

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

Decision on relevant merger situation and substantial lessening of competition

ME/6917/20

The CMA's decision on reference under section 33(1) of the Enterprise Act 2002 given on 13 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 or third parties for reasons of commercial confidentiality.

SUMMARY

Introduction

1. Cellnex UK Limited (**Cellnex**) has agreed to acquire the passive infrastructure assets in the UK of the CK Hutchison group (**CK Hutchison**) (the **Merger**). CK Hutchison and Cellnex are together referred to as the **Parties**.
2. Cellnex is an owner and operator of sites in the UK containing passive infrastructure (elevated structures to which telecommunications equipment can be attached) used by wireless communication providers. Cellnex's customers are mainly mobile network operators (**MNOs**). Cellnex's passive infrastructure is also used by other communication providers.
3. CK Hutchison is a multinational conglomerate headquartered in Hong Kong. In the UK, CK Hutchison's telecommunications division operates as an MNO, namely Hutchison 3G UK Limited (**3UK**). 3UK and BT/EE have an infrastructure sharing joint venture (**MNO JV**) to manage their shared networks, namely Mobile Broadband Network Limited (**MBNL** or the **MBNL JV**). 3UK also owns certain passive infrastructure assets outside of the MBNL JV.

4. The Parties overlap in the supply of access to passive infrastructure assets, specifically developed macro sites, and ancillary services to MNO and non-MNO customers in the UK.
5. On completion of the Merger:
 - (a) Cellnex will acquire ownership of 3UK's unilaterally owned passive infrastructure sites in the UK, including 2,600 sites under construction (the **Unilateral Sites**).
 - (b) Cellnex will obtain the 'economic benefit' to which CK Hutchison is currently entitled in respect of approximately 7,500 sites that sit within the MBNL JV (ie sites owned by 3UK, BT/EE, or by those companies jointly as part of the joint venture) (the **MBNL Sites**). Cellnex will also be responsible for bearing certain costs associated with these interests.
6. In addition, once the MBNL JV (whose term runs to the end of 2031) is dissolved and 3UK receives its share of sites and assets from the JV, 3UK will transfer up to half of the MBNL Sites (subject to a minimum of 3,000 and a maximum of approximately 3,750) to Cellnex (the **Transfer Sites**).
7. The Unilateral Sites, MBNL Sites and Transfer Sites are together referred to as the **Transaction Sites**. Cellnex and the Transaction Sites are together referred to as the **Merged Entity**.
8. The Competition and Markets Authority (**CMA**) believes that it is or may be the case that each of Cellnex, the Unilateral Sites, the MBNL Sites and the Transfer Sites is an enterprise; that these enterprises will cease to be distinct as a result of the Merger; and that the turnover and share of supply tests are met. With regard to the MBNL Sites in particular, the CMA believes that Cellnex will be able to indirectly influence commercial and strategic policy decisions for the MBNL Sites, giving it the ability to exercise material influence over the MBNL Sites. Accordingly, arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

Counterfactual

9. The CMA considered the competitive effects of the Merger against a counterfactual in which CK Hutchison pursued alternative methods to extract value from the Transaction Sites. While the CMA is not required to reach a view on all aspects of the alternative courses of action that CK Hutchison could have pursued absent the Merger, it believes, on the basis of the

evidence currently available, that there is a realistic prospect that it would have sold the Transaction Sites to another purchaser. The CMA believes that this gives rise to a counterfactual in which there would have been stronger competition between Cellnex and the Transaction Sites as compared to the prevailing conditions of competition.

Competitive Assessment

10. The Parties overlap in the supply of access to developed macro sites and ancillary services to wireless communication providers in the UK.
11. The CMA assessed whether the Merger may be expected to result in a substantial lessening of competition (**SLC**) as a result of horizontal unilateral effects in relation to the supply of access to developed macro sites and ancillary services to wireless communication providers in the UK. In order to assess the likelihood of the Merger resulting in horizontal unilateral effects, the CMA assessed (a) Cellnex's existing position; and (b) the impact of the Merger on Cellnex's market position.
12. The CMA found that the size and reach of a supplier can be an important competitive capability. In particular, having a large geographic footprint is a competitive advantage because a supplier with a wider geographic footprint is more likely a supplier to have a suitable site for a customer. Several third parties also submitted that a larger geographic footprint is likely to increase the bargaining power held by a tower operator, with one submitting that the ability to dictate prices increases with the number of sites owned by a particular supplier.
13. The CMA's investigation found that Cellnex has a very strong existing market position in the supply of access to developed macro sites to wireless communication providers in the UK. Cellnex is the largest independent tower company in the UK with a current share of supply for access to developed macro sites in the UK of around [80-90]% by number of developed macro sites, with the Transaction Sites currently not being in the market, as they are held by CK Hutchison and MBNL for their own self-supply.
14. This is consistent with Cellnex's internal documents, as well as third party views, which confirm that Cellnex is the largest independent tower company in the UK. Cellnex's bidding data also shows that Cellnex won almost all contracts that it bid for in 2020 (excluding opportunities abandoned by customers).

15. The CMA estimated that the acquisition of the Unilateral Sites would represent a [20-30]% increment to Cellnex's share of sites, and that the acquisition of the Unilateral Sites and the Transfer Sites would represent a [30-40]% increment to Cellnex's share of sites. The CMA considers that in the counterfactual, these sites would have been acquired by another purchaser, which would have brought about a significant additional constraint on Cellnex.
16. The CMA also believes that the Merger may further strengthen Cellnex's position, as a result of its acquisition of material influence over the MBNL Sites. The CMA believes that Cellnex's material influence over the commercial and policy decisions for the MBNL Sites could, for example, impact BT/EE's ability to upgrade the MBNL Sites to 5G, reducing the constraint that BT/EE's self-supply currently exercises on Cellnex, and would exercise on the Merged Entity post-Merger.
17. Consequently, the CMA believes that Cellnex already has a strong market position, which would be strengthened as a result of its acquisition of a very large number of additional sites together with its ability to exercise material influence over the MBNL Sites.
18. Having considered the impact of the Merger on Cellnex's market position, the CMA also assessed the current and future constraints on the Merged Entity from:
 - (a) independent WIPs;
 - (b) self-supply and supply by MNO JVs; and
 - (c) Build-to-Suit (**BTS**) sites.
19. The CMA believes that other independent WIPs pose only a limited constraint on Cellnex. The share of supply estimates also show that following the acquisition of the Unilateral Sites and the Transfer Sites, the next-largest largest competitor would have a share of supply of [5-10]%, with the shares of supply of the remaining competitors being below 5%. The CMA also found that expansion plans by WIPs are limited and that opportunities for large scale organic growth are limited for competitors with fewer existing sites.
20. The CMA also considered the constraint from MNOs (namely, Telefonica, Vodafone, Three and BT/EE) as well as CTIL (the Vodafone/O2 MNO JV). In *Cellnex/Arqiva*, the CMA had found that MNO and MNO JV self-supply constrained Cellnex, but that the strength of the constraint depended on the customer concerned. In *Cellnex/Arqiva*, the CMA also found that Cellnex was materially constrained by the threat of self-supply by MNOs, particularly given

that MNOs have a preference to self-supply where they have their own sites. However, the CMA found that the nature of the constraint meant that it was not among the most immediate sources of competition to Cellnex and that self-supply should be characterised as a ‘price ceiling’, at least in the near-term.

21. In this case, the CMA considers that self-supply by MNOs and MNO JVs continues to constrain Cellnex to some extent. As set out at paragraph 16, the CMA considers that as a result of the Merger, BT/EE’s self-supply constraint on Cellnex might be weakened.
22. The CMA considered whether other MNOs and MNO JVs may make their sites available to customers, thereby becoming a stronger constraint, individually or collectively, on the Merged Entity. On the basis of third-party submissions, the CMA believes that the MNOs and MNO JVs will predominantly continue to use their sites to self-supply. With regard to CTIL in particular, the CMA believes that it is likely to prioritise serving its shareholders rather than operating as an independent tower company that is neutral as to which customers occupy its sites.
23. The CMA also assessed the constraint posed by BTS sites. Third parties submitted that there are several advantages in using an existing site compared to a BTS site. The CMA also found that the bidding data shows that Cellnex predominantly wins contracts using existing sites, rather than BTS sites. While some WIPs submitted that they use BTS sites more than existing sites to fulfil customer tenders, the CMA considers that this is likely as a result of their more limited geographic footprint, meaning that they are more likely to need to create new sites to fulfil customer needs.
24. The CMA therefore believes that there will be insufficient competition from other suppliers (including WIPs, MNOs and MNO JVs) or from BTS sites post-Merger to constrain the Merged Entity.

Decision

25. The CMA therefore believes that the Merger gives rise to a realistic prospect of 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.
26. The CMA is therefore considering whether to accept undertakings under section 73 of the Enterprise Act 2002 (**the Act**). The Parties have until 20 July 2021 to offer an undertaking to the CMA that might be accepted by the CMA.

If no such undertaking is offered, then the CMA will refer the Merger pursuant to sections 33(1) and 34ZA(2) of the Act.

ASSESSMENT

Parties

27. Cellnex is an owner and operator of sites in the UK containing passive infrastructure used by wireless communication providers. Cellnex's customers are mainly MNOs. Cellnex's passive infrastructure is also used by other communication providers.
28. The Cellnex group¹ is headquartered in Spain. Cellnex entered the UK market in 2016 through its acquisition of 540 sites containing passive infrastructure from Shere Group Limited. In 2020, through its acquisition of Arqiva Services Limited (**Arqiva**), Cellnex acquired 7,113 developed macro sites.² Cellnex's acquisition of Arqiva was reviewed and cleared at Phase 1 by the CMA in 2020.^{3,4}
29. The turnover of the Cellnex group for the financial year ending 31 December 2020 was £1,428 million worldwide and £250 million in the UK.
30. The CK Hutchison group⁵ is a multinational conglomerate headquartered in Hong Kong and listed on The Stock Exchange of Hong Kong Limited. In the UK, CK Hutchison's telecommunications division operates as an MNO, namely 3UK. 3UK and BT/EE have an infrastructure sharing joint venture to manage their shared networks, namely MBNL. 3UK also owns certain passive infrastructure assets outside of the MBNL JV
31. Between 2019 and July 2020, CK Hutchison conducted an internal reorganisation of its telecommunications division. CK Hutchison's European tower assets were grouped into separately managed entities or divisions. CK Hutchison incorporated TowerCo to hold 3UK's passive infrastructure assets in the UK.

¹ Cellnex Telecom S.A. and its subsidiaries.

² Final Merger Notice dated 13 May 2021 (**FMN**), paragraph 2.49.

³ See [Anticipated acquisition by Cellnex UK Limited of Arqiva Services Limited \(2020\) \(Cellnex/Arqiva\)](#)

⁴ Subsequent to the CMA's decision, Arqiva changed its company name to OnTower UK Limited (**OnTower**).

⁵ CK Hutchison Holdings Limited and its subsidiaries including CK Hutchison Networks Europe Investments S.À.R.L., CK Hutchison Group Telecom Holdings Limited, Hutchison 3G UK Holdings Limited (**3UK Holdings**), 3UK and CK Hutchison Networks (UK) Limited (**TowerCo**).

32. The turnover of TowerCo for the financial year ending 31 December 2019 was £[REDACTED], the entirety of which was generated in the UK.

Transaction

33. Cellnex UK Limited, as buyer, and CK Hutchison Networks Europe Investments S.À R.L., as seller, entered into a sale and purchase agreement on 12 November 2020.
34. On completion of the Merger:
- (a) Cellnex will obtain the entire issued share capital of TowerCo from CK Hutchison. TowerCo holds:
- (i) [100-200] developed macro sites that were previously owned and operated by UK Broadband Limited, a subsidiary of 3UK (**UKB Sites**);
 - (ii) [100-200] monopoles,⁶ which currently solely host 3UK active wireless telecommunications equipment; and
 - (iii) [2,400-2,500] monopoles that 3UK is currently building but which have not yet been completed (as of 31 December 2020). The monopoles that have been constructed at completion will transfer to Cellnex at that time. The legal title in the remaining monopoles will transfer to Cellnex once they have been built.

The 2,600 monopoles in (ii) and (iii) (the **Streetworks Sites**) and the UKB Sites (altogether the Unilateral Sites) are not part of, and sit outside of, the MBNL JV.

- (b) Cellnex (through its subsidiary OnTower) will obtain the economic benefit of the interests to which 3UK is entitled to in respect of the MBNL Sites, which are currently managed by MBNL.⁷ Cellnex will also bear the costs associated with these interests. At completion, the CK Hutchison group entities and a Cellnex group entity⁸ will enter into three agreements which specify the nature of the economic benefit and associated costs and set out the legal framework for their transfer and oversight:

⁶ A form of radio antenna often mounted perpendicularly over a conductive surface.

⁷ The MBNL Sites also include [REDACTED]. The MBNL Sites do not include: (i) sites containing passive infrastructure acquired or built after completion of the Merger, or sites that MBNL uses but does not own or operate, ie [REDACTED] sites owned by wireless infrastructure providers that MBNL uses; (ii) the Unilateral Sites which Cellnex will acquire and own outright on completion of the Merger; or (iii) the active infrastructure and backhaul on the MBNL Sites. FMN paragraph 2.32.

⁸ [REDACTED].

- (i) The [REDACTED]. Under the [REDACTED], Cellnex will receive the economic benefit (and bear the related costs) of the interests to which 3UK is entitled in respect of the MBNL Sites. The [REDACTED] also sets out a mechanism to transfer legal title to approximately half of the MBNL Sites to Cellnex on dissolution of MBNL.
 - (ii) The [REDACTED]. The [REDACTED] sets out certain protections for Cellnex in relation to its economic interests. For example, Cellnex can [REDACTED]. It also requires the creation of an advisory board involving 3UK Holdings and Cellnex⁹ (the **Governance Board**) to ensure that 3UK exercises its rights in accordance with Cellnex's interests where required.
 - (iii) The [REDACTED]. The [REDACTED] specifies which telecommunications infrastructure services OnTower will provide to 3UK in relation to the MBNL Sites as well as the fee it is entitled to charge (the **Service Fee**).
35. In addition, under the [REDACTED], following dissolution of MBNL, 3UK will transfer legal title to the Transfer Sites, including certain assets¹⁰ located on those sites.¹¹ The exact number and identity of the Transfer Sites will be determined once the processes specified in the MBNL JV Agreements for the termination of the MBNL JV are completed. The Parties submitted that the default term of MBNL expires on 31 December 2031 and that it can be [REDACTED].
36. Consideration for the acquisition of TowerCo will be [REDACTED]. Consideration for the interests in the MBNL Sites and legal title over the Transfer Sites will be EUR [REDACTED].¹²
37. The Merger is one of six transactions whereby Cellnex is acquiring passive infrastructure assets from CK Hutchison. As well as the Merger in the UK, Cellnex has acquired assets in Austria, Denmark, Ireland, Italy and Sweden (the **European transactions**). Completion of the transactions in Austria, Denmark and Ireland took place on 21 December 2020; completion of the transaction in Sweden took place on 25 January 2021; and completion of the transaction in Italy took place on 30 June 2021.

⁹ The Parties have submitted that [REDACTED]. Cellnex response to question 7a of the CMA's notice under section 109 dated 23 February 2021; CK Hutchison response to question 12 of the CMA's notice under section 109 dated 23 February 2021.

¹⁰ Pursuant to Schedule 1, paragraph 6 of the [REDACTED].

¹¹ [REDACTED] 3UK will be required to transfer legal title to these sites (subject to a minimum of 3,000 sites and a maximum of half of the number of MBNL Sites to Cellnex (ie the Transfer Sites) for nil consideration (as the consideration will already have been paid on Completion) in accordance with the allocation and transfer provisions of the [REDACTED]. FMN, paragraph 2.35.

¹² FMN, paragraphs 2.79 to 2.82.

Procedure

38. The Merger was considered at a Case Review Meeting.¹³

Background

39. Passive infrastructure can take several forms, such as purpose-built towers, rooftops, water towers, pylons, lamp posts or other street furniture. Passive infrastructure comprises the non-electronic elements of a telecommunications site and differs from the active telecommunications equipment that enables voice and data cellular services. Active telecommunications equipment is attached to passive infrastructure.
40. Passive infrastructure comprises the following types of assets:
- (a) Macro sites that host high power macrocells and provide broad coverage. They are generally characterised as sites containing tower structures, or assets such as rooftops, monopoles, or pylons.
 - (b) Micro sites (also called sub-macro sites) that host lower power microcells and provide infill coverage and densification in high use areas (such as in urban locations) and allow MNOs to improve network coverage and capacity. Small cells are types of micro sites that are primarily deployed outside, eg on street furniture.
41. When purchasing access to developed macro sites from site providers, customers typically organise tenders or purchase through bilateral negotiations, but may also choose to self-supply and build their own sites. Tenders can be for a contract to supply specified sites or can be for framework agreements, in which customers acquire an option to nominate a certain number of sites for development by the winning bidder.
42. Customers also purchase ancillary services. These services include site installation and rigging, site sharing, site operation and decommissioning. Customers typically either purchase these services from site providers, self-supply or contract for these services.
43. Suppliers of passive infrastructure are referred to as wireless infrastructure providers (**WIPs**). WIPs supply passive infrastructure sites to MNOs and other wireless communication providers which can be used to locate active telecommunications equipment. In the UK, the MNOs are O2 (Telefónica),

¹³ See [Mergers: Guidance on the CMA's jurisdiction and procedure](#) (CMA2 revised), December 2020, from page 46.

