

Anticipated joint venture between Vodafone Limited And Telefónica UK Limited

ME/5556/12

The OFT's decision on reference given on 28 September 2012. Full text of decision published 11 October 2012.

Please note that the square brackets indicate figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.

PARTIES

1. Vodafone Limited (**Vodafone**) is the UK subsidiary of Vodafone Group Plc, a provider of voice and data communications services with equity interests in mobile network operators (**MNOs**) in 27 countries globally and relationships with partner networks in over 40 countries. In the UK, Vodafone is active in the provision of mobile voice and data communications, as well as a small amount of fixed line and fixed broadband services.
2. Telefónica SA is a global telecommunications operator with business activities in more than 20 countries throughout Europe and South America. In the UK, through Telefónica SA UK Limited (**Telefónica**), it provides mobile telecommunications and fixed broadband services.
3. Towerco (**Towerco**) will be a new joint venture formed by Vodafone and Telefónica to manage a single grid of base station sites contributed by each party.

TRANSACTION

4. Vodafone and Telefónica intend to form a new joint venture (**Towerco**), into which the parties' base station sites and site management businesses

will be transferred along with their related passive mobile network assets¹ (**Passive Arrangements**). Towerco will be responsible for the management of a single, optimised grid of base station sites, including liaising with landlords and decommissioning or acquiring sites. The joint venture will formalise a pre-existing arrangement between the parties to manage their sites jointly and facilitate site and passive asset sharing (known as **Cornerstone**).

5. The parties also intend to enter into contractual arrangements for a minimum period of [] years whereby the parties will divide the UK into two regions, and each party will over time take responsibility for design, management and maintenance of the radio access network (**RAN**) equipment in one half of the country (**Active Arrangements**). In this regard, each party will deploy new multi-operator RAN equipment that will enable one set of radio equipment to broadcast multiple frequencies. The parties have stated in their notification to the Office of Fair Trading (**OFT**) that the Active Arrangements will allow them to deliver network coverage of 98 per cent (indoor) by 2015 across at least 2G and 3G communications.
6. Neither the Passive Arrangements nor the Active Arrangements will encompass the core or intelligent part of either party's mobile network.²
7. The parties submitted a Merger Notice on 17 August 2012 to the OFT. The extended statutory deadline for the OFT's decision in this case is 1 October 2012.

JURISDICTION

8. The jurisdictional test in the Enterprise Act 2002 (the **Act**) is met if the OFT believes that it is or it may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.³

¹ Passive assets are the physical structures onto which radio transmission equipment (active assets) are fixed. They include masts, towers, head frames, compounds, fences, gates, cabins, plinths, cooling equipment, power, lightning protection, power supply, battery back-up equipment, connectors and cabling.

² The parties submitted that the intelligent part of the network provides functionality and features that support end user services such as mobile switching centres, home location registers and service platforms.

³ Section 33(1)(a) of the Act.

9. A relevant merger situation arises where two or more enterprises cease to be distinct and either the turnover or the share of supply test is met.⁴ A relevant merger situation can include the transfer or pooling of assets or the creation of a joint venture.⁵
10. The OFT has considered in turn whether the Passive Arrangements and/or the Active Arrangements constitute a relevant merger situation for the purposes of the Act.

Enterprises ceasing to be distinct

Passive Arrangements

11. The term 'enterprise' is defined in section 129 of the Act as 'the activities, or part of the activities, of a business'. A 'business' is defined as 'a professional practice and ... any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge'.
12. The parties submitted that their respective site management businesses constitute distinct enterprises within the meaning of section 26 of the Act. The parties describe the activities of these businesses as the ongoing management, maintenance and acquisition of new sites carried out principally for the benefit of the parties.
13. Each party will transfer its site management business to Towerco. The parties' site management businesses include the physical 'passive' assets (sites and site infrastructure) used in association with a RAN, IT systems, software, intellectual property rights, records, equipment, stock, receivables, managed contracts and goodwill. Some of the employees that are currently working on Cornerstone are also likely to be transferred to Towerco under Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE**).

⁴ The turnover test is met if the UK turnover of the enterprise being taken over exceeds £70 million. The share of supply test is met if the merging parties together supply or obtain 25 per cent or more of goods or services of any (reasonable) description in the UK or a substantial part of the UK (and where the merger enhances that share of supply).

