

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

**VIRGIN MEDIA O2'S COMMENTS ON CMA PROVISIONAL FINDINGS
14 JANUARY 2022**

1. INTRODUCTION

- 1.1 On 16 December 2021, the Competition and Markets Authority ("**CMA**") published its provisional findings (the "**Provisional Findings**") in relation to the anticipated acquisition by Cellnex UK Limited ("**Cellnex**") of the passive infrastructure assets of CK Hutchison Networks Europe Investments S.À R.L. ("**CK Hutchison**") (the "**Transaction**").
- 1.2 The Provisional Findings conclude that the Transaction may be expected to result in a substantial lessening of competition because *inter alia* it would create a duopoly for the supply of access to developed macro sites/ancillary services to mobile network operators ("**MNOs**") and other communication providers.¹ The CMA considers that this duopoly would consist of Cornerstone Telecommunications Infrastructure Limited ("**CTIL**") and the Merged Entity.²
- 1.3 Virgin Media O2 ("**VMO2**") is a UK MNO, and – as noted in the findings – CTIL is a joint venture between VMO2 and Vodafone Group.
- 1.4 VMO2 considers that certain of the CMA's descriptions of CTIL in the Provisional Findings do not accurately reflect CTIL's true market position. This short submission sets out VMO2's comments on the CMA's description of CTIL.
- 1.5 [...]

2. DESCRIPTION OF CTIL IN THE PROVISIONAL FINDINGS

The Provisional Findings contain the following observations in relation to CTIL:

- 2.1.1 Absent the Transaction, 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]% after CTIL with a [40-50]% share and Cellnex with a [20-30]% share by number of sites (adjusted for foreseeable changes in market structure up to 2031).³
- 2.1.2 The Transaction would leave only CTIL as a rival to Cellnex, able to offer a comparable package of services at similar or greater scale⁴ since removing the owner of the CK Hutchison Assets (even with the limited number of overlaps) would significantly reduce the competitive constraint provided by the overlap sites.
- 2.1.3 Since commercialisation, CTIL has started operating like a wireless infrastructure provider ("**WIP**") and can be expected to compete strongly with the Merged Entity in future, in particular in relation to large customers/large contracts.⁵
- 2.1.4 The Merger would reduce the number of major suppliers from three to two, and thereby create a duopoly consisting of the Merged Entity and CTIL.⁶
- 2.1.5 Even taking into account CTIL's commercialisation, the market remains highly concentrated, with there being no evidence to suggest that there would be any change in the high costs of switching or significant barriers to entry.⁷

¹ See, for example, paragraph 8.222 of the Provisional Findings.

² See, for example, paragraph 8.76 of the Provisional Findings.

³ See paragraph 8.74-8.75.

⁴ See paragraph 8.101.

⁵ See paragraph 8.203.

⁶ See paragraph 8.222.

⁷ See paragraph 8.21.

3. VMO2'S VIEWS ON THE DESCRIPTION OF CTIL

3.1 VMO2 considers that the Provisional Findings materially overstate CTIL's share of supply in light of: [...]

3.2 Expected number of third party tenants

3.3 As the CMA is aware, Vodafone Limited ("**VF**") and Telefónica UK Limited ("**TUK**" – hereinafter referred to as VMO2) entered into a [...]⁸ This arrangement is intended to increase CTIL's ability to generate additional income by increasing the third party tenancy ratio on its portfolio of sites ([...]), and to facilitate the gradual expansion of the scope of services CTIL will provide to VF and VMO2 and other third party tenants.

3.4 The total number of third party points of presence ("**PoPs**") on CTIL-owned sites is projected to [...]. The projected PoP on CTIL-owned sites is set out in Table 1, below. This shows a [...].

3.5 Third party PoPs constitute a more relevant metric for assessing the competitive constraint that [...]

Table 1 – Projected PoP on CTIL-owned sites⁹

[...]

VMO2's [...]

3.6 As noted above [...]

[...]

3.7 It is projected that CTIL's [...].

3.8 VMO2 expects [...].

4. THE CMA'S PREVIOUS DECISIONAL PRACTICE

4.1 The CMA previously considered in its Cellnex / Arqiva decision¹⁰ whether (among other things) self-supply should be included in the relevant frame of reference as supply by WIPs. As quoted in the Provisional Findings¹¹, in Cellnex / Arqiva the CMA considered that while self-supply constrained independent tower companies to some extent, it was not among the most immediate sources of competition to the merging parties in that case. The CMA also 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.

4.2 The CMA further noted that the strength of this constraint is likely to vary depending on the customer concerned. The CMA therefore considered that it was "more appropriate to assess the impact of self-supply in the competitive assessment as an out of market constraint relevant to certain large customers (and in particular, the MNOs and a proportion of non-MNOs)."¹² The CMA also considered that MNO JVs do not currently represent a material constraint on WIP supply to MNOs other than their shareholding MNOs and that the ability of MNO JVs to do so in future is highly uncertain.¹³ On this basis, the CMA excluded inter-JV supply from its frame of reference in that case (instead considering inter-JV supply as an incremental constraint in the competitive assessment). The CMA assessed the scale of site sharing between the JVs and concluded that it was small in

⁸ See the [...].

⁹ This is the same projection [...]

¹⁰ See: Anticipated acquisition by Cellnex UK Limited of Arqiva Services Limited, decision on relevant merger situation and substantial lessening of competition (ME/6860/19, 18 May 2020), available at: https://assets.publishing.service.gov.uk/media/5ec246ffe90e071e29d537f6/Cellnex_Arqiva_full_text_decision_PDFaa.pdf.

¹¹ See paragraph 6.7 of the Provisional Findings.

¹² See paragraph 93 of the Cellnex/Arqiva decision.

¹³ See paragraph 101 of the Cellnex/Arqiva decision.

magnitude. In particular, the CMA found that CTIL and MBNL have less than [5-10]% of their tenancies on each other's sites.¹⁴

- 4.3 In addition, as regards competition for the supply to non-MNO customers, the CMA concluded in Cellnex/Arqiva that MNO JVs are not currently material suppliers of non-MNOs customers. The CMA noted that non-MNO demand is chiefly fulfilled by WIPs. On this basis, the CMA concluded that MNO JVs should be excluded from the frame of reference for supply to non-MNO customers (instead considering inter-JV supply as an incremental constraint in its competitive assessment).¹⁵
- 4.4 As per our previous submission¹⁶, [...] given that, as they stand, the Provisional Findings appear to depart from the conclusion in Cellnex / Arqiva in respect of the likely competitive constraint imposed by CTIL.

5. CONCLUSION

- 5.1 While VMO2 considers that CTIL will be an effective competitor in 2031, [...].
- 5.2 In light of the above, VMO2 does not believe that the CMA can properly substantiate its findings that CTIL will have such a high share of supply or that post-transaction constitute a duopoly with the Merged Entity and we believe this conclusion should be removed from the Provisional Findings.
- 5.3 VMO2 respectfully requests that the CMA therefore reconsiders the factual points relating to CTIL addressed in this letter and that the final conclusions vis-à-vis CTIL addressing the points in Section 2 of this paper recognise CTIL's position.

¹⁴ See paragraphs 96 and 101 of the Cellnex/Arqiva decision.

¹⁵ See paragraphs 106-107 of the Cellnex/Arqiva decision.

¹⁶ See [...]