



Vodafone response
July 2024

Vodafone welcomes the opportunity to comment on the draft guidance consultations.

Digital markets competition regime guidance

1. **Designation criteria:** It would be helpful if the CMA guidance could provide more detail with some indicative examples of services in/out of scope. The guidance tends to confirm that traditional telecoms service (Internet Access Service) will not be within scope of the DMU powers as they would not constitute a “digital activity” but it would be good to have confirmation on this point. Although the UK and the EU have different regimes their objectives align. There are cost and operating benefits for companies (SMS and the companies in the ecosystem that the regulation aims to assist) should regulators be able to achieve reasonably close alignment between the regimes.
2. **Conduct Requirements (CRs):** As part of the CMA’s consultation for the CRs, the CMA states that it will consult with a wide range of stakeholders and will also publish details of the consultation on its website. It would be useful for the CMA to provide further detail in the guidelines to address the following:
 - We expect that the CMA will streamline into the consultation process any necessary engagement with other relevant regulators as part of the one-step approach e.g. detailing in the remedy an agreed position from the ICO in the event that user privacy may be called into question.
 - Where the CMA has engaged or consulted with a relevant regulator in respect of conduct requirements, will the feedback received from the relevant regulator be made public in the same manner as other third-party consultation feedback will be?
 - Is the onus on third parties to notice the consultation on the CMA’s website and engage with the CMA, or will the CMA proactively reach out to relevant third parties it considers may be affected by the CRs to seek their views?
 - How long does the CMA anticipate the consultation period lasting? How long will third parties typically have to respond to invitations to comments?
3. **PCI:** 4.29 (c) reads as follows *“requiring the SMS firm to ensure that its products, applications and services are interoperable with those of other firms. This may include, for example, requiring that the SMS firm creates a new product or functionality, exposes some of its Application Programming Interfaces (APIs) or builds new APIs;”*. The CMA should also have the scope to require the removal of functionality, or alteration of products, functionality and APIs.
4. **PCI:** 4.29 (d) reads *“requiring the SMS firm to be more transparent in its operations, including by providing customers and/or consumers with information to help them make informed choices and thereby increase competitive pressure on the SMS firm”*. Our expectation is that the CMA would set out when in the order journey information about choices should occur, and the level of detail to be presented to users, including the consequences for other services a user may purchase or use that are impacted by choices offered by the SMS service provider. For example operating system based virtual private relay services selected from choice screen in the



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operating system prevent age control settings, elected by the user, in the connectivity layer from working. Users need to be aware that this will occur, but this information isn't apparent until several clicks later outside of the operating system on the internet.

