



Competition and Markets Authority
The Cabot
25 Cabot Square
London E14 4QZ
By email only

7 January 2022

CMA's investigation into the anticipated acquisition by Cellnex UK Limited of the passive infrastructure assets of CK Hutchinson Networks Europe Investments S.A.R.L. (the *Merger*) - Provisional Findings (*PFs*) and Notice of Possible Remedies (*NPR*)

We are grateful for the opportunity to present our views on the CMA's PFs and NPR of 16 December 2021 and more generally the steps the CMA has taken to ensure our views are obtained and taken into account. In light of the representations and evidence we have previously submitted, we do not propose to provide submissions on the CMA's PFs and NPR. We have, however, set out below some limited observations on the next phase in the CMA's merger review.

[CONF] However, there are two aspects on which we would like to comment at this stage: (i) the significance of contractual protections; and (ii) the need to ensure BT/EE is not disadvantaged by any proposed remedies.

Significance of [CONF] contractual protections

Whilst the CMA based its provisional decision on evidence from a variety of sources (customers, competitors, investors and other third parties), it nonetheless "*placed limited weight on the lack of concern expressed by the MNOs and some of the non-MNO customers*"¹ generally in its assessment of the loss of competition arising from the Merger, and specifically in its assessment of contractual arrangements² ([CONF]).

Referring to its pre-existing guidance on this issue, the PFs noted that given the Merger brings about a permanent change in the market, contractual protections may not completely remove a firm's ability to harm its customers, because certain customers might not be covered by the relevant contracts, those contracts might not protect all ways in which they could be harmed, and they may be of limited duration.³

We fully understand and support the importance of the CMA gathering sufficient evidence and market data in its competitive assessment of the Merger, from a variety of sources. However, we consider customers' views are a particularly important element of any such assessment. More specifically, we consider the contractual protections [CONF] to be highly relevant to assessing the impact of the Merger. As we said to the CMA, [CONF].⁴

[CONF]

BT should not be disadvantaged by any proposed remedies

The CMA provisionally found the Merger may substantially lessen competition (*SLC*) and identified either prohibition or divestiture of some/all of either parties' developed macro sites and ancillary services as possible

¹ See para 8.53 of the PFs.

² See para 8.11 of the PFs.

³ See para.8.57 of the PFs.

⁴ See notes from BT call with the CMA on 19 October 2021.

CONFIDENTIAL- CONTAINS BUSINESS SECRETS

remedies to that SLC. The CMA invites views on whether divestment is an effective remedy (e.g. on scope, scale, risk of not finding a suitable purchaser, etc.).

As we previously said, [CONF]. [CONF], should the CMA proceed to accept remedies to address the SLC, we would be concerned if BT was disadvantaged by any such remedies. Indeed, we expect any proposed remedies [CONF].⁵ [CONF].

In terms of structural remedies, the identity and size of both the disposed assets and the purchaser of those assets, would be key to ensuring the effectiveness of any remedy and would directly impact BT. The CMA must ensure that any purchaser: (i) is capable, competent, financially sound; (ii) is able to provide at least the same level and scope of service as Cellnex currently does; and (iii) offers fair and reasonable terms of occupation/access, particularly around price, churn and delivery. If Cellnex is required to sell part of its existing portfolio, the CMA must ensure there is no detrimental impact on our in-flight or planned projects on those sites (including plans to mitigate risks associated with high-risk vendors), and on the landlord relationships (which, if deteriorated, might ultimately lead to the landlord wanting to remove the mast from its land, which would impact the MNOs). In particular, we would be concerned about the impact of any remedies related to the MBNL Sites, both pre- and post-dissolution of the MBNL JV. In addition, we'd expect that any structural remedies would not have a detrimental impact on the value of our own assets.

It is too early for us to provide any specific comments, given the limited information included in the NPR – in particular, in the absence of a specified divestment package and proposed remedy-taker. However, we would ask the CMA to include BT in its market testing of any proposed remedies and more generally, give us the opportunity to comment further as the process progresses.

Confidential information

Given the sensitivity of the information contained in this response, we consider that it is highly confidential and that its disclosure would be prejudicial to BT's business interests. Accordingly, the information provided should not be published or disclosed to any third party without BT's prior written agreement. The information included in this response has been provided on the basis that it will only be used for the purposes of the CMA's investigation into the anticipated acquisition of the passive infrastructure assets of CK Hutchison Networks Europe Investments SARL in the UK by Cellnex UK Limited and for no other purpose, unless otherwise agreed in advance in writing by BT.

Yours sincerely,

Maya Barr, Principal Lawyer, Competition and Regulatory, BT

⁵ [CONF]