

## **ANTICIPATED JOINT VENTURE BETWEEN VODAFONE GROUP PLC AND CK HUTCHISON HOLDINGS LIMITED CONCERNING VODAFONE LIMITED AND HUTCHISON 3G UK LIMITED**

### **Notice of possible remedies under Rule 12 of the CMA's rules of procedure for merger, market and special reference groups<sup>1</sup>**

#### **Introduction**

1. On 4 April 2024, the Competition and Markets Authority (**CMA**), in exercise of its duty under section 33(1) of the Enterprise Act 2002 (the **Act**), referred the anticipated joint venture between Vodafone Group plc (**Vodafone**) and CK Hutchison Holdings Limited (**CK Hutchison**) concerning Vodafone Limited (**VUK**) and Hutchison 3G UK Limited (**3UK**) (the **Merger**), for further investigation and report by a group of CMA panel members (the **Inquiry Group**).
2. Vodafone and CK Hutchison are together referred to as the **Parties**, and for statements relating to the future, the Parties' UK telecoms businesses are together referred to as the **Merged Entity**.
3. In our provisional findings on the reference notified to the Parties on 13 September 2024 (the **Provisional Findings Report**), we provisionally conclude, among other things, that the Merger would result in the creation of a relevant merger situation, and that the creation of that situation may be expected to result in a substantial lessening of competition (**SLC**) in the supply of retail and wholesale mobile telecommunications services in the UK.
4. Our analysis provisionally indicates that the SLCs identified may be expected to result in adverse effects, for example in the form of price increases for mobile customers (or to a reduced service such as smaller data packages in their contracts) and increased difficulty for mobile virtual network operators

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<sup>1</sup> [CMA Rules of Procedure for Merger, Market and Special Reference Groups \(CMA17\)](#), 2014.

(**MVNOs**) to secure attractive competitive terms compared to what would otherwise be the case absent the Merger.

5. This notice sets out the actions which we consider we might take for the purpose of remedying the SLCs and/or any resulting adverse effects identified in the Provisional Findings Report.
6. We invite comments on possible remedies by **17:00 (UK time) on Friday 27 September 2024**.

### Criteria

7. In deciding on a remedy, the CMA shall in particular have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy the SLC and any adverse effects resulting from it.<sup>2</sup>
8. To this end, the CMA will seek remedies that are effective in addressing the SLC and its resulting adverse effects and will select the least costly and intrusive remedy that it considers to be effective.
9. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.<sup>3</sup>

### The Provisional SLCs

10. We provisionally find two SLCs (the **provisional SLCs**) in relation to the Merger:
  - (a) An SLC as a result of horizontal unilateral effects in the national (UK) market for the supply of retail mobile telecommunications services (the **Retail Market**). In particular, we provisionally find in relation to this theory of harm that the Merger would lead to price increases for mobile customers (or to a reduced service such as smaller data packages in their contracts). Any price increases would potentially affect tens of millions of mobile customers, and the CMA has particular concerns about the impact of the Merger on those customers least able to afford mobile services or who might have to pay more for improvements in service quality they do not value.
  - (b) An SLC as a result of horizontal unilateral effects in the national (UK) market for the supply of wholesale mobile telecommunication services

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<sup>2</sup> Section 36(3) of the Act.

<sup>3</sup> [Merger remedies guidance \(CMA87\)](#) (December 2018), paragraph 3.4. This has been adopted by the CMA board.

(the **Wholesale Market**). In particular, we provisionally find in relation to this theory of harm that the Merged Entity – and its competitors – may have less of an incentive to bid for wholesale business and/or may offer less competitive prices/terms to MVNOs. In particular, the Merger would reduce the number of MNOs from four to three, making it more difficult for independent MVNOs to secure competitive terms, restricting their ability to offer the best deals to retail customers.

