

ANTICIPATED ACQUISITION BY CELLNEX UK LIMITED OF THE PASSIVE INFRASTRUCTURE ASSETS OF CK HUTCHISON NETWORKS EUROPE INVESTMENTS S.À R.L

Issues statement

19 August 2021

The reference

1. On 27 July 2021, the Competition and Markets Authority (CMA), in exercise of its duty under section 33(1) of the Enterprise Act 2002 (the Act), referred the anticipated acquisition (the Merger) by Cellnex UK Limited (Cellnex) of the passive infrastructure assets in the UK of the CK Hutchison group (CK Hutchison) (together, the Parties) for further investigation and report by a group of CMA panel members.
2. In exercise of its duty under section 36(1) of the Act, the CMA must decide:
 - (a) Whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and
 - (b) if so, whether the creation of that relevant merger situation may be expected to result in a substantial lessening of competition (**SLC**) within any market or markets in the United Kingdom for goods or services.
3. In answering these two questions, we will apply a ‘balance of probabilities’ threshold to our analysis. That is, we will decide whether it is more likely than not that the Merger will result in an SLC.¹

Purpose of this issues statement

4. In this issues statement, we set out the main issues we are likely to consider in reaching our decision on the SLC question (paragraph 2 above), having had regard to the evidence available to us to date, including the evidence obtained in the CMA’s phase 1 investigation. This does not preclude the consideration of any other issues which may be identified during the course of our investigation.

¹ [Merger Assessment Guidelines \(CMA129\)](#), paragraph 2.31

5. We are publishing this statement in order to assist parties submitting evidence to our investigation. This statement sets out the issues we currently envisage being relevant to our investigation and we invite parties to notify us if there are any additional relevant issues which they believe we should also consider. The CMA's phase 1 decision² contains much of the detailed background to this issues statement.
6. We intend to use evidence obtained during the phase 1 investigation. However, we will also be gathering and considering further evidence on these and any other issues which may be identified during the course of the investigation.

Impact of COVID-19 on the inquiry

7. We are publishing this issues statement during the Coronavirus (COVID-19) pandemic which is having significant impacts on consumers and business across the world. The CMA has published a [statement](#) on its website on how it has adjusted its working arrangements in response and [guidance](#) on key aspects of its practice during the pandemic.
8. Our approach to evidence-gathering will take into account the difficulties that the pandemic may be causing for market participants in this sector. If appropriate, we will also take into account the impact of the pandemic in our assessment of the competitive effects of the Merger, although we are required to look beyond the short-term and consider what lasting structural impacts the Merger might have on the markets at issue.

Background

The Parties

9. Cellnex is an owner and operator of sites and passive infrastructure (elevated structures to which telecommunications equipment can be attached) used by wireless communication providers. Cellnex's customers in the UK are mainly the UK's mobile network operators (MNOs) but Cellnex's passive infrastructure is also used by other communication providers.
10. The Cellnex group³ is headquartered in Spain. Cellnex entered the UK market in 2016 through an acquisition from Shere Group Limited. In 2020, through its acquisition of Arqiva Services Limited (Arqiva), Cellnex acquired 7,113

² See [CMA case page](#)

³ Cellnex Telecom S.A. and its subsidiaries.

developed macro sites.⁴ Cellnex's acquisition of Arqiva was reviewed and cleared by the CMA in 2020.⁵

11. 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.
12. The CK Hutchison group⁶ 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, 3UK.
13. 3UK has an infrastructure sharing joint venture with BT/EE, another MNO, to manage their shared networks, Mobile Broadband Network Limited (the MBNL JV). 3UK also owns certain passive infrastructure assets outside of the MBNL JV.
14. 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 a new entity, TowerCo, to hold 3UK's passive infrastructure assets in the UK.
15. The turnover of TowerCo for the financial year ending 31 December 2019 was £[REDACTED] million, all of which was generated in the UK.

The transaction

16. 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.
17. On completion of the Merger, Cellnex will acquire ownership of 3UK's unilaterally owned passive infrastructure sites in the UK, including 2,600 sites under construction (the Unilateral Sites).
18. 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 (that is, 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.
19. 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

⁴ Final Merger Notice dated 13 May 2021 (FMN), paragraph 2.49.

⁵ See [Anticipated acquisition by Cellnex UK Limited of Arqiva Services Limited \(2020\) \(Cellnex/Arqiva\)](#)

⁶ 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).

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).

