

CELLNEX / CK HUTCHISON UK TOWERS MERGER INQUIRY

SUBMISSION BY COMPANY C ON POTENTIAL REMEDIES

1. INTRODUCTION

- 1.1 This submission is made on behalf of Company C in response to the CMA’s Provisional Findings (“PFs”) and Notice of Possible Remedies (“**Remedies Notice**”) of 16 December 2021 with respect to the proposed acquisition by Cellnex of the UK tower assets of CK Hutchison (the “**Transaction**”).
- 1.2 Company C does not comment on every aspect of these two documents, but in this submission it wishes to draw the CMA’s attention to two key areas on which it has firm views:
- 1.2.1 In **Section 2** Company C sets out its views on the necessary scope of potential remedies.
- 1.2.2 In **Section 3** Company C provides further information with respect to the suitability of potential purchasers of any divestment assets, using its own circumstances as an example. This supplements the information which Company C provided to the CMA on 3 September and 29 September 2021.
- 1.3 If, after having reviewed this submission, the CMA requires any further information, Company C would be available to discuss its views further with the CMA at any time.

2. POSSIBLE REMEDIES

What a remedy needs to achieve

- 2.1 Company C notes that the CMA’s investigation has provisionally found that the sale of the UK CK Hutchison towers business (the “**Target**”) to Cellnex may lead to a Significant Lessening of Competition (“**SLC**”) in a UK market for access to developed macro sites. In particular, the CMA is concerned that the sale of the Target to Cellnex, rather than to an alternative buyer, may prevent the emergence of a third major national player which would otherwise have been the case. Company C agrees with this headline conclusion.
- 2.2 In order to remedy this SLC, the CMA has indicated that any divestiture 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 Target sites absent the Transaction, in the supply of developed macro sites and ancillary services to wireless communications providers.
- 2.3 Further, any remedy will need to achieve as comprehensive a solution as is reasonable and practicable to remedy the SLC and any adverse effects resulting from it, in particular by being:
- 2.3.1 effective in addressing the provisional SLC and its resulting adverse effects;
- 2.3.2 the least costly and intrusive remedy that the CMA considers to be effective; and
- 2.3.3 proportionate in relation to the SLC and its adverse effects.

2.4 The CMA has so far proposed the divestiture of a package of developed macro sites and ancillary services. These could comprise comprising either (i) a sub-set of the Target’s developed macro sites and ancillary services (which for the avoidance of doubt could include own-operated sites, build-to-suit sites and the sites currently operated by the MBNL JV); or (ii) some or all the UK developed macro sites and ancillary services currently operated by Cellnex.

2.5 Company C does not consider that the CMA need go so far as a prohibition of the transaction. While it agrees that at least a substantial remedy is required, Company C does not consider that an order to divest substantially all of the Target’s assets is required. The SLC could instead be adequately remedied, and a viable new competitor created, by way of a more focussed divestment package.

What a new competing operator would need to look like in order to meet these criteria

2.6 Company C recognises that the CMA would need to be confident that suitable divestment purchasers are available who would: (a) be independent of the Parties; (b) have the necessary capability to compete; (c) be committed to competing in the market; and (d) not create further competition concerns.

2.7 So long as all of those features are strongly met, it would not be necessary for a stand-alone business to be divested. The nature of the assets concerned is that they can be easily bolted onto existing WIP businesses, which can in turn be scaled up with a minimum of friction. A package of passive infrastructure assets and associated contracts and other operations could therefore constitute the basis of an effective disposal and would be highly effective when integrated into the operations of an existing well-established WIP.

Minimum remedy to create a viable new competitor

2.8 In response to the CMA’s invitation to propose alternative remedies, this section sets out Company C’s views on how an alternative remedy would better meet the criteria in paras 2.2 and 2.3 above. This requires a focus on the different asset classes within the Target, since each will have a distinct degree of impact on the remedying of the SLC:

2.8.1 Approx. 2,800 developed sites (comprising 100-200 UK broadband sites and 2,600 monopoles, collectively the “**Unilateral Sites**”) which Cellnex will acquire at closing. Of these around 20-30% are to be built in the future (build-to-suit).

2.8.2 While the PFs do not appear to make an explicit reference to them, we understand¹ that the Transaction may also involve the transfer of an additional approx. 600 BTS sites to be constructed in the future (“**BTS Sites**”).

2.8.3 The economic benefit of Three’s interest in the MBNL JV (the “**MBNL Interest**”); and

2.8.4 After MBNL is likely dissolved in 2031, a minimum of 3,000 towers to come under Cellnex’s sole ownership and control (the “**Transfer Sites**”).

