

## Vodafone/CK Hutchison joint venture merger inquiry

## BT's response to the CMA's Provisional Findings

4 October 2024

**Section 1. Introduction and executive summary**

- 1.1. BT agrees with the CMA's Phase 2 Provisional Findings (**PFs**) 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 (the **provisional SLCs**). Unless otherwise indicated, defined terms in this response have the same meaning as set out in the PFs.
- 1.2. BT notes that the CMA has provisionally found that extensive and wide-ranging consumer harm would result from the Merger: price increases of at least £328 million per year and as high as £1.1 billion a year, even before taking into account the effects of the SLC at the wholesale level, directly affecting the Parties' 27 million customers and, indirectly, every other individual consumer and businesses purchasing mobile services in the UK. This is the CMA's estimated impact taking into account the Beacon 4.1 Agreement. These PFs are of particular significance given the CMA has also provisionally found that most consumers value price over network quality. In light of this, as explained in BT's response to the NPRs submitted on 27 September 2024 (**NPRs Response**), prohibition of the Merger is both the only effective remedy and entirely proportionate.
- 1.3. BT nonetheless considers that the PFs do not reflect the full extent of the competition concerns raised by the Merger. In summary:
  - a. The CMA has failed to adequately consider BT's concerns regarding **asymmetry in low-band spectrum**, despite evidence that low-band spectrum [X] (as also confirmed by feedback from customers themselves). The Merger will exacerbate this [X].
  - b. The CMA has incorrectly chosen not to assess **asymmetry in overall capacity** (as opposed to spectrum) – despite acknowledging that *“to the extent any spectrum asymmetry creates a concern, this could be exacerbated by differences in MNO technologies deployed and site numbers”*<sup>1</sup> (consistent with Ofcom statements and court and CMA precedents and regulatory precedent in other jurisdictions)..The PFs purport to justify this on the basis of uncertainty regarding how many sites the Merged Entity would retain under the Parties' JBP. However, as set out in the NPRs, the CMA is considering a remedy requiring the Parties to follow that plan. BT finds it difficult to understand how the CMA can rationally consider the JBP sufficiently certain to provide a possible basis for a remedy (and indeed one that would apparently force the Merged Entity to stick to that plan in all material respects), but insufficiently certain to allow it to assess the capacity asymmetry that would result

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<sup>1</sup> Paragraph 8.284 of the PFs.

from the Merger and the associated adverse effects on competition and ultimately on customers.

- c. BT estimates that the Merger in combination with assumed spectrum divestments as part of Beacon 4.1 will result in the Merged Entity holding 52% of available capacity, compared with [X]% for its rivals. This very substantial capacity advantage will, as explained in BT's previous submissions, allow the Merged Entity to withhold capacity strategically to deter investment by rivals. The result will be lower levels of investment by all players in the market, and therefore poorer levels of quality for UK mobile customers, than absent the Merger.
- d. The CMA has partially acknowledged BT's concerns regarding the Merged Entity's ability to harm it through **frustration of MBNL** (in some, but not all, of the ways BT has raised). However, the CMA has provisionally found that the Merged Entity would not have the incentive to do so. BT disagrees and sets out below detailed comments on the multiple factual and analytical errors on which the CMA's provisional findings on this concern appear to rest. Correcting for these errors, BT submits that the CMA should find that the Merged Entity would have the ability to harm BT through a more extensive set of mechanisms than the PFs recognise; that it would have clear incentives to do so; and that the effects would substantially impair the constraint BT can exercise on the Merged Entity and other retail and wholesale mobile providers. This conclusion is consistent with the analysis of the European Commission and Ofcom (and the CMA's preliminary analysis in its referral request) in respect of the proposed Three/O2 merger. The only remedy considered in the NPRs that would be effective in addressing these concerns is prohibition.
- e. BT agrees with the CMA in many aspects of its assessment of **efficiencies** – i.e., that they would not be delivered with the requisite level of certainty and that, where efficiencies would be delivered, they would clearly not offset the provisional SLCs it has identified. However, BT strongly disagrees that the claimed increases in network quality and capacity will spur a competitive response in the form of greater investment in its own network, given the impact on BT's investment incentives from the capacity asymmetry described above. Without the ability to deploy additional spectrum, BT would only be able to add capacity by building sites. The sunk costs and timescales of doing so would simply be prohibitive when the Merged Entity could render the investment unprofitable by deploying spectrum (at far lower costs and much faster) at any time during this period. The CMA's provisional findings in this respect rest on an incorrect reading of BT's internal documents [X] set out in other BT internal documents. Rather, the right conclusion is that the capacity asymmetry created by the Merger will [X]. As the CMA identifies, without an effective competitive response mechanism in the short, medium and long term, there is no way to ensure any claimed efficiencies (e.g. greater quality or lower incremental costs) would flow to customers.
- f. In any event, it bears emphasis that neither the efficiencies claimed by the Parties, relating to network quality and capacity, nor any corresponding competitive response by BT would, on the analysis in the PFs, be likely to offset the Merger's adverse impacts on consumers in the form of higher prices. The CMA has found that mobile operators price against competitors rather than to incremental cost, so increasing capacity does not lead to lower prices. This is crucial context for the CMA's

assessment of whether, and to what extent, claimed efficiencies are rivalry-enhancing.

- 1.4. As explained in BT's NPRs Response, these points are significant for the CMA's consideration of remedies. The retail and wholesale remedies set out in the NPRs, BT understands, are premised on an Investment Commitment enhancing rivalry over time, driving increased investment, such that these will become unnecessary and can therefore be time limited. However, an Investment Commitment will neither spur a competitive response in the way the CMA apparently hopes, nor impact upon the most important parameter of competition – price. In particular, the CMA has provisionally found that network quality is less important to consumers, as a parameter of competition than price. Further, even if rivalry was enhanced in the way the CMA has provisionally found, the CMA does not set out how over time competition would be expected to tend to a competitive dynamic that is not materially harmful for consumers relative to the counterfactual. For the reasons set out in more detail in the NPRs Response, therefore, the Investment Commitment will not address the significant prices rises that the CMA has provisionally found will arise from the Merger. Moreover, neither the retail and wholesale remedies nor the Investment Commitment address the additional concerns relating to low frequency spectrum, capacity asymmetry and the impact of the Merger on MBNL. The only remedy in the NPRs that does so is prohibition.

## **Section 2. BT agrees that the Merger will result in SLCs but the PFs understate their extent**

- 2.1. BT agrees with the CMA's overall conclusion in the PFs: that the Merger may be expected to result in SLCs 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.
- 2.2. BT also notes that the CMA has provisionally found that extensive and wide-ranging consumer harm would result from the Merger: price increases of at least £328 million per year and as high as £1.1 billion a year, even before taking into account the effects of the SLC at the wholesale level, directly affecting the Parties' 27m customers and, indirectly, every other individual consumer and business purchasing mobile services in the UK. These provisional findings are of particular significance given the CMA has also provisionally found that most consumers value price over network quality.
- 2.3. In light of this, as explained in BT's NPRs Response, prohibition of the Merger is both the only effective remedy and entirely proportionate. Conversely, the Parties' claimed relevant customer benefits from the Merger, which primarily concern network quality, 5G SA and FWA, should carry little weight. This is not only because the claims appear to involve little incremental Merger-specific benefit, but also because any benefits are likely to be time-limited and accrue disproportionately to a small group at the expense of the large majority of price-sensitive customers.
- 2.4. However, while the CMA's analysis in the PFs is sufficient to show why prohibition is proportionate, it materially understates the concerns raised by the Merger. Specifically, BT considers that the CMA has erroneously discarded concerns raised by BT regarding (i) the significant low frequency spectrum and overall capacity asymmetries created by the Merger (which are not resolved by the Beacon 4.1 spectrum trade) and (ii) the impact of the Merger on MBNL (which is exacerbated by Beacon 4.1, as discussed further in Section 4.D). These raise significant competition concerns in their own right in addition to those already identified in the PFs. Importantly, as noted in BT's NPRs Response, of the remedies discussed in the NPRs, only prohibition would address these concerns. BT develops these points in Sections 3 and 4 below.
- 2.5. In addition, as explained in Section 5 below, while the CMA has rightly concluded that the Merger would not give rise to rivalry enhancing efficiencies (**REEs**) sufficient to prevent the provisional SLCs from arising, BT believes the PFs overstate the extent to which *any* REEs may be expected to arise.