20. 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.
21. The Merger is one of six transactions whereby Cellnex is acquiring passive infrastructure assets from CK Hutchison: Cellnex has acquired assets in Austria, Denmark, Ireland, Italy and Sweden. 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.
22. The Merger is not yet complete and is conditional upon clearance by the CMA. The Merger is not being reviewed by any other competition authorities.

Our inquiry

23. Below we set out some specific areas of our intended assessment in order to help parties who wish to make representations to us.

Assessment of the competitive effects of the Merger

Jurisdiction

24. In its phase 1 decision, the CMA found that each of Cellnex, the Unilateral Sites, the MBNL Sites and the Transfer Sites should be considered an enterprise and that these enterprises will cease to be distinct as a result of the Merger. The CMA treated all elements of the Merger as a single relevant merger situation.
25. While, as described above, Cellnex will not acquire full ownership of the MBNL Sites, the CMA found that Cellnex will have the ability to exercise material influence over these sites. The CMA also found that both the turnover and share of supply tests are met.
26. We shall consider the issue of jurisdiction in our inquiry, including the extent to which Cellnex may be able to exercise material influence over the MBNL Sites.

Counterfactual

27. We will compare the prospects for competition resulting from the Merger against the competitive situation without the Merger: this is the counterfactual.

The counterfactual is not a statutory test but rather an analytical tool used in answering the question of whether a merger gives rise to an SLC.⁷

28. In the phase 1 decision, the CMA found a realistic prospect that CK Hutchison would have sold the Transaction Sites to another purchaser and that this prospect gave rise to a counterfactual in which there would have been stronger competition between Cellnex and the purchaser of the Transaction Sites as compared to the prevailing conditions of competition.
29. In our inquiry, in order to reach a judgement as to whether or not an SLC is likely to occur as a result of the Merger, we will select the most likely conditions of competition as the counterfactual against which to assess the Merger.⁸
30. To assess the appropriate counterfactual, we shall consider the possible scenarios absent the Merger and whether any of these possible scenarios make a significant difference to the conditions of competition. To this end, we shall consider in particular:
 - (a) CK Hutchison's rationale for the Merger, within the context of its broader strategic objectives at the time of the transaction (as well as broader industry trends);
 - (b) the alternative ways in which CK Hutchison could have sought to extract value from the Transaction Sites (including the sale of the Transaction Sites to other parties or alternative transactions or arrangements through which CK Hutchison could have sought to pursue its strategic objectives);
 - (c) the ability and incentive of other parties, such as other wireless infrastructure providers, to acquire the Transaction Sites alone or as part of a broader transaction involving the purchase of CK Hutchison sites and passive infrastructure in other European markets; and
 - (d) the possibility that CK Hutchison could, absent the Merger, have retained the Transaction Sites.
31. Significant changes affecting competition from third parties which would occur with or without the Merger (and therefore form a part of the counterfactual) are unlikely to be assessed in any depth as part of the CMA's counterfactual assessment.⁹ The counterfactual is not intended to be a detailed description

⁷ [Merger Assessment Guidelines \(CMA129\)](#) paragraph 3.1

⁸ [Merger Assessment Guidelines \(CMA129\)](#) paragraph 3.13

⁹ [Merger Assessment Guidelines \(CMA129\)](#) paragraph 3.10

of the conditions of competition that would prevail absent the Merger,¹⁰ which we intend to consider in the competitive assessment.

Theories of harm

32. Theories of harm describe the possible ways in which an SLC may be expected to result from a merger and provide the framework for analysis of the competitive effects of a merger.
33. We set out below the theory of harm that we are currently planning to investigate. We may revise our theories of harm as the inquiry progresses and the identification of a theory of harm does not preclude an SLC being identified on another basis following further work, or our receipt of additional evidence.
34. We are currently considering a horizontal unilateral theory of harm.

Horizontal unilateral effects

35. Unilateral effects can arise in a horizontal merger when one firm merges with a competitor that would otherwise provide a competitive constraint, allowing the merged entity profitably to raise prices or 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. Unilateral effects giving rise to an SLC can occur in relation to customers at any level of a supply chain, for example at a wholesale level or retail level (or both) and is not limited to end consumers.¹¹
36. In phase 1, the CMA found that the Merger gave 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.¹²
37. We intend to focus our competitive assessment on this theory of harm at phase 2.
38. In order to investigate this theory of harm, we will consider the competitive strength of the Merged Entity in the supply of access to developed macro sites and the competitive constraint from alternatives to the Merged Entity. These alternatives include supply from other wireless infrastructure providers, including sites built to a customer's specification, self-supply by MNOs and

¹⁰ [Merger Assessment Guidelines \(CMA129\)](#) paragraph 3.7

¹¹ [Merger Assessment Guidelines \(CMA129\)](#) paragraph 4.1

¹² Macro sites have broad coverage and generally contain tower structures, or assets such as pylons. Developed sites have the infrastructure ready to host active telecommunications equipment.

from the other MNO joint venture,¹³ Cornerstone Telecommunications Infrastructure Limited (CTIL). We will look at these potential constraints on the Merged Entity now and in the future, taking into account any expansion plans.

