Time-limited protections for retail customers

3.41. In summary, BT considers that the time-limited retail protections proposed in the NPRs would be ineffective in addressing the SLC identified. More effective remedies would by necessity be more intrusive, distorting competition and would raise very significant monitoring and enforcement challenges. Remedies of this sort are very unlikely to be appropriate in a market as dynamic as the retail mobile market, even if limited in duration. For this reason, they are unprecedented in telecoms mobile mergers in the UK and Europe.

There are no appropriate remedies for such a fast-moving market

3.42. In principle, a time-limited price cap or other outcome-focussed remedy might in some limited instances address the effects of an SLC, even though it cannot address the SLC itself. But BT sees no effective remedies that can work in practice in this case.

3.43. To be effective, pricing remedies would need to be of sufficient scope to address the scale of the adverse effects of the retail mobile SLC, and take account of the complex nature of the market. Neither of the NPRs' proposed remedies would work in this context:

a. **A commitment to rollover existing contracts:** such a remedy would not address the CMA's concerns about market wide pricing effects arising from the loss of a competitor. Whilst customers remaining with the Merged Entity might have some degree of protection, it would not address loss of competition in the acquisition market, for customers out of contract, or customers who wanted to adjust their service. It would also offer no protection against pricing power or quality constraints for new or innovative services or features not included in existing customers' tariffs.

b. **Social tariffs** are necessarily targeted interventions aimed at specific customer groups, with defined (often limited) features. Price commitments linked to a necessarily limited customer base and feature set would not provide sufficient constraint to address any pricing SLC.

3.44. To be effective in the face of retail mobile product variation would require detailed and increasingly intrusive remedies. As the PFs note, retailers offer a range of subscriptions including PAYM, PAYG and hybrid PAYG. Tariffs that may be priced differently according to multiple attributes (including minutes, texts and data allowances and a range of extras, including additional data or the ability to use certain apps for free). Services can be SIM-only or may include a handset. And in all cases products can be subject to specific promotions or discounts.³⁰ The CMA acknowledged the difficulty of comparing the pricing of these tariffs in the PFs, where it was "*not possible*" to calculate a comparable effective price for PAYG tariffs given the variability of their discount structures, even though these were "*relatively more straightforward*" to compare than PAYM tariffs,³¹ which account for more than 80% of all mobile subscriptions.

3.45. In the present case, it will be impossible to design effective remedies for any time period, given the scale of the adverse effects of the retail mobile SLC, the pace of technological and commercial innovation in the retail market, and the complex nature of pricing in markets where retailers cater for differing and evolving demand and usage patterns.

³⁰ PFs, paragraphs 5.5-5.7.

³¹ PFs, paragraphs 8.139 and 8.140 and footnote 472 in particular.

Any price commitments would raise risks of market distortion

- 3.46. Designing any price or other outcome-focussed protections against the effects of the SLC presents an insurmountable tension between effectiveness and minimal circumvention risk on the one hand (which would require extremely detailed specification and monitoring) and the risk of market distortion on the other.
- 3.47. Any controls which attempt to address the pricing complexities noted above in relation to specification and monitoring will necessarily limit price innovation and may preserve or impose prices and terms which may bear little or no relation to those that would have emerged absent the remedies (or the SLC). For example:
- a. specifying a limited set of tariff and/or handset pricing structures. In addition, the mobile retail market is at present (and would in the absence of the Merger be) characterised by falling per unit prices (i.e., prices per MB of data);
 - b. price controls that preserve current prices will not replace the constraint lost due to the merger and may have the unintended effect of facilitating prices set artificially higher than they would be absent the Merger;
 - c. prices that aim to mimic future competition by requiring an improvement in quality at the same prices will highly likely suffer from miss-specification. If set too high controls would result in a loss of effective competition for new customers during the duration of the controls, and potentially weaken the prospect for future competition given the skewed (i.e., reduced) incentives to invest;
 - d. a price that is set too low could hamper competition and investment further and a price that is set too high would be ineffective in preventing the competitive harms of the Merger from materialising; or
 - e. MNOs currently offer highly competitive deals to win new customers would reduce these if one of three MNOs is subject to disproportionate price regulation.
- 3.48. Effective remedies would inevitably curtail commercial innovation and risk spilling over into commercial constraints on other mobile providers, including BT, VMO2 and MVNOs.