Vodafone, 3UK and EE. MNO JVs also supply passive infrastructure sites. These MNO JVs mostly supply their shareholder MNOs (ie these MNOs self-supply) with access to a network of sites in which they or the shareholder MNOs hold some form of interest¹⁴ as well as ancillary services (as described in paragraph 42) at those sites. In addition, the MNO JVs currently have limited supply to other MNOs and non-MNO customers on a commercial basis.¹⁵ Telefónica and Vodafone set up Cornerstone Telecommunications Infrastructure Limited (**CTIL**). As described above, 3UK and BT/EE have set up the MBNL JV.

44. Other WIPs active in the UK include, Wireless Infrastructure Group (**WIG**), Digital Colony, Atlas and Britannia/Hibernian.

Jurisdiction

Legal Framework

45. An anticipated merger must meet the following two criteria to constitute a relevant merger situation for the purposes of the Act:¹⁶
- (a) first, the arrangements in progress or in contemplation will, if carried into effect, lead to enterprises ceasing to be distinct; and
 - (b) second, either:
 - (i) the UK turnover associated with the enterprise which is being acquired exceeds £70 million (the **turnover test**), or
 - (ii) the enterprises which cease to be distinct supply or acquire goods or services of any description and, after the merger, together supply or acquire at least 25% of all those particular goods or services of that kind supplied in the UK or in a substantial part of it. The merger must also result in an increment to the share of supply or acquisition (the **share of supply test**).
46. To conclude that a transaction will lead to enterprises ceasing to be distinct, the CMA must find that that an acquirer obtains a sufficient level of control (ie

¹⁴ In some cases the MNO JVs or shareholder MNOs may own the sites directly (as is the case for the MBNL Sites) while in other cases the sites may be leased or licensed from a third party (as is the case for the [X] sites owned by wireless infrastructure providers that MBNL uses, see footnote 7)

¹⁵ For example, the Parties have submitted in the FMN that there are [X] co-locations across the MBNL Sites. FMN, paragraphs 15.24 and 15.50.

¹⁶ Section 23 of the Act.

material influence, de facto control or a controlling interest)¹⁷ over the activities of an enterprise.¹⁸

47. The key feature of material influence under the Act is the ability 'directly or indirectly [...] materially to influence the policy of a body corporate.'¹⁹ When making its assessment, the CMA focuses on the acquirer's ability materially to influence elements of the target's policy relevant to its behaviour in the marketplace.²⁰ The policy of the target in this context means the management of its business, including the strategic direction of a company, and its ability to define and achieve its commercial objectives. The CMA need not demonstrate that the acquirer has the ability to influence all elements of the target's commercial policy.
48. The CMA's assessment of material influence involves a broad, case-by-case analysis of the overall relationship between the acquirer and the target, and will depend on the facts and circumstances of each case.²¹ Material influence may arise in several ways including through the ability to influence at shareholder level, board level, or through other arrangements, with each of these factors considered together rather than in isolation. The CMA will consider whether material influence can arise as a practical matter, in light of the commercial realities of the transaction.²²

Two or more enterprises ceasing to be distinct

49. The Parties submitted that the Merger involves two interlinked and inter-conditional elements that amount to a single relevant merger situation. Firstly, the acquisition of control over TowerCo (which holds the Unilateral Sites); and, secondly, the acquisition of 'material influence and control' over the Transfer Sites upon dissolution of the MBNL JV. The Parties submitted that the acquisition of interests in the MBNL Sites does not form part of the relevant merger situation.²³ The Parties' submissions are set out in further detail below.

¹⁷ CMA 2, paragraphs 4.20 to 4.43.

¹⁸ CMA 2, paragraphs 4.10 to 4.19.

¹⁹ Section 26(3) of the Act.

²⁰ CMA 2, paragraph 4.21.

²¹ CMA 2, paragraph 4.22.

²² CMA 2, paragraph 4.28. See also *Anticipated acquisition by Amazon of a minority shareholding and certain rights in Deliveroo*, Final Report, paragraphs 4.16 and 4.31.

²³ FMN, paragraph 5.1.

50. The CMA has considered whether each of the following three elements of the Merger constitutes arrangements in progress or in contemplation which, if carried into effect, would lead to enterprises ceasing to be distinct:
- (a) Cellnex's acquisition of legal title over TowerCo (ie the entity which holds the Unilateral Sites);
 - (b) Cellnex's acquisition of rights relating to the MBNL Sites; and
 - (c) Cellnex's acquisition of legal title over the Transfer sites (a subset of the MBNL Sites), following dissolution of MBNL.
51. The CMA has treated the Merger as a single relevant merger situation, under which Cellnex, TowerCo, the MBNL Sites and the Transfer Sites all cease to be distinct.²⁴

Cellnex's acquisition of the Unilateral Sites

52. The CMA considers that each of Cellnex and TowerCo is an enterprise.
53. On completion of the Merger, Cellnex will acquire 100% of the shares in TowerCo. Therefore, as a result of this element of the Merger, Cellnex and TowerCo will cease to be distinct.

Cellnex's acquisition of rights relating to the MBNL Sites

54. The following sections cover the following:
- (a) a description of the economic benefit and protection rights relating to the MBNL Sites that Cellnex will obtain on completion;
 - (b) a summary of the Parties' submissions on the acquisition of rights relating to the MBNL Sites;
 - (c) the CMA's assessment of whether the MBNL Sites constitute an enterprise; and
 - (d) the CMA's assessment of whether, as a result of the Merger, Cellnex and the MBNL Sites will cease to be distinct.

²⁴ Given that the enterprises involved in the three elements of the Merger are different, the CMA has also considered whether more than one relevant merger situation has arisen. The CMA considers whether the Merger is treated as one or multiple relevant merger situations does not affect its jurisdiction to review the Merger (see further paragraph 80). Nor would it affect the competitive analysis set out below.

The economic benefit and protection rights relating to the MBNL Sites

55. On completion, Cellnex will obtain the economic benefit to which 3UK is currently entitled in respect of the MBNL Sites and be responsible for bearing certain costs in relation to the MBNL Sites. These rights and responsibilities are comprised of the following components:

(a) The primary component of the economic benefit is the right to receive on a quarterly basis a service fee, which is fixed at [X] per MBNL Site (adjusted yearly for inflation). Under a [X], this will generate annual revenues of £[X] in 2021, [X] £[X] in [X]. Furthermore, Cellnex will also be entitled to receive [X].

(b) Cellnex will be responsible for bearing various capex and opex costs relating to the MBNL Sites. These include: [X]²⁵.

56. The [X] also includes certain provisions intended to protect Cellnex's interests in the economic benefit of the MBNL Sites (and the Transfer Sites). In particular:

(a) [X]:²⁶

(i) [X];²⁷

(ii) [X];

(iii) [X]; and

(iv) [X].

(b) [X];²⁸

(c) Cellnex will be responsible for costs associated with the MBNL Sites. [X]²⁹ The Parties further submitted that 'Cellnex will have influence over the capex/opex of the MBNL Sites through the annual budget prepared by the [Governance Board] which will be based on [X]'.³⁰

(d) [X].³¹

²⁵ See further footnote 7. The Parties have clarified in the FMN that these are the [X].

²⁶ FMN, Schedule 1, paragraphs 3 and 6.

²⁷ The [X] contemplates the possibility that 3UK may acquire [X].

²⁸ [X], Schedule 1, paragraph 8.

²⁹ FMN, Schedule 1.

³⁰ FMN, Schedule 1.

³¹ [X], Schedule 1, paragraphs 12 and 13.

57. In addition, Cellnex and 3UK Holdings will create the Governance Board to ensure that the above rights are exercised [REDACTED]³². The Governance Board will meet [REDACTED]³³ to:
- (a) provide Cellnex with [REDACTED];
 - (b) discuss the [REDACTED]; and
 - (c) prepare an annual budget for the MBNL Sites. This budget is separate to the overall annual budget for the MBNL JV and [REDACTED].
58. 3UK Holdings will not have to procure that 3UK takes any action following Cellnex's instructions where doing so would lead to a breach by 3UK of its obligations under the MBNL JV Agreements or would materially prejudice 3UK's interests under those agreements.³⁴

The Parties' submissions on the acquisition of rights relating to the MBNL Sites

59. The Parties submitted the following in relation to Cellnex's acquisition of rights relating to the MBNL Sites:
- (a) The economic benefit that Cellnex will obtain from the MBNL Sites as a result of the [REDACTED] has been designed to replicate the income Cellnex would have received and the costs it would have borne had Cellnex owned (and provided 3UK with access to) the MBNL Sites from Completion. That benefit is designed to mimic the cash flows of the interests to which 3UK is entitled in respect of the MBNL Sites but is not equivalent to ownership of the MBNL Sites.³⁵
 - (b) The commercial reality is that under the [REDACTED], [REDACTED] and [REDACTED], and given the constraints under the existing MBNL JV Agreements, Cellnex will be unable to influence the strategic and commercial policy of MBNL in respect of the MBNL Sites. This is because the rights that Cellnex will obtain under the [REDACTED] are limited to those necessary for the protection of its economic interests under the [REDACTED] and [REDACTED], and will not give Cellnex material influence over MBNL or the MBNL Sites, nor will they allow

³² [REDACTED], Schedule 1, paragraph 10.

³³ [REDACTED], Schedule 1, paragraph 10.

³⁴ [REDACTED], Schedule 1, paragraph 1 states: '[REDACTED]'.

³⁵ Parties' response to the Issues Letter, paragraph 5.5.

Cellnex to impact the competitive behaviour of MBNL prior to its dissolution. This is due to the following limitations of those rights:³⁶

- (i) They do not impact any other operations or activities of the MBNL JV, including sites sourced from third parties, active infrastructure or backhaul.
 - (ii) [REDACTED].
 - (iii) While Cellnex will have influence over an annual budget for the MBNL Sites through the Governance Board, [REDACTED]. Further that budget is distinct from the overall budget for the MBNL JV itself, [REDACTED].
 - (iv) Cellnex will not have any involvement in the plans for dissolution of the MBNL JV in 2031 under the terms of the MBNL JV Agreements, including the sites which will be allocated to 3UK as part of the dissolution mechanism.
 - (v) The [REDACTED] does not confer on Cellnex any rights over the management of the MBNL JV generally, and Cellnex will not become a party to the MBNL JV Agreements.³⁷
- (c) In light of the above, the Parties argue that Cellnex will not obtain material influence over the MBNL Sites or the MBNL JV³⁸ meaning that a relevant merger situation has not been created in respect of the acquisition of interests in the MBNL Sites.

CMA's assessment of whether the MBNL Sites constitute an enterprise

60. As set out in paragraph 43 above, the MBNL Sites are mostly used by the MBNL JV to self-supply access to developed macro sites and ancillary services and also to provide the same services to co-locating third parties, thereby generating value both internally and commercially. The CMA considers that together these activities amount to the activities of a 'business' (including the activities that are currently self-supplied) which are carried on for gain or reward.³⁹
61. On the basis of the above, the CMA considers that the MBNL Sites constitute an enterprise.

³⁶ Parties' response to the Issues Letter, paragraph 5.5.2.

³⁷ FMN, Schedule 1, paragraph 14.

³⁸ FMN, paragraph 15.44.

³⁹ Section 129 of the Act.

CMA's assessment of whether Cellnex's rights over the MBNL Sites constitute material influence

62. The legal framework for assessing material influence is described above at paragraphs 46-48. The CMA will consider the significance of rights conferred by formal agreements and structures, as well as the commercial realities of the relationship between an acquirer and the target.⁴⁰
63. The CMA recognises that the Merger will not result in Cellnex acquiring any shareholding in or direct board representation in relation to the MBNL Sites. As a result, the CMA has based its assessment on the 'other sources' of influence set out in CMA2.⁴¹ The CMA also notes that it has assessed whether Cellnex has obtained material influence over the MBNL Sites and not the entirety of the MBNL JV.
- *Commercial reality of the Parties' arrangements*
64. The CMA currently considers that the commercial reality of the Parties' arrangements with respect to the MBNL Sites, which is reflected in the transaction documents, internal documents and proposed accounting treatment, is to replicate the position of Cellnex becoming the owner of the MBNL Sites at completion, with 3UK as only its tenant. Through the Merger, Cellnex will receive income and bear responsibility for the costs of the MBNL Sites, as if Cellnex were their outright legal owner in relation to 3UK.
65. Cellnex will also have a binding right to receive outright legal title to approximately half of the MBNL Sites on dissolution of the MBNL JV (ie as a result of the acquisition of legal title to the Transfer Sites, assessed further below), paying the full consideration for these sites upfront. The CMA currently considers that the fact that CK Hutchison has already agreed to relinquish control over all of the Transfer Sites to Cellnex within a finite period further contributes to Cellnex's ability described below to exert influence over the MBNL Sites, compared to a situation where CK Hutchison planned to regain control of the sites in the future, and this effect may increase in the future as dissolution of the JV becomes imminent.

⁴⁰ See, for example, [Stagecoach Holdings PLC/Mainline Partnership Limited](#) (1995), CC Final Report, paragraph 2.34.

⁴¹ CMA 2, paragraphs 4.35 and 4.36. In that context, there is no defined list of factors to which the CMA may, or may not, have regard.

- *Rights conferred by formal agreements and structures*

66. The CMA also currently considers that the rights granted to Cellnex to protect the value of the economic benefit it acquires, and the structures put in place in this respect, are designed to replicate and protect that commercial reality.
67. In particular, Cellnex will have the ability to influence certain strategic elements of the policy of the MBNL Sites relevant to its behaviour in the marketplace, and will have the incentive and expertise to exercise that influence taking into account, in particular, the fact that it will acquire the Transfer Sites on dissolution of MBNL. In particular:
- (a) Cellnex will have the ability [REDACTED]. This includes [REDACTED].
- (b) Cellnex will be able to influence the annual budget for the MBNL Sites through the Governance Board, [REDACTED]. This provides Cellnex with an indirect means to influence commercial and strategic policy decisions for the MBNL Sites which will impact the sites' behaviour in the marketplace, including on matters relating to [REDACTED]. In practice, as a result of these arrangements, when [REDACTED]. While the budget for the MBNL Sites is technically distinct from the overall budget for the MBNL JV, the CMA considers that this does not preclude a finding that Cellnex has material influence over the MBNL Sites, as [REDACTED]. The CMA also considers that [REDACTED] is a relevant factor for its competitive assessment but does not preclude a finding of material influence.⁴² This is because the evidence indicates that the [REDACTED].⁴³ On that basis, the CMA does not accept the Parties' submission [REDACTED] (see further paragraph 171).
68. The CMA considers that Cellnex would have ample opportunities to exert its influence in practice through its participation in the Governance Board, [REDACTED].
69. The CMA does not consider that Cellnex's inability to veto or influence the MBNL JV's decisions to supply BT/EE precludes a finding that Cellnex has material influence over the MBNL Sites. This is because the CMA considers that the cumulative impact of the rights Cellnex will obtain (as assessed above) are sufficient for a finding of material influence. As noted in paragraph 67(b), the CMA has considered further the extent to which the Merger may

⁴² The Parties have clarified that the [REDACTED]. Parties' response to the Issues Letter, paragraph 3.6.1.

⁴³ BT has submitted that it has engaged in joint projects with 3UK to upgrade a material number of shared sites to facilitate their 5G rollout, including an ongoing project [REDACTED]. It has explained that the processes, terms and funding arrangements for this joint project are set out in extensive contractual arrangements between itself and 3UK. It further submitted that it expects the majority of the MBNL Sites to be upgraded to enable 5G over time. Third party response to the CMA's questionnaire.

impact BT/EE's ability to rely on the MBNL Sites in the competitive assessment.

70. The CMA considers that the fact that Cellnex's rights are limited to the extent that it cannot require [REDACTED] that 3UK takes any action which would cause 3UK to be in breach of the MBNL JV Agreements does not preclude it from obtaining material influence over the MBNL Sites. The CMA considers that while the MBNL JV Agreements prevent [REDACTED], this does not necessarily prevent CK Hutchison from taking into account Cellnex's views, recommendations and directions, including as expressed through its participation on the Governance Board and on matters including the budget for the MBNL Sites.

- *Other evidence*

71. Consistent with the above, evidence from the internal documents indicates that Cellnex's rights with respect to the MBNL Sites are intended to put it into the position [REDACTED]. For example, one internal document produced by CK Hutchison for Cellnex states that the [REDACTED].⁴⁴

72. Furthermore, Cellnex submitted that OnTower's balance sheet will account for the MBNL Sites and related assets as a '[REDACTED]' from the date of completion.⁴⁵ The CMA considers that this is a further indication that Cellnex's rights relating to the MBNL Sites go beyond rights which merely protect its economic interests in the MBNL Sites (contrary to the Parties' submissions at paragraph 59(b) above).

Conclusion on material influence

73. As set out above, the assessment of material influence requires a case-by-case analysis of the relationship between an acquirer and the target. Having assessed the cumulative impact of the factors outlined above in the context of the Merger, the CMA considers that the evidence shows:

- (a) The overall commercial reality of the arrangements between the Parties is that they are intended to put Cellnex in the position it would be in if it were owner of (and able to control) the MBNL Sites, with 3UK as only its tenant.
- (b) Whilst the MBNL Sites will continue to be held in accordance with the terms of the MBNL JV Agreements, the rights granted to Cellnex under

⁴⁴ FMN, Cellnex Document 201, '[REDACTED]', Undated, slide 3.

