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

Provisional findings report

Notified: 16 December 2021

The Competition and Markets Authority has excluded from this published version of the provisional findings report information which the inquiry group considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [✂]. Some numbers have been replaced by a range. These are shown in square brackets. Non-sensitive wording is also indicated in square brackets.

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Overview

1. The Competition and Markets Authority (CMA) has provisionally found that 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) 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 mobile network operators (MNOs) and other wireless communication providers in the UK.

2. This is not our final decision and we invite any interested parties to make submissions on these provisional findings by Friday 14 January 2022.

3. Alongside these provisional findings, we have published a notice of possible remedies which sets out our initial views on the measures that might be required to remedy the SLC that we have provisionally found. We invite submissions on these initial views by Friday 7 January 2022.

4. We will take all submissions received by these dates into account in reaching our final decision.

Background

The reference

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

6. In exercise of its duty under section 36(1) of the Act, the CMA must decide:

   (a) whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation within the meaning of section 23 of the Act. We have provisionally found that the Merger will result in the creation of a relevant merger situation;

   (b) whether the creation of that situation may be expected to result in an SLC within any market or markets in the UK for goods or services. We have

provisionally found an SLC and a summary of our findings is set out below; and

(c) what action we might take for the purposes of remedying, mitigating or preventing any SLC or resulting adverse effect we have identified. This is the subject of the notice of possible remedies we have published alongside these provisional findings, in which we have discussed whether to prohibit the Merger, or whether any other measures could effectively remedy the SLC we have provisionally found.

7. In addressing the questions above, we have considered a range of evidence from the Parties, their customers and rivals through submissions, responses to information requests and hearings.

The Parties

8. Cellnex is a wireless telecommunications infrastructure and services company headquartered in Spain and operating across Europe, including in Austria, Denmark, Spain, Sweden, Switzerland, Italy, the Netherlands, France, Ireland, Poland, Portugal and the UK.

9. In the UK, Cellnex is an owner and operator of sites containing passive infrastructure used by mobile communication providers, primarily the UK's four MNOs although its passive infrastructure is also used by other communication providers who are not MNOs (see Industry Background chapter for details of these).

10. Cellnex entered the UK market in 2016 through its acquisition of 540 sites and passive infrastructure from Shere Group Limited. In 2020, through its acquisition of Arqiva Services Limited (Arqiva), Cellnex acquired 7,113 developed macro sites and became the largest wireless infrastructure provider (WIP) in the UK.

11. Cellnex's turnover in 2020 was £1,550 million worldwide and £250 million in the UK.

12. CK Hutchison is a multinational conglomerate headquartered in Hong Kong and listed on the Hong Kong Stock Exchange. Its activities include ports and related services, retail, infrastructure and telecommunications. In the UK, CK Hutchison operates an MNO, 3UK.

13. 3UK and another MNO, BT/EE, have an infrastructure-sharing joint venture to manage their shared networks, Mobile Broadband Network Limited (MBNL). MBNL was established in 2007 and operates [7,500-8,500] macro sites. 3UK also owns passive infrastructure assets outside of the MBNL JV.

14. In 2020, CK Hutchison's worldwide revenue was £40.5 billion and its UK telecommunications operations revenue was approximately £2.4 billion.

The Merger

15. The Merger is one of six transactions whereby Cellnex is acquiring passive infrastructure assets from CK Hutchison: as well as in the UK, Cellnex has acquired assets in Austria, Denmark, Ireland, Italy, and Sweden. The five European transactions have now completed.

16. Between 2019 and July 2020, CK Hutchison conducted an internal reorganisation of its telecommunications division in Europe. It set up CK Hutchison Networks Holdings Limited to group its European tower assets into separately managed entities or divisions which manage the passive infrastructure assets in their respective countries.

17. In the UK, in October 2020 CK Hutchison incorporated CK Hutchison Networks (UK) Limited (TowerCo) to hold 3UK's passive infrastructure assets outside of the MBNL JV.

18. For the UK transaction, Cellnex, as buyer, and CK Hutchison Networks Europe Investments S.À R.L., as seller, entered into a sale and purchase agreement on 12 November 2020.

19. On completion of the Merger, Cellnex will acquire:

   (a) the entire issued share capital of TowerCo which includes the following passive infrastructure assets):

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

      (ii) 2,600 monopoles which currently host 3UK active wireless telecommunications equipment. The monopoles that have been constructed at completion will transfer to Cellnex at that time. The legal title in the remaining monopoles will transfer to Cellnex once they have been built; and

   (b) the economic benefit of the interests to which 3UK is entitled in respect of [7,000-8,000] macro sites in the MBNL joint venture (the MBNL Sites). Cellnex will also bear the costs associated with these interests. At completion, the Parties will enter into three agreements which specify the nature of the economic benefit and associated costs and set out the legal framework for their transfer and oversight.

20. In addition, following the dissolution of MBNL, scheduled to take place in 2031, 3UK will transfer legal title to a subset of the MBNL Sites, subject to a minimum of 3,000 sites and a maximum of half of the number of MBNL Sites to Cellnex (the Transfer Sites). The exact number and identity of the Transfer Sites will be determined at the termination of the MBNL joint venture.

Industry background

21. Mobile communications services are a vital part of most people's lives in the UK, both for work and leisure. Consumers buy mobile services either from one of the UK's four MNOs (BT/EE, O2, Vodafone or 3UK) or from a mobile virtual network operator (MVNO) such as Sky or Virgin Mobile, that uses an MNO's network.

22. In order to provide their services, MNOs have UK-wide networks of physical infrastructure to support the combination of wireless and fixed telecom technologies which are used to deliver their services. The physical infrastructure includes various types of tower structures which host MNOs' antennae, services such as power supplies and the land on which these are located. These towers or sites are referred to as 'passive' infrastructure while the antennae and other electronic equipment that the towers host are 'active'.

23. The number and location of passive sites hosting the MNOs' active equipment is one factor that impacts the MNOs' geographic coverage and network capacity, both of which are important to their customers. For this reason, MNOs (and non-MNOs which use this equipment) plan the location and number of their sites carefully. They are also subject to legal permissions and restrictions from local planning authorities in relation to site location.

24. Each MNO uses around 18-19,000 macro sites across the UK. MNOs self-supply the majority (up to three-quarters) of the sites that they use, including through joint ventures: MBNL, as described above, and Cornerstone Telecommunications Infrastructure Limited (CTIL), a joint venture between O2 and Vodafone. WIPs provide the remaining quarter and also supply the MNO joint ventures. CTIL commercialised its activity in early 2021 and now operates as a WIP.

25. Customers obtain their passive infrastructure from three main sources:

    (a) Sites that are leased or owned and operated by the MNO itself;

    (b) Sites that are leased or owned and operated by the MNO in a JV with another MNO; and
    (c) Sites supplied by third party WIPs.

26. Both (a) and (b) above are known as ‘self-supply’ by the customer and where a new site is built, it is known as self-build. Where a new site is built by a WIP for a customer, this is known as build to suit (BTS).

27. While their mobile networks are mature the MNOs continue to develop their coverage and capacity, including, since 2019, rolling out the latest generation of mobile technology, 5G.

28. MNOs also require new sites when landlords require passive infrastructure operators to ‘quit’ a site location. MNOs are also active in the delivery of the UK Government’s programme to increase mobile provision in rural areas, the Shared Rural Network, and this has driven some demand for new sites.

Provisional findings

Relevant merger situation

29. An anticipated merger must meet the following two criteria to constitute a relevant merger situation (RMS) pursuant to section 23 of the Act:

(a) first, there must be arrangements in progress or in contemplation which will, if carried into effect, lead to two or more enterprises ceasing to be distinct; and

(b) second, either the UK turnover of the enterprise which is being acquired exceeds £70 million, or the enterprises which cease to be distinct supply or acquire goods or services of any description and, after the merger, together supply or acquire at least 25% of all those particular goods or services of that kind supplied in the UK or in a substantial part of it. The merger must also result in an increment to the share of supply or acquisition (the share of supply test). [1]

30. With regard to the second criterion, the combined turnover of TowerCo and the MBNL Sites (including the Transfer Sites) in the UK in 2019 exceeded £70 million. The share of supply test is also satisfied as Cellnex has a pre-Merger share of supply in excess of 25% in the supply of access to developed macro sites in the UK, which will increase further as a result of the Merger.

31. In terms of the first criterion:

(a) The sale and purchase agreement between Cellnex and CK Hutchison Networks Europe Investments S.À R.L. of November 2020 provides that

[1] The Act, section 23.

Cellnex will acquire the entire issued share capital of TowerCo upon completion of the Merger, resulting in Cellnex and TowerCo ceasing to be distinct.

(b) The ancillary agreements to the sale and purchase agreement provide that Cellnex will acquire the economic benefit of the MBNL Sites. We consider that the arrangements in the round amount to material influence over the MBNL Sites, as defined by section 26 of the Act as being able 'directly or indirectly … materially to influence the policy of a body corporate … without having a controlling interest in that body corporate', resulting in Cellnex and the MBNL Sites ceasing to be distinct. We have reached this provisional view having regard to the overall context of the Merger and the commercial reality of the arrangements, the contractual agreements between the Parties and the wider commercial relationship between the Parties.

(c) The ancillary agreements to the sale and purchase agreement provide that Cellnex will acquire the Transfer Sites on dissolution of MBNL, resulting in Cellnex and the Transfer Sites ceasing to be distinct.

32. The acquisition of TowerCo, the economic benefit of the MBNL Sites and subsequent acquisition of the Transfer Sites are interlinked and inter-conditional, therefore we consider that the Merger constitutes a single commercial transaction and results in a single RMS.

33. Therefore, we have provisionally found that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of an RMS under the Act.

Competitive effects

Counterfactual

Scope of the assessment

34. To assess the effects of the Merger, we have considered the prospects for competition with the Merger against what would have been the competitive situation without the Merger: this is the counterfactual.

35. This is not a statutory test but rather an analytical tool used in answering the question of whether a merger gives rise to an SLC: we select the most likely conditions of competition as the counterfactual against which to assess the merger. These may be the prevailing conditions of competition or conditions of competition that involve stronger or weaker competition between the

merger firms. If two or more possible counterfactual scenarios lead to broadly the same conditions of competition, we do not need to select the particular scenario that leads to the counterfactual.

36. CK Hutchison told us that, if the Merger were blocked by the CMA, the appropriate counterfactual would be that it would continue to own and operate its UK passive infrastructure assets as at present. CK Hutchison also told us that all of its passive infrastructure assets elsewhere in Europe had been sold and the counterfactual could therefore only be assessed in relation to any transaction relating to the UK alone.

37. We consider that, with regard to the approach to the counterfactual assessment, the question we need to answer is not, as CK Hutchison submitted, what the factual situation would be if the Merger does not proceed' or what the counterfactual would be if the Merger was blocked by the CMA.

38. We need to determine what the most likely conditions of competition would have been absent the Merger (which formed part of the broader commercial transaction). The fact that the non-UK assets cannot now be sold to an alternative purchaser if the Merger does not go ahead (because they have already been sold) does not prevent us from considering counterfactual scenarios involving the sale of non-UK assets.

39. We also do not consider, as suggested by CK Hutchison, that the fact that the Parties structured the transactions such that the sale of assets outside the UK could proceed independently of the sale of the UK assets is determinative for our assessment of the counterfactual.

40. The key question is whether the sale of the remainder of CK Hutchison's passive infrastructure assets to Cellnex would have proceeded absent the Merger agreement to sell the UK assets to Cellnex.

41. On this point, we consider that the sale of the EU assets and the UK assets formed part of an overall commercial transaction between the Parties. The evidence shows that, in the absence of agreement to acquire the UK assets, the overall deal between CK Hutchison and Cellnex – including in relation to the EU assets – would not have been done in its current form. As a result, the sale of the EU assets can be considered a consequence of the Merger within the meaning of our guidance.

42. On that basis, we consider that it is open to us to consider a counterfactual that would have included the sale of both the EU assets and the UK assets to an alternative purchaser.

Our assessment of the counterfactual

43. We have noted a broader industry trend, in both the UK and other jurisdictions, in which owners of passive infrastructure assets have sought to realise an uplift in value through some form of commercialisation of them.

44. In pursuit of this objective, CK Hutchison reorganised its European passive infrastructure assets into a separate tower company in 2019. This enabled it to explore a range of opportunities for commercialisation available to it.

45. It also identified a need to increase funding of 3UK, its mobile network in the UK, including the rollout of its 5G network. In our view, this meant that CK Hutchison preferred an option that would raise the necessary cash proceeds for this investment.

46. In our view, this provided CK Hutchison with a clear incentive to commercialise its passive infrastructure. We have seen no evidence to suggest that CK Hutchison gave serious consideration to continuing to own and operate its UK passive infrastructure assets as it had before.

47. We considered the options available to CK Hutchison to achieve its objectives absent the Merger. We considered the credibility of the alternative options available to it, in order to inform our view of the overall likelihood of a counterfactual in which CK Hutchison's passive infrastructure would have been operated in direct competition with that of Cellnex.

48. The evidence available to us shows that CK Hutchison had a range of credible opportunities to commercialise its assets. We note that passive infrastructure assets are generally considered to be attractive and highly marketable assets, and we have identified a number of businesses with a strong interest and established track record in investing in such assets. Other owners of similar assets have found ways to realise an uplift in their value and have taken various approaches to doing so, including outright sale, obtaining minority investments or establishing joint ventures. In addition, the UK is an attractive market for such assets and CK Hutchison's assets represented one of a limited number of opportunities for investors to acquire an interest in them.

49. CK Hutchison considered various options to realise the uplift in the value of its passive infrastructure assets. Some options were not mutually exclusive and could have taken place sequentially.

50. We are not limited to considering alternative scenarios that would have occurred at exactly the same time as the developments that gave rise to the Merger. In this case, we have considered the options available to CK

Hutchison over an extended period of time. This is because there is no indication, in the evidence we have seen, that the sales process that CK Hutchison ran was considered to be a ‘one shot’ process that excluded the pursuit of other options (either individually or in combination) at later points in time.

51. We have found that credible alternative purchasers were interested in acquiring the assets within the sales process that CK Hutchison ran. We also note that CK Hutchison’s alternative options were not limited to the outcome of the sales process that was run and that, had that sales process not resulted in an acceptable outcome, CK Hutchison would have had a variety of alternative ways in which it could have realised its commercial objectives. In particular, it could have run another sales process and/or made changes to the proposed transaction structure so as to appeal to a wider range of potential acquirers of the assets.

52. On the basis of the available evidence, we consider that a sale of CK Hutchison’s UK assets (either individually or as part of a wider package of assets) to an alternative purchaser with the incentive to operate them in direct competition with Cellnex’s passive infrastructure assets would have been the most likely alternative option for it absent the Merger. Such a sale could have been effected either within the original sales process or through a modified and/or extended sales process that we consider would, in light of the underlying commercial incentives of CK Hutchison, have taken place in the short- to medium-term (ie within approximately three years of CK Hutchison’s decision to sell its passive infrastructure assets to a third party).

53. Accordingly, any alternative purchaser would have obtained control over CK Hutchison’s UK assets in the substantively same sequence as envisaged by the Parties pursuant to the terms of the Merger, that is (a) the Unilateral Sites on completion of the transaction; and (b) legal title to the Transfer Sites on dissolution of MBNL, scheduled for 2031 and within the timeframe considered in our assessment of the competitive effects of the Merger.

54. The evidence available to us shows that CK Hutchison gave some consideration to other options.

55. Given that CK Hutchison focussed on the sale of its passive infrastructure assets, the evidence available to inform our assessment of these options is more limited.

56. CK Hutchison considered some options to be less attractive than a sale of the UK assets and some may have raised practical difficulties. On the other hand, the evidence available to us also shows that these alternatives were broadly

regarded as credible options by market participants, and we believe they could have been given more detailed consideration by CK Hutchison (in light of its commercial objectives) had it encountered difficulties in securing the sale of the UK assets.

57. On that basis, while we consider it is more likely that CK Hutchison would have sold its UK assets to a third party, either through the original sales process or a subsequent sales process, we consider that, in the absence of such a sale, other options could have been used to pursue its broader commercial objectives. Each of these options would have resulted in CK Hutchison's passive infrastructure assets in the UK being operated in competition with Cellnex.

58. Overall, given the wide range of credible options available to CK Hutchison to realise the value of its UK assets and the strong incentive on it to do so, we do not believe that the evidence available to us supports the stated position of the Parties that the only possible way that it could pursue its commercial objectives was through a sale to a single possible counterparty, Cellnex.

Provisional conclusion on counterfactual

59. We provisionally conclude that the most likely counterfactual in this case is one in which there would have been stronger conditions of competition between Cellnex and the owner of CK Hutchison's UK assets. This is because we consider that the most likely outcome, absent the Merger, is that CK Hutchison's UK passive infrastructure assets would have been operated in direct competition with Cellnex's passive infrastructure assets. This outcome would be achieved through the successful pursuit by CK Hutchison of one or more of the options that were available to CK Hutchison to commercialise its passive infrastructure assets and which are set out above.

Market definition

60. The purpose of market definition is to provide a framework for the CMA's analysis of the competitive effects of the merger. The relevant market (or markets) is that within which the merger may give rise to an SLC. It contains the most significant competitive alternatives available to the customers of the merged companies.

61. On the basis of the Parties' submissions on product market definition and our own assessment, we have considered that the effects of the Merger should be considered within the market for the supply of access to developed macro sites (including BTS sites) and ancillary services to MNOs and other wireless communication providers.

62. Also, on the basis of the Parties' submissions and our own assessment, we consider that the geographic market is national.

63. We therefore provisionally conclude that the relevant market for the assessment of the Merger is the supply of access to developed macro sites and ancillary services to MNOs and other wireless communication providers in the UK.

Competitive assessment

Nature of competition

64. The market for the supply of access to developed macro sites is complex and has a number of unusual features. Before we assess the impact of the Merger on competition, we therefore first consider in more detail the nature of competition in this market.

65. MNOs represent the main customer group for developed macro sites, although there are also other types of customers who we refer to as non-MNOs. The MNO joint ventures (CTIL and MBNL) are also major customers of WIPs, as well as supplying their own sites and, in CTIL's case, now operating as a WIP itself.

66. In this market, customers typically sign up to long-term framework contracts which provide certainty to customers on the price and service levels they are likely to receive for both their existing and any additional sites they may require from the same supplier over the term of the agreement. In return, long-term contracts provide suppliers with predictable, committed revenues for the duration of the contracts.

67. We found that the drivers of choice of macro sites are similar amongst MNOs and non-MNOs. These are: geographic location of sites; price; churn allowance; the scale of the supplier and their track record.

(a) The evidence available to us shows that the geographic location of a site is important since the location will determine the coverage that can be provided and the extent to which the site can be incorporated into the rest of the network without disruption, or the extent of any disruption.

(b) We found that prices of existing sites in a WIPs' portfolio are primarily agreed in long-term framework contracts with suppliers, which provide customers with certainty on the price and service levels they are likely to receive for both their existing and any additional sites they may require from the same supplier over the term of the contract. Therefore, the

renegotiation of these prices when contracts expire is an important part of our competitive assessment.

(c) The available evidence shows that the existence of a churn allowance (which allows customers to vacate a proportion of sites during the term of the framework contract without financial penalty) and the proportion of sites that fall under the churn allowance are key factors in negotiations over framework contracts. In particular, churn allows customers, in particular MNOs, to evolve their networks in ways which they cannot predict at the outset of a contract and to maintain some competitive pressures on their existing suppliers during the term of the contract.

(d) The evidence also shows that scale and track record contribute to suppliers' competitiveness, alongside other factors, particularly for large contracts. We have found that there are a number of reasons why larger suppliers are stronger competitors, including the greater likelihood of having a site in the right location, customers preferences for dealing with larger suppliers, economies of scale and the ability to secure future commitments to new sites.

68. We have assessed the implications of these factors, which determine customers' choice of sites, on how competition works in this market.

69. In considering how competition can be expected to work in this market, we have taken into account recent developments in the market: while Cellnex may have been the only large WIP competing to retain sites in the past, it is likely to face competition from another large WIP, CTIL, when large contracts come to be renewed in the future.

70. We have found that the main focus of competition in this market is for large framework agreements with MNO customers. This will primarily take place between suppliers with extensive portfolios of sites, as they as they are best placed to meet customers' needs across a large number of areas.

71. We have also found that switching macro sites is costly and, as a result, does not occur often. However, although customers are unlikely to want or be able to migrate all of their sites away from their current supplier, they can use alternative suppliers to improve the terms on which they obtain access to sites provided by their current supplier in future and can evolve their networks over time by making use of churn allowances to reduce their dependency on that supplier.

72. Therefore, when a framework contract comes up for renewal, the terms on which the customer will be able to renew the contract with the existing

supplier, will be influenced by the competition from other WIPs during the process.

73. The evidence shows that suppliers with a large number of existing sites and previous track record are likely to have a competitive advantage over smaller rivals when competing for this demand.

74. We found that, while there is limited demand for new sites, there is some competition for them, mostly driven by particular catalysts, such as an MNO being forced to vacate an existing site or the need to develop the network for 5G.

Competitive assessment

75. We have assessed the Merger's impact on competition, using a counterfactual of stronger conditions of competition between the owner of the CK Hutchison Assets and Cellnex.

- *Our approach to the assessment of competitive dynamics in an evolving market*

76. In light of the counterfactual against which we have assessed the impact of the Merger, we have undertaken a forward-looking assessment, which looks at the market over the longer term, including after Cellnex gains control of the Transfer Sites.

77. The potential competitive effects of the Merger would be likely to play out in different ways over time. In particular, the sector is characterised by the existence of long-term agreements between suppliers and customers and the Transfer Sites will not come under the full control of Cellnex until the MBNL JV ends (whether in 2031 or earlier if mutually agreed by the JV partners).

78. We have considered the impact of the Merger on the structure of the market and competition over the longer-term, and therefore place only limited weight on the contractual arrangements (even in long-term contracts) in assessing the loss of competition that the Merger will bring about.

- *Pre-Merger market outcomes*

79. As set out above, we have found that the size of a supplier's portfolio of sites is an important determinant of its competitive strength. We have therefore assessed suppliers' historical portfolios of sites as a starting point to understand their relative strength and overall extent of competition in the market.

80. We have found that MNOs have historically self-supplied a significant proportion of their sites through MBNL and CTIL with WIPs providing most MNOs with the remainder of their developed macro sites.

81. Until the commercialisation of CTIL at the beginning of 2021, Cellnex was the only large WIP in the UK, with a share of [80-90]% while the next largest competitor had a share of only [5-10]%, and no other competitor had a meaningful share of supply. Even taking into account CTIL's recent commercialisation, making it the largest WIP, we found that the market still remains highly concentrated.

- *Closeness of competition between Cellnex and the owner of the CK Hutchison Assets*

82. We have found that, in the counterfactual, the owner of the CK Hutchison Assets would be a close competitor to Cellnex. It would be the third largest operator in the market, after CTIL and Cellnex, with a large portfolio of existing sites and an extensive geographic footprint.

83. The CK Hutchison Assets would represent a significant proportion of the aggregate overlap of sites which are capable of substituting for Cellnex sites. Removing the owner of the CK Hutchison Assets, even if the overlaps with Cellnex are small in number, would significantly reduce the competitive constraint provided by the overlap sites. This is because we have found that the prospect of losing even a small proportion of sites within a large contract can influence the terms which a WIP may offer for all of its sites in the framework agreement.

84. More broadly, Cellnex and the owner of the CK Hutchison Assets would be two of only three national players of scale able to offer a comparable package of services to customers and able to compete for large customer contracts.

85. Although the owner of the CK Hutchison Assets would acquire the Transaction Sites in two stages to 2031, we consider that it would be a strong competitor and exercise an immediate competitive threat through using the Unilateral Sites to attract new customers.

- *Competition from alternative suppliers*

86. CTIL can be expected to compete strongly with the Merged Entity in future. Given its scale, which exceeds that of the each of Cellnex and the CK Hutchison Assets, it will be able to compete to attract large customers, in particular for large contracts, with its extensive portfolio of existing sites and,

secondarily, with its BTS solution. CTIL would impose a strong competitive constraint on the Merged Entity.

87. In contrast, we have found that all other rival WIPs are, and will likely remain, small and would therefore impose only a very weak competitive constraint on the Merged Entity.

88. This means that, relative to the counterfactual, the Merger would reduce the number of major suppliers from three to two and thereby create a duopoly.

89. In relation to the constraint from sites built-to-suit by WIPs (BTS) and customers' self-build on the Merged Entity's existing sites, we have found that customers prefer using existing sites over new ones. Building sites can be costly and a lengthy process, and BTS has won very few of the opportunities competed for in recent years. This means that BTS supplied by WIPs and customers' self-build are both weak constraints compared to the existing sites of a large WIP, and in particular customers' self-build is likely to be a constraint of last resort in the absence of better options.

90. In relation to the constraint from BTS by WIPs and customers' self-build on the Merged Entity's BTS offering, the evidence shows they will impose some constraint but are not sufficient to offset the loss of competition resulting from the Merger. Outside of CTIL, rival WIPs have very limited scale and track record, and are unlikely to grow significantly, reducing the attractiveness of their BTS offering.

Our provisional conclusion

91. We have provisionally found that, subject to our findings on countervailing factors, the Merger may be expected to result in a SLC as a result of horizontal unilateral effects in the supply of access to developed macro sites and ancillary services to MNOs and other wireless communication providers in the UK.

Countervailing factors

92. There are two main ways in which countervailing factors may prevent or mitigate any SLC arising from a merger: through the entry and/or expansion of third parties in reaction to the effects of a merger, or through merger efficiencies.

Entry and/or expansion

93. Our competitive assessment has already taken into account the [entry and] expansion plans of suppliers of macro sites which we consider will take place irrespective of whether the merger proceeds.

94. In this assessment, we consider whether, in response to the effects of the Merger, there may be entry or expansion by third parties which would be timely, likely and sufficient to mitigate or prevent the SLC from arising.

95. The Parties submitted that barriers to entry and expansion are low and that there is a wide range of potential providers capable of providing access to developed macro sites.

96. Other WIPs submitted that there are a range of factors which create high barriers to entry and expansion. These include the incumbency advantages related to customers' high switching costs, the economies of scale enjoyed by large WIPs, as set out in our competitive assessment, plus the need for planning permission and other regulations for new passive infrastructure.

97. We consider that, while the barriers to entering the market at small scale are low, as evidenced by the existence of several small WIPs in the UK market, the barriers to expansion are considerably higher. This is because there are few, if any, prospects for smaller WIPs to be able to expand through purchase of a large portfolio of sites, as Cellnex has been able to do through its transaction with Arqiva and with the Merger.

98. On the basis of the available evidence it is our provisional view that barriers to entry and expansion are such that it is not likely that entry or expansion of sufficient scale would occur in a timely manner to mitigate or prevent an SLC from arising as a result of the Merger.

Rivalry-enhancing efficiencies

99. Our guidance sets out that efficiencies arising from a merger may enhance rivalry with the result that the merger does not give rise to an SLC. In order for us to take efficiencies into account we must expect that they would be timely, likely and sufficient to prevent the SLC from arising, having regard to the effect on rivalry that would otherwise result from the merger, and that the efficiencies must be a direct consequence of the merger.

100. The Parties submitted that Cellnex expects to realise a number of revenue and cost synergies from the Merger. However, the Parties have not submitted that there would be any synergies that would be passed through to customers

and that we should consider as rivalry-enhancing efficiencies in our assessment.

101. As such, our provisional view is that it is not likely that any rivalry-enhancing efficiencies arise from the Merger which would prevent an SLC from arising.

Provisional conclusion

102. We have provisionally found that the anticipated acquisition by Cellnex of the passive infrastructure assets in the UK of CK Hutchison may be expected to result in an SLC as a result of horizontal unilateral effects in the supply of access to developed macro sites and ancillary services to MNOs and other wireless communication providers in the UK.

103. We invite any parties to make representations to us on these provisional findings by no later than Friday 14 January 2022. Parties should refer to the notice of provisional findings for details of how to do this.

104. Please email cellnex.CKHUK@cma.gov.uk or write to: Project Manager, Cellnex CKHUK merger investigation, Competition and Markets Authority, The Cabot, 25 Cabot Square, London E14 4QZ.

Provisional findings

1. The reference

1.1 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).

1.2 In exercise of its duty under section 36(1) of the Act, the CMA must decide:

(a) Whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and

(b) if so, whether the creation of that relevant merger situation may be expected to result in a substantial lessening of competition (SLC) within any market or markets in the United Kingdom for goods or services.

1.3 We are required to prepare and publish a final report by 10 January 2022.

1.4 Our terms of reference, along with information on the conduct of the inquiry are set out in Appendix A.

1.5 This document, along with its appendices, constitutes the Inquiry Group's provisional findings, published and notified to the Parties in line with the CMA's rules of procedure.[2] Further information can be found on our webpage.

2. The Parties, the Merger and its rationale

Introduction

2.1 In this chapter, we provide an overview of:

(a) The Parties' operations and key financial information;

(b) The Merger; and

[2] Rules of procedure for merger, market and special reference groups: CMA17, paragraphs 11.1 to 11.7

(c) The rationale for the Merger for Cellnex. CK Hutchison's rationale is set out in chapter 5.

The Parties

Cellnex

2.2 The Cellnex Group[3] is a wireless telecommunications infrastructure and services company headquartered in Spain and listed on the Spanish stock exchange. It operates across Europe, including in Austria, Denmark, Spain, Sweden, Switzerland, Italy, the Netherlands, France, Ireland, Poland, Portugal and the UK.

2.3 The Cellnex Group provides infrastructure management services for wireless telecommunications through the following business segments:

(a) Telecom infrastructure services (79% of 2020 revenue).

(b) Broadcasting networks (14%).

(c) Network services and others (7%).[4]

2.4 In the UK, Cellnex is an owner and operator of sites containing passive infrastructure used by wireless communication providers. All of Cellnex's revenue in the UK is generated from telecom infrastructure services.[5]

2.5 Cellnex's core customers are mobile network operators (MNOs), although its passive infrastructure is also used by other communication providers who are not MNOs (see Chapter 3 for details of these).

2.6 Cellnex entered the UK market in 2016 through its acquisition of 540 sites and passive infrastructure from Shere Group Limited.

2.7 Through its acquisition of Arqiva Services Limited in 2020, Cellnex acquired 7,113 developed macro sites. Arqiva was a large and well-established supplier of access to developed macro sites in the UK.[6] Cellnex acquired Arqiva's telecommunications infrastructure division only, so Arqiva still operates as a separate entity in the provision of broadcasting and other infrastructure.

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[3] Cellnex Telecom S.A. and its subsidiaries.
[4] Cellnex Group Annual Report 2020, page 23.
[5] Cellnex Group Annual Report 2020, page 129.
[6] Cellnex's acquisition of Arqiva was reviewed and cleared at Phase 1 by the CMA in 2020.See Anticipated acquisition by Cellnex UK Limited of Arqiva Services Limited (2020).

Key financial information

2.8 In 2020, Cellnex had worldwide revenue of £1,550 million and UK revenue of £250 million.

2.9 In November 2021, Cellnex Telecom SA had a market capitalisation of €35.81 billion.[7]

CK Hutchison

2.10 The CK Hutchison Group[8] is a multinational conglomerate headquartered in Hong Kong and listed on The Stock Exchange of Hong Kong. The largest shareholder (with a circa 26% shareholding) is Li Ka-Shing Unity Trustee Company Limited.

2.11 The CK Hutchison Group has four core business areas:

(a) Ports and related services (8% of global revenue and 5% of European revenue);

(b) retail (40% and 40%);

(c) infrastructure (13% and 14%); and

(d) telecommunications (24% and 41%). [9,10]

2.12 In the UK, CK Hutchison's telecommunications division operates an MNO, 3UK. 3UK supplies [10-20]% of mobile customers in the UK[11] which is the smallest market share of the four MNOs.

2.13 Between 2019 and July 2020, CK Hutchison conducted an internal reorganisation of its telecommunications division in Europe. As part of this reorganisation, CK Hutchison set up CK Hutchison Networks Holdings Limited to group its European tower assets into separately managed entities or divisions, where each entity manages passive infrastructure assets in its respective country.

2.14 In the UK, in October 2020 CK Hutchison incorporated CK Hutchison Networks (UK) Limited (TowerCo) to hold 3UK's Unilateral Sites. TowerCo is

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[7] FT.com (accessed 8th November 2021)
[8] CK Hutchison Holdings Limited and its subsidiaries, including CK Hutchison Networks Europe Investments S.À.R.L., CK Hutchison Group Telecom Holdings Limited, Hutchison 3G UK Holdings Limited, 3UK and CK Hutchison Networks (UK) Limited.
[9] CK Hutchison Group Annual Report 2020, page 4.
[10] Energy and Finance make up the remaining 15% of global revenue.
[11] Anticipated joint venture between Liberty Global Plc and Telefónica S.A. Final Report, 20 May 2021, page 140.

now a wholly owned subsidiary of CK Hutchison Networks Europe Investments S.À R.L. which, in turn, is a wholly owned subsidiary of CK Hutchison Networks Holdings Limited.

2.15 TowerCo was established for the purpose of holding 3UK's passive infrastructure assets in the UK outside of Mobile Broadband Network Limited (MBNL) which is an infrastructure sharing joint venture between 3UK and BT/EE to manage their shared networks. MBNL was established in 2007 and currently operates [7,500 – 8,500] sites.[12]

2.16 TowerCo controls [100-200] [✂] developed macro sites previously owned by UK Broadband, a wholly-owned subsidiary of 3UK, and will control a further 2,600 new monopoles once they have all been built ([✂] have been built as at 31 October 2021) to host its network.

Key financial information

2.17 In 2020, CK Hutchison’s worldwide revenue was £40.546 billion and its UK revenue in telecommunications operations revenue was approximately £2.355 billion. Telecommunications.

2.18 In November 2021, the CK Hutchison Group had a market capitalisation of HK$199.30 billion.[13]

The Merger

2.19 The Merger is one of six transactions whereby Cellnex is acquiring passive infrastructure assets from CK Hutchison. As well as in the UK, Cellnex has acquired assets in Austria, Denmark, Ireland, Italy, and Sweden.

2.20 CK Hutchison told us that these transactions were negotiated and signed as part of the same deal, but they were structured as a series of transactions because each country has different legal and regulatory requirements.

2.21 The Parties told us that each transaction is subject to its own terms and conditions and completion of each transaction is on a standalone basis as each transaction is independent and not inter-conditional upon the others.

2.22 Cellnex told us that all individual transactions, apart from the UK, have already closed. Completion of the transactions in Austria, Denmark and Ireland took place in December 2020; completion of the transaction in

[12] See the Industry Background chapter for more detail on MBNL.
[13] FT.com (accessed 8th November 2021)

Sweden took place in January 2021; and completion of the transaction in Italy took place in June 2021.

2.23 In relation to the UK assets, Cellnex, as buyer, and CK Hutchison Networks Europe Investments S.À R.L. (CK Hutchison), as seller, entered into a sale and purchase agreement on 12 November 2020.

2.24 On completion of the Merger:

(a) Cellnex will obtain the entire issued share capital of TowerCo from CK Hutchison. TowerCo holds or will hold:

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

(ii) 2,600 monopoles (the Streetworks Sites) consisting of [✄] completed monopoles[14] (as at 31 October 2021) and [✄] monopoles that 3UK is currently building but which have not yet been completed (as at 31 October 2021).

(b) Cellnex (through its subsidiary OnTower) will obtain the economic benefit of the interests to which 3UK is entitled in respect of approximately [7,000-8,000] sites that are the subject of the MBNL joint venture (the MBNL Sites).[15] Cellnex will also bear the costs associated with these interests.

(c) In addition, under one of the agreements, following dissolution of MBNL, 3UK will transfer legal title to the MBNL Sites, including certain assets[16] located on those sites, (subject to a minimum of 3,000 sites and a maximum of half of the number of MBNL Sites) to Cellnex in accordance with the allocation and transfer provisions of the ✄] (the Transfer Sites).[17] The exact number and identity of the Transfer Sites will be determined once the processes specified in the MBNL joint venture (JV) Agreements for the termination of the MBNL joint venture are completed. The default term of the MBNL joint venture expires on 31 December 2031.

2.25 The UKB Sites and the Streetworks Sites are referred to collectively as the Unilateral Sites. The Unilateral Sites and the Transfer Sites are referred to collectively as the Transaction Sites or the CK Hutchison Assets.

[14] See Chapter 3 for definition of monopole.
[15] The MBNL Sites also include [✄]. The MBNL Sites do not include: [✄].
[16] [✄] these assets include [✄].
[17] The remaining [✄]

TowerCo

2.26 TowerCo is yet to file any accounts, but its management accounts for 2020 show that it had revenue of £[✂] and EBITDA of £[✂].[18]

2.27 3UK pays TowerCo a service fee on a per-site basis for the use and management of the Unilateral Sites that are currently in existence. The service fee is agreed on [✂].