11. The Parties submitted that the Merger would give rise to substantial rivalry enhancing efficiencies (**REEs**), resulting from network integration and investment leading to increased network quality which in turn would incentivise a competitor response. The Parties submitted that this would offset any potential anti-competitive effect of the Merger. We provisionally consider that in principle the claimed REEs could be rivalry enhancing (if delivered).
12. However, on the basis of the evidence seen to date, we provisionally conclude that the increased rivalry from those efficiencies which are likely to be realised (that we have found to be more limited than the full REEs claimed by the Parties) is not sufficient to offset the adverse impacts on competition identified in relation to either the Retail or Wholesale Markets. We also express some doubts whether the full REEs claimed by the Parties would - if delivered – be sufficient to offset the adverse effects on competition identified, but we did not need to conclude on that question in the provisional findings given our provisional conclusion that delivery of the full REEs claimed by the Parties is not likely.
13. Further detail on the provisional SLCs is set out within the Provisional Findings Report.

### **Possible remedies on which views are sought**

14. In determining an appropriate remedy, the CMA will consider the extent to which different remedy options would be effective in remedying, mitigating or preventing the SLCs or any resulting adverse effects that have been provisionally identified.
15. As set out in published remedies guidance (**CMA87**), the CMA generally prefers structural remedies, such as divestiture or prohibition, over behavioural remedies, because:
  - (a) structural remedies are more likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring rivalry;

- (b) behavioural remedies are less likely to have an effective impact on the SLC and its resulting adverse effects, and are more likely to create significant costly distortions in market outcomes; and
  - (c) structural remedies rarely require monitoring and enforcement once implemented.<sup>4</sup>
- 16. The CMA's guidance on remedies does however set out certain conditions, one or more of which will typically apply in the limited circumstances where behavioural remedies may be appropriate:<sup>5</sup>
  - (a) Where structural remedies are not feasible, or the relevant costs of any feasible structural remedy far exceed the scale of the adverse effects of the SLC(s).
  - (b) The SLC(s) would have a relatively short duration (eg due to IP expiring).
  - (c) Relevant customer benefits (**RCBs**) are likely to be substantial compared with the adverse effects of the merger, and these benefits would be largely preserved by behavioural remedies but not by structural remedies.
- 17. CMA87 notes that behavioural remedies are also more likely to be acceptable where the companies operate in a regulated environment and where there are expert monitors.<sup>6</sup> CMA87 further notes that the likelihood of effective monitoring of a remedy will be significantly increased if it is possible to involve a sectoral regulator in the monitoring regime.<sup>7</sup>
- 18. The CMA will also consider whether a combination of measures is required to achieve a comprehensive solution. The CMA will evaluate the impact of any such combination of measures on the SLC or any resulting adverse effects.

### ***Structural remedy options***

- 19. In defining the scope of a divestiture package that will satisfactorily address an SLC, the CMA will normally seek to identify the smallest viable, standalone business that can compete successfully on an ongoing basis and that includes all the relevant operations pertinent to the area of competitive overlap.<sup>8</sup> The CMA will generally prefer the divestiture of an existing business, which can compete effectively on a standalone basis independently of the merger parties, to the divestiture of part of a business or a collection of

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<sup>4</sup> CMA87, paragraph 3.46.

<sup>5</sup> CMA87, paragraph, 3.48.

<sup>6</sup> CMA87, paragraph, 3.48.

<sup>7</sup> CMA87, paragraph, 7.6.