## **Section 3. The CMA has failed to fully assess competition concerns arising from spectrum *and* capacity asymmetries as a result of the Merger**

### **A. Low-band spectrum asymmetries**

- 3.1. BT notes that the CMA has provisionally found that it does "*not consider that asymmetries within low-band spectrum would significantly weaken the competitive position of other*

MNOs”.<sup>2</sup> This is apparently on the basis that Ofcom has indicated that low-band spectrum constraints are unlikely to significantly weaken an MNO’s ability to compete by constraining their ability to provide (i) effective indoor coverage, (ii) 5G services, or (iii) IoT services.<sup>3</sup>

- 3.2. However, BT submits that the CMA has failed to adequately consider the concerns BT has identified in relation to low-band capacity constraints in its previous submissions.
- 3.3. BT makes the following observations in this regard.
- 3.4. **First**, BT has previously explained that low-band capacity [REDACTED],<sup>4</sup> and [REDACTED].<sup>5,6</sup> This means that whereas pre-Merger [REDACTED] post-Merger [REDACTED].
- 3.5. However, the CMA does not appear to have assessed these concerns at all in the PFs. It is therefore not clear on what basis the CMA has disregarded these concerns identified by BT.
- 3.6. **Second**, BT has previously explained that its low-band capacity [REDACTED].<sup>7</sup> In turn, this means that, while pre-Merger [REDACTED], post-Merger [REDACTED].
- 3.7. The CMA appears to dismiss this concern on the basis that Ofcom has submitted that “*other technologies can be deployed on alternative frequencies to provide IoT*”.<sup>8</sup> However, this is at odds with the evidence previously submitted by BT.
- 3.8. In particular, BT has submitted that [REDACTED].<sup>9</sup>
- 3.9. The CMA has not explained why it has dismissed this evidence presented by BT in this respect. It is therefore not clear on what basis the CMA has chosen to dismiss BT’s concerns regarding low-band spectrum.

## B. Overall capacity asymmetry

- 3.10. BT notes that the CMA’s “*provisional view is that [it does not] consider that spectrum asymmetry is likely to result in a substantial lessening of the competitive constraint of the other MNOs*”, because, following the spectrum trade under Beacon 4.1, “*the degree of overall spectrum asymmetry will be less than the current asymmetry*”.<sup>10</sup>
- 3.11. BT makes the following observations in this regard.
- 3.12. **First**, while the CMA acknowledges that asymmetry concerns are driven by concerns around asymmetries in the “ability to provide capacity” (consistent with Ofcom statements

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<sup>2</sup> Paragraph 8.291 of the PFs.

<sup>3</sup> Paragraph 8.290 of the PFs.

<sup>4</sup> For example, BT’s analysis [REDACTED].

<sup>5</sup> [REDACTED]. See further BT’s Response to the CMA’s Issues Statement, 16 May 2024, paragraph A1.15.

<sup>6</sup> BT Submission on the VMO2 Agreement, paragraphs 42 and 43.

<sup>7</sup> BT Submission on the VMO2 Agreement, paragraph 44.

<sup>8</sup> Paragraph 8.290 of the PFs.

<sup>9</sup> BT Submission on the VMO2 Agreement, paragraphs 45 to 47.

<sup>10</sup> Paragraph 8.291 of the PFs.

and court and CMA precedents and regulatory precedent in other jurisdictions),<sup>11</sup> it notes that its analysis has nonetheless “*focused on spectrum asymmetries*” (emphasis added).<sup>12</sup>

- 3.13. Accordingly, the CMA’s analysis focusses on the wrong metrics for assessing competition concerns arising from capacity asymmetry, and therefore provides no good basis on which to dismiss these concerns.
- 3.14. Indeed, the CMA itself notes that competition concerns arising from spectrum asymmetry “*could be exacerbated by differences in* [other factors that affect the ability of MNOs to provide capacity]”.<sup>13</sup> In other words, the CMA appears to concede that even if spectrum asymmetry does not give rise to competition concerns, such concerns may still arise if it is likely that the Merger would give rise to significant capacity asymmetry.
- 3.15. In this regard, BT has noted in its previous submissions that it is likely that the Merger would result in substantial capacity asymmetry.<sup>14</sup> In particular, following the spectrum trade to VMO2 that BT believes will arise pursuant to Beacon 4.1 (i.e., reportedly 70 MHz including midband 5G spectrum),<sup>15</sup> BT estimates that the Merged Entity will hold a very substantial capacity advantage over its rivals: a capacity share of around 52% (61% absent the Beacon 4.1 Agreement) compared to [X]% for its rivals.<sup>16</sup>
- 3.16. Accordingly, the information available to BT indicates that the Merged Entity will likely control a large amount of capacity and benefit from a large capacity asymmetry relative to BT. As BT has noted previously, the Merged Entity is likely to strategically hold back some of that capacity to undermine rivals’ incentives to invest. By way of summary:
- a. By ‘hoarding’ capacity, the Merged Entity could avoid lower (vs rivals’) costs of deploying it productively, while maintaining its ability to quickly react to any attempt by BT (or VMO2) to make sunk long-term investments to improve their network quality by deploying its own capacity. The costs associated with making that capacity available to customers will be significantly lower for the Merged Entity than for its rivals and it will be able to do so more rapidly. For example:
- (i) The Merged Entity can deploy existing (spare) spectrum on sites more rapidly than its competitors where they need to invest in new sites. By comparison for BT, the cost of deploying a new macro cell site is estimated at £[X], and would take around [X] months, while existing site upgrades for deploying low band spectrum cost between £[X] and £[X] for a typical macro-site.
- (ii) The Merged Entity would be able to, for example for technology deployed in the 3.5 GHz range, turn on its combined capacity at existing sites remotely in a

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<sup>11</sup> As regards Ofcom statements and court precedents, see BT’s Response to the CMA’s Issues Statement, 16 May 2024, paragraphs 2.10, 2.13-2.16. BT also notes that the CMA’s consideration of theories of harm relating to bidding for spectrum in BT/EE expressed the potential harm as “*denying an opportunity to its rivals to increase spectrum holdings (and therefore frustrating their attempts to increase coverage, capacity or speed)*” (Final Report, paragraph 12.31, emphasis added). As regards international precedents, see Box 2.1 of BT’s Response to the CMA’s Issues Statement, which explains that excessive capacity and spectrum asymmetry is considered to be a competition risk in comparable European countries (e.g. Italy and Portugal), where spectrum cap rules are applied at auction whereas others define long-term rules (Belgium, France, The Netherlands and Spain).

<sup>12</sup> Paragraph 8.284(b) of the PFs.

<sup>13</sup> Paragraph 8.284(b) of the PFs.

<sup>14</sup> BT Submission on the VMO2 Agreement, paragraph 33.

<sup>15</sup> Enders Analysis, Spectrum and towers Market-changing telco deal, 3 July 2024.

<sup>16</sup> BT Submission on the VMO2 Agreement, paragraph 33.

very short space of time (potentially overnight). This is because the majority of 3 GHz equipment deployed today can support up to 200 MHz of spectrum capacity. This would compare to the situation of its rivals who would need to deploy massive MiMO antennae on existing sites (typically more complex and expensive than macro-site upgrade for low band spectrum deployments referred to in the paragraph above).

