

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

### RESPONSE BY BT TO THE CMA'S STATEMENT OF ISSUES PUBLISHED 19 AUGUST 2021

#### 1. Introduction

1.1 BT<sup>1</sup> welcomes the opportunity to engage with the CMA in its Phase 2 review of the anticipated acquisition by Cellnex of the passive infrastructure assets of CK Hutchison and makes this submission in response to the CMA's issues statement dated 19 August 2021 (the **Issues Statement**). If completed in its notified form, the Merger would represent a significant development in the UK wireless telecommunications sector, raising serious competition concerns that will adversely affect the supply of access to developed macro wireless telecommunications sites and ancillary services to BT and other UK wireless communication providers. Unless stated otherwise, defined terms used in this response have the meaning given to them in the CMA's decision on reference under section 33(1) of the Enterprise Act 2002, given on 13 July 2021 (the **Phase 1 Decision**).

1.2 Of particular note, BT considers that the Merger would:

- (a) materially enlarge the already significant share of the Relevant Market held by Cellnex, thereby strengthening Cellnex's bargaining position in commercial negotiations for access to developed macro sites;
- (b) remove any realistic scope for Cellnex's smaller competitors to achieve critical scale in the short- to medium-term;
- (c) inevitably lead to higher prices for the services offered by Cellnex to BT and other UK wireless operators and lower service levels; and
- (d) adversely impact BT's ability to utilise the MBNL JV to roll out 5G services to UK customers.

1.3 BT therefore agrees with the CMA's conclusion that the Merger gives rise to a realistic prospect of a substantial lessening of competition and welcomes the decision to refer the Merger for a Phase 2 investigation.

1.4 Many of the concerns highlighted below are discussed in more detail in BT's response to the CMA's second Phase 2 request for information (**RFI2**), submitted to the CMA on 14 September 2021.

#### 2. Cellnex already holds a very strong position in the relevant UK markets

2.1 As set out in Table 1 of the Phase 1 Decision, Cellnex already holds between 80% to 90% of the UK's developed macro sites and 90% to 100% of the UK's available PoPs (in each case excluding supply by MNOs and MNO JVs). By contrast, the next largest supplier (WIG) holds just 5% to 10% of both developed macro sites and PoPs. No other UK supplier holds a share greater than 5%. The Phase 1 Decision also found that independent WIPs have limited plans to expand through organic growth and that the scale of their evidenced expansion plans is very small, concluding that smaller WIPs will not be able to materially increase their share of existing sites relative to Cellnex.<sup>2</sup> Overall, the CMA found that "*WIG is a weak constraint on Cellnex in relation to the supply of access to developed macro sites in the UK and that other independent WIPs represent an even weaker constraint.*"<sup>3</sup>

2.2 BT agrees with the CMA's assessment at Phase 1 that BTS sites are not a meaningful constraint on Cellnex's existing site portfolio (as would be enlarged by the Merger). In particular, BT agrees that existing sites hold a considerable advantage for other WIPs over BTS sites insofar as the latter involve significant risks in terms of lease acquisition

<sup>1</sup> References in this response to BT include EE.

<sup>2</sup> At paragraph 188(a) of the Phase 1 Decision.

<sup>3</sup> At paragraph 190 of the Phase 1 Decision.

(for rights to deploy sites on land/buildings), planning consent and construction delays, whereas the former will be available for use much sooner, if not immediately. BT also takes note of the evidence collected by the CMA at Phase 1 showing that in 2020, Cellnex won almost all of the contracts that it bid for on the basis of its existing sites network.

- 2.3 BT believes that the limited demand-side substitutability between BTS and existing sites exacerbates the weak constraint posed by WIPs on Cellnex insofar as those competitors have a much smaller installed base of sites and a much more limited geographic footprint and, as a result, are forced to rely on BTS sites to a much greater extent than Cellnex to meet customer demand. Consistent with this, BT notes that the CMA's Phase 1 investigation found that "*bidding data shows that Cellnex bid for most of the opportunities it was aware of and won almost every opportunity that it bid for*"<sup>4</sup> and that "*The Parties' bidding data also indicates that independent WIPs pose a weak constraint against Cellnex*".<sup>5</sup>
- 2.4 [CONFIDENTIAL]. This includes the supply by Cellnex of:
- (i) c.[CONFIDENTIAL] sites leased by BT/EE and 3UK jointly from third party WIPs (the [CONFIDENTIAL] includes MNO WIP sites) [CONFIDENTIAL];
  - (ii) c.[CONFIDENTIAL] sites leased directly by BT/EE (unilaterally, i.e. not jointly with 3UK) from third party WIPs (the [CONFIDENTIAL] includes MNO WIP sites) [CONFIDENTIAL]; and
  - (iii) a further c.[CONFIDENTIAL] sites leased by BT/EE or by BT/EE and 3UK jointly [CONFIDENTIAL].
- 2.5 Overall, Cellnex currently controls approximately [CONFIDENTIAL] of the wireless telecommunications sites used by BT [CONFIDENTIAL]. The costs for an operator to relocate from existing Cellnex sites (to other existing infrastructure belonging to a third party, or to self-supplied infrastructure) are significant and carry a sizeable operational risk, including adverse impacts on customer experience if there are any gaps in the provision of service as a result of the relocation. Moreover, the commercial arrangements pursuant to which Cellnex provides access to its sites contain a number of provisions that make it very difficult for BT to switch to alternative providers and / or self-supply. [CONFIDENTIAL] a limited amount of credit is created. Further detail in this respect has been provided by BT in response to RFI2, Question 1(a)(ii).