<sup>8</sup> CMA87, paragraph, 5.7.

assets. This is because divestiture of a complete business is less likely to be subject to purchaser and composition risk and can generally be achieved with greater speed.<sup>9</sup>

20. In the present case, our initial view is that it is unlikely that there is a standalone business or business unit capable of being divested. However, we are aware that other forms of divestment (for example of certain assets and/or spectrum in combination with other commitments such as roaming agreements, wholesale capacity access) have been accepted as remedies in mergers between mobile network operators in other jurisdictions.
21. At this stage, we have identified the following potential structural remedies that we propose to explore further:
  - (a) **Prohibition of the merger.**
  - (b) **A partial divestiture remedy** requiring the divestiture of or access to certain mobile network assets and spectrum (from either VUK or 3UK) in the UK. The aim of this remedy would be to enhance the competitive capability of an existing MVNO or provide sufficient assets to enable a new provider to enter the market as an MNO and compete across all parameters of competition including network quality. Such a remedy would likely also require a national roaming agreement and on-going support from the Merged Entity at a minimum.
22. Prohibition of the anticipated Merger would prevent the provisional SLCs from arising in any relevant market. Our initial view is therefore that prohibition would represent a comprehensive solution to all aspects of the SLCs we have provisionally found (and consequently any resulting adverse effects) and that the risks in terms of its effectiveness are very low.
23. With regards to a partial divestiture remedy, our initial view is that this remedy could enable a fourth MNO to enter the UK post-Merger and we therefore propose to explore this option further. However, our initial view is that it may not be effective for the following reasons (amongst others):
  - (a) To be comprehensive, the divestiture package would need to enable a suitable purchaser to compete effectively under separate ownership. However, a purchaser would likely only acquire a sub-set of the assets currently used by the Parties to compete in the relevant markets. This would lead to an MNO that is smaller than either of the Parties today. It is not clear that such an entity would be able to compete effectively to

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<sup>9</sup> CMA87, paragraph, 5.12.

compensate for the loss of competition deriving from the Merger in both the Retail and Wholesale Markets where we provisionally identify SLCs.

- (b) It would be difficult for the CMA to assess the financial resilience or expected performance of the new MNO with any degree of accuracy given the new MNO would obtain access to a package of assets that has never before operated as a stand-alone business.
- (c) A partial divestiture remedy would unwind economies of scale, potentially undermining the remedy's effectiveness. As a result, the remedy is likely to be reliant on the purchaser's attributes to address shortcomings of its design, increasing the purchaser risk.
- (d) We are concerned about the practicality of such a remedy. The Parties do not own all of the assets that make up their own networks. Indeed, there are third parties who control access to sites and the Parties are both part of separate network sharing agreements with the two other MNOs, which significantly increases the complexity of the remedy.

24. We consider that in the current case, any structural remedy could possibly remove or reduce the value of RCBs, to the extent any arise (see paragraph 72 below).

### ***Behavioural remedy options***

25. For a behavioural remedy to be effective, we would need to be confident that it would address the provisional SLCs comprehensively, both now and in the future as the relevant markets and competitive conditions change and develop. We would also need to be confident that the remedy was capable of effective implementation, monitoring and enforcement.
26. There are significant risks in designing effective behavioural remedies, including the risks of specifying the form of conduct or market outcome with sufficient precision in a dynamic market and the challenges in monitoring compliance.
27. As outlined in paragraphs 16 and 17 above, there are certain circumstances where behavioural remedies may be appropriate.<sup>10</sup> In the present case, our initial view is that there are case specific facts that suggest behavioural remedies could be appropriate. In particular, mobile network operators in the UK are regulated by the Office of Communications (**Ofcom**) which may be able to play a role in the implementation, monitoring and enforcement of

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<sup>10</sup> [CMA87](#), paragraph 3.48.

remedies, including behavioural remedies. Further, this may be a case where RCBs may be present and preserved through a behavioural remedy (see paragraph 73 below).

28. However, as set out in CMA87, one of the conditions in which behavioural remedies are typically more appropriate is where competition concerns are expected to have a short duration.<sup>11</sup> In this Merger, the SLCs provisionally identified are not time limited. This means that to comprehensively address the provisional SLCs, the behavioural remedies would need to have a lasting impact on competition in the relevant markets.
29. At this stage, we have identified the following potential behavioural (or quasi-behavioural) remedies: (a) a network investment commitment (**Investment Commitment**); (b) time limited retail protections; and (c) Wholesale Market remedies, in particular, pre-agreed wholesale access terms or MVNO network capacity ring-fencing.

