Summary

1. This response sets out Vodafone Group plc’s response to the Internal Market Sub-Committee’s call for evidence relating to the impact of Brexit on UK competition policy. In particular, it highlights the need to pursue the following key objectives in relation to antitrust, merger control and state aid:
   a) continued effective enforcement of competition law in the UK;
   b) continuity and certainty/clarity for businesses;
   c) cooperation with the EU to minimise duplication and additional cost;
   d) smooth transition (especially for ongoing cases) to minimise disruption; and
   e) Provide clear practical guidance to consumers and businesses.

General

What should competition policy in the UK set out to achieve? What guiding principles should shape the UK’s approach to competition policy after Brexit?

2. The UK should seek to achieve the following key objectives with regard to UK competition law after Brexit:
   a) Continued effective enforcement of competition law in the UK: this is essential for consumers and businesses operating in the UK.
   b) Continuity and certainty/clarity for businesses: Brexit will inevitably result in a degree of substantive and procedural change to the UK competition regime. Currently, there is significant uncertainty amongst businesses operating in the UK as to the impact that this change will have on their practices and how they will need to adapt. In order to minimise uncertainty, and therefore allow businesses to operate as efficiently as possible, the UK should seek to limit changes to its competition regime to those which are strictly necessary for Brexit. This approach would be consistent with the broad approach of the Government as set out in its White Paper in March 2017 that “wherever practical and sensible, the same laws and rules will apply immediately before and immediately after our departure” and that secondary legislation will not be “a vehicle for policy changes”.
   c) Cooperation with the EU to minimise duplication and additional cost: it seems highly likely that the Competition and Markets Authority (CMA) and European Commission (EC) will carry out parallel merger control and antitrust investigations after Brexit. It is essential that the UK engages with the EU to agree effective cooperation protocols in order to minimise the additional administrative burden and cost for businesses which will arise from having to manage parallel investigations. In particular, cooperation will be necessary in relation to jurisdictional questions, information gathering and sharing, and the design and implementation of commitments in relevant cases.
   d) Smooth transition to minimise disruption: it is also essential that the UK and EU engage now to put in place arrangements to agree how to transition cases which “straddle” Brexit from the current regime to a post-Brexit regime.
e) **Provide clear practical guidance to consumers and businesses:** these arrangements relating to cooperation and transition must be agreed as soon as possible so that the CMA can provide businesses with clear guidance well in advance of March 2019. Such clarity is essential for businesses so that they can minimise the disruption caused by Brexit as effectively as possible.

**Antitrust**

☐ **Post-Brexit, to what extent should the UK seek to maintain consistency with the EU on the interpretation of antitrust law? What opportunities might greater freedom in antitrust enforcement afford the UK?**

3. The UK should seek to maintain consistency with the EU except where strictly necessary for Brexit. In particular:
   a) The Chapter I and Chapter II prohibitions of the Competition Act 1998 (CA98) should remain as currently drafted. There is no apparent need to amend them. They have been in effect since 1 March 2000; there is considerable decisional practice at the level of the CMA and the sectoral regulators; and there is a solid body of jurisprudence in the UK courts explaining their application. Maintaining them in their current form will provide crucial legal certainty for consumers and businesses, thereby helping to minimise disruption to the UK economy.
   b) We suggest that it would be preferable to retain an amended version of section 60 CA98 (which requires UK authorities and courts to apply UK competition law in a manner which is “consistent” EU law), rather than repealing it completely. For example, the UK should consider whether an amended version could require the UK to “have regard to” EU jurisprudence (or similar). Such an amendment would allow UK competition law to develop its own course but reduce the likelihood of sharp divergences in the short term. This would promote legal certainty and mitigate the burden for UK businesses, including the many businesses that will continue to be required to comply with both the EU and UK rules.

☐ **Will Brexit impact the UK’s status as a jurisdiction of choice for antitrust private damages actions?**

4. One of the key reasons why the UK has to date been a jurisdiction of choice for such private damages actions has been the UK’s effective Civil Procedure Rules (for example with regard to disclosure of evidence). These rules will remain in place post-Brexit. However, the extent to which the UK continues to be a popular jurisdiction for actions relating to damage suffered in the EU after Brexit will depend on the outcome of the negotiations between the UK and the EU, and the UK government’s own decisions, in relation to a number of issues. We consider that it would be in the interests of both consumers and businesses in the UK who have been harmed by infringements of EU competition law to continue to be able to bring damages actions in the UK courts.