### 3. Cellnex's market position is reinforced by high barriers to switching

- 3.1 BT notes that the evidence gathered by the CMA in its Phase 1 investigation showed that independent providers of wireless telecommunications sites in the UK face significant barriers to entry and expansion, including difficulties in accessing anchor tenants to finance new sites and construction costs as well as compounding economics and market power enjoyed by Cellnex.<sup>6</sup> This evidence is consistent with BT's experience of sourcing wireless telecommunications infrastructure.
- 3.2 BT believes that the combination of onerous contractual terms [CONFIDENTIAL], the high costs of relocating and the relatively weak position of any alternative UK WIPs results in Cellnex currently holding a position of significant commercial leverage [CONFIDENTIAL]. This view appears to be shared by Cellnex itself insofar as internal Cellnex documents reviewed by the CMA "*show that Cellnex is currently a leading provider in the UK and that the Merger will further strengthen its existing position*".<sup>7</sup> BT has provided additional evidence in response to Question 7 of RFI 2 on the considerable bargaining power that Cellnex already enjoys in the UK, which would be enhanced by the Merger.

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<sup>4</sup> At paragraph 147 of the Phase 1 Decision.

<sup>5</sup> At paragraph 186 of the Phase 1 Decision.

<sup>6</sup> At paragraph 221 of the Phase 1 Decision.

<sup>7</sup> At paragraph 184(a) of the Phase 1 Decision.

#### 4. The Merger will strengthen Cellnex's already significant market position, resulting in price rises

4.1 The CMA clearly considered carefully at Phase 1 how best to assess the likely impact of the Merger on Cellnex's existing market position taking into account the proposed acquisition by Cellnex of the Transaction Sites, as well adjustments for certain foreseeable changes in market structure. Based on that assessment, BT understands that the Unilateral Sites would represent an increment of 20% to 30% to Cellnex's existing (adjusted) 60% to 70% share of available UK sites, giving a combined post-Merger adjusted share of 80% to 90%. When considering the impact of Cellnex's proposed acquisition of the Transfer Sites from 2031, the CMA's Phase 1 assessment shows that the Merger would add an increment of 30% to 40% to Cellnex's adjusted existing share of UK sites, resulting in a combined adjusted share of between 90% to 100%.<sup>8</sup> BT notes that the CMA's Phase 1 assessment concluded that post-Merger:

*"The only remaining suppliers active would be a tail of significantly smaller suppliers (ie WIG, Shared Access, FreshWave, Britannia Tower and Radius). Post-merger, the HHI would be over 8,000 with a delta of over 3,500. The CMA considered that these adjusted shares of supply provide prima facie evidence that Unilateral Sites and Transfer Sites represent a significant group of assets, even when considered in the context of other foreseeable changes in market structure."*

4.2 BT is not in a position to comment on the most likely counterfactual against which the Merger should be assessed but notes the CMA's Phase 1 assessment that, absent the Merger, *"there is a realistic prospect that CK Hutchison would have sold the Transaction Sites to another purchaser, which would have brought about a significant additional constraint on Cellnex"*.<sup>9</sup>

4.3 In light of this, BT agrees with the CMA's assessment that the Merger will result in a material strengthening of Cellnex's already very strong market position. As noted above, Cellnex currently controls approximately [CONFIDENTIAL] of the wireless telecommunications sites used by [CONFIDENTIAL]. The Merger would directly result in a [CONFIDENTIAL]% increase in the number of Cellnex sites in BT's overall portfolio, from c.[CONFIDENTIAL] to c.[CONFIDENTIAL] as of 2031, which would represent approximately half of BT/EE's sites at that time and, as set out in BT's response to question 1(a)(iii) in RF12, this number could materially increase depending on what happens between now and the dissolution of the MBNL JV. Given the very weak constraint exercised by Cellnex's competitors, BT has [CONFIDENTIAL].

