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

Notice of possible remedies under Rule 12 of the CMA's rules of procedure for merger, market and special reference groups[1]

Introduction

1. On 27 July 2021, the Competition and Markets Authority (CMA), in exercise of its duty under section 33(1) of the Enterprise Act 2002 (the Act), referred the anticipated acquisition (the Merger) by Cellnex UK Limited (Cellnex) of the passive infrastructure assets in the UK of the CK Hutchison group (CK Hutchison) (together, the Parties) for further investigation and report by a group of CMA panel members (the Inquiry Group).

2. In our provisional findings on the reference notified to the Parties on 16 December 2021 (the Provisional Findings Report),[2] we, among other things, provisionally concluded that the Merger would result in the creation of a relevant merger situation, and that the creation of that situation may be expected to result in a substantial lessening of competition (SLC) in the supply of access to developed macro sites and ancillary services to wireless communication providers in the UK.

3. This Notice sets out the actions which the CMA considers it might take for the purpose of remedying, mitigating or preventing the provisional SLC[3] [4] and/or any resulting adverse effects identified in the Provisional Findings Report.

4. We invite comments on possible remedies by Friday 7 January 2022.

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[1] CMA Rules of Procedure for Merger, Market and Special Reference Groups (CMA17, March 2014 corrected November 2015).
[2] See the Cellnex / CK Hutchison case page.
[3] Section 36 of the Act.
[4] Elsewhere in this Notice, references to remedying the SLC are used as shorthand for the statutory reference to remedying, mitigating or preventing the SLC.

Criteria

5. In deciding on a remedy, the CMA shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy the provisional SLC and any adverse effects resulting from it.[5]

6. To this end, the CMA will seek remedies that are effective in addressing the provisional SLC and its resulting adverse effects and will select the least costly and intrusive remedy that it considers to be effective.

7. The CMA will seek to ensure that no remedy is disproportionate in relation to the provisional SLC and its adverse effects.[6]

Possible remedies on which views are sought

8. The CMA prefers structural remedies, such as divestiture or prohibition, over behavioural remedies, because:

   (a) Structural remedies are more likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring rivalry;

   (b) behavioural remedies are less likely to have an effective impact on the SLC and its resulting adverse effects, and are more likely to create significant costly distortions in market outcomes; and

   (c) structural remedies rarely require monitoring and enforcement once implemented.[7]

9. At this stage, we have identified the following potential structural remedies:

   (a) Prohibition of the Merger.

   (b) the divestiture of a package of developed macro sites and ancillary services. Such a divestiture package could in principle take a number of forms, including:

      (i) A subset of the CK Hutchison developed macro sites and ancillary services proposed to be acquired by Cellnex; or

      (ii) Some or all the UK developed macro sites and ancillary services currently operated by Cellnex.

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[5] Section 36(3) of the Act.
[6] *Merger Remedies: CMA87,* December 2018, paragraph 3.3 and 3.4.
[7] *Merger Remedies: CMA87,* December 2018, paragraph 3.46.

10. The scale and scope of any divestiture package would need to be sufficient to replicate competition to the level that would have prevailed absent the Merger. In this case we have provisionally adopted a counterfactual which envisages more competitive conditions than prevailed prior to the Merger. This means that a divestiture remedy would need to provide a purchaser with the means to compete effectively and independently at a national level, replicating the rivalry that would have been provided by the CK Hutchison sites absent the Merger, in the supply of developed macro sites and ancillary services to wireless communications providers.

11. Our current view is that a behavioural remedy on its own is unlikely to be an effective remedy to the SLC or any resulting adverse effects that we have provisionally identified. However, we will consider any behavioural remedies put forward as part of this consultation.

12. More generally we will consider any other practicable remedies that the Parties, or any interested third parties, may propose that could be effective in addressing the provisional SLC and/or any resulting adverse effects.

13. In determining an appropriate remedy, we will consider the extent to which different remedy options would be effective in remedying, mitigating or preventing the SLC or any resulting adverse effects that have been provisionally identified.

14. We will also consider whether a combination of measures is required to achieve a comprehensive solution – for example whether any behavioural remedies would be required in a supporting role to safeguard the effectiveness of any structural remedies. We will evaluate the impact of any such combination of measures on the provisional SLC or any resulting adverse effects.

Prohibition

15. As indicated in paragraph 2 above, we have provisionally concluded that the Merger would result in the creation of a relevant merger situation, and that the creation of that situation may be expected to result in an SLC.

16. Prohibition of the Merger would prevent the creation of the relevant merger situation and therefore prevent the SLC we have provisionally identified arising. We therefore consider that prohibition would represent an effective and comprehensive solution to the SLC that has been provisionally found (and consequently any resulting adverse effects).

Divestiture

17. An alternative to prohibiting the Merger would be to instead require, as a condition of allowing the Merger to proceed, the divestiture by Cellnex and/or CK Hutchison, of developed macro sites and ancillary services in the UK. Such a divestiture would be intended to remedy the SLC we have provisionally identified by restoring rivalry in the market to the level that would have prevailed absent the Merger.