⁴⁵ FMN, Appendix 8, paragraph 10.1. The CMA notes that IFRS 3, the accounting standard, defines a [REDACTED]. IFRS3, Appendix A.

the [X] establish a mechanism by which Cellnex will be able influence the policy for the MBNL Sites by [X].

- (c) The fact that Cellnex will acquire the Transfer Sites on dissolution of the MBNL JV (and the consideration paid reflects this) gives Cellnex the incentive to seek to influence the commercial policy of the MBNL Sites in the period prior to dissolution. This also contributes to its ability to influence CK Hutchison to act in accordance with its wishes, as CK Hutchison has transferred its financial interest in the MBNL Sites to Cellnex.

74. On this basis, the CMA considers that the evidence indicates that Cellnex will have the ability to exercise material influence over the MBNL Sites from completion. Therefore, as a result of this element of the Merger, Cellnex and the MBNL Sites will cease to be distinct.

Cellnex's acquisition of the Transfer Sites

75. The Parties submitted that, at the time of transfer of legal title over the Transfer Sites to Cellnex, the Transfer Sites will include both tangible assets and business data (namely customer relationships and related data) and therefore constitute an enterprise.⁴⁶ Cellnex will acquire full control over that enterprise, meaning that Cellnex and the Transfer Sites will cease to be distinct.⁴⁷ The Parties further submitted that the obligation to transfer the Transfer Sites to Cellnex on dissolution of MBNL is certain, despite the fact there is some margin around the precise timing and the exact identity of the sites, and amounts to a relevant merger situation on completion.⁴⁸
76. As noted in paragraph 35, the Transfer Sites are a subset of the MBNL Sites. Therefore, to the extent that Cellnex will obtain material influence over the MBNL Sites at completion, material influence is also acquired over the Transfer Sites, on the basis of the assessment set out in paragraphs 62 to 74. The CMA has therefore not needed to assess separately whether, as a result of the rights it will obtain relating to the MBNL Sites, Cellnex will obtain material influence over the Transfer Sites.
77. On completion, Cellnex will acquire a binding right to receive legal title over the Transfer Sites following dissolution of MBNL. Upon dissolution of MBNL,

⁴⁶ FMN, paragraph 5.3.

⁴⁷ FMN, paragraph 5.7.

⁴⁸ The Parties have submitted that it is [X] that dissolution of MBNL JV will occur by 31 December 2031 and the transfer of the Transfer Sites from 3UK to Cellnex will occur shortly thereafter. Parties' response to the Issues Letter, paragraph 5.12, 5.3.3.

3UK is required to transfer legal title over the Transfer Sites to Cellnex under the [X], subject to a minimum of 3,000 sites and a maximum of half of the number of MBNL Sites.⁴⁹

78. In light of the above, the CMA considers that the Transfer Sites constitute an enterprise and that, as a result of this element of the Merger, Cellnex and the Transfer Sites will cease to be distinct. The CMA does not consider the time at which Cellnex and the Transfer will cease to be distinct to be relevant to its competitive assessment, as Cellnex will obtain at least material influence over the Transfer Sites on completion (given that the Transfer Sites are a subset of the MBNL Sites), and the CMA's competitive assessment takes into account the extent of Cellnex's rights over the Transfer Sites between completion and dissolution of MBNL, as well as following dissolution.

Turnover and share of supply test

79. The UK turnover of TowerCo exceeds £70 million, so the turnover test is met.
80. The Parties also submitted that the share of supply test is met because Cellnex's share of supply for the provision of access to developed macro sites to MNOs and other wireless communication providers is 25%, with an increment after completion of the acquisition of TowerCo.⁵⁰ On that basis, the CMA considers that Cellnex has a 25% share of supply for the provision of access to developed macro sites to MNOs and other wireless communication providers in the UK, with an increment from each of its acquisitions in relation to TowerCo, the MBNL Sites and the Transfer Sites. On this basis, the CMA considers that in the alternative the share of supply test has been met.

Conclusion

81. Based on the above, the CMA believes that 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.
82. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 18 May 2021 and the statutory 40 working day deadline for a decision is therefore 13 July 2021.

⁴⁹ The Parties have submitted that [X]. FMN, footnote 29. The Parties further submitted that the [X] will not impact the CMA's assessment of competition at a national level and that it is open to the CMA to assess the impact of competition by reference to the scenario it envisages would have the most significant impact, such that there is no risk of underenforcement. Parties' response to the Issues Letter, paragraph 5.12.

⁵⁰ FMN, paragraph 5.9, Tables 2 and 3.

Counterfactual

83. The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (ie the counterfactual). In an anticipated merger the counterfactual may consist of the prevailing conditions of competition, or conditions of competition that involve stronger or weaker competition between the merger firms than under the prevailing conditions of competition.⁵¹ In assessing the counterfactual, the CMA is likely to focus only on significant changes where there are reasons to believe that those changes would make a material difference to its competitive assessment.
84. As part of its assessment of the counterfactual, the CMA may consider the ability and incentive (including but not limited to evidence of intention) of the merger firms to pursue alternatives to the merger.⁵² At Phase 1, where there are multiple realistic counterfactual scenarios, the CMA will choose the one where the merger firms exert the strongest competitive constraint on each other, and where third parties exert the weakest competitive constraints on the merger firms.⁵³

Parties' submissions

85. The Parties have submitted that the Merger should be assessed against the prevailing conditions of competition, and that in the counterfactual, [REDACTED]. In particular the Parties submitted the following points:
- (a) For the purposes of the counterfactual, the CMA can only consider whether there is a realistic prospect that CK Hutchison would sell the Transaction Sites in the UK to an alternative purchaser as opposed to considering that CK Hutchison could sell its UK assets alongside its assets in other countries to an alternative purchaser (as CK Hutchison has done with Cellnex).
- (b) The transactions between the Parties for the sale of other passive infrastructure assets in Europe are independent and not inter-conditional upon the Merger (whether legally or on a *de facto* basis). However, CK Hutchison also submitted that it believed that [REDACTED]. In this context, CK Hutchison submitted that it would not have separated transactions, such as selling the Unilateral Sites on their own.⁵⁴

⁵¹ [Merger Assessment Guidelines \(CMA 129\)](#), paragraph 3.2 and paragraph 3.9.

⁵² [CMA 129](#), paragraph 3.14.

⁵³ [CMA 129](#), paragraph 3.12.

⁵⁴ CK Hutchison's response to the Issues Letter, paragraphs 3.11-3.17.

- (c) [REDACTED].
- (d) However, CK Hutchison also submitted that its announcement of its internal reorganisation put the market on notice of its intention to commercialise its passive infrastructure assets, giving alternative purchasers sufficient information and opportunity to make their interest known and bid for them before Cellnex acquired them.
- (e) CK Hutchison submitted it only considered [REDACTED], and would not have considered an alternative purchaser that [REDACTED].
- (f) An initial public offering (**IPO**) is also not a realistic or credible counterfactual. CK Hutchison submitted that [REDACTED].⁵⁵ CK Hutchison also submitted that an IPO leading to a listing on the London Stock Exchange would require three years of standalone business accounts and disclosure of information that [REDACTED].
- (g) Some internal documents that consider alternative transactions are historic and do not represent CK Hutchison's views.
- (h) Vodafone and Telefónica have plans to increase third-party co-location on their MNO JV, CTIL, which requires the CMA to assess the Merger against a counterfactual that includes these assets being operated as if owned by WIPs.

86. As set out at paragraph 31 above, between 2019 and July 2020, CK Hutchison conducted an internal reorganisation of its telecommunications division. CK Hutchison submitted that the rationale for the internal reorganisation of its telecommunications division was creating value for previously undervalued captive assets and to '[REDACTED]'.⁵⁶ In particular, CK Hutchison submitted that the rationale behind the Merger was to [REDACTED].⁵⁷ CK Hutchison submitted that without the Merger it would have [REDACTED].⁵⁸

87. With regard to the negotiations with [REDACTED] and Cellnex, CK Hutchison submitted that:

⁵⁵ FMN, Appendix 9, paragraph 3.4.

⁵⁶ FMN, Appendix 7, paragraph 2.2 and FMN, Annex CKH 2.3, '[REDACTED]', 17 April 2019.

⁵⁷ FMN, paragraph 2.87. See also rationale as presented to CMA at meeting on 23 April 2021 as shown in '[REDACTED]', page 19.

⁵⁸ CK Hutchison's response to the Issues Letter, paragraph 4.4.

- (a) CK Hutchison entered into discussions with [REDACTED].⁵⁹ [REDACTED].⁶⁰ [REDACTED].⁶¹
- (b) CK Hutchison held discussions with Cellnex [REDACTED]. On 9 November 2020, the Parties announced they were in discussions. On 12 November 2020, the Parties signed the transaction documents.⁶²

The CMA's assessment

88. In Phase 1 investigations, the CMA may consider multiple potential counterfactual scenarios, considering whether each of those scenarios is a realistic prospect, and may include reviewing evidence of specific plans where available.⁶³ In order to assess whether an alternative counterfactual is a realistic prospect in this case, the CMA assessed the available evidence in relation to CK Hutchison's ability and incentive to pursue alternatives to the Merger.
89. In addition to the Parties' submissions, the CMA has assessed the counterfactual by reference to:
- (a) public statements made with regard to CK Hutchison's internal restructuring;
 - (b) Parties' internal documents and analysts' reports; and
 - (c) third party evidence.

Public statements made with regard to CK Hutchison's internal restructuring

90. CK Hutchison's announcement of its internal reorganisation in August 2019 set out that 'the new structure will allow the Group to focus on optimising the asset portfolio, achieving cost synergies, as well as maximising returns on invested capital'.⁶⁴ In CK Hutchison's announcement of its 2019 year-end results, CK Hutchison stated that reorganisation 'enables an effective management of these infrastructure like assets across the European operations and provides optionality for CKH Group Telecom to rationalise and optimise capital efficiency going forward'.⁶⁵ In its 2020 interim results published on 6 August 2020, CK Hutchison stated that it had completed the

⁵⁹ FMN, Appendix 7, Table 6.1 (V.2).

⁶⁰ FMN, Appendix 9, paragraph 2.2.

⁶¹ CK Hutchison's response to the Issues Letter, paragraph 3.36-3.40.

⁶² FMN, Appendix 3, Table 8.1.

⁶³ CMA 129, from paragraph 3.6.

⁶⁴ CK Hutchison, [2019 Interim Report](#), page 25 (last accessed on 13 July 2021).

⁶⁵ CK Hutchison, [Announcement of 2019 results](#), page 7 (last accessed on 13 July 2021).

reorganisation and that CK Hutchison ‘continues to actively explore options to maximise the value to the Group of this important business’.⁶⁶ The CMA notes that these announcements did not specify that CK Hutchison was pursuing a sale.

Internal documents and analyst reports

CK Hutchison

91. CK Hutchison’s internal documents show that CK Hutchison explored several options to commercialise the Transaction Sites. For example:
 - (a) An internal document produced by CK Hutchison’s advisers [REDACTED] in March 2019 included the following options.⁶⁷
 - (i) [REDACTED];
 - (ii) [REDACTED]; or
 - (iii) [REDACTED].
92. Another internal document produced in September 2019 shows that CK Hutchison’s advisers estimated [REDACTED], indicating that CK Hutchison was considering a sale of the assets.⁶⁸ In this context, one internal document on the reorganisation sets out that [REDACTED].⁶⁹
93. In terms of potential acquirers, CK Hutchison’s internal documents [REDACTED]. However, contrary to the submissions made by the Parties in this regard, they do not set out that CK Hutchison would be limited in its ability to sell due to the lack of potential purchasers with [REDACTED].
94. The internal documents also show that CK Hutchison’s internal restructuring was part of a long-term strategy to extract value from its passive infrastructure assets. For example:
 - (a) statements that [REDACTED];⁷⁰
 - (b) estimates showing that [REDACTED];⁷¹ and

⁶⁶ CK Hutchison, [2020 Interim Report](#), page 10 (last accessed on 13 July 2021).

⁶⁷ FMN, Annex CKH 2.2, ‘[REDACTED]’, 11 March 2019, slides 4 and 7.

⁶⁸ FMN, Annex CKH 2.4, ‘[REDACTED]’, 27 September 2019.

⁶⁹ FMN, Annex CKH 2.3, ‘[REDACTED]’, 17 April 2019, slide 2. [REDACTED].

⁷⁰ FMN, Annex CKH 2.1, ‘[REDACTED]’, 22 February 2019, slide 2.

⁷¹ FMN, Annex CKH 2.7, ‘[REDACTED]’, 22 October 2019, slide 12.

(c) a document submitted in response to the Issues Letter sets out that [REDACTED].⁷²

Cellnex

95. Cellnex's internal documents also show that it understood the terms of the Merger and was able to ascertain the value of the Transaction Sites despite the unusual transaction structure.⁷³ In this context, Cellnex's valuation provides for [REDACTED].⁷⁴

Analyst reports

96. With regard to the information available to third parties on the transaction structure, the evidence from analyst reports suggests that there is a general understanding about the MBNL JV structure in the public domain, which would allow third parties to consider the interests it could acquire from CK Hutchison. For instance, a report from Barclays provides detailed information on the MBNL JV and its shareholders including stating that the Merger's structure reflects the fact that the MBNL JV does not own many of the sites it uses, that the MBNL JV is difficult to unwind, that it is scheduled to unwind in 2031 and that Cellnex has an economic benefit deal with BT/EE for some of its towers.⁷⁵

Third party evidence

97. Third party submissions to the CMA suggest that several third parties would have been interested in acquiring CK Hutchison's passive infrastructure sites, and that the transaction structure would not have prevented a sale to an alternative buyer.
- (a) [REDACTED] submitted that discussions with CK Hutchison did not progress due to lack of consensus over transaction terms, [REDACTED].
- (b) Independent WIPs also submitted that they would have considered acquiring the Transaction Sites. Four UK WIPs submitted they would have considered engaging in a transaction that would have resulted in them being the effective commercial operator of the Transaction Sites.⁷⁶ Further, one of these companies stated that it actually approached CK

⁷² CK Hutchison's response to Issues Letter, paragraph 4.2.

⁷³ See Cellnex valuation of the Transaction Assets at FMN, Cellnex Document 237, '[REDACTED]'.
⁷⁴ FMN, Appendix 2, paragraph 19.3.

⁷⁵ Barclays report, 13 November 2020, page 4. This report was submitted by CK Hutchison in response to the CMA's notice under section 109 dated 12 May 2021 as 'Annex CKH 1.6 [21 May] - 2020.11 - Project Torres - Review of Market Reactions [Redacted]', page 35.

⁷⁶ Third party responses to the CMA's questionnaire.

Hutchison to express interest in the assets but did not receive a response.⁷⁷ Two of these WIPs also submitted that they considered that they had the funds and experience to be deemed credible buyers by CK Hutchison. One company submitted that it is active in acquiring and building towers in the UK and has recently considered acquisitions with a value in excess of USD 1 billion. The other WIP submitted that it had the management capabilities, systems and process that can be scaled up to manage a larger portfolio. It also noted its financial backing by [REDACTED]. The two other WIPs that indicated they would have been interested in the Transaction Sites are also backed by financial investors [REDACTED]. On that basis, the CMA considers that they also constitute credible alternative purchasers.

CMA's assessment of the evidence

98. In this context, the CMA considers that it is not possible to attribute [REDACTED] a lack of interest on the part of any alternative purchasers. In that context, the CMA notes the promising nature of the negotiations with Cellnex in the summer of 2020, as well as the timing of those negotiations (which became exclusive only a month after CK Hutchison had completed its reorganisation process). The CMA considers that CK Hutchison's submission that it released sufficient information in August 2019 to put potential purchasers on notice that the Transaction Sites were for sale and for third parties to make their interest known is inconsistent with the submission that the CMA should disregard ex post expressions of interest [REDACTED].
99. The CMA also considers that the Parties have not provided evidence to substantiate their submissions that on the basis of [REDACTED], third parties have not been able to comment meaningfully regarding their interest in CK Hutchison's passive infrastructure assets. The CMA notes in this context that other WIPs are also [REDACTED], as well as other MNO JVs, and will therefore have a similar general understanding of the [REDACTED] to Cellnex. The CMA considers that alternative purchasers might [REDACTED] have taken a [REDACTED] forward-looking approach to Cellnex in evaluating the proposed terms. Moreover, [REDACTED].
100. The CMA has considered that the Unilateral Sites are held outside the MBNL JV and thus not subject to the same restrictions as the MBNL Sites and the Transfer Sites. As set out in further detail below, the Unilateral Sites alone represent a large share of passive infrastructure sites in the UK, and the CMA

⁷⁷ Note of the call with a third party.

considers that that the Unilateral Sites would be attractive to many companies already active or intending to become active in the UK market.