⁵ OFT527 Mergers - Jurisdictional and Procedural Guidance, June 2009, paragraph 3.1.

14. The base station sites themselves include any sites owned/leased/managed by the parties and the passive assets located at those sites. The Passive Arrangements are intended to create a single grid of passive infrastructure which shall ultimately be owned, operated and maintained by Towerco.
15. The parties submitted that although the ongoing management and maintenance of the sites benefits them, it also benefits some third parties and can be said to be carried out for gain or reward.⁶
16. The OFT is of the view that the assets being transferred to Towerco are sufficient for it to carry on the site management businesses of the parties.
17. For the reasons set out above, the OFT is of the view that once each party has transferred the assets listed above to Towerco, both parties will cease to be distinct from the site management business of the other. Consequently, enterprises will cease to be distinct as a result of the Passive Arrangements.

Active Arrangements

18. The parties submitted that while the Active Arrangements take advantage of the Passive Arrangements, they constitute separate cooperative agreements, which do not amount to a relevant merger situation. Indeed, the parties submitted that [].
19. The parties submitted that no enterprises are ceasing to be distinct under the Active Arrangements because there will be no change of control in the parties' RAN equipment. That is, each of the parties' RAN assets will not be transferred but rather will be removed and new RAN assets will be acquired from third party suppliers.
20. Further, they argued that each party will bear its own costs in relation to the roll-out of the single RAN. No customer records, employees or goodwill will be transferred between the parties. The parties compared the arrangements to reciprocal outsourcing arrangements, which the OFT recognises are only likely to lead to enterprises ceasing to be distinct where they involve the permanent (or long-term) transfer of assets, rights and/or

⁶ Under section 129 of the Act.

employees to the outsourcing service supplier and where those may be used to supply services other than to the original owner/employer.⁷

21. The OFT has considered whether the RAN assets and management services which the parties will provide to each other under the Active Arrangements amount to enterprises.
22. With regard to the RAN equipment, the OFT noted that, in their respective regions, the parties will remove existing equipment and purchase new multi-operator RAN equipment that will enable one set of radio equipment to broadcast multiple frequencies. The OFT therefore does not consider that there are any assets being shared which, whether or not they will be under common control, enable a particular business activity to be continued.⁸
23. In *Project Canvas*,⁹ the OFT found that the joint venture did not constitute an enterprise, in part because many of the assets being transferred were not revenue-generating, and it might have taken up to a year before the joint venture could have produced any revenue. The parties do not currently provide the RAN assets and management services as set out under the Active Arrangements to third parties, and therefore these cannot currently be considered to be revenue-generating. As a result, there are also no customer records or goodwill associated with the RAN assets and management services.
24. Furthermore, as set out above, in order for the RAN assets and management services to form an enterprise under the Act, they must involve the activities, or part of the activities, of a business. Under the Act, a business includes any undertaking which is carried on for gain or reward. Given that the parties do not currently provide the RAN assets and management services to third parties, it does not consider them to form part of a business, as defined under the Act.

⁷ OFT527 Mergers - Jurisdictional and Procedural Guidance, June 2009, paragraph 3.13.

⁸ OFT527 Mergers - Jurisdictional and Procedural Guidance, June 2009, paragraph 3.10.

⁹ Anticipated joint venture between The British Broadcasting Corporation, ITV Broadcasting Limited, Channel Four Television Corporation, Channel 5 Broadcasting Limited, British Telecommunications plc, Talk Talk Telecom Limited and Arqiva Limited, ME/4477/10, decision 19 May 2010 (*Project Canvas*).

25. For the reasons set out above, and because the Active Arrangements are not part of the same agreement as the Passive Arrangements or even conditional on them, the OFT is of the view that the Active Arrangements will not result in enterprises ceasing to be distinct, and therefore will not be considered further in this decision.