2.28 At completion of the Merger, the CK Hutchison group entities and a Cellnex group entity will enter into three agreements which specify the nature of the economic benefit and associated costs and set out the legal framework for their transfer and oversight.

Preparation for the transaction

2.29 In August 2019, CK Hutchison announced an internal reorganisation, which set up CK Hutchison Networks Holdings Limited.

2.30 CK Hutchison told us that the announcement of the reorganisation made it clear that it was open to proposals to monetise the assets including a sale. After the announcement, it was approached by several parties including Cellnex, [✂].[19]

Negotiations with Cellnex

2.31 CK Hutchison told us that it held the following discussions with Cellnex:

(a) In [✂], Cellnex delivered a management presentation to CK Hutchison and CK Hutchison shared high level business plans with Cellnex.

(b) In [✂], Cellnex held follow up due diligence sessions.

(c) In [✂], Cellnex sent a non-binding offer to CK Hutchison.

(d) On [✂], the Parties signed an exclusivity agreement, following which the virtual data room was opened and discussions continued.

(e) On 9 November 2020, the Parties announced they were in discussions.

[18] TowerCo Management Accounts July 2021, 'CKHN Entity' tab. These figures include the UKB sites, the Unilateral sites and the shared MBNL network.
[19] See Chapter 5 for details

(f) On 12 November 2020, the Parties signed the transaction documents for all of the deals in the UK and Europe.

Consideration

2.32 CK Hutchison's European tower assets were valued [✂].

2.33 The consideration for the Merger involves a mix of cash and Cellnex shares whereas the transactions in the other European countries involved cash consideration only.

2.34 The consideration for the acquisition of TowerCo will be €[✂] in cash and shares in Cellnex equal to €[✂] (constituting between [✂] of Cellnex's share capital). Consideration for the interests in the MBNL Sites and legal title over the Transfer Sites will be €[✂] in cash.

2.35 CK Hutchison told us that the [✂]. CK Hutchison also told us that [✂].

2.36 Cellnex told us, consistent with the submission from CK Hutchison above, that [✂].

Merger rationale

Cellnex

2.37 Cellnex told us that its strategy relating to the Merger has three parts:

(a) Expansion: growing its geographical footprint through M&A;

(b) Densification: growing its presence in existing markets; and

(c) Extension: diversifying into adjacent assets such as indoor solutions, fibre, and shared active equipment.

2.38 Cellnex told us that its rationale for the Merger was:

(a) An opportunity for it to expand its presence in the UK to increase its customer base and revenue.

(b) To enhance its platform to drive future investment to support:

(i) Deployment of 5G networks;

(ii) Expansion of rural coverage in the UK; and

(iii) Diversification into other business lines.

2.39 Cellnex told us that the Merger was consistent with its business strategy of expanding its operations by acquiring tower operators and large portfolios of sites rather than through organic growth.

2.40 Cellnex told us that the UK tower market is mature in the sense that MNOs have extensive coverage already (see Industry Background chapter for details), and organic growth opportunities are therefore (and are expected to remain) limited.

2.41 The Parties told us that Cellnex, as an independent wireless infrastructure provider (WIP) that was acquiring sites that were not currently operated by WIPs, would increase the likelihood that co-location[20] occurred on those sites, to the extent feasible.

2.42 Cellnex told us that it expected the following synergies to be realised from the Merger:

(a) [✂]:

(i) [✂].[✂]

(ii) [✂]

(iii) [✂]

(b) [✂]:[21,]

(i) [✂]

(ii) [✂].

(iii) [✂].

CK Hutchison

2.43 CK Hutchison's rationale for the Merger is set out in Chapter 5.

[20] Co-location is when more than one network operator uses the same passive infrastructure asset (e.g. a tower) to host their active equipment. Co-location can therefore offer the opportunity for more income to be made from a single asset than single occupation of the asset would.
[21] Note that overlap in site locations between Cellnex and the Transaction sites is explored in the Competitive Assessment chapter

3. Industry background

Introduction

3.1 This chapter sets out relevant background information on passive infrastructure assets for mobile telecommunications. Passive infrastructure assets are a key input into the provision of retail mobile telecommunications services and are the focus of this Merger.

3.2 Mobile communications services are a vital part of most people's lives in the UK, both for work and leisure. Consumers buy mobile services either from one of the UK's four MNOs (EE (BT/EE), O2, Vodafone or 3UK) or from a mobile virtual network operator (MVNO) such as Sky or Virgin Mobile, that uses an MNO's network.

3.3 Together the four MNOs supply around 90% of the retail mobile customers in the UK, with the remainder being supplied by around 150 MVNOs, including Virgin Mobile and Sky Mobile.[22]

3.4 In order to provide their services, MNOs have UK-wide networks of physical infrastructure to support the combination of wireless and fixed telecom technologies which are used to deliver their services. The physical infrastructure includes various types of tower structures which host MNOs' antennae and services such as power supplies.

Passive and active infrastructure for mobile networks

Types of infrastructure

3.5 MNOs use different infrastructures to deliver their services but there are broadly two types of infrastructure:

(a) Passive infrastructure, such as towers, poles, power supplies, fences and cabinets; and

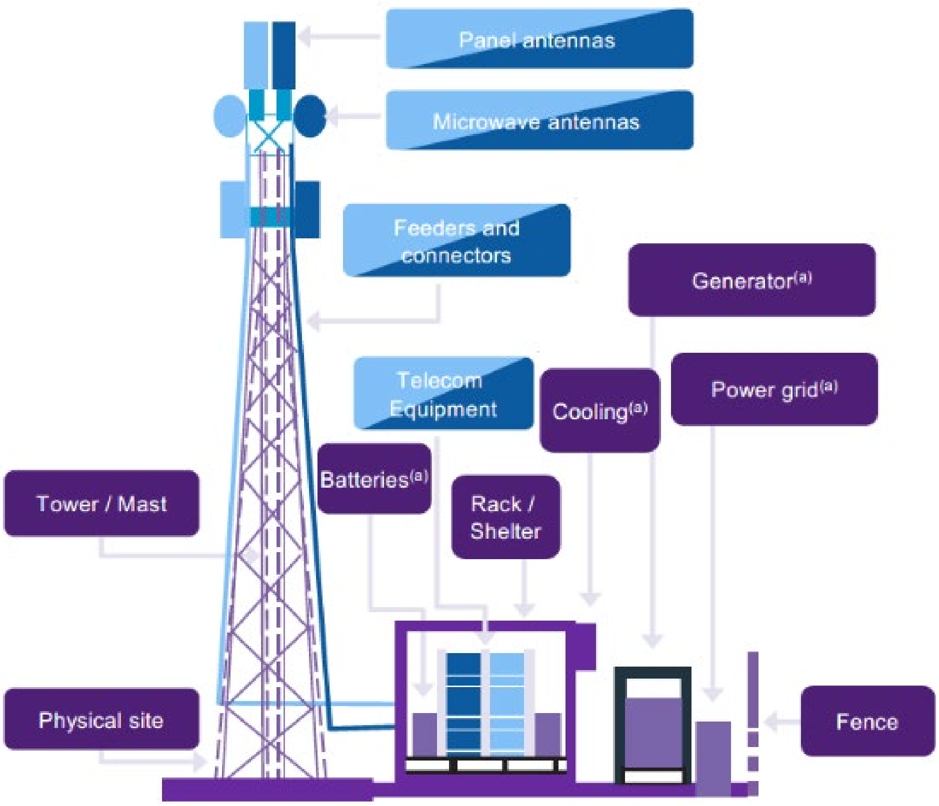
(b) Active infrastructure, such as radio antennae, cables and other equipment.

3.6 The difference between passive and active infrastructure is shown in the diagram of a tower in Figure 3-1 below. The purple elements are passive

[22] Final report, 'Anticipated joint venture between Liberty Global Plc and Telefónica S.A.', page 8.

infrastructure and the remainder (with diagonal colours) are active infrastructure.

Figure 3-1: Diagram of passive and active infrastructure on a tower

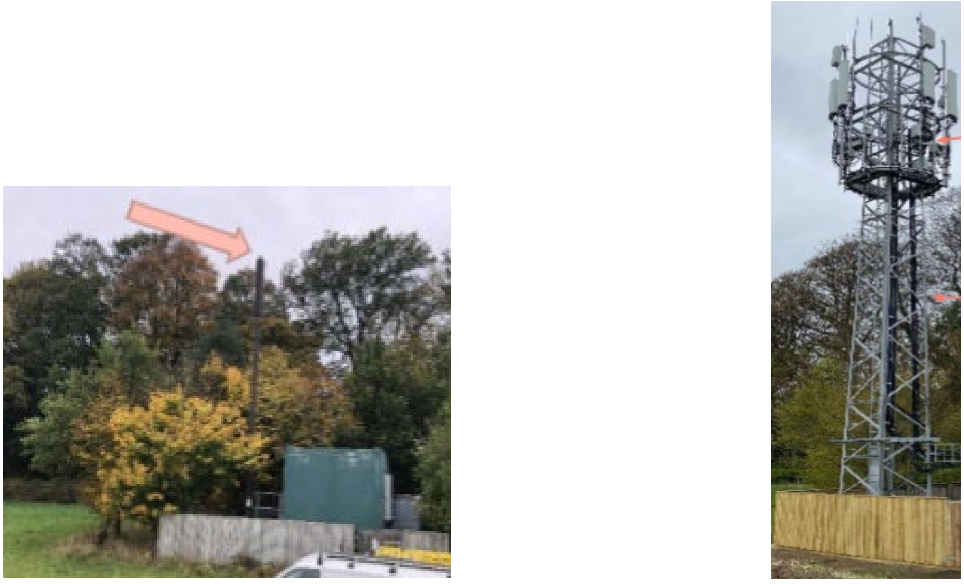


Source: [✂]

3.7 Passive infrastructure enables signals from the active equipment to be sent in both directions between mobile handsets and the active equipment located on a base station/tower. These then link, via either microwave, the MNO's own fixed network or a line leased from another operator, to the core MNO network. Passive infrastructure assets are therefore required by MNOs to enable them to provide both coverage (the availability of a signal at different locations) and capacity (the ability for multiple users to communicate when a signal is available) to their customers.

3.8 Passive infrastructure can take several forms, such as purpose-built towers, rooftops, monopoles, lamp posts or other street furniture. Monopoles are single-pole structures that are typically used in urban areas. Towers are taller lattice-type structures that are able to support more equipment than monopoles. The difference can be seen in Figure 3-2 below.

Figure 3-2: Example of a monopole structure (left) and a tower structure (right)



Source: [✂]

3.9 Passive infrastructure also comprises the following types of equipment:

(a) Macro sites host high power macrocells[23] and provide broad coverage. They are generally sites on tower structures, rooftops or monopoles.

(b) Micro sites (also called sub-macro sites) that host lower power microcells and fill in coverage in 'gaps' left between macrocells or provide additional capacity in high use areas (such as in urban locations). Micro sites include small cell sites and distributed antennae systems (DAS):

(i) Small cells are types of micro sites that are primarily deployed outside, such as on street furniture like lampposts and bus shelters.[24] Small cells have lower radio power, capacity, coverage and ability to deliver multiple technologies and spectrum than macro sites, meaning that a number of small cells would be required to replace one macro site. Small cells are not suitable for coverage beyond about 300 square metres.

(ii) DAS are primarily deployed inside buildings, for example within football stadiums, train stations and shopping centres. DAS, similar to small cells, also have lower radio power, capacity and coverage compared to macro sites and are suitable only for similarly limited coverage areas to small cells.

[23] A macrocell is a cell used in cellular networks with the function of providing radio coverage to a large area. A macrocell differs from a microcell by offering a larger coverage area and having higher power output.
[24] Final Merger Notice, paragraph 2.52, page 28.

3.10 Passive infrastructure is also used by other organisations who require wireless coverage and capacity for their services. Examples of these include Airwave, Aquila (Air Traffic Management) and Network Rail. We refer to these as 'non-MNOs'. They use passive infrastructure to host their communications equipment, and their need for these sites is primarily fulfilled through WIPs.[25]

3.11 As set out in Chapter 6, the focus of this inquiry is on macro sites.

Providers of passive infrastructure

3.12 MNOs obtain their passive infrastructure from three main sources:

(a) Sites that are leased or owned and operated by the MNO itself;

(b) Sites that are leased or owned and operated by the MNO in a JV with another MNO.

(i) Both (a) and (b) above are considered to be 'self-supply' by the MNO. Where a new site is built in this process, it is known as self-build.

(c) Sites supplied by third party WIPs.

(i) Where a new site is built by a WIP for an MNO, this is known as build to suit (BTS)

Overview of developed macro sites in the UK

3.13 Table 3-1 shows the number of developed macro sites in the UK (2020).

[25] Anticipated acquisition by Cellnex UK Limited of Arqiva Services Limited (2020), paragraph 106.

Table 3-1: Number of sites in the UK owned by MNOs, MNO JVs and WIPs

		Number of sites
MNOs:		
a.	BT/EE	[✂]
b.	3UK	[✂]
c.	Vodafone	[✂]
d.	O2	-
MNO JVs:		
a.	MBNL	[✂]
b.	CTIL	[✂]
WIPs[26]:		
a.	Cellnex	[✂]
b.	WIG	[✂]
c.	Shared Access	[✂]
d.	Freshwave	[✂]
e.	Britannia Towers	[✂]
f.	WHP Telecoms	[✂]
g.	AP Wireless	[✂]
Total		**36,302**

Source: CMA analysis of Cellnex and third parties' data.

3.14 Table 3-1 above shows that the majority of sites in the UK are today provided by the MNO JVs, and a significant number by WIPs.

3.15 As explained below, Vodafone, O2 and BT/EE originally relied upon their own sites but later combined them with sites owned by other MNOs to form JVs.[27] Only BT/EE retains a significant number of sites outside of a JV. WIPs account for a growing number of sites in the UK.

MNO joint ventures

3.16 There are two MNO joint ventures in the UK:

(a) BT/EE and 3UK's JV MBNL; and

(b) Vodafone and O2's JV is Cornerstone Telecommunications Infrastructure Limited (CTIL).[28]

3.17 These JVs primarily supply their shareholder MNOs, although they also provide some sites to other MNOs and non-MNO customers on a commercial basis.

[26] Source: CMA analysis of Cellnex and third parties' data. Refer to the Competitive Assessment paragraph 8.7 for further information.
[27] CTIL is referred to as an MNO JV in Table 3-1 and below but, as explained in Chapter 8, is expected in future to operate as a WIP, meaning that the majority of sites will be supplied by WIPs.
[28] CTIL is classified as a joint venture in this chapter but we consider its commercialisation towards WIP status in Chapter 8.

MBNL

3.18 MBNL was established by T-Mobile and 3UK in 2007. Following Orange's merger with T-Mobile in 2009, it became an MBNL partner in 2010 as Everything Everywhere (now EE).[29] Since the merger between BT and EE in 2016, the MBNL JV has been between 3UK and BT/EE.

3.19 3UK and BT/EE use MBNL to manage their shared 3G, 4G and some 5G passive infrastructure assets in the UK, as well as their 3G active infrastructure assets. The JV is due to terminate on 31 December 2031 unless there is agreement to end it earlier.

3.20 [✄]. MBNL is not the legal owner of any of the tower assets as they are owned by 3UK and BT/EE. [✄].

CTIL

3.21 CTIL was set up in 2012 to create and manage a single network of passive infrastructure by O2 and Vodafone alongside agreements between O2 and Vodafone to share active and passive radio access network ("RAN") assets in the UK (except for 2G and 3G RAN in London). For the purpose of active infrastructure sharing and subject to certain limited exceptions, O2 and Vodafone divided the UK into two regions, with each operator being responsible for the deployment and operation / management of active equipment in its region, including those of the relevant operator. Vodafone is responsible for the West of the UK and O2 is responsible for the East.

3.22 However, Vodafone and O2 gradually unwound their active sharing arrangements in respect of 4G in London and have also agreed to unwind a number of large cities with populations above 100,000 inhabitants. Vodafone announced in 2018 that the arrangements for sharing in London would be unwound for 5G, with each company having its own active equipment.[30] O2 and Vodafone agreed in 2019 to strengthen the partnership to include 5G radio equipment sharing at joint sites outside of the UK's 24 largest cities, while each will deploy separate radio equipment in those larger cities on approximately 2,700 sites.[31]

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[29] Source: https://mbnl.co.uk/
[30] Source: https://rethinkresearch.biz/articles/vodafone-and-o2-pull-back-on-ran-sharing-as-urban-data-usage-soars/
[31]Source: https://newscentre.vodafone.co.uk/press-release/vodafone-and-o2-finalise-5g-uk-network-agreement/

3.23 In January 2021, Vodafone and O2 announced that they would commercialise CTIL by each entering into long-term Master Services Agreements (MSAs) with it.

(a) The MSAs leave Vodafone and O2 as 'anchor' tenants that provide the majority of CTIL's revenue, whilst allowing CTIL to pursue more opportunities to earn revenue from third parties.[32] The main consequence of these changes are that CTIL is no longer a cost centre for its shareholders but aims to make a profit margin on its services.

(b) CTIL told us [✂].

3.24 Since this announcement, Vodafone has raised capital from its 50% equity stake in CTIL by transferring this to its subsidiary Vantage Towers which was then admitted to the Frankfurt Stock Exchange in an IPO in March 2021. The IPO raised approximately €2.3 billion with Vodafone retaining an 81% stake in Vantage Towers.[33] Vodafone therefore retains its interest in CTIL, indirectly, through its interest in Vantage Towers.

3.25 Vodafone told us that the rationale for creating Vantage Towers to hold Vodafone's stake in CTIL was two-fold:

(a) For the market to better recognise the value of the tower assets by placing them in a separate tower company; and

(b) to monetise the towers more effectively by transferring them into a separate, commercial organisation which would be more focused on increasing third party tenancies and making profits.

3.26 The effect of CTIL's commercialisation, as discussed elsewhere in the provisional decision, is that it increasingly competes for third party business, as other WIPs do.[34]

3.27 CK Hutchison told us that it expects there to be continued radio access network or active equipment sharing between O2 and Vodafone as CTIL evolves following its commercialisation. CK Hutchison told us that such sharing will mean that CTIL's towers only have one set of active equipment on them and therefore have capacity for additional tenants' equipment.

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[32] Vodafone Group announcement, Cornerstone UK press release, 11 January 2021
[33] NASDAQ, 'Vodafone's Vantage Towers climbs after Germany's biggest IPO in three years', https://www.nasdaq.com/articles/vodafones-vantage-towers-climbs-after-germanys-biggest-ipo-in-three-years-2021-03-18
[34] See chapter 8.

WIPs

3.28 WIPs active in the UK include Cellnex, Wireless Infrastructure Group (WIG), Shared Access, Radius, Freshwave and Britannia Towers. As set out above, since January 2021 CTIL has started to operate like a WIP.

3.29 The shares of supply of WIPs are set out in the competitive assessment chapter.

Roll-out of 5G networks

3.30 Cellnex told us that MNOs will need to upgrade and densify their existing networks for the rollout of 5G, in order to increase coverage and capacity. They also stated that these efforts will be focused on urban areas, where demand for 5G is anticipated to be highest.

3.31 Cellnex also said that it does not anticipate material increased demand for new, traditional macro sites, with the features of the 5G rollout from the MNOs being:

(a) All MNOs are following a 'macro-first' approach to the rollout of 5G networks which involves upgrading macro sites on which they are currently co-locating 4G active equipment to also host 5G active equipment.

(b) The vast majority of 5G requirements are expected to be met by existing sites, though in some instances there will be existing sites which are no longer suitable (that is, upgrade is not feasible from a technical perspective or because capacity is at its limit).

(c) MNOs will also need new sites to add capacity and coverage (in-fill), for example. by adding new locations based on their own radio plan or where it is not feasible to upgrade a site on which they are currently co-locating, with greater need in urban areas. Due to fewer planning restrictions and lower lease costs, MNOs are expected to deploy newly-built monopoles (potentially complemented by small cells) either through self-build or BTS, rather than using existing or macro sites.

(d) In rural areas, the expectation is that 5G rollout will be relatively limited in the next five to ten years. There is already broad coverage of 4G networks, with remaining total and partial not spots being targeted by the

Shared Rural Networks project.[35] MNOs are therefore unlikely to consider it cost effective to deploy 5G in rural areas in the short to medium term.

3.32 CK Hutchison stated that its 5G deployment will be delivered by [✄].

3.33 Other MNOs told us that they will use their existing sites for much 5G roll-out in the next few years.

3.34 Ofcom also told us that it expects initial 5G rollout to involve using existing sites to host 5G equipment. In the medium term, an increase in demand for mobile services may lead a densification of MNOs' networks, leading to an increase in the number of sites.

Growth of new infrastructure for mobile networks

3.35 Each MNO uses around 19,000 macro sites across the UK, providing similar and overlapping geographic coverage. As MNOs' networks are mature and cover most (although not all) of UK premises and the UK landmass, the passive infrastructure sites that host them are also well established.

3.36 Additional sites may, however, be required when a site landlord gives a notice to quit (NTQ) because, for example, it wishes to redevelop the site location. Others are built because the MNO (or other customer) wishes to develop their network to provide extra capacity or coverage.

3.37 Demand for additional sites is limited by long term contracts which mean tenants remain on sites they currently occupy. Leaving existing sites is therefore primarily driven by notices to quit (NTQs) from landlords, sites becoming obsolete or the need to get additional/enhanced capacity. [36]

3.38 When an MNO requires an additional site, this can either take the form of an existing site (on which the MNO may become a new tenant) or the construction of a new site.

Existing sites

3.39 Existing sites will already host active equipment for other tenants. The advantages of using an existing site include:

[35] See paragraphs 3.59 to 3.61 below.
[36] [✄] and [✄] told us that it is costly for MNOs to switch sites. [✄] and [✄] told us that NTQs are the primary driver of switching. Refer to Appendix F for details.

(a) The required planning permission for the site will generally already have been obtained;[37]

(b) Critical services, such as power and transmission, will already be connected; and

(c) As a result of (a) and (b), the new customer can secure access faster than if a new site has to be built.

3.40 The Parties submitted that in many cases existing sites will need upgrading to provide access to additional tenants or to accommodate new equipment for current tenants. This is especially so where 5G equipment is being added to infrastructure, as this tends to weigh more than existing 3G and 4G equipment and may not be accommodated on existing structures.

3.41 BT/EE told us that its network upgrade to 4G was quicker than the 5G upgrade currently underway because it didn't need to change antennae or feeders from previous technology. BT/EE also told us that 5G requires a larger and heavier antennae than 4G.

New sites

3.42 Building new sites involves constructing passive infrastructure to meet the customers' needs (in the case of BTS) or suppliers' own needs (in the case of self-build) at a location where no existing site exists. This will typically be done where there are no other existing sites near to that location. Before building starts, the site itself will first need to be acquired or a lease agreement entered into with a landlord.

3.43 Planning permission is usually needed for new sites.[38]

(a) CTIL told us that building a new site entails finding a suitable plot of land, negotiating the right to build a tower with the landlord, getting the relevant planning permissions, the design and engineering capability to create a suitable tower for the customer's equipment (historically its own shareholders); the ability to get (fibre or microwave) power; and enabling the equipment supplier to install the MNO's active equipment on the tower.

[37] Where an additional tenant is seeking to be added to a developed site this may require planning permission for example if an extension or upgrade of the site is needed.
[38] We set out from paragraph 3.59 how planning works for new or upgraded sites, including requirements and certain exemptions

(b) Figures provided by a UK WIP show the timescales required to build or upgrade a site, as shown in Figure 3-3 below. This shows that a new site may take 12-18 months, while adding capacity to an existing site may take three to six months.

Figure 3-3: Illustrative timeline for building a new site and upgrading an existing site

	New Site (BTS)	*Existing Site (capacity added)*	*Comment*
Radio Planning			Not included
Site search	2–3 months	n/a	
Site acquisition and landlord agreement / consents	3–4 months	0–1 month	May run in parallel with Site Search and Design
Design / GA drawings	2–3 months	2 months	
Planning consent	2–3 months	0–1 month	
Deployment	2–3 months	1 month	
Power and Backhaul installation	2–3 months	0–1 month	May run in parallel with other activities
Total elapsed time	12–18 months	3–6 months	

Source: [✂]

Mobile telecommunications services in the UK

Network capacity and coverage

3.44 Network capacity and geographic coverage are both important in the provision of retail mobile services. The capacity and speed of mobile networks is affected by the amount of spectrum available to an operator and for a given amount of spectrum, transmission speed is affected by the number and location of users within a particular mobile cell and their demands for capacity.

3.45 Additional spectrum can be used to serve more simultaneous users at a certain level of data transfer speed or to provide a set number of users with higher speeds. The available capacity in a specific geographic area can be further increased by deploying additional infrastructure on a site or by adding additional sites.

3.46 MNOs seek to provide both broad geographic coverage and sufficient capacity. Typically, mobile operators will deploy larger macrocells in areas with lower population density, where the challenge is achieving sufficient geographic coverage, and smaller cells in areas with higher population density, where the challenge is providing sufficient capacity to serve the larger number of users. [39]

[39] Ofcom Mobile Data Strategy, 2016

3.47 This means that MNOs have radio access network plans[40] with specific requirements for sites at appropriate locations (and, in respect of their other sites), to help optimise their network's capacity and coverage.

3.48 If an MNO is required to change the location of a macro site within its network, this will have implications for its requirements from other neighbouring sites, given the interdependencies between cells within its radio access network. Any resulting 'gaps' in coverage can lead to interruption of service as users move from one location to another.

3.49 Poor mobile reception/coverage is the most important factor that impacts consumer satisfaction with mobile services.[41] The strength and quality of mobile network capacity and coverage are therefore crucial issues for all MNOs.

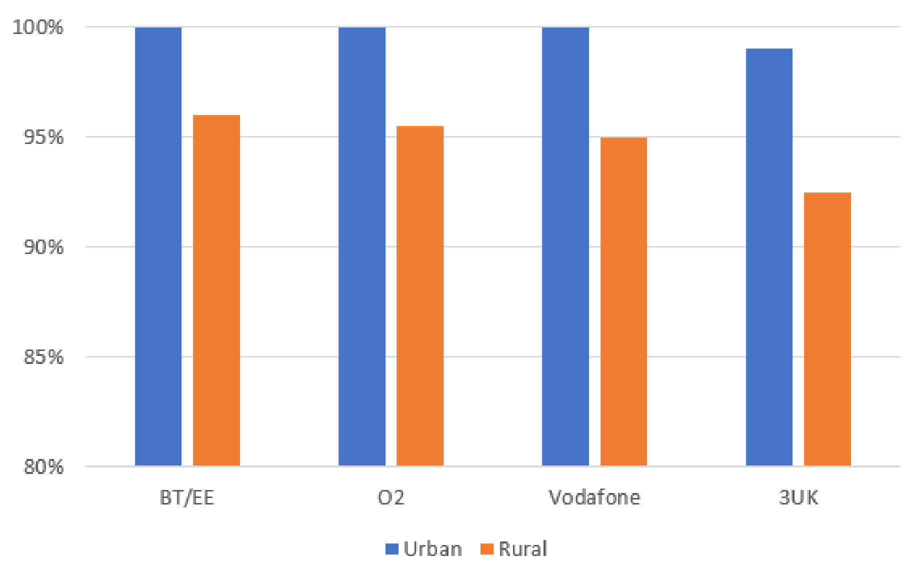
3.50 As noted earlier, the networks of the MNOs in the UK are mature and mobile network coverage in the UK is very widespread but not entirely comprehensive: it extends across almost 100% of urban premises, and approximately 95% of rural premises. As a further indicator of coverage, 4G mobile is available from all MNOs outside 99% of premises in urban areas, compared with around 87% of rural premises.[42]

3.51 The four MNOs have similar levels of network coverage for their 4G networks across the UK, with 3UK's performance slightly below that of other MNOs for rural premises, as shown in Figure 3-4 and 3.5 below.

3.52 Mobile coverage levels are generally lower in rural areas compared to urban areas, and across the extent of the UK landmass, individual operator coverage ranges between 79% (for 3UK) and 85% (for BT/EE). [43]

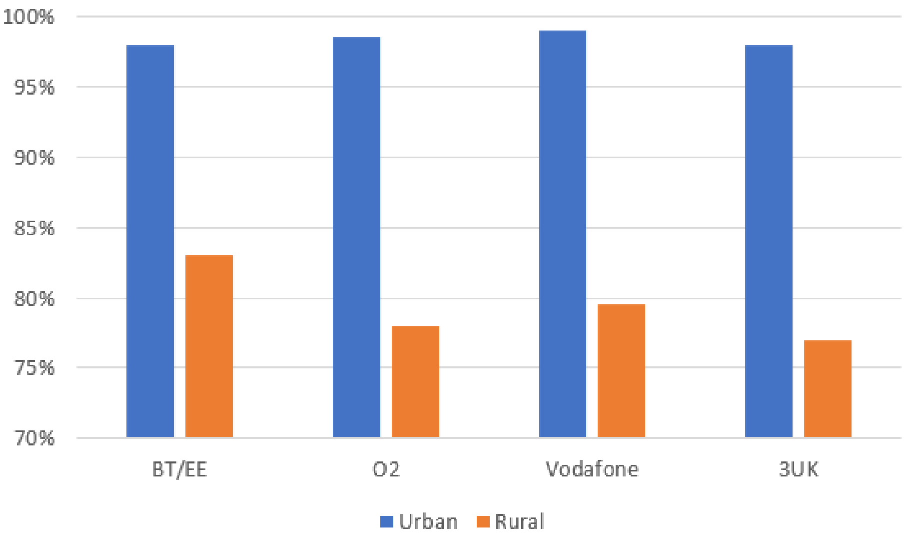
[40] MNOs have radio access network (RAN) plans to determine where their active equipment should be located in order to achieve the coverage and capacity they need
[41] Ofcom Consumer Satisfaction Tracker 2020 (Ofcom CSAT), Table 77
[42] Ofcom – Connected Nations 2020 report, p39 Ofcom Connected Nations report
[43] Ofcom – Connected Nations 2020 report, p4 & p39 Ofcom Connected Nations report

Figure 3-4: MNOs’ UK network premises coverage of 4G data services 2020 (% of premises)



Source: Ofcom – Connected Nations 2020 report, p39-41 Ofcom Connected Nations report

Figure 3-5: MNOs’ UK network geographic coverage of 4G data services 2020 (% of UK landmass)



Source: Ofcom – Connected Nations 2020 report, p39-41 Ofcom Connected Nations report

Shared Rural Network

3.53 The UK Government has a policy to increase mobile coverage to rural areas. In March 2020, it made an agreement with the four MNOs to provide grant funding to them to deliver a Shared Rural Network (SRN) to increase this coverage.

3.54 The SRN aims to make 4G available to 95% of the UK landmass and extend mobile coverage to an additional 280,000 premises, offering improvements to mobile coverage in rural communities. The SRN will cost over £1 billion to build and operate, with the UK Government contributing £500m and the MNOs contributing £532m.

3.55 The programme has two elements:

(a) For those areas where there is some 4G coverage, but not from all four operators, known as 'partial not-spots', the MNOs are investing in extending coverage, by upgrading their existing networks.

(b) The publicly funded element will see new masts being built to target the hard-to-reach areas with no mobile coverage at all, known as 'total not-spots'. The UK Government will pay for the infrastructure and masts to be built and all four MNOs will use these masts to provide coverage to their customers. [44]

Overview of relevant public policy and regulation

3.56 The main areas of public policy and regulation relevant to the sector are planning law and regulation, the Electronic Communications Code (ECC) and spectrum regulation in the mobile telecommunications industry.

Planning

3.57 Planning policy and regulations are an important consideration for owners of passive infrastructure assets, as they must usually apply for planning permission to build or upgrade new sites.

3.58 Before granting planning permission for a new site, local authorities will consider availability of existing towers and will need to be satisfied that co-location on them is not feasible before allowing the development of a new site in the same area.

3.59 Further, under the ECC, MNOs have a positive obligation to support and enable sharing of their infrastructure, so one MNO can request access to a tower owned by another.

3.60 Customers of passive infrastructure assets therefore generally try to secure co-location on an existing site before developing a new site.

3.61 Ofcom told us that, once built, it is typical for no further planning permission to be required to add another MNO's active assets to a tower which already hosts an occupant and no extension to the tower is required. If an extension

[44] SRN Shared Programme Summary

or upgrade of the tower is needed to host another MNO's active equipment, planning permission may be needed.

3.62 Planning regulation for tower development is set out in the UK Government's Permitted Development Code, which has three categories of requirements:[45]

(a) Towers over 20 metres in height require a full planning application.

(b) Towers up to and including 20 metres in height are permitted but require prior approval from the planning authority via a streamlined process.

(c) Towers up to 15 metres in height must be notified and become permitted after 28 days if no issues are raised.

3.63 The UK Government's National Planning Policy Framework (NPPF) sets out requirements for planning applications for electronic communications equipment, including:

(a) For an addition to an existing mast or base station, a statement that self-certifies that the cumulative exposure, when operational, will not exceed International Commission guidelines on non-ionising radiation protection; and

(b) For a new mast or base station, evidence that the applicant has explored the possibility of erecting antennas on an existing building, mast or other structure and a statement that self-certifies that, when operational, International Commission guidelines will be met.[46]

3.64 Planning approval is simplified by the Electronic Communications Code, as set out below. MNOs have positive obligations to support and enable sharing of their infrastructure under the ECC, which includes the right of MNOs to share sites without the landowner's consent.

3.65 Reforms to the Permitted Development Code are being consulted on which would allow relaxed requirements.[47] Specific reform proposals include:

(a) Existing mobile masts to be strengthened without the need for prior approval, so that they can be upgraded for 5G and shared between mobile operators. This would allow increases to the width of existing masts by up to either 50% or 2 metres (whichever is greatest), and in

[45] Information on how phone masts and renewable energy sources are impacted by planning permission. (ashford.gov.uk)
[46] National Planning Policy Framework, updated July 2021
[47] Government response to the consultation on proposed reforms to permitted development rights to support the deployment of 5G and extend mobile coverage (publishing.service.gov.uk)

unprotected areas[48] allow increases in height up to a maximum of 25 metres with permitted development rights (previously 20 metres). Greater increases will also be permitted subject to approval by the local authority.

(b) New masts to be built up to five metres higher – meaning a maximum of 30 metres in unprotected areas and 25 metres in protected areas, subject to approval by the planning authority.

(c) Greater freedoms for slimline 'monopole' masts up to 15 metres in height, which are less visually intrusive than standard masts and used for 5G rollout, in unprotected areas. This could mean operators notifying local authorities of their intention to proceed without needing prior approval. This would align it with current rights that telecoms operators have for telegraph poles.

(d) Building-based masts to be placed nearer to highways to bring better mobile coverage to road networks, subject to prior approval, and in unprotected areas smaller building-based masts to be permitted without prior approval.

(e) Cabinets containing radio equipment to be deployed alongside masts without prior approval and to allow greater flexibility for installing cabinets in existing compounds – fenced-off sites containing masts and other communications equipment – to support new 5G networks. [49]

3.66 These changes are designed to increase sharing on passive infrastructure assets, support upgrades to 5G and extend coverage on transport routes.

Electronic Communications Code

3.67 The ECC is a set of rights that are designed to facilitate the installation and maintenance of electronic communications networks. [50] The effect of the ECC is that planning permission is streamlined for providers and users of passive infrastructure, and that sharing of assets is encouraged.

3.68 The ECC confers rights on providers of such networks and on providers of systems of infrastructure to install and maintain apparatus on, under and over land and results in considerably simplified planning procedures.[51]

[48] Protected areas are locations with an environmental designation, such as Conservation Areas, Areas of Outstanding Natural Beauty, National Parks, and World Heritage Sites
[49] New laws to wipe out rural mobile 'not spots' and speed up rollout of next-generation 5G technology - GOV.UK (www.gov.uk)
[50] The Electronic Communications Code is set out in Schedule 3A of the Communications Act 2003.
[51] https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/policy/electronic-comm-code

3.69 In connection with these rights, the ECC allows persons to whom the ECC applies to:

(a) Construct and maintain electronic communications networks and infrastructure (such as ducts, cabinets and poles) on public highways without the need to obtain a street works licence to undertake such works;

(b) Construct communications infrastructure which is classified as 'permitted developments' under Town and Country Planning legislation (such as certain types of masts, poles and cabinets) without the need to apply for planning permission;

(c) In the event that agreement cannot be reached with the owner or occupier of private land, the ECC allows an operator to apply to the Court to impose an agreement which confers the ECC right being sought or for the ECC right to bind the landowner or occupier; and

(d) Claim compensation from a local authority in circumstances where that local authority has obstructed access to electronic communications apparatus in certain stipulated circumstances.[52]

3.70 In 2017 the ECC was updated to make it easier for network operators to share sites and build infrastructure (such as phone masts, exchanges and cabinets) on public and private land.[53] The key changes were:

(a) Site Sharing: Telecoms operators have the right to share sites without the landowner's consent (regardless of the terms of any written agreement).