With no obvious end-date for remedies, the risk of distortion rises materially

- 3.49. BT notes that although the NPRs describes these potential protections as ‘time-limited’, it is not obvious what their end date would be. The retail mobile SLC provisionally identified by the CMA is not stated to be time-limited and BT can see no reason why its effects would be time limited. The CMA is very clear that *“In this Merger, the SLCs provisionally identified are not time limited. This means that to comprehensively address the provisional SLCs, the behavioural remedies would need to have a lasting impact on competition in the relevant markets”*.³²
- 3.50. BT presumes the CMA may be assuming network consolidation by the Merged Entity would result in positive feedback effects, incentivising VMO2 and BT to increase investments in their own networks, resulting in iterative increases in network quality until price competition is restored to pre-merger levels.
- 3.51. However, for the reasons set out in Section B, an Investment Commitment will not achieve a restoration of price competition to pre-merger levels.

³² NPRs, at paragraph 28.

- a. In the short term, even if delivered, an Investment Commitment does not address pricing pressures from the loss of a competitor. Benefits from a delivered JBP on price would take several years, and possibly beyond the lifetime of any Investment Commitment, to filter through to customers.³³
 - b. The merger will not affect long term incentives to invest, and given BT's concerns about market asymmetry, might actually worsen.
 - c. The CMA itself concludes that mobile operators are unlikely to pass through merger benefits to customers in the form of reduced pricing pressure, but instead via increased quality that many customers do not value as highly as price.
- 3.52. In any case, with no way to know whether or when the alleged REEs would become effective, there is no way to judge when 'time-limited' retail price protections should be lifted.
- 3.53. With no other solution to the SLC identified, effectively addressing the adverse price effect on price-conscious consumers would need a long-term remedy, and possibly in perpetuity.
- 3.54. The CMA acknowledges behavioural remedies risk market distortions: its evaluation of merger remedies shows even relatively short-term price controls can give rise to substantial market distortions.³⁴ Protracted price controls are even more likely to have a distortive effect.³⁵ In dynamic markets like the retail mobile market it is hard to see how it would be possible to design a remedy where quality adjusted prices could be constrained in ways that address the SLC provisionally identified but at the same time do not give rise to very significant market distortions even for a one- or two-year period, let alone potentially for 10 years.

Monitoring would be a complex task, and easily circumvented

- 3.55. Specifying and monitoring controls that would capture the complex and differentiated mobile product sets would require the CMA to achieve what it did not consider possible in the PFs, i.e., find an effective basis on which to compare them.
- 3.56. The CMA would also need to address possible means of circumvention through any one of the many variables that affect price. For example, if controls were somehow imposed that made an effective tariff increase impossible, the Merged Entity might instead increase prices for handsets. If handset prices were, in turn, subject to some degree of control to address this circumvention risk then (notwithstanding the distortion concerns that would arise from those controls) it is difficult to see how these could be prospectively designed to account for handset manufacturer's product and price innovations.
- 3.57. Remedies would be onerous to operate and monitor. Such controls would be a new form of regulation into the mobile sector requiring significant public resource to implement. To effectively monitor the Merged Entity's prices and/or terms Ofcom will need to engage not just with the Merged Entity but also with the several million consumers whose prices and/or terms will be regulated by these remedies. The range of tariffs, including non-telecoms services bundled with mobile services will make monitoring and enforcement of any pricing controls commensurately complex. This will significantly expand the regulation imposed on mobile network providers, whose retail commercial offers are not currently subject to regulation of price levels.

³³ To that extent, BT respectfully submits that the CMA's position in the NPRs that "It may also take some time for the rivalry enhancing effects of an Investment Commitment to manifest" (NPRs, at paragraph 36) is a significant understatement.

³⁴ See, for example, the CMA's case study on five-year price controls in Coloplast, appended to CMA186.

³⁵ CMA final report in FirstGroup undertakings review, paragraph 5.135.

