Together we can

CMA Merger Remedies Review – Call for Evidence

Response from Vodafone

Vodafone welcomes the opportunity to respond to the CMA's Call for Evidence in respect of its merger remedies review.

This year will see the beginnings of a transformation in the UK telecommunications market as we progress our merger with Three. We will build the UK's biggest and best network and unlock investment that will propel the UK's telecommunications infrastructure to the forefront of European connectivity, benefitting over 50 million UK customers, through significantly better quality, greater reliability and enhanced capacity. The market context continues to evolve around us as we do: technology continues to break new ground, and there is ever-growing focus from government on regulated sectors' contribution to economic growth.

We therefore welcome the CMA's recent commitment to rapid, meaningful change based on the 4Ps (pace, predictability, proportionality and process), in particular the focus on proportionality and striking the right balance between different types of remedies.

Remedy Theme 1: CMA's Approach to Remedies

Approach to phase 1 remedies

Q A.1: Should the CMA's current guidance approach of requiring phase 1 remedies to be 'clear-cut' and 'capable of ready implementation' be revisited, within the confines of the applicable legislative framework and timing constraints inherent in the phase 1 UILs process? If so, what standard should the CMA apply?

The CMA's current guidance approach for phase 1 remedies to be "*clear-cut*" and "*capable of ready implementation*" should be reviewed, as this strict standard can result in costly, resource-intensive, and time-consuming phase 2 reviews. Given the overarching principles of the Mergers Charter - the 4Ps (pace, predictability, proportionality and process) - and the drive to foster a competitive yet conducive regulatory environment for businesses, there are clear benefits to adapting the requirement for phase 1 remedies. The CMA's current interpretation in its guidance on effectiveness should not exclude undertakings in lieu of reference (**UILs**) that also have the ability to "*mitigate*" competition concerns identified. Presently, the CMA considers that at phase 1 it is only appropriate for it to "*remedy*" or "*prevent*" competition concerns rather than mitigate concerns. However, section 73(2) of the Enterprise Act 2002 (**EA02**) provides the CMA with the ability to accept UILs "*for the purpose of remedying, mitigating, or preventing*" competition concerns. Therefore, the CMA should give further attention to how mitigation can be incorporated at phase 1, as this would offer more flexibility on the UILs proposed and allow for a mix of structural and behavioural remedies to be considered earlier.

Q A.2: Is there more the CMA can do within its current legal framework to create opportunities for more complex remedies in phase 1?

Vodafone welcomes a more holistic approach by the CMA in assessing UILs in phase 1 through further utilisation of the pre-notification period. The willingness to consider more complex remedies typically emerge in phase 2, partly because the CMA acknowledges that it "*…has increased time available in the context of a Phase 2 merger investigation to consider more detailed remedies*".[1] Under the current framework, merging parties can propose potential UILs to the CMA case team at any point during the phase 1 investigation or during pre-notification. Additionally, paragraphs 4.3 and 4.4 of the CMA Merger Remedies Guidance (**CMA87**) emphasises how merging parties can navigate UILs in advance of the SLC decision. However, there is an opportunity for the CMA to adopt a more proactive stance in relation to complex remedies prior to the commencement of

[1] CMA87, paragraph 3.31.

phase 1. For instance, conducting market tests during the pre-notification period to ensure proposed remedies are practical and effective, which can be done as part of the ordinary information gathering without requiring the case team to inform the parties of the CMA's decision or direction of thinking prior to the decision. By allowing earlier engagement on remedies, the CMA would improve the efficiency of the merger review process and streamline phase 1, whilst creating a foundation to fast-track cases that are likely to require further investigation. This could have the effect of reducing the time and resources required for businesses and the CMA to navigate the phase 1 process.

Effectiveness and Proportionality

Q B.1: Should the CMA's current approach to assessing the effectiveness and proportionality of remedies be revisited within the confines of the legislative framework? If so, what factors should the CMA consider?

The CMA recognises in its Call for Evidence (**CFE**) that the current legislative framework[2] has informed its current focus of only allowing remedies with a "*high degree of certainty*" of being effective.[3] Vodafone considers that this high standard limits the CMA's consideration of innovative, unique or novel remedies. The CMA must be broad-minded and flexible when assessing the effectiveness and proportionality of remedies. The legislative framework and CMA87 should therefore be amended to allow the CMA to consider a range of possible remedies throughout its assessment.

In a similar vein, the CMA could also be more open to considering remedies that sufficiently mitigate SLCs and their effects even if the remedies may not ultimately remedy or prevent an SLC in its entirety in all circumstances. Indeed, the current legislative framework does refer to "*mitigating*" SLCs. To support this approach, the CMA could consider revisiting the requirement to have regard to achieving "*as comprehensive a solution as is reasonable and practicable*" by removing reference to "*comprehensive*". This would allow for more nuanced solutions to be considered. Clearly this will depend on the circumstances of each case. This approach may be appropriate, for example, in more complex cases where a comprehensive solution is impractical or overly burdensome compared to the competitive harm or in dynamic markets where stringent remedies might stifle economic growth. In these scenarios, mitigating remedies can provide flexibility whilst still preserving competitive conditions, and encourage innovation and investment.

