CLIFFORD CHANCE

Freshfields Bruckhaus Deringer

ME/6917/20

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

RESPONSE TO THE ISSUES STATEMENT

2 SEPTEMBER 2021

CONFIDENTIALITY

Annexes expressly marked "Confidential" are confidential to the party or parties to whom the annex relates and should not be shared with the other party to the transaction.

DEFINITIONS

Unless otherwise indicated, any defined terms and acronyms used in this response shall have the same meaning as those provided in the Merger Notice, the SLC Decision or the CMA's Issues Statement.

TABLE OF CONTENTS

ME/6917/20

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

RESPONSE TO THE ISSUES STATEMENT

1. INTRODUCTION AND EXECUTIVE SUMMARY

1.1 This submission is made in response to the Competition and Markets Authority's ("**CMA**") Issues Statement of 19 August 2021 ("**Issues Statement**") in relation to the anticipated acquisition by Cellnex UK Limited (together with Cellnex Telecom, S.A., "**Cellnex**") of the passive infrastructure assets of CK Hutchison Network Europe Investments S.à r.l. in the UK ("**CK Hutchison**" and, together with Cellnex, the "**Parties**") ("**Proposed Transaction**"), as announced on 12 November 2020. This response should be read in conjunction with the previous submissions made by the Parties to the CMA, in particular the response to the issues letter of 16 June 2021 ("**Issues Letter Response**"), the response to the issues letter of 16 June 2021 on the counterfactual ("**Response on Counterfactual**"), and CK Hutchison's initial submission submitted on 20 August 2021 ("**Initial Submission**").[1]

1.2 The Proposed Transaction is strongly pro-competitive and reflects worldwide market trends, whereby MNOs are divesting their passive infrastructure assets, or outsourcing the management of those assets, to independent wireless infrastructure providers ("**WIPs**").[2] This process of vertical dis-integration is pro-competitive because it opens an otherwise captive internal tower network to new potential third party customers, to the extent feasible.

1.3 From Cellnex's perspective, the Proposed Transaction is an opportunity for Cellnex to expand its presence in the UK, and therefore its customer base and revenue generating opportunities. Cellnex, as a dedicated independent WIP that is acquiring sites that are not currently operated by WIPs, will increase the likelihood that co-location occurs on those sites to the extent feasible. The Proposed Transaction will also enhance Cellnex's

[1] This includes: the presentation at the CMA teach-in meeting dated 23 April 2021; the merger notice dated 13 May 2021 ("**Merger Notice**"); the Parties' responses to the CMA's various requests for information including both under section 109 of the Enterprise Act 2002 and otherwise; the presentation at the issues meeting of 18 June 2021 ("**Issues Meeting**") ("**Issues Meeting Presentation**"); the Issues Letter Response; the Response on Counterfactual; and CK Hutchison's Initial Submission.

[2] For example, in January 2021 Telefónica agreed to sell its controlling stake in Telxius (which operates Telefónica's passive infrastructure assets in Germany and Spain) to American Tower, a third party WIP. The commercialisation of CTIL (as discussed in further detail in paragraphs 4.36 to 4.42 below) also reflects these trends. These transactions mirror recent developments in the US, where independent tower operators are now the norm.

platform in the UK to drive future investment that is important to support the deployment of 5G networks and the expansion of rural coverage.

1.4 From CK Hutchison's perspective, the sale of its tower assets and businesses across Europe was motivated by the goal of achieving a more efficient capital allocation and enhancing its strategic focus on the provision of telecommunications activities. In the UK in particular, the proceeds from the Proposed Transaction will enable 3UK to focus on developing its mobile network and facilitate the rollout of its 5G network, while benefitting from significant additional financial capacity to support future growth and investment in its network. 3UK is the smallest of the four MNOs in the UK and faces considerable challenges. [CONFIDENTIAL]. A quick and comprehensive 5G network rollout will enable 3UK to become a more effective and stronger competitor in the mobile market which will lead to significant consumer benefits in the UK mobile market overall. [CONFIDENTIAL].

1.5 The Parties welcome the CMA's decision to focus on the issues that it considers to be the most relevant to its assessment of the Proposed Transaction (i.e. a single theory of harm based on horizontal unilateral effects in relation to the supply of access to developed macro sites and ancillary services to wireless communication providers in the UK).[3] In this response, the Parties therefore focus on the CMA's horizontal unilateral theory of harm and explain why it cannot be expected to result in a substantial lessening of competition ("**SLC**"), in particular on the basis of the stringent Phase 2 balance of probabilities standard. The Parties do not repeat their submissions on other potential theories of harm that the Issues Statement indicates the CMA does not currently intend to investigate further.

1.6 As explained in detail throughout this response, Cellnex is subject to a number of significant competitive constraints and will continue to be subject to those constraints following the Proposed Transaction. Given these constraints, and as 3UK's passive infrastructure assets in the UK do not compete directly with Cellnex and do not represent a significant source of potential macro sites for other customers (whether before the Proposed Transaction, following the Proposed Transaction or in any counterfactual), the Proposed Transaction cannot plausibly lead to any material loss of competition in the supply of access to developed macro sites in the UK. On the contrary, it ensures the quality and stability of 3UK's passive infrastructure through a long-term MSA with Cellnex, an independent tower operator with a proven track record.

1.7 In its Phase 1 decision dated 13 July 2021 ("**SLC Decision**") the CMA not only puts forward a novel and contrived counterfactual, but relies upon erroneous assumptions to support its potential theory of harm that ignore the competitive constraints upon

[3] Issues Statement, paragraphs 34, 37 and 41.

Cellnex. The CMA's counterfactual and its assumptions are unsupported by the evidence (including the Parties' internal documents) and represent a reversal from the CMA's findings in its review of Cellnex's acquisition of Arqiva Services Limited ("***Cellnex/Arqiva***") last year. Moreover, the majority of the evidence relied upon by the CMA is speculative or of no probative value – particularly the self-serving statements made by competitors of Cellnex (in the relevant market) and of 3UK (in the downstream mobile market). These issues are summarised in paragraphs 1.8 to 1.12 below and are addressed in detail in sections 2 to 6 below.

1.8 *First*, as explained in section 2 below, the CMA's concerns are entirely based on a novel and wholly speculative approach to the counterfactual – which forms the foundation of the CMA's Phase 1 finding of a realistic prospect of an SLC. The SLC Decision assumes that, in the absence of the Proposed Transaction, CK Hutchison would enter into a similar deal with an alternative acquirer. In fact, there is no credible evidence of this and, in the absence of this erroneous assumption, the CMA's entire potential theory of harm would not stand. However, even on the basis of the CMA's counterfactual, its potential theory of harm is unfounded for multiple reasons.

1.8.1 If the Proposed Transaction is blocked by the CMA, the counterfactual would be that CK Hutchison would continue to own and operate the relevant passive infrastructure assets as at present.

1.8.2 There is no evidence to suggest that, in the absence of the Proposed Transaction, CK Hutchison might try to sell the relevant passive infrastructure assets to another party, nor that it might succeed in doing so. The CMA's counterfactual (as set out in the SLC Decision) is therefore entirely speculative.

1.8.3 In fact, there is significant evidence to the contrary: (i) there was no credible alternative offer for the relevant passive infrastructure assets at the time when CK Hutchison agreed to sell them to Cellnex; (ii) the need for the purchaser to be [CONFIDENTIAL], limits the number of potential purchasers significantly; (iii) [CONFIDENTIAL]; and (iv) the fact that the vast majority of the relevant passive infrastructure assets in the UK are tied up in the MBNL JV for another 10 years prevents them from being divested.

1.9 *Second*, as explained in section 3 below, the Proposed Transaction gives rise to a single relevant merger situation at completion, comprised of Cellnex's acquisition of the Unilateral Sites and the Transfer Sites. Cellnex's receipt of the economic benefit in relation to the MBNL Sites under the [CONFIDENTIAL] cannot form a part of the relevant merger situation because Cellnex will not obtain material influence over the MBNL Sites.

1.10 *Third*, as explained in section 4 below, the SLC Decision ignores the reality of the competitive conditions in the market.

1.10.1 The SLC Decision fails to recognise that the Proposed Transaction can only have a negligible impact on Cellnex's market position (or that of any other potential acquirer, in the CMA's counterfactual). [CONFIDENTIAL]. As a result, [CONFIDENTIAL].[4] Even once the MBNL JV has been dissolved, 3UK considers that the potential for co-location on the existing sites (including the Transfer Sites) without material investment will be limited given the sites currently host two tenants, 3UK and BT/EE, and already require significant capex for structural enhancements to allow 3UK and BT/EE to host 5G equipment.

1.10.2 The SLC Decision also ignores the reality that anticipated demand for new macro sites by MNOs is, and is expected to remain, limited. MNOs in the UK have fully rolled-out networks (or have already committed to increased coverage in rural areas) and the cost of switching and re-planning their entire radio networks means that, in reality, MNOs will not switch sites unless there is a 'catalyst' that forces them to do so. As such, even with the deployment of 5G, MNOs are only expected to require limited numbers of additional macro sites for the purposes of network densification. Smaller WIPs are as well placed as larger WIPs (such as Cellnex) to offer these targeted "build-to-suit" ("**BTS**") solutions to MNO customers and, in any event, MNO customers have a demonstrated capacity to self-supply.

1.10.3 The SLC Decision downplays the key implication of demand being limited in the foreseeable future, which is that BTS sites (which can either be self-supplied by customers or supplied by a WIP) form an effective competitive constraint on existing sites. In doing so, the SLC Decision erroneously concludes that the size and geographic reach of a WIP is an important competitive capability. In reality, WIPs do not need a large portfolio of pre-existing sites or an expansive geographic reach to satisfy additional site demand from the MNOs or non-MNOs, and smaller WIPs are as well placed as larger WIPs (such as Cellnex) to offer targeted BTS solutions to customers. The CMA's conclusion represents a reversal from its own findings in *Cellnex/Arqiva* that BTS was a strong constraint, despite no relevant changes to market conditions having occurred since then or any other convincing evidence being provided to support a different conclusion. Furthermore, in coming to this conclusion, the SLC Decision relies heavily upon self-serving comments from 3UK's competitors (i.e. MNOs) and Cellnex's competitors (i.e. WIPs) that downplay the significant

[4] The MBNL JV will terminate at the end of 2031, unless terminated earlier by agreement with BT/EE or under any of the relevant provisions of the MBNL JV Agreements.

constraint of self-supply by MNO and non-MNO customers (which is a form of BTS) on Cellnex's pricing, despite clear evidence of the constraint imposed by BTS within Cellnex's internal documents and from 3UK's recent deployment of its streetworks programme. In this respect it is also critical to note that none of 3UK's competitors would like to see a stronger competitor emerging in 3UK as a result of it having greater capital to invest in its 5G offering as a result of the Proposed Transaction.

1.10.4 The SLC Decision also misinterprets the bidding data provided by the Parties which evidences that smaller WIPs continue to be relevant constraints against Cellnex, in line with the CMA's conclusions in *Cellnex/Arqiva*. Of the [CONFIDENTIAL] contracts open to competition for which Cellnex has competed since *Cellnex/Arqiva*, [CONFIDENTIAL]. This bidding data is not significantly different from the bidding data that the CMA used in *Cellnex/Arqiva* to conclude there was no SLC, however the SLC Decision reaches a fundamentally different and erroneous conclusion from the same data set.

1.10.5 The SLC Decision fails to account for recent market developments, in particular the massive impact that the commercialisation of CTIL[5] will have on the market, the expansion plans of other WIPs and the potential for further consolidation amongst WIPs. In light of these developments, the UK market in which Cellnex competes is becoming significantly more competitive. The picture painted in the SLC Decision of a market characterised by Cellnex (as the clear market leader) with a number of much smaller competitors is therefore a significant distortion of the market reality.

1.10.6 The SLC Decision erroneously finds that barriers to entry are high, despite geographic scale not being an important parameter of competition and contrary to its own findings in *Cellnex/Arqiva* that barriers to entry for the supply of access to developed macro sites were low. The SLC Decision also fails to account for the fact that the threat of new entrants is high – whether through BTS or acquisition – with numerous credible potential entrants, including international WIPs and investors.

[5] CTIL is the infrastructure sharing joint venture set up by Telefónica and Vodafone. In January 2021 Telefónica and Vodafone announced their intention to commercialise CTIL and, since the date of the announcement, Vodafone has sold its 50% equity stake in CTIL to Vantage Towers (its European tower business), whose shares were admitted to trading on the Frankfurt Stock Exchange on 18 March 2021. See CTIL's related press release: https://www.cornerstone.network/media/vodafone-and-telefonica-commercialise-cornerstone. As a result of the commercialisation of CTIL, CTIL has become a direct competitor to Cellnex for the supply of access to developed macro sites.

1.10.7 Given that the CMA's assessment is not anchored on the actual competitive conditions in the market, the market share data presented in the SLC Decision cannot be an indicator of market power. The Transaction Sites are not currently in competition with Cellnex, nor would they be in any realistic counterfactual. Moreover, the calculation of those market shares illogically and erroneously omits CTIL's share of sites. In the Parties' view, the CMA has fallen into the error – that its own guidelines caution against – of framing the competitive assessment against a simplistic and misleading "market share" calculation rather than an assessment of how competition in the market actually works and the extent of competitive constraints.

1.11 *Fourth*, as explained in section 5 below, the SLC Decision fails to explain how *customers* could be harmed by the Proposed Transaction. Instead, the SLC Decision relies on an assessment which is aimed at protecting the interests of *competitors*. The SLC Decision also fails to consider that no MNO or non-MNO customer could conceivably be harmed by the Proposed Transaction and does not point to any evidence of significant concerns having been expressed by MNO or non-MNO customers.

1.11.1 3UK's passive infrastructure does not compete directly with Cellnex and the effect of the Proposed Transaction is analogous to the outsourcing by 3UK of certain aspects of the management of its passive infrastructure in the UK to Cellnex. As such, there is limited (if any) competitive interaction between Cellnex, TowerCo and/or MBNL (including the MBNL Sites), and no realistic prospect of an SLC in respect of any customer.

1.11.2 The SLC Decision specifically alleges that, as a result of the Proposed Transaction, BT/EE's self-supply constraint on Cellnex might be weakened, ignoring the reality that Cellnex will have neither the ability nor the incentive to harm BT/EE. In fact, BT/EE is a major customer of Cellnex, and Cellnex has every interest to co-operate with BT/EE rather than adversely impacting its network. In any event, any theoretical ability to impact BT/EE's ability to self-supply through the MBNL JV would have a limited (if any) impact due to BT/EE's ability to "unilaterally deploy" on any MBNL Site without the need for approval from 3UK (or Cellnex).