101. The CMA also does not accept CK Hutchison's submissions that the CMA is unable to consider a counterfactual in which CK Hutchison would have been able to offer the Transaction Sites alongside the other sites forming part of the European transactions between the Parties discussed above at paragraph 37. The CMA notes that the counterfactual is an analytical tool used in answering the question of whether the merger gives rise to an SLC.⁷⁸ It is intended to describe the competitive situation that would have prevailed absent the Merger and, as such, to provide a benchmark against which to assess the effects of the transaction. The CMA considers that, in assessing the counterfactual in this case, it is appropriate to take account of CK Hutchison's alternatives at the time that the Merger was agreed.
102. The CMA considers on the basis of the available evidence that there is a realistic prospect that at the time the Merger was agreed, CK Hutchison's options would have included both: (i) selling the Transaction Sites (or a subset of them) alone or (ii) selling the Transaction Sites (or a subset of them) in combination with those sites forming part of the European transactions:
103. As regards option (i) above, the CMA notes that the evidence indicates CK Hutchison considered the possibility of monetising its passive infrastructure assets on a [X] basis (see further paragraph 92). Furthermore, the CMA notes the fact that the Parties structured Cellnex's acquisition of CK Hutchison's assets in such a way that the Transaction Sites might not be acquired as part of a wider package of assets (as the Merger is subject to CMA clearance while the European transactions are not). This suggests that it is realistic to consider that in the counterfactual the Transaction Sites (or a subset of them) would have been sold on a standalone basis.
104. As regards option (ii) above, the CMA considers that to the extent that:
 - (a) CK Hutchison would not sell the Transaction Sites except as part of a wider transaction including its assets in other European jurisdictions, it is consistent to include within the counterfactual a scenario in which the Transaction Sites is sold as part of such a wider package;⁷⁹ or
 - (b) the Transaction Sites are attractive to third parties only as part of a wider transaction including CK Hutchison's assets in other European

⁷⁸ CMA 129, paragraph 3.1.

⁷⁹ As stated at CMA 129, paragraph 3.4, '[o]nly events that would have happened in the absence of the merger under review—and are not a consequence of it—can be incorporated into the counterfactual.'

jurisdictions, it is consistent to include within the counterfactual a scenario in which the Transaction Sites is sold as part of such a wider package.

105. Consequently, the CMA considers that in the counterfactual the sites forming part of the European transactions would also have been available to an alternative purchaser (without prejudice to its view that the Transaction Sites would have been attractive to other purchasers and that CK Hutchison would have been willing to divest them on a standalone basis). This means that such an alternative purchaser would have had the option to acquire the same set of sites that Cellnex acquired (ie including both the Transaction Sites and other sites forming part of the European transactions) or a subset of those sites, such as the Transaction Sites.
106. The CMA also considers that plausible alternative purchasers (which include existing WIPs) would have had the ability and incentive to increase third-party co-location on the Unilateral Sites and Transfer Sites. The CMA further considers that independent WIPs would have had the incentive to do so given their business models are focused on opening up passive infrastructure assets for use by MNOs and non-MNO customers. The CMA does not accept CK Hutchison's submissions that alternative transactions would not have been pursued if they would have [✂]. As Cellnex is excluded as a purchaser in the counterfactual, the Merger is not a comparator to alternative transactions.
107. The CMA's counterfactual analysis is not intended to determine whether the alternative arrangements would be more competitive than a sale of the Transaction Sites to Cellnex. Rather, it is intended to determine whether the alternative would be more competitive than the prevailing conditions of competition. In this respect, even if a WIP were not to increase third-party co-location on the Transaction Sites, the CMA considers that sale to a WIP (other than Cellnex) in the counterfactual would allow for greater use of the Unilateral Sites and Transfer Sites by MNOs other than 3UK and non-MNO customers. Even if the purchaser would not increase tenancies on the Unilateral Sites and Transfer Sites, they could, for instance, decide to replace 3UK on the sites if a different customer were to appear attractive. A sale of the Unilateral Sites and Transfer Sites to another WIP would therefore have increased the competitive constraint exerted by these assets by moving them into a fully 'commercialised' state.
108. With regard to the Parties' submissions regarding CTIL in the counterfactual, the CMA notes that significant changes affecting competition from third parties that would occur with or without the merger are unlikely to be assessed in any depth as part of the CMA's counterfactual assessment. This includes entry or

expansion by a third party.⁸⁰ Consequently, the constraint exerted by CTIL is examined in the competitive assessment.

Conclusion on counterfactual

109. In light of the evidence set out above, the CMA believes it is realistic to conclude that, absent the Merger, CK Hutchison would have pursued an alternative method to extract value from the Transaction Sites, and that there were several interested credible alternative purchasers. The CMA is not required to reach a view on all aspects of the alternative courses of action that CK Hutchison could have pursued absent the Merger. In that context, the CMA considers that, while the available evidence indicates that there were multiple alternative methods available to CK Hutchison at the time the Merger was agreed, there is a realistic prospect that it would have sold the Transaction Sites to another purchaser (which, for the avoidance of doubt, may have included a similar arrangement to the Merger with respect to the MBNL Sites or another type of arrangement). The CMA believes that this gives rise to a counterfactual in which there would have been stronger competition between Cellnex and the Transaction Sites as compared to the prevailing conditions of competition.

Frame of reference

110. Market definition involves identifying the most significant competitive alternatives available to customers of the merger firms and includes the sources of competition to the merger firms that are the immediate determinants of the effects of the merger.
111. While market definition can sometimes be a useful tool, it is not an end in itself. The outcome of any market definition exercise does not determine the outcome of the CMA's analysis of the competitive effects of the merger in any mechanistic way. In assessing whether a merger may give rise to an SLC, the CMA may take into account constraints outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others. The CMA will generally not need to come to finely balanced judgements on what is 'inside' or 'outside' the market. Not every firm 'in' a market will be equal and the CMA will assess how closely two merger firms compete. The constraint posed by firms 'outside' the market will also be carefully considered.⁸¹

⁸⁰ CMA 129, paragraph 3.10.

⁸¹ CMA 129, paragraph 9.4.

112. As part of its analysis of the competitive effects of the Merger, the CMA has considered the product and geographic frames of reference.
113. The Parties overlap in the supply of access to developed macro sites and ancillary services to MNO and non-MNO customers in the UK.

Product scope

114. The Parties submitted that there is no reason to depart from the CMA's decision in *Cellnex/Arqiva* and that the narrowest plausible candidate market is the market for the provision of site access to developed macro sites and ancillary services to MNOs and other wireless communication providers.⁸²
115. In *Cellnex/Arqiva*, the CMA considered it appropriate to assess macro sites and micro sites as separate frames of reference and define separate frames of reference for developed and undeveloped sites.⁸³
116. In that decision, the CMA excluded self-supply and supply by MNOs and MNO JVs from the frame of reference, instead taking this into account as an out-of-market constraint in the competitive assessment.⁸⁴ While the CMA acknowledged that self-supply constrained independent tower companies, it noted however, that self-supply was not among the most immediate sources of competition to the merging parties.⁸⁵ Taking into account in particular, the evidence of Arqiva benchmarking its pricing against the MNO's costs for self-build, the CMA considered that self-supply by MNOs and MNO JVs should be characterised as a 'price ceiling' for the merging parties, at least in the near-term.⁸⁶
117. In *Cellnex/Arqiva*, the CMA included: (i) Built-to-Suit sites (**BTS sites**), which involves constructing passive infrastructure to the specification of a customer; (ii) all structure types (eg monopoles, alternative towers and pylons); and (iii) ancillary services within the product frame of reference.⁸⁷ With regard to BTS sites, the *Cellnex/Arqiva* decision sets out that while BTS sites may be a substitute to existing sites to an extent, some customers had noted that it is important whether a site is already constructed, as it affects the cost-competitiveness and the time to access/deploy the site.⁸⁸

⁸² FMN, paragraph 13.4.

⁸³ *Cellnex/Arqiva*, paragraphs 57 to 64 and paragraphs 71 to 74.

⁸⁴ *Cellnex/Arqiva*, paragraph 107.

⁸⁵ *Cellnex/Arqiva*, paragraph 93.

⁸⁶ *Cellnex/Arqiva*, paragraph 91.

⁸⁷ *Cellnex/Arqiva*, paragraphs 70, 77 and 81.

⁸⁸ *Cellnex/Arqiva*, paragraph 68.

118. With regard to the constraint from BTS sites, the CMA notes that in *Cellnex/Arqiva*, the CMA assessed a merger between Cellnex, which had a small number of existing sites and competed mainly by supplying BTS sites, and Arqiva, which had a large number of existing sites but little BTS offering (finding in the competitive assessment that several other BTS sites suppliers would remain in the market post-merger).⁸⁹ In that context, the CMA sought to understand the extent to which BTS sites and existing sites competed at all, and it was not necessary for the CMA to come to detailed conclusions about the strength of the constraint from BTS sites relative to the constraint from existing sites. In this case, as the Merger is between two businesses with large holdings of existing sites, the CMA has assessed the relative importance of BTS as a constraint on existing sites.
119. Further, the evidence in this case supports the product frame of reference findings in *Cellnex/Arqiva* in relation to the distinction between macro and micro sites. For instance, Cellnex's internal documents generally maintain a broad distinction between macro sites and micro sites without discussing narrower segments.⁹⁰ They also discuss other technology solutions, such as satellites and airborne macros separately from passive infrastructure.⁹¹ CK Hutchison's internal documents also appear to support a distinction between macro sites and micro sites without further segmentation. Documents indicate that CK Hutchison views 'towers' of all types as separate from small cells and other types of micro sites.⁹²
120. On this basis, and in line with precedent, the CMA has considered the effects of the Merger on the supply of access to developed macro sites (including for the avoidance of doubt, BTS sites) and ancillary services to wireless communication providers.

Geographic scope

121. The Parties submitted that the geographic scope of the supply of access to developed macro sites is national.⁹³ This is consistent with the evidence received by the CMA and is in line with the geographic scope identified in

⁸⁹ *Cellnex/Arqiva*, paragraph 172.

⁹⁰ FMN, Cellnex Document 34, [REDACTED], 13 July 2018, slides 18 and 19.

⁹¹ FMN, Cellnex Document 33, [REDACTED], 7 July 2020, slide 6.

⁹² FMN, Annex CKH 9.4 '[REDACTED]' 28 May 2020, slide 29.

⁹³ FMN, paragraphs 13.26 to 13.28.

Cellnex/Arqiva.^{94,95} Therefore, the CMA has considered the impact of the Merger on the supply of access to developed macro sites and ancillary services to wireless communication providers in the UK.

Conclusion on frame of reference

122. For the reasons set out above, the CMA has considered the impact of the Merger on the supply of access to developed macro sites and ancillary services to wireless communication providers in the UK.

Competitive assessment

Horizontal unilateral effects

123. Horizontal unilateral effects can arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm profitably to raise prices or to degrade non-price aspects of its competitive offering (such as quality, range, service and innovation) on its own and without needing to coordinate with its rivals.⁹⁶ The competitive constraint eliminated by the Merger can be a potential or future constraint.⁹⁷ Horizontal unilateral effects may arise from the elimination of potential competition, where, absent the merger, entry or expansion by either or both merging firms may have resulted in new or increased competition between them.⁹⁸ The CMA has assessed whether it is or may be the case that the Merger may be expected to result in a substantial lessening of competition (**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.

124. The potential concern under this theory of harm is:

- (a) that Cellnex already has a strong pre-existing market position. In circumstances where one merger firm has a strong position in the market, even small increments in market power may give rise to competition concerns.⁹⁹

⁹⁴ See, for example, documents that make reference to a whole UK market for passive infrastructure: FMN, Cellnex Document 43, [REDACTED], 23 September 2020, slide 9; and FMN, Cellnex Document 199, [REDACTED], September 2020, slide 14. See documents that consider Cellnex's investment strategy specifically at a national level (as opposed to a wider geographic market): FMN, Cellnex Document 50, [REDACTED], 3 June 2020, slide 67; FMN, Cellnex Document 233, [REDACTED], 18 November 2020, slides 34 and 35. FMN, Annex CKH 19.1 [REDACTED], 20 May 2020, slide 28.

⁹⁵ *Cellnex/Arqiva*, paragraph 135.

⁹⁶ CMA 129, paragraph 4.1.

⁹⁷ CMA 129, paragraph 4.2.

⁹⁸ CMA 129, paragraph 5.1.

⁹⁹ CMA 129, paragraph 4.12 (b).

- (b) that absent the Merger, CK Hutchison would have pursued alternative means to extract value from its passive infrastructure assets, such as a sale to an alternative purchaser. This would have resulted in a new independent supplier with a large number of existing sites, which would have introduced a significant additional constraint on Cellnex.
- (c) that aside from the Transaction Sites, a material number of passive infrastructure assets would not become available for purchase in the UK in the near term. WIPs may have limited scope for organic growth and rely on inorganic growth, such as acquisitions of sites from MNOs, to gain significant scale relative to Cellnex.
- (d) that in that context, the Merger would result in:
 - (i) the immediate transfer of the Unilateral Sites to Cellnex, eliminating the emergence or growth of a potential alternative to Cellnex, thereby further strengthening Cellnex's market position;
 - (ii) the acquisition of material influence by Cellnex over the MBNL Sites, providing Cellnex a role in setting the commercial strategy of the MBNL Sites. Consequently, Cellnex would be able to affect the attractiveness of these sites as self-supply alternatives for BT/EE. This would weaken BT/EE's bargaining position as against Cellnex; and
 - (iii) a binding commitment to transfer full control over the Transfer Sites to Cellnex, upon the dissolution of the MBNL JV, thereby eliminating the emergence or growth of a potential alternative to Cellnex, thereby further strengthening Cellnex's market position, including in forward-looking negotiations taking place prior to dissolution.¹⁰⁰
- (e) that by eliminating a significant potential competitor and, at the same time, strengthening Cellnex's market position from an already very strong starting point, the Merger may allow Cellnex to profitably maintain prices at higher levels, or maintain quality, range, service and innovation at lower levels, than would have arisen in the counterfactual.

125. While the Merger would be effected in discrete steps over a long time horizon, it would, under this theory of harm, nevertheless have the impact of immediately eliminating the emergence or growth of a potential competitor (or a set of potential competitors) with an existing base of assets (in the form of

¹⁰⁰ At the same time, Cellnex would lose material influence over half of the MBNL Sites.

the Unilateral Sites) and a concrete long-term commitment to expand (in the form of the Transfer Sites), as well as the potential to leverage all the Transaction Sites to act as a dynamic competitor in the interim. The potential impact of the different elements of the Merger is to an extent interrelated and cumulative, and the assessment of their effect is to an extent based on the same or similar evidence.

126. The CMA has assessed these potential concerns as part of its competitive assessment as against the relevant counterfactual (see paragraphs 83 to 109).

Parties' submissions

127. The Parties submitted that the Merger will not give rise to an SLC for the following reasons:
- (a) Cellnex's allegedly strong pre-existing market position is not significantly different to that of Arqiva when Cellnex acquired it. Cellnex's market position is not strong, as a result of the constraint from BTS, the importance of self-supply, the constraint from CTIL and the constraint from smaller tower companies.¹⁰¹
 - (b) Cellnex is not a competitor of CK Hutchison and/or MBNL, including the MBNL Sites.¹⁰² Neither CK Hutchison nor MBNL currently compete to provide co-location or BTS services to non-MNO customers and the transaction does not therefore give rise to a horizontal increment.¹⁰³
 - (c) Neither Cellnex nor any alternative bidder has the ability to use the MBNL Sites to provide co-location [§]. Furthermore, with respect to the Unilateral Sites, the Streetworks Sites are being built by 3UK [§]. The increment brought about by the [100-200] UKB Sites alone is negligible.¹⁰⁴
 - (d) It is not necessary to have sizeable existing portfolio of developed macro sites to compete credibly in that market: (i) BTS is an effective substitute to existing sites, (ii) the cost of upgrading an existing site may not be substantially different from the cost of building a new structure, and (iii) there are limited economies of scale in building new sites.¹⁰⁵

¹⁰¹ Parties' response to the Issues Letter, paragraph 1.6.1.

¹⁰² FMN, paragraph 12.

¹⁰³ Parties' response to the Issues Letter, paragraph 4.16.

¹⁰⁴ Parties' response to the Issues Letter, paragraphs 1.6.4, 3.10 and 3.48.2.

¹⁰⁵ FMN, paragraph 19.6.6 and Appendix 1.

- (e) Cellnex will continue to face strong competition from rival WIPs, including WHP, WIG, AP Wireless, Atlas Tower, Shared Access and Britannia Towers.¹⁰⁶ This is particularly relevant given demand for new sites over the next five years is expected to be small and is entirely within the remit of smaller suppliers to meet.¹⁰⁷
- (f) Vodafone's and Telefónica's recent announcement that they intend to commercialise their network sharing JV, CTIL,¹⁰⁸ means that the CMA should therefore treat CTIL as being owned and operated by independent WIPs in direct competition with Cellnex.¹⁰⁹
- (g) Inorganic growth by competitors is still possible, through MNO-controlled sites becoming available, including assets held by O2 and potentially by BT/EE.¹¹⁰
- (h) Cellnex's valuation model did not [✂].¹¹¹
- (i) The Merger does not give Cellnex material influence over the MBNL Sites and no ability to impact BT/EE's use of the MBNL Sites.¹¹² Even if the CMA were to find that the Merger will give Cellnex material influence over the MBNL Sites (which the Parties dispute), the degree of influence is minimal and could not give rise to an SLC.¹¹³

Industry developments

128. The CMA's investigation is also considering the impact of certain ongoing industry developments, which the CMA will take into account in assessing the nature of competition. The CMA notes the following in particular.