In summary, retail price commitments would be unprecedented and represent a significant and unjustified reversal of the CMA's approach to merger remedies

- 3.58. As BT has noted in Section C above, the CMA has only previously imposed outcome-focussed remedies in a handful of mergers in the rail sector, where the SLCs and market dynamics bear no similarities to those in the present case and where (again, in contrast to the Merger) there is a sectoral regulator that is already responsible for retail price regulation. BT is also not aware of similar remedies having been imposed by the EU Commission or any EU member state competition regulator in any of the numerous mobile telecoms mergers that have been cleared subject to remedies in the last ten years. BT sees no justification in the NPRs for the CMA to make such a significant reversal of its approach to merger remedies.
- 3.59. Without prejudice to the views set out above, if the CMA should nonetheless decide to impose a retail price control remedy, BT responds below to the CMA's specific questions in paragraph 61 of the NPRs.
- (a) **How price protections might be designed.**
- 3.60. BT does not see any obvious design for price controls that would be effective in addressing the retail mobile SLC provisionally identified in the PFs. The CMA expects 27 million subscriptions to be directly affected by price rises as a result of the SLC. Retail mobile pricing is complex and needs to account for multiple pricing variables (as described above) and evolving technologies. Any price protections that aimed to control prices for 27 million subscriptions (or a material proportion of these subscriptions) would be impossible to specify with sufficient clarity (and therefore likely to give rise to significant circumvention risk), and very likely to have a material distortive effect on competition.
- 3.61. The contract rollover example provided by the CMA at paragraph 39 of the NPRs is a helpful illustration of these concerns. The CMA's merger remedies evaluations have identified significant design challenges with previous contract or price rollover provisions.³⁶ If price protections were limited to simply allowing existing customers to 'roll over' their existing contract terms, including price, this would not address the harm arising from the retail mobile SLC to new customers who do not have an existing contract. Even for existing customers, there would be obvious circumvention risk where any customer might want to adjust their mobile package (e.g., to change their data allowance, to upgrade their handset, or to take advantage of a new tariff feature that was not available when they selected the tariff associated with their current contract). Assuming that the retail protections might not cover those (ordinary course and typical) adjustments or changes, the Merged Entity will be able to impose the higher prices that the PFs identified as likely even on its existing customers.
- 3.62. If the retail protections were designed more expansively to avoid this circumvention risk they would (a) need to account for a very large number of possible scenarios and pricing variables (which as noted above, the CMA considered impossible to compare in the PFs), meaning that any price controls will become very complex to understand, monitor and enforce); and (b) be even more likely to distort competition in the market. Equally, if the CMA were to seek to side-step some of this specification complexity by designing a remedy that simply ensured a rollover of existing contracts more akin to a "standard" fall-back tariff for all customers, then there is a risk that it would either be (a) too demanding, becoming the default tariff for the entire industry (akin to the default energy tariff and eliminating competition entirely, a truly unprecedented outcome of a merger in telecoms markets); or (b) set at an insufficiently demanding level and so ineffective at protecting the SLC.

³⁶ See Appendix 4 to the CMA's Merger Remedy Evaluations (CMA186) on *Arqiva* (at paragraphs 388 – 451), where market feedback indicated that in the absence of the roll-forward provisions, prices would have fallen, and *Alanod* (at paragraphs 64 – 86), where the CMA's evaluation noted that price controls by reference to prices previously paid by customers are unlikely to be effective in markets where there is substantial churn or substantial market growth.

- (b) What other retail customer terms need to be protected.
- 3.63. BT does not have a view on other retail customer terms that could be covered by the proposed retail controls.
- (c) Whether the protection should apply to all of the Parties' existing retail customers or only a subset; and, if the latter, how that subset would be determined.
- 3.64. This question illustrates the central tension in the design of an outcome-focussed remedy in the retail mobile markets. The PFs provisionally find that 27 million subscriptions could be directly affected by price rises if the Merger were to proceed; it follows logically that if price controls were adequately to address the adverse effect of these price rises, they would need at least to apply these 27 million subscriptions rather than any subset thereof. However, controls imposed on 27 million subscriptions would be impossible to design given the multiple variables involved in retail mobile pricing and when any implementation is attempted would have a materially distortive effect on price innovation and competition.
- (d) Whether social tariffs provide sufficient protection to low-income households.
- 3.65. To the extent that controls would apply only to social tariffs, see BT's response above in relation to a remedy that only addressed a subset of customers. It is not clear how a 'social tariff' protection remedy for mobile customers would be designed and differentiated from existing low-cost mobile offers. If the protection would only apply to the eligible customers that choose social tariffs, there is a risk this would be a very small subset of the customers harmed by the retail mobile SLC.
- (e) How eligible customers might be notified of such social tariff protections.
- 3.66. Given BT does not consider a social tariff protection would be an effective remedy it does not have a view on this question.
- (f) How retail customer protections might be monitored.
- 3.67. These controls will be complex to monitor, will involve a new form of regulation in the mobile sector and so will require a competent and sufficiently resourced industry regulator.
- (g) How a dispute resolution process might be designed.
- 3.68. BT does not have a view on how a dispute resolution process might be designed.
- (h) How the CMA might determine the appropriate length of time for such protections and what factors it could take into account.
- 3.69. For the reasons explained above, it is not clear that there is any 'appropriate' length of time for the controls proposed.