1.12 *Fifth*, as explained in section 6 below, the SLC Decision does not adequately account for the fact that the Proposed Transaction will have significant consumer benefits and will provide vital funds to support 3UK's £3 billion+ 5G network roll out plan. [CONFIDENTIAL]. UK consumers will be significantly worse off without the Proposed Transaction.

1.13 In addition, Cellnex's separate acquisitions of CK Hutchison's passive infrastructure assets in Austria, Denmark, Ireland, Italy and Sweden completed in December 2020 and January 2021, following approval from the relevant antitrust authorities where required.

1.14 Given the above, and contrary to the assertion in paragraph 124 of the SLC Decision, there is no realistic prospect of the Proposed Transaction eliminating a significant potential competitor or – given the very significant constraints that will remain post-merger – strengthening Cellnex's market position. On this basis, there is no prospect of the Proposed Transaction allowing Cellnex to maintain prices at higher levels, or quality, range, service and innovation at lower levels than would have arisen in the counterfactual – and accordingly the Proposed Transaction cannot, on the balance of probabilities, be said to give rise to an SLC.

2. THE COUNTERFACTUAL

2.1 This section addresses the counterfactual and, in particular, the following points:

2.1.1 <u>The CMA's erroneous approach to the counterfactual</u>: the CMA's case is based on the incorrect assumption that, in the absence of the Proposed Transaction, CK Hutchison would have entered into a similar transaction with a different purchaser.

2.1.2 <u>The terms of the MBNL JV Agreements preclude a sale or transfer of the MBNL Sites</u>: the majority of 3UK's passive infrastructure is within the MBNL JV which will only terminate ([CONFIDENTIAL]) at the end of 2031.

2.1.3 <u>The Unilateral Sites consist mainly of single tenant sites with limited scope to increase co-location</u>: the Unilateral Sites are less attractive to alternative purchasers and a sale of the Unilateral Sites alone would fall short of CK Hutchison's objectives for the Proposed Transaction in terms of *inter alia* raising sufficient capital to support 3UK's 5G investment needs.

2.1.4 <u>The evidence demonstrates that no other transaction is credible or realistic</u>: no other credible offers were made; an IPO of the Transaction Sites is unrealistic; CK Hutchison would only pursue an alternative transaction capable of achieving its key objectives for the Proposed Transaction.

2.1.5 <u>Cellnex's internal documents</u>: none of Cellnex's internal documents show that other credible alternative purchasers were available to CK Hutchison.

The CMA's erroneous approach to the counterfactual

2.2 CK Hutchison's Initial Submission explains in detail that the concerns set out in the Phase 1 decision were based on a novel and wholly speculative approach to the counterfactual. The CMA wrongly assumes that, in the absence of the Proposed Transaction, CK Hutchison would enter into a similar transaction with an alternative acquirer. In fact, there is no credible evidence of this and, in the absence of this erroneous assumption, the CMA's entire potential theory of harm falls away.

2.3 The CMA's assessment was based on an erroneous factual and legal assessment, and crucially ignored the fact that all of CK Hutchison's passive telecommunications assets in Europe have now been sold and could not form part of any other realistic counterfactual, such that [CONFIDENTIAL].

2.4 Specifically, [CONFIDENTIAL] unique transaction structure in the light of the larger pan-European transaction and the broader commercial relationship between them. [CONFIDENTIAL]. Indeed, no offer was made to CK Hutchison relating only to the UK sites.

2.5 There is extensive evidence to indicate that the Transaction Sites alone would not be attractive to a potential purchaser. [CONFIDENTIAL]. CK Hutchison would not be prepared to enter into any transaction that does not meet its key objectives.

The terms of the MBNL JV Agreements preclude a sale or transfer of the MBNL Sites, which make up the majority of 3UK's passive infrastructure assets

2.6 The majority of 3UK's passive infrastructure is within the MBNL JV. As illustrated in **Figure 1** below, the MBNL Sites account for over 70% of the Transaction Sites.

Figure 1: [CONFIDENTIAL]

2.7 [CONFIDENTIAL].[6] [CONFIDENTIAL]:

2.7.1 [CONFIDENTIAL];

2.7.2 [CONFIDENTIAL]; and

2.7.3 [CONFIDENTIAL].

2.8 CK Hutchison conducted an internal reorganisation of its telecommunications division between February 2019 and July 2020, which involved grouping its ownership or economic interests in its European tower assets from each of its local MNOs into separately managed entities or divisions in each relevant jurisdiction under a single

[6] [CONFIDENTIAL].

holding company. The purpose of this re-organisation was to identify and extract value from underutilised assets within CK Hutchison's telecommunications division, and (should it decide to do so) to help prepare CK Hutchison Group Telecom to access cost-efficient capital either through the capital markets or the potential sale of CK Hutchison Networks Europe Investments S.À R.L. In accordance with the terms of the MBNL JV Agreements, this internal re-organisation did not involve an asset carve-out or a transfer of the interest in the MBNL Sites. Rather, under an economic benefit agreement, CK Hutchison Networks was granted an economic position (extending to both economic benefits and costs) that is equivalent to the economic position that CK Hutchison Networks would have had in respect of the underlying assets if these had been sold to CK Hutchison Networks. CK Hutchison thereafter developed the [CONFIDENTIAL] transaction structure which was negotiated with Cellnex under the [CONFIDENTIAL] under which Cellnex will, until dissolution of the MBNL JV, be entitled to receive the economic benefits, and be obliged to bear the same costs and risks that Cellnex would have been entitled to and be obliged to bear in respect of the relevant assets had these been transferred to Cellnex at the outset. This transaction structure ensures the respect of and compliance with the MBNL JV Agreements.

2.9 Furthermore, the MBNL Sites would also be unattractive to potential purchasers as [CONFIDENTIAL], and this process will not be changed or in any way affected by the Proposed Transaction.

2.10 [CONFIDENTIAL].[7] [CONFIDENTIAL].

2.11 [CONFIDENTIAL].

2.12 In light of the above, the terms of the MBNL JV Agreements are a significant impediment to any other transaction involving CK Hutchison's UK passive infrastructure. [CONFIDENTIAL].

2.13 CK Hutchison considers that a key factor that helped Cellnex overcome [CONFIDENTIAL] and submit an offer is the fact that it was able to take on the wider opportunity involving passive infrastructure assets in five other European countries (as well as offer a stable, long-term partnership to ensure operational continuity for 3UK's business). As mentioned in paragraph 2.3 above, these assets are no longer available to any other alternative purchaser.

[7] [CONFIDENTIAL].

The Unilateral Sites consist mainly of single tenant sites with limited scope to increase co-location, meaning they would not be attractive to alternative purchasers on a standalone basis

2.14 As illustrated in **Figure 1** above, the Unilateral Sites account for less than 5% of the Transaction Sites (as at 31 March 2021). Even including the Streetworks Sites that are under construction or yet to be constructed, this only increases to approximately [CONFIDENTIAL]%.

2.15 The transaction in respect of the Unilateral Sites relates largely to a programme of "streetworks" to densify 3UK's network which is in progress. These streetworks are designed solely with 3UK's network needs in mind and are being constructed as monopoles to host the equipment of a single tenant (3UK). Currently, only a small number of sites have been constructed and, in practice, there is limited scope for any potential purchaser to increase their value since the scope for additional tenants without significant further investment is likely to be marginal. Furthermore, the Streetworks Sites only have planning permission for one tenant, which makes the Unilateral Sites inherently less attractive to alternative purchasers.

2.16 [CONFIDENTIAL].

The evidence demonstrates that no other transaction is credible or realistic

2.17 An objective assessment of the relevant evidence demonstrates that:

2.17.1 potential purchasers were on notice for 15 months and had ample time and information to consider a proposal and (at the very least) register their interest in doing a transaction, but no other credible offers were forthcoming;

2.17.2 a sale to a financial sponsor or private equity investor is not a viable option;

2.17.3 there is no realistic prospect of an alternative transaction with another WIP;

2.17.4 [CONFIDENTIAL];

2.17.5 an IPO of the Transaction Sites is entirely unrealistic;

2.17.6 alternative purchasers would neither have a greater ability nor incentive to increase third party co-location compared with Cellnex;

2.17.7 CK Hutchison would not pursue any transaction unless it is capable of raising equivalent consideration to that obtained from the Proposed Transaction and raising equivalent consideration in any other way would not be realistic; and

2.17.8 an expert analysis from [CONFIDENTIAL] at **Annex CKH 016 [2 September]** demonstrates that no other UK transaction is credible or realistic.

Potential purchasers were on notice for 15 months and had ample time to consider a proposal

2.18 [CONFIDENTIAL].

2.19 A number of equity research analyst and news reports were published, both immediately following the announcement of CK Hutchison's internal re-organisation and continuing through 2020 which demonstrated that the market anticipated the possibility of a transaction involving CK Hutchison's passive infrastructure assets. A number of these reports have been provided to the CMA previously as **Annexes CKH RFI 1.11.1 – 1.11.11 [10 August]**, and CK Hutchison has since identified additional news coverage in the public domain. The following extracts are of particular relevance:

2.19.1 Goldman Sachs reported in August 2019 that "*although management emphasized that there are no imminent plans to spin off CKHT or CKHN at this stage, management did state that the above structures would give them the flexibility to choose to do so later*" (see page 3 of **Annex CKH RFI 1.11.11 [10 August]**);

2.19.2 Jefferies reported in August 2019 that the "*restructuring of the telecom assets should help to unlock more of CKHH's asset value and could lead to an eventual spin-off down the road*" (see page 1 of **Annex CKH RFI 1.11.6 [10 August]**);

2.19.3 JP Morgan also queried in August 2019: "*Is this a candidate for a potential sale or spin-off?*" (see page 2 of **Annex CKH RFI 1.11.10 [10 August]**);

2.19.4 UBS described the internal re-organisation in August 2019 as "*positive as it unlocks value in operational/financing efficiency and also provides a cleaner structure for a potential stake sale or spinoff down the road*." (see page 1 of **Annex CKH RFI 1.11.5 [10 August]**);

2.19.5 HSBC reported in August 2019 that "*through reorganising the tower and infrastructure asset interests under a specialised management team, the new structure will allow the Group to focus on optimising the asset portfolio, achieving cost synergies, as well as maximising return on invested capital.*" (see page 2 of **Annex CKH 002 [2 September]**);

2.19.6 Bank of America reported on the re-organisation in March 2020, noting that CKH "indicated '*all options are on the table' to unlock value (e.g. listing, M&A etc.)*" (see page 1 of **Annex CKH 003 [2 September]**);

2.19.7 Goldman Sachs reported in March 2020 that the re-organisation would "*give the [CK Hutchison] group the flexibility to* *<u>evaluate various options</u>* *(e.g., IPO, outright sales, M&A) to unlock value.*" (see page 3 of **Annex CKH 004 [2 September]**);

2.19.8 HSBC reported in March 2020 as follows: "*Reorganisation of tower assets in Europe (CKH Networks) is on track and expected to be completed by Jun 2020, where the company could* *<u>explore further options to unlock potential value</u>*, *in our view.*" (see page 1 of **Annex CKH 005 [2 September]**);

2.19.9 UBS reported in March 2020 that "*the proposed telecom restructuring will see telecom towers in Europe and HK be held in a newly created company called CK Hutchison Networks (CKHN). Management expects this to be completed by June 2020, and says* *<u>it will assess all potential options for the company</u>*. *We estimate potential accretion of nearly HK$6/sh to CKH if CKHN's value becomes more transparent from the restructuring*" (see page 3 of **Annex CKH 006 [2 September]**);

2.19.10 Fitch reported in August 2020 that "*potential monetisation of non-core tower assets should alleviate any near-term capex pressure, as* *<u>the company is open to unlocking the value of its tower business</u>*. *However, the group is yet to announce any concrete M&A deals. CKHT completed the structural separation of its wholly owned telecom-infrastructure company in July, which groups its European tower business.*" (see page 2 of **Annex CKH 008 [2 September]**);

2.19.11 Goldman Sachs reported in October 2020 as follows: "*According to news reports on Oct 4 (e.g. The Telegraph, telecoms.com), UK's mobile operator Three (a subsidiary of CK Hutchison) is considering disposing a package of its tower assets to raise funding for a potential merger with a rival operator in the UK. While Three has not substantiated the media reports, if confirmed, the news would not come as a complete surprise,* *<u>as CK Hutch mentioned at its interim results (see our Aug 7 report) that it is evaluating various options to unlock the value</u>* *of its 29k telco towers which were segregated into a separate entity, CK Hutchison Networks (CKHN).*" (see page 1 of **Annex CKH 009 [2 September]**); and

2.19.12 S&P reported in October 2020 that "*the structural separation of CKGHT's tower assets into a wholly owned subsidiary, CK Hutchison Networks, was completed in July 2020. We believe CK Hutchison may* *<u>crystalize the value of these assets</u>* *to further support its financial position* *<u>as and when opportunities arise</u>*." (see page 9 of **Annex CKH 011 [2 September]**).

2.19.13 Bloomberg reported in October 2020 that "*CK Hutchison said in August of last year that it plans to create a new infrastructure unit holding about 28,500 towers spread across the region, opening the group up to the types of infrastructure deals that carriers across the continent have been pursuing. Proceeds from those transactions will help them cut debt and pay for costly 5G networks.*" (see page 1 of **Annex CKH 012 [2 September]**);

(Emphasis added.)

2.20 In addition, CK Hutchison received several unsolicited pitches from financial advisors with a view to seeking a mandate to work on any transaction involving CK Hutchison's passive telecommunications assets. This in and of itself is evidence that CK Hutchison's announcements had been interpreted by the market as having put its passive infrastructure up for a potential sale. It is common market practice that, in the absence of securing a sell-side mandate from CKHH, financial intermediaries such as investment banks present a potential transaction to their other clients to try to secure a buy-side mandate and approach CKHH through a reverse enquiry (such as [CONFIDENTIAL] and Cellnex).

2.21 The fact that no viable or credible alternative offers were made to CK Hutchison (other than from Cellnex) following these announcements, despite the length of time and the number of financial advisers seeking to broker a deal, demonstrates that there is in fact no other credible purchaser or realistic alternative transaction.