4.4 BT believes that the Merger will therefore result in a significant strengthening of Cellnex's commercial position as a supplier of wireless sites and associated services to BT.<sup>10</sup> In practical terms, BT is concerned that this will result in significant increases to the prices charged by Cellnex to BT [CONFIDENTIAL].

4.5 In addition, BT has concerns about [CONFIDENTIAL<sup>11</sup>].

4.6 It should be the case that, with the size and scale to have efficient processes to support delivery performance, Cellnex would have a better track record with on-time provision and service generally. However, we consider that, given its strong market position and bargaining position, Cellnex is able to provide a lower level of service. BT is concerned that with a stronger market position and bargaining power, this would be entrenched and potentially extended. Further, not being able to acquire the Transfer Sites would mean that other WIPs might struggle to obtain the scale and scope to invest in efficient processes to support delivery performances, impacting services levels more broadly.<sup>12</sup>

<sup>8</sup> At paragraphs 162 to 163 of the Phase 1 Decision, in each case excluding CTIL sites.

<sup>9</sup> At paragraph 207 of the Phase 1 Decision.

<sup>10</sup> Given that Cellnex has different incentives, as an independent infrastructure provider intent on commercialising that infrastructure, compared with a mobile operator who has to control its cost base, BT/EE considers that Cellnex may be incentivised to exert influence in this area (for more information see our response to Q1(a)(ii) and Q7 of RF12).

<sup>11</sup> [CONFIDENTIAL]

<sup>12</sup> [CONFIDENTIAL] In this respect, the Government has noted that a more diverse and competitive supply base for telecom networks will increase quality, innovation and resilience of the UK's networks ([SG Supply Chain Diversification Strategy - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/536222/SG_Supply_Chain_Diversification_Strategy_-_GOV.UK_(www.gov.uk).pdf)). This also applies to passive infrastructure assets.

## 5. Impact of the Merger on MBNL sites

- 5.1 The CMA has assessed whether Cellnex's acquisition of material influence over the MBNL Sites (pending dissolution of the MBNL JV) may impact BT's ability to influence the commercial policy for the MBNL Sites, adversely effecting BT's ability to credibly threaten the use of self-supply and/or roll out 5G to its UK customers, in turn, further weakening BT's bargaining position against Cellnex. As BT has previously explained to the CMA, Cellnex / Hutchison have not provided BT with any details as to the rights over MBNL Sites that Cellnex would acquire pursuant to the Merger. BT notes that the CMA has recognised this in its Phase 1 Decision:

*“CK Hutchison did not consent, for the purposes of the Phase 1 proceedings, to the CMA disclosing to BT/EE details of the rights that Cellnex would obtain over the MBNL Sites. The CMA notes, in this regard, that its ability to test the Parties' submissions with BT/EE, as a relevant third party that is well placed to provide evidence in relation to the impact of the Merger on its business, including as regards its ability to upgrade MBNL Sites to 5G or to self-supply using the MBNL Sites, was limited. For this reason, the CMA has not, at this stage, been able to attach material weight to the Parties' submissions on the impact of the Merger on BT/EE”.*

- 5.2 BT notes the CMA's conclusion at Phase 1 that the Merger may reduce the constraint that BT's self-supply through the MBNL JV currently exercises on Cellnex and that this in turn may further strengthen Cellnex's market position pending dissolution of the MBNL JV. However, BT believes that the material influence acquired by Cellnex over the MBNL Sites is also likely to have a significant impact on Cellnex's market position *after* the MBNL JV dissolution. [CONFIDENTIAL]<sup>13</sup> [CONFIDENTIAL].
- 5.3 BT has provided the CMA with further detail on the Merger's potential impact on the MBNL Sites in its response to RF12.

## 6. Conclusion

- 6.1 BT agrees with the CMA's conclusion that the Merger gives rise to a realistic prospect of a substantial lessening of competition and welcomes the decision to refer the Merger for a Phase 2 investigation. The Merger will strengthen Cellnex's already strong position in the UK and increase its supplier power to the detriment of its customers, and also to the detriment of smaller WIPs' and new entrant providers' ability to compete in the UK. In BT's view, this would inevitably lead to higher prices and lower services levels. Moreover, BT believes that there is a realistic prospect that the Merger will adversely impact BT's ability to utilise the MBNL JV to roll out 5G services to UK customers.

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<sup>13</sup> As explained in BT's response dated 25 May 2021, to the CMA's questionnaire received 14 May 2021, and in BT's response to RF12, BT is not clear on what rights 3UK now has to grant reciprocal Access Arrangements on Sites where Cellnex has an economic interest.