D. The wholesale market remedies

- 3.70. BT considers that a wholesale market remedy, however designed, would need to be in place permanently, leading to serious, lasting distortions of competition. At the same time, it would be ineffective in compensating for the structural loss of competition resulting from the Merger.
- 3.71. The Parties' investment plans, even if fully delivered, cannot offset the structural change in the market resulting from the Merger, since their effect will primarily relate to network quality. This is not a key driver of competition at wholesale level, since all MNOs offer sufficient network quality to be attractive

hosts for MVNOs today.³⁷ Any effects of the investment plans on price (the single most important consideration for MVNOs)³⁸ will also be limited, since:

- a. while the CMA has provisionally found some evidence that reduced incremental costs of capacity may be taken into account in bidding, it has not found evidence showing a clear effect on prices agreed with MVNO customers; and
 - b. the CMA has also provisionally found that the loss of competition at wholesale level can be expected to further reduce any pass-through of any reduced incremental costs of capacity to MVNOs if there was a clear effect in the first place.³⁹
- 3.72. Consistent with this, the CMA observes that any effects of the Investment Commitment would be felt less in the wholesale market.⁴⁰
- 3.73. There is therefore no reason to believe that any change will occur over time to undo the loss of competition on the wholesale market resulting from the Merger. As such, any wholesale market remedy would need to be permanent in order to be (potentially) effective. Otherwise, there would be clear gap between the permanent, structural loss of competition resulting from the Merger and a time-limited remedy.
- 3.74. Any wholesale remedy set today risks by replacing complex, dynamic market judgements marrying MVNO demand and supply with a one-time ‘regulatory’ imposition. A judgement made today could set prices too high or too low, or define features incorrectly. Reserving capacity would pre-suppose the right balance of use between third parties and the Merged Entity’s own retail customers. It would also ossify the level of supply in the market. Removing the industry’s ability to make such commercial judgements in future creates risks to future efficient investment decisions by network operators. Less efficient investment decisions would have material and lasting effects on all customers across the UK.
- 3.75. It is also far from clear that a wholesale market remedy could be effective, given the inherent difficulties and tensions in specifying, monitoring and enforcing such a remedy.
- 3.76. For example, any remedy based on an obligation to offer fair and non-discriminatory terms would risk drawn-out disputes as to what constitutes ‘fair’ terms or ‘discrimination’, which would negate its effectiveness. Conversely, a remedy that sought to address this issue by taking a more directive approach, prescribing specific terms (as in a regulated reference offer) would need to include mechanisms and external review allowing it to adapt over time to unpredictable market conditions. This would introduce additional complexity and risk, and further increase the burden on Ofcom (effectively requiring periodic price reviews of MVNO supply). A prescriptive remedy would also create even greater distortions than one based on FRAND-type obligations: it would not only regulate the Merged Entity’s conduct, but risk becoming a focal point for the terms offered by all suppliers.
- 3.77. The CMA’s guidance recognises that in view of these disadvantages, such remedies should only be used on a temporary basis, unless there is no alternative to a continuing regulatory solution.⁴¹ Here, there is a clear alternative: prohibition of the Merger.

³⁷ In particular, the CMA finds that MVNOs have recognised 3UK’s improvements in network quality, which “should enable it to compete more effectively for the upcoming MVNO opportunities” (PFs, paragraph 9.268(e)).

³⁸ PFs, paragraph 9.22(a), noting that six out of 13 MVNOs selected price as the most important factor. Network quality was identified as the most important factor by five MVNOs – however, BT notes the concept of network quality used included “equal access to the network and latest technologies”, meaning these answers may have been driven by a concern for parity with the host rather than the quality of the host’s network as such.

³⁹ PFs, paragraph 14.243.

⁴⁰ NPR, paragraph 37.

⁴¹ CMA87, paragraph 7.35.

- 3.78. Without prejudice to these overall views, BT sets out below its comments on the CMA's specific questions with regard to wholesale remedies at paragraphs 62-63 of the NPRs.

Questions in relation to pre-agreed wholesale access terms

(a) Whether it would constitute an effective remedy capable of eliminating or preventing the provisional SLC and its adverse effects in the Wholesale Market.

