

Anticipated acquisition by Cellnex UK Limited of the passive infrastructure assets of CK Hutchison Networks Europe Investments S.À R.L

Decision to refer

ME/6917/20

The CMA's decision to refer under section 33 of the Enterprise Act 2002 given on 27 July 2021. Full text of the decision published on 19 August 2021.

Please note that [X] indicates figures or text which have been deleted or replaced in ranges at the request of the parties for reasons of commercial confidentiality.

Introduction

1. Cellnex UK Limited, a subsidiary of Cellnex Telecom S.A. (together, **Cellnex**), has agreed to acquire the following passive infrastructure assets in the UK (the **Transaction Sites**) which CK Hutchison Holdings Limited and its subsidiaries (the **CK Hutchison group**) holds or has an interest in (the **Merger**):
 - (a) the approximately [2,700-2,800] passive infrastructure sites and related assets in the UK (the **Unilateral Sites**), including 2,600 sites to host Hutchison 3G UK Limited (**3UK**) active wireless telecommunications equipment that are under construction (the **Streetworks Sites**), held by CK Hutchison Networks (UK) Limited;
 - (b) the approximately 7,500 passive infrastructure sites used by 3UK that sit within the Mobile Broadband Network Limited Joint Venture (**MBNL JV**) (the **MBNL Sites**); and
 - (c) the passive infrastructure sites and related assets (subject to a minimum of 3,000 and a maximum of approximately 3,750) that 3UK will receive upon dissolution of the MBNL JV (the **Transfer Sites**).

2. CK Hutchison group and Cellnex are together referred to as the **Parties**. Cellnex and the Transaction Sites are together referred to as the **Merged Entity**.
3. On 13 July 2021, the Competition and Markets Authority (**CMA**) decided under section 33(1) of the Enterprise Act 2002 (the **Act**) that it is or may be the case that the Merger consists of arrangements that are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, and that this may be expected to result in a substantial lessening of competition (**SLC**) within a market or markets in the United Kingdom (the **SLC Decision**).¹
4. On the date of the SLC Decision, the CMA gave notice pursuant to section 34ZA(1)(b) of the Act to the Parties of the SLC Decision. However, in order to allow the Parties the opportunity to offer undertakings to the CMA for the purposes of section 73(2) of the Act, the CMA did not refer the Merger for a phase 2 investigation pursuant to section 33(3)(b) on the date of the SLC Decision.
5. Pursuant to section 73A(1) of the Act, if a party wishes to offer undertakings for the purposes of section 73(2) of the Act, it must do so before the end of the five working day period specified in section 73A(1)(a) of the Act. The SLC Decision stated that the CMA would refer the Merger for a phase 2 investigation pursuant to section 33(1), and in accordance with section 34ZA(2) of the Act, if no undertakings for the purposes of section 73(2) of the Act were offered to the CMA by the end of this period (ie by 20 July 2021); if the Parties indicated before this deadline that they did not wish to offer such undertakings; or if the undertakings offered were not accepted.
6. On 20 July 2021, the Parties offered the CMA the following undertakings (the **Proposed Undertakings**).
 - (a) The Parties would divest the rights and obligations in respect of those Streetworks Sites which are not built at the date of completion of the Merger, representing a minimum of [X] developed macro sites, so that the rights and obligations to operate these sites are granted to an alternative purchaser that is independent of and unconnected to the Parties and their respective groups (the **Divestment Remedy**).
 - (b) Cellnex would commit to continuing to abide by the terms and conditions (including duration) relating to the supply of access to [X], and to supply

¹ See [Cellnex / CK Hutchison UK towers merger inquiry - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/cellnex-ck-hutchison-uk-towers-merger-inquiry)

site access [X] (excluding [X]) [X] for at least [X] years [X], subject only to [X] changes reflecting changes to [X] (the **Supply Remedy**).

Assessment of the Proposed Undertakings

7. As noted at paragraph 3, in the SLC Decision the CMA concluded that it is or may be the case that the Merger may be expected to result in an SLC as a result of horizontal unilateral effects in the supply of access to developed macro sites and ancillary services to wireless communication providers in the UK.
8. Section 73(2) of the Act states that the CMA may, instead of making a reference and for the purpose of remedying, mitigating or preventing the SLC concerned or any adverse effect which may be expected to result from it, accept undertakings in lieu of a reference (**UILs**) to take such action as it considers appropriate. When considering whether to accept UILs in phase 1 of its investigation, the CMA has an obligation under the Act to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any resulting adverse effects (section 73(3) of the Act).²
9. Accordingly, in order to accept UILs, the CMA must be confident that all of the potential competition concerns that have been identified in its investigation would be resolved by means of the UILs without the need for further investigation. UILs are therefore appropriate only where the remedies proposed to address any competition concerns raised by the merger are clear-cut and capable of ready implementation.³ Further:
 - (a) in relation to the substantive competition assessment, the clear-cut requirement means that ‘there must not be material doubts about the overall effectiveness of the remedy’; and
 - (b) in practical terms, the requirement for remedies to be capable of ready implementation means that ‘UILs of such complexity that their implementation is not feasible within the constraints of the Phase 1 timetable are unlikely to be accepted’.⁴
10. The CMA’s starting point in deciding whether to accept UILs offered is to seek an outcome that restores competition to the level that would have prevailed

² [Mergers remedies \(CMA87\)](#), December 2018 (**Remedies Guidance**), paragraph 3.30.

³ Remedies Guidance, paragraph 3.27.