- b. With regard to spectrum in the 3.5 GHz range, the CMA notes that within the Parties' modelled 'high traffic areas' there are areas where (broadly speaking) both the Merged Entity and each of the Parties' standalone networks would deploy all available spectrum (Area 1) and areas where the Merged Entity but not the standalone networks (i.e., in the counterfactual) would deploy all available spectrum (Area 2). As for Area 2 the CMA notes that "[g]iven the relatively lower traffic levels at these sites, it is not clear that the Merged Entity would have an incentive to deploy the entire combined spectrum holdings of both Parties at all these sites, and if it did so it appears likely that much of the additional capacity would be redundant (or at best delivered well ahead of need)."<sup>17</sup> This is a clear illustration of a scenario where the Merged Entity's rivals would need to take a decision to invest ahead of demand, given the longer lead time and higher costs to expand capacity using additional sites, while the ME could release capacity as demand grows. However, knowing that the Merged Entity will hold significant undeployed spectrum (and indeed the PFs themselves confirm BT's expectations on this point), rivals will equally be aware that the Merged Entity could quickly and at "very low incremental cost"<sup>18</sup> (again, as confirmed by the PFs) release spectrum in a given area to render any such investments unprofitable. Indeed, given the CMA's provisional findings on this point, the Merged Entity would appear to lack any commercial incentive to act otherwise.
  - c. Consequently, whereas BT (and VMO2) may currently have a reasonable expectation of capturing significant numbers of customers by investing to improve their network quality, after the Merger the prospects of such gains are far less likely. The effect is that the business case for such investments becomes significantly worse.
  - d. Knowing that other MNOs' incentives to invest is weakened, the Merged Entity has even less incentive to deploy its own spectrum productively and otherwise invest in its own network.
- 3.17. As a result, the significant capacity asymmetries that will be brought about by the Merger are likely to result in lower levels of investment by all players in the market – and therefore poorer levels of network quality for UK mobile customers – than would be the case absent the Merger.<sup>19</sup>
- 3.18. In BT's view, the CMA should therefore seek to assess the degree of **capacity** asymmetry that will arise post-Merger and its impact on competition in the relevant markets.

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<sup>17</sup> Paragraph 14.68(b) of the PFs.

<sup>18</sup> Paragraph 14.66 of the PFs.

<sup>19</sup> See further BT's Response to CMA's Issues Statement, 16 May 2024, Section 1, Part 1, pages 9-20.

- 3.19. **Second**, the CMA indicates that it has “*focused on spectrum asymmetries given that it is uncertain how many sites the Merged Entity would retain and the timing of this because of uncertainty over the JBP*”.<sup>20</sup>
- 3.20. While the CMA has noted that there is some degree of uncertainty regarding the extent to which the Merged Entity would implement the JBP, in BT’s view, this does not provide an adequate basis on which to avoid fully assessing post-Merger capacity shares and related competition concerns. Indeed, as the CMA itself notes, there is a degree of uncertainty associated with many aspects of the Merger assessment, but “*the presence of some uncertainty does not in itself preclude [the CMA] from concluding that the SLC test is met on the basis of all the available evidence*”.<sup>21</sup>
- 3.21. Moreover, BT notes that the CMA has proposed a remedy that would require the Merged Entity to fully implement the JBP. BT understands that the CMA considers that this remedy may be effective at addressing the provisional SLCs it has found on the basis that further investment by the Merged Entity in terms of the JBP 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*”.<sup>22</sup>
- 3.22. As BT has explained, in the face of significant capacity asymmetries post-Merger, the business case for BT to make any future investment in its network (and therefore its ability to effectively constrain the Merged Entity) is made demonstrably worse. In BT’s view, at the very least, the CMA must assess whether competition concerns are likely to arise from capacity asymmetries if the JBP is fully implemented and therefore whether its proposed remedy is likely to be effective.
- 3.23. If the CMA still finds that it is unable to undertake that assessment due to uncertainties in the JBP, that would be a clear indicator that the JBP is inadequately specified to underpin the Investment Commitment contemplated in the NPRs. As explained in BT’s NPRs Response, in order to address circumvention risk, the Investment Commitment would need to cover the complete range of inputs relevant to network development (including sites, towers, sectors on masts, electronics, spectrum bands deployed and activated at sites, technology deployed and timeframe for deploying technology in specific bands).<sup>23</sup> This detail should plainly allow the CMA to assess the Merged Entity’s capacity position.
- 3.24. Put another way, BT finds it difficult to understand how the CMA can rationally consider the JBP sufficiently certain to provide a possible basis for a remedy (and indeed one that would apparently force the Merged Entity to stick to that plan in all material respects), but insufficiently certain to allow it to assess the capacity asymmetry that would result from the Merger and the associated adverse effects on competition and ultimately on customers.

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<sup>20</sup> Paragraph 8.284(b) of the PFs.

<sup>21</sup> Paragraph 7.18 of the PFs.

<sup>22</sup> Paragraph 61 of the Summary to the PFs.

<sup>23</sup> NPRs Response, paragraph 3.29.



## **Section 4. The Provisional Findings underestimate the harm to UK customers arising from the Merged Entity’s participation in MBNL**

- 4.1. BT has provided the CMA with extensive evidence on the direct harm that the Merger will cause to BT’s ability to compete as a result of the Merged Entity’s participation in MBNL.<sup>24</sup> For the reasons that BT has previously set out, the Merged Entity:
- a. will be able to use its participation in MBNL to disrupt MBNL’s effective functioning through various means, each acknowledged by the CMA in the PFs;
  - b. has the incentive to do so; and
  - c. would harm BT’s ability to compete in doing so.
- 4.2. BT disagrees with the CMA’s provisional finding in Chapter 11 of the PFs that the Merged Entity’s involvement in MBNL would *not* harm BT’s ability to compete. The CMA relies on provisional findings that:
- a. the Merged Entity would not have the ability to limit the constraint from BT through MBNL by blocking and/or delaying BT’s upgrades, or by reducing the extent of site sharing post-2031; and
  - b. the Merged Entity would have the ability but not the incentive to limit the constraint from BT through MBNL by blocking/reducing funding or overloading sites.
- 4.3. BT respectfully submits that the reasoning provided in the PFs in support of these provisional findings appears to reflect a number of misunderstandings or mischaracterisations of the evidence supplied by BT. When understood properly and considered in its proper context, that evidence does not support the PFs in respect of the Merger’s likely impact on UK customers through MBNL.
- 4.4. BT responds to the CMA’s provisional findings on each mechanism of harm identified by BT in Sections A and B below. As a more general observation, the CMA’s provisional findings on the Merged Entity’s ability to frustrate the effective operation of MBNL rest on a flawed interpretation of the evidence available to the CMA as to MBNL’s importance for the ongoing operation and development of BT’s network. In this context, the CMA appears to provisionally find that MBNL has been “scaled back to an ‘EstatesCo’”, which the CMA appears to take to undermine the Merged Entity’s ability to limit BT’s ability to compete through MBNL.<sup>25</sup> However, as BT has noted in its previous submissions, MBNL remains much more than a mere estate management business.<sup>26</sup> The functioning of MBNL shareholders’ networks requires regular engagement and cooperation between them through MBNL, including to update and improve how the JV runs (as happened most recently in the Stanley Agreement) and also, as described in Sections A and B below, in relation to upgrades, investments and other critical steps that are vital to their respective networks. In the absence of this cooperation, it will be difficult (and might be impossible)

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<sup>24</sup> Described in detail in BT’s Response to the CMA’s Issues Statement, 16 May 2024 (and in prior submissions in Phases 1 and 2) and supplemented with further evidence in BT’s responses to RFIs 2 and 3 (on 17 May 2024 and 30 July 2024 respectively) and BT’s response to tranche 2 of the CMA’s s.109 Notice of 11 July 2024, submitted on 16 July 2024.

<sup>25</sup> Paragraph 11.21(a) of the PFs.

<sup>26</sup> As outlined in the context provided by BT in its response to tranche 2 of the CMA’s s.109 Notice of 11 July 2024, submitted on 16 July 2024.

for MBNL to continue to improve how it runs in response to shareholder needs and this will, in turn, erode BT's ability to compete.

- 4.5. As to the Merged Entity's *incentives* to disrupt MBNL, as BT previously described in its Response to the CMA's Issues Statement dated 16 May 2024, the Merged Entity "*will have drastically reduced incentives compared with Three to invest in MBNL or, more generally, engage co-operatively with BT on matters essential to MBNL's proper functioning.*"<sup>27</sup> These concerns are consistent with the European Commission's findings in previous telecoms mergers, including its 2016 decision to prohibit the proposed Hutchison 3G UK/Telefonica UK transaction. In that decision, the European Commission (supported by submissions from Ofcom and consistent with concerns expressed in the CMA's referral request)<sup>28</sup> acknowledged network sharing concerns resulting from misaligned incentives, concluding that the merger would lead to "*a significant increase in misalignment between the interests of the two MBNL network sharing partners*" (paragraph 1439). In particular, the European Commission noted that:

*"... the success of MBNL would rely upon the efficiency of the decision making process. Still, and as discussed below, a network sharing partner that is not committed will be able to significantly delay or disrupt the joint venture. Still, a network sharing partner could be highly disruptive if it aims to keep its investment in MBNL to the absolute minimum required while concentrating on another network. ..."* (paragraph 1433).