(b) Assignment: Operators have the right to assign (i.e. transfer) their leases without landowner consent (regardless of the terms of any written agreement).

(c) Upgrades: Operators have the right to upgrade equipment without landowner consent (provided there is no more than a minimal adverse visual impact and no additional burden on the landowner).

(d) Valuations: The valuation basis for telecoms sites changed from an open market basis to one that treats the land as if it didn't have existing telecoms leases and rights.

(i) BT/EE told us that the implication of this change was a [✀] reduction in rents

[52] https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/policy/electronic-comm-code
[53] https://www.ofcom.org.uk/consultations-and-statements/category-1/electronic-communications-code

(e) Landlord and Tenant Act 1954: leases for passive infrastructure will no longer be covered by the secure business lease regime contained in the Landlord and Tenant Act 1954. New telecoms leases will only be protected by the Code.[54]

3.71 The Lands Tribunal rulings on the application of the ECC are expected to result in lower land rental costs for site operators.

3.72 Further detail on this is provided by a Vantage Towers' presentation to investors,[55] which set out the impact of the ECC change as:

(a) Significant ground lease cost saving opportunity over the long term on existing and new sites.

(b) Under the ECC, rental fee will be determined by market value of the land for non-telecom purposes, thus reducing rents where sites have low non-telecom market values.

(c) The aim of the changes is to provide additional capital to further the rollout of next-generation digital networks in the UK, making it easier and less expensive to roll-out or upgrade broadband and telecoms infrastructure on public and private land.

(d) Acceleration in renegotiation expected as legal precedent is established – applies to leases on renewal.

3.73 Ofcom includes a condition in licences which requires MNOs to comply with the International Commission on Non-Ionizing Radiation Protection limits for the protection of the general public from electromagnetic fields (EMF). MNOs must take account of these limits when planning new deployments, or making changes to existing deployments, and ensure the location and power levels do not emit EMF levels above these limits.

4. Relevant merger situation

4.1 In accordance with section 36 of the Act and pursuant to our terms of reference, we are required to investigate and report on two statutory questions: (i) whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation (RMS); and (ii) if so, whether the creation of that situation may be

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[54] https://www.michelmores.com/news-views/news/new-electronic-communications-code
[55] Results, reports and presentations | Vantage Towers presentation to investors, 11 January 2021, p13

expected to result in an SLC within any market or markets in the UK for goods or services.

4.2 We address the first of the statutory questions in this chapter.

4.3 An anticipated merger must meet the following two criteria to constitute an RMS for the purposes of the Act:

(a) First, there must be arrangements in progress or in contemplation which will, if carried into effect, lead to two or more enterprises ceasing to be distinct; and

(b) Second, either:

(i) The UK turnover associated with the enterprise which is being acquired exceeds £70 million (the turnover test), or

(ii) The enterprises which cease to be distinct supply or acquire goods or services of any description and, after the merger, together supply or acquire at least 25% of all those particular goods or services of that kind supplied in the UK or in a substantial part of it. The merger must also result in an increment to the share of supply or acquisition (the share of supply test).[56]

4.4 Cellnex and CK Hutchison entered into a sale and purchase agreement on 12 November 2020. The SPA provides for certain ancillary agreements, agreed by the Parties in short form, to be entered into on or prior to completion of the Merger, in particular, the [✄] and the [✄].[57] Accordingly, we consider that arrangements are in progress or contemplation within the meaning of section 36(1)(a) of the Act.

4.5 The combined turnover of TowerCo and the MBNL Sites (of which the Transfer Sites are a subset) in the UK in the financial year ending 31 December 2019 exceeded £70 million. Therefore, we consider that the turnover test is satisfied for the purposes of section 23(1)(b)(i) of the Act. We also consider that the share of supply test is satisfied as we consider that Cellnex has at least a 25% share of supply for the provision of access to developed macro sites and ancillary services in the UK, which will increase further to the Merger.[58]

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[56] The Act, section 23.
[57] See further detail in Appendix C.
[58] See Chapter 8 which shows that Cellnex's share of supply exceeds 25% and that the acquisition of the Unilateral Sites and the Transfer Sites would each result in an increment.

4.6 The remainder of this chapter therefore focuses on the first limb of the RMS test from section 23(1)(a) of the Act; whether the Merger results in two or more enterprises ceasing to be distinct.

Enterprises ceasing to be distinct

4.7 Section 26(1) of the Act provides that 'any two enterprises cease to be distinct if they are brought under common ownership or common control'.

4.8 The Act defines an 'enterprise' as 'the activities or part of the activities of a business'. A 'business' is defined as including 'a professional practice and includes any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge'.[59] This does not mean that the enterprise in question need be a separate legal entity: it simply means that the activities in question could be carried on for gain or reward.[60] In making a judgement as to whether or not the activities of a business, or part of a business, constitute an enterprise under the Act, the CMA will have regard to the substance of the arrangement under consideration, rather than merely its legal form.[61]

4.9 This section assesses whether the following enterprises will cease to be distinct as a result of the Merger:

(a) Cellnex;

(b) TowerCo (the entity that holds the Unilateral Sites);

(c) The Transfer Sites; and

(d) The MBNL Sites.

4.10 Cellnex is a business active in the supply of access to developed macro sites and ancillary services, from which it generates revenue. Therefore, we consider that Cellnex is an enterprise.

TowerCo

4.11 TowerCo is similarly a business active in the supply of access to developed macro sites to 3UK, from which it generates revenue. Therefore, we consider that TowerCo is an enterprise.

[59] Section 129(1) and (3) of the Act.
[60] CMA2 Revised, paragraph 4.10.
[61] CMA2 Revised, paragraph 4.11.

4.12 Cellnex will acquire the entire issued share capital of TowerCo upon completion of the Merger. As a consequence, the enterprises will be under the common ownership and control of Cellnex. Therefore, we consider that Cellnex and TowerCo will cease to be distinct on completion of the Merger.

Transfer Sites

4.13 On completion of the Merger, Cellnex will acquire a binding right to receive legal title over the Transfer Sites following dissolution of MBNL.[62] Upon dissolution of MBNL, 3UK is required to transfer legal title over the Transfer Sites to Cellnex.[63] Therefore, we consider that the Transfer Sites constitute a business carried on for gain or reward and as a result the Transfer Sites (which are a subset of the MBNL Sites) constitute an enterprise.

4.14 The MBNL JV agreements provide that MBNL will terminate on 31 December 2031 (or earlier if agreed) [✂].The [✂] is not conditional on any other events occurring and consideration for the Transfer Sites will be paid in full upon completion of the Merger.[64] [✂].[65] Therefore, we consider that, as a result of these arrangements, Cellnex and the Transfer Sites cease to be distinct.[66]

MBNL Sites

Enterprise

4.15 The [✂] identifies the MBNL Sites, the economic benefit to which Cellnex is entitled is based, as:

(a) Consisting of: (i) the [✂] sites (or such other number agreed in writing) that either 3UK or BT/EE own solely or jointly pursuant to MBNL, or sites that 3UK is granted the right to use; and (ii) [✂];[67] and

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[62] [✂], Schedule 1, paragraphs 1 and 35.
[63] Subject to a minimum of 3,000 sites and a maximum of half of the number of MBNL Sites.
[64] [✂], Schedule 1, paragraph 4.
[65] [✂], Schedule 1, paragraph 43 and 34 respectively.
[66] The CMA notes that the transfer of legal title to the Transfer Sites takes place in the future after the dissolution of MBNL when MBNL's term expires in 2031, or earlier if the MBNL shareholders agree to dissolve MBNL at an earlier date. Section 27(2) of the Act provides that: 'The time when the parties to any such arrangements or transaction become bound to such extent as will result, on effect being given to their obligations, in the enterprises ceasing to be distinct enterprises shall be taken to be the time at which the two enterprises cease to be distinct enterprises'. Cellnex submitted that the transfer of the Transfer Sites is not subject to any option and the transfer will take place for nil consideration (consideration being paid on completion of the Merger): Cellnex, Request for information dated 2 November 2021 response, question 1. In the alternative, the CMA notes the relevant merger situation will nonetheless arise in the future in 2031 or earlier when the legal title to the Transfer Sites is transferred to Cellnex upon dissolution of MBNL.
[67] [✂], Schedule 1, paragraph 5 and 8.

(b) Excluding, amongst other things: (i) the [✂] sites supplied to MBNL by third parties; (ii) sites acquired or built by 3UK and/or BT/EE after the [✂] comes into effect; and (iii) any MBNL active infrastructure (the Excluded Activities).[68]

4.16 The MBNL Sites form part of the activities of MBNL.[69] MBNL is a business active in the supply of developed macro sites (predominantly to its shareholders, 3UK and BT/EE. Therefore, we consider that the MBNL Sites constitute a business carried on for gain or reward and as a result the MBNL Sites constitute an enterprise.

Ceasing to be distinct

4.17 On completion of the Merger, Cellnex will acquire the 'economic benefit' of the MBNL Sites that 3UK is currently entitled to. There is no transfer of legal control over the MBNL Sites on completion of the Merger.

4.18 Section 26 of the Act distinguishes three levels of interest that can constitute control: (i) material influence, (ii) de facto control, and (iii) a controlling interest (also known as 'de jure', or 'legal control').[70]

4.19 De facto control refers to situations where an entity controls a company's policy, notwithstanding that it does not hold a majority of voting rights (eg situations where an entity has, in practice, control over more than half of the votes actually cast at a shareholder meeting). De facto control requires the ability to unilaterally determine (as opposed to just materially influence) a company's policy.[71]

4.20 We consider that the rights that Cellnex will acquire in relation to the MBNL Sites do not give rise to either legal control or de facto control over the MBNL Sites. The MBNL Sites are owned by MNBL, and we note in in this context that MBNL is structured as a 50/50 JV [✂].

4.21 Material influence is described in the Act as being able 'directly or indirectly … materially to influence the policy of a body corporate … without having a controlling interest in that body corporate…'.[72]

[68] [✂], Schedule 1, paragraph 5. In addition, the following are excluded from the MBNL Sites: [✂].
[69] [✂], Schedule 1, paragraph 5. The [✂] identifies the MBNL Sites, and therefore the economic benefit to which Cellnex is entitled, as consisting of (i) the [✂] sites that either 3UK or BT/EE own, or sites that 3UK is granted the right to use, and (ii) [✂].
[70] CMA2 Revised, paragraph 4.20.
[71] CMA2 Revised, paragraph 4.37.
[72] Section 26(3) of the Act.

4.22 Our guidance explains that the 'policy of the target in this context means the management of its business, and thus includes the strategic direction of a company and its ability to define and achieve its commercial objectives'.[73]

4.23 The ability materially to influence a target's policy is not an ability to control it. In particular, it does not amount to an ability to drive policy in a direction that other shareholders, management or the board object to. Rather, it is the ability materially to influence relevant strategic or commercial matters, either *positively* (that is, by persuading the company to pursue particular courses of action) or *negatively* (that is, by dissuading the company or its management from pursuing particular courses of action).[74]

4.24 The CMA's assessment of whether a transaction is likely to result in the ability to exercise material influence requires a broad, case-by-case analysis of the overall relationship between the acquirer and a target, and will depend on the facts and circumstances of each case.[75] The CMA will look at the overall effect of the arrangements in practice, in keeping with the 'general principle that the purpose of UK merger control is to enable the CMA to consider the commercial realities and results of transactions and that the focus should be on substance and not legal form'.[76]

4.25 In particular, the CMA can take a broad view and consider all potential sources or factors (in addition to shareholding or board representation) that might enable an acquirer to materially influence the target's policy.[77] Our guidance explains that 'there are no fixed types of agreement that will (or will not) be relevant to this assessment' and notes that, for example, material influence may arise 'as a result of the ability to influence the board of the target, and/or through other arrangements: that is, without the acquirer necessarily being able to block votes at shareholders' meetings'.[78]

4.26 The Parties submitted that the Merger will not result in Cellnex acquiring material influence over the MBNL Sites.

4.27 The remainder of this chapter describes our assessment of whether the Merger will result in Cellnex acquiring material influence over the MBNL Sites.

4.28 The Merger does not involve the acquisition of a direct shareholding or board representation in MBNL; the target enterprise, the MBNL Sites, is not a stand-alone company and there is therefore no separate shareholder or board

[73] CMA2 Revised, paragraph 4.21.
[74] *Amazon/Deliveroo*, Final Report, 4 August 2020, paragraph 4.12.
[75] CMA2 Revised, paragraph 4.22.
[76] CMA2 Revised, paragraph 4.28.
[77] CMA2 Revised, paragraph 4.35.
[78] CMA2 Revised, paragraphs 4.35 and 4.23 respectively.

structure in place. Therefore, we have conducted our assessment of material influence based on an assessment of 'other sources' of potential material influence as described in our guidance, considering the specific factual circumstances of the arrangements between the Parties.[79]

4.29 The following section presents our assessment as follows:

(a) The overall context of the Merger and the commercial reality of the arrangements;

(b) Cellnex's ability to exert influence through contractual mechanisms in the agreements with 3UK and 3UK Holdings;

(c) Other sources of influence; and

(d) Whether Cellnex's ability to exert influence relates to the policy of the MBNL Sites.[80]

The overall context and commercial reality

4.30 The starting point for our assessment of material influence in this case is to understand the context in which the agreements between the Parties have been entered into.

4.31 Firstly, we note that MBNL is a JV entity with only two shareholders (3UK and BT/EE) and that each has an equal shareholding [✂]. Decision-making [✂] and neither 3UK nor BT/EE [✂].[81]

4.32 Secondly, we note that the Articles of Association of MBNL prevent 3UK from divesting its shareholding without BT/EE's approval (and *vice versa*).[82] However, the acquisition of an indirect interest, in other words without a direct shareholding interest, is sufficient to establish material influence.[83]

4.33 The Parties submitted that the economic benefit that Cellnex will receive in relation to the MBNL Sites is not equivalent to ownership of the MBNL Sites. The Parties told us that the economic benefit 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 Merger and thereafter provided 3UK with access to the MBNL Sites on the basis of a

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[79] CMA2 Revised, paragraphs 4.35 and 4.36.
[80] Appendix C sets out a description of (i) the rights Cellnex is acquiring in relation to the MBNL Sites further to the [✂] and [✂], and (ii) MBNL's structure and decision-making.
[81] See further detail in Appendix C.
[82] MBNL Articles of Association, Article 12.
[83] Section 26 of the Act.

services agreement. The Parties submitted that the economic benefit does not allow Cellnex to control the sites and in particular that the [✂] expressly precludes Cellnex exercising decisive influence or control. The Parties also submitted that Cellnex will not acquire any rights generally over the management of MBNL, nor will Cellnex have the ability to appoint a director or observer to the MBNL board.

4.34 In the light of the restrictions owing to the structure of MBNL, we consider that the Parties' submissions that Cellnex is not acquiring a direct stake in the JV, or that Cellnex's right to receive the economic benefit is not equivalent to ownership, are not determinative of our assessment. Material influence can be established in the absence of ownership and we consider that the absence of direct ownership or board representation is not conclusive.

4.35 Furthermore, we note that Cellnex is not acquiring an interest in MBNL as a whole and its contractual rights do not extend to the Excluded Activities (primarily activities unrelated to the MBNL Sites, for example, sites sourced by MBNL from third parties). We agree with the Parties' submissions in this regard that Cellnex's rights do not extend to all activities of MBNL. However, we disagree with the Parties on the weight to place on this limitation; the CMA is assessing the question of whether there is material influence over the MBNL Sites, not MBNL as a whole, and therefore we consider that this limitation is not determinative to our assessment.

4.36 Taking the factors described at paragraphs 4.31 to 4.35 together, we consider that the commercial reality of the arrangements between the Parties is to put Cellnex in the position as if it were the owner of 3UK's interest in the MBNL Sites and accordingly grant Cellnex rights in circumstances where direct ownership and board representation is not possible.

4.37 We consider that this is supported by:

(a) The fact that Cellnex is paying full consideration in advance for its interest in the Transfer Sites. We consider that the fact that CK Hutchison has already agreed to relinquish control over all of the Transfer Sites to Cellnex [✂] further contributes to Cellnex's ability described below to exert influence over the MBNL Sites, compared to a situation where CK Hutchison planned to regain control of the sites in the future. We consider this effect may increase in the future as dissolution of the JV becomes imminent.

(b) Cellnex internal documents that describe its understanding and purpose of the rights it will acquire. We note that one document explains that '[✂].

4.38 We therefore consider that the rights Cellnex will gain in relation to the MBNL Sites should be understood in the light of the restrictions on divesting or acquiring a shareholding and the intended commercial purpose in mind, which was to put Cellnex in as close a position as possible to ownership despite those restrictions.

Influence through contractual mechanisms

4.39 The first way in which we consider that Cellnex will be able to exert influence is through contractual mechanisms in the [✂] between Cellnex and Hutchison 3G UK Holdings Limited (3UK Holdings) that specify areas where 3UK Holdings must procure that 3UK follows Cellnex's directions.

4.40 As explained in this section, we consider that as a result of the contractual mechanisms, 3UK will [✂]. We note in this context, as explained at paragraph 4.23, that material influence can arise from the ability to negatively influence strategic or commercial matters.

4.41 The Parties submitted that Cellnex's limited rights of instruction or direction in the [✂].The Parties also submitted that the directors of 3UK will remain subject to their fiduciary and directors' duties and their responsibilities to 3UK in respect of the operation of the MBNL JV.

4.42 We note that a different legal entity, 3UK Holdings, is the contractual party to the [✂] and not 3UK. However, 3UK is a wholly owned subsidiary of 3UK Holdings and therefore 3UK Holdings has a controlling interest in 3UK. In addition, and as explained in more detail below, the contractual arrangements between the Parties provide that [✂]. We consider that the obligation that [✂] is a strong obligation [✂] and that it would in practice use its controlling interest in 3UK and any other avenues of influence over 3UK to ensure it meets its obligations under the [✂], noting also the overall context and commercial reality of the arrangements between Cellnex and CK Hutchison as explained at paragraphs 4.30 to 4.38 above.

4.43 We have not, therefore, placed material weight on the fact that the contractual rights and obligations in the [✂] bind 3UK Holdings rather than 3UK directly, as we consider that the practical effect of the provisions is the same.[84] We note that 3UK Holdings will not be bound to [✂]; however, this protection does not prevent every action [✂]. We consider the limitations on Cellnex's contractual rights in more detail below, in paragraphs 4.70 to 4.72 below.

[84] CMA2 Revised, paragraph 4.28: The CMA will assess the substantive effect of arrangements between parties rather than legal form.

- *General decision-making*

4.44 We consider that the right provided by paragraph 6, Schedule 1 of the [✂] (as described in more detail at Appendix C) – [✂].[85]

4.45 The Parties submitted that [✂].However, we note that the second limitation the Parties refer to [✂]– arises only in relation to certain [✂] in paragraph 5, Schedule 1 of the [✂]. There is no equivalent restriction in paragraph 6, Schedule 1 of the [✂] in relation to general decision-making.

4.46 [✂].[86]

4.47 We consider that the practical effect of this right is that it extends to a broad range of ([✂]) decisions related to the MBNL Sites; for example, [✂]. Cellnex could direct 3UK Holdings [✂], thereby exerting influence over the MBNL Sites.

- *Shareholder [✂]*

4.48 We consider that the rights provided by paragraph 5, Schedule 1 of the [✂] in relation to the [✂] are similarly broad.

4.49 3UK Holdings is [✂].

4.50 In addition, the following three [✂] are carved out from the requirement that the matter [✂] and [✂]:

(a) [✂];

(b) [✂];

(c) [✂].[87]

4.51 The Parties submitted that Cellnex's rights under the [✂]fall into two categories: firstly, the right to receive the service fee [✂] from 3UK under the [✂], and secondly, the right to be transferred the Transfer Sites under the [✂] on dissolution of MBNL. The Parties submit that neither of these categories of rights affect any decision taken by MBNL.

4.52 However, we note firstly that the three [✂] listed at paragraph 4.50 are carved out from the requirement that the matter [✂] and [✂]. Therefore, Cellnex

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[85] [✂], Schedule 1, paragraph 6.
[86] [✂], Schedule 1, paragraph 6.
[87] See more detail at Appendix C.

could exert influence over these decisions whether or not the issue could impact Cellnex's rights.

4.53 Secondly, we consider that important areas of decision-making relevant to the strategic commercial policy of the MBNL Sites could arise that meet the two criteria in paragraph 4.49, such that [✂]. In particular, we consider that the second criterion set out at paragraph 4.49 is wide ('[✂]') and is likely to be a weak limitation on Cellnex in practice because 3UK Holdings is likely to give weight to Cellnex's views on prejudice in the light of the factors considered in paragraphs 4.73 and 4.74 below.

4.54 We consider that the Parties' submission that only two categories of rights could fall within the second criterion at paragraph 4.49 is overly narrow and not consistent with the commercial intentions of the provision; if no area of MBNL decision-making could fall within paragraph 4.49 then the provision would be redundant and not required.

4.55 In particular, we consider the obligation on Cellnex to bear costs under the [✂] be affected by certain [✂] decisions. By way of example, when approving an [✂].[88]

4.56 The Parties submitted that the following three limitations applied to all [✂]: firstly, [✂]; secondly, that the [✂]; and thirdly, directors of 3UK will remain subject to their fiduciary and directors' duties and their responsibilities to 3UK in respect of the operation of the MBNL JV. As explained at paragraph 4.35, we agree with the Parties that any influence arises in relation to the MBNL Sites only and where decisions are taken that could affect the MBNL Sites. We considered the role of 3UK Holdings at paragraphs 4.41 to 4.43 above (noting our view that this does not change the practical effect of the arrangements) and we consider the limitations on Cellnex's contractual rights in more detail below in paragraphs 4.70 to 4.72 below.

- *Governance Board*

4.57 We consider that the establishment of the Governance Board between Cellnex and 3UK Holdings is an important mechanism by which Cellnex can exert influence as a result of (i) the budget to be agreed at Governance Board meetings (the GBC Budget), and (ii) [✂].

[88] [✂] The Parties submitted that [✂]. However, the CMA considers this does not prevent influence arising over [✂]. The Parties also submitted that the [✂]; however, this submission does not address new areas of investment contemplated by the JV and therefore not within scope of the [✂], for example, [✂].

- *The GBC Budget*

4.58 The [✂] provides for the GBC to prepare and present an annual budget for the MBNL Sites, that requires Cellnex's approval and which [✂]. The Parties submitted that the GBC Budget is distinct from the MBNL budget and that Cellnex will not have the ability to generally determine the MBNL budget.

4.59 However, we note that Cellnex approval is required for the GBC Budget and that [✂].[89] We consider therefore that the GBC Budget is aimed at informing and influencing the discussion and agreement on the aspects of MBNL's budget that relate to the MBNL Sites.

4.60 [✂]. In our view, noting the broader commercial reality set out in paragraphs 4.36 and 4.37, [✂]. We consider that the ability to exercise influence in this way is strengthened by (i) the fact that Governance Board meetings will take place [✂], and (ii) the requirement on [✂].[90]

4.61 The Parties submitted that there is no interdependency between the GBC Budget and the MBNL budget; [✂].However, we note the requirement for Cellnex to approve the budget and for [✂]. As explained at paragraph 4.60, we consider that the GBC Budget and governance process related to it has been designed to enable Cellnex to express views on the budget and for this to be taken into account in discussions related to the MBNL budget.

4.62 The Parties also submitted that the budget agreed at Governance Board meetings is limited to [✂].We do not consider it relevant to the assessment of the ability to exert material influence that the budget agreed at the Governance Board is limited in certain respects. We also note that a budget is typically limited to cost and revenue items with new investments covered in a business plan.

4.63 Finally, the Parties submitted that the [✂] does not [✂] the budget discussed at the Governance Board. We consider that the lack of dispute resolution mechanism does not prevent Cellnex acquiring an ability to influence and we note in this context the overall commercial context set out at paragraphs 4.30 to 4.38 and the overriding obligation on [✂].

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[89] [✂], Schedule 1, paragraph 10.
[90] [✂], Schedule 1, paragraph 6.

- *Wider [✂] discussions*

4.64 The Governance Board anticipates wider discussions between Cellnex and 3UK Holdings around the [✂]; the [✂] specifies that the Governance Board may include [✂].

4.65 We note in this context that the Governance Board has been designed to meet [✂]; we consider that [✂].

4.66 We therefore consider that the Governance Board process provides Cellnex with an avenue to influence the MBNL budget and wider decisions related to the MBNL Sites that may be discussed at MBNL board meetings.

- *MBNL dissolution, exit plan and site allocation*

4.67 The Parties submitted that [✂].

4.68 However, we note that the [✂] provides that (i) [✂].

4.69 We consider that the provisions of the [✂] will provide Cellnex with influence over which sites will form the Transfer Sites; when consulting Cellnex in relation to [✂], we consider that 3UK Holdings is likely to give weight to Cellnex's views in the light of the factors considered in paragraphs 4.73 and 4.74. While we note that Cellnex will not be a direct participant in the negotiations, we consider that Cellnex will nonetheless be able to exercise influence over 3UK's negotiating position.

- *Limitations on Cellnex's contractual rights*

4.70 The [✂] places the following limitations on Cellnex's rights:

(a) [✂]; and

(a) [✂].

4.71 The Parties submitted that these two limitations on Cellnex's contractual rights prevent Cellnex exercising material influence.

4.72 We consider that these limitations do not, in practice, prevent the ability for Cellnex to exercise influence through the contractual mechanisms described above. The limitations cannot cover every scenario where Cellnex could exercise influence through the contractual mechanisms, noting in particular the narrow remit of the limitations and the breadth of the contractual rights; the commercial intention of the contractual provisions would be defeated if they could never be exercised due to the limitations, for example, if every exercise of the contractual rights put 3UK in breach of the MBNL JV agreements. In addition, we note that a finding of material influence in this context does not depend on, or assume, a breach of the MBNL JV agreements.

Other sources of influence

4.73 We consider that Cellnex's ability to exert influence over the MBNL Sites as a result of the contractual mechanisms described above is strengthened in the light of the wider commercial relationship between Cellnex and 3UK. In this context, we note that our guidance explains that the desire to avoid conflict with an acquirer may be an additional relevant factor in determining material influence.[91]

4.74 We consider the following factors as relevant:

(a) 3UK has agreed an important ongoing and long-term commercial relationship with Cellnex. Firstly, pursuant to the [✄], Cellnex and 3UK have agreed a [✄] in relation to supply of access to the Unilateral Sites. The term of this agreement [✄]. We note in particular that the [✄] provides for 3UK to [✄]. Secondly, the [✄] also provides that Cellnex will similarly agree to supply 3UK with access to the [✄]. Finally, Cellnex is also a supplier to MBNL (in effect 3UK and BT/EE) of [✄] of the remaining [✄] sites within MBNL. On MBNL's dissolution, it is possible that 3UK would look to renew this supply contract with Cellnex. We consider that, in the light of these ongoing and anticipated future commercial arrangements with Cellnex, noting in particular the strategic and important nature of the assets to 3UK's network and possibility for 3UK to [✄], 3UK is likely to be influenced by requests/concerns of Cellnex raised at the Governance Board (or other fora) and take these into account [✄].

(b) Cellnex will become the ultimate owner of the Transfer Sites. We consider that Cellnex is not a mere financial investor and that the rights it will acquire in relation to the MBNL Sites are strategic in nature, particularly in light of the binding right to receive legal title to approximately half of those sites, the Transfer Sites, in 2031. As noted above, Cellnex is paying [✄] in advance for the Transfer Sites on completion of the Merger. We consider that this, together with the fact the 3UK will from completion of the Merger in all practical terms no longer be the owner of the sites and its

[91] CMA2 Revised, paragraph 4.31.

exit from the passive infrastructure market, means that 3UK is likely to be influenced by, and take into account Cellnex's views, [✂].

Influence relates to the policy of the MBNL Sites

4.75 We consider that the contractual mechanisms outlined above at paragraphs 4.39 to 4.72 and the other sources outlined at paragraphs 4.73 and 4.74, are broad and enable Cellnex to influence the strategic and commercial policy of the MBNL Sites (for example, in relation the [✂]). We note in particular that the [✂] relate to [✂] and decisions related to spending are particularly relevant for the passive infrastructure business.

4.76 We therefore disagree with the Parties' submissions that the rights Cellnex is acquiring do not enable it to influence the strategic and commercial policy of the MBNL Sites (via MBNL), nor the day-to-day management to the MBNL Sites. We note more generally in this context that material influence over commercial policy does not need to be established in respect of every possible strategic and commercial policy decision; it is sufficient for the jurisdictional assessment that Cellnex acquires material influence over some areas of strategic and commercial decision-making.

Provisional conclusion on material influence

4.77 For the reasons set out in the analysis above, our provisional conclusion is that the arrangements described above, together and in the round, give rise to the ability for Cellnex to exercise material influence over the MBNL sites.

4.78 We note that the nature of Cellnex's rights and the JV decision-making structure means that Cellnex's material influence is limited to its ability to exert negative influence. The impact of that influence is considered as part of the assessment of competitive effects.

4.79 Therefore, our provisional conclusion is that Cellnex and the MBNL Sites have ceased to be distinct for the purposes of section 23 of the Act.

Single or multiple relevant merger situations

4.80 As explained above, we consider that there are three enterprises that cease to be distinct from Cellnex as a result of the Merger: TowerCo, the MBNL Sites and the Transfer Sites.

4.81 Our guidance explains that: 'It may, in certain limited circumstances, be appropriate to treat a single commercial transaction as giving rise to more than one relevant merger situation … In contrast, in some circumstances it may be appropriate to treat more than one commercial transaction as a single relevant merger situation'.[92]

4.82 We consider that the Merger constitutes a single commercial transaction; the sale and purchase agreement provides for the acquisition of TowerCo and (as a condition to completion) the execution of the [✂] and the [✂], all of which relate to the economic benefit of the MBNL Sites and subsequent acquisition of the Transfer Sites. We consider that these transactions are interlinked and inter-conditional.

4.83 The Parties submitted that the Merger involves two interlinked and inter-conditional elements that amount to a single RMS. Firstly, the acquisition of control over TowerCo (which holds the Unilateral Sites); and, secondly, the acquisition of material influence and control over the Transfer Sites upon dissolution of the MBNL JV. The Parties submitted that the acquisition of interests in the MBNL Sites does not form part of the RMS.

4.84 As the Merger constitutes a single commercial transaction, we consider that the Merger gives rise to a single RMS (rather than three separate RMS in the light of the three enterprises involved) pursuant to which Cellnex, TowerCo, the MBNL Sites and the Transfer Sites all cease to be distinct. We do not consider that there are circumstances that make it more appropriate to treat the Merger as giving rise to more than one RMS; in this regard, we note that the acquirer of control in respect of each enterprise is the same (Cellnex) and therefore the competitive assessment is not materially affected by whether there is a single RMS or multiple RMSs.

Provisional conclusion on relevant merger situation

4.85 In light of the above assessment, our provisional view is that the Merger will result in the creation of a relevant merger situation under the Act.

5. Counterfactual

5.1 To assess the effects of the Merger, we have considered the prospects for competition with the Merger against what would have been the competitive situation without the Merger. This is called the 'counterfactual'.

5.2 In this chapter, we set out:

(a) the CMA's framework for assessing the counterfactual;

[92] CMA2 Revised, footnote 18.

(b) the views of the Parties on the appropriate counterfactual; and

(c) our assessment of the counterfactual.

Framework for our assessment

5.3 At phase 2, the CMA has to make an overall judgement as to whether or not an SLC has occurred or is likely to occur.[93] Applying the SLC test involves a comparison of the prospects for competition with the merger against the competitive situation without the merger. The latter is called the 'counterfactual'. The counterfactual is not a statutory test but rather an analytical tool used in answering the question of whether the merger gives rise to an SLC.[94]

5.4 To help make the SLC assessment, the CMA will select the most likely conditions of competition as its counterfactual against which to assess the merger.[95] The counterfactual may consist of the prevailing, or pre-merger, conditions of competition, or conditions of competition that involve stronger or weaker competition between the merger firms than under the prevailing conditions of competition.[96] The appropriate counterfactual may increase or reduce the prospects of an SLC finding by the CMA.[97]

5.5 The counterfactual is not intended to be a detailed description of the conditions of competition that would prevail absent a merger. Those conditions are better considered in the competitive assessment.[98] The counterfactual assessment will often focus on significant changes affecting competition between the parties.[99]

5.6 The CMA is likely to only focus on significant changes where there are reasons to believe that those changes would make a material difference to its competitive assessment. The example cited in the CMA's guidance involves a firm that is being acquired which could, in the counterfactual, have remained an independent competitor by raising external funding, or alternatively could have remained an independent competitor by being acquired by a firm with no current or potential activities in the relevant sector. The guidance indicates that the CMA would be unlikely to seek to consider the relative likelihood of those scenarios arising since both lead to the same conditions of

[93] Merger Assessment Guidelines (CMA129) (MAGs), paragraph 3.13.
[94] MAGs, paragraph 3.1.
[95] MAGs, paragraph 3.13.
[96] The conditions of competition before a merger in anticipated acquisitions are generally referred to as the 'prevailing conditions of competition' and in completed acquisitions as the 'pre-merger conditions of competition'.
[97] MAGs, paragraph 3.2.
[98] MAGs, paragraph 3.7.
[99] MAGs, paragraph 3.8.

competition.[100] The same principle applies in this case to different transaction structures and different transaction counterparties that might ultimately lead to broadly the same conditions of competition.

5.7 Accordingly, the CMA will generally conclude on the counterfactual conditions of competition broadly – that is, prevailing conditions of competition, conditions of stronger competition, or conditions of weaker competition. If two or more possible counterfactual scenarios lead to broadly the same conditions of competition, the CMA may not find it necessary to select the particular scenario that leads to its counterfactual.[101]

5.8 Establishing the appropriate counterfactual against which to assess a merger is an inherently uncertain exercise and evidence relating to future developments absent the merger may be difficult to obtain. Uncertainty about the future will not in itself lead the CMA to assume the pre-merger situation to be the appropriate counterfactual.[102]

5.9 As part of its assessment, the CMA may consider the ability and incentive (including but not limited to evidence of intention) of the merger parties to pursue alternatives to the merger, which may include reviewing evidence of specific plans where available.[103]

5.10 The time horizon that the CMA considers when describing the counterfactual will be consistent with the time horizon used in the CMA's competitive assessment and depend on the context. In some markets, relevant developments may not take place for some years while in others the relevant time horizon for the counterfactual will be shorter.[104] This means that, while there is a need for overall consistency between the time horizon for assessing the counterfactual and competitive effects of a merger, the CMA is not limited to considering alternative scenarios that would have occurred at exactly the same time as the developments that give rise to the merger under review.[105]

[100] MAGs, paragraph 3.9.
[101] MAGs, paragraph 3.9. For an application of this principle (under the previous Merger Assessment Guidelines) see Final Report, Completed acquisition by PayPal Holdings, Inc. of iZettle AB, 12 June 2019 at paragraphs 7.32-7.35 and Final report, Anticipated acquisition by Amazon of a minority shareholding and certain rights in Deliveroo, 4 August 2020 at paragraph 6.169.
[102] MAGs, paragraph 3.14.
[103] MAGs, paragraph 3.14. In appropriate circumstances, evidence of ability and incentive may be sufficient to establish a counterfactual even if explicit documentary evidence is not available. See Amazon/Deliveroo at paragraph 6.201.
[104] MAGs, paragraph 3.15.
[105] See Amazon/Deliveroo at paragraph 6.202.

Defining the appropriate counterfactual

The Parties' views

5.11 CK Hutchison told us that, if the Merger was blocked by the CMA, the (appropriate) counterfactual would be that it would continue to own and operate its UK passive infrastructure assets.

5.12 CK Hutchison told us that all of its passive infrastructure assets in the EU had been sold and the counterfactual could therefore only be assessed in relation to any transaction relating to the UK alone.