2.9 Company C considers that the most proportionate remedy to ensure that Cellnex’s market position would not increase materially in the short term, while also creating a credible third national competitor in a market for the supply of access to developed macro sites, could be structured as follows:

2.9.1 Cellnex divests all Unilateral Sites to a competing UK Wireless Infrastructure Provider (“**WIP**”). These sites offer a broad spread of national UK coverage and would be highly

¹ Source: Cellnex press release of 12 November 2020.

attractive to potential future customers, especially given that (as the CMA notes at paras 8.48 – 8.51 of the PFs) it is frequently possible to deploy more than one operator’s equipment even on to monopoles.

- 2.9.2 Cellnex divests all acquired BTS Sites to the same purchaser.
- 2.10 While the CMA’s commentary in the PFs appears to indicate that a third national competitor of similar size to CTIL or Cellnex would be the optimum solution to remedy any SLC, no guidance is given on the possible smallest size. Company C submits that if a WIP holding an equivalent market share to itself acquired the 2,800 or so Unilateral Sites and 600 BTS Sites, that would create a strong player with a UK national market share of at least [10-15%]. This would be more than sufficient to create a substantially competitive new entrant in the UK marketplace. In particular, since these sites had not been previously marketed to any operator other than Three or EE, the towers are likely to experience strong revenue growth when made more widely available to other MNOs and users.
- 2.11 Paras 8.88 – 8.89 of the PFs appear to offer support for this where the CMA observes 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. In particular, the renegotiation of the MBNL contract shows that 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*”. This accords with the experience of Company C which is that while larger players may be more convenient for MNOs to deal with, these MNOs will generally have known for years about the locations of existing sites controlled by smaller WIPs. They will not hesitate to evaluate them and include them in their network design if they consider them the best-suited locations.
- 2.12 It is essential that any BTS Sites acquired by Cellnex are also divested to a purchaser alongside the Unilateral Sites:
- 2.12.1 This would enhance the attractiveness to MNOs of dealing with the acquirer of the Unilateral Sites, since when an operator decides whether to agree a national supply agreement with a WIP the intended long-term nature of the supply relationship can make that WIP’s pipeline of sites just as important as existing sites.
- 2.12.2 During the 2022-2031 period, it is expected the MNOs and others will build out substantial 5G networks. Generally, new build towers are in locations of existing poor coverage and required capacity densification locations well-suited for 5G. Consequently, these new towers tend to be attractive to all MNOs. An acquirer of the divestment package who also takes control of the BTS Sites would be very well-placed to service those needs, using this as a springboard for growth and consolidation of its market position.
- 2.12.3 Finally, revenues from existing sites can also be taken into account in order to be able to offer a more competitive BTS offering. This will allow lower overall rates for customers.
- 2.13 Company C does not consider it necessary to include either the MBNL Interest or the Transfer Sites within any divestment package:
- 2.13.1 The significant pipeline of construction of 5G sites over the next decade or so will mean that competitors are highly likely to have larger shares in the market for developed macro sites by the time the Transfer Sites are released to the open market in 2031. The number of Transfer Sites will not grow prior to then as the shareholders are only

investing in new sites outside MBNL. That means that these remaining 3,000 or so sites in which Cellnex is acquiring an interest will form a smaller share of the market in 2031 than they would now. Furthermore, given their age they would need to be rebuilt in order to add tenants, further limiting their competitive impact in light of the high value of CapEx that would be required to do this.

- 2.13.2 Notwithstanding the CMA’s findings that Cellnex will acquire material influence over the sites ahead of that via the MBNL Interest, Cellnex will not be permitted to market these sites to third parties or otherwise directly control their operation akin to its wholly-owned sites. This is because Company C understands that veto rights over the strategic operation of MBNL are limited. Further, the CMA itself notes at para 8.117 of the PFs that these sites provide only “*limited additional competition before the dissolution of the MBNL JV*” qualified with the fact that this is “*if BT/EE were to agree*”.
- 2.14 However, Company C recognises that in the unlikely event that MBNL was dissolved prior to 2031, the 3,000+ Transfer Sites to be apportioned to Cellnex could join the market earlier than anticipated. They might then have a greater competitive effect, before the market had completed its 5G-driven expansion. In order to protect against this risk, Company C suggests that any divestment remedy includes a commitment by Cellnex to immediately sell at least 50% (ie 1,500+) of the Transfer Sites to the purchaser of the Unilateral Sites and BTS Sites, should MBNL terminate early.
- 2.15 Finally, Company C notes that the CMA has indicated the possibility of Cellnex’s existing assets being included within the scope of any possible remedy. While this would comprise a substantial number of sites, they would have only a limited impact in addressing any SLC, such that a divestment of these assets would be disproportionate. Cellnex’s towers were largely built by Arqiva prior to 2015 to serve 2G, 3G or 4G use cases. They are often not ideally located for 5G use cases. While, over time, certain of these sites may be upgraded to 5G in any event, they are unlikely to be optimum and will be unattractive to third parties. Company C considers that the owner of these sites is likely to have significantly less competitive impact than might appear to be the case based on the sheer number of sites alone. It therefore does not consider that these sites represent a significant enough competitive opportunity to be included in any divestment portfolio.

