



**ME/6917/20**

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

**RESPONSE TO THE NOTICE OF POSSIBLE REMEDIES**

**10 JANUARY 2022**



## **CONFIDENTIALITY**

Annexes expressly marked "Confidential" are confidential to the party or parties to whom the annex relates and should not be shared with the other party to the transaction.

## **DEFINITIONS**

Unless otherwise indicated, any defined terms and acronyms used in this response shall have the same meaning as those provided in the Merger Notice and the Notice of Possible Remedies.



**TABLE OF CONTENTS**

1. Introduction and executive summary .....	4
2. The proposed remedy .....	5
3. Suitable purchaser .....	15
4. The Proposed Transaction gives rise to relevant customer benefits which would be lost on prohibition .....	15
5. Conclusion.....	17



ME/6917/20

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

**RESPONSE TO THE NOTICE OF POSSIBLE REMEDIES**

**1. INTRODUCTION AND EXECUTIVE SUMMARY**

- 1.1 In its provisional findings dated 16 December 2021 (**Provisional Findings**), the Competition and Markets Authority (**CMA**) provisionally found that the anticipated acquisition by Cellnex UK Limited (together with Cellnex Telecom, S.A., **Cellnex**) of the passive infrastructure assets of CK Hutchison Networks Europe S.À.R.L (**CK Hutchison**) in the UK (together with Cellnex, the **Parties**) (**Proposed Transaction**) 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 mobile network operators (**MNOs**) and other wireless communication providers in the UK.
- 1.2 For the avoidance of doubt, and as will be set out in the Parties' response to the Provisional Findings, the Parties do not agree that there are grounds for a finding that the Proposed Transaction may be expected to result in an SLC. This response should therefore not be considered as an acceptance of the Provisional Findings and it is made solely on the basis that an SLC finding is upheld in the CMA's final decision and without prejudice to any of the Parties' rights and further submissions.
- 1.3 The notice of possible remedies dated 16 December 2021 (the **Remedies Notice**) sets out the CMA's initial views on potential remedies which may address the SLC identified in the Provisional Findings. It identifies two potential structural remedies:
- 1.3.1 prohibition of the Proposed Transaction; or
  - 1.3.2 the divestiture of a package of developed macro sites and ancillary services. Such a divestiture package could in principle include a subset of the Transaction Sites or some or all of Cellnex's existing sites.



1.4 The second proposed remedy clearly indicates that the CMA would be willing to accept a remedy that does not require full divestment of the Transaction Sites, but to date the CMA has provided limited guidance on precisely what number of sites it would require to be divested to address the SLC to the satisfaction of the CMA or on what basis a suitable remedy package could be constituted. The Parties note that the Remedies Guidance (as defined below) states that a remedy that does not directly restore competition to pre-merger levels may still be acceptable to the CMA insofar as it clearly and comprehensively addresses the SLC identified.<sup>1</sup> In line with the Remedies Guidance, the Parties propose a structural remedy that meets this threshold by clearly and comprehensively addressing the SLC identified.

1.5 In this submission the Parties also explain why neither an upfront buyer nor a monitoring trustee are required in respect of the Proposed Remedy.

## 2. THE PROPOSED REMEDY

2.1 Without prejudice to the Parties' position as regards the finding of an SLC or any of their other rights, the Parties propose a divestment package which will divest the entirety of the overlap between the existing Cellnex sites, and those assets being acquired through the Proposed Transaction (the **Transaction Sites**, which includes the Streetworks Sites, the UKB Sites and the Transfer Sites (each as defined in the Provisional Findings) (the **Proposed Remedy**)).

2.2 The full list of sites that Cellnex proposes to divest is provided as **Annex 1**, and the methodology for identifying those sites is provided as **Annex 2**,<sup>2</sup> but in summary it involves a divestment of an expected [900-1,100] sites consisting of:

2.2.1 [600-900] existing Cellnex sites that overlap with the MBNL Sites (the **MBNL Overlap Sites**). [*confidential*], the Proposed Remedy involves the divestment of all existing Cellnex sites that overlap with any MBNL Site. This approach therefore goes beyond that which is required to divest overlapping sites, and therefore the SLC that has been provisionally identified, given that Cellnex will only acquire up to half of these sites. Indeed, the proposal involves the divestment of twice as many sites as are expected to be required in order to remove the overlaps between the existing Cellnex sites and the Transfer Sites.

---

<sup>1</sup> Merger Remedies (CMA87) (**Remedies Guidance**), 13 December 2018, footnote 34.

<sup>2</sup> This is an updated version of the Geographic Overlaps Paper (as defined below).

 Freshfields Bruckhaus Deringer

- 2.2.2 [0-200] existing Cellnex sites that overlap with those Streetworks Sites in respect of which 3UK has already identified the location at which the site will be built (the **Identified Streetworks Overlap Sites**). For reference, there were [confidential] Streetworks Sites in respect of which the location had already been identified as of 18 December 2021.
- 2.2.3 Those existing Cellnex sites that overlap with those Streetworks Sites in respect of which 3UK had not identified the location of the site as of 18 December 2021 (the **Unidentified Streetworks Overlap Sites**, and together with the Identified Streetworks Overlap Sites, the **Streetworks Overlap Sites**). As the Parties do not at this stage know the precise location of the Unidentified Streetworks Overlap Sites, the Proposed Remedy involves a binding commitment to divest the Unidentified Streetworks Overlap Sites within six months of the date on which 3UK has identified the location of all of the unbuilt Streetworks Sites, such that Cellnex can identify the Unidentified Streetworks Overlap Sites. The Parties estimate that there are approximately [0-200] Unidentified Streetworks Overlap Sites, based on grossing up the number of Identified Streetworks Overlap Sites.
- 2.2.4 [0-100] existing Cellnex sites that overlap with the UKB Sites (the **UKB Overlap Sites**).

(together the **Overlap Sites**).