☐ **Post-Brexit, what is the likelihood of UK authorities conducting parallel investigations with the European Commission or national**
competition authorities of EU Member States? What would the implications of this be?

5. It seems certain that the UK authorities and the European Commission will carry out parallel investigations in at least some cases which have effects across Europe. It will therefore be important that the CMA cooperates effectively with the European Commission and other European competition authorities to ensure resources are used efficiently and the additional burden on businesses is minimised (see below).

☐ *Is a post-Brexit competition cooperation agreement in the mutual interest of the EU and the UK? What provisions would be necessary for such an arrangement to be effective?*

6. An effective cooperation agreement between the UK, the European Commission and the EU member states will be essential particularly if the UK is no longer part of the European Competition Network (ECN). Absent such agreement, there is a real risk that a lack of cooperation will result in duplication of work, diverging approaches and inconsistent outcomes. This would create significant uncertainty and additional burden and cost for business, as well as hindering the effectiveness of competition law enforcement in both jurisdictions. If the UK is required to leave the ECN, it will need to enter into bilateral agreements with the European Commission and the national competition authorities of the Member States (NCAs). In particular, these agreements should provide for extensive information sharing between authorities in relation to parallel investigations,

☐ *How will Brexit affect the CMA’s ability to cooperate with non-EU competition authorities? What impact might there be, if any, on the UK’s influence in developing global competition policy?*

7. Post-Brexit, in addition to the Member State NCAs, the UK will no longer benefit from the EU’s bilateral agreements with the authorities of a large number of third countries such as the US, Canada, Japan, South Korea and Switzerland. It will therefore need to agree bilateral agreements with such authorities.

8. Further, while formal cooperation agreements are extremely important for case work, less formal cooperation is, and will continue to be, important to ensure that the UK is able to participate in, and influence, wider policy initiatives. This promotes a more consistent competition policy framework for businesses which are active on a global basis. The CMA should therefore continue to participate actively in international bodies such as the ICN and OECD.

☐ *Will it be necessary for the UK and EU to agree a transitional arrangement for antitrust enforcement after the UK’s withdrawal from the EU? If so, what transitional issues would such arrangements need to address?*

9. Transitional arrangements will likely be necessary. EU competition law currently prevents the national competition authorities of the EU Member States (including the UK) from taking competition law enforcement action
(under Article 101 or 102 TFEU or, for practical purposes, under equivalent national provisions) when the EC has already opened an investigation into the conduct in question. There is therefore a question as to whether the EC or CMA will have jurisdiction to investigate certain agreements or conduct with effects in the UK post-Brexit. In order to provide businesses with as much certainty as possible, and to ensure the continued effective enforcement of competition law, transitional arrangements will need to address a number of questions, including in particular the question of who will have jurisdiction in relation to (i) investigations opened by the EC pre-Brexit which relate to agreements or conduct with effects in the UK; and (ii) investigations opened by the EC post-Brexit which relate to pre-Brexit agreements or conduct with effects in the UK.

10. The transitional arrangements would likely also need to consider questions relating to leniency processes, commitments and other procedural matters relating to both ongoing and new investigations.

Mergers

- What opportunities does Brexit present for the UK to review national interest criteria for mergers and acquisitions? What might the advantages and disadvantages of this be?

11. The removal of the UK from the scope of application of the EU Merger Regulation (EUMR), and in particular Article 21, will mean that the UK is no longer required to seek the EC’s approval to create a new ground for intervention in merger reviews on public interest or industrial policy grounds.

12. We consider, however, that the circumstances which would justify the creation of such additional grounds are extremely limited and that there is currently no justification for the UK government to take such a step. The current UK merger regime, as set out in the Enterprise Act 2002 (EA02) was based on the premise that mergers and acquisitions should be assessed based specifically on their likely effects on competition in the UK. It is also based on an understanding that this assessment should be made by a body which is independent of government (i.e. the CMA). Expanding the national interest criteria would undermine these fundamental principles and be a retrograde step.