**(a) Investment Commitment**

30. An Investment Commitment would entail a commitment from the Parties to deliver the network investments set out in the Joint Network Plan (**JNP**) / Joint Business Plan (**JBP**) they have developed for the Merged Entity. Such a commitment could potentially:
- (i) guarantee the implementation of the Parties' JNP/JBP within a specified time period;<sup>12</sup>
  - (ii) be implemented by way of an undertaking and also incorporated into the Merged Entity's spectrum licence through a variation of that licence for Ofcom to monitor and enforce;
  - (iii) be verified by an independent third party such as a monitoring trustee; and
  - (iv) be time limited such that no further involvement from the CMA or Ofcom would be needed after the end of the specified investment period.
31. Consistent with CMA policy, our starting point is to prefer enabling measures rather than measures that control market outcomes, such as price caps, given

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<sup>11</sup> CMA87, paragraph 3.48(b).

<sup>12</sup> See [Homepage — Vodafone UK & Three UK \(vodafoneandthree.uk\)](https://www.ofcom.gov.uk/consult/condocs/mergers/vodafoneandthree/vodafoneandthree.pdf)

the latter measures tend to be onerous to operate and monitor, may create significant market distortions and do not address the causes of an SLC.

32. Our initial view is that an Investment Commitment would have the potential to enhance competition in the relevant markets. If the Investment Commitment were to enhance rivalry in a way that counteracts the anti-competitive effects we have provisionally found, then this may be an effective remedy in the long term.
33. However, for the reasons set out in the Provisional Findings Report, we have expressed some doubts as to whether the implementation of the JNP/JBP in full would offset the anti-competitive effects we have identified in the Retail and Wholesale Markets.
34. Our initial view is therefore that an Investment Commitment may not by itself comprehensively address the SLCs provisionally identified in the Retail and Wholesale Markets.
35. We are considering whether additional measures could supplement the Investment Commitment in order to achieve a comprehensive solution.
36. It may also take some time for the rivalry enhancing effects of an Investment Commitment to manifest. As such, there may be a need to supplement an Investment Commitment with some time-limited protections in relation to price and related terms, including data packages (see the section below on potential time-limited customer protections in the Retail Market).
37. With regards to the Wholesale Market, we have provisionally found that the Merger would reduce the number of MNOs from four to three, making it more difficult for independent MVNOs to secure competitive terms, restricting their ability to offer the best deals to retail customers. Our initial view is that an Investment Commitment is likely to have a greater impact on competition in the Retail Market than the Wholesale Market. As such, there may be a need to supplement an Investment Commitment with some additional measures targeted at the Wholesale Market (see the below section on potential Wholesale Market remedies).

***(b) Time-limited Retail Market customer protections***

38. At this stage, subject to further considering the risks and challenges associated with such potential protections (see paragraph 43 below) and assuming that an Investment Commitment were found to address our retail concerns in the long term, we consider that there may be a case for considering some time-limited protections to ensure that retail customers are



appropriately protected during the initial years of network integration and roll-out under any Investment Commitment.

39. Such protections might encompass, for example, allowing the Parties' existing customers to 'roll over' their existing contract terms - price, data allowance etc - for a pre-defined period. Included within this, or separately, there could also be a commitment by the Parties to protect social tariff terms and conditions.<sup>13</sup> They might be accompanied by promotion to encourage uptake amongst those consumers who are eligible.