⁴ Remedies Guidance, paragraphs 3.28.

absent the merger, thereby comprehensively remedying the SLC (rather than accepting a remedy that simply mitigates the competition concerns).⁵

11. At phase 1, the CMA is generally unlikely to consider that a behavioural undertaking will be sufficiently clear-cut to address the identified competition concerns as it will not address the SLC at source (unlike a structural remedy) and may give rise to a number of risks which can reduce its effectiveness or create competition concerns elsewhere, and can be difficult to monitor and enforce. Moreover, the CMA's experience (and that of its predecessor, the OFT) is that devising a workable and effective set of behavioural commitments within the context of a short, Phase 1 timetable is difficult.⁶ Nevertheless, despite its preference for structural remedies, the CMA does not inevitably refuse behavioural remedy offers, in particular where a structural remedy would be clearly impractical or is otherwise unavailable.⁷
12. The CMA has material doubts that the Divestment Remedy would effectively remedy the competition concerns identified in the SLC Decision. The Divestment Remedy is only a partial divestment of the assets that give rise to the overlap between the Parties that raises competition concerns. The Divestment Remedy does not extend to the Transfer Sites at all and only covers a portion of the Unilateral Sites. Even with the Divestment Remedy, the Merger would still lead to the strengthening of Cellnex's already very strong market position and the Merged Entity would still have a large share of supply. As of 31 March 2021, [X] of the 2,600 Streetworks Sites had been built.⁸ As such, the maximum number of sites that could potentially be divested under the Divestment Remedy is around [X] Streetworks Sites' (with the minimum being [X]). If [X] sites were divested, the Merged Entity's combined share of supply adjusted for foreseeable changes in the market structure up to 2022 would be around [70-80]%. If the minimum number of [X] sites were divested, the Merged Entity's combined share of supply adjusted for foreseeable changes in the market structure up to 2022 would be around [70-80]% in 2022.
13. For the reasons set out below, the CMA also has material doubts that the Supply Remedy would effectively remedy the competition concerns identified in the SLC Decision.
 - (a) The Supply Remedy would not restore competition to the levels that would have prevailed absent the Merger. The Supply Remedy would not

⁵ Remedies Guidance, paragraphs 3.27 to 3.28 and 3.30 to 3.31.

⁶ Remedies Guidance, paragraphs 3.5(a) and (c) and 3.32.

⁷ Remedies Guidance, paragraph 3.32.

⁸ A further [X] Streetworks Sites are expected to be built during 2021 and [X] Streetworks Sites are expected to be built during 2022.

recreate a competitive process, but rather would [redacted]. In a scenario where competition would have contributed to declining prices or rising quality over time (relative to the level of prices and quality prevailing at the point of dissolution of MBNL), the Supply Remedy could not be expected to lead to the same outcome.

- (b) The CMA considers that Supply Remedy carries a risk of market distortion through the preservation of terms and conditions that have not been set in competitive conditions. As above, it is not clear that [redacted] would adequately replicate [redacted]. In particular, the CMA considers there is a risk that the terms and conditions [redacted] may already be distorted by Cellnex's market strength. Even if the terms and conditions are favourable to customers [redacted], there is a risk that over the duration of the remedy and as market conditions change they become less favourable.
 - (c) The Supply Remedy only applies to a subset of all potential customers of the Transfer Sites (ie [redacted]), and does not extend to all potential customers on the Transfer Sites that Cellnex may supply [redacted].
 - (d) In relation to customers other than [redacted], the Supply Remedy may last a limited period of only [redacted] years. Given the potentially long-lasting effect of the Merger on Cellnex's market position, the CMA considers that the proposed duration of the Supply Remedy may not be sufficient to protect consumers. In addition, Cellnex would still be permitted to [redacted].
14. In addition, the Proposed Undertakings do not address the CMA's concerns in relation to the material influence that Cellnex will obtain over the MBNL Sites and the potentially reduced resulting constraint that BT/EE exercises on Cellnex.
 15. On this basis, the CMA considers there are material doubts about the overall effectiveness of the Proposed Undertakings and is therefore not confident that all of the competition concerns that have been identified in its investigation would be resolved by means of the UILs without the need for further investigation.
 16. Further, the CMA considers the Supply Remedy raises material concerns regarding implementation. These concerns include that the Supply Remedy would create ongoing monitoring or enforcement risks for the duration of the remedy. The Parties submitted that the Supply Remedy involves a commitment to refrain from altering terms and conditions and that the commitment does not place any positive obligation on Cellnex that the CMA would have to monitor. Irrespective of whether the undertaking is framed positively or negatively, there would be a need (for either the CMA, or another

entity such as a Monitoring Trustee) to monitor the terms and conditions offered to, as well as Cellnex's engagement with, customers, and potentially to resolve any disputes between customers and the Merged Entity. This would be necessary to ensure that Cellnex complies with the remedy.

17. The CMA therefore considers there is a significant risk that the Proposed Undertakings would not effectively restore competition to the level that would have prevailed absent the Merger. The CMA considers the Proposed Undertakings are not clear-cut and would not fully address the competition concerns identified in the SLC Decision. The CMA does not consider that these issues could be addressed through further modifications of the Proposed Undertakings in the phase 1 process.

Decision

18. For the reasons set out above, after examination of the Proposed Undertakings, the CMA does not believe that it would achieve as comprehensive a solution as is reasonable and practicable to the SLC identified in the SLC Decision and the adverse effects resulting from that SLC.
19. Accordingly, the CMA has decided not to exercise its discretion under section 73(2) of the Act to accept undertakings in lieu of reference.
20. Therefore, pursuant to sections 33(1) and 34ZA(2) of the Act, the CMA has decided to refer the Merger to its chair for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 to conduct a phase 2 investigation.

Mike Walker
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Competition and Markets Authority
27 July 2021