5.13 CK Hutchison told us that [✂].

5.14 Submissions from the Parties on specific points are covered in the relevant sections below.

Our approach

5.15 In order to assess whether the Merger may be expected to give rise to an SLC, we have assessed which of the following counterfactual scenarios is the most likely and, therefore, the appropriate counterfactual in this case:

(a) Prevailing conditions of competition. Under this scenario, absent the Merger, the Parties would have continued under separate, independent, ownership. CK Hutchison would have retained ownership of its passive infrastructure assets to be used to service its own mobile network, 3UK, and the MBNL joint venture, such that the assets would not have been operated in direct competition with Cellnex's passive infrastructure assets.[106]

(b) Conditions of stronger competition. Under this scenario, absent the Merger, CK Hutchison would have pursued an alternative method to the Merger to realise value from its passive infrastructure assets in the UK. This would have resulted in these assets being operated in direct competition with Cellnex's passive infrastructure assets resulting in stronger competition between Cellnex and CK Hutchison's assets as compared to the prevailing conditions of competition.

[106] We note that the prevailing conditions of competition are themselves dynamic. See MAGs, paragraph 3.3. Under this counterfactual scenario, CK Hutchison would have retained ownership of its passive infrastructure assets and maintained a broadly consistent business model but may have, for example, sought to increase co-location on those assets to a limited extent.

5.16 The Parties made several submissions about the appropriate framework for our assessment of the counterfactual, in particular in relation to the scope of our assessment (that is, the range of counterfactuals that the CMA is able to consider) and the extent to which the sale of the non-UK assets that were also sold by CK Hutchison to Cellnex should be relevant to our assessment.

5.17 In order to determine which counterfactual scenario should be considered most likely for the purposes of our assessment, we first considered these threshold questions.

5.18 We then considered the rationale for the Merger and how this affects CK Hutchison's incentives to realise value from its passive infrastructure assets.

5.19 We then considered CK Hutchison's ability to implement the strategic options available that allow them to realise value from their passive infrastructure assets in line with these incentives.

5.20 As indicated in paragraphs 5.6 and 5.7 above, our guidelines provide that the CMA will generally conclude on the counterfactual conditions of competition broadly. In particular, if two or more possible counterfactual scenarios lead to broadly the same conditions of competition, the CMA may not find it necessary to select the particular scenario that leads to its counterfactual.[107]

5.21 Accordingly, our analysis of the counterfactual by which the Merger should be assessed does not require us to specify the exact route CK Hutchison would have taken absent the Merger, but rather to consider the credibility of the alternative options available to CK Hutchison in order to inform the overall likelihood of a possible counterfactual in which CK Hutchison's passive infrastructure would have been operated in direct competition with that of Cellnex.

5.22 As noted above, the CMA is not limited to considering alternative scenarios that would have occurred at exactly the same time as the developments that give rise to the merger under review.

5.23 In this case, reflecting the evidence in relation to the considerations driving CK Hutchison's commercial incentives, we have sought to consider the options available to CK Hutchison over an extended period of time.

5.24 This is because, as set out in more detail below, there is no indication, in the evidence we have seen, that the sales process that it ran was considered to

[107] MAGs, paragraph 3.9.

be a ‘one shot’ process that excluded the pursuit of other options (either individually or in combination) at later points in time.

5.25 In fact, CK Hutchison told us that it would have [✄] had the original sales process not ultimately resulted in an acceptable outcome, [✄].

Scope of the counterfactual

Parties’ views

5.26 In relation to the range of counterfactuals that the CMA is, in the Parties’ view, entitled to consider in this inquiry, the Parties submitted that:

(a) ‘The counterfactual must be assessed in the light of the relevant factual situation that would apply if the Proposed Transaction does not proceed. Importantly, those facts include that all of CK Hutchison’s passive telecommunications assets in Europe (the EU) have now been sold and could not form part of any other hypothetical transaction.’ Accordingly, ‘[t]he counterfactual can therefore only be assessed in relation to any transaction relating to the UK alone.’

(b) ‘The CMA’s [phase 1] 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.’

5.27 CK Hutchison submitted that it would be incorrect to include the non-UK assets in the counterfactual, as it told us ‘[…] unless the CMA could satisfy itself on the balance of probabilities that the sale of the non-UK assets was a ‘consequence’ of the sale of the UK assets and would not have occurred absent the Proposed Transaction, the CMA cannot adopt a counterfactual in which the non-UK assets remain available to a third-party purchaser or investor.’

5.28 In support of this position, CK Hutchison cited paragraph 3.4 of the Merger Assessment Guidelines, which states that ‘[o]nly events that would have happened in the absence of the merger under review – and are not a consequence of it – can be incorporated into the counterfactual.’

5.29 Further, CK Hutchison submitted that the Parties entered into ‘[…] a series of carefully structured transactions which provided for the separate sale of CK Hutchison’s passive infrastructure assets in various European jurisdictions’ and that the ‘[…] legal and natural persons involved were each content for the non-UK assets to be sold even if the Proposed Transaction did not occur' and that '[…] the non-UK assets have all now been sold.'

5.30 CK Hutchison submitted that these facts evidence '[…] what the relevant legal and natural persons would have done [absent the Merger], actually planned to do and ultimately did do.'

Our assessment

5.31 As our guidance (which reflects the relevant case law) makes clear, the counterfactual is an analytical tool, intended to establish the conditions of competition that would have prevailed in the absence of the Merger.[108]

5.32 Accordingly, the question we need to answer when determining the appropriate counterfactual is not, as CK Hutchison submitted, 'what factual situation […] would apply if the Proposed Transaction does not proceed' or what the counterfactual would be '[i]f the Proposed Transaction is blocked by the CMA.'

5.33 Instead, we are required to determine what the most likely conditions of competition would have been absent the Merger (a transaction which, as explained below, formed part of the broader set of commercial arrangements between CK Hutchison and Cellnex).

5.34 On this basis, the fact that the non-UK assets cannot now be sold to an alternative purchaser if the Merger does not go ahead because they have already been sold does not prevent us from considering counterfactual scenarios involving the sale of non-UK assets.

5.35 As the Parties note, our guidance states that the counterfactual can incorporate only events that would have taken place absent a merger (and are not a consequence of it).[109]

5.36 In assessing whether events are a consequence of a merger, we consider the impact of the merger broadly. For example, as our guidance makes clear,[110] where the decision to enter into a merger changes the merger parties' intentions to invest in particular activities, or leads them to divest certain lines of business (even if not required to do so by the merger agreements), such

[108] In this context, it should be noted that CK Hutchison's submission (referred to at paragraph 5.20 above) that the balance of probabilities test applies specifically to the determination of the counterfactual is not correct. It is settled law that the balance of probabilities test applies to the statutory questions the CMA must answer but "[i]*t does not have to be applied separately to each element in the analysis which is used to reach a conclusion on each of these points.*" *BSkyB and Virgin Media v CC and BERR* [2010] EWCA. Civ 2, paragraph 69.
[109] MAGs paragraph 3.4.
[110] MAGs, footnote 55.

actions would typically be disregarded for the purposes of determining the counterfactual where those actions would not have been taken in the absence of the merger.

5.37 Similarly, in the present case, we do not consider the fact that the Parties ultimately structured the transactions such that the sale of assets outside the UK could proceed independently of the sale of the UK assets is determinative. To accept CK Hutchison's submission to the contrary would, in effect, allow merger parties to determine the relevant counterfactual through their chosen approach to structuring a merger transaction. The question of whether events are a consequence of a merger under review is fact-specific and is not determined by the transaction structure chosen by the merger parties.[111]

5.38 The key question for our assessment is whether the sale of the remainder of CK Hutchison's passive infrastructure assets to Cellnex would have proceeded absent the Merger agreement to sell the UK assets to Cellnex.

5.39 To address this, we have first assessed the extent to which, at the time the EU and UK asset sales were agreed, they were considered by the Parties as part of an overall commercial transaction, notwithstanding the different conditions precedent that ultimately applied to the sale and purchase agreements entered into in respect of the different elements of the overall commercial transaction.

5.40 CK Hutchison told us that:

(a) [✂];

(b) [✂];and

(c) the Parties subsequently agreed to structure the overall transaction as six standalone transactions. Each transaction was subject to different conditions precedent, including different regulatory processes. CK Hutchison told us that [✂].

5.41 Accordingly, while the overall commercial transaction between the Parties was structured in such a way that different packages of assets were subject to different conditions precedent, the evidence shows that the Parties

[111] For an application of this principle see Final Report, Reckitt Benckiser / K-Y brand, 12 August 2015. In that case "*J&J argued that the counterfactual is the situation that it has effectively brought about by the way it has structured the transaction; namely a stranded UK brand. It claimed that the counterfactual is the situation without the relevant merger situation and that the relevant merger situation in this case relates only to the UK element of the global transaction because the transaction was referred for an in-depth review as an 'anticipated merger' after the parties had completed in most of the world*" (paragraph 7.3). In rejecting this mechanistic approach, the CMA concluded that "[…] *the counterfactual cannot be conditioned by the particular transaction structure chosen by the parties in this way*".

considered each country-specific transaction to form part of an overall commercial transaction.

5.42 This conclusion is supported by CK Hutchison who told us that:

(a) The overall commercial deal with Cellnex was '[…] a €10 billion transaction involving all of [CK Hutchison's] tower assets across Europe and in the UK […]. The transactions were structured, of course, as a series of transactions, simply because each country would have different legal and regulatory requirements […]. And the UK, as it turns out… is the last one, just in terms of timing, right, to come forward. But it's important that you understand that this was for [CK Hutchison] a transaction that involved the whole of [CK Hutchison's] towers. And I believe the same will be said by Cellnex as well... It was not a UK specific transaction, it was a transaction that included… the UK.'

(b) '[T]he transaction with Cellnex was negotiated as a deal for all of CKH Networks' European assets. And it was structured as a series of transactions, essentially to optimise the execution speed. Knowing that regulatory legal compliance requirements would be different in different jurisdictions, closing sequentially… in each of those jurisdictions made sense.'

5.43 Similarly, the evidence provided by Cellnex demonstrates that the Merger formed part of an overall commercial transaction that included the UK assets and the non-UK assets. Cellnex told us:

(a) [✂]

5.44 In light of the evidence above, we consider that the series of legally separate transactions entered into between CK Hutchison and Cellnex in relation to CK Hutchison's passive infrastructure assets formed part of a single overall commercial transaction between the Parties.

5.45 We note the Parties' submission that the transactions forming part of the overall commercial transaction were subject to different conditions precedent and were therefore capable of completing independently of each other (as has happened in practice).

5.46 While that is the case, we do not consider that a contractual structure that allows certain parts of an overall commercial transaction to proceed ahead of others equates to agreeing a transaction that does not include the UK assets at all. This is consistent with the commercial reality of the transaction according to CK Hutchison, which, as noted in paragraph 5.42(a) above, explicitly told us that this was 'not a UK specific transaction' but rather 'a transaction that included […] the UK.'

5.47 Looking beyond the legal form of the transactions, we have considered the available evidence in relation to the rationale for, and negotiation of, the overall commercial transaction entered into by the Parties. We believe that this evidence shows that, in the absence of an agreement to acquire the UK assets, the overall deal between CK Hutchison and Cellnex – including in relation to the EU assets – would not have been done in its current form.

5.48 Given that the sale of the EU assets and the UK assets formed part of the overall commercial transaction between the Parties, we consider that the sale of the EU assets can be considered a consequence of the Merger within the meaning of our guidance.

5.49 On this basis, we also consider that it is open to us to consider a counterfactual that would have included the sale of both the EU assets and the UK assets to an alternative purchaser.

5.50 We recognise that, within the scope of the existing overall commercial transaction, the Parties were willing to take the risk that some or all of the EU assets might ultimately be sold without the UK assets. This demonstrates that alternative options available to CK Hutchison absent the Merger might also have included separate sales of some or all of the EU assets (including potentially to Cellnex) and the UK assets.

5.51 This is consistent with an internal document produced in April 2019 relating to CK Hutchison's internal reorganisation of its telecommunications division. The document shows that CK Hutchison [✂] (emphasis added).

5.52 In our view, the available evidence demonstrates that CK Hutchison considered realising an uplift in value in the assets either as a series of transactions or as a single transaction. Accordingly, we consider that, in addition to counterfactuals that would have included the sale of both the EU assets and the UK assets, it is also open to us to consider a counterfactual that would have included the sale of only the UK assets to an alternative purchaser.

Provisional conclusion on scope of counterfactual

5.53 Our provisional view is that our assessment of the counterfactual can consider the full set of strategic options open to CK Hutchison at the time it entered into the overall commercial transaction with Cellnex, which involved both the UK and EU assets.

5.54 These options included an alternative purchaser acquiring CK Hutchison's UK assets either alone or as part of a wider portfolio including some or all of its other European passive infrastructure assets.

5.55 It is within this context that we will consider whether the UK assets would have been commercialised under alternative scenarios and, if so, whether this would have led to a more competitive counterfactual than the pre-merger situation.

CK Hutchison's rationale and incentives for the Merger

5.56 We now consider the ability and incentive (including but not limited to evidence of intention) of CK Hutchison to pursue alternatives to the Merger. This is intended to help inform our assessment of CK Hutchison's likely actions in the absence of the Merger in light of the credibility of the range of alternative options that were available to it.

5.57 We first outline the Parties' submissions on the rationale for the Merger before providing our assessment of the available evidence in relation to the transaction rationale, as well as the wider strategic incentives that underpin that rationale.

Parties' views

Overview of rationale and incentives

5.58 With regard to the background to the Merger, CK Hutchison submitted that:

(a) It 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 holding company.

(b) 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.

(c) With regard to the Merger itself, CK Hutchison submitted that 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 5G.

(d) Cellnex met CK Hutchison's strategic needs given 3UK's long term reliance on and contractual commitment to these assets.

5.59 Cellnex told us that the Merger was an opportunity for it to expand its presence in the UK and that as a dedicated WIP it has a strategy of acquiring assets not currently operated by WIPs and increasing the value of these assets through increasing the likelihood of co-location on them.

5.60 With the whole transaction including the EU assets, Cellnex told us that the fact [✂] made [✂].

5.61 The Parties also told us that the Merger reflected worldwide market trends, whereby MNOs are divesting their passive infrastructure assets or outsourcing the management of those assets to independent WIPs.

Establishment of a tower company and realising an uplift in the value of the assets through commercialisation

5.62 CK Hutchison told us that the initial rationale for reorganising its European tower assets into a tower company was to seek to realise an uplift in value for the assets. CK Hutchison considered that the reorganisation would 'surface the value of the assets', and that the reorganisation gave it the opportunity to explore all of the options available to it to maximise the value of the assets.

Need to realise funding to invest in 3UK's network

5.63 CK Hutchison told us that by the time it had implemented the reorganisation, its motivation had evolved to include accessing funding [✂], as there was a significant need to invest in 3UK's network. [✂]:

(a) [✂];

(b) the designation of Huawei as a High Risk Vendor by the UK Government, [✂]; and

(c) [✂].

5.64 CK Hutchison submitted that the Merger provides funding for 5G rollout [✂].

5.65 CK Hutchison told us that:

(a) 3UK currently has the largest 5G spectrum holdings in the UK and investment in its 5G network would allow 3UK to enhance its network capacity and compete more effectively against the other MNOs;

(b) this opportunity could only be realised if significant investment was made very rapidly to upgrade 3UK's radio network for 5G;

(c) [✂]; and

(d) [✂].

5.66 CK Hutchison told us that 3UK's network had suffered from significant congestion [✂]. This involved:

(a) [✂]; and

(b) [✂].

5.67 CK Hutchison told us that, [✂].

5.68 CK Hutchison also told us that a sale of the assets represented [✂]. It told us: [✂] the decision… lies with us. And of course, the fact that we are able… to, in effect, raise the equivalent of equity… through this transaction [✂].

5.69 CK Hutchison told us, in relation to an alternative source of funding, that sourcing investment funding through debt could cause a downgrade of its credit rating.

The requirement for a suitable counterparty

5.70 CK Hutchison told us that:

(a) At the time of its internal reorganisation and before the deal with Cellnex was in discussion, CK Hutchison [✂].

(i) [✂].

(b) [✂]:

(i) The [✂] (see (a) above) are long term in nature with each having an initial term of 12 to 15 years, and renewable going forward. CK Hutchison required a partner that was established and had long-term plans for the assets.

(ii) A suitable counterparty would need to be stable and hold onto the assets for at least 15 years. A partner that would seek to sell on the assets in the short term [✂];

Our assessment of the rationale and incentives for the Merger

Realising an increase in the value of passive infrastructure assets

5.71 The evidence available to us suggests that CK Hutchison had a strong incentive to increase shareholder value through commercialising its UK passive infrastructure assets either under its own or a third party's ownership.

5.72 This is due to the significant difference in valuation these assets attract depending on whether they sit within an MNO or whether they form part of a separate entity (either owned by the MNO's wider group or a third party) through which the owner seeks to commercialise them further.

5.73 For example, Deutsche Telekom told us that [✂].Deutsche Telekom told us that[✂].[✂].

5.74 CK Hutchison's internal documents in the first half of 2019 set out the rationale for its re-organisation in which its passive infrastructure assets were moved into a separate holding company:

(a) Under the heading [✂] a presentation [✂] states that the '[✂]. It then notes that [✂]. The presentation also states that: [✂]

(b) Documents prepared for CK Hutchison in respect of Cellnex's offer note that, [✂]. These documents then note that [✂].

5.75 This uplift in value is also reflected in Cellnex's valuation of the UK and continental European passive infrastructure sites of CK Hutchison, with the agreed price of €10 billion representing a [✂].

5.76 Looking at the wider market context, we note that CK Hutchison's strategic objective to commercialise passive infrastructure assets reflects broader global market trends involving telecoms operators that have historically held such assets. For example:

(a) In May 2020: Phoenix Tower International (PTI) reached a deal with the Irish MNO "eir" to acquire Emerald Tower Ltd, which owns eir's portfolio of 650 sites, for €300m.[112] PTI and eir have established a long-term partnership whereby eir will occupy the sites for at least twenty years. eir is the third largest MNO in Ireland in terms of revenue and customers.[113] eir stated that the transaction allows it to accelerate the roll-out of

[112] https://www.towerxchange.com/phoenix-tower-international-enters-the-irish-market-with-the-acquisition-of-eirs-towers/
[113] https://www.prnewswire.com/news-releases/blackstone-backed-phoenix-tower-international-signs-agreement-with-eir-to-own-and-operate-tower-sites-across-ireland-301064744.html

expanded 4G and 5G networks, increases eir's capacity to further invest in its mobile network, helps to deliver the best mobile experience for customers across Ireland, and enables more efficient infrastructure roll-out in the future to further increase geographic coverage.[114]

(b) In January 2021: Telefónica's subsidiary Telxius Telecom signed an agreement with American Tower Corporation for the sale of its towers division in Europe (Spain and Germany) and in Latin America (Brazil, Peru, Chile and Argentina) for €7.7 billion in cash. This involved two separate sales of the European and Latin American businesses, which combined had approximately 30,722 tower sites. This transaction formed part of Telefónica's stated strategy, which includes an active portfolio management policy concerning its businesses and assets based on value creation, and accelerating the organic reduction of debt.[115] Telefónica stated that the consideration represented 'record multiples';[116] American Tower Corporation stated that it represented an EBITDA multiple of 'less than 26 times'. [117]

(c) In January 2021: Vodafone sold its 50% equity stake in CTIL to Vantage Towers, Vodafone's European tower business, whose shares were subsequently admitted to the Frankfurt Stock Exchange in an IPO in March 2021. This IPO raised approximately €2.3 billion, with Vodafone retaining an approximately 82% stake in Vantage Towers. Vodafone therefore retains its interest in CTIL, indirectly, through its shares in Vantage Towers.[118]

(d) In July 2021: Cellnex completed the acquisition of Polkomtel Infrastruktura, the infrastructure division of Polkomtel, a Polish MNO. The €1.6 billion deal involved the acquisition of approximately 7,000 tower sites, as well as the active equipment used in Polkomtel's network. Polkomtel stated that the reasons for this transaction were to allow for faster and more cost-efficient deployment of modern connectivity services for customers, including more 5G sites.[119]

(e) In November 2021: Vodafone stated that it is considering a combination of the passive infrastructure assets in its Vantage Towers portfolio with

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[114] https://www.eir.ie/opencms/export/sites/default/.content/pdf/IR/news/25-May-2020-Strategic-Partnership-with-Phoenix-Tower-International.pdf
[115] https://www.telefonica.com/en/web/press-office/-/telefonica-sells-telxius-tower-division-to-american-towers-corporation-at-record-multiples-for-7-7-billion-euros
[116] https://www.telefonica.com/en/web/press-office/-/telefonica-sells-telxius-tower-division-to-american-towers-corporation-at-record-multiples-for-7-7-billion-euros
[117] American Tower press release 13th Jan 2021
[118] NASDAQ, 'Vodafone's Vantage Towers climbs after Germany's biggest IPO in three years' & Vantage Towers Annual Report 2020/21, p107
[119] https://www.cellnextelecom.com/en/cellnex-closes-the-acquisition-of-polkomtel-infrastruktura/

those of another MNO such as Orange or Deutsche Telekom in which it would seek 'co-control'.[120] Vodafone also stated that this would allow it to further monetise this entity through selling down further stakes whilst retaining co-control with a partner.[121]

(f) In November 2021: Following its announcement in February 2021 that it was establishing a separate tower company to service both Orange and other mobile network operators [122]Orange announced that its European tower company, TOTEM, was now operational. This holds its approximately 26,000 tower assets across France and Spain. TOTEM is intended to be a neutral operator with its management and operations separate from local MNOs and completely independent.[123] Orange said that the aim is to grow revenue and increase operational efficiency, with an increase in co-location rates. It also said it would target other MNO's both to host on existing sites and for the deployment of new sites.[124] This entity would also target both organic and inorganic growth.[125]

5.77 These trends also appear to be consistent with Cellnex's view of industry dynamics, [✂].

5.78 We believe that the evidence summarised above shows that the strategic incentive to increase shareholder value through creation of an independently-operated 'tower company' is broadly recognised in the industry, with a number of companies already having sought to separate their MNO and tower businesses or being in the process of doing so. The share of towers controlled by WIPs in Europe has grown significantly from 13% (in 2014) to 20% in 2020, with an acceleration in the last two years. From 2018 to 2020, WIPs have released approximately €3.5bn in capital via acquisition of various tower portfolios from MNOs.

5.79 Based on this evidence, we consider that one of the main drivers for the overall transaction entered into by the Parties (which includes the Merger) was to enable CK Hutchison to realise the significant uplift in asset value that would arise from commercialising its passive infrastructure assets, which in this instance took the form of a sale to Cellnex.

[120] Vodafone H1 FY22 Results live Q&A pages 5 and 10
[121] Vodafone H1 FY22 Results live Q&A pages 5 and 10
[122] Orange takes a major step forward with the creation of TOTEM, its European TowerCo | Corporate
[123] Orange announces the operational launch of TOTEM, its European TowerCo | Corporate
[124] Orange takes a major step forward with the creation of TOTEM, its European TowerCo | Corporate
[125] https://www.orange.com/en/newsroom/press-releases/2021/orange-takes-major-step-forward-creation-totem-its-european-towerco, Orange takes a major step forward with the creation of TOTEM, its European TowerCo | Corporate

5.80 On this basis, we consider that, in the absence of the Merger, there would still have been a strong incentive for CK Hutchison to realise this uplift in value by alternative means.

Need for funding for 3UK's network and upgrade to support 5G rollout

5.81 CK Hutchison told us that while it initiated a reorganisation of its European passive infrastructure assets into a separate tower company to realise an uplift in value through some form of commercialisation, [✂].

5.82 This is consistent with other evidence available to us:

(a) Ofcom told us that, [✂].

(b) Ofcom also told us that [✂].

(c) CK Hutchison's public documents have consistently noted the importance of network investment. For example:

(i) In its 2019 and 2020 Annual Reports, CK Hutchison highlighted, within the Chairman's statement setting out the key developments at Group level, that 'Members of 3 Group Europe are in varying stages of introducing 5G capabilities, with strong network and spectrum assets available to support development of emerging 5G opportunities'.[126]

(ii) In its half year 2021 results, 3UK announced that it had increased capital expenditure by 60% to £307 million as a result of increased investment in the network and that it was continuing to invest in its network to 'transform infrastructure and deliver the fastest 5G network as part of a five-year programme'.[127]

5.83 We therefore consider that this investment appears to be particularly important for 3UK due to its stated aim to invest in 3UK's network, including its rollout of 5G. We note that this aim is consistent with broader industry trends, with other operators across Europe facing increased capital expenditure to support the roll out of 5G networks.[128]

[126] CK Hutchison Annual Report 2019, page 13 and CK Hutchison Annual Report 2020, page 13.
[127] Three UK reports H1 21 results, 5 August 2021.
[128] EY report on European tower sector, p25

3UK's long-term reliance on the assets

5.84 CK Hutchison submitted that 3UK required a stable, longer-term partner to ensure operational continuity for its mobile businesses (that is, for a minimum of 15 years [✂].

5.85 We consider that CK Hutchison would need to balance these needs with its incentives to realise the significant uplift in asset value that arises from commercialising its passive infrastructure assets and facilitate funding for investment in 3UK.

5.86 In our view, the available evidence shows that CK Hutchison thought that it was not necessary for it to retain control of the assets, but that sufficient protection could be obtained either through contractual protections or governance arrangements.

(a) For example, CK Hutchison told us that [✂].

(b) CK Hutchison's analysis [✂].

(c) CK Hutchison stated that [✂].

(d) CK Hutchison told us that [✂].

5.87 In our view, CK Hutchison could take the opportunity to realise shareholder value from its passive infrastructure assets (through a sale or otherwise) while appropriately safeguarding the interests of its MNO without having to retain control of the assets.

5.88 We also recognise that 3UK's ongoing reliance on the assets may influence CK Hutchison's choice of counterparties for a transaction and have taken this into account in our assessment of alternative transactions.

Provisional conclusion on the rationale and incentives for the Merger

5.89 The evidence available to us shows that CK Hutchison had a strong incentive to commercialise its passive infrastructure assets to realise additional value from them. The commercialisation of these assets would be consistent with a broader industry trend, in both the UK and other jurisdictions, in which owners of passive infrastructure assets have sought to realise an uplift in value through some form of commercialisation.

5.90 In pursuit of this objective, CK Hutchison sought, as a first step, to initiate a reorganisation of its European passive infrastructure assets into a separate tower company. This enabled CK Hutchison to explore the range of opportunities available to it.

5.91 [✂], it also identified a need to increase funding of 3UK, its mobile network in the UK, including the rollout of its 5G network. In our view, this meant that CK Hutchison preferred an option that would raise the necessary cash proceeds for this investment.

5.92 We note that CK Hutchison wanted a stable long-term partner for the assets due to 3UK's reliance on them. The evidence available to us indicates that this could be balanced with the incentive to commercialise the passive infrastructure assets, in particular through a range of mechanisms, such as contractual protections, that would sufficiently protect the interests of its MNO business. We consider that these considerations may influence the range of potential counterparties that CK Hutchison would be willing to consider in relation to a transaction and we take this into account in this next part of our assessment.

5.93 By contrast, the evidence that we have seen does not suggest that the status quo position, in which the pre-Merger situation would continue for the foreseeable future (so CK Hutchison's passive infrastructure assets would continue to be used in the same way as they were prior to commercialisation to primarily service CK Hutchison's MNO), was an option that was given serious consideration within CK Hutchison.

CK Hutchison's ability to implement options available to it absent the Merger

Overview of our approach

5.94 We have considered the options available to CK Hutchison to achieve its objectives absent the Merger.

5.95 Where other owners of passive infrastructure have implemented strategies to realise an uplift in the value of their assets, various approaches (including outright sale, obtaining minority investments, or establishing joint ventures) have been adopted.

5.96 For the purposes of establishing the counterfactual in this case, consistent with our framework for analysis, we have considered the viability of the options that were, or would be, available to CK Hutchison with a view to determining whether the most likely counterfactual is that CK Hutchison's UK assets would be operated in direct competition with Cellnex's passive infrastructure assets.

5.97 For the reasons set out above, when assessing CK Hutchison's ability to implement alternative options we have considered the full set of strategic options that were available to it at the time that it entered into the Merger (as part of a broader transaction) with Cellnex.

5.98 As explained above, our framework does not limit our consideration of the counterfactual to assessing whether the process that CK Hutchison ran could have produced an alternative purchaser at the precise point in time that the Merger was entered into. In accordance with our guidance,[129] we have, therefore, considered the options available to CK Hutchison over an extended period of time, in particular because, as set out in more detail below, the evidence we have seen suggests that the sales process that it ran was not considered to be a 'one shot' process that excluded the pursuit of other options – either individually or in combination – at later points in time.

5.99 We have considered a number of possible routes that CK Hutchison could have taken that would have resulted in it realising increased value from its passive infrastructure assets, including:

(a) The sale of passive infrastructure assets, including the UK assets which formed part of the Merger, to an alternative purchaser at the end of the original sales process run by CK Hutchison.

(b) An alternative sales process at a later date and/or with an alternative transaction structure in respect of a sale so as to appeal to a broader set of potential acquirers.

(c) Certain options other than sale, that were given some consideration by CK Hutchison and/or regarded as credible courses of action by other market participants, such as:

(i) A combination of CK Hutchison's passive infrastructure assets with a strategic partner to create a separate tower company operating at arms-length from the MNO;

(ii) Retaining ownership of the assets while commercialising them through a separate tower company operating at arms-length from the MNO;

(iii) An IPO of the assets.

[129] Which provides that the time horizon for describing the counterfactual should be consistent with the time horizon used in the competitive assessment. MAGs, paragraph 3.15.

Sale of passive infrastructure assets to an alternative purchaser

Parties' views

5.100 The Parties told us that there was no evidence to suggest that, in the absence of the Merger, CK Hutchison might have sold its European passive infrastructure assets to another party. The Parties told us that there was significant evidence to the contrary. In particular:

(a) There was no credible alternative offer for the passive infrastructure assets at the time when CK Hutchison agreed to sell them to Cellnex.

(b) CK Hutchison's need for the purchaser to be a sophisticated partner with a proven track record of executing large-scale tower transactions, [✂], limited the number of potential purchasers significantly.

(c) [✂].

(d) The 'vast majority' of the relevant passive infrastructure assets in the UK were tied up in the MBNL joint venture for another ten years, which prevented them from being divested.

5.101 With regard to there being no credible alternative offer at the time when it agreed to sell the assets to Cellnex, this was despite the announcement of its internal reorganisation making it clear to potential bidders that it was open to a sale. This was shown by:

(a) Approaches from groups such as [✂];and

(b) receipt of unsolicited pitch documents prepared by investment banks and analyst reports that considered the option of a sale.

5.102 CK Hutchison told us [✂]

(a) [✂];

(b) [✂]

(c) a formal process [✂]; and

(d) CK Hutchison knew by reputation or personally 'everybody' that had the financial capacity for the transaction.

5.103 CK Hutchison told us that any counterparty had to have the financial capacity for the transaction and be desirable as a partner. [✂].

5.104 The Parties also told us that the UK assets are unattractive to potential purchasers because:

(a) the specific assets allocated upon termination of the MBNL JV are unknown; and

(b) the Unilateral Sites are not attractive to alternative purchasers, due to being single tenant sites with limited scope for increased co-location.

5.105 Cellnex also told us that the transaction was not an easy one due to its inability to commercialise the MBNL assets until dissolution of the MBNL JV at the end of 2031. Doing so prior to dissolution would put 3UK in breach of its agreement with BT/EE.

CK Hutchison's views on specific purchasers

5.106 CK Hutchison told us that [✂]. CK Hutchison also mentioned [✂].

5.107 However, CK Hutchison also told us that:

(a) [✂] was not interested in an exposure to the European market on the scale of CK Hutchison's sale of its European assets, in an area where it does not have existing inherent operating expertise.

(b) [✂] told CK Hutchison on [✂] that it was no longer interested in a potential transaction since it knew CK Hutchison was in discussions with Cellnex, and [✂] could not enter into a similar deal due to the assets not being appropriate for it in terms of scale, price, and quality of the opportunity and that it would not transact at the level that CK Hutchison was discussing with Cellnex.

(c) [✂] was not in a position to enter into any transaction involving any significant cash payment to CK Hutchison.

5.108 CK Hutchison also told us that [✂] was not a suitable partner [✂].

Our assessment

5.109 In assessing CK Hutchison's ability to achieve its objectives through a sale of passive infrastructure assets to an alternative purchaser, we have considered the following matters:

(a) The attractiveness of CK Hutchison's passive infrastructure assets to potential purchasers, including the attractiveness of the UK assets;

(b) The potential implications for the prospects of a sale of including assets held within the MBNL JV;

(c) The impact of Cellnex's offer on the sales process run by CK Hutchison;

(d) The prospects of achieving a sale to an alternative purchaser drawn from those third parties that had engaged with CK Hutchison during the sales process it had run; and

(e) The prospects of achieving a sale to an alternative purchaser by altering or extending the sales process.

Overall attractiveness of CK Hutchison's passive infrastructure assets

5.110 Third parties consistently told us that passive infrastructure assets are an attractive asset class to invest in and that there is substantial interest in acquiring such assets, both generally and specifically in the UK. For example:

(a) [✄] told us that it 'considers the UK an attractive investment market'. It also told us that it [✄]. Data infrastructure such as towers are of major interest to it.

(b) [✄] told us that the UK was an 'attractive market' and that the CK Hutchison assets represented a potential opportunity for it to.

(c) Vodafone has stated publicly that there is a lot of interest from strategic investors and infrastructure funds in investing in Vantage Towers, the tower company in which Vodafone has an 82% stake.[130]

5.111 The size and scale of the transaction, whether in terms of the UK and European assets or the UK assets in isolation made it attractive to investors.

(a) A report prepared for Cellnex [✄].

(b) Cellnex described the deal as '[✄].'

5.112 We note that there are no other expected opportunities for providers to expand their geographic footprint through the acquisition of large portfolios of existing sites from MNOs in the UK in the foreseeable future. More specifically:

[130] Vodafone results Q&A, 16th November 2021

(a) CTIL has recently been commercialised by Vodafone and O2, [✄] and Vodafone having raised capital from its 50% equity stake in CTIL by transferring it to its subsidiary Vantage Towers.[131]

(b) As described in more detail in Chapter 8, BT/EE [✄].

Inclusion of assets from the MBNL JV

5.113 We note that the MBNL JV is likely to add an additional layer of complexity to any sale of CK Hutchison's UK assets and may make these assets less attractive to purchasers than if they were not part of the MBNL JV. However, in light of the evidence summarised below, we do not consider that this would have prevented a sale of the Transaction Sites to a party other than Cellnex.

5.114 First, we note that, notwithstanding the complex structure of the transaction involving the MBNL Sites, Cellnex internal documents during its negotiations with CK Hutchison show that Cellnex [✄].There is no evidence that an alternative purchaser or partner would not have been able to value the assets in a similar way or would be deterred by the increased complexity of a transaction including these assets.

5.115 In this context, we also note that, in its valuation, Cellnex [✄].

5.116 Second, while we recognise that parties outside the JV are unlikely to be aware of the full details of the MBNL arrangements, the evidence from third parties suggests that the existence of the MBNL JV (some aspects of which are already in the public domain) would not have prevented an alternative transaction. For example:

(a) [✄] told us that it would have been interested in the assets irrespective of the MBNL JV structure and that [✄] they were familiar with the arrangement.

(b) [✄].

(c) [✄] view was that issues around the MBNL related to the valuation of the assets (rather than affecting the viability of agreeing a deal in relation to those assets). It told us that [✄].

5.117 Third, we note that the basis for the transfer of MBNL Sites to Cellnex takes the form of a two-stage approach through which Cellnex is provided with the right to future cashflows until 2031 and ownership rights thereafter. The fact that Cellnex was willing to enter into such a transaction shows that such a

[131] See Chapter 3, Industry Background

package of rights has sufficient value, and can provide sufficient commercial certainty, to make it, or alternative structures involving such MBNL assets, attractive to alternative purchasers at an appropriate price.

5.118 Consequently, taking into account all of these points, we consider that, whilst including assets held within the MBNL JV may add an additional level of complexity to a sale to an alternative purchaser, it would not prevent (or make materially less likely) that the UK assets could be sold, either on a standalone basis or as part of a wider package.

The impact of Cellnex's offer on the sales process run by CK Hutchison

5.119 The available evidence indicates that CK Hutchison believed that [✄]. A CK Hutchison internal document from November 2020 states that [✄].Soon after the receipt of this offer, CK Hutchison entered into an exclusivity agreement with Cellnex relating to agreement of the Merger.

5.120 We consider that, following receipt of this offer, CK Hutchison was primarily focused on Cellnex as the purchaser of the assets and so had only limited engagement with other potential purchasers who sought to engage with it and it therefore did not engage as fully with alternative purchasers as might otherwise have been the case absent this offer.