**(c) Wholesale market remedies**

40. We consider that a measure aimed at ensuring wholesale access terms for MVNOs and/or a remedy that ring-fences a proportion of the Parties' network capacity exclusively for wholesale customers could potentially be combined with an Investment Commitment (and time-limited protections of retail customers, as described above) to protect MVNOs and their retail customers, recognising that many MVNOs price aggressively, often focusing on value segments of the retail market.
41. We have identified two possible Wholesale Market remedies, which are:
- (a) Wholesale access terms – This could involve pre-agreed non-discriminatory wholesale terms, including prices, being made available to MVNOs, subject to a reasonable limit (number of MVNOs or network capacity utilisation).
  - (b) Capacity ring-fencing – This could entail ring-fencing a proportion of the Merged Entity's network capacity exclusively for MVNOs.
42. We welcome views on whether the above remedies combined or in isolation could comprehensively address the anticompetitive effects provisionally identified in the Retail and Wholesale Markets including whether they should be time limited or not. In particular, in order to accept such remedies, we would need to be confident that in the longer term the quality improvements delivered through an Investment Commitment would lead to a sufficient increase in competition to counteract the SLC we have provisionally found in the Retail Market.

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<sup>13</sup> Social tariffs are special low-cost plans available for anyone claiming Job Seeker's Allowance and Universal Credit, as well as those on Employment and Support Allowance, Reduced Earnings Allowance, Disability Allowance, Personal Independence Payment, or Pension Credit. For VUK, this is called "VOXI For Now", which for £10 per month includes unlimited 5G data, calls and texts. See: for VUK, [Cost of living support for customers](#); and for 3UK, see [Social Tariffs SIM plans with no contract, no credit check. | SMARTY](#).

43. While we intend to explore this combination of behavioural measures, we are also of the initial view that they are likely to present a number of challenges and risks that are associated with behavioural remedies including specification, distortion, circumvention as well as monitoring and enforcement risks (as further detailed at paragraph 58 below) that we will need to evaluate further. We therefore welcome views on these risks in particular.
44. We will consider any other practicable remedies that the Parties, or any interested third parties, may propose that could be effective in addressing the provisional SLCs and/or any resulting adverse effects.
45. Where the merger parties or a third party propose remedy options for the CMA's consideration, the CMA's engagement on remedies with limited prospect of being effective can reduce the CMA's ability to focus on remedies that have a greater prospect of being effective. Therefore, in keeping with the CMA's guidance on remedies and in view of the statutory deadline for us to publish our final decision on any SLC and remedies, we will not conduct a detailed consideration of proposed remedies unless the Parties or third parties can demonstrate that their proposed remedy options will address effectively the provisional SLCs and the resulting adverse effects identified in the Provisional Findings Report.<sup>14</sup>

***Invitation to comment on a possible structural divestiture remedy***

46. In evaluating possible divestitures aimed at creating a fourth MNO post-Merger as a remedy to the provisional SLCs, we will consider the likelihood of achieving a successful divestiture and the associated risks. In reaching a view, we will have regard to the following critical elements of the design of divestiture remedies:

*The scope of the divestiture package*

47. To be effective in remedying the provisional SLCs, any divestiture package would need to be appropriately configured to be attractive to potential purchasers and to enable the purchaser to operate effectively as an independent competitor to the remaining three MNOs.
48. We invite views on:

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<sup>14</sup> [CMA87](#), paragraph 4.57.

- (a) the package of assets (including network agreements) and spectrum to be divested, whether these should come from VUK or 3UK, or whether it is acceptable to have a mix-and-match package drawn from both Parties;
- (b) how the CMA might determine the appropriate number and location of sites;
- (c) whether the Parties can propose the assets and spectrum to be divested, subject to the consent of the CMA;
- (d) whether there are risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective MNO in the provision of mobile services to retail and wholesale customers in the UK;
- (e) whether there are risks that a suitable purchaser is not available or that the Parties will divest to a weak or otherwise inappropriate purchaser;
- (f) what on-going support the purchaser is likely to require;
- (g) whether there are risks that the competitive capability of a divestiture package will deteriorate before completion of divestiture;
- (h) whether there are regulatory requirements to be aware of; and
- (i) any other elements that may be required.