A sale to a financial sponsor or private equity investor is not a viable option for a transaction comprising all of CK Hutchison's European tower assets nor for a UK-specific transaction

2.22 Notwithstanding that no financial sponsors or private equity investors approached CK Hutchison with a credible offer, financial sponsors/private equity investors are not viable alternative purchasers to Cellnex. Financial sponsors may be in a position to provide finance [CONFIDENTIAL]. Financial sponsors/private equity investors have neither specific experience in the tower market at this scale, nor more general civil engineering experience that they would be able to leverage to operate 3UK's passive infrastructure assets. It is even less likely that a financial investor would have transacted for the entirety of CK Hutchison's European tower business. CK Hutchison would in any event not put its mobile operations (including 3UK) in the position of having to entrust its passive infrastructure to an investor with no proven track record in such a transaction.

2.23 Furthermore, financial sponsors by their nature require an exit strategy from their investments over a certain investment horizon. This is particularly the case where financial investors take more than a mere minority shareholding. The critical importance of the passive infrastructure assets to its mobile operations means that CK

Hutchison requires a stable, long-term (more than 15 years) partner to ensure operational continuity for its mobile businesses. The short investment horizon of financial sponsors/private equity investors means that CK Hutchison did not – and does not today – consider them to be preferred long-term partners. In the UK specifically, the ability to monetise 3UK's tower assets is limited by the specific transaction structure whereby the vast majority of the assets remain within the MBNL JV until the end of 2031.

2.24 Finally, CK Hutchison would expect interested financial sponsors to focus on investing in a minority stake of the business (in particular if they were to consider a more long-term investment). The sale of a minority stake could not raise the amount of capital [CONFIDENTIAL] required for 3UK's 5G rollout and network.

No realistic prospect of an alternative transaction with another WIP

2.25 The SLC Decision states that four independent WIPs other than Cellnex submitted that they would have considered engaging in a transaction involving the MBNL structure, and that one company approached CK Hutchison but did not receive a response.[8]

2.26 CK Hutchison does not believe that any of these statements were made to the CMA with an understanding of the complexities relating to the UK tower assets, given that the MBNL JV Agreements are confidential. As a result none of these third parties was in a position to provide the CMA with realistic evidence that they would have been willing and able to transact on the same basis as Cellnex, i.e. with sufficient understanding but nevertheless based on only very limited due diligence and disclosure to enter into a £3.7 billion transaction. Since these statements cannot have been made with knowledge of the relevant facts, they are not credible evidence of any alternative purchaser's realistic position and therefore have no probative value.

2.27 Crucially, despite having the opportunity to do so, none of Cellnex's competitors in the UK put forward a credible proposal to CK Hutchison and none of them is in a position to do so now. There is no evidence that any alternative purchaser has, in fact, engaged in any significant tower transaction that is comparable to the Proposed Transaction in the UK, or even one with far less complexity anywhere else in Europe. Statements made in hindsight by WIPs that they would have considered engaging in a transaction involving the MBNL structure cannot be taken into account, given that they have in fact not expressed any credible interest (either directly or through a financial intermediary) in a transaction at the time when it was apparent to the market that CK Hutchison was re-organising its tower assets.

[8] SLC Decision, paragraph 97(b).

2.28 Cellnex, on the other hand, has a proven track record of buying tower assets across Europe and executing large transactions to operate them at scale. Given that the Proposed Transaction envisages a long-term partnership between Cellnex and 3UK covering the vast majority of 3UK's passive infrastructure assets supporting its radio network, this deal track record was a key factor that CK Hutchison took into account in its decision-making.

2.29 Currently, details of the relevant third party statements have not been disclosed to CK Hutchison. CK Hutchison has been denied access and cannot properly respond. CK Hutchison reserves the right to respond further on this issue when further and better particulars of the relevant statements have been made available to it.

[CONFIDENTIAL]

2.30 [CONFIDENTIAL].

2.31 [CONFIDENTIAL].

2.32 [CONFIDENTIAL].

2.33 [CONFIDENTIAL].

An IPO of the Transaction Sites is entirely unrealistic

2.34 An IPO of CK Hutchison's UK passive infrastructure assets was never a realistic prospect, and this possibility was never given any consideration by CK Hutchison.

2.35 The premium segment of the Official List on the London Stock Exchange is the most natural venue for a listing of the UK tower assets. However, there are two key eligibility for listing criteria that are unlikely to be satisfied:

2.35.1 [CONFIDENTIAL].

2.35.2 LR 6.2.1 requires that an applicant for premium listing must have published historical financial information that (among other things) covers at least three years and represents at least 75% of the applicant's business for that period. Audited historical three-year financial statements for the towers business did not exist for the period before it was separated from the telecoms business, so this would need to cover the three years after the separation. Assuming a six-month lead time to prepare for an IPO this would imply a listing in [CONFIDENTIAL] at the earliest, [CONFIDENTIAL].

2.36 In addition, investor appetite to invest in such a structure would be extremely limited especially considering the availability of more straightforward European or global telecom tower sector alternatives in the global public markets (e.g. Inwit, Cellnex, Vantage Towers, American Tower, etc.).

2.37 If an IPO was a viable option, an IPO would typically only facilitate a partial stake sale in the business (e.g. 20-40%). [CONFIDENTIAL].

2.38 While Vodafone did list its tower business in the Vantage Towers IPO, this is not a relevant comparator for 3UK and MBNL. As set out in **Table 1** below, CTIL does not involve the same complexity as regards the ownership of the sites and assets, and it was therefore not only possible for the regulators to approve the listing, but much easier for prospective public market investors to understand.

Table 1: Comparison of MNO JV features

Characteristics	CTIL	MBNL
Ownership of identified network assets	CTIL owns identified network assets.	[CONFIDENTIAL].
Ability of JV partners to transfer their stakes to the IPO vehicle	Vodafone was able to transfer its 50 per cent stake in CTIL to its IPO vehicle, Vantage Towers.	[CONFIDENTIAL].
Alignment between JV partners on future commercialisation	Both Vodafone and Telefónica were aligned on the future commercialisation of CTIL.[9]	[CONFIDENTIAL].

[9] See the parties' public announcement in this regard here: https://www.cornerstone.network/media/vodafone-and-telefonica-commercialise-cornerstone.

2.39 Any suggestion or proposal that an IPO might be a possible way to monetise the UK assets is uninformed and speculative. Any proposals for an IPO are entirely unrealistic and were not considered by CK Hutchison senior management in evaluating the options available for monetising its tower assets.

Alternative purchasers would not have the ability or incentive to increase third party co-location compared with Cellnex

2.40 Without any substantiation, the CMA states that plausible alternative purchasers would have the ability and incentive to increase third party co-location compared with Cellnex.[10] [CONFIDENTIAL][11] [CONFIDENTIAL]. [CONFIDENTIAL] once the MBNL JV has been dissolved, 3UK considers that the potential for co-location on the existing sites without material investment will be limited given the sites currently host two tenants (3UK and BT/EE).

2.41 Secondly, the CMA's view that plausible alternative purchasers would have the ability and incentive to increase third party co-location compared with Cellnex is contradicted by the fact that [CONFIDENTIAL].

2.42 Furthermore, the "streetworks" monopoles are being constructed solely for 3UK's network needs and would require significant planning consent and investment for any future co-location of third parties. The claim made by the CMA that alternative purchasers could "*decide to replace 3UK on the sites if a different customer were to appear attractive*"[12] is also incorrect and entirely unrealistic, and appears to be based on a deeply flawed understanding of the telecoms and passive infrastructure sectors.

CK Hutchison will not pursue any transaction that is not capable of raising equivalent consideration to that obtained from the Proposed Transaction

2.43 The CMA is incorrect to allege that alternative transactions would have been pursued by CK Hutchison if they would have raised less than the consideration obtained from the Proposed Transaction. [CONFIDENTIAL].[13] [CONFIDENTIAL].

2.44 Indeed, as set out in further detail in section 6 below, [CONFIDENTIAL].

[10] SLC Decision, paragraph 106.
[11] [CONFIDENTIAL].
[12] SLC Decision, paragraph 107.
[13] [CONFIDENTIAL].

Expert analysis from [CONFIDENTIAL] demonstrates that no other UK transaction is credible or realistic

2.45 At Phase 1, the CMA incorrectly interpreted an initial presentation from CK Hutchison's adviser [CONFIDENTIAL] as indicating that [CONFIDENTIAL].[14] [CONFIDENTIAL].

2.46 In light of the Phase 1 Decision, CK Hutchison has asked [CONFIDENTIAL] to consider what options could be available to CK Hutchison for a UK-only transaction in the light of the knowledge and experience gained during the course of advising on the Proposed Transaction. [CONFIDENTIAL] analysis is set out at **Annex CKH 016 [2 September]**. In summary, [CONFIDENTIAL] concludes that:

2.46.1 [CONFIDENTIAL];

2.46.2 [CONFIDENTIAL];

2.46.3 [CONFIDENTIAL];

2.46.4 [CONFIDENTIAL];

2.46.5 [CONFIDENTIAL];

2.46.6 [CONFIDENTIAL]; and

2.46.7 [CONFIDENTIAL].

Cellnex's internal documents

2.47 In addition, the SLC Decision refers to Cellnex's internal documents, stating that it understood the terms of the Proposed Transaction despite the unusual transaction structure, and [CONFIDENTIAL].[15] [CONFIDENTIAL]. In any event, none of these documents show that other credible alternative purchasers were available to CK Hutchison.

[14] [CONFIDENTIAL].
[15] SLC Decision, paragraph 95.

Conclusion

2.48 In summary, there is no evidence – far less any evidence of a "realistic prospect" – of any alternative viable transaction available to CK Hutchison in respect of the UK tower assets. The CMA therefore has no basis to conclude that, in a counterfactual scenario, there would have been stronger competition between Cellnex and the Transaction Sites as compared to the prevailing conditions of competition.

3. JURISDICTION

The Proposed Transaction amounts to a single relevant merger situation that will occur at completion of the Proposed Transaction

3.1 In the SLC Decision, the CMA treated the Proposed Transaction as a single relevant merger situation comprised of three separate elements: (i) Cellnex's acquisition of TowerCo (i.e. the entity which holds the Unilateral Sites); (ii) Cellnex receiving the economic benefit in relation to the MBNL Sites (as well as bearing the costs associated with such interests) for the period between completion and dissolution of the MBNL JV; and (iii) Cellnex's acquisition of the Transfer Sites.[16] The CMA has also indicated in the Issues Statement that it will consider the extent to which Cellnex may be able to exercise material influence over the MBNL Sites during its Phase 2 inquiry.[17]

3.2 In reality, the Proposed Transaction gives rise to a single relevant merger situation at completion, comprised of Cellnex's acquisition of the Unilateral Sites and the Transfer Sites (i.e. only elements (i) and (iii) above). Cellnex's receipt of the economic benefit in relation to the MBNL Sites does not form part of the relevant merger situation because Cellnex will not obtain material influence over the MBNL Sites.

Cellnex will not obtain material influence over the MBNL Sites

3.3 As explained in detail in the Parties' Phase 1 submissions, and as discussed briefly in paragraph 2.8 above, the economic benefit that Cellnex will receive in relation to the MBNL Sites has been designed to replicate the income Cellnex would have received, and the costs it would have borne, had Cellnex acquired the MBNL Sites from 3UK at completion of the Proposed Transaction and thereafter provided 3UK with access to the MBNL Sites on the basis of a services agreement. This economic benefit is not equivalent to ownership of the MBNL Sites as it does not allow Cellnex to control the sites (given that the transfer of these sites is prohibited under the MBNL JV Agreements). Specifically, the rights that Cellnex will have in relation to the MBNL Sites are limited to those necessary for, and directly related to, the protection of Cellnex's economic interests under the [CONFIDENTIAL], and do not give Cellnex

[16] SLC Decision, paragraphs 50 and 51.
[17] Issues Statement, paragraph 26.

the ability to influence commercial and strategic decisions in relation to MBNL or the MBNL Sites.

3.4 The Parties note that, in any event, only a very limited proportion (approx. [CONFIDENTIAL]%) of the MBNL Sites host third party tenants. MBNL does not market the MBNL Sites to third parties or compete to provide site access for third parties using the MBNL Sites, and the overwhelming majority of the MBNL Sites are used solely by MBNL's shareholder MNOs (3UK and BT/EE) with very limited co-location by third parties.[18] As such, the primary purpose of the MBNL Sites is self-supply by 3UK and BT/EE. In fact, the hosting of the existing MNOs (3UK and BT/EE) will require significant investments (e.g. for 5G upgrades), making it unlikely that a third tenant can be supported on the sites in the next ten years in a meaningful manner.

Cellnex will have no ability to influence MBNL's commercial and competitive behaviour

3.5 As explained in paragraphs 3.3 and 3.4 above, Cellnex will not obtain material influence over the MBNL Sites. However, even if the CMA erroneously finds that Cellnex will obtain material influence over the MBNL Sites (as it did in the SLC Decision),[19] Cellnex (or any counterfactual potential acquirer) would still be unable to influence the commercial and competitive behaviour of MBNL in any way (and neither would any possible counterfactual purchaser). This is explained in detail in Section 5 below.

4. THE SLC DECISION IGNORES THE REALITY OF THE COMPETITIVE CONDITIONS IN THE MARKET

4.1 The CMA's assessment in the SLC Decision is anchored on an erroneous understanding of the actual competitive conditions prevailing in the market, which are unaffected by the Proposed Transaction (and would therefore apply in any counterfactual scenario). In particular, the SLC Decision:

4.1.1 ignores the reality that [CONFIDENTIAL];

4.1.2 ignores the circumstances in which customers source additional sites and the reality that anticipated demand for new macro sites by MNOs is and will remain limited;

[18] As stated in paragraph 12.3 of the Merger Notice, approximately [CONFIDENTIAL]% of the MBNL Sites are used solely by MBNL's shareholder MNOs. Third party co-location occurs on approximately [CONFIDENTIAL]% of the MBNL Sites, the majority of which is attributed to the MNO JV Framework Agreement entered into with CTIL.

[19] SLC Decision, paragraphs 73 and 74.

4.1.3 denies the significance of BTS (whether through self-supply or by a WIP) as a competitive constraint, despite coming to the opposite conclusion in *Cellnex/Arqiva*;

4.1.4 fundamentally misunderstands the passive infrastructure market;

4.1.5 misinterprets the bidding data provided by the Parties;

4.1.6 ignores recent market developments (in particular that CTIL has become a direct competitor to Cellnex);

4.1.7 fails to account for the fact that barriers to entry are low, the threat of new entrants is likely, and geographic scale is not an important parameter of competition;

4.1.8 fails to recognise that relationships between MNOs and WIPs when passive infrastructure assets are sold do not make it more difficult for other tower companies to win business; and

4.1.9 relies on a simplistic, artificial and misleading "market share" calculation, rather than an assessment of how competition in the market actually works and the extent of competitive constraints.