The prospects of achieving a sale to an alternative purchaser through the original sales process

5.121 Although CK Hutchison's engagement with alternative purchasers was limited once it received the offer from Cellnex, other credible purchasers had taken an active interest in acquiring its passive infrastructure assets.

5.122 [✄].

- *[✄]*

5.123 As noted above, CK Hutchison considered [✄] as a potentially credible alternative purchaser.

5.124 The evidence available to us shows that [✄] has a strong track record in operating passive infrastructure assets, demonstrated strong interest in the CK Hutchison UK assets and has all the necessary capabilities to execute a transaction of this nature.

5.125 [✄]

5.126 [✄].

5.127 The suitability of [✂] as a counterparty is also reflected in evidence from the Parties: whilst CK Hutchison stated that [✂] it also told us that [✂] and that it would have been only [✂] as a counterparty than Cellnex.

5.128 CK Hutchison stated that [✂] was not interested in acquiring the assets (although it recognised that [✂] position in this regard could have been influenced by knowledge of the status of Cellnex's negotiations with CK Hutchison).

5.129 This is, however, not consistent with evidence from [✂] which had considerable interest in the European and UK assets. [✂] stated that it was 'persistent in these contacts with CKH' and that 'there was never really any strong engagement from CKH'

5.130 [✂] told us that:

(a) [✂].

(b) [✂].

(c) It subsequently learned in November 2020 that the assets had been sold to Cellnex.

5.131 [✂].

5.132 It told us that, at that time, a transaction with CK Hutchison in respect of the European and UK assets would have been [✂].

5.133 Furthermore, it stated the UK market was attractive and that the UK assets would have been [✂]. It stated the UK assets would likely also be attractive in isolation although it had not examined in detail the MBNL arrangement.

5.134 Whilst [✂] had a strong track record and interest in CK Hutchison's European and UK assets, we have considered whether its ability to pursue a transaction with CK Hutchison would have been inhibited by [✂].

5.135 [✂].

5.136 [✂] stated that the €10bn transaction price for CK Hutchison's European and UK assets [✂].

5.137 While Cellnex's market capitalisation of approximately €35bn is [✂], we note that Cellnex internal documents suggest that it considered [✂].

(a) For example, at [✂].'

5.138 We therefore consider that the evidence available to us indicates that [✂] would not have been prevented from acquiring CK Hutchison's UK assets [✂].

5.139 We consider that [✂] would have had a strong interest in the UK assets (whether in isolation or as part of a broader deal alongside the continental European assets). In our view, [✂] would, in principle, have had both the organisational and funding capacity to acquire the CK Hutchison Assets, [✂].

- *[✂]*

5.140 [✂] also took an interest in CK Hutchison's UK and EU passive infrastructure assets.

5.141 [✂].

5.142 [✂] told us that:

(a) In response to a rumour that CK Hutchison was trying to monetise its European passive infrastructure investments, it reached out to CK Hutchison [✂].

(b) While the call was not specific to CK Hutchison's passive infrastructure assets, these assets were discussed. [✂] told us: 'It was more of a relationship call than a transaction call and was not specific to the CK Hutchison tower assets in Europe. They discussed [✂] and how they might partner together. They [✂].

(c) [✂] told us that they 'also covered [✂].

(d) [✂] sent a follow-up email to CK Hutchison 'to reiterate its interest in partnering in CKH's European towers, or two or three other classes of infrastructure (so not necessarily specific to the towers).'

(e) [✂] noted that in November 2020, the transaction with Cellnex was announced and therefore [✂] considered there was 'no significant traction' for it with CK Hutchison.

5.143 [✂] told us that the UK was an attractive market to it and that [✂].

5.144 [✂] also told us [✂]

(a) [✂].

(b) [✂].

5.145 [✂] told us that the biggest single investment it has made to date in infrastructure assets is $[✂] billion [✂].It told us that, for large opportunities, [✂].

5.146 From the evidence set out above, it is clear that at the time [✂] engaged with CK Hutchison on this matter, CK Hutchison was already in advanced talks with Cellnex. Therefore, it is difficult for us to determine how any discussions with [✂] would have evolved in the absence of the Merger as these were not pursued by CK Hutchison at the time. It is unclear to us whether [✂] could raise sufficient funding to acquire all the UK and continental European assets.

5.147 However, we consider that, in the absence of the transaction with Cellnex, CK Hutchison would have had the incentive to engage with [✂] in relation to one of:

(a) An acquisition of all or a subset of the assets, possibly through a syndicate or consortium of investors. We note in this respect that [✂] told us that there were other similar funds [✂] and that [✂]; or

(b) A minority stake in a tower company actively targeting third party MNOs (discussed in more detail below).

The prospects of achieving a sale to an alternative purchaser through a modification or extension to the original sales process

5.148 We note that CK Hutchison's alternative options were not limited to the outcome of the sales process that was run, and it told us that it would have [✂] had the original sales process not resulted in an acceptable outcome.

5.149 Given CK Hutchison's incentives as set out above, we consider that, in the absence of concluding a sale of the UK assets (either individually or as part of a wider transaction including the European assets) within the transaction process described above, CK Hutchison would have re-examined the options available to it to realise its strategic objectives.

5.150 CK Hutchison could have looked at a range of alternative methods to achieve a sale of these assets:

(a) In broad terms, these could have included alternative transaction structures and/or running a wider sales process, in each case to accommodate a wider pool of purchasers as well as re-engaging with parties that had expressed interest previously.

(b) It could also have sought to extend or delay the timing of any sale, for example to overcome any short-term issues that might have arisen with specific purchasers.

(c) As well as pursuing a sale in the longer-term, CK Hutchison could also have pursued other options to realise value in the meantime, such as partnering before a subsequent sale or selling different assets at different points in time.

- *Alternative transaction structure*

5.151 Alternative transaction structures could have included:

(a) Seeking purchasers for subsets of, or minority investors in, its passive infrastructure assets rather than a single complete package of UK and European assets in combination; and/or

(b) Assessing a wider range of investors, including private equity, either in isolation or in a combination or syndicate.

5.152 The evidence available to us is consistent with CK Hutchison considering that there were a range of options. For example:

(a) A CK Hutchison internal document [✂][132] [✂]

(b) A document prepared by CK Hutchison's advisers, [✂]. This presentation then proceeds to set out many of these investors' current investments in passive infrastructure and interest in the sector. The covering e-mail to this document from [✂] noted the 'strong level of investor interest currently'.

(c) An email between CK Hutchison's senior management in February 2020 notes: [✂].

5.153 We consider that these entities could have been approached in any wider sales process either for the whole assets, a subset or as a minority investor in a wider group.

- *Running a wider sales process*

5.154 We accept that CK Hutchison's reorganisation of its telecommunications division may have indicated to some in the market that its passive infrastructure assets could be for sale. However, we note that CK Hutchison's

[132] These ranged from [✂]

announcements did not explicitly state that it was seeking to sell its passive infrastructure assets[133] and that its internal documents from the time of the announcement indicate that a range of options, of which the sale of assets was only one, were still being considered.

5.155 While some potential counterparties approached CK Hutchison at a relatively early stage, others only approached it after it had received a (non-binding) offer from Cellnex in July 2020.[134]

5.156 We therefore consider that the evidence available to us indicates that a broader or more formal sales process could have attracted additional purchasers, a number of which are identified by CK Hutchison as viable options within its own internal documents with an interest in acquiring passive infrastructure assets.

5.157 We also consider that deeper engagement with other prospective purchasers would have provided a better understanding of possible transaction structures that would appeal to alternative purchasers.

- *Timing*

5.158 [✂], it also had the option of running a longer or alternative sales process, in the event that it was not possible to achieve its desired outcomes within its [✂].[135].

5.159 Conducting an alternative sales process would have been consistent with its incentives (including investment in 3UK's network) and could have enabled it to manage or overcome any timing issues limiting the involvement of particular bidders (such as any funding limitations or practical constraints that could have arisen (such as [✂] as the CK Hutchison sales process).

5.160 As we set out above, we are not limited to considering alternative scenarios that would have occurred at exactly the same time as the developments that

[133] CK Hutchison's announcement of its reorganisation in August 2019 set out that 'the new structure will allow the Group to focus on optimising the asset portfolio, achieving cost synergies, as well as maximising returns on invested capital' (CK Hutchison, 2019 Interim Report, page 25). In CK Hutchison's announcement of 2019 results, CK Hutchison stated that reorganisation 'enables an effective management of these infrastructure-like assets across the European operations and provides optionality for CKH Group Telecom to rationalise and optimise capital efficiency going forward' (CK Hutchison, Announcement of 2019 results, page 7). In its 2020 interim results published on 6 August 2020, CK Hutchison stated that it had completed the reorganisation and that CK Hutchison 'continues to actively explore options to maximise the value to the Group of this important business' (CK Hutchison, 2020 Interim Report, page 10).
[134] We note, for example, that [✂] in response to rumours at that time that it was seeking to monetise its passive infrastructure assets and subsequently raised this [✂] and that [✂].
[135] This is supported by CK Hutchison telling us that, if the original sales process had not gone ahead, it [✂].

gave rise to Merger and so have considered the options available to CK Hutchison over an extended period of time.

5.161 Given CK Hutchison's incentives, we consider that, if it had conducted an alternative sales process, it would have done so in the short- to medium-term (that is, within approximately three years of its decision to sell its passive infrastructure assets to a third party).

Provisional conclusion on prospects of a sale of the UK assets to an alternative purchaser

5.162 The evidence available to us indicates that CK Hutchison had a strong incentive to realise the value of its passive infrastructure assets and that there were a range of credible options available to it, either within the original sales process or through a modified and/or extended sales process.

5.163 On this basis, we provisionally conclude that a sale of the UK assets, either individually or as part of a wider package of assets, to an alternative purchaser with the incentive to operate CK Hutchison's UK assets in direct competition with Cellnex's passive infrastructure assets would have been the most likely alternative option for CK Hutchison absent the Merger.

5.164 We provisionally conclude that any sale to an alternative purchaser (either within the original sales process or through a modified and/or extended sales process) would have been conducted in the short- to medium-term (that is, within approximately three years of CK Hutchison's decision to sell its passive infrastructure assets to a third party.

5.165 Accordingly, we provisionally conclude that any alternative purchaser of CK Hutchison's UK assets in the counterfactual would have obtained control over these assets in substantively the same sequence as envisaged by the Parties pursuant to the terms of the Merger (that is, (a) the Unilateral Sites on completion of the transaction; and (b) legal title to the Transfer Sites on dissolution of MBNL, scheduled for 2031) and within the timeframe considered in our assessment of the competitive effects of the Merger as set out in Chapter 8.

Other options to commercialise the assets

5.166 We consider that several other options were available to CK Hutchison had it not been able to achieve a sale of its passive infrastructure assets on satisfactory terms. We consider these below.

Parties' views

Combination of passive infrastructure assets with a strategic partner

5.167 CK Hutchison told us that its reorganisation of its European assets allowed it to fully explore all options. It told us that when it considered the suitability of potential partners it considered [✂].

5.168 CK Hutchison told us that [✂].

5.169 CK Hutchison told us that [✂].

5.170 CK Hutchison told us that [✂]. Cellnex told us that [✂].

5.171 Cellnex told us that [✂].

5.172 CK Hutchison told us that it had discussions with [✂]

5.173 CK Hutchison told us that it also suggested [✂]

IPO

5.174 CK Hutchison submitted that an IPO of its UK passive infrastructure assets was never a realistic prospect and it did not give any consideration to this. It told us that this was for the following reasons:

(a) [✂];

(b) [✂]; three years of historical audited financial information, which would imply a listing [✂] at the earliest. This [✂];

(c) [✂];

(d) An IPO would only facilitate the sale of a partial stake in a business [✂].

5.175 The Parties told us that the listing of Vantage Towers was, in their view, not a relevant comparator as it did not involve the same complexity as the inclusion of the MBNL JV, and it was therefore not only possible for the regulators to approve the listing, but also much easier for prospective public market investors to understand.

Other forms of commercialisation

5.176 CK Hutchison told us that:

(a) 3UK only used its passive infrastructure sites for its own radio network and did not actively market those sites to other MNOs or other third parties;

(b) 3UK had no plans to [✂];

(c) [✂]; and

(d) Even once the MBNL JV has been dissolved, 3UK considers that the potential for co-location on the MBNL Sites (including the Transfer Sites) without material investment will be limited given the sites currently host 3UK and BT/EE, and already require significant capex for structural enhancements to allow 3UK and BT/EE to host 5G equipment.

5.177 CK Hutchison told us that, after the internal reorganisation, it did not market the European or UK assets as a host for third party tenants. It told us that operating its passive infrastructure assets as an independent WIP was [✂].

5.178 CK Hutchison told us that its internal reorganisation and establishment of its tower companies took a year, by which time its [✂].

Our assessment

5.179 In assessing the extent to which options other than a sale could have been pursued by CK Hutchison absent the Merger we have examined:

(a) The extent to which any alternative options were explored by CK Hutchison prior to the Merger and the extent to which any issues were identified that would affect its ability to implement them.

(b) Other options potentially available to CK Hutchison, that have been pursued by other market participants or that were identified in the Parties' internal documents.

5.180 In assessing these alternative options, we note that they are not necessarily mutually-exclusive and some could be used in conjunction or sequentially with others. We also note that some of these options could have been pursued sequentially.

Exploration of alternative options by CK Hutchison

5.181 The evidence available to us indicates that CK Hutchison took some steps to explore at least one alternative to a sale of its passive infrastructure assets: [✂].

5.182 CK Hutchison discussed [✂].

5.183 In our view, there is evidence to suggest that this was initially CK Hutchison's preferred option:

(a) [✂].

(b) The Cellnex board was discussed in June 2020 that, in respect of its discussions to acquire CK Hutchison's European and UK assets, CK Hutchison [✂].

5.184 However, as set out above, [✂] both to meet Cellnex's desire to be an independent tower operator and CK Hutchison's emerging need to raise funding.

5.185 There was limited traction in discussions between CK Hutchison and [✂] in respect of a combination with [✂].

5.186 By contrast, discussions with [✂] about a possible combination did make some progress. As set out above, CK Hutchison's view was that [✂].

5.187 [✂] told us that these discussions began in [✂].

5.188 [✂].

5.189 [✂].

5.190 [✂].

5.191 [✂].

5.192 [✂].

5.193 [✂]

5.194 We note that the end of these discussions coincided with the submission of a [✂] which CK Hutchison perceived [✂].

5.195 As a consequence, it is difficult to ascertain whether, in the absence of this offer, CK Hutchison would have sought to more fully explore [✂] position and find a way of reaching an accommodation.

5.196 Similarly, an initial discussion with [✂] envisaged an arrangement in which [✂], based on the respective value of their passive infrastructure assets. I it is difficult to ascertain the extent to which a combination might have successfully concluded in the absence of the Cellnex sale.

5.197 We note, however, CK Hutchison initially perceived [✂] as a way to realise the value of its passive infrastructure assets.

5.198 Furthermore, we note that, whilst [✂].

5.199 Evidence from internal documents provided by CK Hutchison suggests the idea was to create a [✂][✂].

5.200 The possibility of a combination proving an attractive and workable option absent the Merger is consistent with current market developments, with Vodafone stating in November 2021 that it is considering a combination of the passive infrastructure assets in its Vantage Towers portfolio with those of another MNO such as Orange or Deutsche Telekom in which it would seek 'co-control'.[136] Vodafone noted that this could also potentially allow it to further monetise these assets through the sale of a further stake, whilst retaining co-control with a partner.[137]

5.201 Orange has also stated that it was willing to consider combinations with its passive infrastructure network 'TOTEM' as part of what it also saw as a consolidation in this area.[138]

5.202 We consider that this shows such combinations are considered as a realistic option by established industry participants and, in addition, that strategic concerns around control arrangements over passive infrastructure assets are capable of being overcome.

5.203 It is difficult to assess the extent to which such a combination could have been successfully pursued by CK Hutchison, absent the Merger, given the more limited consideration that this option received. We consider, however, that the evidence available to us suggests that this was an option that was initially considered to be attractive by CK Hutchison, is considered to be an attractive and workable option by other industry players, and therefore could have been subject to further consideration absent the Merger.

Other options not fully explored by CK Hutchison

5.204 We note that, in addition to the options that were explored by CK Hutchison, there are other options that other MNOs have used, either in isolation or in conjunction, in order to commercialise their passive infrastructure assets.

(a) Vodafone completed an IPO of its Vantage Towers in March 2021, in a move that was characterised by industry commentators as 'benefiting

[136] Vodafone H1 FY22 Results live Q&A pages 5 and 10
[137] Vodafone H1 FY22 Results live Q&A pages 5 and 10
[138] Orange Annual Report Investors presentation at 1hr and 29 minutes

from strong investor appetite'.[139] Vodafone told us that the objective of the Vantage Towers listing on the Frankfurt Stock Exchange was to recognise the value of the tower assets within the Vodafone group and to place all the group's tower assets under a single management team dedicated to build that business. It told us that [✄].

(b) Prior to this, Vodafone had organically grown its European passive infrastructure business through co-location, with 84% of revenue coming from Vodafone group companies prior to the IPO and the remaining revenue generated from other MNOs.[140] Despite Vodafone retaining an 82%[141] interest in the company, third-party revenues have grown.[142]

(c) With respect to the complexity of the arrangements that form part of the Vantage Towers portfolio, we note that the Vantage Towers business that was the subject of the IPO [✄].[143]

(d) Orange established a separate tower company 'TOTEM' for its French and Spanish passive infrastructure assets. While it continues to fully own these assets, it has put in place a governance structure to separate it from its MNOs and seeks to grow revenue through increasing tenancy ratios on its assets from 1.3 to 1.5 in 2026 through attracting co-location from other MNOs.[144] It stated that it will seek M&A tower company opportunities in other parts of Europe and that it would seek to fund these through debt and equity from its tower company.[145] Orange also stated that the option of an IPO was 'very open' but they would wish to retain a controlling stake either alone or with another operator.[146]

(e) As set out above, Deutsche Telekom has also established a separate tower company for its German and Austrian passive infrastructure assets and has organically grown third party revenues on these sites to the extent that they now account for [✄] of revenues.

5.205 Options including an IPO or commercialising while retaining ownership were suggested to CK Hutchison [✄] following its announcement of its internal reorganisation to establish a separate passive infrastructure asset company. The evidence available to us indicates that CK Hutchison did not explore

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[139] NASDAQ, 'Vodafone's Vantage Towers climbs after Germany's biggest IPO in three years', https://www.nasdaq.com/articles/vodafones-vantage-towers-climbs-after-germanys-biggest-ipo-in-three-years-2021-03-18
[140] Vantage Towers Prospectus March 2021
[141] Vodafone H1 FY22 Results live Q&A pages 5 and 10
[142] Vantage Towers HY22 results presentation page 8
[143] Vantage Towers Annual Report 2020/21, page 56. [✄]
[144] FY 20 Presentation - EN - vdef.pdf (orange.com) slide 34
[145] Orange Annual Report Investors presentation at 1hr and 17 minutes
[146] Orange Annual Report Investors presentation at 1hr and 30 minutes

these options (because, in our view, other options were preferred at that time), and therefore the evidence available to inform our assessment of whether or not such strategies would have been pursued absent the Merger, or would have been successful if pursued, is more limited.

5.206 We note that there is some evidence that [✂]. We also note that [✂].

5.207 In terms of feasibility, it is unclear, in the absence of an IPO being explored further by CK Hutchison, whether the constraints it has mentioned would have prevented it, or whether these could have been overcome, for example by seeking a listing on a non-UK or in some other way.

5.208 Whilst, in our view, an IPO may not have been a preferred option for CK Hutchison, we consider that it may have been preferable to the status quo and therefore an option that could have been explored further absent the Merger.

5.209 Similarly, in relation to retaining ownership and commercialising the assets, we note the success that other market participants have had in doing so. There is also some evidence in CK Hutchison's internal documents that, [✂].

(a) A CK Hutchison presentation on its internal reorganisation in April 2019 states that [✂].

(b) CK Hutchison internal documents also [✂].

5.210 We note that it took two years for Deutsche Telekom to set up the separate tower company in Austria but less time in Germany where the management team needed to be recruited but legal entities were already established.

5.211 We also note that, as Vodafone did, this option could be pursued in order to demonstrate to the market the ability to increase revenue through attracting third party MNOs, possibly as part of a route to an IPO.

5.212 In the absence of CK Hutchison pursuing this option, the evidence available to inform our assessment of whether or not it would be successful is limited.

5.213 However, given the success of other market participants in pursuing similar options, our view is that, in the absence of a sale, these are also options that CK Hutchison could have pursued further.

Provisional conclusion on options other than a sale of the assets

5.214 The evidence available to us shows that while CK Hutchison did not fully explore options other than a sale, it did give some consideration to alternatives. The evidence available to inform our assessment of other options is more limited, given that CK Hutchison's efforts ultimately focussed on the sale of its passive infrastructure assets.

5.215 We also note that these options were considered by CK Hutchison to be less attractive than a sale of the UK assets (and may also have raised certain practical difficulties).

5.216 However, we note that these options have been used by other owners of passive infrastructure to realise an uplift in the value of their assets and we consider that these options would have been given more detailed consideration by CK Hutchison, given its incentives, had been unable to sell the UK assets, either alone or as part of a wider package.

5.217 For these reasons, while we consider it is more likely that CK Hutchison would have sold the UK assets to a third party, either through the original sales process or through a modified and/or extended sales process, we believe that, in the absence of a sale, other options could have been pursued. Each of these options would have resulted in CK Hutchison's passive infrastructure assets being operated in direct competition with those of Cellnex.

Our provisional view on the counterfactual

5.218 The evidence available to us shows that CK Hutchison had a strong incentive (irrespective of the Merger) to commercialise its passive infrastructure assets in one of a number of ways to realise additional value from them. The commercialisation of these assets would be consistent with a broader industry trend, seen in both the UK and other jurisdictions, in which owners of passive infrastructure assets have sought to realise an uplift in value through some form of commercialisation.

5.219 In pursuit of this objective, CK Hutchison sought, as a first step, to initiate a reorganisation of its European passive infrastructure assets into separate tower companies. This enabled CK Hutchison to explore the range of opportunities available to it.

5.220 CK Hutchison subsequently identified a need to increase funding of its mobile network in the UK, including the rollout of 5G. In our view, this, for CK Hutchison, meant that any preferred commercialisation option should raise a significant amount of cash proceeds.

5.221 We therefore consider that the evidence available to us shows that CK Hutchison had a clear commercial incentive, driven by broader strategic objectives, to commercialise its passive infrastructure assets in some way.

5.222 By contrast, the evidence that we have seen does not suggest that the status quo position, in which CK Hutchison's passive infrastructure assets would continue to be used in the same way as they were prior to commercialisation, was an option that was given serious consideration.

5.223 Given the strong incentive to realise the value from its passive infrastructure assets by commercialising them in some way, we considered the options available to CK Hutchison to achieve these objectives absent the Merger.

5.224 As noted above, our analysis of the counterfactual by which the Merger should be assessed does not require us to specify the exact route CK Hutchison would have taken absent the Merger, but rather to consider the credibility and range of alternative options available to CK Hutchison in order to inform the overall likelihood of a possible counterfactual in which CK Hutchison's passive infrastructure would have been operated in direct competition with that of Cellnex.

5.225 We believe that the evidence available to us shows that CK Hutchison had a range of credible opportunities to commercialise its assets. By way of context, we note that passive infrastructure assets are generally considered to be attractive and highly marketable assets, and that a wide range of existing industry players and financial investors have a strong interest and established track record in investing in such assets. Where other owners of passive infrastructure have implemented strategies to realise an uplift in the value of their assets, various approaches (including outright sale, obtaining minority investments or establishing joint ventures) have been adopted.

5.226 We note that the evidence available to us shows that CK Hutchison also considered various options, over time, to realise the uplift in the value of its UK passive infrastructure assets. We consider that many of these options were not mutually exclusive and that they could have taken place sequentially (which again reflects the approach previously taken, in practice, by other owners of passive infrastructure).

5.227 As noted above, we are not limited to considering alternative scenarios that would have occurred at exactly the same time as the developments that give rise to the merger under review. In this case, reflecting the evidence in relation to the considerations driving CK Hutchison's commercial incentives, we have sought to consider the options available to CK Hutchison over an extended period of time.

5.228 There is no indication, in the evidence we have seen, that the sales process that it ran was considered to be a 'one shot' process that excluded the pursuit of other options (either individually or in combination) at later points in time. In fact, CK Hutchison told us that it would have gone [✂]had the original sales process not ultimately resulted in an acceptable outcome, indicating that it would have reconsidered its options, and pursued alternative courses of action, in the short- to medium-term.

5.229 Of the various options available to CK Hutchison, it ultimately decided to sell its passive infrastructure assets in the UK (to Cellnex), for a mix of cash and shares. This, in our view, was its preferred way of realising the uplift in value. The evidence available to us shows that there were credible alternative purchasers that were interested in acquiring these assets within the sales process that CK Hutchison ran. The evidence also shows that CK Hutchison believed that Cellnex's offer [✂], which in our view explains why CK Hutchison did not engage as fully with alternative purchasers as might otherwise have been the case absent this offer.

5.230 As noted, we consider, however, that CK Hutchison's alternative options were not limited to the outcome of the sales process that was run.

5.231 The evidence available to us shows that CK Hutchison would, if the original sales process had not resulted in an acceptable outcome, have had a variety of alternative ways in which it could have realised its broader commercial objective to realise the value from its passive infrastructure assets. In particular, we note that CK Hutchison could have run another sales process. This could have included adapting possible transaction structures and/or running a wider sales process, in each case to accommodate a wider pool of purchasers, as well as re-engaging with parties that had expressed interest previously. It could also have sought to extend or delay the timing of any sale, for example to overcome any short-term issues that might have arisen with specific purchasers. As well as pursuing a sale in the longer-term, CK Hutchison could also have pursued other options to realise value in the meantime, such as partnering before a subsequent sale or selling different assets at different points in time.

5.232 On this basis, we consider that a sale of the UK assets (either individually or as part of a wider package of assets) to an alternative purchaser with the incentive to operate CK Hutchison's UK assets in direct competition with Cellnex's passive infrastructure assets would have been the most likely alternative option for CK Hutchison absent the Merger.

5.233 Such a sale could have been effected either within the original sales process or through a modified and/or extended sales process that we consider would, in light of the underlying commercial incentives of CK Hutchison, have taken place in the short- to medium-term (that is, within approximately three years of CK Hutchison's decision to sell its passive infrastructure assets to a third party). Accordingly, any alternative purchaser would have obtained control over the assets in the substantively same sequence as envisaged by the Parties pursuant to the terms of the Merger (that is, (a) the Unilateral Sites on completion of the transaction; and (b) legal title to the Transfer Sites on dissolution of MBNL, scheduled for 2031) and within the timeframe considered in our assessment of the competitive effects of the Merger as set out in Chapter 8.

5.234 The evidence available to us shows that CK Hutchison also gave some consideration to other options (many of which, as noted above, have been used by other owners of passive infrastructure to realise an uplift in the value of their assets). We note, for example, that CK Hutchison discussed [✄].

5.235 The evidence available to inform our assessment of these other options is more limited, given that CK Hutchison's efforts ultimately focussed on the sale of its passive infrastructure assets. We note, in addition, that some of the evidence available to us indicates that these options were considered by CK Hutchison to be [✄]. However, the evidence available to us also shows that these other options were broadly regarded as credible options by market participants, and we believe that they would have been given more detailed consideration by CK Hutchison (in light of its commercial objectives) had it encountered difficulties in securing the sale of the UK assets.

5.236 On that basis, while we consider it is more likely that CK Hutchison would have sold the UK assets to a third party, either through the original sales process or an alternative sales process, we consider that, in the absence of such a sale, other options such as a combination of assets, IPO or organic commercialisation, could have been used to pursue its broader commercial objectives. Each of these options would have resulted in CK Hutchison's passive infrastructure assets being operated in direct competition with those of Cellnex.

5.237 We recognise that some of the alternative options considered by us may have yielded lower cash proceeds than the Merger or might have been less attractive for CK Hutchison for other reasons. However, our assessment is concerned with the options CK Hutchison would have pursued in the absence of the Merger, not whether such options would have been preferred by CK Hutchison to the Merger itself. As set out above, we consider that CK Hutchison had strong strategic incentives to pursue alternative options even if they allowed CK Hutchison to only partially achieve its objectives and/or took longer to do so.

5.238 Accordingly, in the round, we believe that the evidence available to us supports the conclusion that the most likely counterfactual in this case is one in which there would have been stronger conditions of competition between Cellnex and the owner of the CK Hutchison UK assets. This is because we believe that the most likely outcome, absent the Merger, is that CK Hutchison's UK passive infrastructure assets would have been operated in direct competition with Cellnex's passive infrastructure assets.

5.239 This outcome would be achieved through one or more of the options, as set out above, that were available to CK Hutchison to commercialise its passive infrastructure assets. While we consider that a sale of the assets was the most likely scenario, we have also taken into account the range of other possible outcomes that would have led to a similarly strong conditions of competition between Cellnex and the owner of the UK assets.

5.240 By contrast, in light of the range of credible options available to CK Hutchison to realise the value of its assets, and the strong incentive on CK Hutchison to pursue these options, we do not believe that the evidence available to us supports the stated position of the Parties, that the only possible way that CK Hutchison could pursue its broader commercial objectives was through a sale to a single possible counterparty, Cellnex.

6. Market definition

6.1 This chapter assesses the relevant market for the assessment of the Merger. The purpose of market definition is to provide a framework for the CMA's analysis of the competitive effects of the merger. The relevant market (or markets) is the market within which the merger may give rise to an SLC and contains the most significant competitive alternatives available to the customers of the merged companies. Within that context, the assessment of the relevant market(s) is an analytical tool that forms part of the analysis of the competitive effects of the merger and should not be viewed as a separate exercise.[147]

6.2 Market definition involves identifying the most significant competitive alternatives available to customers of the merger firms and includes the sources of competition to the merger firms that are the immediate determinants of the effects of the merger.

6.3 As part of our analysis of the competitive effects of the Merger, we have considered the product and geographic scope of the market.

[147] Merger Assessment Guidelines (CMA129), paragraph 9.1

Product scope

6.4 The Parties have not made submissions on market definition in phase 2 of this inquiry and we have not received any submissions from third parties on this matter. Our assessment of the relevant markets has not changed from the assessment made in phase 1.

6.5 In phase 1, the Parties submitted that there was no reason to depart from the CMA's decision in *Cellnex/Arqiva*[148] and that the narrowest plausible candidate market is the market for the provision of site access to developed macro sites and ancillary services to MNOs and other wireless communication providers.

6.6 In *Cellnex/Arqiva*, the CMA considered it appropriate to assess macro sites and micro sites as separate frames of reference and define separate frames of reference for developed and undeveloped sites.[149]

6.7 In that decision, the CMA excluded MNOs and MNO JVs' self-supply, site sharing by MNOs and MNO JVs and supply by MNO JVs to non-MNO customers from the frame of reference, instead taking these into account as an out-of-market constraint in the competitive assessment.[150] While the CMA acknowledged that self-supply constrained independent tower companies to some extent, it noted that self-supply was not among the most immediate sources of competition to the merging parties.[151] Taking into account, in particular, the evidence of Arqiva benchmarking its pricing against MNOs' costs for self-build, the CMA considered that self-supply by MNOs and MNO JVs should be characterised as a 'price ceiling' for the merging parties, at least in the near-term.[152]

6.8 In *Cellnex/Arqiva,* the CMA concluded that BTS sites, all structure types (monopoles, towers, etc) and ancillary services were within the product frame of reference.[153]

6.9 With regard to BTS sites, the *Cellnex/Arqiva* decision set out that, while BTS sites may be a substitute to existing sites to an extent, some customers had noted that it is important whether a site is already constructed, as it affects the cost-competitiveness and the time to access/deploy the site.[154]

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[148] *Cellnex/Arqiva*
[149] *Cellnex/Arqiva*, paragraphs 57 to 64 and paragraphs 71 to 74.
[150] *Cellnex/Arqiva*, paragraph 107.
[151] *Cellnex/Arqiva*, paragraph 93.
[152] *Cellnex/Arqiva*, paragraph 91.
[153] *Cellnex/Arqiva,* paragraphs 70, 77 and 81.
[154] *Cellnex/Arqiva*, paragraph 68.

6.10 With regard to the constraint from BTS sites, we note that in *Cellnex/Arqiva,* the CMA assessed the merger between Cellnex, which had a small number of existing sites and competed mainly by seeking to supply BTS sites, and Arqiva, which had a large number of existing sites but a limited offering of BTS sites.[155] In that context, the CMA sought to understand the extent to which BTS sites and existing sites competed at all, and it was not necessary for the CMA to come to detailed conclusions about the strength of the constraint from BTS sites relative to the constraint from existing sites.

6.11 In this case, as the Merger involves two enterprises with large holdings of existing sites, we have, in our competitive assessment, primarily assessed the relative importance of BTS as a constraint on suppliers with large numbers of existing sites.

6.12 Further, evidence we have gathered in this inquiry supports the product frame of reference findings in *Cellnex/Arqiva* in relation to the distinction between macro and micro sites:

(a) For instance, Cellnex's internal documents [✂]

(b) [✂].

6.13 On this basis, we have considered the effects of the Merger on the supply of access to developed macro sites (including for the avoidance of doubt, BTS sites) and ancillary services to MNOs and other wireless communication providers.

Geographic scope

6.14 The Parties submitted that the geographic scope of the supply of access to developed macro sites is national. The Parties said that given the need for wireless communication providers to address capacity and coverage in particular local areas, sites in one locality are not substitutable with sites in another. However, they also said that there is a substantial national element to customers' purchasing considerations, notably that (i) WIPs (including Cellnex) have entered into framework agreements with MNOs and non-MNOs that require coverage across the UK, and (ii) having a broad range of sites with national coverage is helpful in winning large tenders.

6.15 The Parties submitted that customers typically negotiate long-term contracts – or framework agreements – with WIPs for site access. These agreements give customers long-term protection and certainty as to the terms of the

[155] *Cellnex/Arqiva*, paragraph 172.

service provision and pricing. Such agreements typically have a term of [✂] and may either be negotiated bilaterally and/or put out to tender.

6.16 In addition, the Parties also said that pricing by WIPs tends to be based on national rate cards [✂]. The Parties also submitted that this is consistent with the CMA's decision in *Cellnex/Arqiva*, in which the CMA noted that important elements of pricing are set across portfolios of sites and any local variations in competition tend to be accounted for in aggregate for larger purchases.[156]

6.17 Both competitors and customers agreed that pricing does not vary on the basis of local factors, such as local competition or geography, and most WIPs price on a national basis. In addition, they told us that other commercial terms, such as churn allowance, were considered important factors and are applied on a national basis. (We give more details on the relevance of churn for competition in Chapter 7.)

6.18 Customers confirmed that pricing typically occurs on a national basis, which they told us makes transactions with suppliers easier. For example:

(a) Vodafone said that national rate cards reduce the need to enter into negotiations for each individual site.

(b) CTIL said that, as a WIP customer, it would usually pay a price for each site set under a long-term umbrella agreement, or rate card, instead of negotiating on a site-by-site basis.

6.19 Competitors also told us that pricing is national. For example:

(a) WIG said that, for customers with more than one site and in particular for MNOs, pricing is typically structured around a national framework. WIG also said that pricing does not necessarily reflect how busy or attractive a particular location is, how hard or expensive a site may be to build or operate or what height is being used by the customer. In WIG's view this model is preferred by MNOs and reflects their preference to deal with larger portfolios, [✂].

(b) Similarly, FreshWave said that it sets prices on the basis of framework agreements entered into with each MNO and MNO JV, which have individually negotiated terms and rate cards.

6.20 Some small suppliers said that they were not large enough to be able to offer pricing on a national basis to their customers. For example:

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[156] For example, prices may vary according to whether a site is located in an urban or rural area.

(a) Britannia Towers said that, since it is a small WIP, it tends to price by site and on the basis of customer requirements.

(b) WHP sets prices at a local level as its portfolio of sites is relatively small and specialised.

6.21 On the basis of the evidence summarised above, we have considered the impact of the Merger on the supply of access to developed macro sites and ancillary services to MNOs and other wireless communication providers in the UK.

Provisional conclusion on market definition

6.22 For the reasons set out above, we provisionally conclude that the relevant market for the assessment of the Merger is the supply of access to developed macro sites (including for the avoidance of doubt, BTS sites) and ancillary services to MNOs and other wireless communication providers in the UK.

7. Nature of competition

7.1 The market for the supply of access to developed macro sites is complex and has a number of unusual features. Before we assess the impact of the Merger on competition, we therefore first consider in more detail the nature of competition in this market.