3. SUITABLE PURCHASER

- 3.1 As set out in Section 2 above, Company C does not consider that prohibiting the transaction would be appropriate. Similarly, it does not consider that ordering a divestment of all of the acquired assets would be either necessary or proportionate, since SLC risks can be effectively managed by way of a more targeted divestment package.
- 3.2 However, in the event that the CMA does consider that only a significant divestment package of the nature outlined in the Remedies Statement would be sufficient in order to address any SLC, in this section Company C sets out that there is very low risk of a suitable purchaser not being available or the Parties otherwise divesting to a weak or inappropriate purchaser. Several WIPs would potentially be able to acquire and operate the Target assets in a sustainable fashion to remedy the SLC.
- 3.3 By way of example, as a typical UK WIP, Company C would comprise a purchaser that: (a) would be independent of the Parties; (b) has the necessary capability to compete; (c) is committed to competing in the market; and (d) will not create further competition concerns. Each of these criteria is briefly assessed below.

(a) Independent of the Parties

3.4 Company C has no existing structural or material shareholder links with any of the parties to the Transaction.

(b) Necessary capability to compete

3.5 Company C would be capable of integrating any size of divestment package so as to become a credible, national competitor to Cellnex, CTIL, or any other large macro site operator.

3.6 Company C is a well-established UK-based operator, having started operations as a WIP [Redacted]. Since its founding, the company has focused on building and owning a portfolio of towers. [Redacted].

3.7 [Redacted] years of operation as a WIP in intensely competitive UK markets means that Company C has long-term established relationships and extensive experience of working with all four UK MNOs, providing a strong track record. Selected operational highlights include:

3.7.1 [Redacted].

3.7.2 Building new towers and small cells for [Redacted].

3.7.3 Adding [Redacted] to existing towers.

3.7.4 Acting as the landlord under towers owned by [Redacted].

3.7.5 Building and operating [Redacted].

3.7.6 Managing [Redacted].

3.7.7 Working with [Redacted] new-build sites.

3.8 Company C also serves a range of national tenants like [Redacted] demonstrating a wider competitive customer base [Redacted].

3.9 Company C operates proven processes, procedures and systems to manage and maintain tower portfolios for 24-hour access management, annual tower structural integrity inspections, annual tower maintenance, health and safety standard management. It is also entirely able to design, develop, construct and manage all site types potentially required by MNOs [Redacted].

(c) Committed to competing in the market

3.10 Company C is able to offer [Redacted] tower locations in the UK, [Redacted] suited for 5G networks development. Combining its extensive existing network of operational and potential new-build sites with any combination of divestment assets would create a strong, durable and competitive challenger over the long term to Cellnex, CTIL and any other UK-wide operator going forward.

3.11 Given the buoyancy of current investment in the network infrastructure space, Company C (as will likely be the case with certain other WIPs) has the financing strength to complete a scale transaction quickly. In the case of Company C, it considers that it would be able to complete a transaction of up to [Redacted], bolstered by an existing debt facility with around [Redacted] million of headroom which may be structured and expanded to up to [Redacted]. The company's existing equity investors include [Redacted] any one of which Company C anticipates would be willing to commit an additional [Redacted] in relation to the high quality, stable asset base which would form the basis of any divestment package.

(d) No further competition concerns created

3.12 As already noted by the CMA in its Provisional Findings, Company C would hold an existing share of any market for the UK supply of developed macro sites of [0-5%]. If combined with the UK share attributable to the Unilateral Sites it is estimated that the parties' combined share would rise to at least [10-15%]. This is sufficiently large to comprise a credible competitor in the eyes of potential customers, and to ensure that Cellnex does not retain excessive market power post-remedy. However, it would equally not create an excessively large new player.

7 January 2022