4.2 In light of these factors, the reality of the competitive conditions in the market is such that the Proposed Transaction could not give rise to an SLC, regardless of the counterfactual and whether or not the CMA concludes that Cellnex will obtain material influence over the MBNL Sites (which it will not).

[CONFIDENTIAL]

4.3 Until the dissolution of the MBNL, the effects of the Proposed Transaction are largely limited to Cellnex obtaining a revenue stream, and incurring the corresponding costs, in relation to the MBNL Sites. This revenue stream will not in any way strengthen the current competitive position of Cellnex towards its customers or its competitors.

4.4 [CONFIDENTIAL]. This means that the ability to use these assets to compete with Cellnex in any counterfactual is extremely limited and the Proposed Transaction can therefore only have a negligible impact on Cellnex's market position:

4.4.1 *First*, as is clear from the terms of the MBNL JV Agreements, [CONFIDENTIAL]. Accordingly, [CONFIDENTIAL].[20] This would be the case for any acquirer in any counterfactual. [CONFIDENTIAL].

[20] The MBNL JV will terminate at the end of 2031, unless terminated earlier by agreement with BT/EE or under any of the relevant provisions of the MBNL JV Agreements.

4.4.2 *Second*, the Streetworks Sites are designed solely with 3UK's network needs in mind and have been (and are being) built for 3UK as single tenant monopoles. The scope for additional co-location is therefore limited, as it would require significant planning consents and investment. These sites are also significantly different to Cellnex's portfolio of macro towers, which are generally built to accommodate greater co-location.

4.4.3 *Third*, the UKB Sites, which in any case comprise a small proportion of the Transaction Sites, are also predominantly rooftop sites, many of which are unsuitable for further commercialisation, the reasons being that (i) adding further tenants would typically require building a new structure and thus require further planning permissions and entail significant additional costs; (ii) it is therefore often more attractive for a customer to negotiate with the rooftop-owner directly rather than through a third party; and (iii) approx. two thirds of rooftop sites typically already have multiple tenants limiting the available space for further tenants.[21] For example, an Arqiva internal document states that there is a "[CONFIDENTIAL]".[22] In any event, there are only a very small number of UKB Sites (accounting for only [CONFIDENTIAL]% of the Transaction Sites) and as such the number of UKB Sites which might allow for co-location is *de minimis* in number.

4.4.4 *Fourth*, all Transaction Sites that have already been built are presently (and will continue to be) used by 3UK, and Cellnex (or any alternative purchaser) would not have the right to simply "replace" 3UK on these sites. As mentioned in paragraph 2.42 above, the claim made by the CMA that alternative purchasers could "*decide to replace 3UK on the sites if a different customer were to appear attractive*"[23] is incorrect and entirely unrealistic, and appears to be based on a deeply flawed understanding of the telecoms and passive infrastructure sectors.

4.4.5 *Fifth*, even putting the possibility of further co-location on the sites to one side, the other MNOs will ultimately only consider a site to be attractive if it fits in with their radio planning (as discussed further in paragraphs 4.5 and 4.18 to 4.20 below). As MBNL and CTIL sites have historically been rolled out in parallel, there is likely to be significant existing site overlap between MBNL and CTIL, such that only a very limited number of 3UK sites would potentially be attractive to O2 and Vodafone for co-location (even if all the other issues referred to above were resolved). This is evidenced by the fact that, despite having a framework agreement in place for co-location on MBNL sites since 2014, CTIL is a tenant on only [CONFIDENTIAL] MBNL sites.

[21] [CONFIDENTIAL].
[22] Cellnex S109#1 **Annex 00005572** dated 31 March 2021.
[23] SLC Decision, paragraph 107.

Anticipated demand for new macro sites by MNOs, including for 5G rollout, is and will remain limited

4.5 Fundamentally, 3UK's (and all MNOs') requirements for passive infrastructure are determined by its radio plan. The only function of passive infrastructure is to support the active mobile network in achieving the coverage, capacity and quality necessary for 3UK's mobile customers, and for 3UK to compete vigorously. Once the core passive site grid has been rolled out, 3UK (and all MNOs) do not move from their existing sites without some sort of catalyst [CONFIDENTIAL].

4.6 Indeed, as explained in Cellnex's previous submissions to the CMA,[24] 5G rollout in urban areas (where demand for additional capacity is expected to be the highest) is anticipated to be achieved primarily through upgrading existing macro sites.[25] MNOs in the UK already have fully rolled-out networks (or have already committed to increased coverage in rural areas) and, rather than seeking to replace large numbers of existing sites, MNOs typically look for targeted solutions based on specific needs for additional capacity or coverage in their networks. As such, even with the deployment of 5G, demand for additional sites is limited to site churn (as discussed further in paragraph 4.9 below) and situations where it is not feasible to upgrade existing macro sites or where there is a need to deploy additional infill sites in urban areas, which will only represent a small number of sites. These additional sites are mainly anticipated to be achieved through monopoles which can be built with relative ease due to more relaxed planning permissions and lower costs compared with other types of macro site. These sites are also typically single tenant and offer limited scope for co-location.

4.7 The (existing) "macro-first" approach to 5G network deployment in urban areas may evolve in the next few years to a more integrated approach across traditional macro sites, streetworks, monopoles and small cells. The deployment of monopoles and small cells is expected to be driven by newly constructed sites given the more relaxed planning permissions and lower costs.

4.8 With respect to rural areas, as part of the SRN the MNOs have each already committed to delivering 4G coverage to 88% of the UK by the end of June 2024.[26] However, as explained in Cellnex's response to question 1 of the CMA's RFI#1 of 27 July 2021, the expectation is that demand for sites from 5G rollout will be relatively limited in the next five to ten years.

[24] See in particular Cellnex's Phase 1 submissions and its response to question 1 of the CMA's RFI#1 of 27 July 2021.
[25] By way of evidence, please refer to page 3 of Cellnex S109#1 **Annex 00005572** dated 31 March 2021, which states a key trend is "*MNOs will pursue a macro first rollout*".
[26] See https://www.gov.uk/government/news/shared-rural-network.

4.9 Finally, it is not expected that material demand will arise from large scale switching of existing contracts between WIPs and MNOs / MNO JVs. Cellnex's contract with MBNL was signed on [CONFIDENTIAL] for a period of [CONFIDENTIAL] and its contract with CTIL [CONFIDENTIAL]. However, regardless of the date of these renewals, the reality is that there is expected to be limited competition for the renewal of these contracts ([CONFIDENTIAL]) for the following reasons:[27]

4.9.1 *First*, replacing an existing site with an alternative existing site is generally not feasible. As explained in Cellnex's previous submissions to the CMA, location is the primary factor which customers take into account when choosing a site from a supplier.[28] In order to fit into an MNO's existing radio plan without creating gaps in coverage, any replacement site must be geographically extremely close to the existing site. This means that there would generally only be a very small number of existing sites (if any) that would be suitable for an MNO to switch away from a given site.

4.9.2 *Second*, even if there is an alternative existing site that is sufficiently close to the existing site to be suitable, the cost of taking down the equipment and moving onto a new site, and the associated operational disruption, may be significant. As set out in Cellnex's response to question 12 of the CMA's RFI#1 of 27 July 2021, Cellnex estimates that the installation of equipment alone typically costs between [CONFIDENTIAL] per site ([CONFIDENTIAL]) and expects that these costs will be higher for the installation of large-scale 5G installations (i.e. they could increase to around [CONFIDENTIAL]).

4.9.3 *Third*, in addition to the cost of moving the equipment, there is also a potential cost of strengthening the alternative existing site. Many existing sites have been designed for 2G and 3G, for which the active equipment was significantly lighter than the 4G and 5G equipment now used. This means that a large proportion of sites have needed to be strengthened before they could take additional equipment of existing tenants. The costs of this strengthening can be substantial – as set out in Cellnex's response to question 12 of the CMA's RFI#1 of 27 July 2021, to upgrade a traditional lattice tower Cellnex estimates it would cost between [CONFIDENTIAL] (depending whether the existing structure could be upgraded or whether it would need to be replaced with a new structure).

[27] It is important to note that the fact that large scale switching is highly unlikely does not mean that there is no competition on the renewal of large contracts (such as the contracts with MBNL and CTIL). As noted in paragraph 4.9.4 below, competitive tension is maintained through the threat of churn over time and the incumbent operator faces intense competition for these churn sites, and also for incremental demand for additional sites over time. MNOs use the threat of churning away sites over time, thereby eroding the total number of sites supplied by a WIP, as a means to ensure that the MNO receives competitive pricing for access to the full portfolio of sites.
[28] See in particular Cellnex's response to questions 4 and 5 of the CMA's RFI#1 of 27 July 2021.

4.9.4 *Finally*, whilst switching for small numbers of sites may in principle be feasible in terms of planning and logistics (which, given the constraints on using existing sites described in paragraph 4.9.1 above, would likely be to BTS sites), switching a large number of sites (such as the number that Cellnex currently provides to MBNL and CTIL) can be extremely complicated and disruptive to customers. Switching on such a large scale would require long lead times in order to ensure that the process is smooth and not create disruptions in the network and coverage that would adversely affect an MNO's offering, and as such MNOs try to avoid large-scale switching where possible. In reality, competitive tension in such contract renewals is maintained through the threat of self-supply and churn over time and not through switching large numbers of sites.

4.10 The result is that, as described in Cellnex's response to question 5 of the CMA's RFI#1 of 27 July 2021, switching generally only occurs where there is a catalyst (other than the rental costs) that forces the MNO to switch sites. For example, the MNO (or the WIP that operates the site) may receive a Notice to Quit ("**NTQ**") from the landlord of the site. In these instances, the MNO has no choice but to vacate the site and therefore will already be incurring the cost of moving the equipment and potential disruption to their radio plan.

4.11 This dynamic is clearly visible in Cellnex's internal documents. For example, a recent Cellnex internal document from March 2018 [CONFIDENTIAL].[29] Similarly during the MBNL Tender it was clear that, [CONFIDENTIAL].

Figure 2: [CONFIDENTIAL]

4.12 In light of the above, site demand is expected to be for these 'catalyst' sites (together with additional incremental demand for coverage or capacity) and not for large-scale switching from existing sites. This means that, an alternative purchaser of the MBNL Sites would not be able to use these to bid for the CTIL contract in [CONFIDENTIAL] (even if such an alternative purchaser had the rights to commercialise those sites, which it would not). Consequently, site demand is expected to be for a limited number of individual sites (or small numbers of sites) rather than for large-scale replacements of existing sites.

[29] **Annex 1** – [CONFIDENTIAL].

Cellnex is constrained by BTS (both through self-supply and supply by a WIP)

4.13 The SLC Decision downplays the competitive constraint imposed by BTS (both through self-supply and supply by a WIP) and, in doing so, erroneously concludes that the size and geographic reach of a WIP is an important competitive capability.[30] This represents a reversal from the CMA's findings in *Cellnex/Arqiva* that BTS was a strong constraint, despite no convincing evidence being provided to support a different conclusion. The SLC Decision also relies heavily upon self-serving comments from competitors to support this conclusion whereas submissions from customers are more mixed.[31]

4.14 In reality, BTS is particularly a constraint given that, as explained in paragraphs 4.5 to 4.12 above, the foreseeable demand from MNOs is for relatively small numbers of new macro sites where scale is not an important parameter of competition. Furthermore, the vast majority of non-MNO customers do not require national coverage from WIPs because they do not require nationwide coverage themselves and, even for the very few non-MNOs that do have national coverage, they do not generally formally tender for a large number of sites at once. BTS (whether through self-supply or a WIP) therefore remains a credible proposition for MNO and non-MNO opportunities and a competitive constraint on existing sites, and WIPs therefore do not need a large portfolio of existing sites or national coverage to credibly compete for opportunities.

4.15 In addition, both MNO and non-MNO customers are able to self-supply using BTS solutions, and Cellnex expects that all existing WIPs (as well as new entrants) will be able to offer a compelling BTS proposition. This is supported by evidence submitted to the CMA by a competitor (that is largely dismissed in the SLC Decision), which intends to supply a proportion of future site demand from MNOs through a BTS programme.[32]

4.16 The Parties provided a significant amount of clear and compelling evidence the constraint imposed by BTS during the course of Phase 1, including evidence from the Parties' internal documents. Further evidence includes the fact that [CONFIDENTIAL].[33] [CONFIDENTIAL].

[30] Further detail on the constraint imposed upon Cellnex by BTS is provided in the Issues Letter Response, paragraphs 3.24 to 3.27.
[31] SLC Decision, paragraphs 137 and 201.
[32] SLC Decision, paragraph 188(b).
[33] Cellnex S109#1 **Annex 00006556** dated 10 August 2021.

4.17 In conclusion, as a direct result of the SLC Decision downplaying the competitive constraint imposed by BTS, the SLC Decision significantly fails to adequately assess the ability of rival WIPs and customers (via their considerable countervailing buyer power, as discussed further in paragraphs 4.29 to 4.33 below) to impose constraints upon Cellnex (notwithstanding the Proposed Transaction).

The SLC Decision fundamentally misunderstands the passive infrastructure market

4.18 The SLC Decision proceeds on the basis of misunderstandings as to how the passive infrastructure market works in practice, and in particular:

4.18.1 the fact that radio planning drives the requirement for any additional sites;

4.18.2 the range of alternatives that customers of passive infrastructure sites have; and

4.18.3 the extensive countervailing buyer power that MNOs can (and do) exercise.

MNOs' radio planning drives the requirement for additional sites, with no set preference for existing third party sites

4.19 As set out in paragraph 4.5 above, 3UK's (and all MNOs') requirements for passive infrastructure are determined by the radio plan became the only function of passive infrastructure is to support the active mobile network in achieving the necessary coverage and quality. Accordingly, 3UK takes three key factors into account when assessing an additional site:

4.19.1 [CONFIDENTIAL];

4.19.2 [CONFIDENTIAL],[34] [CONFIDENTIAL]; and

4.19.3 [CONFIDENTIAL].