(a) First, we describe the contracts for passive infrastructure, which play a key role within the supply of access to developed macro sites and ancillary services.

(b) Second, we describe how customers choose macro sites and the suppliers of them. We assess the evidence on what matters to customers, and the implications of this for the nature of competition between suppliers and which firms are best placed to win business.

(c) Third, we describe the implications of this for how competition between suppliers of macro sites operates in practice. We identify an important distinction between competition for existing sites and new sites and discuss the role for competition in both contexts.

Contracts for passive infrastructure

7.2 As noted in Chapter 3, two groups of customers purchase access to developed macro sites: MNOs (either unilaterally or through their JVs) and other (non-MNO) customers.

7.3 Cellnex submitted that MNOs are, by a significant margin, its largest and most important customers for it and rival WIPs and represent the vast majority ([✂]) of its revenue from macro sites.

7.4 As set out in Chapter 6, customers typically sign up to long-term framework contracts which are intended to allow them to simplify their commercial arrangements, in particular with large suppliers.[157] This is because, under framework agreements, customers do not then need to negotiate access for each individual site and have certainty on the price and service levels they are likely to receive for both their existing and any additional sites they may require from the same supplier over the term of the agreement. In return, long-term contracts provide suppliers with predictable, committed revenues for the duration of the contracts.

7.5 MNOs typically require access to many sites across a wide range of locations. As discussed in Chapter 3, MNOs self-supply a large proportion of these sites by themselves or through JVs that they have entered into. The remaining MNO demand is generally not met by a single WIP, but MNOs will typically need to enter into a number of framework agreements with different suppliers. As we explain in more detail in Chapter 8, competition in this market does not generally involve MNO customers considering whether to terminate a relationship with one supplier and switch all of their sites to an alternative supplier.

7.6 Framework agreements may include commitments to use more sites from the supplier's portfolio during the term of the contracts.

7.7 Contracts may also allow customers to vacate a relatively small proportion of sites during the term of the contract, if the contract includes a 'churn allowance'.[158] However, even if there is a churn allowance, MNOs are typically committed to remain on the majority of the sites it occupies for the entire term.

7.8 These contracts do not generally relate to new, as yet unbuilt sites, which are normally provided under a separate BTS arrangement. However, as we discuss at paragraph 7.38 below, framework agreements may include commitments to contracting a minimum number of future new sites with the same supplier, if the customer's need for such sites arose.

7.9 Competitive dynamics are discussed in more detail in Chapter 8 but, in broad terms, the contractual commitments and restrictive nature of the contracts

[157] See paragraph 6.15 above.
[158] Churn allowance is discussed below.

means that relatively few sites can be competed for by other WIPs whilst a contract is in place.

7.10 As discussed further below, the main focus of competition occurs when contracts come up for renewal, at which point a greater proportion of sites may be switched from one WIP to another. However, the existence of switching costs means that switching will generally only represent a proportion of the total sites governed by the contract, which can occur immediately or over time.[159]

7.11 The remainder of sites which customers do not switch are then likely to remain with the incumbent supplier, on terms which will be determined by the competitive conditions at the point of renewal.

Customers' choice of macro sites

7.12 The evidence we gathered shows that the main factors influencing customers' choice of macro site suppliers are: (i) geographic location, (ii) pricing, (iii) churn allowances, (iv) the scale of suppliers, and (v) suppliers' track record. We discuss each of these in turn before providing our overall conclusions on the importance of factors influencing customer choice. We found that the drivers of customer choice are broadly consistent across both MNO and non-MNO customers.

Geographic location

7.13 There was a broad consensus between the Parties and third parties that geographic location is a very important factor affecting customers' choice of macro sites.

(a) The Parties submitted that MNO and non-MNO customers' primary consideration in their choice of sites is location, which is driven by factors including geography, licensing requirements, coverage requirements, traffic volume, customer service issues, the frequency to be used and adjacent cell frequencies.

(b) The Parties also said that MNOs plan their networks by determining the ideal location for new active communication equipment, which is determined by geography, coverage requirements, traffic volume and other factors.

[159] See paragraphs 7.57 to 7.65 below.

(c) In relation to non-MNOs, the Parties stated that, although their key requirement is generally still location, they 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.

7.14 As set out in Chapter 3 above, MNOs have mature networks with a number of established and interdependent macro sites which provide almost full geographic coverage. In this context MNOs submitted that, when they need to replace an individual site, they look for replacements close to their existing site to avoid minimising the disruption to their network.

7.15 However, we have also heard that MNO networks are not static, but can evolve over time, in particular when new technologies are introduced. As we discussed in Chapter 3, MNOs will roll out 5G primarily by using and upgrading existing sites, but also partly by adding new sites, such as monopoles, to add capacity and coverage in the next few years, in particular in urban areas.

7.16 Although some network changes are driven by external factors (such as NTQs), there is evidence to suggest that over the longer term MNOs can also play an active role in shaping how their networks evolve:

(a) An MNO told us that, when sites on the grid are not available for commercial (or other) reasons, it reworks its plan to identify other viable sites.

(b) Another MNO said that it is currently considering redesigning its network with both self-build and rival WIPs. It also provided an internal document showing a preliminary analysis of the costs to decommission and migrate sites away from their current suppliers in a sample area.

7.17 In summary, the geographic location of a site is important since the location will determine the coverage that can be provided and the extent to which the site can be incorporated into the rest of the network without disruption, or the extent of any disruption. Where sites are required to extend coverage, enhance capacity and/or accommodate new technologies, then their location and their relationship to the rest of the network will also be a key consideration.

Pricing

7.18 As discussed above, suppliers and customers typically negotiate framework agreements which use national rate cards to determine the prices for site access, use, installation, maintenance, and other associated services.

National rate cards are used to derive a price per site.[160] Rate cards are set on the basis of negotiations with individual customers and differ for each customer.

7.19 Cellnex submitted that [✂].

7.20 In relation to new customers, Cellnex submitted that, [✂].

7.21 Cellnex also said that [✂].

Churn allowance

7.22 As explained above, framework agreements cover most of the sites that MNOs purchase from WIPs and commit customers to purchase and pay for access to these sites for a long duration. MNOs have to pay the price agreed in these contracts irrespective of whether or not they generate any revenue from these sites and regardless of what happens to their revenues over the life of the contracts.

7.23 However, a relatively small proportion of sites can be vacated during the term of the agreement and without financial penalty, if contracts include a 'churn allowance'. This recognises both the needs of MNOs to evolve their networks in ways which they cannot predict at the outset of a contract and the wish of MNOs to maintain pressure on their existing supplier by having the ability to switch at least some of their sites to another supplier prior to the expiry of the contract.

7.24 The inclusion of a churn allowance in framework contracts and the proportion of sites that qualify under the 'churn allowance' are key factors in negotiations over framework agreements. This is supported by the evidence we have seen. For example:

(a) An MNO, indicated that churn allowance is '[✂]. It also told us that, [✂].

(b) The churn allowance [✂]. In that context:

(i) [✂].[161]

(ii) [✂].

[160] National rate cards, which are used to derive a price per site, are then applied to the WIP's entire portfolio of existing sites, meaning that there is not a site-by-site negotiation of prices based on local factors.
[161] Appendix G, paragraph 33.

(c) Another MNO also submitted that to avoid being too reliant on a supplier which could expose it to higher prices, [✂].

(d) Cellnex's internal documents also show that it considers the availability of churn opportunities to be a material commercial risk.

(i) For example, a Cellnex internal document [✂].

(ii) The same document [✂].

7.25 The available evidence shows that the existence of a churn allowance and the proportion of sites that fall under the churn allowance are key factors in negotiations over framework contracts which otherwise commit MNOs to commit to occupying sites for very long periods of time. In particular, churn allows customers, in particular MNOs, to evolve their networks in ways which they cannot predict at the outset of a contract and to maintain some competitive pressures on their existing suppliers during the term of the contract.

Scale of suppliers

7.26 Cellnex submitted that WIPs' scale, whether in geographic or in absolute terms, is not an important factor of competition and does not give a material advantage when competing for opportunities for new customers. It said that for demand for new sites, customers will require a site within a small search area to meet their radio planning needs and that it is very unlikely that Cellnex, or any other WIP, will have an appropriate site in a location to replace an existing site.

7.27 Cellnex also submitted that there are two main scenarios where very limited economies of scale may be considered to arise: first, in the outsourcing of costs of operating an existing portfolio of sites and second, in deploying new sites. However, Cellnex said that economies of scale are not material in either scenario.

7.28 We have seen a wide range of evidence that shows that the extent of a supplier's portfolio of sites is important to customers and a determinant of a supplier's competitiveness in the market. In particular, the internal documents provided by both the Parties and third parties consistently show that all suppliers monitor the number of sites in competitors' and suppliers' portfolios of sites.

(a) For example, a Cellnex internal document provides a description of the European market and of the portfolios of Cellnex's competitors by looking, among other things, [✂].

(b) Internal documents provided by a WIP and an MNO, [✄].

7.29 The importance of scale is also demonstrated by the cost savings which Cellnex expects from the Merger, in the form of [✄].[162]

7.30 Other Cellnex internal documents also indicate that scale is important and explain some of the advantages that a supplier with material scale might hold. For example:

(a) A document [✄] prepared in 2017 by Arqiva states [✄].

(b) The same document states that [✄].

7.31 Evidence from third parties also shows that scale contributes to suppliers' competitiveness, alongside other factors, particularly for large contracts.

7.32 Most obviously, suppliers with many existing sites can have a greater ability to meet customer demand as they are more likely to be present where customers need sites. For example:

(a) An MNO said that the wider the geographic footprint a supplier has, the more likely it would have a suitable site, which could provide a 'cumulative advantage over competitors'.

(b) A WIP submitted that the number of existing sites in a supplier's portfolio can make a meaningful difference to the ability to capture new business. The WIP also said that a scale supplier will have the ability to satisfy a significant portion of new demand of the MNO with one strategic engagement and MNOs have a preference for scale suppliers. [✄].

(c) Another WIP submitted that the volume and geographic location of WIP assets is a key determinator of the attractiveness of a WIP and significantly affects negotiating power with MNO customers. In its view, if the portfolio is large, there is a greater likelihood of having an asset that meets MNO customer requirements.

7.33 However, the evidence from third parties also highlighted a number of other reasons why larger suppliers are stronger competitors.

7.34 First, although customers use multiple suppliers, customers (MNOs in particular) have a preference to contract with large suppliers. For example:

(a) [✄].

[162] These synergies are set out in more detail in Chapter 2 above.

(b) Another MNO said that it may not be worth negotiating framework agreements with a small-scale supplier.

7.35 Second, smaller WIPs told us that large WIPs can enjoy some advantages from economies of scale, which may enable them to offer better deals to customers. For example:

(a) A WIP told us that benefits of economies of scale are most evident in the ability to win a higher proportion of new business with key customers (both new sites and share of major upgrade programmes). This is driven by both the ability of larger portfolios to satisfy more of a customer's needs under a single contract with the wider range of commercial levers a larger portfolio has available to structure a deal such as [✂].

(b) Another WIP explained that a WIP that owns a significant number of existing sites is able to offer sites on shortened deployment timelines compared to the extended acquisition planning and build process of new site development. The WIP also explained that having existing sites on scale also enables more efficient site access and maintenance continuity and programming, thus lower per site maintenance and site access costs.

(c) Another WIP submitted that the number of existing macro sites, alongside new BTS sites, a WIP can offer is a critical factor in winning contracts as this gives rise to significant economies of scale generated by the ability to negotiate lower prices with suppliers of site construction, such as volume discounts, operational maintenance and health and safety checks.

7.36 There is some evidence that these economies of scale advantages for large suppliers may also play a role when competing for BTS sites, as well as existing ones, although views from MNOs on this were mixed.

(a) For example, a WIP submitted that it is important for a WIP to have scale in existing sites that can be utilised for new network roll-out and these sites can help subsidise any new BTS sites required. It said that a scale portfolio will have several levers such as existing sites, options over new sites, economies of scale and the ability to inject momentum quickly into an MNO rollout [✂].

(b) An MNO, submitted that suppliers which can offer a bundle of existing and new sites would be a more attractive BTS suppliers, assuming the existing sites are in suitable locations.

(c) [✂].

(d) However, another MNO, said that whether a new supplier has a large number of existing sites is not likely to be significant when negotiating a framework agreement because of the small likelihood of moving a large number of sites at any one time.

7.37 Finally, we note that Cellnex (Arqiva at the time), as part of its contract negotiations with CTIL in 2014, [✄].

7.38 However, third parties told us that large suppliers also have an advantage in being able to secure future commitments to new sites, which smaller suppliers are not able to.

(a) A WIP told us that minimum commitment growth clauses can only be achieved by scale operators [✄].

(b) Another WIP told us that it was [✄].

7.39 In summary, the evidence shows that scale contributes to suppliers' competitiveness, alongside other factors, particularly for large contracts. We discuss suppliers' scale in more detail and the role it plays when they compete with one another in Chapter 8.

Suppliers' track record

7.40 There is evidence that suppliers' previous track record is another factor affecting customers' choice of macro sites, in particular when choosing providers of BTS sites.

(a) BT told us that suppliers' past track record or demonstrated ability to partner with parties who have a strong track record for building new sites is an important factor affecting customers' choice.

(b) Vodafone submitted that suppliers' proven track record in delivering sites on time and to the correct specification is an important factor. [163]

7.41 In addition, having worked with an operator in the past can be an advantage because it provides customers with an indication of what it might be like to work with that operator when, for example, commissioning new sites.

7.42 The evidence available to us highlights that a supplier's track record is an important aspect of that supplier's commercial offering, particularly in negotiations for framework agreements.

[163] Further evidence on the importance of suppliers' track record is set out in Chapter 5.

(a) For example, in the context of the MBNL contract renegotiation, Cellnex, which was a small WIP at the time with limited track record in the UK, provided a [✄].[164]

Provisional conclusions on factors influencing customer choice

7.43 The evidence shows that the geographic location of a site is important, since this will determine the coverage that can be provided and the extent to which the site can be incorporated into the rest of the network without disruption, or the extent of any disruption.

7.44 Where sites are required to extend coverage, enhance capacity and/or accommodate new technologies, their location and their relationship to the rest of the network will be a key consideration. Although some of these network changes are driven by external factors (such as NTQs), there is evidence that over the longer-term MNOs can also influence how their networks evolve.

7.45 There is evidence that pricing is another important element of competition. In practice, prices for existing sites are primarily negotiated in the context of long-term national framework agreements which are periodically renewed. These agreements are therefore an important focus of our assessment.

7.46 Churn allowances are another important dimension of competition, by allowing customers to switch some sites during the term of the agreement without incurring in financial penalties. This allows customers to maintain some degree of competitive pressure on their existing suppliers. It also provides customers with some flexibility to change site locations and alter their network configuration over time.

7.47 The evidence also shows that scale and track record contribute to suppliers' competitiveness, alongside other factors, particularly for large contracts. We found that the Parties' submissions that these factors are not important were not supported by their own internal documents or the weight of evidence from third parties. There are a number of reasons why larger suppliers are stronger competitors, including the greater likelihood of having a site in the right location, customers preferences for dealing with larger suppliers, economies of scale and the ability to secure future commitments to new sites.

[164] See more detail in Appendix G, paragraph 30.

Competition between suppliers of macro sites

7.48 Having assessed the factors that determine customers' choice of macro sites, in this section we go on to assess the implications of these for our assessment.

7.49 As discussed above, the passive infrastructure sites that host MNO networks are already well established and a very large proportion of customer demand which is met by WIPs is contracted for under long term framework agreements. Although these contracts are infrequently tendered or renegotiated, contracts with MNOs are valuable and therefore particularly important opportunities for which suppliers compete.

7.50 There are also opportunities which occur on a more regular basis as the result of NTQs and, as the 5G rollout progresses, MNOs' network densification programmes. These new opportunities have historically been smaller than those provided by existing contracts. For example, [✄].[165]

7.51 We have therefore assessed separately the nature of competition for existing sites and for new site opportunities.

Competition for existing sites

7.52 In the foreseeable future, renewals of large contracts are expected to occur in [✄] and [✄].

7.53 In considering how competition can be expected to work in relation to these contracts, we have taken into account recent developments in the market: while Cellnex may have been the only large WIP competing to retain sites in the past (for example, in relation to the renewal of the MBNL contract in 2019), it is likely to face competition from other large WIPs when large contracts come to be renewed in the future. This is discussed in more detail in chapter 8 below The Parties submitted that there is expected to be limited competition for the renewal of large-scale contracts for existing sites between WIPs and MNOs and MNO JVs for four main reasons.

(a) First, there would generally only be a very small number of existing sites (if any) that would be suitable for an MNO to switch, as replacement site would need to be geographically extremely close to the current site.

(b) Second, even if there is an alternative existing site that is sufficiently close to the current site to be suitable, the cost of taking down the equipment

[165] See Appendix E, Table 8.

and moving onto a new site, and the associated operational disruption, may be significant.

(c) Third, additional costs may be incurred to strengthen the alternative existing site. A large proportion of existing sites were designed for 2G and 3G and needed to be strengthened before they could accommodate additional equipment of existing tenants (in particular to host 5G equipment).

(d) Fourth, whilst switching for small numbers of sites may in principle be feasible in terms of planning and logistics, switching on a large scale would require long lead times in order to ensure that the process is smooth and does not create disruptions in the network and coverage.

(i) The Parties said that competitive tension in such contract renewals is maintained through the threat of customers' self-supply and churn over time and not through switching large numbers of sites.

(ii) However, it is possible for customers to switch a large number of sites away to BTS sites on expiry of a large framework agreement, if sufficient time to prepare is allowed. Cellnex submitted that, [✂].

7.54 Cellnex submitted that an existing customer is not likely to switch away from an existing site without a catalyst to do so due to the costs and time involved. In addition, Cellnex submitted that, as switching costs are the same for each site, the incumbency advantage is the same for smaller WIPs as it is for larger ones, so it is as difficult for a large WIP to win existing sites from a small WIP as vice versa.

7.55 Cellnex also said that, as a result, competition for switching large numbers of existing sites tends to be very limited, with competition centred on those sites where a catalyst causes the customer to move. However, Cellnex submitted that even where it may not be feasible for customers to switch a large number of sites at one time, there will always be the threat of gradually losing churned sites over a longer period and/or no longer being considered for incremental site requirements.

7.56 Evidence from customers, competitors and the Parties' internal documents was consistent with the Parties' view that switching macro sites is costly and potentially disruptive to services and, as a result, does not occur often.[166] As a result of the existence of high switching costs, being a customer's current supplier of existing sites provides a significant competitive advantage over

[166] See Appendix F, paragraphs 49 to 54.

rivals seeking to attract those customers to new sites ('incumbency advantage').[167] For example, data submitted by Cellnex shows that Cellnex [✂].[168]

7.57 We agree with the Parties' position that there are high switching costs and that current suppliers enjoy a material incumbency advantage. We also consider, however, that the evidence available to us indicates that competition to existing sites plays a material role in driving customer outcomes.

(a) When existing contracts expire or are close to expiring, customers run competitive processes which can generate an important competitive threat to current suppliers. For example, when its contract with Arqiva (now part of Cellnex) was close to expiring, MBNL ran a tender process for [✂] sites to which it invited multiple suppliers to bid and evaluated their proposals in detail, which put competitive pressure on [✂].[169]

(b) The renegotiation of the MBNL contract also shows that [✂], and was an important driver of commercial decisions, including the level of prices, relating to its entire portfolio of sites.

(c) As discussed above, the churn allowance included in framework agreements is a lever for customers to maintain competitive pressure on their existing suppliers. Although the annual churn allowance may be small, its cumulative effect over the long life of contracts can be significant: as discussed above, it has accounted for between [✂] and [✂] in previous contracts. A churn allowance therefore allows customers to (threaten to) migrate marginal sites over time, reducing their reliance on their existing suppliers.

7.58 When competing to switch a customer of a WIP away from an existing site, the strongest competitive alternative will be provided by another existing site in a suitable location. This is because the costs, time and risks associated with building new sites make switching to an existing site preferable for customers in most circumstances. They allow customers to move quickly onto already built sites with established ancillary services such as power connections and so minimise the risk of any disruption.[170] We discuss this in more detail in our assessment of the constraint from customers' self-build and BTS in Chapter 8 below.

[167] See Chapter 9.
[168] See Table 8 in Appendix E.
[169] The MBNL contract renegotiation is described in more detail in Appendix G and our assessment of this evidence is discussed below.
[170] See paragraphs 3.45 to 3.48 in Chapter 3 and paragraph 8.160 in Chapter 8.

7.59 As described in paragraphs 7.26 to 7.39 above, large WIPs can offer access to a significant portfolio of existing sites, meet their current and future needs across a number of areas and offer solutions which can include existing sites as well as BTS sites. This means that large WIPs are likely to represent the most significant competitive constraints to each other when competing to serve large customers, such as the MNOs, across an extensive number of sites.

7.60 Although, for the reasons given above relating to switching costs, this is unlikely to result in a customer migrating all of its existing sites away from its current supplier when a framework contract comes up for renewal, the terms on which the customer will be able to renew the contract with the existing supplier will be influenced by the competition from other WIPs during the process.

7.61 The threat of the loss of even a small proportion of the existing sites in the framework agreement to another WIP can enable the customer to secure better prices, a larger churn allowance or improvements in other aspects of the framework agreement which will govern its access to the entire site portfolio for many years to come.

7.62 Again, as noted above and discussed further in the Chapter 8, Cellnex was the only large WIP offering existing and BTS sites in the past, but it is likely to face competition from CTIL in the future.

Competition for new sites

7.63 The Parties submitted that anticipated demand for new macro sites by MNOs is, and is expected to remain, limited because MNOs 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 they 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 BTS solutions to MNO customers and, in any evet, MNO customers have a demonstrated capacity to self-supply.

7.64 The evidence we have gathered supports the Parties' views that demand for new sites is largely driven by MNOs' 5G densification programmes, increased coverage in rural areas and NTQs on existing sites.[171]

[171] See more detail in Appendix F.

7.65 Customers seeking to improve the quality or coverage of their networks first look at whether there are existing sites available in those locations. As described in paragraph 7.58 above, customers prefer the use of existing sites over building new ones. Suppliers with a large portfolio of sites are more likely to have existing sites where customers will need them and therefore have a greater ability to meet their future requirements (see paragraph 7.32 above).

7.66 If existing sites are not available, customers then look to build sites themselves or contract WIPs to do so using BTS arrangements. When considering the BTS offering of suppliers, the evidence we discussed at paragraph 7.28 indicates that large suppliers have some advantages competing for the provision of BTS sites. For example, large suppliers can leverage their portfolio of existing sites to pass onto customers economies of scale in the form of cheaper prices or secure some of customers' future need for sites as part of framework agreements.

Provisional conclusions on competition between suppliers of macro sites

7.67 The most important focus of competition in this market is for large framework agreements with MNO customers. This will primarily take place between suppliers with extensive portfolios of sites, as they are best placed to meet customers' needs across a large number of areas.

7.68 The evidence shows that switching macro sites is costly and as a result does not occur often. However, although customers are unlikely to want or be able to migrate all of their sites away from their current supplier, they can use alternative large suppliers to improve the terms on which they obtain access to sites provided by their current supplier in future and can evolve their networks over time by making use of churn allowances to reduce their dependency on that supplier.

7.69 We return to the issue of competition between large WIPs in our assessment of the closeness of competition between the Parties in Chapter 8.

7.70 In addition to competition for existing sites, there is also competition for new sites. Although we have not seen evidence suggesting that only large suppliers can compete for these contracts, the evidence shows that suppliers with a large number of existing sites and previous track record are likely to have a competitive advantage over smaller rivals when competing for this demand.

8. Competitive assessment

8.1 In this chapter we assess the Merger's impact on competition. We have done so against the counterfactual we have provisionally found, namely stronger conditions of competition between the owner of the CK Hutchison Assets and Cellnex, for example through the sale of the CK Hutchison Assets to an alternative purchaser either within the original sales process or through a modified and/or extended sales process, that would have been conducted by CK Hutchison in the short to medium-term (that is, within approximately three years of CK Hutchison's decision to sell its passive infrastructure assets to a third party).

8.2 As set out in Chapter 4, the Merger constitutes a single, interlinked and inter-conditional commercial transaction. The sale and purchase agreement provides for: (i) the acquisition of TowerCo; (ii) the execution of the [✄] and the [✄], which relate to the economic benefit of the MBNL Sites (which in turn gives rise to material influence); and (iii) the subsequent acquisition of the Transfer Sites.

8.3 As explained in Chapter 4, we have provisionally found that the Merger gives rise to a single RMS. In light of this, it has not been necessary to conclude on whether Cellnex's acquisition of material influence over the MBNL Sites would, on a stand-alone basis, give rise to an SLC. Instead, our analysis set out below has primarily focussed on the long-term impact of the Merger on the structure of the market and competition, and therefore on the acquisition of TowerCo and the Transfer Sites.

8.4 Specifically, our assessment focuses on the impact of the two structural changes the Merger will give rise to:

(a) The first will arise from the transfer of the Unilateral Sites to Cellnex, which will occur when the Merger is completed; and

(b) the second, and most significant, will occur when Cellnex gains control of the Transfer Sites when the MBNL JV is dissolved, which is scheduled to occur in 2031.

8.5 While we have examined both of these changes in detail, in ultimately considering the overall effect of the Merger we have assessed the impact of all factors collectively.

8.6 The structure of this chapter is as follows:

(a) First, we consider how the state of competitive evolution in the market affects the evidence available to us to assess the competitive impact of

the Merger. We briefly explain how we assess the evidence available to us in this case within the applicable framework for our analysis.

(b) Second, we briefly describe pre-Merger market outcomes, as this provides an important starting point for our assessment.

(c) Third, we assess how closely the owner of the CK Hutchison Assets would compete with Cellnex (taking into account the appropriate counterfactual in this case).

(d) Fourth, we consider the strength of the competitive constraints exercised by alternative suppliers, including how these are evolving over time.

(e) Finally, we provide our provisional conclusion on whether the Merger may be expected to result in an SLC.

Our approach to the assessment of competitive dynamics in an evolving market

8.7 As in any case involving a more competitive counterfactual, there is limited evidence of competition in practice (such as tender data or internal documents) between the Parties.

8.8 In addition, as noted further below, customers have no experience against which to assess how an owner of the CK Hutchison Assets would compete with Cellnex in practice. We note, however, that the absence of this kind of evidence should not be taken to suggest that a merger does not raise competition concerns, and we have instead sought to inform our assessment from the wide range of evidence that is available.[172]

8.9 In this regard, we have based our provisional decision on a range of evidence including shares of supply, tender data, evidence from previous tenders (noting that such tenders occurred when there was only one established WIP of national scale), internal documents, and views and other information submitted by the Parties and third parties. As in any merger investigation, we note that some of the views that we have received may be affected by the incentives of the businesses or individuals that provided those views. We have sought to take those incentives into account in assessing the weight that should be attached to those views, as well as considering the extent to which

[172] The absence of certain types of evidence such as historical data will not in itself preclude the CMA from concluding that the SLC test is met on the basis of all the available evidence assessed in the round. See Merger Assessment Guidelines, paragraph 2.28.

such views are consistent with other evidence that we have gathered so far during our investigation.

8.10 We note, in addition, that the potential competitive effects of the Merger would be likely to play out in different ways over time. In particular, the sector is characterised by the existence of long-term agreements between suppliers and customers and the Transfer Sites will not come under the full control of Cellnex until the MBNL JV ends (whether in 2031 or earlier if mutually agreed by the JV partners).

8.11 In our investigation, in keeping with the CMA's established approach to competitive assessment, we are considering the impact of the Merger on the structure of the market (as summarised in paragraph 8.4) and competition over the longer-term, and therefore place only limited weight on the contractual arrangements (even in long-term contracts) in assessing the loss of competition that the Merger will bring about. We have also, in keeping with our remit to consider the overall impact of the Merger on rivalry over time and the continued evolution of customer demand,[173] sought to avoid an unduly static assessment of competition based on customer's immediate needs.

Pre-Merger market outcomes

8.12 In our assessment of the nature of competition in Chapter 7, we found that the size of a supplier's portfolios of sites is an important determinant of its competitive strength. Assessing the historical evidence on suppliers' portfolios therefore provides us with a starting point for understanding their relative strength and the overall extent of competition in the market – albeit one that must be supplemented with a consideration of ongoing industry developments.

8.13 As described in Chapter 3, MNOs have historically self-supplied a significant proportion of their sites through their JVs – MBNL and CTIL – which have mainly served the needs of their respective shareholders.[174] WIPs provide the majority of the remainder of their developed macro sites.

8.14 Through its acquisition of Arqiva in 2020, Cellnex became by far the largest WIP in the market and, until the commercialisation of CTIL at the beginning of 2021, it was the only large WIP.

8.15 Table 8-1: WIPs' shares of supply (2020) below presents WIPs' shares of supply in 2020, and shows that Cellnex had a share of [80-90]% while the

[173] See Merger Assessment Guidelines, paragraph 2.6.
[174] BT/EE also self-supplies a significant proportion of sites outside of the MBNL JV.

next largest competitor had a share of only [5-10]%, and no other competitor had a meaningful share of supply.

Table 8-1: WIPs' shares of supply (2020)

Competitor	*Number of sites*	*Share*	*Annual Revenues (£m)*	*Share*	*PoPs*	*Share*
Cellnex	[✂]	[80-90]%	[✂]	[90-100]%	[✂]	[80-90]%
WIG	[✂]	[5-10]%	[✂]	[5-10]%	[✂]	[10-20]%
Shared Access	[✂]	[0-5]%	[✂]	[0-5]%	[✂]	[0-5]%
FreshWave	[✂]	[0-5]%	[✂]	[0-5]%	[✂]	[0-5]%
Britannia Towers	[✂]	[0-5]%	[✂]	[0-5]%	[✂]	[0-5]%
WHP Telecoms	[✂]	[0-5]%	[✂]	[0-5]%	[✂]	[0-5]%
AP Wireless	[✂]	[0-5]%	[✂]	[0-5]%	[✂]	[0-5]%
Total		100%		100%		100%

Source: CMA analysis of Cellnex and third parties' data.

8.16 Consistent with this position, the evidence available to us from the Parties' internal documents, third parties' internal documents and the other information that third parties have provided during our investigation show that Cellnex (previously, Arqiva) holds a strong market position compared to rival WIPs. For example:

(a) Cellnex's internal documents recognise its market-leading position, noting that [✂],and that it is [✂].

(b) In terms of the size of its position, one Cellnex (Arqiva at the time) internal document notes that '[✂]'.

8.17 We were also told by both its customers and competitors that Cellnex was the largest independent WIP in the UK.[175] For instance:

(a) A WIP submitted that Cellnex is a very strong competitor [✂] and a number of smaller WIPs are weak or very weak competitors in the UK.

(b) Another WIP submitted that Cellnex 'dominates the market' and there are a number of smaller WIPs.

(c) An MNO internal document lists Cellnex (Arqiva at the time) as the third largest player, after CTIL and MBNL, but the first WIP at the time, in terms of number of sites.

(d) CTIL identified Cellnex as the main supplier of access to developed macro sites in the UK.

8.18 Our analysis shows that these very high levels of historic market concentration have been associated with high profit margins. Looking at

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[175] See Appendix F, paragraphs 56 to 73.

EBITDA, a measure of profit margin widely used in this industry, we found that the margins of Cellnex UK, WIG and Arqiva (now Cellnex) were [✄], 61% and [✄] respectively.[176]

8.19 Overall, the evidence shows that pre-Merger there has been limited competition in the supply of access to developed macro sites in the UK. Cellnex (previously, Arqiva) has had a very high market share and, along with high costs of switching and significant barriers to entry, this has allowed most WIPs to earn substantial profit margins.[177]

8.20 We recognise that there are limits to the inferences that can be drawn from these pre-Merger market outcomes, in particular because there are other important ongoing market developments. Most notably, CTIL commercialised in 2021 and has now begun operating as a WIP, becoming the largest supplier. This is an important development we discuss in detail in our assessment of competition from alternative suppliers at paragraphs 8.135 to 8.140 below.[178]

8.21 However, even taking into account the addition of CTIL, we note that, as shown in the table below, the market still remains highly concentrated, and we have found no evidence to suggest that there has been or would be any change in the high costs of switching and significant barriers to entry.[179]

8.22 We also note, by way of context to our assessment, that even the loss of only a limited constraint can give rise to competition concerns where markets are already highly concentrated.[180]

[176] EBITDA margin has been calculated on the basis of EBITDA/Revenue for 2020. Cellnex (UK) data includes Arqiva data (for the telecoms business) for part of 2020 (following the closing of that transaction). Arqiva data (for telecoms business) is for the part of the year before sale to Cellnex.
[177] See Chapter 9 for a description of switching costs and barriers to entry.
[178] See Chapter 3 for a description of CTIL commercialisation, paragraphs 3.22 to 3.28.
[179] See Chapter 9 for a description of barriers to entry.
[180] See Merger Assessment Guidelines, paragraph 4.39.

Table 8-2: Shares of supply by number of sites adjusted for foreseeable changes in market structure up to 2031

Competitor	*Number of sites*	*Share*
Cellnex	[✂]	[20-30]%
CKH Sites:		
Unilateral sites	[✂]	[5-10]%
Transfer sites	[✂]	[10-20]%
CK Hutchison Assets	[✂]	[10-20]%
Merged Entity	[✂]	*[40-50]%*
CTIL	[✂]	[40-50]%
FreshWave	[✂]	[0-5]%
WIG	[✂]	[0-5]%
Shared Access	[✂]	[0-5]%
Britannia Towers	[✂]	[0-5]%
WHP Telecoms	[✂]	[0-5]%
AP Wireless	[✂]	[0-5]%
Total	[✂]	100%

Source: CMA analysis of data provided by the Parties and third parties.

Closeness of competition between Cellnex and the owner of the CK Hutchison Assets

8.23 In this section, we assess the extent to which Cellnex and the owner of the CK Hutchison Assets would be close competitors in the counterfactual we have provisionally found.

8.24 Generally, the closer two firms are, then the stronger the competitive constraint they impose on each other, and the more likely it is that the loss of this competition as a result of a merger could create an incentive to increase prices and/or reduce service quality.

8.25 This section is structured as follows:

(a) First, we set out the Parties' submissions on closeness of competition.

(b) Second, we set out the evidence on this from the Parties' internal documents.

(c) Third, we set out the relevant evidence from third parties.

(d) Fourth, we present shares of supply on a forward-looking basis, taking into account firms' expansion plans.

(e) Then, building on all of this evidence, we set out our assessment of closeness of competition between Cellnex and the owner of the CK Hutchison Assets.

(f) Finally, we set out our provisional conclusions on closeness of competition.

Parties' submissions

Extent of competition between Cellnex and the owner of the CK Hutchison Assets

8.26 The Parties submitted that alternative existing sites have a limited impact on Cellnex as demand is local and the likelihood of overlaps, even for a WIP with large numbers of sites, is minimal. The Parties said that it is very unlikely that Cellnex, or any other WIP, will have an appropriate site in a location to replace an existing site of a rival WIP.

8.27 In support of their view, the Parties submitted an overlap analysis which they said shows that there is no meaningful overlap between Cellnex's existing sites and the Transaction Sites, and that having a large number of existing sites does not make a material difference to the likelihood that a WIP will have a site in the right location for a customer.

8.28 They said that, even using the largest catchment area, their analysis shows that only around [✂] of Cellnex's sites overlap with the Transaction Sites and therefore could be feasibly be subject to competition in the counterfactual.

Scope to increase co-location on the Transaction Sites

8.29 The Parties told us that the scope for additional co-location on the [✂] Unilateral Sites is and will continue to be limited irrespective of the Merger and, in any event, as is clear from the MBNL JV Agreements, [✂].The Parties also said that there is limited anticipated demand for co-location on the Transaction Sites (to the extent it is feasible) in the near future.

8.30 On this basis, the Parties suggest that the owner of the CK Hutchison Assets would, in practice, only be capable of providing limited additional competition, in the counterfactual, to Cellnex and other WIPs.

8.31 More specifically, with regard to monopoles the Parties submitted that monopoles may only be able to host a single tenant. However, the Parties also said that:

(a) The Streetworks Sites [✂].

(b) Cellnex told us that it has an aspiration to turn some of the [✂] into multi-tenant sites. We consider this further when discussing the Parties' internal documents below.

8.32 Cellnex told us that, to upgrade [✂] for additional tenants would require significant capex and disruption to the existing tenants' networks and that planning permission would be required. Specifically:

(a) Cellnex submitted that 3UK estimated that the average expected cost per [✂] is [✂].Cellnex estimated the costs of upgrading these sites to be between [✂] and [✂] for sites which have not been deployed yet. They also provided a wide estimate range between [✂] and [✂] to upgrade [✂], depending on the [✂] and site. They said the lower end of the range was to upgrade poles and reconfigure sites, while the estimates on the upper bound were for cases that required to replace the pole, strengthen the foundations, and reconfigure the site.