*"The incentives of the merged entity and BT/EE are therefore not only misaligned but even contradict each other. **The merged entity has an interest to reduce its costs under MBNL because it will not use all MBNL sites and will have considerably lower incentives than absent the Transaction to settle disputes with BT/EE quickly and effectively because it will not be as dependent on MBNL sites as BT/EE.** Instead, deadlocks that frustrate investments in MBNL might even be for the benefit of the merged entity as they disproportionately harm BT/EE because the merged entity will [...]"* (paragraph 1434, emphasis added).

- 4.6. BT also disagrees with the CMA's suggestion at paragraph 11.28 of the PFs that the financial or reputational impacts of breaching MBNL agreements would be a meaningful disincentive to do so. [X]. As the CMA already acknowledges, even where MBNL disruption gave rise to a breach of the MBNL agreements (which would not always be the case), the possible financial impact of this would depend on the likely consequences of breach in all the circumstances. As to reputational impacts, as a starting point, these could only arise to the extent that there is a public judgment that Three has breached its obligations. Notwithstanding that there are unlikely in practice to ever be any reputational impacts, any such hypothetical reputational impact would need to be weighed against Three's commercial incentives to breach its obligations. Given the scale of the sums involved in the JBP this would, BT considers, be very clearly likely to weigh in favour of Three committing the breach. BT therefore sees no reason why breaches of the Merged Entity's obligations in the MBNL agreements would give rise to reputational impacts of a sufficient magnitude to disincentivise the Merged Entity from harming BT's ability to compete.
- 4.7. Finally, BT notes that the CMA relied on the increased alignment in the Beacon parties' spectrum and site holdings and incentives to co-operate (resulting from Beacon 4.1) to

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<sup>27</sup> BT's Response to the CMA's Issues Statement, 16 May 2024, Section 3, paragraph 3.43.

<sup>28</sup> E.g., paragraph 1397 of the Commission's decision; CMA referral request dated 2 October 2015, paragraph 50.

support its provisional findings that the Merged Entity will not have the incentive to disrupt the Beacon network sharing arrangement and thereby harm VMO2's ability to exert an effective competitive constraint in the retail and wholesale markets, *but* that the CMA reached the same provisional finding with regard to the Merged Entity's incentive to limit the constraint from BTEE through MBNL, despite the increased *misalignment* and spectrum and site *asymmetry* between the Merged Entity and BT, resulting from the Merger. It is not clear to BT why this is the case.

4.8. Moreover, even if the Merged Entity did not intentionally engage in disruptive behaviour, it would be expected to disengage from MBNL, with its attention shifting to focus on Beacon 4.1 and the Investment Commitment. Given the binding nature of the enhanced Beacon 4.1 Agreement and the Investment Commitment, the Merged Entity's incentives to abide by those, compared to its incentives to support the effective operation of MBNL, would be clearly stronger.

4.9. In this Section 4, BT further addresses:

- a. In Section A, the CMA's provisional findings that the Merged Entity will lack the ability to limit BT's competitive constraint through MBNL by blocking and/or delaying upgrades or reducing the extent of site-sharing post-2031. For the reasons outlined in Section A, BT disagrees with these provisional findings.
- b. In Section B, the CMA's provisional findings that the Merged Entity will have the ability to limit BT's competitive constraint through MBNL by blocking/reducing funding or overloading sites. For the reasons outlined in Section B, BT agrees with the CMA's overall provisional finding that the Merged Entity will have this ability, but considers that the CMA has significantly underestimated the extent to which the Merged Entity will be able to do so.
- c. In Section C, the CMA's provisional findings that the Merged Entity will not have the incentive to limit BT's competitive constraint through MBNL, even where the CMA provisionally concluded that it had the ability to do so.
- d. In Section D, Beacon 4.1, which in BT's views will exacerbate its concerns on the impact of the Merger on MBNL and network sharing.

#### **A. The Merged Entity's ability to limit BT's competitive constraint through MBNL by blocking and/or delaying upgrades or reducing the extent of site-sharing post-2031**

##### ***Blocking and/or delaying upgrades through the new technology notification process***

4.10. BT has provided the CMA with evidence of the Merged Entity's ability to block and/or delay upgrades through the [REDACTED] process. As explained previously (and summarised at paragraphs 11.53 and 11.54 of the PFs), [REDACTED], allowing the other shareholder opportunities for frustration. In practice [REDACTED].<sup>29</sup> If the Merged Entity [REDACTED]. This means, as BT has explained previously, [REDACTED].<sup>30</sup>

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<sup>29</sup> Paragraph 11.54 of the PFs.

<sup>30</sup> BT's Response to the CMA's Issues Statement, 16 May 2024, Box 3.1.

- 4.11. BT disagrees with the CMA’s provisional finding that the Merged Entity would not have the ability to limit the constraint from BT through its presence in MBNL by blocking proposals for new technologies/equipment. The provisional finding appears to rest on the following factors:
- a. The core principles of the Stanley Agreement, which the CMA notes include to “*facilitate, and continue to facilitate, the shareholders' ability to pursue their separate technical and operational objectives for their networks, independently of each other*”.<sup>31</sup>
  - b. MBNL shareholders do not have a role in approving new technologies or equipment unless the equipment is shared and the CMA expects there to be “*very limited circumstances of equipment sharing in the future*”<sup>32</sup> on the basis that BT and Three have ceased jointly upgrading sites through MBNL and now perform all upgrades independently of each other and predominantly at their own, rather than shared, expense.
  - c. Contractual considerations that have been redacted in the version of the PFs available to BT and so on which BT is unable to comment.
  - d. The MBNL dispute resolution process, a description of which has been included at paragraph 11.10 of the public version of the PFs and in the unredacted version of the PFs available to BT.<sup>33</sup>
- 4.12. The CMA’s reasoning on the first factor places undue weight on a broad statement included in the Stanley Agreement. [REDACTED]. The cited objective should carry no weight in the CMA’s assessment.
- 4.13. The second factor seems to rest in part on the CMA’s understanding, described in setting out the ‘background’ to this provisional finding, that where proposals are for unilateral equipment (i.e., not shared), [REDACTED] for the reasons BT has set out in previous submissions and summarised again in this submission, the Merged Entity would nonetheless have both the ability and incentive to frustrate unilateral deployments involving new technology [REDACTED]. BT also strongly disagrees with the statement in the PFs that there will be “*very limited circumstances of equipment sharing in the future*”.<sup>34</sup> There are still, for example, [REDACTED] sites on which the parties have shared antennas, with [REDACTED] shared antennas in total.
- 4.14. On the third factor, BT notes that the subsequent reference to the dispute resolution mechanism reflects doubt as to whichever contractual factors have been considered. This doubt is justified – as noted above, [REDACTED], which the Merged Entity will be able to delay or frustrate.
- 4.15. As to the final factor, for the reasons explained to the CMA previously, the MBNL dispute resolution process will not in practice prevent frustration. The process involves [REDACTED].<sup>35</sup>

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<sup>31</sup> Paragraph 5.81(b) of the PFs.

<sup>32</sup> Paragraph 11.60(a) of the PFs.

<sup>33</sup> Paragraphs 11.58 and 11.59 of the PFs.

<sup>34</sup> Paragraph 11.60(a) of the PFs.

<sup>35</sup> As described in more detail in response to Question 1c of BT’s response of 17 May 2024 to RFI 2.