- 3.79. For the reasons explained above, pre-agreed wholesale access terms would not constitute an effective remedy capable of eliminating or preventing the SLC and its adverse effects in the wholesale market provisionally identified by the CMA.

(b) What the key terms are that need to be offered to MVNOs.

- 3.80. To ensure that MVNOs retain access on the same terms they would have enjoyed absent the Merger, the remedy (and therefore the CMA or Ofcom) would need to regulate all of those terms. However, MVNO access terms cover a wide range of factors, with different MVNOs having different requirements and placing different weight on the importance of those factors. It would therefore be impractical to determine and monitor access terms for all MVNOs that may want to contract with the Merged Entity.

- 3.81. It should also be noted that simply rolling over existing MVNO terms would not avoid MVNOs being harmed relative to the counterfactual. This is because the CMA finds that "VUK and 3UK are close competitors in the supply of wholesale mobile services" and that "3UK's improvements in network quality [...] should enable it to compete more effectively for the upcoming MVNO opportunities"⁴² – i.e., 3UK would likely impose an increased competitive constraint absent the Merger, leading to better access terms for MVNOs. As such, the CMA or Ofcom would need to identify what terms would realistically have been offered absent the Merger. This is again wholly impracticable.

(c) How the CMA should determine what constitutes fair and reasonable terms, including concerning price.

- 3.82. BT's view is that the CMA should not become involved in determining the terms to be offered by the Parties at all. Instead, the CMA should prohibit the Merger, allowing terms to continue to be driven by an effectively competitive market. This will deliver better outcomes for MVNOs and retail customers than a regulatory solution.

(d) Whether pre-agreed wholesale access terms should be offered up to a specified number of MVNOs or cover a proportion of the Merged Entity's network capacity.

- 3.83. This question clearly illustrates the fundamental issue identified above: any wholesale remedy set today risks by replacing complex, dynamic market judgements marrying MVNO demand and supply with a one-time 'regulatory' imposition. The implication that the CMA or Parties could decide now what the 'right' level of demand and supply is a dangerous one. If MVNO demand exceeds that level, the remedy will be ineffective and not compensate for the reduced number of MNOs. However, if capacity that is reserved (explicitly, or implicitly given the need to offer access to a specified number of MVNOs) remains unused, this is wasteful and inefficient. This brings serious jeopardy to future efficient infrastructure investment which would entail enduring and economically very material harm.

⁴² PFs, paragraphs 9.268(e) and (d).

- (e) How the CMA might determine the appropriate length of time for such a commitment.
- 3.84. As discussed above, any wholesale access commitment would need to be permanent in order to be (potentially) effective, with attendant costs in terms of market distortions and enforcement/monitoring.
- (f) How disputes might be dealt with and what potential role the CMA or an independent adjudicator/monitoring trustee might take in this process.
- 3.85. It would be necessary for any disputes relating to the Merged Entity's compliance with the commitments to be dealt with very quickly and without significant cost to the MVNO. BT doubts that this would be practicable, given the inherent complexity of the underlying remedy.

Questions in relation to capacity ring-fencing

- (a) Whether a remedy that ring-fenced network capacity in the Parties' network for MVNOs would sufficiently incentivise the Merged Entity to compete for MVNO customers.
- 3.86. For the reasons explained above, BT does not believe such a remedy would be effective.
- (b) How the CMA could design a capacity ring-fencing remedy.
- 3.87. BT does not believe this would be practicable.
- (c) How much of the Merged Entity's network capacity should be ring-fenced for MVNOs.
- 3.88. Please refer to BT's comments above, explaining that this question illustrates the fundamental issues with any such remedy.
- (d) How the CMA might determine the appropriate length of time for such a commitment.
- 3.89. As discussed above, any such commitment would need to be permanent, and therefore not an appropriate remedy.
- (e) Whether a monitoring trustee would be well placed to monitor such a commitment.
- 3.90. BT considers that monitoring such a commitment would be inherently challenging. While a monitoring trustee might reduce some of the burden on Ofcom, Ofcom would likely have to remain closely involved. There would in any event remain significant ongoing risks and costs in monitoring a permanent commitment of this nature.