(b) Cellnex also told us that the capital expenditure required is a secondary issue in terms of its ability to upgrade, with planning permissions being the primary issue.

(c) CK Hutchison submitted that [✂].

8.33 The Parties also submitted that an alternative purchaser could not realistically replace 3UK on the Unilateral Sites because they would not have the right to do so. Even if such a theoretical right to replace 3UK existed, market dynamics make it unrealistic for a WIP to replace an anchor tenant. This is because there are significant costs to moving active equipment to different sites and disruption to MNOs' network services would be inevitable. If a WIP attempted such a strategy, it would make it unable to attract MNO customers.

8.34 The Parties submitted that many of the UKB Sites, which are very small in number and as a proportion of the Transaction Sites, are unsuitable for further co-location as they are predominantly rooftop sites which would require significant planning and capex and it is often more attractive for a customer to negotiate with the rooftop owner directly than through a third party. The Parties also submitted that approximately two-thirds of the rooftops on which the UKB Sites are located already host another MNO in addition to 3UK, limiting the space available for further tenants.

Parties' internal documents

8.35 We have gathered and analysed a wide range of the Parties' internal documents. These provide evidence on a number of issues relevant to the assessment of closeness of competition between Cellnex and the owner of the CK Hutchison Assets in the counterfactual.

8.36 First, in terms of understanding how WIPs develop their business to compete with each other within the context of an evolving market, we note that some of Cellnex's internal documents highlight [✂].

(a) For example, a Cellnex internal presentation from 2020 notes that [✂].

8.37 Similarly, some of Cellnex's internal documents indicate that the [✄]. For example:

(a) A presentation prepared for Cellnex in the context of the Merger [✄].

(b) A Cellnex (then Arqiva) internal document [✄]

8.38 On the potential for the owner of the CK Hutchison Assets to compete for business against other WIPs, we have also considered internal documents relating to Cellnex's plans and ability to increase utilisation on the Transaction Sites.

8.39 In this regard, several of Cellnex's internal documents show that Cellnex has plans to [✄] on the Transaction Sites to increase revenues generated from [✄]. For instance:

(a) A Cellnex internal document produced during the early stages of assessing the Merger provides for tenancies to [✄] in 2025. Revenue forecast to grow at [✄].

(b) In relation to [✄], Cellnex's valuation model anticipates the possibility of [✄]. In particular, Cellnex's valuation model [✄].

8.40 Lastly, on the extent of competition between different sets of sites, we have also seen a number of Cellnex (then Arqiva) documents on the MBNL contract renegotiation which discuss the contract renegotiation process, the perceived competitive constraints and Arqiva's changing offering over time. These are set out in detail in Appendix G; in summary, they broadly show that:

(a) [✄].

(b) [✄].

(c) [✄].

8.41 We have also seen two internal documents [✄].

Third parties' views

8.42 Third parties provided evidence on two key issues relating to closeness of competition: the effectiveness of the CK Hutchinson Assets and the extent to which monopoles can host multiple tenants. We have also, more broadly, considered what weight can be attached to customers' views about the impact of the Merger on competition and taken their incentives into account.

Effectiveness of the CK Hutchison Assets

8.43 Third parties were consistent in their views that, if the CK Hutchison Assets were to be operated by an independent supplier of macro sites, the owner of these assets would be a strong competitor and/or a viable alternative to Cellnex.[181]

8.44 WIPs submitted that the owner of the CK Hutchison Assets would compete strongly or moderately strongly with Cellnex, emphasising the large national portfolio of sites which it would operate. Two WIPs also highlighted that the share of the MBNL Sites transferred at the dissolution of the MBNL JV (that is, the Transfer Sites) would exercise the most effective competitive constraint as a result of the number and nature of these sites.

- *(a)* A WIP submitted that with the acquisition of the Unilateral Sites, including those which will be built by 2022, the owner of the CK Hutchison Assets would achieve a national portfolio of scale and become the second largest independent portfolio (not taking into account the entry of CTIL). [✂] told us that it was possible that the Unilateral Sites alone, given the nature of many of them, would 'lack the depth and capacity to create a national' supplier. However, [✂] said that together with the ongoing interest in the MBNL portfolio and the transfer of sites in 2031, at the dissolution of the MBNL JV, the owner of the CK Hutchison Assets would have more than 6,000 sites placing it in the 'national portfolio of scale category'.

- *(b)* Another WIP said that the owner of the CK Hutchison Assets would have a very limited competitive effect compared to the current status quo until the Transfer Sites are added to its portfolio. It said this was because many of the Unilateral Sites would only be able to host 3UK as, in its view, they include non-shareable structures as the Streetworks Sites. However, [✂] was also of the view that, after the end of the MBNL JV, the owner of the CK Hutchison Assets would become an independent supplier 'with sufficient scale to rival Cellnex and other players and therefore significantly increase competition in the market.'

8.45 Some WIPs also expressed views on the impact of the Merger on the ability of Cellnex and other WIPs to compete. For example:

- *(a)* A WIP told us that the combination of the CK Hutchison Assets with Cellnex's existing portfolio of sites would strengthen Cellnex's 'dominant position' and make it harder for other suppliers to compete with Cellnex.

[181] More details in Appendix F, paragraphs 56 to 73.

(b) Another WIP stated that the Merger would 'further entrench Cellnex's dominant position' and remove the opportunity for an independent WIP to acquire the CK Hutchison Assets and 'become a material competitor to Cellnex, both now and in the future'.

8.46 All MNOs indicated that they would consider the owner of the CK Hutchison Assets as an alternative to Cellnex, provided that it met other requirements including site location, price and past track record. For example:

(a) An MNO said that it would consider the owner of the CK Hutchison Assets as a supplier if the sites were located in their required search areas and met its other criteria. The MNO also said that a critical consideration in deciding whether or not to deploy with them would be the ability of the owner of CK Hutchison Assets to perform as an independent supplier.

(b) Another MNO told us that if CK Hutchison Assets operated towers in locations suitable to them, it would consider this a further option.

8.47 Out of the nine non-MNO customers who responded to us, five told us they would consider the CK Hutchison Assets as an alternative to Cellnex. For example:

(a) A non-MNO customer [✄], said it would consider the CK Hutchison Assets.

(b) Another non-MNO customer said that the CK Hutchison Assets would represent a strong portfolio with a wide geographic spread which would make the portfolio attractive.

Multiple tenants on monopoles

8.48 Upon completion of the planned roll-out, the Streetworks Site monopoles will represent a significant proportion of the CK Hutchison Assets.

8.49 We asked third parties whether monopoles could accommodate more than one tenant and what proportion of the monopoles included in their portfolio host multiple tenants.[182]

(a) Data provided by CTIL shows that around half of its monopole sites host two or more tenants.

[182] See Appendix F, paragraphs 74 to 80.

(b) Data submitted by other WIPs similarly indicate that some of their monopoles accommodate more than one customer. For example, [✄].

8.50 WIPs also told us that monopoles have the capacity to host multiple customers, including MNOs with 4G or 5G active equipment, and capacity can be increased where this is not already available. For example:

(a) A WIP said that, although there are different types of monopoles with different levels of capacity, 'even a basic monopole has the capacity (in some cases subject to further investment) to support at least two customers and some monopoles can go significantly further than this'. [✄]. The WIP also stated that it is also accurate to say that (all other things being equal) a portfolio comprising basic monopoles will contain on average less capacity and opportunity than a portfolio of lattice structures.

(b) Another WIP submitted that monopoles are a 'design-to-suit product' and can therefore be designed for future multi-tenant occupation. It also said that planning authorities prefer to support monopoles designed to suit the known requirement, rather than speculatively, and consider future redevelopment plans at the point where additional demand arises.

(c) Another WIP submitted that monopoles are able to accommodate multiple tenants whether MNO or non-MNO customers, including either 4G and 5G equipment. It also said that if monopoles are not designed to hold a large amount of equipment, structural upgrade works can be completed to hold more equipment rather than building a new structure.

8.51 An MNO, submitted that it expects that the 5G rollout would mean that only one MNO's equipment can be put on a lamppost.

Customers' views on the Merger

8.52 BT/EE raised concerns about the potential impact of the Merger on competition at the start of our Phase 2 investigation, [✄].The other MNOs have not raised concerns. We have taken the lack of explicit customer concerns into account, along with all of the other evidence available to us, in reaching our provisional decision.

8.53 We recognise that the MNOs are large and sophisticated businesses that are able to take an informed view on the commercial implications of the Merger. However, we have placed limited weight on the lack of concern expressed by the MNOs and some of the non-MNO customers in our assessment of the loss of competition that would result from the Merger for the following reasons:[183]

8.54 First, with a more competitive counterfactual, customers have no practical experience of assessing how an owner of the CK Hutchison Assets would compete with Cellnex.

8.55 While customers have provided useful evidence on the constraint that they would expect the owner of the CK Hutchison Assets to provide, the views that they submit cannot be informed (as they are in most other cases) by previous experience of competition in practice (either between an alternative purchaser and Cellnex or, more broadly, even between any large WIPs).

8.56 Second, some customers appear to place material weight on the protections that can be provided by their contractual arrangements with suppliers.

8.57 In this regard, we note that the Merger brings about a permanent change in market structure, and, as set out in our guidance, [184] contractual protections (even long-term ones) should only be given limited weight in assessing the overall loss of competition that a merger will bring about. This is because contracts may not completely remove a firm's ability to harm its customers, given that certain customers might not be covered by these contracts, the contracts might not protect all ways in which they could be harmed, and the contracts may be of limited duration.

8.58 Moreover, as our guidance sets out, over time contracts may be renegotiated or terminated, and firms may waive their rights to enforce any breaches in light of their overall bargaining position (reflecting the change in market structure brought about by a merger).[185]

8.59 In this case, our assessment involves consideration of the terms which MNOs and other customers may expect to achieve upon the renewal of their existing contracts with Cellnex under the Merger and the counterfactual. The long-term nature of existing contracts means that renewal negotiations will not commence for some years into the future.

8.60 Third, we note that two of the MNOs – Vodafone and O2 – are not, because of their existing network arrangements with CTIL, likely to be particularly affected by a loss of competition between Cellnex and the owner of the CK Hutchison Assets, at least in the near term. Vodafone and O2 have historically

[183] See Appendix F, paragraphs 147 to 167.
[184] See, for example, Merger Assessment Guidelines, para. 7.15.
[185] Merger Assessment Guidelines, para 7.15

relied less on Cellnex, through CTIL, than MBNL (and hence BT/EE and 3UK) relies on Cellnex.[186]

8.61 Fourth, as in any case, we recognise that the views of some third parties may be affected by other incentives. In this regard:

(a) BT/EE told us that '[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/EE and other UK wireless communication providers.'

(b) BT/EE [✂]

8.62 [✂]. As set out above, in any case, we attach only limited weight to any contractual protections in assessing the competitive effects of a merger [✂] for the reasons set out above.

8.63 The other customer that is most likely to be affected by the Merger, 3UK, is part of CK Hutchison, and therefore has a significant incentive to support the successful completion of the Merger.

8.64 We note that 3UK [✂].

8.65 When we raised this with CK Hutchison during this inquiry, it told us that [✂].

8.66 Given [✂] on Cellnex's position in the market, and in light of their broader incentives, we have placed limited weight on 3UK's views on the Merger.

8.67 Finally, while MNO customers have not expressed concerns about the Merger, we note that they have typically not identified significant alternative suppliers to Cellnex and the owner of the CK Hutchison Assets (other than CTIL) or submitted evidence to suggest that our understanding of Cellnex's existing or expected market position is incorrect.

Forward-looking shares of supply amongst WIPs

8.68 To help us assess the significance of the competitive constraint exercised by the owner of the CK Hutchison Assets in the counterfactual and, therefore the impact of the Merger on Cellnex's position and the wider market structure, we have calculated forward-looking shares of supply. To do so, we have

[186] See Table 3-1 in Chapter 3.

considered the impact of the Merger over a relatively longer term, including after Cellnex gains control of the Transfer Sites in 2031.

8.69 Our starting point has been the market for access to developed macro sites which, as defined in Chapter 6, excludes sites that MNOs and MNO JVs use for their own needs ('self-supply'). We have assessed whether MNOs, in particular BT/EE, are likely to enter the market for access to developed macro sites from paragraph 8.135 below.

8.70 We consider that forward-looking shares of supply are a useful indicator of the impact of owner of the CK Hutchison Assets in the market and Cellnex's position.

8.71 The supply of access to developed macro sites is a market characterised by long-lasting infrastructure, long-term contracts, and high barriers to entry, making the market less prone to significant swings in shares of supply and concentration.[187]

8.72 As set out at the beginning of this chapter, the Merger will give rise to two structural changes in the market:

(a) The first will arise from the transfer of the Unilateral Sites to Cellnex, which will occur when the Merger is completed; and

(b) the second, and most significant, will occur when Cellnex gains control of the Transfer Sites when the MBNL JV is dissolved, which is scheduled to occur in 2031.

8.73 Here as throughout the rest of this chapter, we have examined the impact of both of these changes on the market.

8.74 Table 8-3 shows our estimated shares of supply by 2031 adjusting for Cellnex, the owner of the CK Hutchison Assets and competitors' long-run entry and expansion plans.

[187] See Chapter 9 below for a description of barriers to entry.

Table 8-3: WIPs' shares of supply by number of sites adjusted for foreseeable changes in market structure up to 2031

Competitor	*Number of sites*	*Share*
Cellnex	[✂]	[20-30]%
CKH Sites:		
Unilateral sites	[✂]	[5-10]%
Transfer sites	[✂]	[10-20]%
CK Hutchison Assets	[✂]	[10-20]%
Merged Entity	[✂]	*[40-50]%*
CTIL	[✂]	[40-50]%
FreshWave	[✂]	[0-5]%
WIG	[✂]	[0-5]%
Shared Access	[✂]	[0-5]%
Britannia Towers	[✂]	[0-5]%
WHP Telecoms	[✂]	[0-5]%
AP Wireless	[✂]	[0-5]%
Total	[✂]	100%

Source: CMA analysis of data provided by the Parties and third parties.

8.75 This shows that in the counterfactual the owner of the CK Hutchison Assets would be the third largest supplier of access to developed macro sites with a share of [10-20]% and would be many times larger than the next-largest firm.

8.76 Compared to the counterfactual, the Merger would significantly reinforce the CTIL-Cellnex duopoly, leaving two large (and similarly sized suppliers) accounting for almost all of the market with some very small rival WIPs.

Our assessment of closeness of competition

8.77 In this section we present our assessment on the extent to which the owner of the CK Hutchison Assets would be a close competitor to Cellnex in the counterfactual, drawing on the evidence set out above. We do this in two steps:

(a) First, we consider the extent of competition between Cellnex and the owner of the CK Hutchison Assets in the counterfactual. Here we assess the Parties' submission that there is only a minimal overlap between the two sets of sites, and that this means there could be only limited competition between them.

(b) Second, we consider the effectiveness of the CK Hutchison Assets in the counterfactual. Here we assess the Parties' submission that there is only limited scope to increase co-location on the CK Hutchison Assets.

Extent of competition between Cellnex and the owner of the CK Hutchison Assets

8.78 In order to assess the extent of competition between Cellnex and the owner of the CK Hutchison Assets in the counterfactual we have:

(a) Considered the extent of current overlaps between the two portfolios of sites, and also the extent to which this overlap (even if limited) would have an impact on competition in the supply of macro sites within the UK.

(b) In keeping with our remit to consider the overall impact of the Merger on rivalry over time,[188] we also assessed the extent to which other aspects of the offering provided by Cellnex and the CK Hutchison Assets, beyond the areas of current overlaps between their existing sites, form part of the overall competitive constraint that the Parties provide on each other (and on rival WIPs).

8.79 We then present our provisional conclusions on the extent of competition between Cellnex and the CK Hutchison Assets in the counterfactual.

8.80 We undertake this assessment whilst being mindful that, when assessed against the counterfactual, the Merger would remove one of only three large WIPs from a market in which both barriers to entry and profits appear to be high and stable.[189, 190]

Current overlaps

8.81 We have examined the Parties' submissions on the degree of geographic overlap between Cellnex's existing sites and the CK Hutchison Assets which, in their view, shows no meaningful overlap – estimated at around [✂].

8.82 We have three factual observations on this analysis:

(a) The analysis is likely to underestimate the degree of geographic overlap between Cellnex and the CK Hutchison Assets, as it excludes about [✂] of the Streetworks Sites that have not yet been built. These account for about [20-30%] of the Transaction Sites and are therefore a sizeable proportion of the CK Hutchison Assets.

(b) Since the Transfer Sites will be identified only when the MBNL JV is dissolved, the precise degree of overlap between Cellnex and the CK Hutchison Assets will depend on this allocation process.

(c) The degree of overlap will also vary by customer, since only a subset of each WIP's sites are used by each customer.

[188] Merger Assessment Guidelines, paragraph 2.6.
[189] See paragraph 8.15 above for our analysis on margins.
[190] See Chapter 9 for a description of barriers to entry.

8.83 Notwithstanding the limitations that should be attached to the Parties' analysis or our ability to predict the exact degree of overlap in any particular set of circumstances, we broadly agree with their position that the size of the overlap between the Parties' sites is likely to be numerically limited (that is, accounting for a relatively small proportion of each Party's sites).

8.84 Indeed, we note that in this industry the extent of overlaps between current sites is often limited because of the nature of the assets at issue and public policies which seek to discourage duplication.[191]

8.85 However, the key question, in our view, for our analysis is not the precise degree of overlap between the Cellnex and the CK Hutchison Assets' sites, but rather how these overlaps affect commercial decision making and competition in practice and therefore how the removal of overlaps in the Merger will affect competition.

8.86 Firstly, we have already noted that suppliers set prices and other commercial terms at a national level, without flexing their offerings on a local or regional basis and that we have provisionally found, in keeping with the Parties' submissions, that competition in this market should be analysed on a national basis.[192] This means that a loss of competition for a limited number of sites can nevertheless potentially affect prices and other commercial terms for the entire national portfolio of sites.

8.87 Moreover, as discussed in Chapter 7, it is not the case that competition in this market involves customers considering whether to switch all of their sites to an alternative supplier, even in the long run. Instead, customers will require access to sites from several different suppliers in order to meet their overall needs. We therefore consider that the Parties' position, that '<u>any</u> competition to switch away from Cellnex's existing sites will need to involve a BTS or self-supply option as an alternative to at least [✂] of Cellnex's sites' (because existing overlaps only account for [✂] of sites), is fundamentally incorrect.

8.88 Instead, we believe that the evidence available to us shows that even relatively limited overlaps in existing sites between suppliers can be an important driver of commercial decision-making and an important determinant of customer outcomes.

[191] See Chapter 3.
[192] See Chapter 6 for our assessment on the geographic boundaries of the market.

8.89 In particular, the renegotiation of the MBNL contract shows that [✂].[193] A supplier that is able to offer an immediate alternative in even a relatively small proportion of sites appears to be an important competitive constraint.

8.90 In this regard, the Merger would have a major impact on the aggregate overlaps that Cellnex would have with other WIPs. Its overlaps with the CK Hutchison sites, although limited as a proportion of Cellnex's entire site portfolio, nevertheless account for a significant proportion of the Cellnex sites that overlap with any of its rivals.

8.91 It therefore represents an important competitive constraint in relative terms, with the only other significant overlap with existing sites being provided by CTIL.[194] We noted in paragraph 8.41 above that the overlap between CTIL and Cellnex appears to be of the order of [✂] of Cellnex sites, which compares the Parties' estimate of [✂] for the overlap between the CK Hutchison and Cellnex sites.

8.92 This is consistent with our conclusion that, compared to the counterfactual, the Merger would remove one of only two large rival WIPs that Cellnex faces.[195] In this context, the loss of a rival imposing a constraint to a limited number of sites may nevertheless result in a substantial lessening of competition.[196]

8.93 While we believe that the MBNL tender provides insight into the nature of the constraint provided by existing sites, we also note that this evidence is likely to understate the strength of this constraint (taking into account the counterfactual against which the impact of the Merger should be considered).

8.94 That is because in the MBNL renegotiation, although the number of sites that Cellnex (then Arqiva) considered to be at risk [✂], there were, at the time, no other WIPs with a large portfolio of existing sites actively competing to win its business. While CTIL [✂], it had not been commercialised at the time and there was therefore [✂].[197]

8.95 In contrast, we consider that, in the counterfactual, both CTIL and the owner of the CK Hutchison Assets would represent an immediate threat to Cellnex at

[193] See Appendix G.
[194] See, for example, paragraph 8.31 above and Table 8-1 above on the WIPs' shares of supply.
[195] See Table 8-3 above.
[196] While the focus of the CMA's assessment is on the change in the competitive constraints on the merger firms arising from a merger, where one merger firm has a strong position in the market, even small increments in market power may give rise to competition concerns. See Merger Assessment Guidelines, paragraphs 4.12(a) and 4.39.
[197] See Appendix G, paragraph 7 and 10.

those locations where their sites overlap with Cellnex. The removal of the overlap from the CK Hutchison Assets would significantly lessen that threat.

Other aspects of competition between rival WIPs

8.96 Alongside competing with their existing portfolios of sites in the areas where these overlap, the evidence indicates that there are other aspects to the rivalry between competing WIPs (including Cellnex and the owner of the CK Hutchison Assets). While these aspects of competition have played a less prominent role in customers' decision-making to date (within the context of a market in which there was only one large WIP), we are required to consider how rivalry in this market will operate over time, as networks and demand evolve with new technology, rather than limiting our assessment to a static assessment of existing overlaps.

8.97 First, WIPs can compete with their existing sites even when these do not closely overlap with those of rivals. This is because, rather than switching only individual sites, MNOs may threaten to switch a collection of sites in an area to a rival by adopting a new network configuration, as long as this would still provide coverage over the same region. In this way a package of local sites offered by a rival WIP can be an alternative, even if its sites are not sufficiently close to be substitutable on an individual basis.[198]

8.98 Second, WIPs compete in the provision of BTS in areas where customers require a new build site. As discussed in Chapter 7, this need can come about from 5G densification programmes, the need for increased coverage in rural areas and NTQs on existing sites.

8.99 In both cases, the evidence shows that scale and a WIP's track record, alongside other factors, contribute to their competitiveness, especially for larger contracts.

8.100 In particular, larger suppliers possess important competitive capabilities that smaller suppliers are unable to match. WIPs with a large network of existing sites will be better placed to offer an alternative network configuration that meets MNOs' coverage requirements. When offering BTS, they will be able to take advantage of economies of scale in building and operating sites, have more credibility in the eyes of customers and be able to offer customers the ease of purchasing BTS sites alongside existing ones in a smaller number of overarching framework agreements.

[198] See Appendix F, paragraphs 105 to 110.

8.101 In terms of the implications for the impact of the Merger, this would leave only CTIL as a rival to Cellnex, able to offer a comparable package of services at similar or greater scale. Smaller WIPs will not be able to compete as effectively in these ways, especially for large contracts.[199]

8.102 The significance of the loss of competition between Cellnex and the CK Hutchison Assets is corroborated by other evidence we have collected. This provides important insight into the totality of the loss of constraint from the owner of the CK Hutchison Assets, whether from direct overlaps or the other aspects of competition where the competitive capabilities held predominantly by larger suppliers are important. In particular:

(a) Cellnex's internal documents generally indicate that [✂]. For instance, as shown in paragraph 8.37 above, [✂].

(b) Another Cellnex (then Arqiva) internal document states that [✂].

8.103 We have considered Cellnex's view that these internal documents were produced by an external consultant, are historical and/or did not reflect Cellnex's views or plans [✂].

8.104 Whilst we agree that some care must be taken in interpreting internal documents in their appropriate context, these documents nevertheless provide an insight into the extent to which a rival's ownership of assets can be a competitive threat. We also note that this is consistent with third parties' views and Parties' internal documents which highlight the importance of inorganic growth for WIPs.[200]

8.105 Third parties were broadly consistent in their views that the CK Hutchison Assets would be a relatively strong competitor and/or an alternative for Cellnex's customers, notwithstanding the position, as noted above, that the extent of overlap for any customer is likely to be limited.

Provisional conclusions on the extent of competition between Cellnex and the owner of the CK Hutchison assets

8.106 In summary, our provisional view is that:

(a) In the counterfactual, while the overlaps between Cellnex and the owner of the CK Hutchison Assets would be limited in number, overlaps in existing sites are important competitive constraints, where they exist, and

[199] See Chapter 7, paragraphs 7.30 to 7.42.
[200] See paragraph 8.27 above and Appendix F, paragraphs 123 to 130.

the threat of small losses of sites can affect customer outcomes significantly.

(b) The Merger would result in the loss of a supplier able to offer an immediate alternative to Cellnex with a material number of sites and, in the longer term, in a significant reduction in the aggregate number of overlaps that Cellnex has with its competitors.[201]

(c) There will also be a broader loss of competition, beyond these narrow overlaps, particularly when considering the other capabilities that national suppliers of scale are able to offer over time.

8.107 Our provisional conclusion is therefore that, in the counterfactual, the owner of the CK Hutchison Assets would be a close competitor to Cellnex, implying that the Merger will have a substantial impact on the competitive constraints that it would otherwise face.

8.108 We discuss the remaining competitive constraints exercised by CTIL and other rivals in the section on competition from other suppliers further below.

Effectiveness of the CK Hutchison Assets

8.109 In order to assess the extent to which the owner of the CK Hutchison Assets would compete closely with Cellnex in the counterfactual, we have in this section also assessed whether the Transaction Sites could accommodate additional tenants and so be used to compete for customers.

8.110 Since the Transfer Sites will be identified only at the dissolution of the MBNL JV, we have considered whether co-location on the MBNL Sites, in general, can be increased. We have then considered the same issue in relation to the Unilateral Sites.

Scope to increase co-location on MBNL Sites

8.111 The vast majority of MBNL Sites are currently used by 3UK and BT/EE, but [✄] sites (less than [✄]) already host an additional tenant. Third party co-location on these sites is by [✄] and a small number of other third parties.

8.112 The Parties submitted that Cellnex, as an independent WIP acquiring sites that are not currently operated by a WIP, will increase the likelihood that co-location occurs on the sites to the extent feasible.

[201] Our assessment on the scope to increase co-location on the Unilateral and MBNL Sites is discussed in the section below.

(a) This is consistent with Cellnex's internal analysis during the early stages of assessing the Merger, which indicates that [✂].[202]

(b) This position is also consistent with a BT/EE internal document, [✂]. We also note that this assessment [✂].

8.113 We have considered the Parties' view that Cellnex's internal documents in paragraph 8.38 were produced at an early stage of the negotiation between the Parties, before the complexity of the MBNL Sites was fully understood, and/or did not reflect Cellnex's plans. However, we interpret these documents as an overview of the ability to expand co-location on these sites, rather than plans on the extent to which co-location would be increased.

8.114 We note that Cellnex internal documents show that [✂]. On this basis, it does not appear to us that these requirements, preclude any increase in co-location.

8.115 Lastly, we have also considered the Parties' submissions on [✂].[203]

8.116 In our view, once the JV has been dissolved and the identity and ownership of the Transfer Sites agreed, the owner of the CK Hutchison Assets could offer third party tenancies on the Transfer Sites [✂].

Provisional conclusion on scope to increase co-location on MBNL Sites

8.117 Overall, our provisional view is that, [✂], this does not preclude the MBNL Sites from being capable of providing some limited additional competition before the dissolution of the MBNL JV if BT/EE were to agree.

8.118 Moreover, we consider that, after the end of the MBNL JV, the owner of the CK Hutchison Assets could more easily and readily increase co-location on the Transfer Sites.

Scope to increase co-location on Unilateral Sites

8.119 The Unilateral Sites comprise [100-200] UKB Sites (which account for less than [✂]% of the Transaction Sites) and 2,600 Streetworks Sites, [✂].The Streetworks Sites are being built as part of 3UK's network densification strategy and are therefore designed solely with 3UK's network needs in mind.[204]

[202] See paragraph 8.34
[203] See paragraph 8.101(b) above.
[204] As of 31 October 2021, [✂] monopoles have been built, [✂] are being prepared for build or are in the process of being built and the remainder are at earlier stages.

8.120 The Parties have submitted that monopoles 'may' only be able to host a single tenant, and that upgrading the monopoles would require some investment (and to secure planning permission).

8.121 We note, however, that the views and data submitted by third parties, in relation to on the monopoles in their portfolios of sites which are currently or were in the past shared between tenants, indicate that a significant proportion of monopoles can accommodate more than one tenant.[205]

8.122 We also note that Cellnex had plans to turn some of the Streetworks Sites into multi-tenant sites as stated to the CMA and supported by its valuation model which provides for an increase in third party tenancies on the Streetworks Sites.[206]

8.123 We have considered the [✂].However, similarly to paragraph 8.113 above, we interpret this document as an overview of the ability and incentives to expand co-location on these sites, rather than plans on the extent to which co-location would be increased.

Provisional conclusion on scope to increase co-location on Unilateral Sites

8.124 Our provisional view is that, whilst there may be some constraints on the degree of co-location on the Streetworks sites which may be more significant than for the MBNL Sites, some material degree of sharing would nonetheless be feasible.

Provisional conclusions on scope to increase co-location on the Transaction Sites

8.125 Overall, our provisional view is that a significant proportion of the Transaction Sites could accommodate an additional tenant and be able to compete to attract additional business. Although some sites may require additional capital and planning permission in order to increase third-party co-location, these are unlikely in themselves to prevent increases in competition.

8.126 We recognise that there are some factors which will limit the extent to which some of the Transaction Sites may be used to compete for additional tenants.

8.127 We consider, however, that the proportion of sites that could support additional tenants on competitive terms is sufficient, when considered alongside the number of overlapping sites and the other aspects of competition between the Transaction Site and Cellnex sites, to mean that the

[205] See paragraphs 8.37 to 8.40 above and Appendix F, paragraphs 74 to 80.
[206] Our assessment of the Parties' views on the internal documents is set out in paragraph [7.98] above.

owner of the CK Hutchison Assets in the counterfactual would represent a significant competitive constraint on Cellnex.

Provisional conclusions on closeness of competition between Cellnex and the owner of the CK Hutchison Assets

8.128 In summary, the evidence we have assessed on closeness of competition shows that, in the counterfactual:

(a) The owner of the CK Hutchison Assets would be the third largest operator in the market, after CTIL and Cellnex, with a large portfolio of sites and an extensive geographic footprint.

(b) The CK Hutchison Assets would represent a significant proportion of the aggregate overlap of sites which are capable of substituting for Cellnex sites. Removing the owner of the CK Hutchison Assets, even if the overlaps with Cellnex are small in number, would significantly reduce the competitive constraint provided by the overlap sites.

(c) A supplier able to offer an immediate alternative with overlap sites, even if that overlap is numerically small, could represent a significant competitive constraint on the terms offered by Cellnex for all of its sites.

(d) Both the MBNL Sites and, to some extent, the Unilateral Sites could be used to compete with Cellnex for additional tenants. This indicates that co-location on the Transfer Sites, once identified, will likely be increased, and therefore that these sites are capable of providing material additional competition.

(e) More broadly, Cellnex and the owner of the CK Hutchison Assets would be two of only three national players of scale able to offer a comparable package of services (for example, to customers looking to meet their future demands as their networks evolve) and compete for the large MNO customers, in particular for large contracts.

(f) The Parties' internal documents and third parties' views are consistent with the position that the owner of the CK Hutchison Assets (as a national player of scale) would be expected to be a close rival to Cellnex.

Competition from alternative suppliers

8.129 In this section, we assess the alternatives available to customers and the extent to which they would constrain the Merged Entity.

8.130 As part of our forward-looking assessment, which looks at the market over a relatively longer term, including after Cellnex gains control of the Transfer Sites, we have taken into account ongoing market developments that might materially change the nature of the competitive constraints on the Merged Entity, such as MNOs commercialising their assets.

8.131 This section is structured as follows:

(a) First, we consider the constraint exercised by CTIL and BT/EE;[207]

(b) Second, we assess the constraint from other WIPs;

(c) Third, we assess the extent to which customers' ability to self-build and WIPs' BTS offering would be a competitive constraint; and

(d) Finally, we set out our provisional conclusions on competition from alternative suppliers.

Constraint from CTIL and BT/EE

Parties' submissions

8.132 The Parties submitted that, since its decision to commercialise in January 2021, CTIL is a direct and growing competitor to Cellnex, as evidenced by its public statements and a range of other evidence.

8.133 The Parties said that they expect that CTIL [✄].

8.134 The Parties also told us that Cellnex is particularly concerned that [✄].

Our assessment on constraint from CTIL

8.135 In January 2021, Vodafone and O2 took steps to commercialise CTIL. Given CTIL's large portfolio of existing sites, we have investigated the extent to which CTIL will compete for customers going forward. We have considered CTIL's internal documents, alongside internal documents of its shareholders, to understand its future strategy.

8.136 CTIL documents indicate that it has [✄].[208]

[207] We do not consider Vodafone or O2 as they would not offer a competitive constraint to Cellnex since they do not themselves own any material number of sites, outside of CTIL. Following the Merger, 3UK would also not retain any sites for itself. Its shares of the MBNL Sites form part of the CK Hutchison Assets which we have considered above.
[208] See Appendix F, paragraphs 141 to 146.

8.137 CTIL submitted that [✂].

8.138 CTIL, Vodafone and O2's internal documents [✂].

8.139 [✂]. [209]

8.140 Based on the evidence above, we consider that, as a result of its commercialisation, CTIL has started operating like a WIP.

8.141 Given its scale, which is similar to that of the Merged Entity, we consider that it is likely to compete strongly to attract large customers (in particular for large contracts) to its extensive portfolio of existing sites and its BTS solutions, taking into account the broader limitations of the constraint provided by BTS (as set out below from paragraph 8.179).[210]

Our assessment of the constraint from BT/EE

8.142 The network of sites owned by BT/EE remains the only other large portfolio of sites owned by an MNO which has yet to be commercialised. Given the scale of the portfolio and therefore potential impact on the structure of the market if these were to be commercialised, we have considered BT/EE's plans for the future use of these assets.

8.143 We note that, in the context of the broader industry trend, in both the UK and other jurisdictions, in which owners of passive infrastructure assets have sought to realise an uplift in value through some form of commercialisation, BT/EE is likely to have some incentive to commercialise its assets.[211]

8.144 This is [✂] BT/EE's internal documents, [✂].[212]

8.145 The evidence available to us shows that [✂].

8.146 BT/EE's internal documents indicate, [✂].

8.147 BT/EE told us that [✂].

8.148 Overall, on the basis of the evidence summarised above, we consider that BT/EE will [✂].

8.149 While all holders of passive infrastructure assets have some incentive to commercialise these assets, [✂] and the CK Hutchison Assets (in the

[209] See Appendix F, paragraph 144.
[210] We included CTIL when calculating our shares of supply above and undertook our assessment on this basis.
[211] See examples in other jurisdictions in Chapter 5
[212] See Appendix F, paragraphs 131 to 134.

counterfactual), where concrete steps have already been taken to commercialise the assets.

8.150 Moreover, while the evidence available to us on [✂].

Constraint from other WIPs

8.151 In this section we set out the Parties' submissions and our assessment of the constraint the Merged Entity will face from other WIPs. We start by considering the current market position of each supplier and, given our forward-looking assessment, we also assess their expansion opportunities and plans.

Parties' submissions

8.152 The Parties submitted that Cellnex faces competition from a range of other suppliers such as [✂] and from WIPs including WIG and BAI Communications.

8.153 The Parties also said that smaller WIPs are as well placed as larger WIPs such as Cellnex to offer BTS solutions to MNO customers and, in any event, MNO customers have a demonstrated capacity to self-supply.

8.154 Cellnex internal documents show that it (then Arqiva) recognised [✂].

8.155 The Parties submitted that there are limited organic growth prospects for UK sites, and noted that 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. However, they submitted that competitors or potential new entrants can gain market share organically through capturing demand for additional sites or demand from churn of existing sites and that this acts as a competitive constraint on Cellnex. They noted examples including BAI Communications winning a tender with TfL and CTIL's expansion plans. One competitor also submitted that it intends to grow organically by supplying a proportion of the sites that MNOs need renewed each year with a BTS sites programme.