***Blocking and/or delaying upgrades through the change control and change management process***

- 4.16. BT has provided the CMA with evidence of the mechanisms for frustration that would be available to the Merged Entity through the common change request (CCR) and change management processes. BT's network is constantly evolving and requires continual changes to its network. These changes typically involve modifying existing equipment or the deployment of new equipment for use on shared sites and will very often ([REDACTED] times a month) require work to be carried out that may [REDACTED] under the CCR process. The CCR process includes [REDACTED].<sup>36</sup>
- 4.17. BT disagrees with the CMA's provisional finding that the Merged Entity would not have the ability to limit the constraint from BT by blocking and/or delaying upgrades through the change control and change management processes. This provisional finding appears to rest on two factors:
- a. A factor that is entirely redacted from the version of the PFs available to BT, which appears in some way to relate to reporting lines and leads the CMA to consider that the Merged Entity does not have the ability to limit the constraint from BT by blocking change control requests.<sup>37</sup>
  - b. The CMA also places weight on the fact that the change management process is wholly administered by MBNL and concludes that this means that the "*Merged Entity does not have the ability to limit the constraint from BTEE via this process*".<sup>38</sup>
- 4.18. It is impossible for BT to comment in full on the first factor, but BT is not aware of [REDACTED]. In that context, BT notes that while MBNL has claimed that if there was a dispute or disengagement in the change process, MBNL would "*look to make the change decision timebound*" or follow "*the escalation route*",<sup>39</sup> BT is not aware of [REDACTED]. Instead, as BT has previously confirmed to the CMA, if a CCR request is disputed [REDACTED].<sup>40</sup> As noted above in relation to technology notification processes, the dispute resolution process involves [REDACTED]. If no agreement is reached, [REDACTED], which is unlikely to lead to an effective remedy.<sup>41</sup>
- 4.19. The CMA's provisional finding on the second factor appears not to reflect important evidence on the role that MBNL shareholders play in approving or rejecting the 'material' number (as acknowledged by the CMA) of change control requests that are made each month. As noted in paragraph 11.13(b) of the PFs, both shareholders play a role in reviewing and approving (or rejecting) proposed changes. BT submits [REDACTED] of requests per month [REDACTED].<sup>42</sup>

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<sup>36</sup> Details of CCR processes and the opportunities that they provide for frustration were submitted in BT's response to tranche 2 of the CMA's s.109 Notice of 11 July 2024, submitted on 16 July 2024.

<sup>37</sup> Paragraph 11.72 of the PFs.

<sup>38</sup> Paragraph 11.73 of the PFs.

<sup>39</sup> Paragraph 11.68 of the PFs.

<sup>40</sup> Response to Question 1 in BT's response to tranche 2 of the CMA's s.109 Notice of 11 July 2024, submitted on 16 July 2024.

<sup>41</sup> As described in more detail in response to Question 1c of BT's response of 17 May 2024 to RFI 2.

<sup>42</sup> As described in BT's response to tranche 2 of the CMA's s.109 Notice of 11 July 2024, submitted on 16 July 2024.

***Blocking and/or delaying upgrades by disengaging with or delaying BT unilateral deployments on shared sites***

- 4.20. As noted above in relation to the technology notification process, BT has provided the CMA with extensive evidence of the Merged Entity’s ability to frustrate unilateral deployments. BT’s comments set out above in this Section A on new technology notifications apply equally to the CMA’s provisional finding on unilateral deployments on shared sites more broadly.
- 4.21. BT disagrees with the CMA’s provisional finding that the Merged Entity would not have the ability to limit the constraint from BT through MBNL by engaging with or delaying BT unilateral deployments on shared sites. This provisional finding appears to rest on two factors:
- a. The core principles of the Stanley Agreement, on a similar basis to the CMA’s provisional findings on the new technology notification process.<sup>43</sup>
  - b. Various statements in relation to overtake requests. Two are redacted in the version of the PFs available to BT. The statements visible to BT are that overtake requests have been used relatively infrequently in the past and that “*while there is uncertainty over the level of overtake requests in the future, we consider that the level would need to increase significantly to lead to an impact on BTEE’s ability to exert a competitive constraint*”.<sup>44</sup>
- 4.22. On the first factor, the reasons noted above in relation to the technology notification process (which apply equally to unilateral deployments), the [REDACTED] should carry no weight against the evidence submitted to the CMA on the various mechanisms through which Three could block and/or delay BT’s new technologies or equipment.
- 4.23. It is impossible for BT meaningfully to comment on the CMA’s reasoning on the only other factor cited in support of this provisional finding given the extent of the redactions in the public version of the PFs, save that BT expects that the integration of the Parties’ networks will lead to a considerable amount of activity, leading to [REDACTED] and a significant impact on BT’s ability to compete as set out below in Section B and in previous submissions.
- 4.24. The CMA mentions an argument from the Parties that any theoretical ability on the part of Three to disrupt BT’s unilateral deployment programmes would not realistically affect its ability to compete because its share of MBNL’s capex accounts for a small proportion of BT’s overall capex envelope.<sup>45</sup> BT respectfully submits that this reflects a misunderstanding of [REDACTED] – indeed, it is because [REDACTED] that the ability for the Merged Entity to throttle its investment plans is such a concern.

***Increasing BT’s costs by reducing the extent of site sharing after 2031***

- 4.25. BT has submitted evidence of the increased network costs it expects to face as a result of reduced site sharing from 2031 were the Merger allowed to proceed. The PFs acknowledge BT’s submissions and calculations, which estimated an impact of £[REDACTED].<sup>46</sup> [REDACTED].<sup>47</sup>

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<sup>43</sup> Paragraph 11.84 of the PFs.

<sup>44</sup> Paragraph 11.85(d) of the PFs.

<sup>45</sup> Paragraph 11.81 of the PFs.

<sup>46</sup> Paragraph 11.97 of the PFs.

<sup>47</sup> In relation to paragraph 11.97 of the PFs [REDACTED].

- 4.26. However, BT disagrees with the CMA’s provisional finding that the Merged Entity would not have the ability to limit the competitive constraint posed by BT by reducing the extent of site sharing with BT after 2031 (and thereby increasing BT’s costs). In reaching this provisional finding, the CMA does not challenge BT’s assumption of reduced site sharing (which the CMA considers “reasonable”)<sup>48</sup> but places weight on the following factors:
- a. Although the CMA agrees that BT’s assumption of reduced site sharing seems reasonable, it provisionally concludes that the impact of this is unlikely to limit the competitive constraint imposed by BT on the Merged Entity from 2031.
  - b. The CMA also views BT’s estimate of increased costs as an upper bound estimate on the basis that:
    - (i) BT may have understated its bargaining power with third party infrastructure providers insofar as MNOs may use the threat of self-supply to improve their commercial terms, and the CMA considers that [REDACTED];
    - (ii) in 2031, Three’s sites will transfer to Cellnex which will have commercial incentives to provide site access to BT; and
    - (iii) BT may be able to reduce its costs after 2031 by sharing with non-MNO partners, although the PFs concede that any such non-MNO partners are unlikely to replace Three at a significant number of sites.
- 4.27. On the first factor, BT disagrees that the considerable costs arising from reduced site sharing is unlikely to limit the constraint from BT post-2031. The benefits of network sharing agreements to their participants are well understood and we do not propose to repeat them here, save to say that the extra costs incurred by BT are highly unlikely to be offset by any future mitigating network share to the extent this would be possible (which BT considers unlikely for the reasons set out below).
- 4.28. On the second factor, BT considers that:
- a. The CMA has overestimated BT’s bargaining power and ability credibly to threaten self-supply, [REDACTED].<sup>49</sup> [REDACTED].
  - b. The CMA’s suggestion that it would reduce site costs through partnering with non-MNO businesses is not, in BT’s view, realistic. [REDACTED].
  - c. Even if this was a realistic proposition, [REDACTED].

## **B. The Merged Entity’s ability to limit BT’s competitive constraint through MBNL by blocking/reducing funding or overloading sites**

### ***Blocking / reducing funding***

- 4.29. BT’s submissions have highlighted that a key mechanism for harm available to the Merged Entity will be its ability to block or reduce funding, whether or not that funding may be contractually committed by Three.<sup>50</sup> BT agrees with the CMA’s provisional finding that the

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<sup>48</sup> Paragraph 11.98 of the PFs.

<sup>49</sup> Paragraph 11.99 of the PFs, and Cellnex / CK Hutchison phase 1 decision, paragraph 191.