18. Divestiture would bring the acquirer of any divested developed macro sites and ancillary services into competition with Cellnex. To be effective in remedying the SLC we have provisionally identified, such a divestiture would need to provide the acquirer with the means to compete effectively and independently at a national level, replicating the rivalry that would have been provided by the CK Hutchison sites absent the Merger (taking into account the appropriate counterfactual in the case).

19. In evaluating possible divestitures as a remedy to the provisional SLC that has been found, we will consider the likelihood of achieving a successful divestiture and the associated risks. In reaching its view, we will have regard to the following critical elements of the design of divestiture remedies:

The scope of the divestiture package

20. To be effective in remedying the provisional SLC, any divestiture package would need to restore competition to the level that would have prevailed absent the Merger and be appropriately configured to be attractive to potential purchasers of the divestiture package. As noted above there are different ways in which a divestiture package might be formed.

Subset of the CK Hutchison macro sites proposed to be acquired by Cellnex

21. In principle, it may be possible that the divestiture of a subset of the CK Hutchison macro sites to be acquired by Cellnex if the Merger were to complete could remedy the provisional SLC. These comprise:

    (a) [100-200] developed macro sites that were previously owned by UK Broadband, a wholly-owned subsidiary of 3UK (the 'UKB Sites');

    (b) 2,600 monopoles (the 'Unilateral Sites'); and

    (c) Between 3,000 and 3,750 sites ('Transfer Sites') which would be transferred to Cellnex from CK Hutchison on the dissolution of the MBNL JV between CK Hutchison and BT/EE, which the MBNL JV agreements provide for to happen on 31 December 2031 (or earlier if agreed).

22. Given the nature of the provisional SLC, in particular that an SLC has been found on a national basis, to be effective any such divestiture would need to provide a purchaser with the means to compete effectively and independently at a national level, replicating the competitive capabilities of the CK Hutchison sites absent the Merger.

23. Where a divestiture package of a subset of the CK Hutchison macro sites includes any or all of the Transfer Sites, we expect that any transfer of ownership in relation to a divestiture of these sites would only be transferred after dissolution of the MBNL JV.

Cellnex developed macro sites and ancillary services

24. Cellnex's ownership of developed macro sites in the UK is largely the result of two separate acquisitions:

    (a) In 2016 Cellnex acquired Shere Group Limited (Shere), a telecommunications infrastructure operator that operated sites containing passive infrastructure in the Netherlands and the UK. As part of this acquisition, Cellnex acquired 540 wireless telecommunications sites and associated passive infrastructure in the UK.

    (b) In 2020 Cellnex acquired Arqiva Services Limited (Arqiva), an owner and operator of sites in the UK containing passive infrastructure used by wireless communication providers. As part of this acquisition, Cellnex acquired 7,113 macro sites containing passive infrastructure.

25. This compares to the [5,700-6,550] developed macro sites that would be acquired by Cellnex if the Merger were to complete.

26. Again, any divestiture of Cellnex's existing assets (or a sub-set of those assets) along with the associated contracts/agreements to provide services to downstream customers, would need to provide a purchaser with the means to compete effectively and independently at a national level, replicating the competitive capabilities of the CK Hutchison sites which would have otherwise been changed by the Merger. The divestiture package would also need to be appropriately configured to be attractive to potential purchasers.

Risk profile of divestiture options

27. Both of these divestiture options introduce material composition, asset and purchaser risks, over and above those associated with prohibition. Of the two divestiture options, the second, requiring a divestiture of a package of developed macro sites and ancillary services currently operated by Cellnex,

would appear to present a relatively lower risk profile, as these assets have previously been operated independently in the market.

28. If the Parties wish to pursue divestiture as a remedy, they will need to demonstrate that the additional risks associated with these divestiture options can be managed and that a comprehensive solution to the provisional SLC would be achieved.

29. We also consider that in principle, it might be feasible to configure a divestiture package of sufficient scale and coverage to effectively address the provisional SLC by combining a subset of Cellnex's developed macro sites and ancillary services with a subset of the CK Hutchison assets which form the Merger. However, the CMA has a strong preference for avoiding such 'mix-and-match' divestitures as these may create additional composition risks.[8]

30. As such, we currently consider this to be a less attractive approach, which is unlikely to be effective in comprehensively addressing the provisional SLC. If the Parties wish to pursue this option, they would need to demonstrate to our satisfaction that, as well as establishing a supplier capable of replicating the rivalry that would have been provided by the CK Hutchison macro sites absent the Merger, there would be no significant increase in risk from such a mix-and-match alternative to a divestment of Cellnex-only or CK Hutchison-only passive infrastructure assets.

31. We invite views on:

(a) Whether divestiture is likely to be an effective remedy, including whether a divestiture of sufficient scale and scope, comprising appropriate assets, can be identified and whether the risk profile of divestiture can be effectively managed, such that divestiture should be preferred to prohibition of the Merger;

(b) the scope of any divestiture package including:

(i) the extent of developed macro sites and ancillary services that would need to be divested in order to achieve an effective remedy;

(ii) what additional assets, operations and agreements would need to be included in any divestiture package including whether a stand-alone business would need to be divested, or whether a package of passive

[8] *Merger Remedies: CMA87*, December 2018, paragraph 5.16.

infrastructure assets and associated contracts and other operations could constitute the basis of an effective disposal;

(c) whether there are risks that a suitable purchaser is not available or that the Parties will divest to a weak or otherwise inappropriate purchaser;

(d) whether there are risks that the competitive capability of a divestiture package will deteriorate before completion of divestiture; and

(e) any other elements that may be required.