4.20 3UK's decision-making when sourcing additional sites will vary depending on the particular programme and its objectives at that time, with no set preference for any particular types of site. To illustrate how 3UK has sourced sites in the recent past, it is helpful to consider two examples of recent programmes where 3UK required a significant number of additional sites:

4.20.1 3UK's decision to build its own streetworks monopoles using third party contractors ([CONFIDENTIAL]) as part of its network densification plan; and

4.20.2 3UK's programme to fill the Partial Not Spots ("**PNS**") as part of the SRN.

[34] [CONFIDENTIAL].

3UK's streetworks programme evidences the options available to MNOs when sourcing additional sites

4.21 By way of example, 3UK decided to build its own streetworks monopoles using third party contractors ([CONFIDENTIAL]) despite the fact that some of the WIPs would likely have had existing sites in some of the areas needed for the network densification. Importantly, 3UK concluded that [CONFIDENTIAL].

4.22 [CONFIDENTIAL].

4.23 [CONFIDENTIAL]. Given the very narrow distance requirements when selecting a suitable location, the mere fact that a WIP has a large number of sites does not guarantee that any of its sites will be in the right location, with the right commercials for an MNO's requirements, or feasible in the required timescale. In this context, scale is not a key competitive parameter: it provides no particular advantage for customers and customer pricing is not affected by the volume of sites already held by the supplier or contracted by the supplier to the customer. By way of example, as MBNL was specifically designed for 3UK and BT/EE's networks, most MBNL Sites would be of limited attraction to CTIL. CTIL's network is configured differently, has a different radio plan, and therefore will have different requirements. In reality, the number of MBNL Sites that CTIL could use to replace sites it sources from Cellnex would be very limited, and in fact CTIL is a tenant on only [CONFIDENTIAL] MBNL Sites [CONFIDENTIAL].[35]

4.24 [CONFIDENTIAL]. And even for large programmes or builds (e.g. the Streetworks Sites) there are many contracting companies that can provide build services such as [CONFIDENTIAL].

3UK's decision-making process in respect of the Shared Rural Network evidences the options available to MNOs when sourcing additional sites

4.25 As part of the Government drive to ensure 95% coverage for 4G from at least one operator, each mobile operator has committed to providing good quality data and voice coverage to 88% of the landmass by 30 June 2024, and 90% by 30 June 2026. In order to meet these obligations 3UK considered its various options for increasing its network coverage and sourcing of additional sites to facilitate this.

[35] See paragraphs 15.8.2, 15.32-15.33, and 15.45.3 of the Merger Notice for further details.

4.26 3UK's latest plan to reach its primary 88% coverage obligation by 30 June 2024 under the SRN envisages that [CONFIDENTIAL] additional sites will be required to meet an 88.2% nationwide coverage level. The [CONFIDENTIAL] sites are made up of the following:

4.26.1 [CONFIDENTIAL].

4.26.2 [CONFIDENTIAL].

4.26.3 [CONFIDENTIAL].[36]

4.26.4 [CONFIDENTIAL].

4.27 The fact that there is a significant number of alternatives to Cellnex is clearly illustrated by the fact that [CONFIDENTIAL].

4.28 [CONFIDENTIAL]. This demonstrates the significant number of alternatives that 3UK had at its disposal for its SRN programme.

Cellnex's customers have considerable countervailing buyer power

4.29 In Cellnex's experience, the closest and typically binding competitive constraint on contract negotiations with customers usually comes from the threat of self-supply (by MNO and non-MNO customers).[37] Self-supply is a form of BTS as it involves the customer building a new site in order to meet its own demand, and there are several examples of self-supply by both MNO and non-MNO customers.[38] Cellnex's internal documents also provide clear and compelling evidence that self-supply by customers is a significant constraint on its pricing.[39] By way of further example:

4.29.1 [CONFIDENTIAL].[40]

4.29.2 [CONFIDENTIAL].[41] [CONFIDENTIAL].

4.29.3 [CONFIDENTIAL].

[36] See news coverage on the BBC regarding BT's attempt to charge 250% more than the existing commercial rate to allow 3UK, O2 and Vodafone to access its rural sites, available at: https://www.bbc.co.uk/news/technology-51372017.
[37] See in particular the Parties' submissions in the Issues Letter Response, paragraph 3.28.
[38] Issues Letter Response, paragraph 3.28.1.
[39] Issues Letter Response, paragraph 3.28.2.
[40] Cellnex S109#1 **Annex 00005572** dated 31 March 2021.
[41] Cellnex S109#1 **Annex 00005572** dated 31 March 2021.

4.30 Most importantly, the two largest recent contracts for additional sites – the SRN and 3UK's streetworks program – both rejected the use of existing sites in favour of self-supplied BTS sites.

4.31 In this respect, the ability to fulfil the demand for densification in urban areas through the use of streetworks monopoles has only increased the attractiveness of BTS over existing sites. Streetworks monopoles typically cost less than traditional lattice towers and are subject to less deployment constraints such as securing Code agreement with the landowner – see Cellnex's response to question 12 of the CMA's RFI#1 of 27 July 2021.

4.32 In addition, the SLC Decision does not account for the fact that Cellnex's non-MNO customers have a range of options available to them other than the supply of access to developed macro sites from Cellnex (including self-supply, supply by another WIP, or the use of other elevated structures instead of macro sites):[42]

4.32.1 Non-MNO equipment does not necessarily require the height of a macro tower, as it is typically substantially lighter and easier to install than that of MNOs.[43] Whilst their key requirement is generally still location, non-MNOs may have a greater degree of flexibility in location than MNOs, as they are not always seeking to create a mesh network in the same way.

4.32.2 Non-MNOs also tend to have a far wider variety of options outside of the use of a traditional macro tower compared to MNOs. Non-MNOs utilise a number of site solutions to establish coverage depending on coverage requirements and the services being provided to end customers. For example, fixed wireless access providers such as Connexin and Quickline provide wireless broadband / connectivity services to end customers and therefore only need to deploy antennae or microwave links at low level. Consequently, these installations could be low down on a tower structure or on non-tower structures such as the rooftop of a building or specially-constructed wooden poles (and there are numerous examples of such deployments).[44] In many instances the provider will elect to deploy on buildings (via direct agreements with landlords) or deploy wooden poles via self-supply streetworks rather than via a WIP.

[42] Non-MNOs operate on a wide range of varied downstream telecommunications markets and are varied in size and complexity, and as such their requirements for passive infrastructure can vary significantly.
[43] Certain non-MNOs still require access to tall towers: for example, [CONFIDENTIAL].
[44] For example, see https://www.quickline.co.uk/news/lincolnshire/.

4.33 By way of evidence (in addition to the evidence on non-MNO self-supply provided during Phase 1), Cellnex produced an internal document considering an opportunity to [CONFIDENTIAL].[45]

The Parties' bidding data demonstrates that Cellnex faces multiple competitive constraints

4.34 The bidding data provided by the Parties evidences that smaller WIPs and MNO self-supply continue to be relevant constraints against Cellnex, in agreement with the CMA's conclusions in *Cellnex/Arqiva*, as they show that Cellnex has lost sites to BTS from both WIPs and customer self-supply. However, the SLC Decision relies on the same bidding data and internal documents as in *Cellnex/Arqiva* to reach a fundamentally different and erroneous conclusion regarding the competitive constraint from other players. More recent tenders provided by the Parties in the Issues Letter Response (the outcome of which show that Cellnex continues to face strong competition from smaller WIPs) were not considered in detail notwithstanding that the CMA had sufficient time to consider them before issuing the SLC Decision. Of the [CONFIDENTIAL] contracts open to competition for which Cellnex has competed since *Cellnex/Arqiva*, [CONFIDENTIAL].[46]

4.35 For completeness, the Parties' consider the most relevant measure of the strength of competition to be the number of contracts on which Cellnex competed. Bilaterally negotiated contracts are not a good measure for the extent of competition because there is no indication of what customers considered their outside options were. However, it would be erroneous to assume that a bilateral negotiation absent a competitive tender implied that there was no competitive pressure. Although the customer may not issue a formal tender or invite bids from multiple suppliers, both Cellnex and the customer know that the customer has a number of alternatives (including self-supply and sites provided by other WIPs). Should the price quoted by Cellnex be above these alternatives, the customer could approach another WIP or self-supply. In the Parties view there is no reason to assume that the outside options in bilaterally negotiated contracts would be different to those that faced explicit competition. As such the Parties consider that the options for contracts that were open to competition are likely to be a good proxy for those that were bilaterally tendered.

[45] Cellnex S109#1 **Annex 00006557** dated 4 May 2021.
[46] Issues Letter Response, paragraph 4.4.

Cellnex is constrained by rival WIPs, particularly in light of the commercialisation of CTIL and the expansion plans of Cellnex's other competitors

CTIL is a direct and growing competitor to Cellnex

4.36 The SLC Decision relies on the fact that CTIL is ultimately owned by Telefónica and Vodafone (through its majority shareholding in Vantage Towers) to conclude that CTIL is unlikely to focus on the provision of access to develop macro sites other than self-supply to its shareholders. This presumption ignores clear evidence that CTIL is an active and willing player on the market and accordingly a direct competitor to Cellnex, and has led the CMA to erroneously exclude CTIL from its market share calculations (as discussed further in paragraph 4.53 below).

4.37 The Parties provided a significant amount of clear and compelling evidence of CTIL's market position to the CMA during the course of Phase 1, including evidence from the Parties' internal documents and unambiguous statements by CTIL and its shareholders regarding its market intentions. The competitive constraint posed by CTIL on Cellnex is particularly apparent from a number of public statements made by CTIL and Vantage Towers, in particular:

4.37.1 CTIL: In addition to the evidence presented in Phase 1, CTIL's ability and intention to compete have been further evidenced by its assertions that it is a "*neutral host*" focused on the provision of sites and passive infrastructure to third parties (including *but not limited to* Telefónica and Vodafone),[47] and that it would consider discounts to anchor tenants where a new MNO joins a site.[48]

[47] See paragraph 128 *Cornerstone Telecommunications Infrastructure Limited v Marks & Spencer plc and Equorium Property Company Limited*, LTS/ECC/2019/0034 [2021]. Available here: http://www.lands-tribunal-scotland.org.uk/decisions/LTS.ECC.2019.34.html

[48] See page 6, Cornerstone presentation, available at https://www.vantagetowers.com/sites/tower-co-v2/files/media/cornerstone-presentation.pdf.

4.37.2 Vantage Towers:

(a) Despite having Vodafone as a majority shareholder, Vantage Towers has stated that its business model includes "*expanding the services offered by a tower company beyond the traditional role of an infrastructure landlord to MNOs to the role of a network enabler for a range of existing and new customers*".[49] In fact, while Vantage Towers considers CTIL to be a preferred supplier to Telefónica and Vodafone, it also has the ability and incentive to compete for other customers given the ample co-location capacity on its sites.[50]

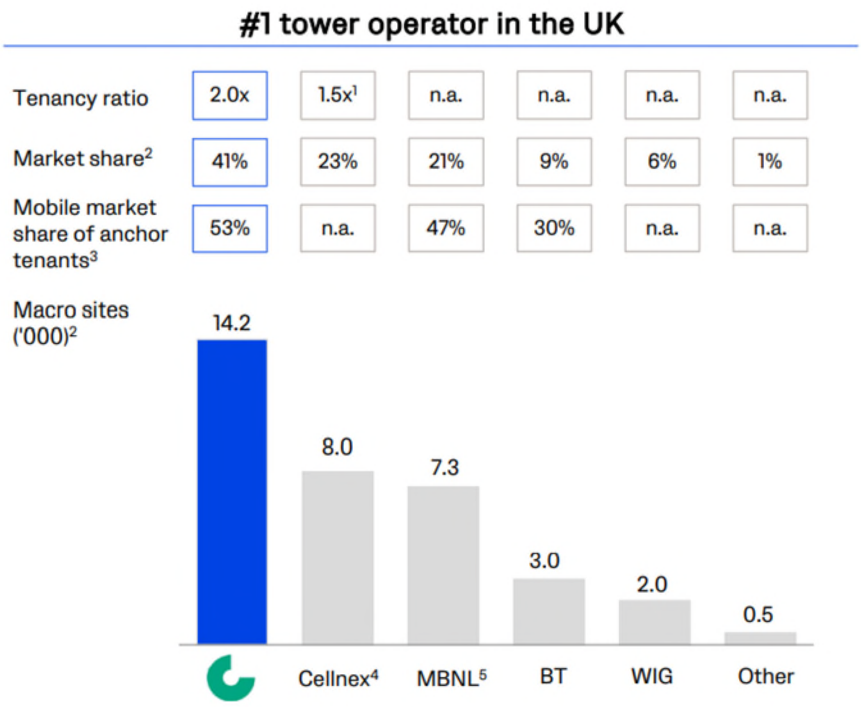
(b) CTIL also owns a good proportion of urban sites, and Vantage Towers has publicly stated that it intends to capture a significant portion of future demand as a result of 5G rollout (which is expected to be focused in urban areas).[51]

(c) "*new third-party colocations will drive margins [for CTIL] in the medium to long term*".[52] This clearly shows CTIL's competitive offering to MNOs for co-location.

(d) CTIL will be the "*#1 tower operator in the UK*". This statement is supported by the following extract from Vantage Towers' CTIL presentation, which lists the UK tower operators by site count and indicates that CTIL has a 41% market share.[53] CTIL's own shareholders therefore consider it to be a non-captive WIP, a competitor of Cellnex and, as such, a competitive constraint on Cellnex:[54]

[49] See page 54, Vantage Towers Annual Report, available at https://www.vantagetowers.com/sites/tower-co-v2/files/2021-06/PDFs/VT-Group-Annual-Report-202021%28ENG%29.pdf.
[50] See Vantage Towers' IPO prospectus, section 16.4.6, page 175, where it is stated that "*the tenancy ratio on Cornerstone's Macro Sites was 2.01x… with the Macro Sites having sizeable colocation capacity due to significant active sharing between the anchor tenants*". Available here: https://www.vantagetowers.com/sites/tower-co-v2/files/vantage-towers-prospectus-v3.pdf.
[51] See page 5, Cornerstone presentation, available at https://www.vantagetowers.com/sites/tower-co-v2/files/media/cornerstone-presentation.pdf.
[52] See Vantage Towers' IPO prospectus, section 27.2.2, page R-3. Available here: https://www.vantagetowers.com/sites/tower-co-v2/files/vantage-towers-prospectus-v3.pdf.
[53] See page 4, Cornerstone presentation, available at https://www.vantagetowers.com/sites/tower-co-v2/files/media/cornerstone-presentation.pdf.
[54] The 3,000 BT sites also shows BT's large existing unilateral assets i.e. whilst MBNL reflects all of CK Hutchison's network assets, it only accounts 50% of BT's network assets.