Turnover Test

26. The OFT has considered whether, with regard to the Passive Arrangements, the turnover test is met. The parties' site management businesses currently provide site access and associated services internally, as well as to third parties. The turnover generated from the provision of access to third parties amounted to £[less than 70] million in 2011. The parties estimated that the market value of the services provided internally by the parties amounted to approximately £[in excess of 70] million.
27. OFT guidance on this point says that where two or more enterprises form a joint venture incorporating their assets and businesses in a particular area of activity, the relevant turnover is the sum of the turnover of each of the contributed enterprises.¹⁰ Applicable turnover does not include amounts that are derived from transactions involving the sale of goods or provision of services between enterprises that are and will remain, post-merger, under the same common ownership or common control.¹¹
28. Paragraph 9 of the Schedule to the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 (**the Order**) provides the OFT with a discretion to consider intra-group turnover as applicable turnover for the purposes of determining whether the turnover test in section 23(1)(b) of the Act is met. The parties requested that the OFT decline to exercise this discretion.
29. The OFT is of the view that paragraph 9 of the Schedule to the Order permits the OFT to treat amounts that were derived internally pre-transaction as applicable turnover, where such amounts would, post-transaction, be regarded as external.¹² The OFT has therefore considered

¹⁰ OFT527 Mergers - Jurisdictional and Procedural Guidance, June 2009, paragraph 3.49.

¹¹ OFT527 Mergers - Jurisdictional and Procedural Guidance, June 2009, paragraph B.18.

¹² OFT527 Mergers - Jurisdictional and Procedural Guidance, June 2009, paragraph B.21.

whether the provision of site access and services provided by Towerco to the parties should, post-transaction, be considered as external.

30. In assessing this, the OFT considered whether Towerco will effectively deal with the parties to the Passive Arrangements on an arm's length basis.¹³
31. In this case, the parties to the Passive Arrangements will pay [], which indicates that pre-merger intra-group transactions would, to a certain degree, become external post-merger.
32. The parties further submitted that these charges [], for which both parties currently have rate cards setting out the charges []. It is anticipated that third parties will be []. However, the parties informed the OFT that they do not anticipate that [] as a result of the Passive Arrangements.
33. Furthermore, the parties submitted that the margin that [].
34. However, the OFT is conscious that the Passive Arrangements are being entered into for the benefit of the parties to the Passive Arrangements and, while some of the passive assets will be made available to third parties after the transaction as they have been pre-transaction, it is not the case that formerly intra-group services will be provided on the open market. This has been corroborated by the parties' internal documents. Furthermore, in this case the Passive Arrangements qualify as a relevant merger situation by virtue of the share of supply test (below) and the OFT will generally only seek to exercise its discretion pursuant to the Order in those cases where doing so affects jurisdiction or the fee due.¹⁴ Therefore, for jurisdictional purposes the OFT does not consider it appropriate to count pre-transaction intra-group sales as relevant turnover, and therefore is not exercising its discretion under the Order.
35. The applicable turnover of the site management businesses of both parties is £[] million, so the turnover test in section 23(1)(b) of the Act is not met.

¹³ See OFT527 Mergers - Jurisdictional and Procedural Guidance, June 2009, paragraph B.20.

¹⁴ OFT527 Mergers - Jurisdictional and Procedural Guidance, June 2009, paragraph B.21.

Share of Supply Test

36. The OFT will have regard to any reasonable description of a set of goods or services to determine whether the share of supply test is met. The parties' site management businesses overlap in the provision of access to base station sites for MNOs. The parties submitted that it would be inappropriate to look at this activity for the purposes of the share of supply test because not all base station sites are capable of being shared.¹⁵
37. The parties submitted that it would be more appropriate to look at the number of sites to which access is controlled by each party and which are capable of being shared with a third party. On that basis, the parties estimate that their combined share of supply amounts to approximately [15-25] per cent.
38. The OFT notes that the share of supply test is intended to establish whether, together, the parties supply at least 25 per cent of a particular set of goods or services. Given that the base station sites controlled by the parties are primarily accessed by the parties to the Passive Arrangements, the OFT agrees that in these circumstances it would be reasonable to look at the parties' shares of supply of third party access to base station sites.
39. The parties submitted that they estimate that together they account for around [10-20] per cent of base station sites shared with, or to which access is provided to, third party MNOs. Based on its market testing, figures submitted by third party competitors (although not all of the relevant competitors provided figures) as well as those submitted by the parties indicated that the parties may account for a larger share of site access to third party MNOs than indicated. The figures derived from this exercise show that the parties may account for over [10-20] per cent (but below 25 per cent) of such sites.
40. In its market test, the OFT found considerable uncertainty over the number of base station sites to which access is provided to third party MNOs. For example, one element of the uncertainty was whether the base station sites were being double counted in the various figures submitted. This may be because a site owner (which may itself be a MNO) does not necessarily determine which MNOs are provided access to the site, for example