5. **PCI:** paragraphs 4.55-4.56 – Vodafone repeats its submission at point 2 above in respect of the consultation for proposed CRs. The same questions arise in respect of the consultation on the proposed PCI decision and Vodafone would welcome further clarification in this section.
6. **Commitments:** Vodafone welcomes the CMA's confirmation at paragraph 4.86 that any acceptable commitment must fully and clearly address all or the relevant part of the AEC without the need for further investigation and is likely to be more extensive than any PCO imposed at the end of a PCI investigation. Vodafone also welcomes confirmation that the acceptance of a commitment does not prevent the CMA from opening an investigation where it believes there has been a change of circumstances or suspects the terms of the commitment are not being complied with. However, Vodafone consider it would be useful for the CMA to clarify in this section of the guidance what ongoing monitoring takes place in respect of commitments and, in particular, the anticipated frequency of compliance reports detailed in section 6.
7. **Commercial contracts:** Consideration needs to be given to commercial contracts that are in place prior to regulation coming into force and in the future when regulation is changed/removed. Market power can be reflected in commercial contracts. Contracts that are in place should not simply roll on. The CMA should seek to ensure that, when imposing CRs, it includes an obligation on the SMS firm to undertake due diligence of its existing contracts to ensure that they are compliant with the CRs within a certain timeframe of imposition of the CR.
8. **Remedy lifecycle:** When making decisions consideration should be given to product lifecycle management including each party's responsibilities, when the time comes, with respect to the required communication/notification, parallel running and how costs such as parallel running, migration, service termination are expected to be borne. There are many lessons to be learned with respect to the approach to end of life pricing for services and which have a sticky user base. We would advocate for advance notification of pricing, terms and conditions for the entire end of life period to enable optimal planning. For example, in telecoms, one service, with complicated migration planning has had its pricing increased by 45% across the board with 3 months' notice. In this regard we support the proposals where an obligation is revoked (2.102/3) "*The SMS decision notice must also include: (a) any provision that the CMA has decided to make in respect of existing obligations; Where the CMA decides, as a result of a further SMS investigation, to revoke an SMS designation, the CMA may make transitional, transitory or saving provision in respect of any existing obligations imposed on an SMS firm*".
9. **Countervailing benefits exemption (CBE)** – Vodafone welcomes confirmation from the CMA that Condition 3 (benefits could not be realised without the conduct) is akin to the 'indispensability' test in section 9(1)(b) of the Competition Act 1998 and agrees that this is an appropriate assessment to ensure that there is no other reasonable or practical way to achieve the benefits which have a less anti-competitive effect.
10. **Administration:** we support the CMA's approach to confidentiality set out at paragraphs 5.85 to 5.91. However, the CMA should confirm in paragraph 7.26 that the redaction process for confidential information prior to disclosure / publication of evidence includes engagement with



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the particular third party, giving the third party the opportunity to put forward arguments for redacting its confidential information before disclosure.

11. **Retrospection of decisions.** For certainty and confidence in the regime we support the requirement of parties to comply with the rules in force at a given time. *"The CMA will not give such consent retrospectively to approve actions that have already occurred and may have been in breach of an EO; nor does the granting of consent preclude the CMA from taking action against any steps in breach of an EO prior to consent having been granted."*
12. **Complaints can be raised by businesses and consumers:** To the extent that the CMA is able, we consider it would be useful for template forms to be provided or more guidance to users to be given in respect of the types of information the CMA would require to consider a complaint.

Further, paragraph 6.15 onwards details the ability for third parties to make a complaint, which could lead to launch of an investigation. Noting the CMA's transparency intentions at paragraph 9.16 onwards, where an investigation follows from a complaint, it would be useful for the CMA to clarify whether the complainant is likely to be provided with information beyond that which is made public about the investigation in order to be kept fully informed of the status of the investigation and in recognition of the special status as complainant.



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Guidance on the mergers reporting requirements for SMS firms

Vodafone notes the CMA's guidance on when a firm is required to submit a report to the CMA. However, Vodafone considers that further guidance should be given in respect of section 64 of the DMCC Act and the interpretation of "unconditionally obliged". Further clarification could be given in the guidance on the meaning of unconditionally obliged in line with the explanatory notes and commentary on the Bill during the House of Lords readings. Specifically, we note the following, which we consider useful to include in the guidance. [House of Lords: \(parliament.uk\)](https://www.parliament.uk)

Clause 64: Timing of a reportable event

336 This clause provides that in certain cases a reportable event is considered to take place at the point there is an unconditional obligation to proceed with the event. That is, where a reportable event results from an agreement for a designated undertaking or group member to acquire shares or voting rights, or to form a joint venture vehicle, the event is to be treated as taking place for the purposes of the duty to report when the undertaking or group member becomes unconditionally obliged to acquire the shares or voting rights, or to form the joint venture vehicle. Unconditionally obliged means either that there are no conditions that need to be met for the agreement to be executed or that any such conditions have been met. This is to ensure that a reportable event that amounts to a merger is reported before it is treated as taking place under the merger control regime (see section 27 of the Enterprise Act 2002).

¹ [House of Lords: \(parliament.uk\)](https://www.parliament.uk)