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[2] The CMA must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable, for the purpose of remedying, preventing or mitigating the SLC and any adverse effects resulting from it: EA02, sections 35, 36, 73.

[3] CMA87, paragraph 3.5(d).

Vodafone also considers that the CMA must take into account any regulatory overlap (i.e., CMA / Ofcom) when considering the proportionality of a remedy. In the case of telecommunications, remedies have the effect of acting as additional regulation on an already regulated sector and are asymmetrically applied to the merger parties only in that sector. Vodafone considers that caution is needed to (i) avoid duplication and (ii) avoid market distortions. In this regard, the CMA should balance the need to ensure remedies are effective against imposing 'gold-plated' remedies that are overly onerous and costly. Placing additional obligations (e.g., additional public reporting obligations) on certain operators (the merger parties) could have sector distorting effects if they reveal details of future strategy (e.g., site and spectrum targets).

Q B.2: Has the CMA's approach to effectiveness precluded potentially effective remedies being considered as part of its proportionality assessment?

Vodafone considers that the CMA's approach to effectiveness has the potential to preclude potentially effective remedies being considered as part of its proportionality assessment. In this regard, Vodafone refers to its response to B.1. As discussed above, the CMA's focus on remedies with a "*high degree of certainty*" of effectiveness, and historical preference for remedies that fully solve for SLCs, mean that the remedies which are ultimately considered as a part of its proportionality assessment are limited to those which meet the existing effectiveness thresholds. This approach therefore has the potential to exclude more innovative, dynamic or flexible remedies from the CMA's proportionality assessment.

CMA's approach to behavioural remedies

Q C.1: Is the current distinction that the CMA draws in its Merger Remedies Guidance between behavioural and structural remedies helpful and meaningful? If not, how should the CMA classify different types of remedies?

While the distinction between behavioural and structural remedies in CMA87 is helpful, it is not binary. The construction of remedies in response to competition concerns is more nuanced than currently presented – "behavioural" remedies such as access obligations are structural in their effect. The two categories should not exist in isolation. As acknowledged in the CFE, there is a diverse group of remedies with varied characteristics. Therefore, the CMA's classification should be more flexible to capture the symbiotic relationship between the two categories. Further emphasis should be given to how each category can complement the other and ultimately address complex competition issues.

Q C.2: In what circumstances are behavioural remedies likely to be most appropriate?

In addition to the circumstances outlined in paragraph 3.48 of CMA87, behavioural remedies are likely to be most appropriate when the merger involves a market where structural remedies might not effectively address the competition concerns due to complex market dynamics and where behavioural remedies can have a structural effect. Also, to preserve pro-competitive efficiencies and benefits that might be lost with structural remedies.

Q C.3: How should the CMA assess the likely effectiveness of behavioural remedies? What types of evidence should the CMA obtain to assess this (and from whom)?

Assessment of the likely effectiveness of behavioural remedies

Vodafone considers that the following factors should be taken into account by the CMA when assessing the likely effectiveness of behavioural remedies:

- Impact on market dynamics;
- Whether the remedy is 'fit-for-purpose' - i.e., whether it adequately addresses competition concerns;
- Whether the remedy can be implemented and monitored sufficiently; and
- Whether there is market oversight and regulation by other regulators (e.g., sector regulators).

Types of evidence

Vodafone considers that the following types of evidence could be relied on to assess the effectiveness of behavioural remedies:

- monitoring data and compliance plans (additionally, as noted in response to L.1 below, feedback could also be obtained from monitoring trustees during remedy assessment to help inform the CMA on viability of the proposed remedy package);
- engaging stakeholders such as competitors, sector specific regulators, customers, and suppliers early on to obtain feedback on the proposed remedy package; and
- economic and market analysis.

Q C.4: To what extent could the CMA's new enforcement powers under the DMCC Act

2024 to fine merger parties for breaches of their remedy obligations under remedy undertakings and orders influence the types of remedies the CMA accepts at phase 1 or imposes at phase 2?

Vodafone considers that the CMA's new enforcement powers under the DMCC Act 2024 (**DMCCA**) are likely to influence the types of remedies the CMA accepts at phase 1 or imposes at phase 2.

As the CMA can now impose significant fines for breaches of remedy obligations without requiring a court order, it should have increased confidence in accepting more complex and innovative remedies at phase 1, that are not necessarily "*clear cut*" and obviously "*capable of ready implementation*". The CMA should be more open to imposing behavioural remedies, particularly at phase 2, that require ongoing monitoring and compliance. It will be in the merger parties' interests to be confident they can deliver on any novel or longer-term remedies; otherwise, they face the risk of substantial fines.

Q C.5: Should the CMA take a different approach to behavioural remedies at phase 1 and phase 2?

Within the current constraints of the phase 1 investigation (remedy requirements and time period), behavioural remedies, which are often more complex and less certain than structural remedies, may be less likely to be considered as a credible option. However, in some markets like telecoms where access agreements are common, such "behavioural" remedies could readily be agreed at phase 1.