¹⁵ For example, due to terms of the lease, planning restrictions and physical limitations.

because it does not have the marketing rights or it has leased the site to a third party. One third party told the OFT that it has marketing rights over a large number of sites over which it does not own or have leasehold interests. Such issues make it difficult for the OFT to undertake a 'bottom-up' analysis of the structure of the market from a range of sources.

41. The parties did, however, submit data on the number of sites that they estimate are capable of being shared with third party MNOs. This measure relates to capacity to provide access. In this regard the OFT notes that, in determining whether the share of supply test is met, the OFT may have regard to capacity.¹⁶ The parties' figures show that together they account for [15-25] per cent of these sites. However, the parties' figures included land-bank opportunities held by a competitor and the OFT is of the view that these are not sufficiently advanced to be shareable base station sites to be taken into account for the purpose of the share of supply test. Moreover, when the figures submitted by the parties are adjusted for third party responses to OFT questions on third parties' own number of shareable sites, the OFT has found that the parties together supply more than 25 per cent of base station sites shareable with third party MNOs.
42. Consequently, the OFT is of the view that it is or may be the case that the share of supply test under section 23 of the Act is met in this case.

Conclusion on jurisdiction

43. For the reasons set out above, the OFT believes that, with regard to the Passive Arrangements, it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

COUNTERFACTUAL

44. When drawing up theories of harm to provide the framework for assessing the effects of a merger, the OFT will look at the expected competitive harm as compared with the situation likely to arise without the merger (known as the counterfactual).¹⁷ In practice, the OFT generally adopts the prevailing

¹⁶ OFT527 Mergers - Jurisdictional and Procedural Guidance, June 2009, paragraph 3.55.

¹⁷ OFT1254 Merger Assessment Guidelines, Joint publication of the Competition Commission and the OFT, September 2010, paragraph 4.2.1.

conditions of competition as the counterfactual against which to assess the impact of a transaction.¹⁸

45. Cornerstone is the name given to a pre-existing arrangement between the parties, under which they manage their sites jointly and facilitate site and passive asset sharing. Cornerstone involves a more limited collaboration between the parties than the Passive Arrangements will, and is purely done on a contractual basis. The Passive Arrangements are intended to build upon and enhance the efficiencies achieved by Cornerstone.
46. The parties submitted that the main difference under the Passive Arrangements will be that Towerco will be incorporated as a legal entity and shall hold personnel and site leases, but will continue to perform most of the functions of the Cornerstone team. The parties submitted that the OFT's assessment of the effects of the Passive Arrangements should be compared with the competitive situation under Cornerstone as the counterfactual.
47. The OFT has not received any evidence to suggest that the competitive situation under Cornerstone has an unrealistic prospect of continuing, and therefore has adopted this as the counterfactual in its assessment below.

FRAME OF REFERENCE

48. In the provision of telecommunications services MNOs require access to a physical base station site and physical assets to maintain their RAN. The RAN equipment used for the reception and transmission of wireless signals is installed onto the physical assets (also referred to as 'passive assets') which are located on base station sites.
49. Base station sites are generally leased or licensed from land owners, but MNOs may own the freehold of a site. There are several companies, such as Arqiva and WIG, which specialise in leasing and licensing base station sites to MNOs. The MNOs may also enter into sharing agreements with other MNOs to share base station sites and infrastructure with each other.

¹⁸ OFT1254 Merger Assessment Guidelines, Joint publication of the Competition Commission and the OFT, September 2010, paragraph 4.3.5.

50. The Passive Arrangements will affect the national market for the supply of base station sites and site infrastructure for MNOs.