E. Other questions in relation to potential behavioural remedies

- 3.91. Paragraphs 64 to 68 of the NPRs raise additional questions regarding alternative remedies to the provisional SLCs, practical issues with the remedies and how they should be implemented. BT comments briefly on these points below.
- (a) Whether there are other measures that would address the provisional SLCs identified in the Retail and Wholesale Markets.
- 3.92. BT considers that only prohibition of the Merger would be effective in addressing the provisional SLCs.
- (b) Any legal and practical challenges associated with any of the above proposed remedies.
- 3.93. Please refer to the comments on specific remedies above.
- (c) What potential role Ofcom could undertake in implementing, monitoring and enforcing any of the above remedies.
- 3.94. As discussed above, BT does not believe that the possibility of Ofcom becoming involved in implementing, monitoring and enforcing behavioural remedies is sufficient basis for, or would fully

address the extensive risks of, accepting behavioural remedies in this case. Without prejudice to this view, Ofcom would need to take a very active role to mitigate risks so far as possible and, in particular, be ready to take enforcement action under the Merged Entity's spectrum licences, including through revocation.

- 3.95. However, as discussed above, BT doubts that the prospect of such action would be a sufficient deterrent to ensure compliance, given (i) Ofcom has never revoked a national mobile network spectrum licence for breach of licence conditions in the past, and (ii) the Merged Entity may suspect that the regulator will be reluctant to impose financial penalties at a level sufficient to be dissuasive, since paying these could reduce resources available to invest in its network.

(d) Views on the appropriate timescale for achieving the implementation of the potential behavioural remedies.

- 3.96. BT does not have a specific view on this, but notes that the potential behavioural remedies would need to be in place for an extended (and in the case of the wholesale remedy, indefinite) time period, rather than involving a one-off implementation. This significantly increases the risks associated with the remedies.

(e) What, if any, potential safeguards may be required to minimise the risks associated with implementation.

- 3.97. Please refer to the comments on specific remedies above. BT does not believe any safeguards would reduce the risks to an acceptable level.

(f) Whether the Parties should be required to appoint a monitoring trustee (or adjudicator) to oversee the implementation and compliance of any behavioural remedies to ensure that the Parties comply with their obligations.

- 3.98. While a monitoring trustee (or adjudicator) might reduce some of the burden on Ofcom, Ofcom would likely have to remain closely involved. There would in any event remain significant ongoing risks and costs in monitoring long-term / permanent commitments of this nature.

Section 4. BT's comments on the cost of remedies and proportionality

- 4.1. In Sections 2 and 3 of this response, BT has highlighted very significant costs associated with each of the remedies proposed that fall short of prohibition. Any of these remedies would have a significant distortive effect and would incur very significant compliance and monitoring costs. Prohibition is the least costly remedy and is clearly proportionate to the adverse effects of the SLCs provisionally identified in the PFs.

Section 5. BT's views on RCBs

- 5.1. BT does not consider the Merger would give rise to RCBs of a scale or nature that should influence the CMA's selection of a suitable remedy as any Merger-specific benefits are likely to be very limited in scale and far outweighed by the adverse effects of the SLCs.⁴³
- 5.2. The Parties' first two RCB claims relate to network quality and, in particular, the nationwide deployment of 5G SA. Here, it is important for the CMA to consider only the incremental, Merger-

⁴³ BT will provide further information relevant to the CMA's consideration of RCBs in response to RF15.

specific benefits, not the benefits of 5G SA in general or network quality improvements that would have been delivered absent the Merger.