- 2.3 Cellnex will divest all of its rights and obligations relating to the Overlap Sites to the alternative purchaser and will use its best endeavours to (i) divest the Overlap Sites with the full benefit of all existing customer contracts, and (ii) obtain all necessary landlord and customer consents to effectively implement the divestment.

**Methodology for identification of Overlap Sites**

- 2.4 As explained in paragraphs 2.1 to 2.3 above, the Proposed Remedy involves the divestment of all geographic overlaps between Cellnex and the Transaction Sites. Those overlaps have been identified, or will be identified, by applying the overall most conservative (and therefore the most pro-competitive) of the methodologies used to identify overlaps between Cellnex and the Transaction Sites in Appendix 5 of the Parties' response to the Annotated Issues Statement and Competitive Assessment Working Paper (the **Geographic Overlap Paper**) i.e., the set of catchment areas which identifies the largest number of overlapping sites. An updated version of that paper is attached as **Annex 2**.



- 2.5 The Geographic Overlap Paper identified overlaps on the basis of four potential consolidation catchment areas. The Parties' have used the most conservative of these catchment areas i.e., the set of catchment areas which identifies the largest number of overlapping sites, in identifying the Overlap Sites for divestment. This is notwithstanding (a) the Parties' view that the overall most conservative of the catchment areas is significantly wider than the distance in which competition can take place, and (b) the fact that (i) some of the Overlap Sites will face competition from rival WIPs' sites in the same catchment area and (ii) it is not feasible to share many of the Overlap Sites [*confidential*] with which they overlap, in any event.
- 2.6 In addition, and as already discussed at paragraph 2.2.1 above, [*confidential*] the Proposed Remedy involves the divestment of all existing Cellnex sites that overlap with any MBNL Site. This approach therefore involves the divestment of twice as many sites as are expected to be required in order to remove any overlaps between the existing Cellnex sites and the Transfer Sites. In addition, the alternative purchaser will obtain the overlapping sites immediately rather than in 2031 [*confidential*], thereby ensuring that these sites will provide an immediate structural change in competitive conditions. Divestment of these sites will therefore enable the alternative purchaser to exert a competitive constraint on Cellnex and other market participants with effect from the time of the divestment to the alternative purchaser, notwithstanding that any lessening of competition in respect of these overlaps (even on the CMA's case in the Provisional Findings) will not arise until 2031.
- 2.7 As explained above, the Parties are not able to identify at this point in time the precise identity of the Unidentified Streetworks Overlap Sites. Therefore, the Proposed Remedy involves a binding commitment to divest the Unidentified Streetworks Overlap Sites within six months of the identification by 3UK of the location of the unbuilt Streetworks Sites, such that Cellnex can identify the Unidentified Streetworks Overlap Sites.

**The Proposed Remedy comprehensively addresses the alleged SLC by divesting those sites that make the alternative purchaser in the CMA's counterfactual an important competitive constraint on Cellnex as a rival WIP**

- 2.8 The Provisional Findings are predicated on the assumption that even a limited geographic overlap (which the Provisional Findings accept is "*likely to be numerically limited*") between Cellnex and the Transaction Sites could be leveraged by a customer to drive large discounts on renegotiation of large contracts with the incumbent supplier. The CMA uses this assumption to conclude that, in the counterfactual, if these Transaction Sites were operated by an alternative purchaser, that alternative purchaser would impose an important competitive constraint on Cellnex.



- 2.9 It thus follows from the Provisional Findings that the divestment of the Overlap Sites to an alternative purchaser would comprehensively address the SLC by divesting all of those sites which provide an important competitive constraint on Cellnex. That alternative purchaser would then be in the same position as the alternative purchaser in the CMA's counterfactual to exert a competitive constraint on Cellnex as it will be in a position to use the Overlap Sites to compete with Cellnex on the same basis that the Provisional Findings allege would be otherwise lost as a result of the Proposed Transaction.
- 2.10 The Proposed Remedy accordingly fully addresses the CMA's central concern in the Provisional Findings which state that the "*key question ... [is] how these overlaps affect commercial decision making and competition and practice and therefore **how the removal of overlaps in the Merger will affect competition***"<sup>3</sup> (emphasis added) and the Provisional Findings go on to state that (emphasis added):
- 2.10.1 "*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 those locations where their sites overlap with Cellnex. **The removal of the overlap from the CK Hutchison Assets would significantly lessen that threat.***"<sup>4</sup>
- 2.10.2 "*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***".<sup>5</sup>
- 2.11 Therefore, in accordance with the Provisional Findings, divestment of all geographic overlaps between existing Cellnex sites and the Transaction Sites would comprehensively address the SLC identified in the Provisional Findings.
- 2.12 [*confidential*]. In accordance with the logic of the Provisional Findings, divestment of the Overlap Sites will bring about an immediate structural change to the market, creating an additional competitor - or strengthening an existing competitor - that will be in a position to impose an important competitive constraint on Cellnex and other market participants.

---

<sup>3</sup> Provisional Findings, paragraph 8.85.

<sup>4</sup> Provisional Findings, paragraph 8.95.

<sup>5</sup> Provisional Findings, paragraph 8.89.





2.13 Finally, the Parties make two additional points:

2.13.1 *First*, there are no material economies of scale for large suppliers when competing for BTS sites and it is not the case that WIPs can compete through the use of existing sites that do not overlap with those of its rivals. Although the Provisional Findings state that there is "*some evidence*" that such economies of scale exist, the CMA accepts that at best the evidence is mixed.<sup>6</sup> The Parties' response to the Provisional Findings will address in detail why the conclusions the CMA draws from this mixed evidence are, in any event, flawed.

2.13.2 *Second*, the Provisional Findings accept that "*location is a key requirement of customers*" and there is no credible evidence to support a finding that customers are likely to adopt an entirely new network configuration in order to obtain, at best, a modest cost saving on site negotiations with WIPs.<sup>7</sup> Hence, it is very unlikely that a customer would switch to a site that would require it to adopt a new network configuration. Again, this will be addressed in detail in the Parties' response to the Provisional Findings.