Product scope

51. The Competition Commission (**CC**) has previously looked at the market for the provision of site access to MNOs and wireless communication service providers.¹⁹ The CC considered, but did not conclude on, whether the provision of site access to MNOs should be distinguished from the provision of site access to other wireless communication service providers. The EC has previously found that the provision of site infrastructure for digital mobile radio communications equipment constitutes a separate product market.²⁰
52. For the purposes of the current assessment, the OFT does not consider it necessary to come to a firm conclusion as to the precise product scope given that, on the evidence presented to it, no competition concerns arise on any possible frame of reference. On a cautious basis, the OFT has examined the competition effects on the basis of the provision of base station site access to MNOs.

Geographic scope

53. The OFT has previously found in *National Grid Transco/Crown Castle* that the market for the provision of site access is national but with local characteristics.²¹ The national element arose due to the national framework agreements in place and national relationships between the major site providers and the MNOs. The CC has previously declined to conclude on geographic market, but decided instead to determine market shares at a national level but then consider factors indicating that such market shares might under-estimate the parties' competitive strength.
54. The parties submitted that the ability of MNOs to provide services in a particular geographic location depends on their access to a site in such location, and that this lends a local market characteristic to otherwise

¹⁹ Competition Commission, *Macquarie UK Broadcast Ventures Limited/National Grid Wireless Group* (11 March 2008).

²⁰ COMP/38.369 *T-Mobile Deutschland / O2 Germany* [2003].

²¹ Anticipated acquisition by National Grid Transco plc. of Crown Castle UK Holding Limited, decision August 2004.

national markets. The parties also submitted that they do not believe that, overall, the impact of the Passive Arrangements on a regional or local basis would be materially different to their impact on the national market.

55. For the purposes of the current assessment, the OFT is of the view that it does not need to come to a firm conclusion as to the precise geographic scope given that no competition concerns arise on any possible frame of reference. However, given that the OFT received evidence that the parties do not have a particular presence in any region of the UK, it has examined the competition effects on the basis of the provision of base station site access to MNOs on a national basis.

HORIZONTAL ISSUES

Unilateral effects

56. The OFT considered a unilateral effects theory of harm relating to the provision of access to base station sites to MNOs.
57. The parties submitted that they primarily provide internal access to their base station sites, and that not all base station sites which they control access to are capable of being shared. For that reason, the parties provided UK shares of supply on the basis of sites which are capable of being shared with a third party. As set out above, the OFT adjusted those figures to find that the parties have a combined share of supply of 25 to 35 per cent.
58. The OFT considers that the parties' combined share of capacity is insufficient to give the OFT cause for concern.
59. The parties submitted that the Passive Arrangements merely incorporate Cornerstone as a legal entity, Towerco, in order to continue and enhance the sharing of passive assets which was already taking place. Therefore, the Passive Arrangements do not represent a substantial change to the competitive landscape.
60. The parties' customers for the provision of access to base sites are MNOs. Post-transaction, the remaining MNOs will be Everything Everywhere (**EE**) and Hutchinson 3G (**H3G**). The parties submitted that demand for access to their base station sites is extremely low, which they believe to be due to the consolidation of the sites of Orange UK and T-Mobile UK (following

their merger to form EE) and the network sharing arrangement in place between EE and H3G (**MBNL**).

61. The OFT received no third party concerns with regard to unilateral effects of the Passive Arrangements.

Barriers to entry and expansion

62. The OFT notes the existence of land-bank opportunities set out above, held by companies which specialise in the provision of access to base station sites. One third party told the OFT that upon request by a MNO, such land-bank opportunities can generally be converted into base station sites within six months to a year.
63. However, given the competition assessment above, the OFT has not found it necessary to conclude on whether barriers to entry and expansion are present on the market.

Buyer power

64. As set out above, the customers for the provision of access to base sites are MNOs. Post-transaction, it is likely that the remaining MNOs will be Everything Everywhere (**EE**) and Hutchinson 3G (**H3G**). EE provides access to a number of base station sites to the parties, and vice-versa. As a result of this reciprocity, it is likely that EE could use its negotiating strength to limit the ability of Towerco to raise prices.
65. However, given the competition assessment above, the OFT has not found it necessary to conclude on whether countervailing buyer power is present on the market.