Figure 3: Vantage Towers considers CTIL to be the market leader



4.38 Cellnex's internal documents are also clear that [CONFIDENTIAL]:

4.38.1 [CONFIDENTIAL].

Figure 4: [CONFIDENTIAL]

4.38.2 In August 2021, Cellnex produced a document [CONFIDENTIAL].[55] [CONFIDENTIAL]:

(a) [CONFIDENTIAL].

(b) [CONFIDENTIAL].

(c) [CONFIDENTIAL].

(d) [CONFIDENTIAL].

(e) [CONFIDENTIAL]:

(i) [CONFIDENTIAL].

(ii) [CONFIDENTIAL].

[55] **Annex 1** – [CONFIDENTIAL].

(iii) [CONFIDENTIAL].

(f) [CONFIDENTIAL].

(g) [CONFIDENTIAL].

(h) [CONFIDENTIAL].

(i) [CONFIDENTIAL].

(j) [CONFIDENTIAL].

(k) [CONFIDENTIAL].

4.38.3 [CONFIDENTIAL].[56] [CONFIDENTIAL]:

(a) [CONFIDENTIAL].

(b) [CONFIDENTIAL].

(c) [CONFIDENTIAL].

(d) [CONFIDENTIAL].

(e) [CONFIDENTIAL].

(f) [CONFIDENTIAL].

(g) [CONFIDENTIAL].

4.38.4 [CONFIDENTIAL].

Figure 5: [CONFIDENTIAL]

4.39 Indeed, the competitive constraint posed by CTIL on Cellnex is also apparent from the CK Hutchison Group's internal documents. For example:

4.39.1 One internal document expressly identifies Vantage Towers as [CONFIDENTIAL].[57]

4.39.2 An extract from a Morgan Stanley report attached as **Annex CKH 015 [2 September]** further supports the fact that CTIL is a clear competitor of Cellnex. In particular, the following statements show that CTIL had a first mover advantage and, as a result, was able to secure "optimal positions", clearly

[56] Cellnex S109#1 **Annex 00005711** dated 17 December 2020.
[57] See [CONFIDENTIAL].

pointing to its competitive advantage. They also illustrate that, as a result of the RAN sharing agreement between Vodafone and O2, the two JV partners have 14,000 towers which have a free slot to host a third party MNO:

(a) "*The Cornerstone sites are geographically spread across London (16%), urban (29%) and rural (55%). Perhaps most interestingly, we believe that sites are optimally-positioned, as O2 was the original / first UK wireless operator, while Vodafone launched second (ahead of Orange and T-Mobile, which merged to create EE).*"

(b) "*Moreover, we believe that Cornerstone has an ample number of spare slots, given the active sharing taking place between Vodafone UK and O2 UK (shared RAN only fills one spot, on the site).*"

4.40 While the Parties have not been able to review the confidential submissions to the CMA by CTIL and its shareholders, it is difficult to see how these could entirely negate the public statements which show that CTIL increasingly operates as an independent tower company and as a direct competitor to Cellnex. For example, CTIL's submission to the CMA that the vast majority of its *current* supply is to Vodafone and O2[58] and Vodafone's submission that "*it anticipated that [✂] of CTIL's revenues would be generated by supplying Vodafone and O2 by 2031*"[59] do not mean that CTIL will not capture demand for sites by third parties in the *future*. In this regard, CTIL has publicly stated that it is "*well placed to capture a significant portion of the additional market tenancies required for densification and coverage in the UK*",[60] and Vantage Towers (to which Vodafone has transferred its stake in CTIL) has stated that, *inter alia*, "*new third-party colocations will drive margins [for CTIL] in the medium to long term*".[61] Self-serving comments from 3UK's competitors (i.e. Vodafone and O2) should not be taken over public statements of strategic intent to their shareholders, potential investors, the market, and the evidence presented in paragraphs 4.37 to 4.39 above.

4.41 In light of the commercialisation of CTIL, the picture painted in the SLC Decision of a market characterised by Cellnex (as the market leader) and a number of much smaller competitors is a significant distortion of the market reality. As a direct result of CTIL's emergence as a competitor, the UK market in which Cellnex operates is becoming significantly more competitive notwithstanding the Proposed Transaction.

---

58 SLC Decision, paragraph 131.
59 SLC Decision, paragraph 131 and 196(b).
60 See https://www.cornerstone.network/media/vodafone-and-telefonica-commercialise-cornerstone.
61 See Vantage Towers' IPO prospectus, section 27.2.2, page R-3. Available here: https://www.vantagetowers.com/sites/tower-co-v2/files/vantage-towers-prospectus-v3.pdf.

4.42 For completeness, it is clear from the evidence provided by the Parties that Cellnex faces competition from a range of other suppliers in addition to CTIL. By way of example (as mentioned in paragraph 4.24 above) [CONFIDENTIAL], and (as mentioned in paragraphs 4.33 to 4.35 above) Cellnex's bidding data shows that it has recently faced intense competition from WIPs including [CONFIDENTIAL].

The commercialisation of Telefónica's stake in CTIL in the near future is inevitable

4.43 The Parties disagree with the CMA's finding that, aside from the Transaction Sites, passive infrastructure assets in the UK are unlikely to become available for purchase in the near term.[62] There is clear evidence that future inorganic growth by competitors is still possible through MNO-controlled sites becoming available, including Telefónica's stake in CTIL.

4.44 As explained in detail in the Parties' previous submissions,[63] it has been public knowledge for quite some time that CTIL is targeting a 'monetisation process' in line with Vodafone and Telefónica's pan-European strategy of forming stand-alone commercial tower companies.[64] As early as 2018, Arqiva internal documents stated that the "[CONFIDENTIAL]".[65] As explained in footnote 5 to paragraph 1.10.5 above, Vodafone has already sold its 50% equity stake in CTIL to Vantage Towers (its European tower business) which has recently raised capital through an IPO. In addition, Telefónica's CEO has publicly stated that "*Monetisation could take place once the (Liberty merger) has finished or be approached between signing and closing ... The asset is ready for such a possibility*".[66] Now that the O2/Liberty Global merger is complete, it is highly likely that all of CTIL's assets will be owned and operated by independent WIPs in the near future, making CTIL an even stronger competitor to Cellnex. Mike Fries, chair of the combined O2/Liberty Global entity, has stated:

4.44.1 "*Obviously we are in a position to, if we wanted to, monetise it [Cornerstone] as a JV. You should assume that there's a possibility we would look at that favourably. So let's wait for the transaction to close. It's a decision we would likely make jointly with our partners Telefónica. But we are obviously in a position to monetise that if we felt it was appropriate and we either needed or wanted to get that capital out and do some of these strategic things*."[67]

[62] SLC Decision, paragraphs 124(c) and 223.
[63] Merger Notice, paragraphs 11.4 and 11.5.
[64] See https://mediacentre.vodafone.co.uk/news/vodafone-and-o2-finalise-5g-uk-network-agreement/ and https://www.cornerstone.network/media/telefonica-and-vodafone-strengthen-partnership.
[65] Cellnex S109#1 **Annex 00005572** dated 31 March 2021.
[66] See https://www.reuters.com/article/us-telefonica-liberty-global-britain-inf-idINKBN22J1LB.
[67] See https://www.telcotitans.com/telefonicawatch/cornerstone-exit-could-be-early-item-on-vm-o2-agenda/3177.article.

The SLC Decision disregards competitor expansion plans

4.45 The Parties agree with the CMA's finding that there are limited organic growth prospects for UK sites; however, this is a consequence of the limited demand for additional sites and is not evidence of geographic scale being an important parameter of competition nor is it a merger specific competition concern. By way of further evidence, an Arqiva internal document in 2018 noted that there are "[CONFIDENTIAL]".[68] However, this does not mean that a competitor or potential new entrant cannot gain market share organically (whether through capturing additional site demand or demand from churn of existing sites). Despite the fact that this demand for sites can easily be met by smaller WIPs through existing sites and/or BTS (whether self-supplied or supplied by a WIP) as explained in paragraph 4.14 above, the SLC Decision largely dismisses evidence submitted by a competitor that it intends to grow by supplying a proportion of that demand.[69] The Parties have not been able to review the confidential submissions to the CMA by this competitor, however Cellnex notes that a number of other WIPs can and do compete with Cellnex for opportunities for organic growth in the market. As an example, after announcing that it is looking to "*aggressively scale its solutions and operations over the next four years, particularly across its existing geographies: Europe, North America, and Austria*",[70] BAI Communications recently won a competitive tender for a 20-year concession with TfL [CONFIDENTIAL] to deliver high-speed mobile coverage across the London Underground (despite having a very small presence in the UK at the time of bidding),[71] and has since indicated that it intends to continue expanding "*in the UK and Europe as it pursues, and wins, significant opportunities*".[72] Against this background, it is clear that the market in which Cellnex competes is becoming significantly more competitive.

4.46 In addition, it is unclear whether the CMA has adequately accounted for CTIL's expansion plans in its assessment of competitor expansion plans (as set out in Table 3 and paragraphs 162 to 165 of the SLC Decision). The Parties consider that CTIL's binding commitments to construct an additional c. 1,200 BTS sites by FY25 and accommodate c. 1,950 new passive tenancies on existing sites by FY24 are sufficiently foreseeable to be included in any share of supply analysis of Cellnex's acquisition of the Transfer Sites.

[68] Cellnex S109#1 **Annex 00005572** dated 31 March 2021.
[69] SLC Decision, paragraph 188(b).
[70] See https://www.baicommunications.com/mediarelease/bai-communications-appoints-new-chief-commercial-officer/.
[71] See https://www.baicommunications.com/mediarelease/bai-communications-awarded-20-year-concession-to-deliver-high-speed-mobile-coverage-across-the-london-underground/.
[72] See https://www.baicommunications.com/mediarelease/bai-communications-accelerates-its-growth-trajectory-by-agreeing-to-acquire-us-telecommunications-infrastructure-leader-mobilitie/.

Barriers to entry are low, geographic scale is not an important parameter of competition, and entry and expansion by new players is likely

4.47 As explained in Section 21 of the Merger Notice, and given the substitutability of BTS for existing sites, there are low barriers to entry or expansion and a wide range of potential providers are capable of providing access to developed macro sites. This is in line with the CMA's findings in *Cellnex/Arqiva*:

4.47.1 Paragraph 200: "*...the CMA also considers that a number of other WIPs have received investment and are well-positioned to expand in future*."

4.47.2 Paragraph 140: the industry has been characterized by "*recent entry and expansion", and "entry and expansion are expected in the future*."

4.48 There has been no increase in barriers to entry or expansion since *Cellnex/Arqiva* and the SLC Decision provides no compelling evidence to support any increase in such constraints.

4.49 The SLC Decision claims that geographic scale is an important parameter of competition, however its evidence in support of this assertion is solely self-serving evidence from competitors.[73] As explained in paragraphs 4.13 to 4.17 above, the key implication of limited demand from MNOs for additional sites is that WIPs are able to compete on the basis of BTS and therefore do not need a large portfolio of existing sites or national coverage to credibly compete for opportunities. In addition, as explained in paragraph 4.14 above, there are very few non-MNOs with national coverage requirements, and national coverage is therefore simply not required (and, even for the very few non-MNOs that do have national coverage, they do not generally formally tender for a large number of sites at once).

4.50 In addition, the SLC Decision states that a competitor submitted that "*companies could enter and operate in the market easily*" – which the Parties agree with – but that "*the challenge was how they scaled up*". This disregards the fact that geographic scale is not required to compete – as the competitor accepts. Similarly, the SLC Decision states that Cellnex has a very strong existing market position in the UK,[74] but disregards the competitive constraint imposed by *inter alia* BTS (both through self-supply and supply by a WIP) in reaching that conclusion. In any event, contrary to the competitor quote in the SLC Decision, inorganic growth remains possible outside of MNO assets – for example, [CONFIDENTIAL].

[73] Issues Letter, paragraphs 97 and 98.
[74] Issues Letter, paragraphs 106 and 107.

4.51 Accordingly, the threat of entry is high – through BTS or acquisition – with numerous credible potential entrants, including international WIPs and investors. By way of example of entry into a passive infrastructure market absent a pre-existing market position, in 2020 Phoenix Towers agreed with Bouygues Telecom to deliver 4,000 BTS sites across France, despite having no presence.[75] Phoenix Towers also recently entered the Irish market through the acquisition of 650 sites from Irish telco eir.[76] Section 21 of the Merger Notice explains in detail why there are significant opportunities for new entrants to enter the UK market (or for existing competitors to expand their offerings), which the CMA has failed to consider.

Relationships between MNOs and WIPs when passive infrastructure assets are sold do not make it more difficult for other tower companies to win business

4.52 The SLC Decision cites a competitor response alleging that "*the relationships created between MNO and tower companies when passive infrastructure assets are sold ... increase barriers to expansion by making it more difficult for other tower companies to win business from the MNOs*".[77] The Transaction Sites were captive sites of 3UK prior to the Proposed Transaction and the demand met by these sites was not contestable, and therefore the suggestion that the Proposed Transaction can make it more difficult for WIPs to compete for MNO demand is unfounded. The supply of access to the demand met by the Transaction Sites was not contestable prior to the Proposed Transaction and is not contestable following the Proposed Transaction, at least until the expiry of the MSA between Cellnex and 3UK. 3UK has no requirement to source additional sites from Cellnex going forward.

The SLC Decision relies on simplistic and misleading market share data and Cellnex's bargaining power will not increase as a result of the Proposed Transaction

4.53 Given that the CMA's assessment in the SLC Decision is not anchored on the actual competitive conditions in the market (as explained in detail in paragraphs 4.3 to 4.51 above), the market share data presented in the SLC Decision cannot be an indicator of market power. This is especially the case given:

4.53.1 The Transaction Sites are not currently in competition with Cellnex, nor would they be in any realistic counterfactual.

---

[75] See https://phoenixintnl.com/blackstone-backed-phoenix-tower-international-closes-agreement-with-bouygues-telecom-to-own-and-operate-up-to-4000-sites-across-france/.
[76] See https://phoenixintnl.com/blackstone-backed-phoenix-tower-international-signs-agreement-with-eir-to-own-and-operate-tower-sites-across-ireland/.
[77] SLC Decision, paragraph 224.