The roll-out of 5G networks:

129. In Cellnex/Arqiva, the parties submitted that to facilitate the deployment of 5G networks, most existing sites will require capex because of the need to add an additional tower or to strengthen the existing tower in order for active 5G equipment to be installed. In this case the Parties stated that, although the roll-out of 5G will require investment in the UK's mobile infrastructure, demand

¹⁰⁶ FMN, paragraph 15.4 and Parties' response to the Issues Letter, paragraph 3.31.

¹⁰⁷ Parties' response to the Issues Letter paragraphs 3.23 and 3.32.

¹⁰⁸ FMN, paragraph 11.4 and Parties' response to the Issues Letter, paragraphs 3.35.1, 3.35.2. and 3.37.

¹⁰⁹ FMN, paragraph 11.8.

¹¹⁰ Parties' response to the Issues Letter, paragraphs 3.37, 3.38 and 3.39.

¹¹¹ Parties' response to the Issues Letter, paragraphs 1.7.5, 4.29 and 4.30.

¹¹² Parties' response to the Issues Letter, paragraphs 5.4 and 5.5.

¹¹³ Parties' response to the Issues Letter, paragraphs 5.5.3.

for new macro sites (versus upgrading existing ones or using micro sites) is expected to be comparatively modest and driven by the use of micro sites.¹¹⁴ Ofcom told the CMA that it expects the 5G rollout will involve a densification of MNOs' networks, leading to an increase in the number of sites in the medium term. It also expects that existing sites will have the capacity to be used to host 5G equipment, though upgrades for this purpose would involve capex which may result in increased prices for customers.¹¹⁵ The CMA has taken into account MNO's and MNO JVs' plans for upgrading to 5G in the competitive assessment, where relevant.

The MNOs' monetisation of their tower assets

130. The Parties and third parties submitted that there was a European-wide trend towards the commercialisation of passive infrastructure assets by MNOs. In this context, the Parties submitted that O2 and Vodafone intended to commercialise their network sharing JV (CTIL) and that Vodafone had sold its 50% equity stake in CTIL to Vantage Towers, Vodafone's European tower business, whose shares have been admitted to the Frankfurt Stock Exchange. The Parties submitted that the CMA should therefore consider CTIL as being owned and operated by independent WIPs in direct competition with Cellnex.¹¹⁶
131. The CMA has considered whether to assess CTIL as a direct competitor to Cellnex rather than as constraint from self-supply. This assessment is set out at paragraphs 196 and 198 below. By way of summary, the CMA considers that despite the recent commercialisation of CTIL, there are significant differences between CTIL and an alternative owner of the Transaction Sites. CTIL is still ultimately owned by Telefónica and Vodafone (through its majority shareholding in Vantage Towers). The CMA considers that this makes it likely that CTIL will focus on self-supply to Vodafone and O2. In this context, CTIL submitted that the vast majority of its current supply is to its JV shareholders Vodafone and O2; Vodafone submitted it anticipated that [REDACTED] of CTIL's revenues would be generated by supplying Vodafone and O2 by 2031. In terms of co-location, CTIL indicated that it was able to [REDACTED]. By way of contrast, an alternative owner of the Transaction Sites would have an incentive to compete (including with Cellnex) for all customers, including by competing to retain existing tenants.

¹¹⁴ Parties' response to the Issues Letter, paragraph 3.17.

¹¹⁵ [REDACTED].

¹¹⁶ FMN, paragraph 11.8.

132. In *Cellnex/Arqiva*, the CMA also found that MNO JVs did not materially supply MNOs other than their shareholding MNOs and non-MNO customers.¹¹⁷
133. The CMA therefore considers that CTIL is currently not a direct competitor to Cellnex comparable in nature to a WIP.
134. In addition, as set out in more detail at paragraph 198 below, the CMA considers that there is insufficient evidence that third-party co-location on CTIL's passive infrastructure sites will materially increase in future.

CMA assessment

135. In order to assess whether the Merger may give rise to an SLC as a result of horizontal unilateral effects, the CMA considered:
- (a) Cellnex's existing market position; and
 - (b) the impact of the Merger on Cellnex's market position.

Shares of supply as an indicator of competitive strength

136. As a preliminary point, the CMA considered whether shares of supply calculated based on a supplier's number of sites are a relevant indicator of the competitive strength of suppliers competing to supply access to developed macro sites.
137. In this context, the available evidence shows that geographic scale is an important parameter of competition, which suggests that increased geographic scale increases competitive strength:
- (a) All of Cellnex's competitors that responded to the CMA's market test submitted that having wide geographic coverage is important for their competitive offering.¹¹⁸ One competitor submitted that sites that are already developed have an advantage over sites that are available for development, as having planning permission for an existing mast sets the precedent for the mast in that geographic location.
 - (b) Half of Cellnex's non-MNO customers that responded to the CMA's market test submitted that a greater geographic coverage has a competitive advantage over suppliers with smaller geographic coverage. One customer stated that being able to conclude multi-site agreements

¹¹⁷ *Cellnex/Arqiva*, paragraphs 101 and 106.

¹¹⁸ Third party responses to the CMA's questionnaire.

made it easier to choose a supplier and another stated they considered a supplier's large footprint provided an advantage to them as a customer.¹¹⁹ With regard to the MNO customers, two customers ([REDACTED] and [REDACTED]) submitted that that footprint size is less important and that a key factor is whether the supplier is able to offer a site in the location. [REDACTED], however, explained that the wider the geographic footprint a supplier has, the more likely they would be to have a suitable site, which could provide a cumulative advantage over competitors.

138. Third party evidence also shows that the number of existing developed macro sites has an impact on a tower operator's bargaining power when negotiating with customers. The majority of Cellnex's competitors and customers that responded to the CMA's market test on this point submitted that the number of existing developed macro sites or PoPs impacts a tower operator's bargaining power.¹²⁰ One customer explained that a supplier's ability to dictate the rental price across the industry increases with the number of sites owned by the supplier.¹²¹
139. Overall, the available evidence suggests that setting up a new site requires time and resources as well as planning permission. Providers that have existing developed macro sites can upgrade these to host additional MNOs. While the evidence on the relative costs of building a new site and upgrading an existing site is mixed, with the Parties submitting that the costs can be equivalent or that upgrading an existing site can be more expensive, the Parties and third parties also provided figures which showed that upgrading a UKB Site would be less expensive than building a new site.
140. This is also consistent with Cellnex's own valuation that provides for [REDACTED].¹²² It is also consistent with analyst reports,¹²³ which set out that tenancies on existing towers can still increase including for Cellnex.
141. Finally, the CMA considers that independent WIPs compete for both new tenancies and to retain existing customers. Whilst spare capacity and the ability of independent WIPs to upgrade existing sites may be relevant to compete for new tenancies, the number of existing developed macro sites is important when competing to retain existing customers.

¹¹⁹ Third party responses to the CMA's questionnaire.

¹²⁰ [REDACTED] Third party responses to the CMA's questionnaire.

¹²¹ [REDACTED] Third party response to the CMA's questionnaire.

¹²² FMN, Appendix 2, paragraph 19.3.

¹²³ FMN, Cellnex Document 106, [REDACTED]; see references to Cellnex's increased tenancy growth at pages 1 and 2.

142. On this basis, the CMA considers that having an existing site in a location can provide an advantage when bidding for a contract, and that the more sites a provider has, the better its ability to supply customers. The CMA therefore considers that shares of supply calculated based on the number of sites are a relevant indicator of the competitive strength of suppliers competing to supply access to developed macro sites. The CMA also assessed the Merger's impact on Cellnex's market position using adjusted shares of supply as discussed below at paragraph 154 to 158.

Cellnex's existing market position

143. As set out in the CMA's Merger Assessment Guidelines, while the focus of the CMA's assessment is on the change in the competitive constraint on the merger firms arising from the merger, where one merger firm has a strong position in the market, even small increments in market power may give rise to competition concerns.¹²⁴ When current competitive constraints are weak even a small loss of competitive relative to the counterfactual could raise a competition concern.
144. In 2020, Cellnex acquired Arqiva, a large and well-established supplier of access to developed macro sites in the UK. Prior to this acquisition, Cellnex was a small supplier, but it had some success in winning sites against more established suppliers. In *Cellnex/Arqiva*, the CMA found that 'Arqiva is a large and well-established supplier, with a high share of supply by stock (based on the total number of current tenancies of each supplier), especially where self-supply is excluded, and by flow (based on each suppliers' wins in recent competitive interactions). The very high proportion of renewals suggests that Arqiva often faces limited competition from WIPs'.¹²⁵
145. The CMA's estimates of Cellnex's current shares of supply in the supply of access to developed macro sites in the UK are set out in Table 1.¹²⁶ The table shows the share of supply by (i) number of developed macro sites and by (ii) number of points of presence (**PoPs**).¹²⁷ These estimates do not include PoPs supplied by MNOs and MNO JVs (including for the avoidance of doubt, in relation to the Transaction Sites), as these are assessed as out-of-market constraints. Furthermore, as set out above, the CMA considers that CTIL is

¹²⁴ [CMA 129](#), paragraph 4.12(a).

¹²⁵ [Cellnex/Arqiva](#), paragraph 152.

¹²⁶ As part of its ongoing investigation, the CMA received data from the Parties and the third parties on the number of towers owned and the number of tenancies (PoPs) in 2020 and has compiled its own share of supply estimates based on these data.

¹²⁷ PoPs refers to the number of access points for the active telecommunications equipment of MNO and non-MNO customers that are on WIPs' passive infrastructure assets. A macro site could hold more than one PoP.

currently not a direct competitor to Cellnex and has therefore not included CTIL's shares of supply in the estimates below.

Table 1: CMA estimates of shares of supply by number of sites and number of tenancies in 2020

<i>Competitor</i>	<i>Share of supply by number of developed macro sites</i>	<i>Share of supply by number of PoPs</i>
Cellnex	[80-90]%	[90-100]%
WIG	[5-10]%	[5-10]%
Shared Access	[0-5]%	[0-5]%
FreshWave	[0-5]%	[0-5]%
Britannia Tower	[0-5]%	[0-5]%
Radius	[0-5]%	n/a
Total	100%	100%

Source: CMA estimates based on the Parties' data and data provided by third parties

146. As Table 1 shows, Cellnex, having acquired Arqiva, is by far the largest independent WIP compared to the other suppliers. Cellnex has a share in excess of 80% when based on the number of sites, and a share in excess of 90% when based on the number of PoPs. The CMA also considered shares of supply by flow in *Cellnex/Arqiva*. In that case, the CMA found that the merged entity of Cellnex and Arqiva had a share of flow (ie in terms of shares of renewals and new sites won) between 2018 and 2019 of [90-100]% including renewals and of [40-50]% excluding renewals.¹²⁸
147. The Parties also provided the CMA with bidding data that included all opportunities Cellnex was aware of in 2020 at the point of submission, including opportunities that Cellnex did not bid for and bids for tenders that were abandoned or cancelled. The bidding data shows that Cellnex bid for most of the opportunities it was aware of and won almost every opportunity that it bid for. This suggests that Cellnex has a very strong market position when assessed according to the flow of sites for which competition has taken place.
148. This is consistent with the Parties' internal documents and third-party views. For instance:
- (a) Cellnex's internal documents indicate that Cellnex became 'the largest independent TowerCo in the UK by acquiring Arqiva';¹²⁹

¹²⁸ *Cellnex/Arqiva*, Table 1 and Table 2.

¹²⁹ FMN, Cellnex Document 50, [REDACTED], June 2020, slide 67. See also FMN, Cellnex Document 199, [REDACTED], September 2020, slide 14 and FMN, Cellnex Document 200, [REDACTED], 12 November 2020, slide 5.

- (b) A third party submitted that Cellnex is the largest genuinely independent WIP in the UK;¹³⁰
- (c) another third party submitted that Cellnex owns high quality infrastructure in the UK with comprehensive national coverage and scale. The competitor indicated that Cellnex acquired from Arqiva a portfolio that has a 'very significant' scale and market power;¹³¹ and
- (d) Cellnex's non-MNO customers that responded to the request to identify alternatives to Cellnex did not rank another independent WIP as a strong alternative to Cellnex.¹³²

149. For the reasons set out above, the CMA believes that Cellnex has a very strong existing market position in the supply of access to developed macro sites to wireless communication providers in the UK.

Merger impact on Cellnex's market position

150. The CMA assessed the impact of the Merger against a more competitive counterfactual scenario involving a sale of those assets to an alternative purchaser (including existing WIPs).
151. The CMA assessed whether the Merger would further strengthen Cellnex's very strong existing market position by eliminating the emergence and growth of a significant new potential competitive constraint in the counterfactual. The CMA also assessed whether the Merger would confer on Cellnex the ability to weaken an important alternative source of supply for BT/EE.
152. The CMA assessed the above with reference to:
- (a) measures of concentration, namely adjusted shares of supply;
 - (b) internal documents;
 - (c) third party views; and
 - (d) evidence on the current and future offerings of the Parties' competitors, in particular:
 - (i) independent WIPs;

¹³⁰ Third party response to the CMA's questionnaire.

¹³¹ Third party response to the CMA's questionnaire.

¹³² Third party responses to the CMA's questionnaire.

- (ii) self-supply and supply by MNO JVs; and
- (iii) BTS sites.

Measures of concentration

- *The Parties' submissions*

153. The Parties submitted that the CMA's estimated shares of supply do not reflect the commercial reality of the market, for the following reasons:¹³³

- (a) CTIL is now active in the supply of access to developed macro sites, and intends to seek to increase third-party co-location on its sites in the near future. Furthermore, CTIL views itself as a competitor to WIPs;¹³⁴
- (b) the Streetworks Sites [✂]. The increment brought about by the [100-200] UKB Sites alone is negligible;¹³⁵ and
- (c) BTS and self-supply are strong constraints on Cellnex, and scale is not an important parameter of competition and smaller tower companies can compete credibly and effectively without a large site portfolio.¹³⁶

- *The use of adjusted shares of supply*

154. The CMA's assessment on whether shares of supply calculated based on a supplier's number of sites are a relevant indicator of the competitive strength of suppliers competing to supply access to developed macro sites is set out at paragraphs 136 to 142 above.

155. To assess the significance of the potential competitive constraint that would be eliminated by the Merger, and therefore the extent to which the Merger would reinforce Cellnex's market position, the CMA calculated adjusted shares of supply that allocate the Transaction Sites to Cellnex.

156. The CMA adjusted the shares of supply to take into account developments that may be expected to have an impact on market structure. The CMA notes in this context that market structure may evolve over time, with the effect that the combined shares of supply may overstate (if new competitive constraints would have emerged) or understate (if Cellnex's market position would have

¹³³ Parties' response to the Issues Letter, paragraph 3.48.

¹³⁴ Parties' response to the Issues Letter, paragraph 3.48.1.

¹³⁵ Parties' response to the Issues Letter, paragraph 3.48.2.

¹³⁶ Parties' response to the Issues Letter, paragraph 3.48.3.

become stronger in the counterfactual) their competitive position. The adjusted shares of supply are not intended to serve as a precise prediction of future shares of supply. Instead, they serve as an indicator of the significance of the Merger, taking into account all available evidence about market structure and its trajectory, as well as any evidence of other significant events that may be expected to affect that market structure.

157. The CMA considered it reasonable to use shares of supply that take into account Cellnex's acquisition of the Transaction Sites, which will be effected in discrete steps over a long time-horizon, as well as other foreseeable changes in market structure, given the following context:
- (a) Cellnex has a very strong market position, and the increments in terms of the number of existing sites are very significant, as discussed in paragraphs 160 and 163. It would take substantial changes in market structure to dilute the effect of the Merger.
 - (b) There is a long-run trend in the market of Cellnex (previously Arqiva) expanding its share of supply over time, rather than losing share to smaller but expanding rivals. In 2008, the Competition Commission reviewed the acquisition of National Grid Wireless Group (**NGW**) by Arqiva (which now forms part of the Cellnex business). Arqiva and NGW's combined share of PoPs for mobile telecommunications transmission in the UK amounted to 18.7%.¹³⁷ Arqiva's share continued to increase over time. By 2020 in *Cellnex/Arqiva*, Arqiva had a share of [80-90]% in the supply of passive infrastructure assets in the UK considering the number of tenancies.¹³⁸
 - (c) The supply of access to developed macro sites is an infrastructure market characterised by long-lasting facilities, long-term relationships, and high barriers to entry (as discussed at paragraph 214 onwards), making the market less prone to significant swings in shares of supply and concentration.
 - (d) Expansion via organic growth is limited and small independent WIPs would not have the possibility to gain a scale comparable to Cellnex's through organic growth as demonstrated by:
 - (i) Cellnex's competitors' expansion plans in Table 3;

¹³⁷ *Macquarie UK Broadcast Ventures Limited / National Grid Wireless Group*, paragraph 5.66 and Table 14.

¹³⁸ *Cellnex/Arqiva*, Table 1.