Coordinated effects

66. The OFT considered a coordinated effects theory of harm, namely coordination in wholesale and retail mobile call access and origination (including coordination in Ofcom's auction for spectrum).²²

²² On 24 July 2012 Ofcom announced an auction of spectrum for mobile services in the UK (4G) which is set to get under way by the end of 2012.

67. The parties, and other MNOs, compete for customers at the core network level. The core network consists of mobile switching centres, home location registers and service platforms. It is often referred to as the intelligent part of the network because it provides functionality and features that support the end user services supplied by operators to their customers. The parties will continue to compete and for this purpose and remain free to differentiate themselves in respect of the products and services offered to their wholesale and retail customers, as well as in the field of research and development.
68. When assessing coordinated effects, the OFT will analyse the characteristics of the market that could be conducive to coordination. When assessing whether coordination is possible, the OFT will consider whether the following three cumulative conditions are satisfied:
- firms need to be able to reach and monitor the terms of coordination
 - coordination needs to be internally sustainable among the coordinating group and
 - coordination needs to be externally sustainable.
69. If the OFT finds evidence of pre-transaction coordination, the OFT will examine whether the transaction makes coordination more stable or effective. If the OFT finds no evidence of pre-transaction coordination, the OFT will examine whether the transaction makes it more likely that firms in the market will start to coordinate. In this case the OFT has not received any evidence indicating pre-existing coordination.
70. The OFT considered whether there would be an increased level of information-sharing under the Passive Arrangements (as against under Cornerstone), and whether this would make it easier for the parties to reach and monitor any terms of coordination. The parties have submitted that information will only be disclosed to Towerco where it is necessary to enable it to undertake its role, and that it is unlikely that they will need to share any competition sensitive information with Towerco to enable it to undertake its duties in relation to the parties to the Passive Arrangements. Consequently, the OFT is not of the view that the Passive Arrangements will lead to a significantly increased level of information sharing as against Cornerstone.

71. One third party raised concerns that the parties' ability to coordinate in the wholesale and retail call access and origination market would be enhanced by the increased cost symmetry produced by the Passive Arrangements. However, the parties estimated that the magnitude of passive RAN costs in the mobile industry as [] per cent of the parties' total operational costs.²³ This is broadly in line with comments from third parties. Consequently, the OFT does not consider that the costs of the parties will be substantially more aligned as a result of the Passive Arrangements.
72. Given that neither the level of information sharing nor the cost symmetry between the parties is likely to significantly increase as a result of the Passive Arrangements, the OFT does not consider that they will make it easier for the parties to coordinate in wholesale and retail call access and origination. The OFT is therefore of the view that the Passive Arrangements do not give rise to a realistic prospect of a substantial lessening of competition in the form of coordinated effects.

Altered incentives for the parties to expand downstream

73. The OFT considered a further theory of harm related to whether the Passive Arrangements will alter the parties' incentives to expand downstream in the wholesale and retail mobile call access and origination market. The OFT first considered whether the Passive Arrangements decrease the incentive of the parties to expand in the downstream market. This would be on the basis that if either party gains share of supply in the wholesale and retail call access and origination markets, a traffic imbalance may be created. This traffic imbalance would increase that party's upstream costs under the Passive Arrangements.
74. As set out above, in general the parties will share Towerco's costs equally. However, where a site is only required by one party (**Unilateral Demand**), that party will pay [].
75. The OFT considered whether, given that Towerco's costs [], the Passive Arrangements will decrease the parties' incentives to expand unless []. Under Cornerstone, where a site is only required by one party, that party would be responsible for []. Therefore, the OFT does not consider that the Passive Arrangements would decrease the incentive to expand.

²³ *Benefits under Beacon*, report by Frontier Economics, June 2012, Figure 5.

76. Rather, given that the other party will [], the arrangements might increase the incentives of the parties to expand. Given the thresholds in place for Unilateral Demand, the OFT does not consider the change in incentives to be significant. The OFT did not receive any third party concerns relating to the parties' altered incentives to expand downstream as a result of the Passive Arrangements.
77. In light of the above, the OFT is of the view that the Passive Arrangements do not give rise to a realistic prospect of a substantial lessening of competition in the form of altered incentives to expand in the downstream market.