39. We will consider evidence from the demand-side: the main customers being the UK's four MNOs, BT/EE, O2, Vodafone and 3UK, but also other customers. We will consider the potential impact of the Merger on individual MNOs, including considering whether or how BT/EE, 3UK's joint venture partner in the MBNL joint venture, might be harmed as a customer if we consider that the Merged Entity is able to exercise material influence over the MBNL Sites. We will consider how customer needs may be evolving given industry trends.
40. The competitive assessment will be closely connected to our view on the counterfactual. In particular, if we find that the most likely counterfactual is that CK Hutchison would have sold the Transaction Sites to another purchaser, then we will consider the loss of competition between Cellnex and that alternative purchaser. If we find that the most likely counterfactual is that CK Hutchison would have retained the Transaction Sites, then we will consider the loss of competition between Cellnex and the constraint provided by the Transaction Sites under the prevailing conditions of competition.
41. Subject to new evidence being submitted, we do not currently intend to investigate any other theories of harm in relation to this Merger.

Market definition

42. Where the CMA makes an SLC finding, this must be 'within any market or markets in the United Kingdom for goods or services'.¹⁴ The CMA is therefore required to identify the market or markets within which an SLC exists. An SLC can affect the whole or part of a market or markets. Within that context, the assessment of the relevant market is an analytical tool that forms part of the analysis of the competitive effects of a merger and should not be viewed as a separate exercise.¹⁵
43. In the Phase 1 Decision, the CMA considered the impact of the Merger on the supply of access to developed macro sites and ancillary services to MNOs and wireless communications providers in the UK.

¹³ Joint venture of Vodafone and O2

¹⁴ [the Act](#) section 36(1)(b)

¹⁵ [Merger Assessment Guidelines \(CMA129\)](#) paragraph 9.1

- (a) In terms of product scope, this includes developed macro sites, including build to suit sites, and ancillary services to MNOs and other wireless communication providers.
 - (b) In terms of geographic scope, in phase 1 the CMA and Parties both considered that the scope should be UK-wide.
- 44. We will use the frame of reference adopted in the Phase 1 Decision as a starting point for our analysis and our view of market definition will be largely drawn from the findings of our competitive assessment. Where relevant, we will consider out-of-market constraints and/or any differences in the degree of competitive constraints on the Merged Entity from different suppliers. We will also consider whether there are any notable geographic variations within a UK-wide market definition.

Countervailing factors

- 45. We will consider whether there are countervailing factors which are likely to prevent or mitigate any SLC that we may find. Some of the evidence that is relevant to the assessment of countervailing factors may also be relevant to our competitive assessment.
- 46. We will consider evidence of entry and/or expansion by third parties and whether entry and/or expansion would be timely, likely and sufficient to prevent any SLC from arising as a result of the Merger.¹⁶ We will also consider any relevant evidence that the Merger is likely to give rise to efficiencies that will enhance rivalry, such that the Merger may not be expected to result in an SLC.

Possible remedies and relevant customer benefits

- 47. Should we conclude that the Merger may be expected to result in an SLC within one or more markets in the UK, we will consider whether, and if so what, remedies might be appropriate.
- 48. In any consideration of possible remedies, we may in particular have regard to their effect on any relevant customer benefits that might be expected to arise as a result of the Merger and, if so, what these benefits are likely to be and which customers would benefit.¹⁷

¹⁶ [Merger Assessment Guidelines \(CMA129\)](#) paragraph 8.28 to 8.43.

¹⁷ [Merger Remedies \(CMA87\)](#), paragraphs 3.4 and 3.15 to 3.24.

Responses to this issues statement

49. Any party wishing to respond to this issues statement should do so in writing, **no later than 17.00hrs, BST on Thursday 2 September 2021** by emailing cellnex.CKH@cma.gov.uk.
50. Please note that, due to the ongoing COVID-19 pandemic, the CMA is not able to accept delivery of documents or correspondence by post or courier to its offices.