The CMA's current approach of requiring phase 1 remedies to be "*clear-cut*" and "*capable of ready implementation*" makes it more challenging for behavioural remedies to be accepted at phase 1. During this phase (as well as pre-notification), the CMA should start to gather evidence to assess the likely effectiveness of behavioural remedies from various sources, including the merger parties, economists, competitors, customers, suppliers and any relevant sectoral regulator. The CMA should consider whether behavioural remedies that might in the past have been considered not "*capable of ready implementation*" could effectively address or mitigate any possible SLC without the need to resort to a lengthy and costly phase 2 investigation (such as a wholesale access agreement or licence). Clearly, this will depend on the complexity of the case. If the merger is particularly complex, behavioural remedies could be explored at phase 1, but the statutory timetable would not allow adequate time to fully review their likely effectiveness considering any possible SLC. Vodafone considers that there would still be merit in exploring behavioural remedies in complex cases at an early stage, as it would allow the parties and the CMA to proceed to phase 2 with some understanding as to how such behavioural remedies could effectively address any eventual SLC.

At phase 2, the focus should remain on ensuring that the remedies effectively address or mitigate the SLC identified and the CMA should be open to exploring both structural and behavioural remedies, including imposing a combination of both. The CMA should not restrict its assessment to behavioural remedies with a "*high degree of certainty of being effective*". Instead, the CMA should consider the competitive harm identified and impose a remedy that sufficiently mitigates any SLC and taking into account any pro-competitive efficiencies and relevant customer benefits of the merger.

Q C.6: What lessons can be drawn from evidence in other jurisdictions, and behavioural remedies which do not relate to mergers, but which could be seen as comparable (for example, markets or sector regulation)?

In recent years, Vodafone observes that global regulators have shown an increased willingness to accept behavioural remedies (either standalone or in conjunction with structural fixes), which should give the CMA confidence to consider these remedies in more merger cases and adopt a more flexible and proportionate outcome to address the specific competition concerns of the merger. It is of course naturally a case-by-case assessment and the specific remedy design will depend on the nature of the case – certainly for vertical or conglomerate-type mergers Vodafone has observed that regulators have frequently responded to interoperability or access concerns by imposing remedies which are behavioural in nature.

The EC's ex-post evaluation on antitrust remedies published in 2025 [4] and its recommendations emphasise the need not to take a dogmatic approach to remedy design. Its overall recommendations for change with the EC's antitrust framework highlight the importance of the twin pillars of proportionality and effectiveness with the latter to be taken as the "fundamental guiding principle".

Designing an effective remedy requires a forward-looking approach as market conditions are not static – especially in sectors characterised by ever-changing technical and competitive dynamics. This serves to reinforce the importance of early engagement between regulators and relevant parties on remedies discussions, market testing, ensuring that monitoring trustees are well briefed and supported in the early stages of implementation and that there are clear dispute resolution mechanisms. Behavioural remedies by their nature give more scope to allow for the necessary flexibility required to achieve effectiveness.

[4] Final Report: ex post evaluation of the implementation and effectiveness of EU antitrust remedies, DG COMP (2025) available at: https://competition-policy.ec.europa.eu/document/download/53e9348d-4f11-46ef-9098-526e24313ee8_en?filename=kd0125000enn_ex-post_evaluation_antitrust_remedies_study_e-version.pdf.

Within that context, the CMA should remain open to the consideration of longer-term behavioural remedies subject always to on-going monitoring as to their effectiveness and whether the measures remain proportionate. It can be reasonable for behavioural remedies to remain in place for the medium to long term where this is appropriate in the circumstances and enables the merger to proceed without any substantial lessening of competition.

The CMA should ensure it considers how lessons learned from any enforcement action taken under the DMCCA could be relevant to mergers. For example, the conduct requirements which could be imposed on firms with strategic market status are wide-ranging and aimed at curtailing potential anti-competitive conduct. Given the market power of these SMS firms, it seems reasonable that any potential behavioural remedies under the DMCCA may also be appropriate to address competition concerns in merger cases where the resulting market share of the merging parties is likely to be significantly lower than an SMS firm's market share.

CMA's approach to carve-out divestment remedies

Q D.1: In what circumstances are carve-out divestiture remedies likely to be most appropriate?

The CMA must remain open to a range of possible remedies in all circumstances, to encourage and facilitate economic growth. Vodafone considers that there are several circumstances in which carve-out divestiture remedies are likely to be most appropriate:

- **Horizontal and Vertical Dynamics:** In mergers with both horizontal and vertical dynamics, a limited carve-out divestiture to remedy horizontal concerns may be more likely to preserve the efficiencies and economies of scale of vertical integration, as compared with a structural divestment or prohibition.

- **Multiple Product Markets:** In mergers between parties operating in multiple product markets, where competition concerns are restricted to only a small number of product markets, enabling a carve-out divestiture package to focus only on those markets without affecting the merger benefits in other markets.

- **Digital Markets:** In digital markets where traditional structural remedies are not appropriate or possible to impose, carve-out divestitures can provide a flexible solution to address competition concerns.

- **No clear structural remedy:** When there is no clear-cut structural divestment or it is not economically viable, but an appropriate package or quasi-structural remedy

can be carved out, enabling the merger to proceed and achieve efficiencies and relevant customer benefits.

- **Upfront Purchaser:** When an upfront purchaser has been identified, ensuring that the divested assets will be effectively utilised to maintain competition.