EFFICIENCIES

78. The parties submitted that the Passive Arrangements are intended to build upon and enhance the efficiencies achieved by Cornerstone. The parties told the OFT that the Passive Arrangements are being put in place because Cornerstone has encountered significant practical/operational difficulties which have prevented it from fully meeting the parties' expectations in relation to network expansion and consolidation of sites in existing areas.
79. Given the competition assessment above, the OFT has not found it necessary to conclude on whether the Passive Arrangements give rise to efficiencies (whether relevant customer benefits or rivalry-enhancing efficiencies).

THIRD PARTY VIEWS

80. The OFT received comments from two third parties that the Passive Arrangements would permit the parties to exert unfair pressure on landlords due to their strength as a combined tenant. The OFT has not considered these comments further given that they are not related to the competition effects of the Passive Arrangements.
81. The OFT received a number of representations expressing concerns relating to coordination between the parties in wholesale and retail mobile call access and origination. As set out above, the OFT is of the view that the Passive Arrangements will not have a significant impact on the likelihood of

coordination between them, especially in light of the Cornerstone arrangements already in place.

82. In particular, one third party raised a concern relating to coordination by the parties in their bids for spectrum in Ofcom's auction. The OFT is of the view that the Passive Arrangements would not sufficiently change the likelihood of coordination between the parties in their bids for spectrum.
83. Another third party raised a concern that the Passive Arrangements must be treated as a single arrangement along with the Active Arrangements and that this will result in a duopoly at the RAN level. As set out above, the OFT does not consider that it has jurisdiction over the Active Arrangements, and therefore has not considered this concern further.
84. Other third party comments have been incorporated where relevant in the decision.

ASSESSMENT

85. Vodafone and Telefónica intend to enter into the Passive Arrangements and Active Arrangements as set out above. For the purposes of the Passive Arrangements each party will transfer its site management business to Towerco. This will involve the transfer of the parties' tangible and intangible assets associated with these businesses, as well as the transfer of employees. The OFT is of the view that the Passive Arrangements amount to a relevant merger situation. The OFT does not consider that the Active Arrangements form part of the relevant merger situation.
86. The parties submitted that they together account for [15-25] per cent of base station sites shareable with MNOs. Upon adjustment of these shares for third party responses, the OFT found that the parties together may supply more than 25 per cent, and therefore that it is or may be the case that the share of supply test under the Act is met.
87. The parties' site management businesses overlap in the provision of access to base station sites for MNOs. The OFT has assessed the Passive Arrangements on the basis of the provision of base station site access to MNOs on a national basis.

88. The OFT considered a unilateral effects theory of harm relating to the provision of access to base station sites to MNOs. With regard to the provision of access to base station sites to MNOs, the parties have a relatively low combined share of supply. The only current customers are two MNOs who currently have a site sharing agreement in place between them. Furthermore, the OFT did not receive any third party concerns relating to unilateral effects of the Passive Arrangements. In comparison with Cornerstone, the OFT is of the view that the Passive Arrangements do not give rise to a realistic prospect of a substantial lessening of competition in the provision of access to base station sites to MNOs.
89. The OFT also considered one coordinated effects theory of harm in the form of coordination in wholesale and retail mobile call access and origination (including coordination in Ofcom's auction for spectrum). The OFT received some third party concerns relating to such coordination. The OFT does not consider that the costs of the parties will be substantially aligned as a result of the Passive Arrangements. Furthermore, the parties will not share significantly more information with each other under the Passive Arrangements.
90. With regard to the incentives of the parties to expand in the downstream market, the OFT considered whether these would be altered significantly as a result of the Passive Arrangements. The OFT received no third party concerns relating to such altered incentives. Having analysed the cost arrangements under the Passive Arrangements, the OFT is of the view that, as against Cornerstone, they do not give rise to a realistic prospect of a substantial lessening of competition in the form of altered incentives to expand in the downstream market.
91. Consequently, for the purposes of its competition assessment in the current case, the OFT has not found it necessary to conclude on whether the market is conducive to coordination, given that, in the OFT's view the likelihood of coordination in the market would not be significantly increased as a result of the Passive Arrangements.
92. Consequently, the OFT does not believe that it is or may be the case that the merger may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

DECISION

93. This merger will therefore **not be referred** to the Competition Commission under section 33(1) of the Act.