<sup>50</sup> As described in BT’s response to the CMA’s Issues Statement, 16 May 2024, paragraph 3.32, and supplemented with BT’s concerns on the deterrent effect (or lack thereof) of contractual clauses relating to non-compliance with funding obligations in response to Question 1 of RFI 2.

Merged Entity will have the ability to limit the constraint from BT through MBNL by blocking/reducing funding through the mechanisms of harm identified at paragraph 11.43 of the PFs.

- 4.30. However, the Merged Entity's ability to limit BT's constraint through funding is likely to be greater than the CMA has provisionally identified. In addition to the examples of mechanisms for harm mentioned in the PFs:
- a. MBNL funding often has to cater for unforeseen requirements. [REDACTED]. Post-Merger, agreeing additional funding in similar circumstances but in the absence of aligned incentives will be less likely.
  - b. BT disagrees with MBNL's submission, summarised at paragraph 11.39(c) of the PFs, that the probability of major remediation costs arising would be low. [REDACTED]; BT views this as a present and material risk.
  - c. BT disagrees with the CMA's interpretation of the MBNL agreements, as set out in paragraph 11.45 of the PFs, that one shareholder could not obstruct the funding process through the means identified by BT and summarised at paragraph 11.35 of the PFs. Those examples present a risk even where [REDACTED]. As BT has previously submitted, [REDACTED]no ability reasonably to foresee requirements that will arise regularly in the shared network nor how the nature of the network share will develop many years in advance.<sup>51</sup>

#### **Overloading sites**

- 4.31. As reflected in paragraph 11.102 of the PFs, the Merged Entity could harm BT's ability to compete through overloading MBNL sites with Vodafone traffic. BT has estimated the potential impact of this at £[REDACTED] million. BT therefore agrees with the CMA's provisional finding that the Merged Entity will be able to limit BT's competitive constraint by overloading MBNL sites.
- 4.32. However, BT believes that the Merged Entity's ability to do so is likely to be greater than the CMA has provisionally identified. In particular, one potential mitigation to such action identified by the CMA in the PFs is the possibility for BT to bring forward site upgrades. However, [REDACTED].<sup>52</sup>

### **C. The Merged Entity's incentives to limit BT's competitive constraint through MBNL by blocking/reducing funding or overloading sites**

#### **Blocking / reducing funding**

- 4.33. BT has explained in previous submissions that the Merged Entity will have drastically reduced incentives to invest in MBNL and will be well-placed to benefit from a less effective MBNL leading to a degraded BT mobile offer at the retail level.<sup>53</sup> BT disagrees with the CMA's provisional finding that the Merged Entity will lack the incentive to limit the constraint from BT through MBNL by blocking/reducing funding. In reaching this provisional finding, the CMA notes two factors in particular:

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<sup>51</sup> As noted in BT's response to Question 4 of RFI 3 on 30 July 2024.

<sup>52</sup> See in particular [REDACTED].

<sup>53</sup> BT's Response to the CMA's Statement Issues, 16 May 2024, paragraph 3.43.



- a. In order to materially benefit from blocking and/or limiting funding to MBNL, the Merged Entity would have to risk incurring significant financial costs by breaching contractual obligations.
  - b. The fact that the Merged Entity will continue to use Three sites in the short and longer-term and would require BT’s consent to secure rights for VMO2 to access Three sites would act as a further disincentive.<sup>54</sup>
- 4.34. On the first factor, the PFs overestimate the financial costs to the Merged Entity of blocking and/or limiting funding. In particular:
- a. The Merged Entity will be able to block/limit funding of MBNL without breaching its contractual obligations. The PFs concede this point but dismiss its relevance because of an incorrect assumption that it is unlikely that there are significant additional funding requirements in the future which are not captured within existing and planned Business Plans.<sup>55</sup> As noted above in relation to the Merged Entity’s *ability* to cause harm through blocking or limiting funding, MBNL funding often has to cater for unforeseen requirements.
  - b. The CMA’s provisional findings on this point also wrongly place weight on an interpretation of a statement in a BT internal document that is not supported when read in context. Specifically, the PFs highlight a BT internal document which mentions that the “*default assumption*” would be that the Merged Entity [redacted] until 2031.<sup>56</sup> The CMA notes, at paragraph 11.124 of the PFs that it “*place[s] weight on this and consider[s] that it is consistent with the Merged Entity having the incentive to fulfil its contractual obligations*”. However, taken in context, it is clear that the “*default assumption*” referred to in this document is not an assumption that the Merged Entity [redacted]. The section of the presentation from which the quote is drawn sets out [redacted].<sup>57</sup>
  - c. The PFs also overstate the likelihood of contractual remedies acting as a disincentive on the Merged Entity to breaching any MBNL funding commitments. The CMA notes that contractual breach could lead to enforcement action that would likely be costly, time consuming and risky for the Merged Entity as well as giving rise to possible reputational harm.<sup>58</sup> This overstates the effectiveness of the remedies available to BT in relation to funding. BT has explained the shortcomings of these remedies in previous submissions, including that they are not practicable remedies where the parties’ incentives are not aligned and would not serve as a deterrent.<sup>59</sup>
- 4.35. On the second factor, which appears to draw on the CMAs provisional finding at paragraph 11.127 of the PFs that the Merged Entity plans to maintain a material number of shared sites and that “*this means that the quality of the shared sites will have an impact on the Merged Entity’s own network quality both in the short-term and longer-term*”, BT notes that this is far from certain. Indeed, the PFs rightly find the Merged Entity’s plans “*may not be the course of action the Merged Entity would necessarily adopt in practice*”. Paragraph

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<sup>54</sup> Paragraph 11.133 of the PFs.

<sup>55</sup> Paragraph 11.122(a) of the PFs.

<sup>56</sup> [redacted].

<sup>57</sup> As submitted to the CMA most recently in BT’s response to RFI 3 on 2 August 2024.

<sup>58</sup> Paragraph 11.120 of the PFs.

<sup>59</sup> See in particular BT’s response of 17 May 2024 to Question 1 of RFI 2.

11.127 of the PFs also appears to be inconsistent with the CMA’s provisional findings on site overload incentives (at paragraph 11.146), namely that the Merged Entity’s plans to *exit* a number of MBNL sites “*limits the scope for overload and therefore the competitive benefits*”.

- 4.36. BT also disagrees with the CMA’s provisional finding at paragraph 11.125 of the PFs that Three’s obligations to Cellnex (and cost increases from, e.g., non-funding of NTQ sites on a one-to-one basis) would act as a disincentive to block and/or limit funding to MBNL. In particular, there are enough sites in the shared network for Three to meet its Cellnex obligations ([REDACTED] sites) even with a high NTQ run-rate and, as the CMA also notes, the Merged Entity may be able to disrupt MBNL while still easily meeting its obligations to deliver sites to Cellnex.

#### **Overloading sites**

- 4.37. As noted above, BT has explained in previous submissions that the Merged Entity will be well-placed to benefit from a less effective MBNL leading to a degraded BT mobile offer. BT disagrees with the CMA’s provisional finding that the Merged Entity will lack the incentive to limit the constraint from BT through MBNL by overloading sites. In reaching this provisional finding, the CMA states that the likely competitive benefits to the Merged Entity are unlikely to be material<sup>60</sup> on the basis of three factors:

- a. The Merged Entity’s plans to exit MBNL sites limit the scope for overload and therefore the competitive benefits.
- b. BT estimated that overloading MBNL sites would amount to an impact on BT’s total network spend of c. [REDACTED].
- c. Although the Merged Entity plans to continue using Three’s sites, this may not be the course of action that the Merged Entity follows in practice, which would further limit the scope for overload and therefore competitive benefits.<sup>61</sup>

- 4.38. These factors largely rest on assumptions about the Merged Entity’s exit plans that are identified as uncertain and so not an adequate basis to dismiss the extensive evidence provided by BT in relation to the Merged Entity’s incentives to limit BT’s ability to compete. They are also in tension with the CMA’s provisional finding in relation to the Merged Entity’s incentives to block/reduce funding, which assumes that the Merged Entity will maintain a material number of MBNL shared sites.