**The Overlap Sites will enable the alternative purchaser to compete with Cellnex effectively and independently at a national level**

2.14 The Remedies Notice provides that "*a divestiture remedy would need to provide a purchaser with the means to compete effectively and independently at a national level, replicating the rivalry that would have been provided by the CK Hutchison sites absent the Merger, in the supply of developed macro sites and ancillary services to wireless communications providers*".<sup>8</sup> As explained above at paragraphs 2.8 to 2.12, the Proposed Remedy fully achieves this objective by providing a purchaser with those sites that, according to the Provisional Findings, would make the operator of the Transaction Sites in the CMA's counterfactual an important competitive constraint on Cellnex. The Overlap Sites are clearly those which are competitively relevant for an alternative purchaser to compete with Cellnex on a national basis.

2.15 In addition, the Overlap Sites represent a high-quality package of passive infrastructure assets which will be immediately exploitable by the alternative purchaser. In this respect, the following important qualitative elements should be considered:

2.15.1 The Overlap Sites, constituting legacy Cellnex sites, are likely to be significantly valuable to an alternative purchaser. The Overlap Sites are a mixture of lattice towers and rooftop sites which were designed and built as shareable infrastructure, and which already host one or more customers' active equipment – and so will provide an alternative purchaser with an immediate

---

<sup>6</sup> Provisional Findings, paragraph 7.36.

<sup>7</sup> Provisional Findings, paragraph 8.217.

<sup>8</sup> Remedies Notice, paragraph 10.



revenue stream - as well as being immediately available to the alternative purchaser to compete with Cellnex following completion of the divestment.

2.15.2 The Overlap Sites from Cellnex's existing portfolio will thus provide the alternative purchaser with a particularly strong basis to compete directly with Cellnex. In addition, given that they are all Cellnex legacy sites, this will ensure deal executability and simplicity in respect of the divestment to the remedy taker. In comparison, the following is relevant in respect of the Transaction Sites:

- (a) The Streetworks Sites are being designed and built solely with 3UK's network needs in mind and are being constructed as monopoles to host the equipment of a single tenant (3UK).
- (b) The UKB Sites are rooftop sites which were designed and built solely with UK Broadband's network needs in mind and were not designed to be shareable.
- (c) The MBNL Sites / Transfer Sites [*confidential*] in 2031.

2.15.3 The Overlap Sites are geographically dispersed, located across urban, suburban and rural locations throughout the United Kingdom (including in each of England and Wales, Scotland and Northern Ireland).<sup>9</sup> In this respect they represent a material national portfolio of assets that will provide the alternative purchaser with the means to compete effectively and independently at a national level. Should the Overlap Sites be divested to an alternative purchaser with an existing portfolio of sites, the effect of the Proposed Remedy on competition at the national level will be even more pronounced as the addition of the Overlap Sites will enhance the scale and breadth of the purchaser's existing site portfolio on a national basis. This is recognised by the Provisional Findings, which conclude that "*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*".<sup>10</sup>

---

<sup>9</sup> Approximately [30-40]% of the Overlap Sites are situated in urban or suburban locations and [60-70]% are in rural locations. The remaining c. [0-10]% of the Overlap Sites are in Northern Ireland, for which there is no ONS classification.

<sup>10</sup> Provisional Findings, paragraph 8.128(c).



2.16 The Parties note that the CMA concluded in *Cellnex / Arqiva* that a much smaller number of non-overlapping sites than the Overlap Sites allowed each of WIG, Atlas Towers, Freshwave and Shared Access to operate as "*credible alternative suppliers*" that imposed a competitive constraint on the merged entity.<sup>11</sup> Given that the CMA has found that site portfolios which are smaller than the number of sites comprised of the Overlap Sites are capable of imposing a competitive constraint on the market, the alternative purchaser will clearly also be in a position to be a "credible alternative supplier".

**It would be disproportionate for the CMA to prohibit the Proposed Transaction, or to require a divestment remedy involving a much larger number of non-overlapping sites**

2.17 It is important to consider the objective that any remedy must achieve. Any remedy must be as comprehensive a solution as is reasonable and practicable so as to address the SLC and any adverse effects resulting from it.<sup>12</sup> The remedy cannot be for any other purpose: it must solely relate to the merger situation for which an SLC is found.<sup>13</sup> It must also be the least costly remedy, or package of remedies, from the remedies that the CMA considers will be effective.<sup>14</sup> The CMA is also obliged to avoid a remedy that risks imposing costs that would be disproportionate to the scale of the SLC.<sup>15</sup>

2.18 As explained above, the Remedies Notice has identified two potential structural remedies – the prohibition of the Proposed Transaction, or a divestment of a package of sites that will provide a purchaser with the means to compete effectively and independently at a national level, replicating the rivalry that would have been provided by the Transaction Sites absent the Proposed Transaction in the CMA's counterfactual. The Parties understand from the Provisional Findings, the Remedies Notice and from discussions with the CMA case team and remedies unit that the CMA's intention is for such a package of sites to effectively create a third national competitor to Cellnex and CTIL.

2.19 The other potential structural remedy identified by the CMA is a prohibition. The Remedies Guidance provides that the CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.<sup>16</sup> In this case, a prohibition of the Proposed Transaction would clearly be disproportionate.

---

<sup>11</sup> Cellnex / Arqiva Final Report, para 213 and 214.

<sup>12</sup> Enterprise Act 2002, section 35(4).

<sup>13</sup> Enterprise Act 2002, sections 35(3) and 41(3).

<sup>14</sup> Remedies Guidance, paragraph 3.6.

<sup>15</sup> Remedies Guidance, paragraph 3.11.

<sup>16</sup> Remedies Guidance, paragraph 3.6.