Identification of a suitable purchaser

32. The CMA will wish to be satisfied that a prospective purchaser:

(a) is independent of the Parties;

(b) has the necessary capability to compete;

(c) is committed to competing in the market; and

(d) will not create further competition concerns.[9]

Effective divestiture process

33. We invite views on the appropriate timescale for achieving a divestiture, should this be our preferred remedy. The timescale will run from the time undertakings from the Parties are accepted by the CMA, or the Order requiring divestiture is made.

34. We will consider what, if any, procedural safeguards may be required to minimise the risks associated with this divestiture.

35. At this stage, we expect that it will be necessary to require that any divestiture to a suitable purchaser be completed before the Merger is allowed to complete. This requirement for an upfront buyer would help guard against some forms of composition and purchaser risks. In the event that the Parties are unsuccessful in completing the divestment of a divestiture package within the required timelines, the Merger would be prohibited.

36. We invite views on whether the Parties should be required to appoint a monitoring trustee to oversee any divestiture and to ensure that the assets to be divested are maintained during the course of the process.

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[9] *Merger Remedies: CMA87*, December 2018, paragraph 5.20 and 5.21.

37. The CMA would have the power to mandate an independent divestiture trustee to dispose of the divestiture package if:

(a) the Parties fail to procure divestiture to a suitable purchaser within the initial divestiture period; or

(b) the CMA has reason to expect that the Parties will not procure divestiture to a suitable purchaser within the initial divestiture period.

38. In unusual cases, the CMA may require that a divestiture trustee is appointed at the outset of any divestiture process.

39. As set out above, our current thinking is that if a divestiture is required, an upfront buyer will be necessary, in which case there would not be a need for a divestiture trustee. However, we welcome views on appropriate divestiture trustee provisions, should we take a different view about requiring an upfront buyer.

Cost of remedies and proportionality

40. In order to be reasonable and proportionate, the CMA will seek to select the least costly remedy, or package of remedies, that it considers will be effective. The CMA will also seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects. If the CMA is choosing between two remedies that it considers equally effective, it will choose the option which imposes the least cost or is least restrictive. The CMA will not normally take account of costs or losses that will be incurred by the Parties as a result of a divestiture remedy.[10]

41. We invite views on what costs are likely to arise in implementing each remedy option.

Relevant customer benefits

42. In deciding the question of remedies, the CMA may have regard to the effects of any remedial action on any relevant customer benefits (RCBs) in relation to the creation of the relevant merger situation.[11] The CMA normally takes RCBs into account by considering the extent to which alternative remedies may preserve such benefits.[12]

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[10] *Merger Remedies: CMA87*, December 2018, paragraph 3.8 and 3.9. This has been adopted by the CMA board.
[11] Section 36(4) of the Act, see also *Merger Remedies: CMA87*, December 2018, paragraph 3.15 and 3.16.
[12] Merger Assessment Guidelines (CMA129), paragraph 8.26

43. Relevant customer benefits are limited by the Act to benefits to relevant customers in the form of:

(a) 'lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom; or

(b) greater innovation in relation to such goods or services.'[13]

44. The Act provides that a benefit is only a relevant customer benefit if:

(a) it accrues or may be expected to accrue to relevant customers within the UK within a reasonable period as a result of the creation of that situation; and

(b) it was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.[14]

45. The Parties will be expected to provide convincing evidence regarding the nature and scale of any RCBs that they may wish to claim to result from the Merger and to demonstrate that these fall within the Act's definition of such benefits.[15]

46. We welcome views on the nature of any RCBs and on the scale and likelihood of such benefits and the extent (if any) to which these are affected by each of the two different remedy options (prohibition or divestiture) we are considering.

Next steps

47. Interested parties are requested to provide any views in writing, including any practical alternative remedies they wish the CMA to consider, by Friday 7 January 2022 (see Note (i)).

[13] Section 30(1)(a) of the Act, see also Merger Remedies: CMA87, December 2018, paragraph 3.17.
[14] Section 30(3) of the Act, see also Merger Remedies: CMA87, December 2018, paragraph 3.19.
[15] Merger Remedies: CMA87, December 2018, paragraph 3.20.

48. A copy of this notice will be posted on the CMA webpage.

Richard Feasey
Group Chairman
16 December 2021

Note

(i) This notice of possible actions to remedy, mitigate or prevent the provisional SLC and/or any resulting adverse effects is made having regard to the Provisional Findings announced on 16 December 2021. The Parties have until Friday 14 January 2022 to respond to the Provisional Findings. The CMA's findings may alter in response to comments it receives on its Provisional Findings Report, in which case the CMA may consider other possible remedies, if appropriate.