- (ii) Analyst reports indicate that while there are growth prospects for UK sites, these are limited.¹³⁹ Reports outline that Cellnex's prospects for growth depend on its ability to acquire towers from MNOs and that the size of its deal pipeline is a key determinant of the level of its growth;¹⁴⁰
 - (iii) One third party submitting that companies could enter and operate in the market easily, but that the challenge was how they scaled up. It submitted that the only way to get scale was by acquiring passive infrastructure assets from MNOs because MNOs historically owned the assets;¹⁴¹ and
 - (iv) Another third party submitting that organic growth would be challenging because of the need to acquire additional sites and have MNOs as anchor tenants on those sites to build sufficient scale. The competitor indicated that in order to increase its share of supply by 10%, it would most likely have to acquire existing sites from another WIP or MNO.¹⁴²
- (e) The CMA's adjusted shares of supply incorporate rivals' long-run entry plans and take account of their track record of expansion in line with those plans.
- (f) The CMA has not received evidence that would suggest the likelihood of a disruptive industry development within the foreseeable future and the main industry trends would not appear to favour the expansion of Cellnex's rivals to a greater extent than Cellnex itself. For example, while the rollout of 5G may lead to increase demand for macro cell sites, the CMA has not seen evidence indicating that Cellnex would be in a weaker position to compete for those new contracts than Cellnex would have been for recent contracts and indeed, Cellnex's very high success rate in the recent opportunities would be consistent with Cellnex expanding its share relative to rivals as discussed above at paragraph 147.
- (g) Analyst reports contain valuation projections for Cellnex, estimates of key performance indicators (eg PoPs and tenancy ratios) and projected financials for as far ahead as 2030 and sometimes beyond. Such long-term analysis is consistent with an industry that is sufficiently stable to

¹³⁹ CK Hutchison's response to the CMA's notice under 109 dated 12 May 2021, Annex CKH 1.10, 'Annex CKH 1.10 [21 May] - 2021.04.14 - Brief reprieve from COVID turbulence – Enders', page 24.

¹⁴⁰ FMN, Cellnex Document 98, [🔗], 8 July 2020, page 6 and FMN, Cellnex Document 102, [🔗], 29 September 2020, page 6.

¹⁴¹ Third party response to the CMA's questionnaire.

¹⁴² Third party response to the CMA's questionnaire.

attach weight to shares of supply adjusted for long-run changes in concentration.¹⁴³

(h) Finally, Cellnex's valuation contains long term projections that do not foresee or adjust for any significant changes in market structure or competitive conditions.¹⁴⁴ The CMA notes that market conditions were sufficiently stable for Cellnex to enter into the Merger and pay consideration on completion despite only being able to acquire ownership of the Transfer Sites in around 10 years.¹⁴⁵

158. The CMA's adjusted shares of supply are set out in the following sections, considering the increment from the Unilateral Sites and from the Transfer Sites in turn.

- *Unilateral sites*

159. With regard to the Unilateral Sites, the CMA's estimates of the shares of supply in access to developed macro sites to wireless communication providers in the UK adjusting for foreseeable changes in market structure are set out in Table 2 below.

(a) The CMA adjusted the shares to reflect CK Hutchison's plans to build 2,600 Unilateral Sites [REDACTED]. Although the aforementioned 2,600 Unilateral Sites have not yet been built, the CMA considers that these plans are sufficiently concrete to reflect them in the share of supply estimates.

(b) With regard to the Parties' submissions that the majority of the Unilateral Sites are unlikely to be suitable for further co-location, as set out at paragraph 141, the CMA considers that independent WIPs compete for both new tenancies and to retain existing customers. Whilst spare capacity and the ability of independent WIPs to upgrade existing sites may be relevant to compete for new tenancies, the number of existing developed macro sites is important when competing to retain existing customers.

(c) With respect to CTIL's sites, for the reasons mentioned in paragraph 145, the CMA considered a baseline scenario that excludes CTIL's sites.

¹⁴³ FMN, Cellnex Document 101, [REDACTED], 9 September 2020, page 14; FMN, Cellnex Document 102, [REDACTED], 29 September 2020, pages 15-21 and FMN, Cellnex Document 104, [REDACTED], 16 November 2020, pages 16-15.

¹⁴⁴ FMN, Cellnex Document 237, [REDACTED].

¹⁴⁵ FMN, Appendix 2, paragraphs 19.1 to 19.4.

However, as a sensitivity check, the CMA also presents shares of supply that include CTIL.¹⁴⁶

- (d) The CMA has included all third-party expansion plans up to 2022. The CMA only considered expansion plans that were sufficiently evidenced, rather than high-level indications of expansion ambitions.
- (e) Cellnex has not made any submissions regarding any concrete expansion plans. To the extent that Cellnex has such plans, the share estimates would understate its position.

Table 2: CMA’s estimates of the shares of supply by number of sites adjusted for changes in market structure up to 2022

<i>Competitor</i>	<i>Shares – Excluding CTIL</i>	<i>Shares – Including CTIL</i>
Cellnex	[60-70]%	[30-40]%
Unilateral Sites	[20-30]%	[10-20]%
Cellnex + Unilateral Sites	[80-90]%	[40-50]%
CTIL	-	[50-60]%
WIG	[5-10]%	[0-5]%
Shared Access	[0-5]%	[0-5]%
FreshWave	[0-5]%	[0-5]%
Britannia Tower	[0-5]%	[0-5]%
Radius	[0-5]%	[0-5]%
Total	100%	100%

Source: CMA estimates based on the Parties’ data and data provided by third parties.

160. Table 2 shows that the combined adjusted shares of supply of Cellnex and the Unilateral Sites is [80-90]%, with a significant increment of [20-30]%. Post-Merger, only a tail of significantly smaller suppliers (ie WIG, FreshWave, Shared Access, Britannia Tower and Radius) would remain, all with very small adjusted shares of supply. In the counterfactual, the Unilateral Sites would, if taken as a single unit, represent the second-largest share of supply. Furthermore, the post-Merger HHI would be over 7,500 with a delta of over 2,500, which shows that the Merger would lead to a significant increase in concentration in an already highly concentrated market.

¹⁴⁶ Although BT/EE may become a third party supplier of sites to 3UK upon dissolution of the MBNL JV (currently expected to occur in 2031), the CMA has not included BT/EE in the shares of supply as there is significant uncertainty as to whether, following dissolution, [redacted]. Moreover, [redacted], these are likely to be complementary to (rather than substitutes for) the Transfer Sites and therefore may be unlikely to be relevant to competition between Cellnex and the Transfer Sites in the counterfactual. [redacted] For the purposes of this decision, the CMA has considered [redacted] as forming part of the MBNL JV’s self-supply arrangements, and not included them in the shares of supply.

161. Table 2 shows that, after including CTIL, the combined adjusted share of supply of access to developed macro sites in the UK significantly reduces to [40-50]%. However, the market would remain very concentrated, even if CTIL were included in the frame of reference. In that scenario, over 90% of all sites would be owned by the two largest suppliers (ie CTIL and Cellnex with [50-60]% and [40-50]% respectively once the Unilateral Sites are attributed to Cellnex). The transfer of the Unilateral Sites would result in an increment of [10-20]%, which means a post-merger HHI of over 4,500 with a delta of approximately 600.

- *Transfer sites*

162. Cellnex will acquire the Transfer Sites upon dissolution of MBNL, which is currently expected to occur in 2031. In order to assess the significance of the potential competitive constraint that is eliminated by the Merger (relative to the counterfactual) and, therefore, the significance of the resulting increase in Cellnex's market position, the CMA calculated adjusted shares of supply that take into account the Transfer Sites. These estimates also reflect third parties' expansion plans up to 2031 to the extent that they were sufficiently evidenced, rather than high-level indications of expansion ambitions. As with the Unilateral Sites, the CMA has not adjusted the shares of supply to reflect Cellnex's expansion plans in the counterfactual. With respect to CTIL's sites, for the reasons mentioned in paragraph 145, the CMA considered a baseline scenario that excludes CTIL's sites. However, as a sensitivity check, the CMA also presents shares of supply that include CTIL. These adjusted share of supply estimates are set out in Table 3 below.

Table 3: CMA's estimates of the shares of supply by number of sites adjusted for foreseeable changes in market structure up to 2031

<i>Competitor</i>	<i>Shares – Excluding CTIL</i>	<i>Shares – Including CTIL</i>
Cellnex	[50-60]%	[20-30]%
Unilateral Sites	[10-20]%	[5-10]%
Transfer Sites	[20-30]%	[10-20]%
Combined	[90-100]%	[40-50]%
CTIL	-	[40-50]%
WIG	[5-10]%	[0-5]%
Shared Access	[0-5]%	[0-5]%
FreshWave	[0-5]%	[0-5]%
Britannia Tower	[0-5]%	[0-5]%
Radius	[0-5]%	[0-5]%
Total	100%	100%

Source: CMA estimates based on the Parties' data and data provided by third parties

163. The combined adjusted shares of supply of Cellnex, the Unilateral Sites, and the Transfer Sites is [90-100]%, with an increment of [30-40]% from the Merger. These adjusted shares of supply indicate that Cellnex's share (excluding the Unilateral and Transfer Sites) would be [50-60]%, making it the largest supplier when excluding CTIL. Taken together, the Unilateral and Transfer Sites account for the second-largest adjusted share of supply on this metric and would be many times larger than the next-largest firm. The only remaining suppliers active would be a tail of significantly smaller suppliers (ie WIG, Shared Access, FreshWave, Britannia Tower and Radius). Post-merger, the HHI would be over 8,000 with a delta of over 3,500. The CMA considered that these adjusted shares of supply provide *prima facie* evidence that Unilateral Sites and Transfer Sites represent a significant group of assets, even when considered in the context of other foreseeable changes in market structure.
164. Table 3 shows that, after including CTIL, the Parties' combined adjusted shares of supply of access to developed macro sites in the UK are smaller, at [40-50]%. However, the CMA's estimates in Table 3 also indicate that adjusted shares of supply would remain very concentrated even if CTIL were included. The two largest suppliers would still account for over 90% of the market (ie CTIL and Cellnex with [40-50]% and [40-50]% respectively once the Unilateral and Transfer Sites are attributed to Cellnex). The transfer of the Unilateral Sites and Transfer Sites would result in an increment of [10-20]%, which a post-Merger HHI of over 4,500 with a delta of over 1,000.
165. The CMA also considers that these estimates are likely to underestimate Cellnex's market position on a forward-looking basis, because they do not account for any increase in Cellnex's total number of sites beyond [X]. In this context, the CMA is aware that Cellnex has recently won a new, albeit small, contract.¹⁴⁷ Furthermore, these estimates underestimate the number of sites that Cellnex will operate as a result of the Merger, and therefore the increment in its share attributable to the Merger. As part of the Merger, Cellnex has entered into an agreement with CK Hutchison whereby 3UK commits to acquire a minimum number of BTS sites from Cellnex.¹⁴⁸
- *MBNL Sites*
166. As set out in more detail at paragraphs 62 to 74, the available evidence indicates that Cellnex will have the ability to exercise material influence over

¹⁴⁷ FMN, paragraph 16.5 and Annex 5 to Cellnex's response to the CMA's notice under section 109, dated 22 February 2021.

¹⁴⁸ FMN, paragraph 2.22.3.

the MBNL Sites until the dissolution of the MBNL JV. In particular, Cellnex will be able to influence the commercial policy for the MBNL Sites including on matters relating to the MBNL Sites' budget, [REDACTED].

167. The CMA has considered whether Cellnex's material influence over the MBNL Sites, in particular the points raised at paragraph 151 above, could also impact BT/EE's ability to influence the commercial policy for the MBNL Sites, seeing that it will in effect not only have to [REDACTED]. This could, by way of non-exhaustive example, impact BT/EE's ability to [REDACTED], with the result that in post-Merger negotiations with Cellnex on [REDACTED], BT/EE's ability to credibly threaten the use of self-supply would be adversely affected, weakening its bargaining position against Cellnex in those scenarios.
168. The Parties submitted that Cellnex cannot in any way impact BT/EE's ability to upgrade MBNL Sites to 5G or to self-supply using the MBNL Sites prior to the dissolution of the MBNL JV.¹⁴⁹ In particular:
- (a) Under the MBNL JV Agreements, [REDACTED];¹⁵⁰
 - (b) The Parties expect that BT/EE will continue to [REDACTED];¹⁵¹ and
 - (c) More generally, Cellnex will have no ability to influence BT/EE's ability and incentive to self-supply.¹⁵²
169. In *Cellnex/Arqiva*, the CMA found that Cellnex was materially constrained from the threat of self-supply by MNOs, particularly given that MNOs have a preference to self-supply where they have their own sites.¹⁵³ However, the CMA found that the nature of the constraint meant that it was not among the most immediate sources of competition to Cellnex (as self-supply may not be an effective substitute to independent WIPs where self-supply is less viable or less attractive). The CMA therefore found that self-supply should be characterised as a 'price ceiling', at least in the near-term.¹⁵⁴ In this case, the CMA considers that the available evidence supports the approach taken in *Cellnex/Arqiva*.
170. BT/EE submitted that the MBNL JV Agreements contain processes and terms governing the unilateral deployment of equipment (and associated unilateral upgrade works) by either BT/EE or 3UK and that the costs of the unilateral

¹⁴⁹ Parties' response to the Issues Letter, paragraph 3.6.

¹⁵⁰ Parties' response to the Issues Letter paragraph 3.6.1.

¹⁵¹ Parties' response to the Issues Letter, paragraph 3.6.3.

¹⁵² Parties' response to the Issues Letter paragraph 3.6.4.

¹⁵³ *Cellnex/Arqiva*, paragraph 213.

¹⁵⁴ *Cellnex/Arqiva*, paragraphs 91 and 93.

deployment are met by the deploying party who must also ensure that there is no adverse impact to the other party. Further, BT/EE added [REDACTED]. In relation to BT/EE's plan for the deployment of its 5G network [REDACTED]. However, BT/EE submitted that, over time, it expected the majority of the MBNL Sites to be upgraded to enable 5G.¹⁵⁵ It also submitted that it has engaged in joint projects with 3UK to upgrade a material number of shared sites to facilitate their 5G rollout, including an ongoing project [REDACTED]. The available evidence also shows that the MBNL Sites represent [REDACTED], suggesting that the weakening of BT/EE's constraint on Cellnex would be significant.

171. CK Hutchison did not consent, for the purposes of the Phase 1 proceedings, to the CMA disclosing to BT/EE details of the rights that Cellnex would obtain over the MBNL Sites.¹⁵⁶ The CMA notes, in this regard, that its ability to test the Parties' submissions with BT/EE, as a relevant third party that is well-placed to provide evidence in relation to the impact of the Merger on its business, including as regards its ability to upgrade MBNL Sites to 5G or to self-supply using the MBNL Sites, was limited. For this reason, the CMA has not, at this stage, been able to attach material weight to the Parties' submissions on the impact of the Merger on BT/EE.
172. The CMA therefore considers that the market structure changes brought about by the Merger may also reduce the constraint that BT/EE's self-supply through the MBNL JV currently exercises on Cellnex. The CMA considers that this in turn may further strengthen Cellnex's market position post-Merger (albeit only until the dissolution of the MBNL JV).

Internal documents

173. Cellnex's internal documents show that Cellnex is currently a leading provider in the UK and that the Merger will further strengthen its existing position, making it the largest independent tower provider in the UK.
- (a) One document states that the merger represents the opportunity [REDACTED].¹⁵⁷
- (b) Another document states that '[REDACTED]'.¹⁵⁸

¹⁵⁵ Third party response to the CMA's questionnaire.

¹⁵⁶ Notwithstanding the CMA's position for the purposes of the Phase 1 proceedings, the CMA reserves its position that it may disclose further information concerning the Merger, including further details of the rights that Cellnex would obtain over the MBNL Sites, to BT/EE without the Parties' consent, to the extent permitted by Part 9 of the Act.

¹⁵⁷ FMN, Cellnex Document 199, [REDACTED], September 2020, slide 4.

¹⁵⁸ FMN, Cellnex Document 200, [REDACTED], 12 November 2020, slide 5.

(c) Another document states that [REDACTED].¹⁵⁹

(d) A document, dated November 2019, [REDACTED].¹⁶⁰

174. Finally, Cellnex's internal documents suggest that the Transaction Sites are particularly important to secure Cellnex's growth and secure its current position, despite some of these assets, ie the Transfer Sites, only being transferred in 2031. The due diligence report prepared by [REDACTED] for Cellnex's M&A and Senior Management in September 2020 (ie two months before the Parties entered into the Merger) explains [REDACTED]. The report states that [REDACTED]¹⁶¹. The CMA considers that documentary evidence that industry consultants perceive [REDACTED] is consistent with concerns that an alternative owner of the Transaction Sites would represent a significant new constraint on Cellnex. In this context, the CMA notes that the document also suggests that [REDACTED] and, therefore, that the Merger is likely to strengthen Cellnex's market position.

Third party views

175. Third party evidence also suggests that if the Unilateral Sites and Transfer Sites were to be operated by an independent tower operator, it would be a strong competitor to Cellnex.
- (a) All of Cellnex's competitors that responded to the CMA's market test submitted that the CK Hutchison business would compete closely or moderately closely with Cellnex if that business were to start operating as an independent tower operator;¹⁶² and
- (b) The majority of customers that responded to the CMA's market test submitted that they would consider the CK Hutchison business as an alternative to Cellnex if that business were to start operating as an independent tower operator.¹⁶³

The CMA's views on the impact of the Merger on Cellnex's market position

176. In light of the evidence above, the CMA believes that the Merger would strengthen Cellnex's very strong existing market position in a highly concentrated market and lead to a reduction in the number of suppliers that could have emerged absent the Merger. The CMA also believes that a large

¹⁵⁹ FMN, Cellnex Document 233, [REDACTED], 18 November 2020, slide 35

¹⁶⁰ FMN, Cellnex Document 36, [REDACTED], 11 November 2019, slide 20.