*Identification of a suitable purchaser*

49. Purchaser risk arises if a divestiture is made to a weak or otherwise inappropriate purchaser or if a suitable purchaser is not available. As such, in line with CMA guidance, we will need to be satisfied that a prospective purchaser:<sup>15</sup>
- (a) is independent of the Parties;
  - (b) has the necessary capability to compete;
  - (c) is committed to competing in the Retail and Wholesale Markets; and
  - (d) will not create further competition concerns
- (together, the **Purchaser Suitability Criteria**).

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<sup>15</sup> CMA87, paragraph 5.20 and 5.21.

50. We invite views on whether there are any specific factors to which we should pay particular regard in assessing purchaser suitability in this case, eg:
- (a) whether any particular purchaser (or types of purchaser) might fail to meet the Purchaser Suitability Criteria and whether there are any other factors that we should consider when identifying a suitable purchaser for the divestiture package; and
  - (b) whether there is a risk that the Parties will be incentivised to divest to a weak or otherwise inappropriate purchaser.

*Effective divestiture process*

51. We invite views on the appropriate timescale for achieving a divestiture.
52. We will consider what, if any, procedural safeguards may be required to minimise the risks associated with a divestiture.
53. At this stage, given the nature of a partial divestiture, we expect that it would be necessary to require an up-front buyer and that any divestiture(s) is contractually committed before the Merger is allowed to complete due to the potential risks involved.
54. We invite views on whether the Parties should be required to appoint a monitoring trustee to oversee the divestiture(s) and to ensure that the business / assets to be divested are maintained during the course of the process. Our initial view is that a monitoring trustee would be required given the potential complexity of the transaction.
55. The CMA would have the power to mandate an independent divestiture trustee to dispose of the divestiture package if:
- (a) the Parties fail to procure divestiture to a suitable purchaser within the initial divestiture period; or
  - (b) the CMA has reason to expect that the Parties will not procure divestiture to a suitable purchaser within the initial divestiture period.
56. In unusual cases, the CMA may require that a divestiture trustee is appointed at the outset of the divestiture process. We invite views on whether the circumstances of this Merger necessitate such an approach.

### ***Invitation to comment on potential behavioural remedies***

57. In reaching a view on the potential effectiveness of behavioural (or quasi behavioural) remedies, we will have regard to the following critical elements which we invite views on.

### ***Design, monitoring and enforcement of behavioural remedies***

58. We invite views on the design, monitoring and enforcement of any potential behavioural remedies. In particular regarding:
- (a) Specification: we welcome views on (i) how the commitment(s) should be specified to define with sufficient clarity the conduct required to comprehensively address the provisional SLC(s) or the adverse effects, (ii) the risks that they cannot be specified with sufficient clarity to provide an effective basis for monitoring and enforcement, and (iii) how the commitments could be specified in a way that accounts for technological changes in the relevant markets.
  - (b) Circumvention: as behavioural remedies generally do not deal with the source of an SLC, we welcome views on the risk that other possible adverse forms of behaviour may arise as a result of the commitment(s) that might undermine their effectiveness. For example, if only certain metrics were controlled under the Investment Commitment (eg number of sites), we welcome views on the risk that the Merged Entity could reduce other metrics.
  - (c) Distortion: we welcome views on whether commitment(s) may create market distortions that reduce the effectiveness of the measures and/or increase their effective costs.
  - (d) Monitoring and enforcement: We welcome views on the volume and complexity of information required to monitor compliance; the resources required to monitor; asymmetry of information between the monitoring agency and the Parties; and views on potential enforcement mechanisms for failing to comply with commitment(s).

### ***Questions with regards to the Investment Commitment***

59. We invite views on the following questions with regards to a potential Investment Commitment:
- (a) Whether an Investment Commitment from the Parties could constitute an effective remedy capable of eliminating or preventing the provisional SLCs and their adverse effects in (i) the Retail Market and/or (ii) the

Wholesale Market respectively, as described in the Provisional Findings Report.