- 2.20 Proportionality requires an overall 'fair balance' in which the scale of any SLC, the degree of effectiveness of the remedy being considered, and the intrusiveness of the remedy, are all matters which are to be evaluated and balanced in the round. If an effective remedy is not reasonable and proportionate, then it should not be pursued by the CMA. The test to be applied by the CMA is whether the prohibition of the transaction is objectively justifiable in light of the supposed harm. A prohibition in this case would clearly be disproportionate:
- 2.20.1 The Provisional Findings accept 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).<sup>17</sup> As a result, the scale of the SLC (if any) is similarly likely to be limited. On this basis, a remedy which prohibits the Proposed Transaction in its entirety would be disproportionate to address the SLC identified, given its limited scale. Indeed, any lessening of competition, even on the case put forward in the Provisional Findings, is minor. Prohibiting the entire transaction from proceeding would be unduly intrusive.
- 2.20.2 The Parties have explained in detail the significant relevant customer benefits which will flow from the Proposed Transaction (these are highlighted again in section 4 below). Given the merger-specificity of these benefits, a prohibition of the Proposed Transaction would prevent these customer benefits from being realised. A remedy which fails to realise the significant customer benefits associated with the Proposed Transaction would be disproportionate.
- 2.20.3 The Provisional Findings accept that the most significant structural change in the market as a result of the Proposed Transaction will occur when Cellnex gains control of the Transfer Sites after the dissolution of the MBNL JV scheduled to occur in 2031.<sup>18</sup> In other words, given that the vast majority of the Transaction Sites are the Transfer Sites and that Cellnex will only gain control over these sites in 2031, the lessening of competition identified by the CMA will, for the most part, only arise in 2031. Following this logic, it would be disproportionate to prohibit a transaction now in circumstances in which the alleged resulting SLC will only take effect in almost a decade.
- 2.20.4 The Provisional Findings acknowledge that CTIL 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. This is a fundamental change in the market structure which will result in a substantial competitive constraint on Cellnex. It would be disproportionate for the CMA to ignore this change and prohibit the Proposed Transaction.

---

<sup>17</sup> Provisional Findings, paragraph 8.83.

<sup>18</sup> Provisional Findings, paragraph 8.211.



- 2.20.5 Finally, given the effectiveness of the Proposed Remedy, as described in greater detail above, it is evident that the Proposed Remedy is a more proportionate remedy than the prohibition of the Proposed Transaction.
- 2.21 As explained above at paragraphs 2.8 to 2.13 above, the Parties' remedy proposal fully and comprehensively eliminates the SLC identified in the Provisional Findings. Moreover, the remedy proposal will result in the divestment of a large portfolio of high-quality sites that can be used to exert an immediate and significant competitive constraint on Cellnex on a national basis from the time of divestment, notwithstanding that [*confidential*] 2031. The remedy proposal therefore addresses all the requirements for a comprehensive and effective remedy. It is not within the CMA's power to reject a remedy proposal that clearly and comprehensively and in a clear-cut manner addresses the SLC identified in the Provisional Findings. Any suggestion that it would be necessary to divest a larger portfolio of sites, including sites which do not overlap (and are therefore not exerting a competitive constraint on Cellnex according to the Provisional Findings), would clearly be disproportionate and unnecessary to remedy the SLC that has been provisionally identified. As the CMA is aware, its statutory function in merger remedies under the Enterprise Act 2002 is to remedy an identified SLC. The Parties' remedy proposal fully and comprehensively does this. It would not be appropriate, and would be beyond the CMA's statutory powers in the Enterprise Act 2002, to seek to require a merger remedy that extends beyond the identified SLC or strays into industrial policy, which is properly the remit of the UK Government and Parliament.

**The Proposed Remedy has a low risk profile, and a monitoring trustee is not necessary**

- 2.22 The Proposed Remedy does not give rise to material composition, asset and/or purchaser risks and therefore has a relatively low risk profile. Insofar as such risks materialise, these can be managed such that a comprehensive solution to the provisional SLC could be achieved.
- 2.23 In particular, the Proposed Remedy does not give rise to composition risks, for the following reasons:
- 2.23.1 As explained in further detail below, according to the Provisional Findings "*passive infrastructure assets are generally considered to be attractive and highly marketable assets*" and the CMA has already identified a number of businesses with "*a strong interest and established track record in investing in such assets*".<sup>19</sup>

---

<sup>19</sup> Provisional Findings, paragraph 5.225.



- 2.23.2 The Proposed Remedy involves the divestment of a portfolio of existing Cellnex assets which are already operated independently and effectively on the relevant market. This aligns with the CMA's view that a divestiture of a package of developed macro sites and ancillary services currently operated by Cellnex *"would appear to present a relatively lower risk profile, as these assets have previously been operated independently in the market"*.<sup>20</sup>
- 2.23.3 The Proposed Remedy does not involve a 'mix-and-match' style remedy. This aligns with the CMA's stated preference to avoid such 'mix-and-match' divestitures.<sup>21</sup> That being said, in any event, the typical reasons behind the CMA's preference for avoiding 'mix-and-match' divestitures do not apply, given that towers are straight-forward assets that could easily be incorporated into an existing portfolio of assets or effectively operated as stand-alone assets by a new entrant.
- 2.23.4 The Proposed Remedy involves the divestment of any potential overlaps between Cellnex's existing sites and the Transfer Sites immediately, which in the CMA's counterfactual would only become competitively relevant on dissolution of the MBNL JV in 2031. Moreover, the Proposed Remedy involves the divestment of the overlaps not only between Cellnex and the Transfer Sites, but with all MBNL Sites, even those which Cellnex will not acquire in 2031. Therefore, the Proposed Remedy goes far beyond what is necessary to comprehensively resolve the immediate impact of the SLC.
- 2.24 In addition, the Proposed Remedy does not give rise to asset risks as there is no risk of the competitive capability of the assets deteriorating before the completion of the divestiture. The divestment of the Overlap Sites will occur within a relatively short period following approval of the Proposed Transaction, and therefore there is no need for a monitoring trustee to be appointed in respect of the divestment of these sites.
- 2.25 Although the Unidentified Streetworks Overlap Sites cannot yet be identified, the unbuilt Streetworks Sites form part of 3UK's ongoing programme for constructing additional streetworks to meet its network requirements and all Streetworks Sites are expected to be built [*confidential*]. It is therefore expected that the location of the Streetworks Sites will be identified [*confidential*], and that Cellnex will be in a position to divest the Unidentified Streetworks Overlap Sites promptly thereafter.
- 2.26 For these reasons, there is no need for a monitoring trustee to be appointed.