#### **D. Beacon 4.1 exacerbates concerns relating to MBNL and network sharing**

- 4.39. The only reference to Beacon 4.1 in the published version of Chapter 11 of the PFs comes at paragraph 11.123, discussing the Merged Entity’s incentives to block and/or limit the funding of MBNL which states that “*We further note that, as set out in Chapter 10, under Beacon 4.1 [REDACTED]. [REDACTED]. We consider that this would add to the financial cost of such a mechanism.*” BT is unable to follow the CMA’s reasoning on this point given the extent of the redactions, and in any event does not see any reason as to why Beacon 4.1 might reduce the Merged Entity’s incentives to block and/or limit the funding of MBNL.

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<sup>60</sup> Paragraph 11.147 of the PFs.

<sup>61</sup> Paragraph 11.146 of the PFs.

- 4.40. In any event, Beacon 4.1's relevance to assessing MBNL-related concerns extends well beyond this. As explained in BT's previous submissions, it significantly exacerbates those concerns rather than mitigating them.<sup>62</sup>
- 4.41. One aspect of this is that it strengthens the Merged Entity's incentives to frustrate MBNL. By including a commitment on behalf of Vodafone to enhance and strengthen CTIL and Beacon, the Agreement further reduces the incentives for Three to continue contributing to the effective operation of MBNL going forward. It also creates a stronger incentive for the Merged Entity to use its participation in MBNL to disrupt the effective functioning of that network sharing arrangement so as to weaken the competitive constraint imposed by BT. This is because an enhanced and strengthened Beacon reduces the cost to the Parties of an unworkable MBNL.<sup>63</sup> The CMA should ensure that its analysis of the Merged Entity's incentives fully takes these effects into account.
- 4.42. There is also a broader point, relating to the longer-term market structure created by the Beacon 4.1 agreement. Absent the Merger, as noted in BT's previous submissions, [§].<sup>64</sup> There would therefore have continued to be two relatively balanced mobile networks, with Beacon facing strong competition from MBNL.
- 4.43. In contrast, following the Merger and in light of the deepening and extension of Beacon resulting from Beacon 4.1, there will be a situation in which three of the four pre-Merger MNOs participate in an intensive mobile network sharing agreement, while BT is the only MNO outside of the agreement, and may no longer benefit from the economies of scale and scope arising from network sharing. This will create a fundamental competitive imbalance at the network level that will harm competition and consumers in the long term. It is not apparent that the CMA has considered this overall imbalance in its assessment and for the reasons set out in paragraph 4.27 above, BT disagrees that the 'outside options' briefly outlined by the CMA in PFs (including network sharing with non-MNO providers) are in fact commercially viable options. While BT recognises there may be uncertainty as to how exactly it would play out over the longer term, this should not prevent the CMA from doing so. The CMA's guidance recognises that uncertainty is not determinative and does not, by itself, reduce the likelihood that a merger could give rise to competition concerns;<sup>65</sup> and that the CMA is not required to make precise predictions about the future.<sup>66</sup>
- 4.44. This market structure also calls into question whether the Beacon arrangement is pro-competitive or will rather harm competition and consumers going forwards. As BT has previously submitted,<sup>67</sup> the nature of the extended Beacon agreement, and the market context in which it will occur, indicate an increased likelihood that the network sharing agreement will result in competitive harm compared with the position when the Office of Fair Trading (**OFT**) considered Beacon in 2012:
- a. In its previous assessment of Beacon, the OFT considered as a relevant metric the Parties' combined share of sites capable of being shared with third parties which amounted to 25-35%. On this basis, the OFT concluded that the agreement gave

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<sup>62</sup> BT submission on VMO2 announcement, 8 August 2024.

<sup>63</sup> Post-Merger, the Merged Entity [§].

<sup>64</sup> BT's Response to the CMA's Issues Statement, 16 May 2024, Section 3, Part 3, paragraph 3.7.

<sup>65</sup> CMA 129, Merger Assessment Guidelines (**CMA129**), paragraph 2.10.

<sup>66</sup> CMA 129, paragraph 2.21.

<sup>67</sup> BT submission on VMO2 announcement, 8 August 2024.

rise to combined shares of supply that were “insufficient to give the OFT cause for concern”. However, Beacon will hold a substantial share of supply on this basis under the extended Agreement. Accordingly, there is a material prospect that the extended Beacon agreement would be found likely to give rise to unilateral effects on this basis.

- b. The Beacon assessment was undertaken in the context of two relatively balanced mobile networks, in which Beacon would face strong competition from MBNL. This is no longer the case in the context of the Merger and Beacon 4.1. As set out above, this means that the incentives to invest in Beacon and pass-on any efficiencies arising from the network sharing arrangement are likely to be also lower post-Merger and with Beacon 4.1.
- 4.45. Again, it appears that the CMA has not considered this broader issue in reaching its PFs. BT would invite the CMA to do so now.

## **Section 5. The Merger will not give rise to REEs**

- 5.1. The PFs indicate that the CMA currently considers that the Merger will give rise to a number of potential efficiencies that, in turn, will enhance rivalry in the retail market, albeit not to a sufficient extent to offset the provisional SLCs and benefit consumers.<sup>68</sup>
- 5.2. BT understands in particular that the CMA provisionally considers that the Merger will give rise to some increase in network quality (including by way of increased capacity). BT also understands the CMA’s provisional view is that, whilst these effects will not directly serve to reduce prices (and/or offset the impetus towards higher prices generated by the Merger),<sup>69</sup> they 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”.<sup>70</sup> That is, they would enhance rivalry more generally within the industry with a particular focus on investments in quality.
- 5.3. BT’s views on these conclusions are set out below, following the framework set out by the CMA for the assessment of rivalry enhancing efficiencies in the PFs.<sup>71</sup> That is, BT first comments on whether the efficiencies will be rivalry enhancing. It then comments on whether the efficiencies will be timely, likely and sufficient to offset the SLC.

### **A. REEs Criteria 1: the claimed efficiencies will not enhance rivalry in relation to the core parameters of competition impacted by the Merger**

- 5.4. BT understands that the CMA has provisionally found that the efficiencies claimed by the Parties would be rivalry enhancing in the sense that they may increase the quality (and potentially the capacity of) the Merged Entity’s network and that this will generate a stronger incentive for other rivals to compete harder post-Merger (for example by investing in their own networks).

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<sup>68</sup> Paragraphs 14.237 and 14.247 of the PFs.

<sup>69</sup> Paragraphs 14.212 to 14.214 of the PFs.

<sup>70</sup> Paragraph 61 of the Summary to the PFs.

<sup>71</sup> Paragraph 14.2 of the PFs.

- 5.5. BT does not agree with this.
- 5.6. **First**, the CMA has confirmed that price is the most important parameter of competition and that many consumers would not be willing to pay more for higher network quality. The CMA has also confirmed that claimed efficiencies will have no impact on pricing and that, as a result, the efficiencies in question cannot offset effectively the scale of harms it has identified.<sup>72</sup> BT agrees with these findings.
- 5.7. Notably, the CMA has confirmed (with respect to the Parties' arguments that increases in capacity will reduce the incremental cost of serving customers and hence spur more aggressive price competition) that prices are not set by reference to capacity in this market. The CMA notes in particular that it does "*not see evidence of a direct link between retail prices and capacity or network costs, or that longer run cost savings would be directly passed onto retail customers. Conversely, we see strong evidence that prices are set relative to competitors*".<sup>73</sup> BT agrees that an increase in capacity is unlikely to offset the impetus towards price increases resulting from the Merger for these reasons, in the short- and in the long-run.
- 5.8. Moreover, BT notes again that Ofcom has highlighted concerns that a player with significant excess spectrum and capacity relative to rivals (i.e., asymmetric capacity) may wield that capacity strategically to deter other players from making their own investments in capacity.<sup>74</sup> BT has noted in its previous submissions that the Merged Entity will hold substantially greater capacity than its rivals and, as noted in Section 3.B above, in BT's view the CMA has not undertaken a sufficiently robust analysis to dismiss the competition concerns that will arise as a result of that asymmetry.<sup>75</sup> BT notes that this will further serve to reduce the probability that the Merged Entity would use spare capacity to drive down prices. Rather, its strategic incentives are likely to be best served by restricting capacity strategically to maintain higher prices post-Merger.
- 5.9. **Second**, with regard to the claim that increases in network quality or capacity would lead to a competitive response [REDACTED] (i.e., that the claimed efficiencies would be rivalry enhancing in the sense that they would strengthen pre-existing competition on quality), BT strongly disagrees.
- 5.10. BT has noted in its previous submissions, [REDACTED]. It is therefore incorrect to suggest that the Merger would [REDACTED]; instead the Merger is likely to lead to [REDACTED] than would be the case if the Merger did not proceed.
- 5.11. BT's submissions have noted that the key drivers of these outcomes are as follows. Today, [REDACTED]. However, after the Merger [REDACTED].<sup>76</sup>
- 5.12. In other words, post-Merger, the prospect of [REDACTED].