4.53.2 There are material limitations on the ability for Cellnex to commercialise the Unilateral Sites and the MBNL Sites (and potentially the Transfer Sites following dissolution of the MBNL JV) – since (as explained in paragraphs 2.15, 2.40 to 2.42, 3.4 and 4.3 to 4.4 above and at paragraph 3.48.2 of the Issues Letter Response) the vast majority of the sites can either not be commercialised at all (as they are congested) or require significant further investment as a prerequisite for increasing co-location.

4.53.3 The market shares presented in the SLC Decision disregard the constraint imposed by BTS (whether self-supplied or supplied by a WIP), which demonstrates that geographic scale is not an important parameter of competition (as explained in paragraphs 4.14 and 4.47 to 4.51 above and at paragraph 3.48.3 of the Issues Letter Response).

4.53.4 The SLC Decision misinterprets the recent bidding data provided by the Parties (as explained in paragraphs 4.34 and 4.35 above).

4.53.5 The CMA has erroneously disregarded CTIL, the largest tower operator in the UK, as a credible and meaningful competitor, despite clear evidence of its ability and intention to compete as a WIP (as explained in paragraphs 4.36 to 4.41 above and at paragraph 3.48.1 of the Issues Letter Response).

4.54 Notwithstanding the material inaccuracies within the market share data presented in the SLC Decision, the CMA has fallen into the error – that its own guidelines caution against – of framing the competitive assessment against a simplistic and misleading "market share" calculation rather than an assessment of how competition in the market actually works and the extent of competitive constraints. Consequently, the SLC Decision provides an artificial and skewed view of Cellnex's position on the relevant market and the increment brought about by the Proposed Transaction.

5. NO CUSTOMERS (INCLUDING BT/EE) COULD BE HARMED AS A RESULT OF THE PROPOSED TRANSACTION

5.1 This section addresses the lack of harm to customers resulting from the Proposed Transaction and, in particular, the following points:

5.1.1 <u>3UK's passive infrastructure does not compete directly with Cellnex</u>: there is little competitive interaction between Cellnex and TowerCo/MBNL. Accordingly, no customers will be harmed as a result of the Proposed Transaction.

5.1.2 The SLC Decision fundamentally mischaracterises Cellnex's rights and abilities in relation to the MBNL Sites: the terms of competition for BT/EE's existing sites are fixed until the end of 2031. Cellnex will have no ability or incentive to adversely affect BT/EE or impact its ability to upgrade the MBNL Sites to 5G and, in any event, BT/EE is already upgrading sites for 5G unilaterally.

3UK's passive infrastructure does not compete directly with Cellnex and no customers (including BT/EE) could be harmed as a result of the Proposed Transaction

5.2 3UK's passive infrastructure does not compete directly with Cellnex and does not represent a significant source of potential macro sites for other customers either before the Proposed Transaction or in the counterfactual (see paragraphs 15.2 to 15.3 of the Merger Notice). In particular:

5.2.1 There is little real competitive interaction between Cellnex and TowerCo due to the significant differences in focus of their activities. While Cellnex actively competes as a provider of access to developed macro sites in the UK, TowerCo does not. TowerCo provides services only to 3UK and its focus is therefore entirely different from that of Cellnex. Indeed, TowerCo/3UK is primarily a potential customer, rather than a competitor, to Cellnex. The Parties cannot therefore be considered to be competitors in any meaningful sense.

5.2.2 Similarly, there is little competitive interaction between Cellnex and MBNL (including the MBNL Sites). Even if Cellnex were to obtain any degree of material influence over MBNL, or over any of the MBNL Sites prior to the dissolution of the MBNL JV (which it will not), the Proposed Transaction would not give rise to any reasonable prospect of an SLC as a result of the competitive interaction between Cellnex and MBNL (including the MBNL Sites). This is because, after Completion, the MBNL JV will continue to be managed by 3UK and BT/EE, and the overwhelming majority of the MBNL Sites (approximately [CONFIDENTIAL]) will continue to be used exclusively by 3UK and BT/EE.

5.3 The effect of the Proposed Transaction is analogous to the outsourcing by 3UK of certain aspects of the management of its passive infrastructure in the UK to Cellnex (which is inherently unlikely to create any competition concerns). As such, there is limited (if any) competitive interaction between Cellnex, TowerCo and/or MBNL (including the MBNL Sites). Accordingly, even if Cellnex were to obtain material influence over the MBNL Sites prior to the dissolution of the MBNL JV (which it will not), and even though Cellnex will obtain material influence and control over the Transfer Sites only after MBNL has been dissolved, there would be no realistic prospect of an SLC in respect of any customer.

The SLC Decision fundamentally mischaracterises Cellnex's rights and abilities in relation to the MBNL Sites

5.4 CK Hutchison's Initial Submission explained why the SLC Decision fundamentally mischaracterises Cellnex's rights and abilities in relation to the MBNL Sites (and why no customer will be harmed by the Proposed Transaction). In particular, it explains that:

5.4.1 Cellnex will not obtain material influence over MBNL or the MBNL Sites (and will only obtain material influence over the Transfer Sites after the dissolution of the MBNL JV);[78]

5.4.2 Cellnex will have no ability to adversely affect BT/EE or any other tenant of the MBNL Sites; and

5.4.3 BT/EE's ability to upgrade its network cannot be affected by the Proposed Transaction.

5.5 As a brief summary, Cellnex will have no ability to influence MBNL's commercial and competitive behaviour in respect of the MBNL Sites (and accordingly the Proposed Transaction will not harm BT/EE) for, amongst others, the following reasons:

5.5.1 The rights Cellnex will obtain in relation to the MBNL Sites are subject to significant limitation. In particular:

(a) 3UK Holdings will not be required to procure that 3UK exercises its rights under the agreements governing the MBNL JV in accordance with Cellnex's instructions if it would lead to a breach by 3UK of its obligations under those agreements,[79] or if it would materially prejudice 3UK's interests in the MBNL JV Agreements.[80]

(b) Cellnex will not be able to veto or influence decisions on building new sites, sourcing sites from third party providers or providing co-location services (including to BT/EE). Cellnex will also not be able to veto or influence decisions by BT/EE to roll out unilateral deployments on the shared MBNL network. Cellnex will therefore not be able to influence

[78] Under the terms of the [CONFIDENTIAL], upon completion of the Proposed Transaction, Cellnex will start receiving the economic rewards, and be obliged to bear the same cost and risks, that Cellnex would have been entitled to/be obliged to bear in respect of the MBNL Sites, had legal title been transferred to Cellnex at the outset. Cellnex will also have certain rights under the [CONFIDENTIAL] which are limited to those necessary for, and directly related to, the protection of Cellnex's economic interests under the [CONFIDENTIAL] in relation to the MBNL Sites. Cellnex will not have the ability to materially influence commercial and strategic decisions in relation to MBNL or the MBNL Sites.
[79] See **Annex 2.5** to the Merger Notice – [CONFIDENTIAL].
[80] See **Annex 2.5** to the Merger Notice – [CONFIDENTIAL].

the ability of BT/EE to credibly threaten the use of self-supply (whether through the MBNL JV or otherwise).

(c) The process for dissolving MBNL and agreeing site sharing between 3UK and BT/EE is not changed or in any way affected by the Proposed Transaction, and will continue to be governed by the MBNL JV Agreements.

5.5.2 The rights that Cellnex will have in relation to the MBNL Sites are limited to those necessary for, and directly related to, the protection of its economic interests under the [CONFIDENTIAL]. As such, they do not impact any other operations or activities of the MBNL JV, including: (i) the sites sourced from third parties (which represent approximately half of the MBNL site grid) and MBNL's ability to contract with third parties; (ii) the active sharing elements of MBNL; and (iii) the backhaul sharing within MBNL.

5.6 The SLC Decision specifically alleges that, as a result of the Proposed Transaction, BT/EE's self-supply constraint on Cellnex might be weakened.[81] This is entirely fanciful in light of the circumstances explained below. In particular, and as explained in detail in the Merger Notice:

5.6.1 The terms of competition for BT/EE's existing sites are fixed until the end of 2031; and

5.6.2 Cellnex will have no ability or incentive to adversely affect BT/EE or any other tenant of the MBNL Sites.

5.7 Each of these points is addressed in turn below.

The terms of competition for BT/EE's existing sites are fixed until the end of 2031

5.8 The terms of competition for the supply of existing sites to BT/EE by MBNL are fixed until the end of 2031 (see paragraphs 15.58 to 15.60 of the Merger Notice).

5.9 Until dissolution of the MBNL JV, the terms for BT/EE in relation to existing MBNL sites (including the MBNL Sites) are governed by the MBNL JV Agreements [CONFIDENTIAL]. As such, Cellnex would have no ability to reduce competition to BT/EE in relation to existing MBNL sites in the near to mid-term in relation to existing sites.

[81] See paragraph 15.79 of the Merger Notice for an explanation as to why the Proposed Transaction can give rise to no loss of competition for supply of developed macro sites to O2 and/or Vodafone.

5.10 The process for dissolving MBNL and agreeing site sharing between 3UK and BT/EE is governed by the MBNL JV Agreements. This process is not changed or in any way affected by the Proposed Transaction. [CONFIDENTIAL].

Cellnex will have no ability or incentive to adversely affect BT/EE or any other tenant of the MBNL Sites

5.11 The SLC Decision puts forward a theory of harm that Cellnex "*could, by way of non-exhaustive example, impact BT/EE's ability to upgrade the MBNL Sites to 5G, with the result that in post-Merger negotiations with Cellnex on upgrading new or existing sites to 5G, or moving to an existing site that is already 5G enabled, 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*."[82]

5.12 This theory of harm is entirely fanciful for the following key reasons:

5.12.1 Cellnex will have no ability to impact the supply of developed macro sites by MBNL to BT/EE (see paragraphs 15.58 to 15.75 of the Merger Notice and CK Hutchison's Initial Submission, as briefly described in paragraph 5.5 above) by virtue of Cellnex's contractual rights under the transaction agreements;

5.12.2 Cellnex will have no incentive to adversely impact BT/EE's network (even if it had the ability, which it will not), as it does not compete on the downstream mobile market (unlike 3UK) and has every interest to co-operate with BT/EE, as BT/EE is a major customer of Cellnex; and

5.12.3 In any event, any theoretical ability to impact supply to BT/EE would have a limited (if any) impact due to BT/EE's contractual rights under the MBNL JV Agreements to "unilaterally deploy" on any MBNL Site without the need for 3UK's (or Cellnex's) approval.

Cellnex will have no ability to impact BT/EE's ability to self-supply through the MBNL JV

5.13 The SLC Decision exaggerates the extent of Cellnex's rights under the transaction agreements. In reality, Cellnex will [CONFIDENTIAL] will not be able to impact the competitive behaviour of the MBNL JV or BT/EE. [CONFIDENTIAL][83]

5.13.1 [CONFIDENTIAL];

5.13.2 [CONFIDENTIAL]; and

5.13.3 [CONFIDENTIAL].

---

[82] SLC Decision, paragraph 167.
[83] Schedule 1 to the Merger Notice, paragraph 3 and Table 1.

5.14 [CONFIDENTIAL]. The [CONFIDENTIAL] contains only limited rights for Cellnex to protect it against certain of the costs and risks it is exposed to under the economic benefit arrangements in respect of the MBNL Sites that underline the [CONFIDENTIAL]. These rights will *not* give Cellnex material influence over MBNL or the MBNL Sites nor will they allow Cellnex to impact the competitive behaviour of MBNL prior to its dissolution. Crucially, Cellnex will have no influence whatsoever in respect of:

5.14.1 [CONFIDENTIAL];

5.14.2 [CONFIDENTIAL]; and/or

5.14.3 [CONFIDENTIAL].

5.15 Furthermore, the CMA has disregarded a key element of the [CONFIDENTIAL] which reduces the extent of Cellnex's (already limited) rights even further, namely that the [CONFIDENTIAL] expressly provides that 3UK Holdings cannot be required to act in any way which could lead to a breach by 3UK of its obligations under the MBNL JV Agreements. In particular:

5.15.1 [CONFIDENTIAL].

5.15.2 [CONFIDENTIAL].

(a) [CONFIDENTIAL].

(b) [CONFIDENTIAL].

(c) [CONFIDENTIAL].

5.15.3 [CONFIDENTIAL].

Cellnex will have no incentive to impact BT/EE's ability to self-supply through the MBNL JV or upgrade the MBNL Sites to 5G

5.16 Unlike 3UK, Cellnex is not a competitor to BT/EE. On the contrary, BT/EE is an important customer of Cellnex. Cellnex has no interest in adversely impacting BT/EE's network and every interest to cooperate with BT/EE to improve its chances of securing future demand from BT/EE.

5.17 In particular, Cellnex will have no incentive to adversely impact the supply of developed macro sites by MBNL to BT/EE (see paragraphs 15.76 to 15.78 of the Merger Notice). Given the availability of competing options for MBNL to source new sites (particularly in light of the commercialisation of CTIL and the range of alternatives available to MBNL, including the WIPs with whom MBNL already has framework agreements [CONFIDENTIAL]) and the need for BT/EE to agree to decisions as to key vendors, Cellnex would have no incentive to veto a self-supply proposal.

5.18 Fundamentally, Cellnex (a supplier to BT/EE) cannot have a greater incentive to disrupt BT/EE's network plans than 3UK (its direct competitor on the downstream retail mobile market).

5.19 Indeed, it is self-evident that BT/EE, like the other two UK MNOs, would *benefit* considerably if the Proposed Transaction did not proceed because, as explained in section 6 below, 3UK would be less competitive on the downstream mobile market, particularly in respect of 5G. The CMA should therefore be particularly cautious regarding any statements by BT/EE that its interests may be adversely affected by the Proposed Transaction. BT/EE's overarching strategic interest is in reducing the competitiveness of 3UK in the retail mobile market rather than any contrived concern regarding competition on the market for the supply of access to developed macro sites or unfounded harm that can result from Cellnex's limited rights in connection with the MBNL Sites.

BT/EE is upgrading sites for 5G largely unilaterally, and its demand for additional sites through MBNL is expected to be limited

5.20 [CONFIDENTIAL].

5.21 [CONFIDENTIAL] has resulted in BT/EE, the largest UK MNO, achieving a faster rollout of new technology with consequent benefits to its network reputation and competitive positioning, particularly as against 3UK. The fact that 3UK is not in a position to use any aspect of the MBNL JV Agreements to affect BT/EE's network competitiveness is illustrated by the fact that BT/EE enjoys the best network reputation in the UK, while 3UK has consistently ranked as a poorer quality network.