---

<sup>20</sup> Remedies Notice, paragraph 27.

<sup>21</sup> Remedies Notice, paragraph 29.



**3. SUITABLE PURCHASER**

3.1 The Parties consider that all potential credible alternative purchasers of the Overlap Sites will already have an existing management and operational structure which is capable of planning, constructing, operating and managing the Overlap Sites and would therefore be a suitable purchaser of the Overlap Sites.

3.2 The Parties do not consider that it is essential that the alternative purchaser has an existing portfolio of assets in the UK, as operators with experience of successfully operating passive infrastructure assets in another jurisdiction will already have the requisite management and operational structure and will be viewed by customers as a credible competitor when operating the Overlap Sites. [*confidential*].

*No need for an upfront buyer*

3.3 The Parties do not consider that there is a need for an upfront buyer in light of the conclusion in the Provisional Findings that "*passive infrastructure assets are generally considered to be attractive and highly marketable assets, and that a wide range of industry players and financial investors have a strong interest and established track record in investing in such assets*".<sup>22</sup> In light of this, the CMA can have no doubt as to the viability or attractiveness to purchasers of a package of passive infrastructure assets or that there is only a limited pool of suitable purchasers.

*Divestiture process*

3.4 Cellnex commits to completing the divestiture of the Overlap Sites, other than the Unidentified Streetworks Overlap Sites, within six months of the date of the Final Undertakings.

3.5 Cellnex commits to divesting the Unidentified Streetworks Overlap Sites within six months of the identification by 3UK of the location of all unbuilt Streetworks Sites, such that Cellnex can identify all the Unidentified Streetworks Overlap Sites.

**4. THE PROPOSED TRANSACTION GIVES RISE TO RELEVANT CUSTOMER BENEFITS WHICH WOULD BE LOST ON PROHIBITION**

4.1 If the Proposed Transaction is prohibited, and the proceeds of the transaction will not be realised by CK Hutchison, [*confidential*].

4.2 Throughout the CMA's review of the Proposed Transaction, the Parties have provided clear evidence demonstrating that the Proposed Transaction will lead to considerable

---

<sup>22</sup> Provisional Findings, paragraph 5.225.



merger-specific efficiencies and customer benefits.<sup>23</sup> These benefits will continue to materialise even if the Proposed Transaction is approved subject to the Proposed Remedy but would be lost – to the significant detriment of UK consumers – if the Proposed Transaction were prohibited. The key relevant customer benefits are outlined below.

- 4.3 3UK is the smallest of the four MNOs in the UK and faces considerable challenges. [*confidential*].
- 4.4 A strong 5G offering can be a turning point for 3UK. 3UK has assessed that approx. [*confidential*] of further critical capital investment is required to support its 5G rollout.<sup>24</sup> However, this opportunity can only be realised if significant investment is made very rapidly to upgrade 3UK's radio network for 5G. 3UK's current investment plans are predicated on the basis that the Proposed Transaction will proceed. CK Hutchison has communicated this strategy internally and externally. [*confidential*]. Following the Proposed Transaction CK Hutchison Group Telecom will be able to increase its focus on developing its mobile networks and IT platforms in the UK, while benefiting from significant additional financial capacity to support future growth and investment in its networks.
- 4.5 [*confidential*].
- 4.6 The proceeds from the Proposed Transaction will enable 3UK to compete more aggressively and ultimately benefit UK consumers. These significant customer benefits will result directly from the Proposed Transaction. In particular, the Proposed Transaction will give rise to significant customer benefits that clearly meet the requirements set out in the Remedies Guidance on the basis that they:
- 4.6.1 will arise in the form of improved quality and greater innovation for mobile customers (notwithstanding that this is not the same market in which the CMA has provisionally identified an SLC);
  - 4.6.2 will accrue shortly after Completion of the Proposed Transaction, once 3UK has been able to make the requisite investments in its 5G rollout, and certainly within a reasonable period from the creation of the relevant merger situation;
  - 4.6.3 would not accrue without the creation of the relevant merger situation; and
  - 4.6.4 could not be achieved by plausible less anti-competitive alternatives to the Proposed Transaction.<sup>25</sup>

---

<sup>23</sup> See, for example, the response to question 24 of the Merger Notice, section 4 of the Initial Submission and section 6 of the Response to the Issues Statement

<sup>24</sup> [*confidential*]

<sup>25</sup> Remedies Guidance, paragraphs 3.14-3.24.





- 4.7 The Proposed Remedy secures 3UK's access to additional funding. Therefore, these significant customer benefits are not impacted by the Proposed Remedy but are merger-specific, i.e., they cannot be realised if the Proposed Transaction were prohibited. In other words, the Proposed Remedy preserves the relevant customer benefits that the alternative remedy envisaged by the CMA (i.e., prohibition) does not.<sup>26</sup>

## 5. CONCLUSION

- 5.1 The Parties strongly disagree with the conclusion in the Provisional Findings that the Proposed Transaction gives rise to an SLC, and the Parties' views on the SLC finding will be set out in detail in their response to the Provisional Findings.
- 5.2 However, to the extent that the provisional conclusion that the Proposed Transaction gives rise to an SLC is upheld in the CMA's final report, the only proportionate way in which to address the SLC identified in the Provisional Findings is to divest the overlaps between Cellnex's existing sites and the Transaction Sites. To require any other remedy, whether prohibition or a much larger divestment of sites, would be disproportionate and inconsistent with the logic of the competitive assessment in the Provisional Findings.