Q D.2: Are there specific circumstances (eg certain industries) where the risks associated with carve-out divestitures are generally more or less likely to manifest themselves?

Carve-out divestitures present varying levels of risk depending on the circumstances. For example, where the brand of the divesting party is very strong, it may be more challenging for the purchaser and divestment package to compete effectively post-merger due to lack of brand awareness. Similarly, where there are significant shared resources or other links to the divesting party, a divestiture package may not readily be able to be carved-out or, even if a package could be carved-out, would be unable to compete effectively due to the loss of resources/dependence on the divesting party.

The CMA must ensure that any proposed divestitures do not adversely affect the efficiencies and relevant customer benefits of the merger, for example due to reduced economies of scale following divestment.

Q D.3: Are there any additional ways in which the risks relating to carve-out divestitures can be mitigated?

One of the key mitigations is for carve-out divestiture remedies to be considered at an early stage in the process. For example, the parties may be able to propose a carved-out divestiture package with an upfront buyer early during the pre-notification or phase 1 period, which would ensure the suitability of the package and purchaser can be appropriately assessed and modified as required. Any risks would also be mitigated through appropriate consultation with interested parties and stakeholders to ensure a wide range of views are received and considered. This will enable any potential risks to success being identified at an early stage.

The CMA should also remain open and flexible with what is considered a 'carve out divestment remedy'. What is appropriate in each case will necessarily vary depending on market dynamics. Parties should be able to propose a range of possible solutions (such as IP licensing, package of assets or customer contracts, team of expert employees) for inclusion in the divestiture package, all of which should be considered and consulted on. Imposing carve-out divestiture remedies in conjunction with behavioural remedies, where appropriate, would also enable the CMA to monitor the success of the remedies

during the post-merger period.

Q D.4: Purchasers may face challenges in conducting robust due diligence on divestment packages in carve-out divestiture remedies. This may limit the usefulness of such due diligence to the CMA as a safeguard against composition risks. Are there any steps that could be taken to mitigate these risks?

Allowing for significant due diligence and scrutiny of the divestment packages could prove challenging for merging parties, particularly in circumstances where the package comprises assets, personnel etc which are co-mingled with retained assets / business.

The use of strict confidentiality rings may facilitate more in-depth diligence while protecting competitively sensitive and confidential information in the event the purchaser is a trade buyer. Where the purchaser is not a trade buyer, the same concerns regarding competitively sensitive information may not present themselves, but the concern with disclosing confidential information would remain.

If the CMA is concerned with ensuring that the due diligence process is robust, it is important for there to be sufficient time in the merger control process to allow for a detailed due diligence process (including, for example, ways for businesses to 'stop-the-clock' in order to progress meaningful diligence). This would again indicate that early engagement on remedies during the pre-notification, phase 1 and phase 2 process would be beneficial.

Q D.5: What lessons can be drawn from evidence in other jurisdictions, and from complex structural remedies which do not relate to mergers, but which could be seen as comparable (for example, markets or sector regulation)?

While not strictly a divestiture, lessons could be drawn from Ofcom's requirement that Openreach be carved out of and held legally separately from BT. While enabling the businesses to sit under the same wider organisation, the separate board of directors, management, strategy and purpose sought to ensure Openreach makes independent decisions in the best interests of all customers and not self-preferencing BT's downstream customers. Similar structural independence could be appropriate in merger cases where vertical integration and self-preferencing are concerns, but where other benefits flowing from the merger should be preserved.

Assessing, monitoring and enforcing remedies

Q E.1: Are there circumstances in which the CMA could make greater use of Monitoring Trustees when monitoring and enforcing remedies? What would be the

costs and benefits of this?

The CMA's use of Monitoring Trustees should be proportionate and necessary for the remedy in question. Circumstances where it would be appropriate to make use of Monitoring Trustees include where remedies are particularly complex or involve significant changes, or where remedies require ongoing compliance and monitoring over a long period of time.

Q E.2: Are there any circumstances in which the CMA could take on a greater role in the monitoring and enforcement of remedies? What would be the costs and benefits of this?

Vodafone does not consider it necessary for the CMA to take on a greater role in monitoring and enforcement of remedies.

Q E.3: How can the CMA ensure it has access to the right expertise to assess complex remedies given the breadth of industries we cover?

There are several strategies that the CMA could adopt to ensure access to the right expertise. This will clearly depend on the remedy in question, and could include sector regulators, government departments and other competition authorities. For example:

- **Formal agreements, joint task forces etc with sectoral regulators or government departments**: Formalise cooperation with sector regulators or government departments through agreements or memorandum of understandings. Joint task forces or working groups could form part of agreed ways of working, which allow for expertise and resources to be pooled when assessing complex remedies.

- **Collaboration with competition authorities**: Continue to establish and develop collaboration frameworks with other competition authorities to enable a cohesive and harmonised approach to complex remedies, avoid conflicting remedies and to benefit from shared experience. This would be particularly helpful in multijurisdictional mergers, e.g., where the same remedy package is being considered by competition authorities in multiple jurisdictions or where a remedy package for one jurisdiction involves assets etc in another jurisdiction.