- a. Claims that the Parties cannot achieve 5G SA roll-out themselves absent the Merger should be treated with considerable caution, given the CMA's provisional findings that the Parties have been able to invest adequately in their networks to date.⁴⁴ Similar caution is required in relation to claimed quality improvements generally, given the CMA's provisional findings that absent the Merger, both of the Parties' stand-alone networks are likely to deliver higher network quality than they have claimed.⁴
 - b. It is also notable that Vodafone has already started deploying 5G SA, as discussed at paragraph 5.22 of the PFs. BT understands that Vodafone has already built a 5G core, capable of supporting 5G SA, and assumes that it is deploying 5G equipment today that is capable of supporting 5G SA at small incremental cost (in line with BT's own approach). This means the incremental costs of 5G SA roll-out / enablement will be limited.
 - c. Both BT and VMO2 have also started deploying 5G SA, with BT targeting [X] % 5G SA population coverage within [X] years and VMO2 announcing that its roll-out is proceeding "at pace, in line with the Government's Wireless Infrastructure Strategy ambition to have 5G Standalone coverage in all populated areas by 2030".⁴⁵ Given this, it is not likely that the Merger will lead to any significant expansion of 5G SA coverage to that likely to be delivered by the market today.
 - d. Given three MNOs have already begun their roll-out, it is reasonable to expect that Three would, absent the Merger, also do so – and even if it did not, customers would have the choice of three 5G SA networks, the same as the claimed result of the Merger.
 - e. The CMA should also be slow to attach material weight to claims that the Merger would accelerate the roll-out of 5G SA and associated use-cases. While 5G SA will be an important technology for certain applications, specific use-cases are likely to take some time to emerge and become widespread. Given this, and the concrete steps already taken by BT and other MNOs to roll-out 5G SA, it is not plausible that the Merger would be necessary to ensure the pace of roll-out meets demand. In any event, any benefit in terms of time saved would be small, since it would just bring forward benefits that would otherwise be achieved within a short period of time. As noted above, BT is targeting [X] % 5G SA population coverage within [X] years, and BT would assume Vodafone is working to a similar broad timeframe.
- 5.3. The CMA should also consider carefully the distributive implications of accepting a price-rise which (as it has provisionally found) would fall disproportionately on lower-income consumers, on the claim that this will facilitate faster or wider 5G SA roll-out or otherwise improve network quality. It may be the case that the benefits of 5G SA largely accrue to other customer groups, such as certain enterprises (e.g. those wanting to use network slicing) and consumers willing to pay a premium for higher-speed services. More generally, as discussed above, the CMA has found that most consumers prioritise price and are not willing to pay more for network quality. As such, any benefits are likely to accrue disproportionately to a small group (presumably the better-off).

⁴⁴ E.g., PFs, paragraph 48.

⁴⁵ Press release dated 22 February 2024, "Virgin Media O2 Unveils the Next Phase of its Mobile Network Evolution, with 5G Standalone Switch On".

- 5.4. Finally, the CMA should take into account the uncertainty recognised in the PFs (and by Ofcom) around the public value of use cases for 5G SA.⁴⁶
- 5.5. The Parties' remaining RCB claim is that the Merger will expand FWA in the UK, ensuring broadband connections for customers without access to fibre. The Parties also assert that FWA will compete more effectively with fibre broadband, providing greater choice. Again, any incremental benefits of the Merger in this regard will be minimal.
- a. FWA is a niche service primarily of interest to a small group of customers who value the flexibility of being able to move their FWA connection to another location and, in some cases, where fixed broadband speeds are very low.
 - b. The number of premises with low fixed broadband speeds is very small. At present, 97% of premises have access to a superfast fibre connection (FTTC or better), and Ofcom projects gigabit-capable coverage in excess of 97% by 2027 (FTTP or gigabit-capable networks).⁴⁷ Gigabit-capable coverage is expected to be very close to 100% by 2030. Moreover, FWA is not suitable for many of the hardest to reach premises in the UK due to issues of distance and signal strength, and a significant proportion are likely to be served through alternative satellite broadband technology instead. As a result, any benefits of FWA will be both small and time-limited in nature, as recognised by industry commentators.⁴⁸
 - c. Where fibre broadband is available, its technical superiority (e.g. in terms of speed, stability and reliability) and competitive price means that FWA is not a competitive alternative for almost all customers.
 - d. Even for customers wishing to use FWA, any incremental benefits of the Merger will be minimal. Three, Vodafone and BT have already launched FWA, and the CMA has provisionally found that Three is already seeing strong growth in FWA.⁴⁹
 - e. The extent to which the Merger expands FWA will also be impacted by the behavioural remedies contemplated by the NPRs. Any expansion of FWA is likely to be a temporary way to make use of spare capacity. If the Merged Entity commits to ring-fence capacity for MVNOs, or launches new capacity-hungry mobile services, that spare capacity will be reduced.
- 5.6. In view of the above, it is plain that any RCBs that might accrue from the Merger and be foregone through prohibition must carry no material weight when set against the scale of the harm that would result from the provisional SLCs, as set out in the PFs.
- 5.7. In sharp contrast to the claimed RCBs, that harm is extensive (£328m to £1.1bn a year, even without taking the wholesale market SLC into account), wide-ranging (affecting every mobile customer in the UK) and would fall disproportionately on the least well-off.

⁴⁶ E.g., PFs, paragraph 14.124: "We note that revenue from new 5G use cases largely does not exist at present for either Party and therefore presents particular challenges in forecasting. Ofcom said that, given the paucity of evidence of demand for services that will rely upon 5G SA, and in particular that the demand would depend upon the difference in quality and extent of the 5G SA provided in the JBP relative to that in the counterfactual, it would be reasonable to assume that the revenue synergy (and associated public value) resulting from unlocking demand for such services would be limited."