## **Clifford Chance LLP and Freshfields Bruckhaus Deringer LLP**

10 January 2022

---

<sup>26</sup> Merger Assessment Guidelines (CMA129), 18 March 2021, paragraph 8.26.



**ANNEX 1**

*[confidential]*

## Appendix 2 to the Response to the Remedies Notice: geographic overlap between Cellnex and the Transaction Sites

10 January 2022

In the first submission to the CMA dated 29 September 2021, CRA conducted a geographic overlap analysis to demonstrate that there is limited overlap between the Transaction Sites (i.e., the MBNL Sites and the Unilateral Sites, which in turn include the UKB Sites and the Streetworks Sites which are either already developed or where the location for the development has been identified as of 18 December 2021) and the Cellnex sites on which CTIL currently has a presence (the “Cellnex CTIL Sites”).<sup>1</sup> A subsequent analysis was provided on 26<sup>th</sup> October 2021, conducting a geographic overlap analysis between all of Cellnex’s existing sites and the Transaction Sites. This assessed the extent to which the Transaction Sites under a hypothetical alternative purchaser may be used to compete with Cellnex in negotiations with not only CTIL but any other customer. Consistent with the first analysis, it showed that there is only a very small geographic overlap between Cellnex and the Transaction Sites. CRA concluded that the Transaction Sites will not provide a hypothetical alternative purchaser with a significantly stronger constraint on Cellnex versus another WIP that does not hold the Transaction Sites. This is because given the negligible overlap, any alternative to a Cellnex site is much more likely to be a BTS offering than an existing site, regardless of the size of the competitor. Accordingly, the Proposed Transaction does not remove a material constraint on Cellnex even in the CMA’s counterfactual.

As part of the Response to the Remedies Notice, CRA has further updated the overlap analysis to include a consideration of all MBNL sites, as well as the Streetworks Sites (with both known and unknown locations).

The methodology for this analysis is the same as the previous submission. CRA obtained a list of the locations of all [confidential] Cellnex sites and considered this against a list of the locations of the [confidential] MBNL Sites and the [confidential] Unilateral Sites (comprised of [confidential] UKB Sites and [confidential] Streetworks Sites, which are either already developed or where the location for the development has been identified as of 18 December 2021), for a total of [confidential] sites.<sup>2</sup> Using data on population density from the ONS 2011 census,<sup>3</sup> the Cellnex Sites were assigned into one of the

---

<sup>1</sup> Response to the CMA’s request for information dated 22 September 2021 (RFI4), Annex 1.

<sup>2</sup> The figures for both Cellnex and the Transaction sites include sites in Northern Ireland. These sites were excluded from the previous iterations of the overlap analysis as no ONS classification is available for Northern Ireland. However, to be conservative, these sites are now included and treated as rural i.e., we assume to have wider catchments than sites in urban and suburban areas although some sites in Northern Ireland may be in more urban locations.

<sup>3</sup> See <https://geoportal.statistics.gov.uk/datasets/ons::ons-postcode-directory-august-2021/about>.

following categories based on the postcode closest to their location: Dense Urban, Urban, Suburban, Hilly Rural and Rural.<sup>4</sup>

The catchment distances for the analysis are again based on (a) Cellnex's previous analyses conducted internally when considering substitutability of sites and/or distances requested by customers when looking for a site in a particular location; and [confidential].<sup>5</sup> The catchment area scenarios are set out below.

**Table 1 Scenarios considered with respect to consolidation catchments**

Scenario	Distances (m)				
	Dense Urban	Urban	Suburban	Hilly Rural	Rural
[confidential]	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]
[confidential]	[confidential]	[confidential]	[confidential]	[confidential]	[confidential]
[confidential]	[confidential]		[confidential]	[confidential]	
[confidential]	[confidential]		[confidential]	[confidential]	

Source: CRA analysis using data from the Parties

In all four scenarios CRA looked at the number of MBNL Sites or Unilateral Sites that were within the given consolidation distance to an existing Cellnex site. The results under each sensitivity are shown in Table 2 below.

**Table 2 Number of Cellnex sites with Transaction Sites within the consolidation catchment**

Scenario	Weighted number of potential consolidations		Number of potential consolidations	
	Number	% of total Cellnex sites	Number	% of total Cellnex sites
[confidential]	[confidential]	[0-5]%	[confidential]	[0-5]%
[confidential]	[confidential]	[0-5]%	[confidential]	[5-10]%
[confidential]	[confidential]	[0-5]%	[confidential]	[5-10]%
[confidential]	[confidential]	[5-10]%	[confidential]	[5-10]%

Source: CRA analysis using data from the Parties

<sup>4</sup> For **England and Wales**, the ONS area classifications were grouped as follows: Dense Urban consists of RUC2011 code "A1"; Urban consists of "B1"; Suburban consists of "C1" and "C2"; Hilly Rural consists of "D1", "E1" and "D2"; and Rural consists of "F1", "E2" and "F2". For **Scotland**, which has different ONS area classifications, the groupings were as follows: Urban consists of 8-fold Urban Rural Classification code "1"; Suburban consists of "2"; Hilly Rural consists of "3", "4" and "5"; and Rural consists of "6", "7" and "8". For more details on the ONS classifications, see [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/239478/RUC11user\\_guide\\_28\\_Aug.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/239478/RUC11user_guide_28_Aug.pdf) (England and Wales) and <https://www.webarchive.org.uk/wayback/archive/20150218121113/http://www.gov.scot/Topics/Statistics/About/Methodology/UrbanRuralClassification> (Scotland).

For **Northern Ireland**, there is no ONS urban/rural classification however to be conservative these sites are all treated as rural (see footnote 3 above).

<sup>5</sup> See Response to RF14, Annex 1 for a detailed description of these scenarios.