Q E.4: Are there ways in which the CMA can practically monitor complex and behavioural remedies without materially increasing its own resourcing costs or giving rise to conflict-of-interest issues?

Vodafone considers that the CMA has several tools available to it which enable it to

monitor complex and behavioural remedies without materially increasing its own resourcing costs or giving rise to conflict-of-interest issues. For example:

- **Monitoring Trustee**: Appointment of third-party Monitoring Trustees to monitor compliance with remedies is common practice in many jurisdictions and there are now many firms who offer this service. The use of a Monitoring Trustee means that the monitoring process is handled externally and does not need to be internally resourced by the CMA. Monitoring Trustees are also independent, which helps ensure impartiality and prevent conflicts of interest.

- **Sector regulators**: Involvement of sector regulators in ongoing monitoring. While this of course depends on the product markets in question, sector regulators may have the relevant expertise that allow it to better and more efficiently monitor compliance. This could be particularly useful for complex markets.

- **Use of technology**: Explore advancements in technology, including automated reporting systems, to utilise in circumstances where data collection and reporting is a component of the remedy. This could reduce the need for manual oversight and make the reporting process overall more efficient.

Remedy Theme 2: Preserving pro-competitive merger efficiencies and merger benefits

The CMA's current approach to rivalry enhancing efficiencies

Q F.1: What evidence should the CMA look for to support the materiality and likelihood of claimed rivalry enhancing efficiencies?

Rivalry-enhancing efficiencies (**REE**) are an important aspect of the CMA's merger assessment. They should be given due regard and not treated as an "afterthought". In terms of evidence, the CMA should be open to considering qualitative evidence (in addition to the usual quantitative economic or financial modelling) such as customer feedback. Vodafone also considers that the internal business expertise of the merging parties and corresponding internal documents afford unique and valuable insights into claimed REEs (as these businesses are in the best position to assess what they can achieve technically and commercially), and greater weight should be given to this evidence by the CMA in its assessment. In this context, it is worthwhile bearing in mind that businesses enter into transactions on the basis of efficiencies – they are not something that are "engineered" for the CMA merger process. Additionally, and depending on the product markets in question, it could be beneficial for the CMA to consult with sector regulators, who may be able to provide specialist and in-depth insight into the analysis of REEs.

Q F.2: Does the CMA's current approach to remedies effectively capture potential rivalry-enhancing efficiencies? If not, how can the current approach be improved?

Vodafone refers generally to its responses to G.1 and G.2 and considers that a similar sentiment is applicable here - in that the CMA should be flexible and dynamic in its approach to structuring remedies (including to ensure that REEs are captured).

Q F.3: What are the circumstances in which it would be possible to design effective remedies that can lock-in genuine Rivalry Enhancing Efficiencies?

Vodafone considers that it should generally be possible in all circumstances to design effective remedies that lock-in in REEs circumstances where the CMA accepts that the REEs are genuine. The CMA should maintain a flexible and dynamic approach in this regard and not restrict itself.

Q F.4: What more can the CMA do to ensure that its approach to merger remedies encourages pro-competitive investment?

Vodafone considers that the CMA should continue to explore how merger remedies can encourage pro-competitive investment. In the Vodafone/Three merger, the CMA was

concerned about the delivery of the merged entity's efficiencies; in particular, the degree of certainty with which these efficiencies would be realised and the merger parties' obligations and incentive to deliver the network investment programme. The CMA accepted that a legally binding commitment to undertake the network investment programme will ensure that the parties deliver fully on the programme and realise the claimed efficiencies. The CMA should consider whether similar investment commitments could be applied to other cases.

Vodafone considers that the CMA should remain open-minded as to the timeframe over which any efficiencies can be realised. The CMA has traditionally considered that the longer the time period necessary for efficiencies to be realised, the greater the level of doubt that efficiencies will be realised at all.[1] In the Vodafone/Three merger, the CMA accepted that it was necessary to adopt a longer-term perspective to investment in mobile networks due to the long payback periods.

Where appropriate, the CMA should also make use of sectoral regulators' expertise to monitor and enforce any longer-term commitments designed to encourage pro-competitive investment. This would reduce the burden on the CMA needing to monitor lengthy remedy commitments.

Finally, as noted in our responses to B.1 and C.5 above, Vodafone considers that the CMA should be more open to remedies that *mitigate* an SLC, particularly where stringent or 'gold-plated' remedies have the potential to stifle pro-competitive investment, economic growth and innovation.

The CMA's current approach to RCBs

Q G.1: Does the CMA's current approach to remedies in phase 1 effectively capture RCBs? If not, how can the current approach be improved?

Vodafone considers that RCBs are less likely to be captured or given appropriate consideration within the constraints of the CMA's current approach to phase 1 remedies. The CMA currently requires phase 1 remedies to be "*clear-cut*" and "*capable of ready implementation*", which makes it more challenging for complex, innovative or novel remedies to be accepted at phase 1. Revisiting this requirement could open the door for more nuanced, flexible or tailored remedy packages that allow for RCBs to be preserved as well as address competition concerns. There are also inherent timing constraints with the phase 1 process (including for remedies), which poses challenges for appropriate consideration of RCBs. Implementing earlier engagement on phase 1 remedies would not

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CMA129, paragraph 8.12.

only allow for greater consideration of the remedy itself, but it would also provide scope for more in-depth consideration of RCBs in the design and assessment of those remedies and the perceived competitive harm.