¹⁶¹ FMN, Cellnex Document 199, [REDACTED], September 2020, slide 4.

¹⁶² Third party responses to the CMA's questionnaire.

¹⁶³ Third party responses to the CMA's questionnaire.

geographic footprint is a competitive advantage and that the Merger therefore further strengthens Cellnex's market position by strengthening its geographic footprint.

Alternative suppliers

177. The CMA assessed whether post-Merger the Merged Entity would be effectively constrained by alternative suppliers. In particular, the CMA has assessed the constraint in that context from:

- (a) Independent WIPs;
- (b) Self-supply by MNOs and MNO JVs; and
- (c) BTS sites.

- *Approach in Cellnex/Arqiva*

178. In *Cellnex/Arqiva*, the CMA made the following findings in respect of each of these potential constraints.

- (a) In relation to independent WIPs, while the CMA took into account the constraint from smaller WIPs, this was in the context of a transaction where the target, Cellnex, was a relatively small player itself competing mainly through its BTS sites offering and growing organically. The CMA found that Cellnex was not differentiated from other players that could also expand. The CMA considered in that case that the elimination of one small supplier focused on BTS sites was not significant in circumstances where post-merger there would be several alternative suppliers with a similar focus. In that context, the CMA did not need to conclude on the relative constraint exerted by suppliers competing through BTS sites as compared to the constraint from suppliers competing using existing sites. In this case, the CMA considers that the constraint from these smaller WIPs should be assessed with regard to the factual context in this case, namely a transaction between two entities that would each hold large numbers of existing sites in the counterfactual.
- (b) In relation to self-supply, the CMA found that self-supply by MNOs constrained Cellnex, but that the strength of the constraint depended on the customer concerned. In particular, the CMA considered that self-supply by a particular MNO or MNO JV was not a material constraint on supply to non-MNO customers or supply to another MNO customer in a

separate MNO JV.¹⁶⁴ The CMA found that Cellnex was materially constrained by the threat of self-supply by MNOs, particularly given that MNOs have a preference to self-supply where they have their own sites.¹⁶⁵ However, the CMA found that the nature of the constraint meant that it was not among the most immediate sources of competition to Cellnex and that self-supply should be characterised as a ‘price ceiling’, at least in the near-term.¹⁶⁶

- (c) In relation to BTS sites, the CMA included BTS sites in the product frame of reference without engaging in a detailed assessment of the relative strength of BTS sites as against existing sites. The CMA notes that although customers indicated that BTS was substitutable with existing sites,¹⁶⁷ the CMA considers that this is not necessarily probative as to the competitive strength that BTS sites exert against existing sites.

- *Parties’ submissions*

179. In relation to the constraint from smaller WIPs, the Parties submitted that Cellnex will continue to face strong competition from rival WIPs post-Merger, including WHP, WIG, AP Wireless, Atlas Tower, Shared Access, and Britannia Tower.¹⁶⁸ The Parties submitted that in *Cellnex/Arqiva*, the CMA considered that there were sufficient alternative credible suppliers to the parties.¹⁶⁹ The Parties submitted that, given that MNOs have mature networks with almost full geographic coverage, MNOs’ future demand will be focused on upgrades or increased densification rather than new sites. Consequently, MNOs’ limited demand for new sites will be focused on small numbers of sites to fill partial spots and infills for local increases in customer traffic demand.¹⁷⁰ Smaller WIPs have the ability to meet this demand.¹⁷¹ Further, the Parties submitted that large tower companies lose contracts to smaller tower companies.¹⁷²
180. In relation to the constraint from self-supply, the Parties submitted that MNOs have strong countervailing buyer power and that self-supply by MNOs is a strong constraint on Cellnex. The Parties submitted that MNOs and MNO JVs are large, sophisticated buyers with detailed understanding of the market and

¹⁶⁴ *Cellnex/Arqiva*, paragraphs 93 101 and 106.

¹⁶⁵ *Cellnex/Arqiva*, paragraph 213.

¹⁶⁶ *Cellnex/Arqiva*, paragraphs 91 and 93.

¹⁶⁷ *Cellnex/Arqiva*, paragraph 68.

¹⁶⁸ FMN, paragraph 15.35.

¹⁶⁹ Parties’ response to the Issues Letter, paragraph 3.29.

¹⁷⁰ Parties’ response to the Issues Letter, paragraph 3.16.

¹⁷¹ Parties’ response to the Issues Letter, paragraph 2.23.

¹⁷² Parties’ response to the Issues Letter, paragraphs 3.31 to 3.33.

underlying costs of supply and provided examples of self-supply by customers. The Parties submitted that their internal documents show that Cellnex (and, previously, Arqiva) has long-regarded self-supply as a significant constraint.¹⁷³ The Parties stated that Cellnex has [X] and Arqiva had [X].¹⁷⁴ In addition, the Parties submitted that the CMA should consider the prospect of MNOs using their portfolio of sites to supply other customers, stating that Cellnex is likely to face even stronger competition in the near future as a result of the commercialisation of CTIL, ie CTIL's assets being owned and operated as an independent WIP.¹⁷⁵ The Parties also submitted that CTIL views itself as a competitor to Cellnex and that CTIL has a strong propensity to self-build new sites.¹⁷⁶ The Parties also stated that their internal documents also consider that CTIL is a competitive constraint.¹⁷⁷

181. In relation to the constraint from BTS sites, the Parties submitted that BTS sites are a strong constraint on Cellnex and will continue to be so. In particular, the Parties submitted that:¹⁷⁸
- (a) In *Cellnex/Arqiva* the CMA found that BTS sites constrained the merged entity.
 - (b) MNOs self-supply new sites where an existing site is not in the appropriate location.
 - (c) The cost of upgrading a site may not be substantially different from the cost of building a new structure and may actually be significantly more than the cost of installing a new BTS Sites. The Parties submitted that in many cases existing sites will need upgrading to provide access to other tenants, especially where 5G equipment is being added because such equipment is relatively heavy and cannot generally be accommodated on existing structures. The Parties submitted that BTS sites are priced competitively and within the same range as the prices for access to existing sites.
 - (d) There are several instances where Cellnex's existing sites have been in direct competition with BTS sites.

¹⁷³ Parties' response to the Issues Letter, paragraph 4.9.

¹⁷⁴ Parties' response to the Issues Letter, paragraphs 4.8 and 4.9.

¹⁷⁵ FMN, paragraph 15.4.

¹⁷⁶ Parties' response to the Issues Letter, paragraphs 3.34 to 3.35.

¹⁷⁷ Parties' response to the Issues Letter, paragraphs 3.36.

¹⁷⁸ Parties' response to the Issues Letter, paragraphs 3.26 to 3.27.

- (e) Even for some larger contracts, it remains possible for smaller competitors to bid for a partial number of sites in a large tender including through BTS.¹⁷⁹
182. The Parties also submitted that the cost of commercialising an existing monopole so as to enable co-location on them may be significantly more expensive than the cost of installing a new BTS monopole for a single tenant.¹⁸⁰
- *Independent WIPs*
183. As shown in Tables 1, 2 and 3 by the shares attributable to the smaller independent WIPs for the supply of access to developed macro sites, these entities constitute a very small share of supply, especially in comparison to the size of Cellnex or the Merged Entity.
184. Consistent with the shares of supply estimates set out above, the Parties' internal documents also suggest that independent WIPs provide [REDACTED] on Cellnex. [REDACTED] that it is significantly larger than the next biggest alternative supplier, WIG, which is followed by a number of smaller alternatives, including Shared Access, FreshWave, Atlas Towers, and Britannia Tower.
- (a) As set out at paragraph 173 above, Cellnex's internal documents show that Cellnex is currently a leading provider in the UK and that the Merger will further strengthen its existing position, making it the largest independent tower provider in the UK.¹⁸¹
- (b) An Arqiva internal document (provided by Cellnex in the context of this investigation) sets out that Arqiva considered that [REDACTED].¹⁸²
- (c) Another internal document drafted by Arqiva evaluates [REDACTED].¹⁸³
185. Third party feedback also suggests that there is a limited constraint from independent WIPs.
- (a) As part of its investigation, the CMA asked Cellnex's competitors to name the main suppliers of access to developed macro sites in the UK, as well as to indicate their relative strength as competitors. All of Cellnex's

¹⁷⁹ Parties' response to the Issues Letter, paragraph 4.12.4.

¹⁸⁰ Parties' response to the Issues Letter, paragraph 3.9.

¹⁸¹ FMN, Cellnex Document 199, [REDACTED], September 2020, slide 14 and FMN, Cellnex Document 50, [REDACTED], 3 June 2020, slide 67.

¹⁸² FMN, Cellnex Document 28, [REDACTED], 13 May 2019, slides 32 and 33.

¹⁸³ FMN, Cellnex Document 27, [REDACTED], 22 January 2019, slide 23.

competitors that responded to the CMA's market test submitted that Cellnex is a strong or very strong competitor. All responding competitors also named WIG as a competitor, though some respondents indicated that WIG was a weak competitor. Respondents also named FreshWave, Shared Access and Britannia Towers as competitors, but indicated they were weaker competitors relative to Cellnex.¹⁸⁴

(b) The CMA also asked Cellnex's customers who they consider to be alternatives to Cellnex. No respondents to this question referred to any of the other independent WIPs as a strong alternative to Cellnex. Some customers did not identify any provider as an alternative to Cellnex.¹⁸⁵ The CMA also asked MNOs who they consider to be alternatives to Cellnex. MNOs also did not identify other independent WIPs as a strong alternative to Cellnex. The CMA notes that one MNO respondent mentioned other independent WIPs but did not provide an indication of their relative strength to Cellnex.

186. The Parties' bidding data also indicates that independent WIPs pose a weak constraint against Cellnex. As discussed at paragraph 147 above, the Parties' bidding data indicates that Cellnex won almost all contracts that it bid for in 2020, excluding opportunities abandoned by customers.¹⁸⁶ Furthermore, the CMA also assessed the Parties' submission that large companies lost contracts to smaller companies and considered the tenders that the Parties mentioned in response to the Issues Letter. These tenders were not provided by the Parties in their original bidding data meaning the CMA has had less time to examine them. The CMA has found it difficult to conclude whether these tenders were satisfied by an independent WIP (as opposed to, for example, self-supply) and understand that some of the wins attributed to WIPs were for no-commitment frameworks under which sites have yet to be built. Moreover, the CMA acknowledges that WIPs can win a small proportion of available tenders, as evident from their presence in the market. However the CMA has not received evidence to show that smaller WIPs represent a strong constraint.
187. The CMA has also assessed the growth prospects of alternative WIPs and whether their constraint could increase significantly in future.
188. The CMA considers that the evidence indicates that WIPs are not expected to expand significantly through organic growth.

¹⁸⁴ Third party responses to the CMA's questionnaire.

¹⁸⁵ Third party responses to the CMA's questionnaire.

¹⁸⁶ Cellnex's response dated 25 May 2021 to the CMA's email of 21 May 2021.

- (a) The share of supply estimates in Tables 2 and 3 show that independent WIPs have limited plans to expand through organic growth and that the scale of their evidenced expansion plans is very small. The CMA considers that small players would not win a large proportion of these limited opportunities when compared to Cellnex because of the evidence from bidding data about other WIPs' performance and success at winning bids compared to Cellnex. Consequently, the CMA considers that smaller WIPs will not be able to materially increase their share of existing sites relative to Cellnex.
- (b) One competitor submitted that it intended to expand the number of sites it owned by 5,000 over the next 10 years. The competitor indicated that MNOs renew around 300 sites each year, mainly due to landlords or owners of sites terminating the contract to host the MNO on that site. The competitor intends to supply a proportion of the sites that MNOs need renewed each year with a BTS sites programme. The CMA considers that these plans represent ambitions at this stage. The CMA also considers that the growth estimates are not well-reasoned as the number of sites expected in 2031 far exceeds the number of sites that should be available from renewals (ie supplying [~~300~~] % of the 300 sites renewed each year would constitute an increase of [~~300~~] sites over 10 years, as opposed to the 5,000 submitted.). The CMA has not received sufficient evidence that the proposed strategy would be successful, meaning that the expansions plans of this competitor are not reflected in Tables 2 and 3. As mentioned above in relation to the general prospect of organic growth, there is insufficient evidence to show that any competitor has a greater ability to win these opportunities compared to Cellnex so as to increase share relative to Cellnex. Further, the competitor submitted that its plans reflected its thinking prior to the announcement of the Merger and that, post-Merger, it could possibly receive a lower proportion of renewals than previously estimated because of requirements on 3UK to obtain a minimum number of its new sites from Cellnex.
189. The available evidence further indicates that barriers to expansion are high (discussed in further detail at paragraphs 214 onwards). In this context, the CMA notes that 3UK's long-term supply agreement with Cellnex for future BTS sites and Cellnex's ability to exercise material influence over the MBNL Sites would further affect the ability of independent WIPs to compete to supply 3UK and MBNL post-Merger.
190. In light of the above evidence, the CMA believes that WIG is a weak constraint on Cellnex in relation to the supply of access to developed macro sites in the UK and that other independent WIPs represent an even weaker

constraint. Furthermore, the CMA believes that post-Merger the available evidence indicates that WIPs, considered together, would not significantly increase the constraint they exert on the Merged Entity, including through organic growth.

- *Self-supply by MNOs and MNO JVs*

191. The CMA considers that the evidence it has received supports the position in *Cellnex/Arqiva* that an MNO can use the threat of self-supply to constrain Cellnex. The CMA has not received evidence to indicate that it should depart from this finding in respect of Vodafone or Telefónica. In this context, the CMA considers that the evidence submitted by the Parties is neither indicative of a constraint that extends further than that found in *Cellnex/Arqiva* nor is it indicative of self-supply exerting a constraint similar to the level of constraint that would exist were another large independent WIP active in the market.
192. In respect of BT/EE, as discussed at paragraphs 169 to 172, the CMA has gathered evidence that Merger may weaken the competitive constraint from BT/EE's self-supply on the Merged Entity until the dissolution of the MBNL JV.
- (a) As discussed above at paragraph 171, CK Hutchison did not consent to the CMA disclosing to BT/EE details of the rights that Cellnex would obtain over the MBNL Sites, and the CMA therefore obtained submissions from BT/EE without making such disclosures. As a result, BT/EE's ability to make submissions on the impact of the Merger on its business were limited and BT/EE in fact submitted that it lacked sufficient information about the Merger to fully engage with the impact that the Merger could have on the BT/EE business. For this reason, the CMA has not, at this stage, been able to attach material weight to the Parties' submissions on the impact of the Merger on the constraint that BT/EE exercises on Cellnex. However, in this context, the CMA notes that, to the extent that it was able to comment on the potential effects of the merger, BT/EE submitted it is a possibility that [redacted], including in relation to price, [redacted].¹⁸⁷
- (b) As discussed above at paragraphs 62 to 74, the CMA considers that the evidence shows that Cellnex will acquire material influence over the MBNL Sites as a result of the Merger.
- (c) As set out in more detail at paragraphs 166 to 172 above, Cellnex's ability to exercise material influence over the MBNL Sites will impact BT/EE's

¹⁸⁷ Third party response to the questionnaire.

ability to influence the commercial policy for the MBNL Sites. BT/EE will in effect [REDACTED], which will weaken its bargaining position against Cellnex.

193. In light of the above, the CMA considers that self-supply by MNOs and MNO JVs constrains Cellnex. However, the CMA notes that self-supply by a particular MNO or MNO JV is not a material constraint on supply to non-MNO customers or to an MNO customer in a separate MNO JV. The CMA also considers that the strength of the constraint depends on the customer concerned. In addition, the CMA believes that the Merger may reduce the constraint that BT/EE's self-supply currently exercises on Cellnex and would exercise on the Merged Entity post-Merger.

- *Future constraint of MNOs and MNO JVs*

194. The CMA assessed the extent to which supply by MNOs and MNO JVs could constrain the Merged Entity in the future.

195. While the MNOs are giving some consideration to how these assets might be best deployed in future, the CMA currently considers that there is ultimately limited evidence to indicate that post-Merger any MNO will become a materially stronger constraint to the Merged Entity. In particular, MNOs indicated limited ability or intention to open up their assets to third parties.

(a) Telefónica submitted that its macro sites acquisition and management are currently carried out through CTIL. In terms of self-supply, Telefónica currently has no sites outside of CTIL. Telefónica submitted that it had [REDACTED]. The constraint posed by CTIL is assessed below.

(b) Vodafone submitted that it has only a limited number of sites outside of the CTIL joint venture. Vodafone's arrangements with CTIL currently include a minimum commitment; although Vodafone submitted that CTIL would normally be its preferred supplier, Vodafone does have the ability and incentive to choose another supplier if it wishes. In January 2021, Vodafone transferred its stake in CTIL to Vantage Towers. Vodafone submitted that the rationale for the sale was to improve asset utilisation, play a role in enabling Europe's sustainable and inclusive digital society, and unlock further value for its shareholders. The constraint posed by CTIL is assessed below.

(c) BT/EE owns [REDACTED] sites outside the MBNL JV, with [REDACTED] of these sites used solely by BT/EE. BT/EE submitted that it [REDACTED]. BT/EE considered that [REDACTED].