Using the Huxley consolidation analysis catchments, out of the [confidential] Cellnex sites, only [confidential] ([0-5]%) could potentially be substituted by a Transaction Site. However, this overstates the potential number of MBNL Sites that could be considered as substitutable for the Cellnex sites: while Cellnex will receive the full economic benefit from the Unilateral Sites, it will receive only 50% of the economic benefit associated with the MBNL Sites – i.e., the economic benefit of the interests to which 3UK is currently entitled. Thus, CRA has weighted the number of sites by the proportion of revenue that Cellnex would receive.<sup>6</sup> On this basis, the weighted proportion of future pooled MBNL Sites and Unilateral Sites overlapping with Cellnex is only [0-5]%. This implies that any incentive to increase the price of the Cellnex sites arising from the Proposed Transaction is immaterial since the Transaction Sites are not a suitable alternative in the vast majority of cases. Furthermore, this number can be regarded as an upper bound on the diversion ratio with respect to revenue. Even if there were no other competitors on any of the potential overlap sites, at most only [0-5]% of revenue could divert from Cellnex sites to Transaction Sites. If one considers the constraint of BTS and other competitors in overlapping sites, the diverted revenue that Cellnex could possibly capture is likely to be significantly lower.

Doubling the catchment raises this figure to [0-5]% on a weighted basis, while using the wider catchment used during the MBNL analysis of sites that are at risk of moving to CTIL only raises the proportion of weighted overlaps to [0-5]%. Finally, [confidential] the weighted proportion of overlaps is [5-10]%.

### Unidentified Streetworks Sites

The analysis above does not consider the Streetworks Sites for which a location is not yet determined (“**Unidentified Streetworks Sites**”). However, it is possible to estimate the expected number of Cellnex sites overlapping with the Unidentified Streetworks Sites based on the existing overlap between the [confidential] Streetworks Sites for which the location is determined and the Cellnex sites. To do this CRA has assumed that the Unidentified Streetworks Sites will overlap with Cellnex in the same proportions as the [confidential] Streetworks Sites for which the location is identified. This can be used to estimate the full overlap between Cellnex and all possible Transaction Sites (including the UKB Sites, the [confidential] Streetworks Sites and all the potential MBNL Sites). The results of this analysis are presented below. A more detailed breakdown of the overlaps for by the type of site for the Transaction Sites (i.e., UKB, Streetworks, MBNL) is provided in the Appendix.

---

<sup>6</sup> There are instances where multiple Transaction Sites (for example, an MBNL and a UKB site) overlap with Cellnex. In order to be conservative when calculating the weighted number of potential consolidations, sites that overlap with a Unilateral Site are attributed full weight, while only sites that overlap with MBNL (and no Unilateral Site is present within a consolidation distance from Cellnex) are attributed a 50% weight.

**Table 3 Number of Cellnex sites with Transaction Sites within the consolidation catchment (including a pro-rata allocation for the Unidentified Streetworks Sites)**

Scenario	Weighted number of potential consolidations		Number of potential consolidations	
	Number	% of total Cellnex sites	Number	% of total Cellnex sites
[confidential]	[confidential]	[0-5]%	[confidential]	[0-5]%
[confidential]	[confidential]	[0-5]%	[confidential]	[5-10]%
[confidential]	[confidential]	[5-10]%	[confidential]	[5-10]%
[confidential]	[confidential]	[5-10]%	[confidential]	[10-15]%

Source: CRA analysis using data from the Parties

The table above shows that even if the Unidentified Streetworks Sites are considered, the weighted number of overlaps under the most conservative catchment remains low at [5-10]%. As above, this [5-10]% is an upper bound as it does not include the alternatives present in these localities such as WIP BTS, self-supply (on existing sites or BTS) and other existing WIP towers. As such, even if the CMA's counterfactual were correct, any incentive for Cellnex to raise the price arising from the Proposed Transaction must be immaterial given the minimal overlaps and the substantial number of alternative options.

Finally, to the extent that the CMA is concerned with there being uncertainty in which of the MBNL Sites will constitute the Transfer Sites, the table shows that the total number of potential considerations including all MBNL Sites is [900-1,100]. This includes the Unidentified Streetworks Sites.

## APPENDIX A OVERLAPS BY TYPE OF TRANSACTION SITES

**Table 4 Number of Cellnex sites with Transaction Sites within the consolidation catchment – sensitivity 1 ([*confidential*] analysis) by type of site**

	Weighted number of potential consolidations		Number of potential consolidations	
	Number	% of total Cellnex sites	Number	% of total Cellnex sites
UKB Sites (*)	[ <i>confidential</i> ]	[0-5]%	[ <i>confidential</i> ]	[0-5]%
Streetworks Sites (**) (excl. Unidentified Streetworks Sites)	[ <i>confidential</i> ]	[0-5]%	[ <i>confidential</i> ]	[0-5]%
Streetworks Sites (***) (incl. Unidentified Streetworks Sites)	[ <i>confidential</i> ]	[0-5]%	[ <i>confidential</i> ]	[0-5]%
MBNL Sites (****)	[ <i>confidential</i> ]	[0-5]%	[ <i>confidential</i> ]	[0-5]%
<b>All Transaction Sites</b>				
(excl. Unidentified Streetworks Sites)	[ <i>confidential</i> ]	[0-5]%	[ <i>confidential</i> ]	[0-5]%
(incl. Unidentified Streetworks Sites)	[ <i>confidential</i> ]	[0-5]%	[ <i>confidential</i> ]	[0-5]%

(\*) Includes all instances where a UKB Site is within a consolidation distance from a Cellnex site (i.e. irrespective of whether Streetworks Sites and/or MBNL Sites are also present). (\*\*) Excludes instances where a Cellnex site overlaps with both a Streetworks Site and a UKB Site (these instances are captured in the UKB Sites line). (\*\*\*) Assumes that the Unidentified Streetworks Sites overlap with Cellnex sites in the same proportions as the [*confidential*] Streetworks Sites for which the location is identified. (\*\*\*\*) Excludes instances where a Cellnex site overlaps with both a Unilateral Site and a MBNL Site (these instances in the UKB Sites/Streetworks Sites lines).