More generally, and as the CMA acknowledges in its CFE, it has typically taken a conservative approach to RCBs in past merger cases (across phase 1 and phase 2).[5] In this regard, Vodafone refers to its response to G.2 below where it advocates for a more flexible approach to structuring remedies, particularly where RCBs are present. Vodafone considers that the CMA should also consider adopting this approach at phase 1, where the current statutory test involves the CMA expressly considering whether the RCBs outweigh the SLC; if so, the CMA can choose not to refer. The CMA should consider whether to amend the statutory test to afford it a wider margin of discretion regarding the effect of RCBs at phase 1, in particular whether the RCBs need to *outweigh* the SLC (especially in cases where there are also REEs).

Q G.2: Does the CMA's current approach to remedies in phase 2 effectively capture RCBs? If not, how can the current approach be improved?

Vodafone considers that there is scope for the CMA to improve its approach to remedies in phase 2 in the context of RCBs. Specifically, Vodafone considers that the CMA should adopt a more flexible approach to structuring phase 2 remedies, particularly for transactions where the CMA accepts that RCBs do exist (and in circumstances where the phase 2 timetable does already allow for more in-depth analysis).

As noted in Vodafone's response to G.1, there has historically been a high bar in relation to the CMA's assessment of RCBs (including during the phase 2 remedies process). Indeed, the CMA notes in its CFE that RCBs are not typically sufficient to alter the CMA's view on the choice and design of remedies. This is despite the CMA being permitted to "*have regard to the effects of any action on any RCBs in relation to the creation of the relevant merger situation concerned",* [6] and where the CMA acknowledges that "*it is not uncommon for the CMA to accept the existence of RCBs".*[7] Therefore, in circumstances where the CMA *has* accepted the existence of RCBs (which is not uncommon), it should place greater weight and consideration on these when assessing and designing remedy packages than it currently does. In particular, the CMA should be willing to consider the preservation of RCBs through carefully designed behavioural remedies. This would be consistent with the intent of the legislative framework, whereby the explanatory notes

[5] CFE, paragraph 61.

[6] CFE, paragraph 61; EA02 sections 35(5), 36(4).

[7] CFE, paragraph 61.

explicitly provide scope for the CMA in phase 2 to "*apply lesser competition remedies than would otherwise be the case*"[8] where RCBs do exist and where the only steps the CMA could otherwise take to remedy the competition concern would mean that the RCBs could not be realised.

Q G.3: Should the CMA's current approach to the types of evidence for substantiating RCBs be revisited, within the confines of the legislative framework? If so, what types of evidence should the CMA accept in substantiating RCB claims?

Vodafone considers that the CMA should be open-minded to the types of evidence it refers to for substantiating RCBs.

Currently, CMA guidance states that merger parties are generally expected to produce detailed and verifiable evidence that anticipated RCBs will emerge,[9] and to provide convincing evidence regarding the nature and scale of potential RCBs.[10] Vodafone considers that setting this high benchmark from the outset means that more dynamic or flexible assessment methods and categories of evidence are potentially excluded.

The CMA should therefore consider amending its guidance to support a wider range of evidence in its assessment of RCBs, which will ensure a well-rounded and comprehensive approach. In this regard, Vodafone considers that there are various categories of evidence which could aid the CMA's assessment of RCBs, and that the CMA should be open to quantitative and qualitative evidence. This includes, *inter alia*, economic modelling, analysis of past mergers, advice / analysis from relevant sector regulators and customer feedback, testimonials, surveys etc.

Q G.4: How can the CMA best quantify and balance RCBs on the one hand with the SLC's adverse effects on the other?

The CMA has a wide discretion in accepting and quantifying RCBs created by a merger.[11] The CMA should make effective use of both qualitative and quantitative evidence in assessing the magnitude of the RCBs. As the CMA notes, quantitative evidence is "*particularly important in circumstances in which it is difficult to judge whether the scale*

[8] Explanatory Note to section 30 of EA02.

[9] CMA Mergers: Exceptions to the Duty to Refer Guidance, paragraph 4.11 (**CMA64**).

[10] CMA87, paragraph 3.20.

[11] EA02, section 30.

of the [RCBs] is such that they outweigh the competition concerns".[12] However, Vodafone considers that the CMA should retain a flexible view about the level of evidence required to demonstrate an RCB as this will vary on a case-by-case basis. When reviewing the evidence available to it, the CMA should consider both in-market and out-of-market RCBs, the latter where there is sufficient evidence regarding their nature, scale and merger specificity. Indirect customer benefits could also be considered (e.g., where the merger catalyses further investment and innovation).

Vodafone considers that when assessing the proportionality of a remedy to address the SLC's adverse effects, the CMA should look at all evidence available to it. As the CMA noted in Microsoft / Activision, "*a precise mathematical weighing exercise is neither necessary nor possible*" and the CMA has "*regard to all the available evidence in the round – both qualitative and quantitative*".[13] Where the CMA has identified that RCBs do exist, it should consider whether the remedy identified would mean that those RCBs could not be realised. If this is the case, the CMA should consider whether it would be proportionate to apply lesser competition remedies to preserve the identified RCBs.