196. The CMA also considers that there is mixed evidence to indicate that post-Merger CTIL will become a stronger constraint on the Merged Entity.

- (a) The available evidence indicates that CTIL has the intention to increase third-party co-location on its sites. For example, it stated in a press release that as a result of its commercialisation efforts, it would become the ‘#1 tower infrastructure company in the UK’ and that it would be ‘well placed to capture a significant proportion of the additional market tenancies required for densification and coverage in the UK’.¹⁸⁸ As discussed above at paragraph 180, the CMA also received evidence from the Parties that their internal documents consider CTIL to be a competitive constraint.
- (b) However, the evidence also suggests that CTIL will predominantly be used to self-supply for Vodafone (who remains the majority owner of Vantage Towers that now holds its 50% stake in CTIL) and Telefónica. Further, Vodafone submitted that the proportion of CTIL’s annual revenue that is expected to be derived from sales to third party tenants is not expected to exceed [X] by 2031.

197. In light of the evidence above, the CMA believes that the MNOs and MNO JVs will continue to use their sites predominantly for self-supply.
198. The CMA also believes that post-Merger CTIL is unlikely to become a stronger constraint on the Merged Entity. Firstly, the CMA believes that, as an MNO JV, CTIL is still likely to prioritise self-supply to its shareholders before considering additional commercialisation to other customers. Therefore, the extent to which CTIL will pose an increased constraint against the Merged Entity depends on the amount of third party co-location that will occur on its sites because customers will only be able to use CTIL’s sites if CTIL chooses to open the sites up for co-location. Secondly, based on the evidence available, the CMA considers that there is insufficient certainty that third-party co-location on CTIL’s sites will materially increase in future. Furthermore, even to the extent that CTIL were to materially increase co-location on its sites, the market would remain highly concentrated (see Tables 2 and 3 above) and the CMA considers that CTIL would not by itself sufficiently constrain the Merged Entity.

- *BTS sites*

199. As noted above at paragraph 118, in contrast to *Cellnex/Arqiva*, the Merger involves a transaction between two suppliers with a large holding of existing

¹⁸⁸ CTIL press release ‘[Vodafone and Telefónica commercialise Cornerstone, the UK’s largest tower company](#)’, 11 January 2021.

sites. Therefore, the CMA has assessed the relative importance of BTS as a constraint on existing sites.

200. Third party evidence suggests that there are several advantages in using existing sites compared to BTS sites.
- (a) One competitor submitted that existing sites have significant advantages over BTS sites because there are no planning risks or construction delays;¹⁸⁹
 - (b) Another competitor submitted that ‘the advantage of a pre-existing site is that it will already have proven technical capabilities and be immediately available’.¹⁹⁰
 - (c) Another competitor submitted that ‘having a portfolio of existing sites is a significant competitive advantage’.¹⁹¹
201. The CMA received somewhat mixed third-party evidence on the use of BTS sites and existing sites for new tenders. Some evidence suggested that BTS sites represented a constraint to existing sites. For instance, several competitors submitted that most of the recent sites that they have used to fulfil MNO tenders have been BTS sites.¹⁹²
202. Further, with regard to the Parties’ submissions that the costs of upgrading an existing site could be significantly more than the cost of installing a new BTS site, the CMA notes that this evidence appears mixed and that, at least for some sites, the evidence suggests that upgrading an existing site is less expensive than building a new one [✂]. However, a competitor indicated that there are range of costs to build new macro sites, including the internal costs (ie costs to the WIP to build) of £100,000-250,000 as well as costs for building/land access, a track to the site and a link from the power company to the site.¹⁹³
203. The CMA also received evidence that more clearly indicated that BTS sites pose a limited constraint on existing sites. Some customers that responded to the CMA’s market questionnaire submitted that in the last five years most of the tenders for new passive infrastructure, or to switch supplier, were for existing sites rather than BTS sites. In particular, one customer submitted that 75% of its new sites in the last five years were for existing sites, and another

¹⁸⁹ Third party response to the CMA’s questionnaire.

¹⁹⁰ Third party response to the CMA’s questionnaire.

¹⁹¹ Third party response to the CMA’s questionnaire.

¹⁹² Third party responses to the CMA’s questionnaire.

¹⁹³ Note of the call with a third party.

customer submitted that 100% of its new sites in the last five years were for existing sites.

204. Further, Cellnex's bidding data shows that, in 2020, Cellnex won almost all contracts that it bid for on the basis of its existing sites network (with those that it did not win having been abandoned by the customer). [REDACTED] The CMA considers that Cellnex's bidding data indicates that existing sites tend to account for a large proportion of wins overall, and that its customers appear to have a preference for existing sites over BTS sites or that existing sites have a competitive advantage over BTS sites, for example from a cost point of view.
205. The CMA notes in this context that as a result of the Merger, a large number of sites will become available for increased third-party co-location. The CMA considers that given the advantages of existing sites over BTS sites, and the apparent customer preference of existing sites over BTS sites set out above, this would likely reduce opportunities for BTS site offerings to win tenders.
206. In light of the above evidence, the CMA believes that BTS sites exert a weak constraint on Cellnex in the supply of access to developed macro sites in the UK. In relation to the evidence from WIPs that they used mostly BTS sites to fulfil recent MNO tenders (as discussed at paragraph 201), the CMA notes that small WIPs have a limited geographic footprint or existing portfolio of sites. Therefore, small WIPs are more likely to need to rely on BTS sites to supply new customers because of their existing number of sites, as opposed to choosing to rely on BTS sites because they offer a competitive advantage.

Conclusion on horizontal unilateral effects

207. For the reasons set out above, the CMA believes that the Merger leads to the removal of a significant alternative source of competition compared to the counterfactual and to the strengthening of Cellnex's very strong market position in what is already a concentrated market. The CMA found in the counterfactual that there is a realistic prospect that CK Hutchison would have sold the Transaction Sites to another purchaser, which would have brought about a significant additional constraint on Cellnex. As a result of the Merger, Cellnex will further strengthen its market position through its acquisition of a very large number of additional sites (the Unilateral Sites and the Transfer Sites) together with its ability to exercise material influence over MBNL Sites. The CMA also believes that the individual and collective constraint from other suppliers (including WIPs, MNOs and MNO JVs and any BTS sites offerings by those suppliers) will not be sufficient post-Merger to constrain the Merged Entity.

208. Accordingly, the CMA believes that the Merger raises significant competition concerns as a result of horizontal unilateral effects in relation to the supply of access to developed macro sites and ancillary services to wireless communication providers in the UK.

Other theories of harm

209. The CMA also considered whether:

- (a) given Cellnex acts as a supplier of CK Hutchison's rival MNOs, the Merger could lead to the foreclosure of competing MNOs as a result of the Merged Entity restricting access to Cellnex's developed macro sites;
- (b) the Merger could lead to foreclosure of WIPs that compete with Cellnex as a result of the Merged Entity restricting access to CK Hutchison (ie 3UK) as a customer;
- (c) the Merger could result in coordinated effects as a result of the structural links between Cellnex, CK Hutchison and BT/EE; and
- (d) the Merged Entity could result in increased buyer power in the purchase of leasehold land for developed macro sites.

210. With regard to 209(a), although CK Hutchison will acquire shares in Cellnex, it will not acquire material influence. Thus, CK Hutchison will not be able to influence Cellnex's decisions to provide site access to competing MNOs. The CMA therefore does not believe that the Merged Entity will have the ability or incentive to engage in such a foreclosure strategy. The CMA therefore does not believe that it is or may be the case that the Merger may be expected to result in an SLC due to foreclosure concerns of this nature.

211. With regard to 209(b), the evidence available does not suggest that Cellnex will have the ability to influence CK Hutchison's decisions over its choice of WIP. The CMA therefore does not believe that the Merged Entity would have the ability to foreclose rival WIPs. The CMA therefore does not believe that it is or may be the case that the Merger may be expected to result in an SLC due to foreclosure concerns of this nature. The potential impact of 3UK securing long-term supply agreement with Cellnex for BTS sites has been taken account within the competitive assessment above, including in the CMA's consideration on the scope for rival WIPs to expand.

212. With regard to 209(c), the CMA notes that Cellnex will continue to operate at a different level of the supply chain to CK Hutchison and BT/EE, and that any increased links between CK Hutchison and Cellnex as a result of the Merger

will not materially increase the links between BT/EE and CK Hutchison relative to the pre-existing links between those companies due to their shareholdings in the MBNL JV. The CMA therefore does not believe that it is or may be the case that the Merger may be expected to result in an SLC due to coordinated effects.

213. With regard to 209(d), the CMA considers that Cellnex would equally be able to purchase the land under the Unilateral Sites or the MBNL Sites absent the Merger. As a result, the CMA does not believe that it is or may be the case that the Merger may be expected to result in an SLC as a result of increased buyer power in the purchase of leasehold land for developed macro sites.

Entry and expansion

214. Entry or expansion of existing firms can mitigate the initial effect of a merger on competition, and in some cases may mean that there is no SLC. In assessing whether entry or expansion might prevent an SLC, the CMA considers whether such entry or expansion would be timely, likely and sufficient.¹⁹⁴

Parties' submissions

215. The Parties submitted that the provision of access to developed macro sites and ancillary services is characterised by low barriers to entry and expansion and that this was confirmed by the CMA in *Cellnex/Arqiva*.¹⁹⁵
216. The Parties submitted that development and expansion of new sites in the UK has low regulatory barriers. The Parties submitted that there was a large number of potentially marketable macro sites and suitable sites not previously used for macro sites in the UK.¹⁹⁶ The Parties also referenced several government plans to reduce the regulatory burden on building sites.¹⁹⁷
217. The Parties submitted that WIPs that are not currently active in the UK can easily enter by acquiring sites owned by others or bidding in a consortium.¹⁹⁸ The Parties stated that competitors can compete successfully through BTS sites for tenders and geographic scale was irrelevant to their ability to do so, providing the example of Phoenix Towers entering the French and Irish markets by winning BTS site contracts and acquiring sites from incumbents

¹⁹⁴ [CMA 129](#), from paragraph 5.8.1.

¹⁹⁵ Parties' response to the Issues Letter, paragraphs 3.42 and 3.43.

¹⁹⁶ FMN, paragraph 21.4.

¹⁹⁷ FMN, paragraphs 21.2 to 21.3.

¹⁹⁸ FMN, paragraphs 21.5 to 21.7.

with no previous presence in those countries.¹⁹⁹ The Parties also submitted that the evolving market structure provides additional, significant opportunity for new entrants, referencing the trend for vertical disintegration by MNOs and the rollout of 5G.²⁰⁰

Evidence on entry and expansion

218. In its competitive assessment, the CMA may take into account entry and/or expansion plans of rivals who will enter or expand irrespective of whether a merger proceeds, and the CMA has done so in this case (see paragraphs 196 and 198). However, any analysis of a possible SLC includes consideration of the direct responses to the merger by rivals and potential rivals. The CMA therefore considers the possibility of entry and/or expansion as a countervailing measure to what might otherwise be an SLC finding. When the CMA does consider the evidence on effective entry and expansion as a countervailing measure, it will be doing so in cases which have features that might lead to competition concerns, such as the market being concentrated. The CMA considers that entry and/or expansion preventing an SLC from arising would be rare. The CMA is likely to place greater weight on detailed consideration of entry or expansion and previous experience of entry and expansion.²⁰¹
219. The CMA assessed whether entry or expansion would prevent a realistic prospect of an SLC as a result of the Merger. The entry or expansion must be timely, likely and sufficient to prevent an SLC.²⁰²
220. In relation to the Parties' submission that, in *Cellnex/Arqiva*, the CMA found that there were limited barriers to entry and expansion, the CMA notes that there was limited consideration of barriers to entry in that case given the CMA's conclusion that the merger did not give rise to competition concerns.²⁰³
221. The CMA assessed the specific expansion plans of competitors. With regard to barriers to entry and expansion more generally, the available evidence indicates that expansion is difficult. The majority of competitors indicated that it would be difficult or impossible to increase their market share by 10%.²⁰⁴ Competitors identified the following barriers to expansion:

¹⁹⁹ Parties' response to the Issues Letter, paragraphs 3.43 and 3.44.

²⁰⁰ FMN, paragraphs 21.9 to 21.12.

²⁰¹ [CMA 129](#), paragraphs 8.28 to 8.30.

²⁰² [CMA 129](#), paragraphs 8.31.

²⁰³ [Cellnex/Arqiva](#), paragraph 229.

²⁰⁴ Third party responses to the CMA's questionnaire.

- (a) time to build programmes and solidification of the vertical relationships between MNOs and tower companies for new sites;²⁰⁵
 - (b) electronic communications code and the number of acquisitions taking place in the market;²⁰⁶
 - (c) operator's ability to access anchor tenants to finance new sites and constructions costs;²⁰⁷ and
 - (d) compounding economics and market power enjoyed by Cellnex.²⁰⁸
222. The available evidence also shows that geographic scale is an important parameter of competition. As discussed at paragraph 137 all of Cellnex's competitors that responded to the CMA's market test submitted that having wide geographic coverage is important for their competitive offering.²⁰⁹ In relation to the Parties' submission that such evidence was self-serving,²¹⁰ the CMA notes that over half of the customers that responded shared this view.²¹¹
223. In relation to the possibility of sites becoming available for sale, including by virtue of the trend of vertical disintegration by MNOs, third party responses do not indicate with sufficient certainty that there would be a material number of UK passive infrastructure assets available for purchase in the near term.²¹²
224. Furthermore, competitors have indicated that there is limited ability to expand by supplying MNOs. One WIP submitted that the relationships created between MNOs and tower companies when passive infrastructure assets are sold (eg between Vodafone, Telefónica and CTIL; or between CK Hutchison and Cellnex by virtue of this Merger) increases barriers to expansion by making it more difficult for other tower companies to win business from the MNOs.²¹³ Moreover, as mentioned in paragraph 189, 3UK securing a long-term supply agreement with Cellnex for future BTS sites would further reduce the ability and the scope for rival independent WIPs to expand.
225. The CMA has also seen an internal document from Cellnex that suggests [REDACTED].²¹⁴

²⁰⁵ Third party response to the CMA's questionnaire.

²⁰⁶ Third party response to the CMA's questionnaire.

²⁰⁷ Third party response to the CMA's questionnaire.

²⁰⁸ Third party response to the CMA's questionnaire.

²⁰⁹ Third party responses to the CMA's questionnaire.

²¹⁰ Parties' response to the Issues Letter, paragraph 4.43.

²¹¹ Third party responses to the CMA's questionnaire.

²¹² Third party responses to the CMA's questionnaire.

²¹³ Third party responses to the CMA's questionnaire.

²¹⁴ FMN, Cellnex Document 30, [REDACTED], 12 March 2018, page 21.

226. Some available evidence also suggests that experience and proven track records are important factors for an independent WIP to gain scale. CK Hutchison submitted [redacted].²¹⁵
227. Finally, the CMA notes that almost no entry to scale has occurred in recent years. This is reflected in Cellnex's large share of supply and the very small share of supply of its rival independent WIPs.

Conclusion on entry and expansion

228. In light of the above, the CMA believes that there are barriers to entry and expansion. The evidence indicates that new entrants or expanding WIPs have limited ability to acquire new sites and face difficulties winning business from MNOs. The CMA believes that entry or expansion would not be sufficiently likely to prevent a realistic prospect of an SLC as a result of the Merger.

Third party views

229. The CMA contacted customers and competitors of the Parties. Some customers raised concerns regarding the Merged Entity's strong market position post-Merger and the lack of options to constrain that strength. Third party comments have been taken into account where appropriate in the competitive assessment above.
230. The CMA also received a concern about Cellnex's neutrality as a WIP, with the third party submitting that Cellnex favours certain groups of customers when allocating space on its passive infrastructure assets and may degrade the service it offers customers, and engage in behaviour that makes entry by third parties less likely.²¹⁶ The CMA notes that the third party did not provide evidence that these concerns were merger specific and should therefore be considered in the competitive assessment.

Conclusion on substantial lessening of competition

231. Based on the evidence set out above, the CMA believes 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 relation to the supply of access to developed macro sites and ancillary services to wireless communication providers in the UK.

²¹⁵ CK Hutchison's response to the Issues Letter, paragraph 3.18.

²¹⁶ Third party submissions.

Decision

232. Consequently, the CMA believes that it is or may be the case that (i) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and (ii) the creation of that situation may be expected to result in an SLC within a market or markets in the United Kingdom.
233. The CMA therefore believes that it is under a duty to refer under section 33(1) of the Act. However, the duty to refer is not exercised whilst the CMA is considering whether to accept undertakings under section 73 of the Act instead of making such a reference.²¹⁷ The Parties have until 20 July 2021²¹⁸ to offer an undertaking to the CMA.²¹⁹ The CMA will refer the Merger for a phase 2 investigation²²⁰ if the Parties do not offer an undertaking by this date; if the Parties indicate before this date that they do not wish to offer an undertaking; or if the CMA decides²²¹ by 27 July 2021 that there are no reasonable grounds for believing that it might accept the undertaking offered by the Parties, or a modified version of it.

Mike Walker
Chief Economic Adviser
Competition and Markets Authority
13 July 2021

²¹⁷ Section 33(3)(b) of the Act.

²¹⁸ Section 73A(1) of the Act.

²¹⁹ Section 73(2) of the Act.

²²⁰ Sections 33(1) and 34ZA(2) of the Act.

²²¹ Section 73A(2) of the Act.