5.22 [CONFIDENTIAL].[84] [CONFIDENTIAL].

5.23 [CONFIDENTIAL].

5.24 [CONFIDENTIAL].

5.25 [CONFIDENTIAL].[85] [CONFIDENTIAL]

Figure 6: [CONFIDENTIAL][86]

[84] [CONFIDENTIAL].
[85] [CONFIDENTIAL].
[86] [CONFIDENTIAL].

5.26 The theory of harm that BT/EE could be negatively impacted by the Proposed Transaction is, in those circumstances, entirely fanciful. Cooperation between 3UK and BT/EE is already limited. More importantly, BT/EE has its own considerable portfolio of approximately 3,000 unilateral sites, and has access to a large property portfolio. BT/EE is likely to continue its independent network strategy and develop its 5G network largely independently, with Cellnex having no ability to influence this. [CONFIDENTIAL]. Cellnex will therefore have no rights under the transaction agreements with regards to any decisions involving unilateral deployments.[87]

6. THE PROPOSED TRANSACTION WILL HAVE SIGNIFICANT CUSTOMER BENEFITS

6.1 It was explained in Section 4 of CK Hutchison's Initial Submission why the Proposed Transaction is essential to support critical investment in 3UK's 5G network and therefore why the Proposed Transaction will have significant consumer benefits.

6.2 From CK Hutchison's perspective, the sale of its tower assets across Europe was motivated by the goal of achieving a more efficient capital allocation and enhancing its strategic focus on the provision of telecommunications activities.

6.3 In the UK in particular, the proceeds from the Proposed Transaction will *inter alia* support faster and more extensive investment in 3UK's 5G network creating significant consumer benefits. [CONFIDENTIAL].

6.4 In this section, we explain further:

6.4.1 [CONFIDENTIAL].

6.4.2 [CONFIDENTIAL].

6.4.3 [CONFIDENTIAL].

6.4.4 [CONFIDENTIAL].

6.4.5 [CONFIDENTIAL]. Future investment in 3UK must be in line with the CK Hutchison approach to investment.

6.4.6 [CONFIDENTIAL]. The credit rating agencies have made it clear that further debt funded investment by CK Hutchison would be a downgrade trigger.

[87] See row 12 in the table at Schedule 1 to the Merger Notice.

Key challenges faced by 3UK

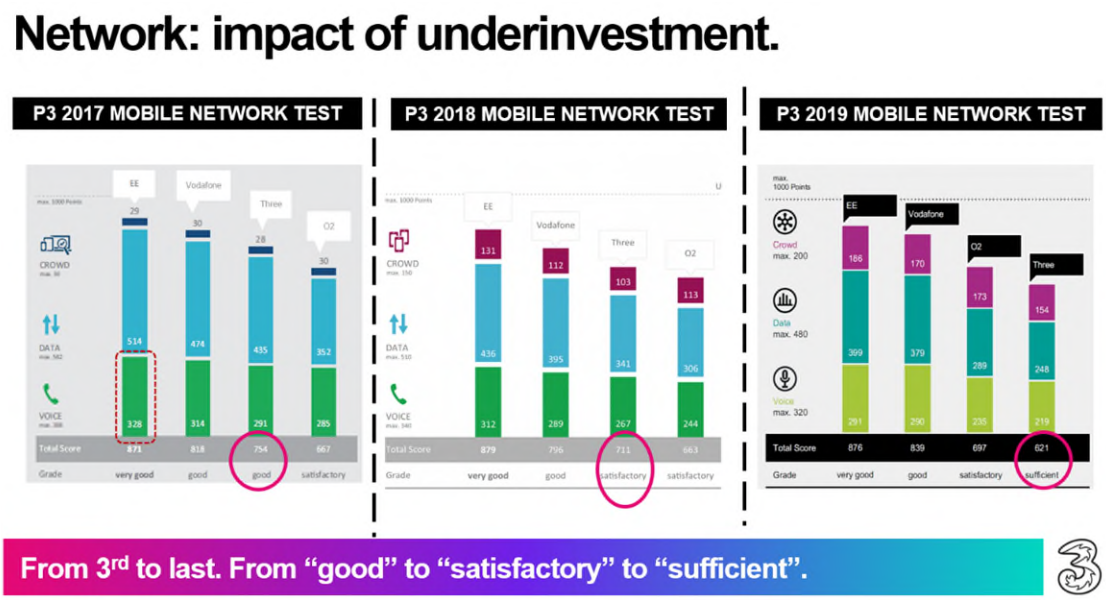
6.5 3UK is the smallest of the four MNOs in the UK and its network has suffered from significant congestion. [CONFIDENTIAL].

6.6 Key challenges faced by 3UK include the following:

6.6.1 3UK had the lowest mobile customer satisfaction of the 10 providers listed in Ofcom's 2020 Comparing Service Quality Report.[88]

6.6.2 As shown in **Figure 7 below**, 3UK's network ranked last in Umlaut's 2019 mobile network test, declining from third place and a rating of "good" in 2017 to "satisfactory" in 2018 and then only "sufficient" in 2019.[89]

Figure 7: 3UK's declining mobile ranking



Source: Umlaut's 2019 mobile network test

6.6.3 [CONFIDENTIAL].

6.6.4 3UK is facing increased costs due to:

(a) [CONFIDENTIAL]; and

(b) Regulatory changes to Annual Licence Fees resulting in a [CONFIDENTIAL]% increase in operating costs from 2019 to 2021,

[88] See page 3 of Ofcom's 2020 Comparing Service Quality Report, available at: https://www.ofcom.org.uk/__data/assets/pdf_file/0014/201434/comparing-service-quality-2019.pdf.

[89] Umlaut has not yet published a 2020 Mobile Network Test.

with a further [CONFIDENTIAL]% growth expected from 2021 to 2022.

6.7 As a consequence, [CONFIDENTIAL].

5G can be a turning point for 3UK if significant investment is made without delay

6.8 A strong 5G offering can be a turning point for 3UK. 3UK currently has the largest 5G spectrum holdings in the UK compared to the other three MNOs (3UK holds 160MHz of 5G spectrum, with a mix of mid band (3.4-3.8 GHz) and low band (700MHz) spectrum). Investment in its 5G network would allow 3UK to compete more effectively against the other MNOs and recapture market share.

6.9 However, this opportunity can only be realised if significant investment is made very rapidly to upgrade 3UK's radio network for 5G. 3UK has assessed its network investment requirements will amount to at approx. [CONFIDENTIAL]:

Table 2: 5-year plan for capex spend

	Capex spend per year (£m)					
	2021	**2022**	**2023**	**2024**	**2025**	**Total**
Total capex	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
Of which network capex	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]

Source: 2021 Budget (as presented in Q4 2020). See also page 5 of ***Annex CKH-0000033*** *to CK Hutchison's response to the s109 Notice submitted on 25 August 2021.*

6.10 [CONFIDENTIAL], the timing of 3UK's investment in its 5G network is critical otherwise it risks falling further behind.

6.11 The other three MNOs (BT/EE, Vodafone and O2) will continue to be in a position to offer an acceptable level of network performance based on their greater 4G spectrum holdings in the short to medium term. [CONFIDENTIAL].

[CONFIDENTIAL]

6.12 3UK's current performance and competitiveness is such that it [CONFIDENTIAL].

6.13 [CONFIDENTIAL].

Figure 8: [CONFIDENTIAL]

6.14 [CONFIDENTIAL]. For example, an October 2020 report by Enders Analysis stated: "*At just 6%, H3G's return on capital employed (ROCE) is well below its cost of capital and worsening thanks to a shrinking sector, ongoing spectrum costs and the costs of 5G rollout, which are increasing enormously following the decision to ban Huawei. The rollout will be more protracted, pushing out any prospect H3G has to turn its situation around*" (see page 2 of **Annex CKH 010 [2 September]**). Indeed, Enders notes that 3UK is "*earning below its likely pre-tax WACC which stands at a nominal 9% on the basis of Ofcom analysis*". [CONFIDENTIAL].

6.15 [CONFIDENTIAL].

3UK's 5G network investment plans rely on the proceeds from the Proposed Transaction

6.16 3UK has assessed that approx. [CONFIDENTIAL] of further critical capital investment is required to support its 5G rollout (see page 5 of **Annex CKH-0000033**).

6.17 3UK's current investment plans are predicated on the basis that the Proposed Transaction will proceed. CK Hutchison has communicated this strategy internally and externally:

6.17.1 [CONFIDENTIAL].

6.17.2 This is supported by CK Hutchison's public announcements (see **Annexes CKH 10.21 [12 March] – CKH 10.23 [12 March]**, **CKH-0000038 and CKH-0000039**), which note that CK Hutchison will utilise the consideration from the Proposed Transaction for general corporate purposes (which includes 5G investment), reducing financial indebtedness consistent with its existing credit ratings, and optimising capital structure and returns to shareholders. CK Hutchison Group Telecom also noted in its Q3 2020 trading update dated 4 November 2020[90] that "*3UK progresses to complete IT transformation and planned acceleration of 5G rollout*".

[90] Please see https://doc.irasia.com/listco/hk/ckh/announcement/a238514-e_ckhhannouncement_ckhgt2020q3tradingupdate.pdf.

6.17.3 The use of the Proposed Transaction proceeds towards 5G investment is also recognised in the CK Hutchison's annual report, which states as follows: "*Following the transactions, the Group will be able to increase its focus on developing its networks and IT platforms, and will retain optionality to accelerate the rollout of its 5G networks, while benefiting from significant additional financial capacity to support future growth and opportunities*".[91]

6.18 This is also reflected in 3UK's current budget. As explained in Section 5 of CK Hutchison's response on 25 August 2021 to the CMA's section 109 notice dated 27 July 2021, [CONFIDENTIAL]:

6.18.1 [CONFIDENTIAL].

6.18.2 [CONFIDENTIAL].

6.18.3 [CONFIDENTIAL].

6.18.4 [CONFIDENTIAL].

Future investment in 3UK in the absence of the Proposed Transaction

6.19 Any decision by CK Hutchison to invest capital or debt in 3UK in order to fund its 5G rollout would have to be made in line with CK Hutchison's approach to investment. In the absence of the significant additional funding expected from the Proposed Transaction proceeds, [CONFIDENTIAL].

CK Hutchison's approach to investment

6.20 CKHH is listed on The Stock Exchange of Hong Kong Limited. It has operations in over 50 countries in four core businesses: ports, retail, infrastructure and telecommunications. It operates mobile telecommunications businesses in 11 countries (including the UK). 3UK must therefore compete for further investment with all other potential investment opportunities within the Group.

6.21 CK Hutchison pursues a strategy of "growth with stability" by which it seeks to (i) grow recurring earnings per share and (ii) maintain a strong financial profile, strong liquidity and cash flow generation, as well as a conservative net debt to net total capital ratios so as to maintain its investment grade credit ratings (of A2, A and A- from Moody's, S&P and Fitch respectively).

[91] See page 12 of CK Hutchison's 2020 Annual Report, available at: https://doc.irasia.com/listco/hk/ckh/annual/2020/ar2020.pdf.

6.22 This strategy is reflected in the Corporate Strategy section of the CKHH 2020 Annual Report: "… the Group focuses on achieving recurring and sustainable earnings, cash flow and dividend growth without compromising the Group's financial strength and stability".[92]

6.23 [CONFIDENTIAL].

6.24 [CONFIDENTIAL].

6.25 [CONFIDENTIAL].

6.26 [CONFIDENTIAL].

6.27 Credit rating agencies focus on cash flow, liquidity, levels of gross and net debt and other financial measurements. All three major credit rating agencies have indicated in their recent publications that they expect CK Hutchison to manage the capex needs in the telecommunication division in order to mitigate negative cash flow otherwise this may lead to a ratings downgrade:

6.27.1 S&P indicated that "*debt-funded expansion that is more aggressive than we anticipate*" would be a downgrade trigger, specifying that such an approach may be indicated by "*a debt-to EBITDA ratio at 4.0x on a sustainable basis*" (see S&P Global Ratings Report, CK Hutchison Holdings Ltd, published on 12 October 2020 at **Annex CKH 011 [2 September]**);

6.27.2 Moody's similarly indicated that potential factors that may lead to a ratings downgrade include "if (1) CKHH's key debt metrics weaken, (2) the stable income from the group's non-telecommunications businesses is disrupted, (3) the improving trend at 3 Group Europe reverses, or (4) the group makes large debt-funded acquisitions" (see Moody's Credit Opinion, CK Hutchison Holdings Limited, published on 30 March 2021 at **Annex CKH 014 [2 September]**); and

6.27.3 Fitch expressed an expectation that CK Hutchison will "continue its measured approach to capex and 5G investments in its telecom operations", confirming that "significant changes in the business mix and capital structure management that have adverse effects on [CK Hutchison's] credit risk profile" could lead to a downgrade in CK Hutchison's current rating (see Fitch Ratings, Spotlight: CK Hutchison Holdings Limited, published on 12 January 2021 at **Annex CKH 013 [2 September]**).

[92] See page 100 of CK Hutchison's 2020 Annual Report, available at: https://doc.irasia.com/listco/hk/ckh/annual/2020/ar2020.pdf.

6.28 CK Hutchison has stated publicly to its stakeholders and the credit ratings agencies that it is committed to maintaining "a capital structure that is appropriate for long-term investment grade ratings of A2 on the Moody's Investor Service scale, A on the S&P Rating Services scale and A- on the Fitch Ratings scale".[93]

6.29 [CONFIDENTIAL].

Conclusion

6.30 [CONFIDENTIAL].

6.31 [CONFIDENTIAL].

6.32 [CONFIDENTIAL].

7. CONCLUSION

7.1 In summary, contrary to the assertions in the SLC Decision, there is no realistic prospect of the Proposed Transaction eliminating a significant potential competitor or – given the very significant competitive constraints that will remain post-merger – strengthening Cellnex's existing market position. On this basis, there is no prospect of the Proposed Transaction allowing Cellnex to maintain prices at higher levels, or quality, range, service and innovation at lower levels than would have arisen in the counterfactual – and accordingly the Proposed Transaction cannot, on the balance of probabilities, be said to give rise to an SLC.

Clifford Chance LLP and Freshfields Bruckhaus Deringer LLP

2 September 2021

93 See page 64 of CK Hutchison's 2020 Annual Report, available at: https://doc.irasia.com/listco/hk/ckh/annual/2020/ar2020.pdf.