Q G.5: Are there any barriers to merger parties engaging on RCBs with the CMA throughout the different stages of a case (either at phase 1 or phase 2)?

Vodafone considers that there can be barriers for merger parties when engaging with the CMA on RCBs during both phase 1 and phase 2.

During phase 1, there are limited opportunities for merger parties to discuss RCBs early in the process. The phase 1 statutory timeframe can restrict the depth of engagement on RCBs, in particular on complex RCBs, which can take time to define and quantify. Vodafone would welcome guidance from the CMA around the type of preliminary evidence it would benefit from on RCBs during the phase 1 process, or, in the case of a more complex merger, during the pre-notification phase.

At phase 2, RCBs can be difficult to define and quantify, particularly in complex mergers, where the benefits might be widely spread. The industry that the merger parties operate in can make it more difficult to quantify or explain the likely benefits to the CMA without detailed discussions and explanations on e.g., the quantum of each RCB, the number of customers affected, the methodology underlying these calculations and the qualitative evidence of the impact of the merger on customers. Vodafone would also welcome earlier

[12] CMA64, paragraph 4.20.

[13] Final Report: Anticipated acquisition by Microsoft of Activision Blizzard, Inc. (2023), paragraph 11.294.

and more frequent engagement with the CMA on RCBs during phase 2.

Remedy Theme 3: Running an efficient process

Phase 1 remedies process

Q H.1: What process barriers are there currently to reaching a phase 1 remedies outcome?

The CMA has a statutory deadline of 40 working days to complete its phase 1 merger review. This timing constraint can make it challenging for the CMA and merger parties to adequately assess and discuss any potential remedy, not least because it is not clear until later in the phase 1 process whether there will be a decision to refer. Once the CMA has taken a decision to refer to phase 2, the parties only have 5 working days to offer UILs, which, with the exception of the most straightforward remedy, is not sufficient (although there is provision for the parties to offer UILs at any time during the pre-notification / phase 1 process, the current framework makes this impractical). At this point, the merger parties do not have access to the decision-maker or the opportunity to engage in iterative discussions or negotiations with the CMA. Vodafone considers that this impacts the likelihood that remedies will be accepted at phase 1, even if the merger parties submit more than one version of their UILs offer, given the inherent uncertainty over what is needed for the remedy to be effective in addressing the competition concern. The CMA could consider either extending the time-period for UILs or proactively encouraging them to be offered earlier in the phase 1 process to promote a successful phase 1 remedies outcome.

As noted in our response to B.1, the current legislative framework has informed the CMA's focus of only allowing remedies that address the SLC with a "*high degree of certainty*" of being effective and that are "*clear cut*" and "*capable of ready implementation*". Vodafone considers that this high standard limits the CMA's consideration of innovative, unique or novel remedies. Vodafone considers that the legislative framework and guidance should therefore be amended to allow the CMA to consider a range of possible remedies throughout its assessment, beginning at the pre-notification stage, which is often lengthy in complex merger reviews. Early engagement on remedies should not prejudice the parties and should not require an SLC admission. The CMA should also consider whether changes could be made to the composition of the case team from the outset to include members with remedies expertise. Earlier access to the decision-maker or remedies team through dedicated remedies meetings could also help remedies to be tabled and discussed upfront.

Q H.2: How can the CMA amend its phase 1 process to allow more complex remedies to be assessed within a phase 1 timeframe?

The CMA should engage effectively on remedies at the earliest possible stage in phase 1 / pre-notification, even if the nature and / or scope of potential competition concerns are unclear. The CMA should consider amending the legislative framework and guidance to allow it to consider a range of possible remedies throughout its assessment, beginning at the pre-notification stage, which is often lengthy in complex merger reviews. The CMA should also consider whether the phase 1 statutory timeframe could be amended by consent to allow for greater flexibility such that the CMA is not bound by the 40-day period and would therefore be able to consider more complex remedies at this earlier stage, albeit this may require legislative change. The pre-notification / phase 1 distinction should also be reviewed to assess whether it is workable. For the merger parties, who require pace and certainty during merger investigations, not having a view as to how long the pre-notification period will last is challenging.

Vodafone considers that early engagement on remedies should not prejudice the CMA's review and should not require an SLC admission. The CMA should also consider whether changes could be made to the composition of the case team from the outset to include members with remedies expertise. Earlier access to the decision-maker or remedies team through dedicated remedies meetings would also be beneficial.

Q H.3: If the nature and/or scope of potential competition concerns are unclear, what steps can the CMA case team and merger parties take to ensure that they are best placed to engage effectively on remedies at the earliest possible stage in phase 1?

Vodafone considers that the CMA should engage with merger parties during the pre-notification phase which will allow for a better understanding of potential competition concerns and the exploration of possible remedies before the formal phase 1 investigation begins. The merger parties should be asked to provide clear and comprehensive information about the merger and its potential impact on competition – they are likely to be the best source of information in terms of understanding of the business and sector that they operate in. This could include early economic modelling and analysis that supports their case – something which is usually only shared later in the process, often at phase 2.