- Does the Competition & Markets Authority (CMA) have the capacity to manage an anticipated increase in UK merger notifications post-Brexit? Could regulators with concurrent competition powers, e.g. Ofgem and Ofcom, play a greater role?

13. The CMA is best-placed to assess and comment on its capacity to manage the anticipated increase in UK merger notifications. However, we anticipate that this increase is likely to be significant (in March 2017, the CMA itself indicated that it anticipates a 40-50% post-Brexit increase in its merger case load (by comparison to April 2014) levels). 1 Those additional transactions will also, by definition, meet the EUMR thresholds and will be large mergers involving at least two (and possibly more)

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1 Andrea Coscelli on the CMA’s role as the UK exits the European Union.
competition authorities. The CMA therefore needs to consider how it will coordinate such investigations with the European Commission (and other authorities) so as to mitigate the increased administrative burden on businesses (see below).

14. Regulators with concurrent competition powers will continue to play an important role in the CMA’s merger reviews by providing relevant input into CMA investigations of transactions in their respective sectors. However, we do not consider that the role of these regulators should be significantly expanded, as they do not currently have experience or expertise in merger control. Also, if the CMA’s exclusive competence in relation to UK merger control were diluted, there would be a significant risk of a loss of consistency of application of the merger regime, given the sectoral regulators’ broader policy goals, which reach beyond competition law. Further, the parties (and interested third parties) to a merger could be faced with the additional burden of communicating with a sectoral regulator as well as the CMA.

□ How burdensome would dual CMA/European Commission merger notifications be for companies?

15. Dual merger notifications and the resulting investigations would create a significant additional burden for the notifying parties to a merger (and also for interested third parties). In particular, there would be a need to (i) hold pre-notification discussions with both the CMA and the EC, (ii) draft separate notifications, (iii) respond to requests for information from each authority, and (iv) in some cases, agree commitments with each authority. This could involve very significant additional cost.

16. While it will almost certainly be impossible to eliminate this additional burden completely, it will be essential for the CMA to enter into effective cooperation agreements with the EC and the EU’s NCAs in order to minimise the additional burden for businesses as far as possible.

□ How likely is it that parallel merger reviews by the European Commission and CMA would lead to divergent outcomes? What would be the likely implications of such a scenario?

17. There is a clear risk that parallel merger reviews by the EC and CMA would lead to divergent outcomes, at least in some cases. For example, the investigations carried out by various EU Member State competition authorities in recent years into online hotel bookings clearly demonstrated that different competition authorities can reach different conclusions in relation to the same set of facts in their respective territories (albeit that those were antitrust rather than merger investigations).

18. This risk is a further (and very important) reason why, as noted above, the CMA should agree effective cooperation arrangements with the EC and the NCAs of the Member States.

□ Do either the CMA or the European Commission currently cooperate with other non-EU national competition authorities on concurrent merger reviews?

19. In our experience, it is common practice for both the CMA and EC to cooperate with non-EU national competition authorities on concurrent
merger reviews and that the extent of such cooperation depends in particular on whether the CMA/EC has a close working relationship with the relevant authorities generally and also whether the parties to the transaction have granted waivers to allow information sharing between the authorities (if there is no formal information sharing agreement in place). We understand that the EC has formal cooperation agreements with a large number of third country authorities. According to the CMA’s website, it also works with “fellow competition and consumer bodies across the world.”. Both authorities also cooperate with their counterparts in other territories through the International Competition Network and the Organisation for Economic Cooperation and Development.

□ Will it be necessary for the UK and EU to agree a transitional arrangement for merger control after the UK’s departure from the EU? If so, what transitional issues would such an arrangement need to address?