- (b) Whether an Investment Commitment should be based on inputs the joint network must have (eg the sites and spectrum to be deployed on those sites) or outputs the network must achieve (eg minimum speeds), and any views on what those inputs/outputs should include.
- (c) What the most appropriate role for Ofcom would be in such a remedy.
- (d) Whether there are any concerns with incorporating such a commitment into the Merged Entity's spectrum licence.

60. Whether there are additional conditions that could be included to ensure the Investment Commitment is delivered.

*Questions with regard to time-limited protections for retail customers*

61. We invite views on the following questions with regards to potential time-limited protections for the Parties' retail customers:

- (a) Questions in relation to time-limited terms and price protections:
  - (i) How price protections might be designed.
  - (ii) What other retail customer terms need to be protected.
  - (iii) Whether the protection should apply to all of the Parties' existing retail customers or only a subset; and, if the latter, how that subset would be determined.
  - (iv) Whether social tariffs provide sufficient protection to low-income households.
  - (v) How eligible customers might be notified of such social tariff protections.
  - (vi) How retail customer protections might be monitored.
  - (vii) How a dispute resolution process might be designed.
  - (viii) How the CMA might determine the appropriate length of time for such protections and what factors it could take into account.

*Questions with regards to wholesale remedies*

62. We invite views on the following questions with regards to potential behavioural remedies aimed at addressing the provisional SLC in the Wholesale market:
- (a) Questions in relation to pre-agreed wholesale access terms:
- (i) Whether it would constitute an effective remedy capable of eliminating or preventing the provisional SLC and its adverse effects in the Wholesale Market.
  - (ii) What the key terms are that need to be offered to MVNOs.
  - (iii) How the CMA should determine what constitutes fair and reasonable terms, including concerning price.
  - (iv) Whether pre-agreed wholesale access terms should be offered up to a specified number of MVNOs or cover a proportion of the Merged Entity's network capacity.
  - (v) How the CMA might determine the appropriate length of time for such a commitment.
  - (vi) How disputes might be dealt with and what potential role the CMA or an independent adjudicator/monitoring trustee might take in this process.
- (b) Questions in relation to capacity ring-fencing:
- (i) Whether a remedy that ring-fenced network capacity in the Parties' network for MVNOs would sufficiently incentivise the Merged Entity to compete for MVNO customers.
  - (ii) How the CMA could design a capacity ring-fencing remedy.
  - (iii) How much of the Merged Entity's network capacity should be ring-fenced for MVNOs.
  - (iv) How the CMA might determine the appropriate length of time for such a commitment.
63. Whether a monitoring trustee would be well placed to monitor such a commitment.
64. We invite views on whether there are other measures that would address the provisional SLCs identified in the Retail and Wholesale Markets.

65. More broadly, we invite views on any legal and practical challenges associated with any of the above proposed remedies. We also invite views on what potential role Ofcom could undertake in implementing, monitoring and enforcing any of the above remedies.

#### *Effective implementation process*

66. We invite views on the appropriate timescale for achieving the implementation of the potential behavioural remedies.
67. We will consider what, if any, procedural safeguards may be required to minimise the risks associated with implementation.
68. We invite views on whether the Parties should be required to appoint a monitoring trustee (or adjudicator) to oversee the implementation and compliance with any behavioural remedies to ensure that the Parties comply with their obligations.

#### **Cost of remedies and proportionality**

69. In order to be reasonable and proportionate, the CMA will seek to select the least costly remedy, or package of remedies, that it considers will be effective. Between two remedies that the CMA considers equally effective, it will choose the one which imposes the least cost or is the least restrictive. The CMA will also seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.<sup>16</sup>
70. When considering relevant costs, the CMA's considerations may include (but are not limited to):<sup>17</sup>
- (a) distortions in market outcomes;
  - (b) compliance and monitoring costs incurred by the Parties, third parties, Ofcom or the CMA; and
  - (c) the loss of any RCBs that may arise from the Merger which are foregone as a result of the remedy (see paragraph 76 below).
71. We invite views on what costs are likely to arise in implementing each remedy option.