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<sup>72</sup> Paragraphs 14.212 to 14.214 of the PFs.

<sup>73</sup> Paragraph 14.151 of the PFs.

<sup>74</sup> BT's Response to the CMA's Issues Statement, 16 May 2024, paragraph 1.6.

<sup>75</sup> BT Submission on the VMO2 Agreement, paragraphs 33 to 35.

<sup>76</sup> BT's Response to the CMA's Issues Statement, 16 May 2024, paragraphs 2.26 and 2.29.

- 5.13. In considering this point, it is important to understand the [REDACTED], and how sharply this contrasts with the Merged Entity’s position. This is because [REDACTED](as the Merged Entity would be able to do, and as recognised in the PFs).<sup>77</sup>
- a. Based on publicly available information, [REDACTED].
- b. [REDACTED].
- 5.14. As such, [REDACTED]. Without this, the Parties’ claimed efficiencies simply cannot be rivalry-enhancing in the way they suggest, such that customers would benefit from lower incremental costs and/or improved network quality vis a vis the counterfactual.
- 5.15. In contrast, [REDACTED].
- 5.16. BT notes the discussion of its internal documents in Appendix C to the PFs and the CMA’s apparent provisional finding that these documents suggest that [REDACTED](although the CMA’s reasoning on this point remains unclear as a result of redactions to the version of the PFs made available to BT). In particular, the CMA notes that “we provisionally consider that most of BTEE’s internal documents indicate that BTEE considers that if the Merged Entity were to challenge [REDACTED]. BTEE would consider [REDACTED], but we provisionally consider that the balance of the evidence points to it responding to any such challenge [REDACTED]”.<sup>78</sup>
- 5.17. If this is the CMA’s view, BT does not understand how this can be sustained. As noted above, BT has confirmed, and evidenced, that the Merger will likely result in [REDACTED]. BT therefore considers that the CMA should reconsider its provisional findings in this regard.
- 5.18. Specifically, the CMA has not interpreted the documents provided by BT in a fair and accurate way. This manifests in two main ways:
- a. Firstly, BT documents from mid-2023 onward indicate that [REDACTED]. However, the CMA incorrectly interprets this [REDACTED]. The CMA specifically misinterprets BT documents in the PF Appendix C paragraphs 47(a), (b) and (c).
- (i) In paragraph 47(a) the CMA states “A [REDACTED] states that [REDACTED] the spectrum asymmetry from a potential VF/3 merger’. [...] The document also sets out [REDACTED]”.
- (ii) In paragraph 47(b) the CMA states “An internal document dated [REDACTED]states that ‘For BT, [REDACTED]. The document also states that there is [REDACTED]”.
- (iii) In paragraph 47(c) the CMA states: “[REDACTED] also set out BT Group’s [REDACTED]”.
- However, there is no indication in any of these documents that [REDACTED], and indeed subsequent documents indicate that [REDACTED] – see e.g., BT documents referred to by the CMA in Appendix C paragraph 47(e) and 48.
- b. Secondly, [REDACTED]. This becomes clear when considering internal documents that [REDACTED].<sup>79</sup>
- 5.19. Should the Merger go ahead in its proposed form, for the reasons set out above the resulting unprecedented capacity asymmetry [REDACTED]. Moreover, this impact will be

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<sup>77</sup> Paragraph 14.143 of the PFs.

<sup>78</sup> Paragraph 14.202 of the PFs.

<sup>79</sup> [REDACTED], see also BT’s response to RFI2 P2 Q8.

compounded by the adverse effects arising from the participation of the Merged Entity in MBNL (as discussed in more detail above).

- 5.20. Finally, BT notes that, [X], this would not effectively offset the adverse impacts on consumers in the form of higher prices. [X]. Therefore, there is no clear prospect of [X] offsetting the harms caused by higher prices that will be felt by the large number of price sensitive customers that exist today.

**B. REEs Criteria 2, 3 and 4: the claimed efficiencies would not be timely, likely and/or sufficient to offset the provisional SLCs identified by the CMA**

- 5.21. Turning to the question of whether the efficiencies identified would be timely, likely and sufficient to offset the identified provisional SLCs, BT considers that there is strong evidence that they would not.
- 5.22. First, the CMA notes that it has “*some doubts as to whether the full JNP would – if delivered – be sufficient to offset the adverse effects on competition in the retail market provisionally identified*”.<sup>80</sup>
- 5.23. BT agrees with this. BT notes in this regard that the CMA has identified a provisional SLC, in the form of higher prices, of unprecedented size that will last many years (as noted in Section 2 above). In this context, only very substantial efficiencies would offset those price effects (i.e., serve to reduce prices post-Merger). No such efficiencies are posited by the CMA in the PFs and indeed the CMA has specifically ruled out that the efficiencies claimed by the Parties will mitigate upward pricing pressure post-Merger. For these reasons BT does not consider that the claimed efficiencies can be considered sufficient to offset the identified provisional SLCs.
- 5.24. BT further notes that, contrary to the CMA’s provisional views, any claimed improvements in quality are [X].
- 5.25. In terms of likelihood, the CMA notes that “*on the basis of the evidence we have seen thus far, that the Parties are not likely to have the incentive to deliver the full JBP, and therefore the quantum of any REEs is likely to be less than claimed by the Parties*”.<sup>81</sup> That is, BT understands that the CMA is sceptical that many of the claimed efficiencies will arise in practice. BT has no reason to disagree with this view.
- 5.26. However, BT also understands that the CMA does consider that certain efficiencies are likely to be delivered in a timely manner – namely the so-called “*Day 1*” efficiencies.<sup>82</sup>
- 5.27. BT notes that these Day 1 efficiencies will, however, clearly not be sufficient to offset the provisional SLCs identified by the CMA. First, they will affect network quality, and not price and therefore not serve to mitigate the consumer harm identified by the CMA. Second, the CMA has itself confirmed that these benefits are of limited value. At most the posited benefits would result in an improvement in coverage in rural areas where there is more limited traffic and some alleviation of capacity constraints in relation to 4G services.<sup>83</sup>

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<sup>80</sup> Paragraph 69 of the Summary to the PFs.

<sup>81</sup> Paragraph 14.198 of the PFs.

<sup>82</sup> Paragraphs 14.72 and 14.75 of the PFs.

<sup>83</sup> Paragraph 14.72 of the PFs.

- 5.28. BT also notes that the CMA’s assessment of the so-called “Day 1” efficiencies appears inconsistent with its assessment of the competition concerns relating to low-band spectrum constraints identified by BT. In particular, the CMA appears to accept the Merging Parties’ argument that the addition of VUK’s mid-band 1800MHz spectrum to 3UK’s sites would promote competition by “*alleviating 4G congestion in areas where 3UK is currently experiencing mid-band congestion*”.<sup>84</sup> In other words, the CMA appears to find that a constraint on 3UK’s mid-band spectrum pre-Merger has created network congestion that has limited its ability to compete effectively through the provision of 4G services. Similarly, as BT has explained, [X].<sup>85</sup> It is not clear to BT why the CMA finds that mid-spectrum capacity constraints limit Three’s ability to provide effective 4G coverage to customers, and that alleviating those constraints will improve its ability to compete effectively, [X].
- 5.29. In short, BT agrees with the CMA in many aspects of its assessment of efficiencies – i.e., that they would not be delivered with the requisite level of certainty and that, where efficiencies would be delivered, they would clearly not offset the SLCs the CMA has provisionally identified.

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<sup>84</sup> Paragraph G.158 of Appendix G to the PFs.

<sup>85</sup> Paragraph 8.291 of the PFs.