Source: CRA analysis using data from the Parties

**Table 5 Number of Cellnex sites with Transaction Sites within the consolidation catchment – sensitivity 2 ([*confidential*] analysis) by type of site**

	Weighted number of potential consolidations		Number of potential consolidations	
	Number	% of total Cellnex sites	Number	% of total Cellnex sites
UKB Sites (*)	[ <i>confidential</i> ]	[0-5]%	[ <i>confidential</i> ]	[0-5]%
Streetworks Sites (**) (excl. Unidentified Streetworks Sites)	[ <i>confidential</i> ]	[0-5]%	[ <i>confidential</i> ]	[0-5]%
Streetworks Sites (***) (incl. Unidentified Streetworks Sites)	[ <i>confidential</i> ]	[0-5]%	[ <i>confidential</i> ]	[0-5]%
MBNL Sites (****)	[ <i>confidential</i> ]	[0-5]%	[ <i>confidential</i> ]	[5-10]%
<b>All Transaction Sites</b>				
(excl. Unidentified Streetworks Sites)	[ <i>confidential</i> ]	[0-5]%	[ <i>confidential</i> ]	[5-10]%
(incl. Unidentified Streetworks Sites)	[ <i>confidential</i> ]	[0-5]%	[ <i>confidential</i> ]	[5-10]%

(\*) Includes all instances where a UKB Site is within a consolidation distance from a Cellnex site (i.e. irrespective of whether Streetworks Sites and/or MBNL Sites are also present). (\*\*) Excludes instances where a Cellnex site overlaps with both a Streetworks Site and a UKB Site (these instances are captured in the UKB Sites line). (\*\*\*) Assumes that the Unidentified Streetworks Sites overlap with a Cellnex site in the same proportions as the [*confidential*] Streetworks Sites for which the location is identified. (\*\*\*\*) Excludes instances where a Cellnex site overlaps with both a Unilateral Site and a MBNL Site (these instances in the UKB Sites/Streetworks Sites lines).

Source: CRA analysis using data from the Parties

**Table 6 Number of Cellnex sites with Transaction Sites within the consolidation catchment – sensitivity 3 ([confidential] analysis) by type of site**

	Weighted number of potential consolidations		Number of potential consolidations	
	Number	% of total Cellnex sites	Number	% of total Cellnex sites
UKB (*)	[confidential]	[0-5]%	[confidential]	[0-5]%
Streetworks (**) (excl. Unidentified Streetworks Sites)	[confidential]	[0-5]%	[confidential]	[0-5]%
Streetworks (***) (incl. Unidentified Streetworks Sites)	[confidential]	[0-5]%	[confidential]	[0-5]%
MBNL (****)	[confidential]	[0-5]%	[confidential]	[5-10]%
<b>All Transaction Sites (excl. Unidentified Streetworks Sites)</b>				
All Transaction Sites (excl. Unidentified Streetworks Sites)	[confidential]	[0-5]%	[confidential]	[5-10]%
<b>All Transaction Sites (incl. Unidentified Streetworks Sites)</b>				
All Transaction Sites (incl. Unidentified Streetworks Sites)	[confidential]	[5-10]%	[confidential]	[5-10]%

(\*) Includes all instances where a UKB Site is within a consolidation distance from a Cellnex site (i.e. irrespective of whether Streetworks Sites and/or MBNL Sites are also present). (\*\*) Excludes instances where a Cellnex site overlaps with both a Streetworks Site and a UKB Site (these instances are captured in the UKB Sites line). (\*\*\*) Assumes that the Unidentified Streetworks Sites overlap with a Cellnex site in the same proportions as the [confidential] Streetworks Sites for which the location is identified. (\*\*\*\*) Excludes instances where a Cellnex site overlaps with both a Unilateral Site and a MBNL Site (these instances in the UKB Sites/Streetworks Sites lines).

Source: CRA analysis using data from the Parties

**Table 7 Number of Cellnex sites with Transaction Sites within the consolidation catchment – sensitivity 4 ([confidential] analysis) by type of site**

	Weighted number of potential consolidations		Number of potential consolidations	
	Number	% of total Cellnex sites	Number	% of total Cellnex sites
UKB (*)	[confidential]	[0-5]%	[confidential]	[0-5]%
Streetworks (**) (excl. Unidentified Streetworks Sites)	[confidential]	[0-5]%	[confidential]	[0-5]%
Streetworks (***) (incl. Unidentified Streetworks Sites)	[confidential]	[0-5]%	[confidential]	[0-5]%
MBNL (****)	[confidential]	[0-5]%	[confidential]	[5-10]%
<b>All Transaction Sites (excl. Unidentified Streetworks Sites)</b>				
All Transaction Sites (excl. Unidentified Streetworks Sites)	[confidential]	[5-10]%	[confidential]	[5-10]%
<b>All Transaction Sites (incl. Unidentified Streetworks Sites)</b>				
All Transaction Sites (incl. Unidentified Streetworks Sites)	[confidential]	[5-10]%	[confidential]	[10-15]%

(\*) Includes all instances where a UKB Site is within a consolidation distance from a Cellnex site (i.e. irrespective of whether Streetworks Sites and/or MBNL Sites are also present). (\*\*) Excludes instances where a Cellnex site overlaps with both a Streetworks Site and a UKB Site (these instances are captured in the UKB Sites line). (\*\*\*) Assumes that the Unidentified Streetworks Sites overlap with a Cellnex site in the same proportions as the [confidential] Streetworks Sites for which the location is identified. (\*\*\*\*) Excludes instances where a Cellnex site overlaps with both a Unilateral Site and a MBNL Site (these instances in the UKB Sites/Streetworks Sites lines).

Source: CRA analysis using data from the Parties