⁴⁷ Ofcom, *Connected Nations – Planned Network Deployments 2024*, 4 September 2024.

⁴⁸ See e.g., Enders (Fixed Wireless access: Having its moment [2023-019]), which concludes that any role for FWA is time-limited due to coverage of faster fixed networks (including the UK's ambition for 100% FTTP coverage by 2030).

⁴⁹ PFs, paragraph 8.134.

- 5.8. In this context, any RCBs cannot reasonably provide a basis to select a less effective or higher-risk remedy. BT is not aware of any precedent case in which behavioural remedies have been selected to preserve RCBs in comparable circumstances.⁵⁰

Section 6. Prohibition is the only effective remedy in the NPRs for BT's additional competition concerns

- 6.1. BT has significant additional competition concerns regarding the Merger, beyond the provisional SLCs identified in the PFs and the NPRs. As set out in BT's previous submissions,⁵¹ these relate to:
- a. The **capacity asymmetry** created by the Merger; and
 - b. **frustration of the MBNL** network sharing arrangement.
- 6.2. As regards **capacity asymmetry**, notwithstanding the proposed transfer of spectrum from the Merged Entity to VMO2 as part of Beacon 4.1, the Merged Entity will retain a substantial capacity advantage over its rivals, and therefore the incentive to use capacity to engage in strategic conduct to the detriment of long-term incentives to invest. The transfer also does nothing to address concerns about [REDACTED]. Indeed, if the Beacon 4.1 announcement gives VMO2 access to the Merged Entity's expanded sites grid, BT [REDACTED].
- 6.3. As regards **frustration of MBNL**, BT is concerned that the Merged Entity would have very different incentives to Three and, as a result, not only the ability and but also the incentive to disrupt the effective functioning of MBNL. This could manifest in various ways, including through slowing or blocking BT's unilateral deployments; disengagement with approvals for antenna upgrades on shared sites; the Merged Entity overloading MBNL sites with Vodafone traffic; failure to agree new service requirements or SLAs in relation to services jointly procured through MBNL; and limited funding of 'notice to quit' (**NTQ**) replacement sites, leading to a loss of coverage. The result could be total network capacity shortfall of up to [REDACTED]% compared with BT's pre-Merger forecast position, and additional costs with a net present value (NPV) of £[REDACTED] - at least part of which would ultimately have to be borne by consumers through further reduced network quality and/or higher prices. These concerns are further exacerbated by the Beacon 4.1 announcement.
- 6.4. The PFs conclude that neither of these concerns gives rise to an SLC and, as such, the NPRs does not address how the concerns might be remedied. BT strongly disagrees with this conclusion, which (amongst other things) rests on misunderstandings regarding the operation of MBNL and a failure to consider the *capacity* position resulting from the Merger as opposed to merely the *spectrum* position.
- 6.5. Accordingly, BT considers that these concerns remain valid and that any remedies would need to address them. However, of the remedies being consulted on by the CMA, it is clear that only prohibition would be an effective solution, since the behavioural remedies outlined in the NPRs simply do not address these concerns.
- 6.6. BT also disagrees with other aspects of the PFs that bear on the approach to remedies in the NPRs. Notably, BT disagrees with the CMA's provisional findings that the Merger would lead to a competitive

⁵⁰ As the CMA will be aware, remedies have rarely been modified based on RCBs outside the specific contexts of NHS trust and water mergers. While behavioural remedies were accepted based on RCBs in *Macquarie UK Broadcast Ventures / National Grid Wireless Group* (2008), this involved what the Competition Commission explicitly acknowledged as unique circumstances related to digital switch-over, and a relatively narrow SLC affecting a small number of well-resourced customers (broadcasters) rather than tens of millions of customers as here.

⁵¹ E.g., BT's response to the Issues Statement, dated 16 May 2024 and BT's submission; BT's submission regarding VMO2 Agreement dated 8 August 2024.

response by BT in the form of increased investment. Instead, the correct analysis is that the Merged Entity would have the ability and incentive to frustrate BT's investments, both through strategic use of its excess capacity and through its role in MBNL. This has implications for the CMA's evaluation of the Parties' JBP as capable of generating REEs and, in turn, for the CMA's evaluation of the Investment Commitment.

- 6.7. BT will develop these points in its separate response to the PFs.