20. Transitional arrangements will be necessary. It appears that the EC will lose its jurisdiction to review mergers in relation to their effect on the UK from the moment of Brexit and that this will be true even of mergers that have been notified to the EC pre-Brexit. Further, the requirements of Article 6 EUMR may well lead to a number of cases that initially came within the scope of the EUMR no longer doing so at the time at which Brexit formally takes place. Such transactions would require consideration at national level instead. However, it is currently completely unclear how the EC and CMA proposes to proceed in relation to such investigations ongoing at the moment of Brexit. For example, where the EC has already started investigations under EUMR into transactions which would also satisfy the jurisdictional thresholds under EA02, the CMA could, in theory, open its own parallel investigation immediately after Brexit. However, this would not appear to be a suitable option, either for the CMA (which might find itself overwhelmed with a wave of new merger filings) or the parties, who would likely face the significant additional burden of, effectively, re-notifying the transaction half-way through the EU process.

21. There is therefore a real need for the UK and EU to agree transitional arrangements relating to mergers which will have been notified to the EC under the EUMR, but will still be under investigation on the date of Brexit. Discussions between the CMA and the EC regarding these transitional arrangements should start as soon as possible (if they have not already) so that the arrangements are in place and, importantly, have been clearly explained to businesses before the window of time when notifying parties could find themselves in this position. The CMA should also explain to merger parties when and how to engage with the CMA in order to discuss how best to manage their notification process to minimise any additional delay, supplication and/or cost.

22. Transitional arrangements and related guidance for businesses will likely also need to cover other issues such as commitments and the continued application of legal privilege to advice from UK-qualified lawyers in relation to ongoing investigations.

23. If clear transitional arrangements have not been agreed and communicated to businesses, it seems likely that there could be a significant “cooling” effect on merger activity for a significant period of
time in the build-up to Brexit. It is also possible that the CMA would be inundated with merger notifications immediately after Brexit if companies consider that a post-Brexit notification to the CMA is the best way to proceed on account of uncertainty prior to that date.

State Aid

**Are state aid provisions likely to form an essential component of any future trade agreement between the UK and EU? Do any existing trade agreements between the EU and third countries provide a useful precedent for future UK-EU state aid arrangements?**

24. The precise nature of the state aid provisions included in any future trade agreement between the UK and EU will likely depend to a significant extent on the nature and extent of the trade agreement. Irrespective of any such agreement however, we consider that it will be essential for businesses operating in the UK that a robust state aid regime is implemented post-Brexit. This will be necessary to prevent undue distortions of competition between companies which do business in the UK and thereby to safeguard the effectiveness of UK competition law. The absence of a robust regime would dis-incentivise firms from doing business in the UK.

**Will the UK require a domestic state aid authority after Brexit?**

25. We consider it likely that a domestic state aid authority would be required post-Brexit. This authority should be an impartial body (such as the CMA) which is independent of government. It should have authority to assess/investigate and approve or prohibit state subsidies and rights to bring actions before the UK courts where it considers this to be necessary or appropriate.

**What would be the opportunities and challenges for state aid or subsidy controls in the UK if no trade agreement were to be reached with the EU? Would WTO anti-subsidy rules restrict the UK’s ability to support industries, or individual companies, through favourable tax arrangements?**

26. If no trade agreement is reached between the UK and EU, it seems highly likely that the WTO anti-subsidy rules would apply. While we have not conducted a detailed assessment of the extent and/or effectiveness of these rules, we note that the WTO rules are generally considered to impose a lesser restriction on WTO members’ ability to support industries and/or companies generally. As noted above, we consider it necessary that a robust state aid regime is implemented in the UK post-Brexit.

**How will the Government’s industrial strategy shape its approach to state aid after Brexit? To what extent has the European Commission’s state aid policy limited interventions that the UK Government may have otherwise pursued?**

27. The government itself should answer this question. However, we note that the UK government has historically been a supporter of state rules as a means of safeguarding undistorted competition. Recent comments
made by the government have suggested that its position remains broadly the same.

☐ **What, if any role, might the devolved institutions play in UK state aid control post-Brexit? Are there any potential implications for the UK internal market?**

28. We consider that others are best placed to answer this question.

☐ **Will it be necessary for the UK and EU to agree a transitional arrangement for state aid matters after the UK’s withdrawal from the EU? If so, what transitional issues would such an arrangement need to address?**

29. The need for and precise nature of transitional arrangements will depend on the nature of the agreement between the UK and EU in relation to trade post-Brexit.

15 September