Current market position

8.156 As shown in Table 8-1 above, WIG has historically been the largest WIP after Cellnex but has had a significantly smaller market position. This is an important factor, given our finding that the scale of suppliers is an important determinant of their competitiveness.[213]

8.157 Third parties indicated that Cellnex was a strong or very strong competitor and that [✂] WIPs are unable to exercise an effective competitive constraint on Cellnex.[214] For instance:

(a) [✂]

(b) Another WIP submitted that Cellnex ‘dominates’ the market and there are a number of smaller WIPs, which exercise a weak competitive strength, with only WIG being a competitor of moderate strength;

(c) An MNO submitted that CTIL is a very strong alternative to Cellnex, [✂]; and

(d) Airwave identified [✂] as [✂] alternative to Cellnex because of their extensive portfolios of sites. Airwave also identified [✂] as a [✂] alternative because of its [✂].

8.158 We have also considered the extent to which rival WIPs (excluding CTIL which was not an active WIP until recently) have historically been able to win tenancies such that in the future they may become stronger rivals through their portfolio of existing sites than suggested by looking at their current market position.

8.159 Table 8-4 shows the results of our analysis of tenancies won by Cellnex and its historical competitors, both including and excluding renewals.[215]

Table 8-4: WIPS’ shares of supply of tenancies won, including and excluding contract renewals (2017-2020)

	Incl. renewals		*Excl. renewals*	
Competitor	*Volume*	*Share*	*Volume*	*Share*
Cellnex	[✂]	[90-100]%	[✂]	[50-60]%
WIG	[✂]	[0-5]%	[✂]	[10-20]%
Shared Access	[✂]	[0-5]%	[✂]	[10-20]%
WHP Telecoms	[✂]	[0-5]%	[✂]	[5-10]%
AP Wireless	[✂]	[0-5]%	[✂]	[0-5]%
Britannia Towers	[✂]	[0-5]%	[✂]	[0-5]%
FreshWave	[✂]	[0-5]%	[✂]	[0-5]%
Total	[✂]	100%	[✂]	100%

Source: CMA analysis of Cellnex and third parties data

[213] See paragraphs [7.16] to [7.27] above
[214] See detail in Appendix F, paragraphs 82 to 97.
[215] See Appendix E, Table 2.

8.160 As shown in the table above, Cellnex has won nearly all available tenancies, with rivals winning less than [0-10%] of tenancies in aggregate. We consider this reflects both Cellnex's competitive strength and scale, and the advantages of incumbents when existing large contracts come up for renewal. We note that a very significant proportion of Cellnex's tenancies arise from renewals, rather than from new tenancies.

8.161 If we exclude renewals and consider only the new available tenancies that arose in the past few years, [✂] and [✂] shares are higher and Cellnex' share lower than indicated by looking at their expected future market position (see Table 8-3 above).

8.162 This suggests that these WIPs are able to compete with Cellnex to some extent for new tenancies. However, new tenancies account for a small proportion [5-10]% of all the tenancies competed for in the last four years. In addition, even for these new tenancies, Cellnex obtains [50-60]% share and is the strongest competitor by some margin.[216]

8.163 To understand whether these competitors may be able to exercise a stronger competitive constraint on the Merged Entity in the future we have considered Cellnex's view of these rivals, through its internal documents, as well as the WIPs' expansion plans.

Expansion opportunities and plans

8.164 Cellnex internal documents identify [✂] and other WIPs as rivals, but we have not seen evidence suggesting that the competitive constraint that these WIPs exercise has increased or is expected to increase significantly in the future.

8.165 Both the Parties and third parties agree that there are limited opportunities for organic expansion because of the limited customer demand for BTS sites, which allow suppliers to build sites on-demand, rather than speculatively.

8.166 Therefore, third parties are of the view that WIPs' ability to grow substantially could only be driven by acquisitions of existing pools of assets.[217] For example:

(a) A WIP stated that there are only two ways to expand in the UK by a material amount which is through the acquisition of towers from MNOs and/or by capturing large scale BTS programmes. Because of this, [✂].

[216] See Chapter 7 for a description of competition for existing and new sites.
[217] A more detail summary of third parties' growth plans is set in Appendix F, paragraphs 122 to 130.

(b) Another WIP said that a challenge it faces when looking to expand is that WIPs include future sites in the form of BTS programmes in their MNO offer which prevent [✂] from having the opportunity to tender for these sites.

8.167 To further investigate the growth prospects of alternative WIPs, we have assessed their expansion plans.

8.168 WIPs have limited plans to expand in the future as the UK market is mature and there will be limited opportunities for organic expansion through BTS in the next five to ten years. It follows that rival WIPs to the Merged Entity will likely be unable to significantly increase their shares beyond the modest levels projected in Table 8-3 above.

8.169 We have not seen any evidence of further opportunities for inorganic expansion, which would allow rival WIPs to grow, that would be of sufficient scope and magnitude to constrain the Merged Entity so as to offset the loss of competition from the Merger.[218] [219]

Provisional conclusion on constraint from other WIPs

8.170 In light of the evidence summarised above, our provisional view is that all other rival WIPs are, and will likely remain, small and would therefore impose only a very weak competitive constraint on the Merged Entity.

Constraint from customers' self-build and BTS

8.171 In this section we have assessed the extent to which customers' ability to self-build sites and WIPs' ability to build sites to the specification of customers (as BTS) exercise a competitive constraint on the Merged Entity.

8.172 Although there are certain differences between customers' self-build and BTS supplied by WIPs, both entail the building of new sites.

8.173 We have therefore first considered the constraint from new sites in general. We have then more specifically assessed the competitive constraint from BTS supplied by WIPs and from customer's self-build separately.

[218] Merger Assessment Guidelines, paragraph 8.31.
[219] More details are set out in out Chapter 9.

Parties' submissions

8.174 The Parties submitted that BTS (either supplied by WIPs or customers' self-build) is the binding constraint on Cellnex when competing for either new demand or to retain existing customers and that therefore the size of Cellnex's existing portfolio of sites does not give it a material advantage over smaller sites when competing.

(a) The Parties noted that in the two largest recent contracts for new sites – the SRN and 3UK's Streetworks programme – 3UK chose to build sites itself over the use of existing sites. The Parties also noted that 3UK's approach to building its Streetwork Sites is evidence of the choices available to MNOs in site selection. They noted that 3UK is building its Streetworks sites using third party contractors, rather than WIPs, [✄].

(b) The Parties said that because of the very local demand for site access having a large portfolio of sites provides minimal advantages and that BTS represents the overwhelming majority of a suppliers' offering, with the small difference between the portion of existing sites (between large and small suppliers) making very little difference to the competitiveness of their overall offer. They argue that, for example, a firm with [✄] overlaps would still need to have a BTS offering for [✄] of sites, whilst a firm with [✄] overlaps would need to have a BTS offering for [✄] of the customer demand.

(c) The Parties submitted that WIPs are able to compete for MNO customers on the basis of BTS and therefore do not need a large portfolio of existing sites or national coverage to credibly compete for opportunities.

(d) They note that 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.

(e) Cellnex submitted that, even if there is an existing site in the right location that is appropriate for co-location, it [✄].In support of this position, Cellnex submitted internal documents which it considers indicate that [✄].The Parties noted that Cellnex [✄].

(f) Although BTS sites can be made available to non-MNO customers, Cellnex said that generally it is not economic to offer BTS solutions to these customers, although there are circumstances in which this can occur.

8.175 The Parties submitted that [✄].

8.176 They said that [✂].

8.177 In their view the evidence shows that Arqiva [✂]. The Parties submitted that [✂]. The Parties also said that [✂].

8.178 With regard to customers' ability to self-build, the Parties submitted that MNO and non-MNO customers have a demonstrated capacity to self-supply.[220] They also said that self-supply is a form of BTS as it involves the customer building a new site in order to meet its own demand. They provided internal documents showing that, in preparing its BTS solution for customers, [✂].

The general constraint from new sites

8.179 With regard to building new sites, the evidence shows that MNOs have a strong preference to use existing sites, where available, rather than building new sites. For example:

(a) BT/EE told us that, when replacing a site, [✂].

(b) Vodafone submitted that it will normally choose to self-build sites only when there is no suitable site available within the location it needs.

(c) Electricity North West, a non-MNO customer, told us that as the electricity network is static in terms of locations, where there is no existing infrastructure, it will build itself, otherwise it uses 'third party sites generally hill top'.

8.180 The costs of building new sites can vary significantly but can be substantial, and, in most cases, are higher than the costs of using an existing site, even if it needs to be upgraded to, for example, host 5G equipment or an additional tenant. In this regard:

(a) MNOs were of the view that, in general, upgrading a site is cheaper than building a new one. For example:

(i) Vodafone submitted that this is the case due to the costs of the build and other factors affecting the time to deploy the site, including planning the cost of the power and transmission that are required, which in rural areas can be particularly substantial.

(ii) O2 submitted that [✂].

[220] See Appendix G.

(b) A cost analysis submitted by the Parties shows that upgrading a site is cheaper than building a new one over a ten-year period, but more expensive over a longer timeframe of 20 years. This is because the operational costs of upgrading a site are greater than the saving in capital expenses.

8.181 Furthermore, building a new site requires significant time, planning permissions and landlord negotiations, which are the main reasons why customers have a strong preference to use existing sites.

(a) For example, BT/EE told us that [✂]. The impact of planning regulation on WIPs' expansion is discussed in more detail in Chapter 9.

8.182 Overall, this evidence shows that new sites, whether built by the customers' themselves or WIPs, are considered a second-best option by customers, who prefer to use suppliers' existing sites where available. Therefore, in areas where there are rival existing sites, these will be a stronger competitive constraint on the Merged Entity compared to that exercised by new sites.

Constraint from BTS supplied by WIPs

8.183 In this section, we consider whether BTS supplied by rival WIPs could constrain the Merged Entity: first, by offering alternatives to the Merged Entity's existing sites; and second, by constraining the Merged Entity's own BTS provision.

8.184 Given we have found above that suppliers' scale is an important determinant of their competitive strength, we have also considered the extent to which the size of suppliers' existing portfolios of sites affects the strength of their BTS offering.

8.185 With regard to the ability of BTS to constrain the Merged Entity's existing sites, we note the following:

(a) The evidence from Arqiva's renegotiation of the MBNL contract shows that [✂]. Although it is difficult to disentangle the exact constraint exercised by each, we consider that this is evidence that [✂].[221]

(b) However, the MBNL contract renegotiation also shows that [✂]. Although all sites could in principle be competed for with BTS sites, Arqiva thought that [✂]. For the majority of sites, [✂] (see Figure 8 in Appendix G).

[221] See Appendix G.

(c) To the extent that [✂], it is important to consider the context in which this occurred: namely there were no other rivals with a large portfolio of existing sites. As a result, we consider that this evidence does not shed much light on the relative competitive strength of existing sites and BTS sites, for which we have principally looked at other evidence.

(d) In this regard, we note that the evidence above (paragraphs 8.180 to 8.181) shows that customers prefer to use existing sites when available, because of the costs, time and risks involved in building new sites.

(e) Our analysis of tenancies recently competed for shows little evidence of BTS competing effectively against existing sites. In particular BTS, which was historically offered by small suppliers, won only [0-5%] of all the available tenancies between 2017 and 2020. Even excluding renewals, [✂] of new tenancies were won by existing sites, with only [5-10%] of all new tenancies available being served by BTS.[222]

8.186 We have considered the Parties' submissions that, when looking at past win rates for BTS, we should consider only new opportunities rather than renewals because existing suppliers always have an advantage and including these opportunities would bias the number of Cellnex wins and understate the strength of BTS as a competitive constraint.

8.187 However, we consider that looking at the proportion of all competitive interactions won by BTS allows us to assess the competitive constraint that BTS supplied by WIPs would exercise on the Merged Entity, which will have a large network of existing sites.

8.188 On the basis of this evidence, we consider that BTS supplied by WIPs will exercise some competitive constraint on the Merged Entity's existing sites, but that this will be relatively weak. In particular, the evidence available to us consistently shows that BTS has not been a significant constraint in previous competitive interactions and there is no basis to suggest that it is likely to be a meaningfully different constraint in future.

8.189 We also note that, if there are other national suppliers of scale in the market, BTS supplied by a larger WIP is likely to be a more compelling offering for customers than BTS supplied by a smaller WIP, particularly for larger BTS contracts.

8.190 In particular, the evidence above shows that:

[222] See Appendix E, Table 3 and Table 4.

(a) Large WIPs can build sites for customers more readily and, because of economies of scale, provide greater savings compared to their smaller competitors.

(b) Large WIPs are liable to have a stronger track record, supporting their ability to successfully complete the building of potentially a large number of new sites.

(c) Large WIPs can offer a package of BTS alongside their larger portfolios of existing sites. This is attractive to customers, who can negotiate with smaller group of suppliers to meet the majority of their current and future requirements, as well as local specific needs. [223]

8.191 On this basis, and as a result of its scale, we expect that the BTS offering of Cellnex, the owner of the CK Hutchison Assets, and CTIL, are likely to be a more significant constraint on Cellnex than those of other suppliers, notwithstanding the general position, as set out above, that BTS offered by any suppliers, will be a materially weaker constraint than existing sites.

Constraint from customers' self-build

8.192 In this section, we have considered whether customers' ability to self-build could constrain the Merged Entity in two ways: first, by being an alternative to the Merged Entity's existing sites; and second, by constraining the Merged Entity's BTS solutions.

8.193 For the reasons set out above, new sites, whether built by the customers' themselves or WIPs, are considered a second-best option by customers, who prefer to use suppliers' existing sites where available.

8.194 In addition, we consider that the MBNL contract renegotiation provides evidence of the ability of MNO's self-build to constrain existing sites. We note that in the initial phase of the MBNL contract renegotiation Cellnex (then Arqiva) [✂]. The documents also show that Arqiva [✂].[224]

8.195 However, as set out above, the documents suggest that Cellnex's (then Arqiva) [✂].

8.196 We also considered the Parties' submissions on 3UK's decision to build Streetworks Sites instead of using, at least in part, existing sites as evidence of the choices available to MNOs in site selection.

[223] See Chapter 7.
[224] See Appendix G, Figure 3 and paragraph 10.

8.197 We agree with the Parties that customers' self-build is a viable option for MNOs and may be the preferred option in some specific instances, as discussed further below.

8.198 However, we make the following observations:

(a) First, 3UK's Streetworks Sites are monopoles which typically require fewer planning permissions, have lower lease costs and do not require potentially lengthy negotiations with landowners. As a result, self-build monopoles may be easier to build compared to other types of developed macro sites, such as lattice towers, for which existing sites may be a more attractive alternatives for customers.

(b) Second, 3UK's decision to self-build needs to be assessed in the context of the market structure, where there was only one large WIP: Cellnex. In the counterfactual there would be three large suppliers with extensive networks of sites which could be available across a broad geographic area. Therefore, we consider that 3UK's decision was taken under materially different conditions of competition and is unlikely to provide material insight into the competitive constraint that customers' self-build would exercise on the Merged Entity's existing sites.

(c) Third, 3UK's requirements may be atypical and not representative of other customers. 3UK is the smallest of the four MNOs in the UK and the scale and speed of its densification programme could be different from those expected by other MNOs in the coming years, given their different network coverage and capacity requirements.

(d) Last, CK Hutchison told us that it took the decision to fund the Streetworks Sites [✄]. We therefore consider that [✄] may have affected CK Hutchison's decisions on, for example, how to carry out this programme. [✄].

8.199 We have also considered the Parties' submission on the SRN programme as evidence that customers prefer to self-build sites. However, we consider that this is a unique programme and there may be reasons, such as the need to access public money, which may have influenced MNOs' behaviours in this particular case.

8.200 In order to assess the extent to which customers' self-build constrains WIPs' BTS offerings, we asked MNOs about their rationale for building sites, either independently or through their JVs, as compared to using WIPs. Their responses were mixed and suggest that different options are used in different circumstances: [225]

(a) In some instances where MNOs need new sites, they may prefer to self-build sites as it gives them greater control over site locations and, in their view, it is usually faster for MNOs to do than using a WIP. In these cases, WIPs' BTS offering is unlikely to be considered a good option by customers.

(b) However, customers tend to prefer the use of BTS supplied by WIPs where they want to avoid significant upfront costs and/or in circumstances in which WIPs can build faster. This is the case, for example, when a WIP has already started the planning process or is ahead in the designing and building process. In these circumstances, customers' self-build can constrain WIPs' BTS offerings, to some extent, but is unlikely to be a customer's preferred approach.

8.201 We also note that Cellnex's internal documents show that [✄].

8.202 This suggests that customers' self-build may exercise some competitive constraint on the Merged Entity's BTS for new build opportunities. However, for the reasons discussed above, this is likely to be a weaker constraint relative to that from BTS offered by a large WIPs with an extensive portfolio of existing sites.

Provisional conclusions on competition from alternative suppliers

8.203 Since its commercialisation, CTIL has started operating like a WIP and can be expected to compete strongly with the Merged Entity in future. Given its scale, which exceeds that of each of the Cellnex and the CK Hutchison Assets, it will be able to compete to attract even large customers, in particular for large contracts, with its extensive portfolio of existing sites and, secondarily, with its BTS solution.

8.204 Other WIPs exercise some competitive constraint, but they all have a much smaller portfolio of existing sites. Moreover, the scale and therefore constraint imposed by rivals is unlikely to increase significantly in future.

8.205 In relation to the constraint from BTS by WIPs and customers' self-build on the Merged Entity's existing sites, there is clear evidence that customers prefer using existing sites over new ones. Building sites can be costly and a lengthy process, and BTS has won very few of the opportunities competed for

[225] See Appendix F, paragraphs 105 to 110.

in the last four years. This means that both BTS supplied by WIPs and customers' self-build are both relatively weak constraints (compared to the existing sites of a large WIP), and in particular customers' self-build is likely to be a constraint of last resort in the absence of better options.

8.206 In relation to the constraint from BTS by WIPs and customers' self-build on the Merged Entity's BTS offering, the evidence shows they will impose some constraint but are not sufficient to offset the loss of competition resulting from the Merger. Outside of CTIL (discussed above), rival WIPs have very limited scale and track record, and are unlikely to grow significantly, reducing the attractiveness of their BTS offering to some extent.

Impact of Cellnex's material influence on the MBNL Sites

8.207 As set out in Chapter 4, we have provisionally found that the Merger constitutes a single, interlinked and inter-conditional commercial transaction and that it gives rise to a single RMS.

8.208 In the analysis set out above, we have primarily focussed on the long-term impact of the Merger on the structure of the market and competition and therefore on the acquisition of TowerCo and the Transfer Sites.

8.209 For the reasons set out above, we have provisionally concluded that, subject to our findings on countervailing factors, the Merger gives rise to an SLC in the supply of access to developed macro sites and ancillary services to MNOs and other wireless communication providers in the UK. Having reached this provisional conclusion, it has not been necessary to conclude, in our Provisional Findings, on whether Cellnex's acquisition of material influence over the MBNL Sites would, on a stand-alone basis, also give rise to an SLC.

Provisional conclusion

8.210 In this chapter we have assessed the Merger's impact on competition. We have done so against the counterfactual we have provisionally found, namely stronger conditions of competition between the owner of the CK Hutchison Assets and Cellnex. As set out in Chapter 5, we provisionally consider that this could be achieved through the sale of the CK Hutchison assets to an alternative purchaser.

8.211 The Merger will give rise to two structural changes in the market. The first will arise from the transfer of the Unilateral Sites to Cellnex, which will occur when the Merger is completed. The second, and most significant, will occur when Cellnex gains control of the Transfer Sites when the MBNL JV is dissolved, which is scheduled to occur in 2031. While we have examined both of these changes in detail, in ultimately considering the overall effect of the Merger we have assessed the impact of all factors collectively.

8.212 As important context for our assessment, we have found that there has been limited pre-existing competition in the supply of access to developed macro sites in the UK. Cellnex (previously, Arqiva) historically had a very high share of supply and faced limited competition from much smaller rivals. Along with high costs of switching and significant barriers to entry, this has allowed it and other WIPs to earn substantial profit margins.

8.213 We have therefore been particularly mindful of the likely evolution of the structure of the market, over the relatively longer term, including after Cellnex gains control of the Transfer Sites. If it was to remain highly concentrated, then the loss of a rival imposing even a limited constraint may result in a substantial lessening of competition.[226]

8.214 In light of our theory of harm and counterfactual, we have undertaken a forward-looking assessment, which looks at the market over the relatively longer term, including after Cellnex gains control of the Transfer Sites. This means that, while we have collected a wide range of evidence, there are limitations to the degree of weight that can be placed on certain pieces of historical evidence. In particular, given our counterfactual we would not expect there to be evidence of competition between the Cellnex and CK Hutchison pre-Merger.

8.215 More generally, given the high degree of historical concentration, and the very recent commercialisation of CTIL, we have yet to see evidence of the effect of competition between large WIPs with extensive portfolios of sites, or of customers using this as a negotiation strategy when renewing large contracts. The absence of such evidence does not in and of itself tell us anything about the likely impact of the Merger, which we have instead assessed based on the evidence that is available.[227]

8.216 We have found that, in practice competition plays out in a number of different ways. Most obviously there is competition within the context of large framework agreements with MNO customers, which occurs infrequently but is important. Here we found that, despite high switching costs, the threat of losing tenants on even a limited number of sites generates significant rivalry between suppliers and will influence the commercial terms for all sites in the

[226] Merger Assessment Guidelines, paragraphs 4.12(a) and 4.39.
[227] See Merger Assessment Guidelines, paragraph 2.28.

portfolio, as shown by the MBNL contract renegotiation. There is also competition for a more limited number of new build sites.

8.217 Considering competition for large framework agreements, the evidence shows that large suppliers with an extensive portfolio of existing sites are the most effective competitors and would compete most closely with each other. This is because location is a key requirement of customers, and large suppliers have a much greater ability than their smaller rivals to offer sites at suitable locations across a number of geographic areas which meet customers' needs.

8.218 We agree with the Parties that, despite this, the overlap between the Cellnex sites and the CK Hutchison Assets will be comparatively small. However, as noted above, the evidence shows that even small overlaps can impose significant competitive constraints.

8.219 We have therefore found that, in the counterfactual, the owner of the CK Hutchison Assets would be a close competitor to Cellnex. It would be the third largest operator in the market, after CTIL and Cellnex, with a large portfolio of existing sites and an extensive geographic footprint. CTIL would likely have a greater number of overlap sites with Cellnex than the owner of the CK Hutchison Assets would have, but both would make a significant contribution to the aggregate number of sites that overlap. The removal of the CK Hutchison Assets would therefore remove a significant proportion of competitive constraint on Cellnex provided by overlap sites.

8.220 Although the competitive position of the owner of the CK Hutchison Assets would be acquired in steps (as, in our view, the MBNL Sites might not be commercialised until 2031) the evidence demonstrates that it would be a strong competitor and exercise an immediate competitive threat through the Unilateral Sites, which can be used to attract new customers.

8.221 There would be only one other WIP that would impose a strong constraint on the Merged Entity. Following its commercialisation, CTIL has a very large portfolio of existing sites and would therefore be expected to compete effectively.

8.222 In contrast, we have found that all of the other rival WIPs are, and will likely remain, small and would therefore impose only a very weak competitive constraint on the Merged Entity. This means that, relative to our counterfactual, the Merger would reduce the number of major suppliers from three to two, and thereby create a duopoly.

8.223 We consider that new sites impose only a weak constraint on existing sites. The time, costs and risks involved in building new sites mean that customers have a clear preference for using existing sites where these are available. As a result, both BTS supplied by WIPs and customers' self-build will provide only a weak constraint on the Merged Entity's portfolio of existing sites.

8.224 Turning to competition for new sites, the evidence shows that large suppliers with an established track record have a competitive advantage over smaller suppliers. They can negotiate future demand in the context of large framework agreements, be a one-stop supplier and can pass on economies of scale in the form of lower prices to customers. The Merger would reduce the number of large suppliers of new build sites from three to two.

8.225 On the basis of the evidence set out above taken in the round, we provisionally conclude that, subject to our findings on countervailing factors, the Merger may be expected to result in a SLC in the market for the supply of access to developed macro sites and ancillary services to MNOs and other wireless communication providers in the UK.

9. Countervailing factors

9.1 There are some instances when a merger may reduce competition substantially but for one or more countervailing factors in reaction to a worsening of terms by the merged entity. There are two main ways in which countervailing factors may prevent or mitigate any SLC arising from a merger: through the entry and/or expansion of third parties in reaction to the effects of a merger; or through merger efficiencies.[228]

9.2 Therefore, before provisionally concluding on the Merger, in this section we assess whether there are any countervailing factors which would prevent an SLC from arising despite the provisional findings from our competitive assessment discussed in Chapter 8.

Barriers to entry and expansion

9.3 As part of the assessment of the effect of a merger on competition we examine whether, in the event of worsening prices and/or non-price terms to customers, entry or expansion by third parties would be timely, likely and sufficient to mitigate or prevent an SLC from arising.

Parties submissions and evidence

9.4 The Parties submitted that barriers to entry and expansion are low and that there is a wide range of potential providers capable of providing access to

[228] Merger Assessment Guidelines, paragraph 8.1.

developed macro sites. The Parties identified a number of factors that lead to this view:

(a) It is relatively easy for providers without existing sites to enter the market with a proposition of building new sites.

(b) The development and expansion of sites has low regulatory barriers and the government is pursuing policies to reduce further the regulatory burden.

(c) There is a large number of potentially marketable macro sites and it is common for additional sites to be identified by MNOs for the location of wireless telecommunications equipment.

(d) WIPs not currently active in the UK can acquire concessions to operate and market sites owned by others. [✄].

(e) There are opportunities for new entrants to enter the UK through bidding as part of a consortium of bidders.

(f) Required levels of capex to build new sites does not prevent entry as genuine potential new entrants are well-funded organisations with sufficient capital and existing providers need to incur capex to build new sites. As such there is limited incumbency advantage.

(g) Recent trends of vertical disintegration whereby MNOs divest passive infrastructure provides opportunity for entry: the commercialisation of CTIL is an example.

(h) The roll-out of 5G provides further opportunities for entrants to provide site access to MNOs.

9.5 The Parties further submitted that the CMA, in its Phase 1 decision, erroneously found that barriers to entry are high and this was despite geographic scale not being an important parameter of competition and the CMA finding in its assessment of the Cellnex/Arqiva merger that barriers to entry for the supply of access to developed macro sites were low.[229]

9.6 The parties also submitted that the CMA's Phase 1 decision failed to account for the threat of new entry being high through BTS or acquisition with there

[229] We note that the CMA did not conclude on barriers to entry or expansion in its Phase 1 decision in relation to the anticipated acquisition by Cellnex UK Limited of Arqiva Services Limited, as that merger was found to not give rise to competition concerns, CMA, 22 April 2020, paragraph 230.

being numerous credible entrants, with these including international WIPs and investors.

Third-party views on entry and expansion

9.7 Some smaller WIPs submitted to us that barriers to entry and expansion are significant.

(a) For example, Radius Global Infrastructure (Radius) submitted that requirements around the planning regime, including the Electronic Communications Code (ECC) raise barriers to entry and expansion. These requirements include that for suppliers seeking to construct new sites, they must obtain planning permissions, obtain Civil Aviation Authority permissions, construct new fibre or microwave backhaul and ensure fibre connectivity to the sites and obtain cost-effective power distribution.

(b) Another WIP, submitted that planning restrictions were one of the main barriers to expansion.

(c) Another WIP noted that the recent introduction by the UK Government of new measures had made obtaining land and planning permissions for new sites easier.

9.8 Incumbency advantages and scale of operations were also cited by a number of WIPs as presenting a barrier to entry and expansion.

(a) Radius submitted that the presence of high barriers to entry is supported by Cellnex itself having actively lobbied DCMS to increase permitted tower heights.

9.9 Radius also told us that the Parties' claims that barriers to entry are low was contradicted by Cellnex's public comments and provided a specific example from Cellnex's 2019 Annual Report which stated that Cellnex's consolidation in Europe 'presents significant barriers to entry into its main markets' and that Cellnex had referred to its business model being 'protected by commercial and regulatory barriers to entry in the tower market' when Cellnex acquired Swiss Towers AG in 2017.

Our assessment

9.10 We have considered whether entry or expansion in the provision of passive infrastructure by third parties would be timely, likely and sufficient to mitigate or prevent an SLC from arising.[230]

9.11 We consider there are four main sources of barriers to entry and expansion in the provision of passive infrastructure:

(a) Economies of scale;

(b) Incumbency advantage;

(c) Maturity of the market; and

(d) Public policy and regulation.

9.12 In considering these four main sources, we recognise that there has been entry by WIPs in the UK, suggesting that the barriers to entry are not high, and there are a number of smaller WIPs that seek to compete in the provision of macro sites.

Economies of scale

9.13 We have considered the importance of scale in Chapter 7 and found that scale is an important element to enable a WIP being an effective competitor.

9.14 In particular, we found that it is important for a WIP to have an extensive portfolio of existing sites with a wide geographic footprint to enable it to compete for new business. This is in part because suppliers with many existing sites can have a greater ability to meet customer demand as they are more likely to be present where customers need sites.

9.15 In contrast, a lack of scale inhibits smaller WIPs being able to compete effectively as they do not benefit from the advantages outlined above.

9.16 We also found that large WIPs can be more attractive to MNO customers than smaller providers when choosing BTS providers:

(a) MNO customers negotiate part of the future demand for sites within large framework agreements, which only large providers of existing sites can in practice compete for. This means that MNOs will engage first with large providers when considering their network plans.

[230] Merger Assessment Guidelines 8.28 to 8.46.

(b) Although customers use multiple suppliers, customers (MNOs in particular) have a preference to contract with large and credible suppliers with a good track record rather than several small providers with limited previous experience.

(c) There are some scale advantages, in particular in relation to the procurement of new sites and operating costs, which large WIPs can use to offer more competitive prices or other terms to customers than small WIPs.

9.17 We consider that the large synergies which Cellnex expects from the Merger in relation to operational costs, is further evidence that providers with a large portfolio of sites are likely to be at an advantage when competing with smaller operators.

9.18 The requirement for a WIP to be of sufficient scale to be an effective competitor means that barriers to expansion are important in understanding whether new entrant or existing small WIPs could achieve sufficient scale to mitigate or prevent an SLC from arising.

Incumbency advantages

9.19 We have considered the impact of incumbency advantage as part of our assessment of the competitive effects of the Merger [add cross-reference]. In particular, the significant barriers to customers switching provider means that there are incumbency advantages when a passive infrastructure provider is providing sites to a customer:

(a) The additional costs associated with a customer switching to an alternative provider, whether at another existing site, or to a new site through self-supply or BTS. These can include the costs of taking down and relocating equipment to a new site, disruption to operations when relocation is being undertaken and costs associated with any required upgrade to the alternative site. These factors together mean that the incumbent provider has a high likelihood of winning a contract renewal;

(b) An MNO may have in place existing arrangements with a passive infrastructure provider such as eg Cellnex or the CTIL or MBNL JV which can increase barriers to switching. These can include churn allowance, which restrict the number of sites which can be vacated by the customer without penalty during the term of the contract, as well as preferential arrangements such as minimum commitment growth provisions, whereby a customer commits to contract access to a minimum number of new sites during the course of an existing contract with a supplier. The inability to churn from existing sites, combined with the long duration of the contracts relating to those sites (often as much as 15 years), serve to minimise opportunities for switching and can significantly limit the ability of independent WIPs to expand, or for new WIPs to enter the market.

Market maturity and limited demand

9.20 As explained in the Industry Background section, MNO networks are mature, covering most of UK premises and most of the UK landmass. This means that demand for new macro sites is limited. This limited demand for new sites, together with customers having a preference for using existing sites where these are available [cross refer to Competitive Assessment] mean that BTS opportunities, which could provide a route for a new entrant or smaller WIP to expand their geographic footprint through organic growth, arise relatively infrequently and are often modest in size.

9.21 It is also the case that opportunities for entry and expansion are largely reliant on these limited BTS opportunities, as there are no opportunities for WIPs to expand their geographic footprint in the foreseeable future through the acquisition of large portfolio of existing sites:

(a) If the Merger were to proceed, CK Hutchison's sites will have been acquired by Cellnex.

(b) CTIL has recently been commercialised by Vodafone and O2, with each entering into long-term Master Services Agreements with CTIL and Vodafone having raised capital from its 50% equity stake in CTIL by transferring it to its subsidiary Vantage Towers.[231]

(c) BT has no current plans to sell its own passive infrastructure assets.

9.22 We also observe that where BTS opportunities do arise, it is difficult for smaller WIPs to be successful in bidding for these opportunities due to the scale and incumbency advantages of larger providers outlined above. This is illustrated by the low levels of growth of smaller WIPs in the market over the last five years.

Public policy and regulation

9.23 The Industry Background chapter provides an overview of the public policy, regulation and recent developments of these relevant to the provision of passive infrastructure assets. As noted there, the main areas of public policy

[231] See Chapter 3

and regulation relevant to the sector are the planning regime, the ECC and the regulation of electromagnetic spectrum.

9.24 There are various constraints on the ability of a passive infrastructure provider to build new infrastructure and make it available to customers. These include obtaining planning permission from the relevant local authority and restrictions on the height of tower infrastructure which in turn limits the propagation of the spectrum (as all else equal higher towers provide for greater coverage). When planning permission is requested to develop a new site, local authorities will first consider the availability of existing towers within the vicinity and will need to be satisfied that co-location is not feasible before granting permission for new infrastructure to be constructed.

9.25 While the ECC somewhat simplifies the planning requirements, these remain significant and are likely to continue to result in significant costs for passive infrastructure providers seeking to build and operate networks.

9.26 There have been recent amendments made and proposed to the planning regime in terms of changes to the ECC and Permitted Development Code. These have the effect of reducing to some extent the costs and barriers associated with new network deployments. However, it is our provisional view, supported by submissions from various third parties, that while these recent developments will reduce barriers arising from the planning regime to some extent, some of the changes remain proposals and are not yet in force and the ones that are in force would not be effective in sufficiently eradicating the barriers that currently exist. Some of these changes are intended to lower barriers to the sharing of existing sites, which if successful in achieving this objective, will further lower demand for new sites (and growth opportunities for WIPs).

9.27 The planning regime is only one step that influences the overall timescales that are required for a WIP to establish a new site to provide services to a customer. Further details are provided in the Industry Background section, with other steps additional to securing the relevant planning permissions including: time to search for suitable site locations, acquiring the site (or agreeing terms with the landlord), designing the requirements for the passive infrastructure, building the site and installing power and backhaul to the site so that the site is ready to enable the customer to carry out its activities at handover.

Provisional conclusion on barriers to entry and expansion

9.28 On the basis of the available evidence it is our provisional view that it is not likely that entry or expansion of sufficient scale would occur in a timely manner to mitigate or prevent an SLC from arising as a result of the Merger.

9.29 Our provisional view takes into account the evidence we have in relation to economies of scale, incumbency advantages, the maturity of the market and the impact of public policy and planning regulation, including any expected improvements that may be implemented from proposed changes relevant planning regulation. Our provisional view also takes into account relevant interactions between these factors. We also note that the Parties have not provided analysis to support a conclusion that if barriers to entry are not high, that entry and/or expansion would be timely, likely and sufficient to mitigate or prevent an SLC from arising.

Efficiencies

9.30 Efficiencies arising from a merger may enhance rivalry with the result that the merger does not give rise to an SLC.[232] In order for us to take efficiencies into account we must expect that they would be timely, likely and sufficient to prevent an SLC from arising (having regard to the effect on rivalry that would otherwise result from the merger) and the efficiencies must be a direct consequence of the merger.[233]

9.31 The Parties submitted during the CMA's Phase 1 investigation that Cellnex expected to realise a number of revenue and cost synergies from the Merger. Details of these are set out in the Parties, the Merger and its rationale section. The cost efficiencies can be summarised as:

(a) [✄].

(b) [✄].

9.32 In our Phase 2 investigation the Parties have not made any representations that the Merger is likely to lead to rivalry-enhancing efficiencies.[234]

[232] Merger Assessment Guidelines, paragraph 8.4.
[233] Merger Assessment Guidelines, paragraph 8.8.
[234] Rivalry enhancing efficiencies are defined in the Merger Assessment Guidelines as 'Efficiencies that change the incentives of the merger firms and induce them to act as stronger competitors to their rivals—for example, by reducing their marginal costs giving them the incentive to provide lower prices or a better quality, range or service.

9.33 Our provisional view is, therefore, that it is unlikely that rivalry enhancing efficiencies will arise from the Merger to prevent an SLC from arising as a result of the Merger.

10. Provisional decision

10.1 As a result of our assessment, we have provisionally found that the anticipated acquisition by Cellnex UK Limited (Cellnex) of the passive infrastructure assets in the UK of the CK Hutchison group (CK Hutchison) has resulted, or may be expected to result, in a substantial lessening of competition (SLC), as a result of horizontal unilateral effects, in the supply of access to developed macro sites and ancillary services to wireless communication providers in the UK.