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<sup>16</sup> CMA87, paragraph 3.6.

<sup>17</sup> CMA87, paragraph 3.10.



## RCBs

72. In deciding the question of remedies, the CMA may have regard to the effects of any remedial action on any RCBs in relation to the creation of the relevant merger situation.<sup>18</sup>
73. RCBs are limited by the Act to benefits to customers in the form of:
- (a) 'lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom ... or
  - (b) greater innovation in relation to such goods or services.'<sup>19</sup>
74. The Act provides that a benefit is only a relevant customer benefit if:
- (a) it accrues from the creation of the relevant merger situation concerned or may be expected to accrue within a reasonable period from the creation of that merger situation; and
  - (b) it was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.<sup>20</sup>
75. We welcome views on the nature of any RCBs and on the scale and likelihood of such benefits and the extent (if any) to which these are affected by the different remedy options we are considering.
76. The Parties have submitted that the Merger will give rise to substantial customer benefits, and in particular that the Merger will:
- (a) Lead to a significant increase in network quality for millions of customers in the UK.
    - (i) The Parties have submitted that the Merger will significantly improve mobile connectivity. They submit the combination of the Parties' assets, sites and spectrum holdings, will deliver a market-wide step-change in network performance, providing reliable nationwide 5G standalone (**5G SA**) coverage across all populated areas in the UK and bridging the connectivity gap between regions. This would not be possible absent the Merger as the Parties lack the scale required to generate sufficient returns to invest sustainably in their networks.

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<sup>18</sup> Section 36(4) of the Act, see also [CMA87](#), paragraph 3.15 and 3.16.

<sup>19</sup> Section 30(1)(a) of the Act, see also [CMA87](#), paragraph 3.17.

<sup>20</sup> Section 30(3) of the Act, see also [CMA87](#), paragraph 3.19.

- (b) Bring forward the roll out of and expand the availability of 5G SA, bringing associated economic benefits to the UK.
  - (i) The Parties have submitted that the Merger will lead to the nationwide deployment of 5G SA, which the Parties cannot achieve on a standalone basis, which will unlock and accelerate access to new and advanced 5G SA use cases. This will stimulate investment, drive productivity, foster innovation and promote economic growth in the UK.
- (c) Enable more UK broadband customers to benefit from Fixed Wireless Access (**FWA**) as an alternative to fixed broadband products.
  - (i) The Parties have submitted the Merger will lead to nationwide deployment of 5G RAN equipment which, together with the Parties' combined spectrum across more sites, will provide greater capacity than either standalone network, offering a unique opportunity to expand FWA access in the UK. FWA will ensure broadband connection to customers who might not have access to fibre-based home broadband products, and compete more effectively with traditional broadband services. This will provide customers with a faster and more reliable service, while also offering a greater choice of broadband products.

77. We welcome views and evidence on the above submissions.

### **Next steps**

78. Interested parties are requested to provide any views in writing, including any practical alternative remedies they wish the CMA to consider, by **17:00 (UK time) on Friday 27 September 2024** (see Note (i)).
79. A copy of this notice will be posted on the [CMA case page](#).

Stuart McIntosh  
*Inquiry Group Chair*  
13 September 2024

### *Note*

- (i) This notice of possible actions to remedy, mitigate or prevent the SLC or any resulting adverse effects is made having regard to the Provisional Findings announced on 13 September 2024. Interested parties have until 17:00 (UK time) on Friday 4 October 2024 to respond to the Provisional Findings. The CMA's

findings may alter in response to comments it receives on its Provisional Findings, in which case the CMA may consider other possible remedies, if appropriate.