The merger parties should also be asked to proactively identify and propose potential remedies that could address the potential competition concerns. The composition of the case team should include members with remedies expertise from the outset. This would ensure that the team is well-equipped to consider and discuss potential remedies early in the process based on comprehensive evidence provided by the merger parties at an early stage.

The CMA could also seek third-party feedback from other stakeholders (e.g., competitors,

customers, suppliers, sectoral regulators) at an earlier stage in the process.

Phase 2 remedies process

Q I.1: What barriers are there currently to reaching a phase 2 remedies outcome?

The CMA's revised phase 2 process has brought about some welcome changes, including increased exposure to, and engagement with, the Inquiry Group throughout the phase 2 process and earlier discussions on remedies. As the first merger review under the new process only concluded in March 2025, it is difficult to assess at this stage whether significant barriers remain to reaching a phase 2 remedies outcome.

However, Vodafone considers that the CMA should continue to monitor whether providing access to its case file during the phase 2 process could lead to increased transparency and better engagement between the CMA and the merger parties, in particular in relation to remedies. Access to file is an established practice amongst other competition authorities, including the European Commission.

It is not clear whether the new phase 2 process and the increased opportunities for dialogue with the Inquiry Group extends to the remedy implementation phase. It should. Even after the Final Report has been delivered there may be significant issues that need to be addressed in finalising the remedy undertakings or order. This requires dialogue and the Inquiry Group should remain available rather than communicating with the parties through the case team.

Q I.2: Does the current phase 2 process adequately facilitate early remedy engagement? If not, how can it be improved?

The CMA's new phase 2 process facilitates early remedy engagement through the use of the phase 2 Remedies Form and encourages merger parties to engage with the case team earlier and more frequently throughout the phase 2 process. Vodafone welcomes the CMA's new approach and considers that it will deliver a more streamlined and interactive process, in line with the CMA's 4Ps of proportionality, predictability, process and pace.

Working with other regulators

Q J.1: How can the CMA ensure its remedies process at phase 1 and phase 2 sufficiently takes account of parallel actions by other competition agencies?

To ensure parallel actions by other competition agencies are appropriately considered, the CMA can should seek information on the parties' other jurisdictional filings at an early

stage and proactively engage with those authorities

Early disclosure of the other jurisdictions in which the parties have filed will enable the CMA to understand the scope of parallel regulatory actions and tailor its remedies process accordingly, ensuring it complements rather than conflicts with actions taken by other agencies.

The CMA should proactively engage with other competition authorities to share insights and align actions. This collaboration can help identify potential overlaps and conflicts in remedies, ensuring a more cohesive and effective approach across jurisdictions.

Q J.2: How can the CMA ensure it utilises the expertise of other UK government departments or sector regulators to increase the chance of a successful remedy outcome?

As above, the CMA should proactively engage with relevant sector regulators and government departments to share insights and align actions. This collaboration can help identify potential policy considerations or sector-specific issues outside of the CMA's usual competition enforcement considerations, ensuring a more effective approach.

Effective collaboration could be achieved through the creation of joint task forces or working groups with representatives from other departments and regulators, which could be used to facilitate a more integrated approach to addressing competition issues. These groups could pool their expertise to develop a package of remedies which considers various regulatory perspectives.

Clearly the relevance of sector regulators and government departments will vary depending on the product markets in question.

Q J.3: On the question of whether the CMA or others should take remedial action to address an SLC, should the CMA make more use of making recommendations to others to take action to remedy competition concerns arising from a merger and if so, what are the circumstances where it may be appropriate to do so?

There may be circumstances where it is appropriate for others to take remedial action to address SLCs arising from mergers. The CMA should continue to adopt this approach where relevant. This will depend on a number of factors including, *inter alia*, the relevant product markets, the proposed remedies, the nature of the SLC, the overall complexity of the merger.

For example, this could be appropriate where the product markets fall within the remit of

another regulatory body with specific expertise (such as sector regulators like Ofgem, Ofcom, Ofwat etc) or, due to the complexity of the merger and SLC, a collaborative approach involving multiple stakeholders is necessary. There can be several advantages to this, including that specialised knowledge and capabilities are being utilised, and multi-faceted and nuanced consideration is being given to the proposed remedial action, which can lead to more effective, tailored and well-balanced remedies.

Other processual changes

Q K.1: Are there any other ways, not covered by the specific questions above, in which the CMA could improve its remedy processes, at either phase 1 or phase 2?

[Intentionally left blank]

External support

Q L.1: How should the CMA access external expertise, for example using Monitoring Trustees and/or industry experts in its remedy assessment and implementation, including oversight of divestment sales processes, divestment purchaser suitability assessments, or monitoring of remedy implementation and/or compliance?

- Use of **monitoring trustees** during remedy assessment could help to inform the CMA as to the viability of the remedies package, including how easily the remedies could be implemented. The independence of the monitoring trustees would mean any input would be objective.

- Use of **sectoral regulators** – where a market has a sectoral regulator, the CMA could make use of their specific market knowledge to assist with any remedies assessment and implementation, including ongoing compliance and monitoring of remedies.