

Cellnex / CK Hutchison

Company D response to the CMA's
provisional findings and notice of possible remedies

1. [Redacted].
2. [Redacted].
3. Company D agrees with the CMA's provisional conclusion that the Transaction would result in a substantial lessening of competition ("**SLC**") in the supply of access to developed macro sites and ancillary services to wireless communication providers in the UK. In particular:
 - (i) Company D agrees 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.¹ Company D considers that, were CK Hutchison to put the assets up for sale publicly, it would receive a number of alternative offers to Cellnex's. There is clearly a market for passive infrastructure assets: the CMA's provisional findings notes other purchases of such assets by other entities, such as American Tower's 2021 acquisition of the assets of Telxius Telecom and Phoenix Tower's 2020 acquisition of Emerald Tower Limited.²
 - (ii) Company D agrees that the Transaction would in effect result in a reduction of national suppliers of scale from three to two.³ The Transaction would remove the ability (which is already weak) of independent operators to compete with Cellnex and the MNO JVs, given the structural links between Cellnex and the MNO JVs that will shut out other suppliers. If independent suppliers cannot access anchor tenants, they will not be able to finance (and therefore develop and construct) new towers. This will result in less investment, lower quality coverage, and lower available consumer capacity than would be the case in a more competitive market.⁴ The anticompetitive effect of the Transaction (part of the trend for the MNOs seeking to lock themselves contractually in with Cellnex and/or the MNO JVs on a long term basis) would provide immediate returns for the merging parties and their shareholder, but at a cost to be borne by consumers in the future.
 - (iii) Barriers to entry and barriers to expansion are such that it is not likely that organic entry or expansion of sufficient scale would occur to mitigate or prevent an SLC arising as a result of the Transaction.⁵ [Redacted]. The cross-shareholdings and

¹ Paragraph 59 of the summary to the provisional findings.

² Paragraph 5.76 of the provisional findings.

³ Paragraphs 84 and 88 of the summary to the provisional findings.

⁴ Company D is also concerned that the Transaction will result in anticompetitive coordinated effects, as it will result in just two major players of similar size (Cellnex and CTIL) accounting for the vast majority of the market.

⁵ Paragraph 98 of the summary to provisional findings.

long term supply contracts between the MNOs, the MNO JVs and Cellnex⁶ also create a high barrier to entry and expansion for independent WIPs. [Redacted].

- (iv) Company D agrees with the CMA's assessment that it is highly unlikely that the benefits of any synergies from the Transaction would be passed on to customers.⁷ For example, public statements that have recently been made by Cellnex show that it intends to implement a strategy of capacity closures (i.e. decommissioning of tower sites, to consolidate single tenant sites into multi-tenant sites) in order to increase profits by having fewer towers in operation, where the cost savings will not be passed on to consumers. [Redacted].
 - (v) The anti-competitive effects of the Transaction are exacerbated by the excessively long exclusive service agreements that Cellnex and CK Hutchison are entering into alongside the Transaction. [Redacted].
- 4. Company D agrees with the CMA that the most effective remedy to the SLC would be the divestiture of a package of developed macro sites and ancillary services that replicates the competitive constraint that would have been exerted by the owner of the CK Hutchison sites absent the Transaction.
 - 5. Company D considers that in fact a divestiture would create a more pro-competitive situation than prohibition in this case, as it would create an immediate strong competitor to Cellnex and would mitigate the effect of the long term supply contracts being proposed as part of the Transaction (which would lock CK Hutchison / 3UK in as a customer of Cellnex and prevent any other WIP from competing for that business). It is extremely important that any remedy not only addresses the increase in market power as a result of the combination of Cellnex's and CK Hutchison's portfolios, but also addresses the foreclosure effect that would be caused to other suppliers by the excessively long service contracts being entered into between the merging parties.
 - 6. In terms of the scale and scope of the divestment package,⁸ Company D agrees with the CMA's assessment that it is important for a WIP to have an extensive portfolio of sites to enable it to compete for new business.⁹ Scale is important in that having more sites enables a WIP to compete more cost-effectively, by spreading its operating and capital expenditure costs across a wider pool of assets, in terms of access to finance, and by being able to offer a single rate card for each site (even though the value of each site is different given different locations). The divestment package must have sufficient size, scope and quality of assets to enable the purchaser to compete effectively with Cellnex in the market place:
 - (i) On geographic scope, it is important that any package comprises assets of appropriate national geographic spread, including a split of urban vs. rural sites.

⁶ Such as are contemplated by the Transaction, and are already in place between CTIL and Vodafone / Telefónica.

⁷ Paragraphs 100 and 101 of the summary to the provisional findings.

⁸ Paragraph 31(b)(i) of the notice of possible remedies.

⁹ Paragraph 9.14 of the provisional findings.

Geographic spread is important for a supplier to be able to compete effectively, in particular for MNO customers. The more sites that a supplier has, the more likely they are to have existing relationships with the MNO which they can leverage off to win more contracts. MNOs are also more likely to contract with WIPs that have significant geographic reach and scale, to be able to meet their requirements for large scale schemes.

- (ii) On the composition of the divestment package, any divestiture should acknowledge that there is a hierarchy of sites. In other words, not all sites offer equal competitive potential. For example, a streetworks site (i.e. monopole) offering limited coverage and limited upgrade potential is not the same as a macro site with much greater coverage and upgrade potential. The divestment package should therefore consist of macro sites as opposed to monopole sites, in order to replicate the competitive constraint that would have been provided by CK Hutchison absent the Transaction (taking into account the macro sites that are currently part of the MBNL JV).¹⁰ [Redacted]
- (iii) The sites in the divestment package should have attributes that are commensurate with Cellnex's post-Transaction (and post-divestment) portfolio. Attributes that the CMA could consider include (i) average number of customers per site; and (ii) percentage of sites per UK region.

7. [Redacted].

8. [Redacted].

9. [Redacted].

10. An effective divestiture package could be comprised of the passive infrastructure assets and the associated customer service/tenant contracts and infrastructure contracts, together with sufficient salespeople (and back-office functions) to allow the purchaser to operate the business immediately at scale in competition with Cellnex.¹¹ It is critically important that the infrastructure assets are sold together with the existing customer contracts, plus the supporting infrastructure contracts that allow the business to be operated (such as backhaul contracts). Without the customer contracts, the value and competitive constraint associated with the assets would be lost.

11. Company D considers that there would be a number of suitable industry purchasers for the divestment package. [Redacted].

¹⁰ Company D notes that it is not possible for it to provide more precise views on which assets should form part of a divestment package without understanding in greater detail the merging parties' respective site portfolios and the detailed terms of the transaction, including the master service agreements and the agreed transfer pricing of BTS sites. Its comments in this submission are therefore necessarily high level.

¹¹ Paragraph 31(b)(ii) of the notice of possible remedies.

12. Company D shares the CMA's concern that there are risks that the competitive capability of the divestiture package could deteriorate before completion of the divestiture,¹² in particular as the result of deliberate actions taken by Cellnex. In particular, Company D notes that Cellnex has publicly announced a strategy of capacity closures (i.e. decommissioning of tower sites), to consolidate customers on to fewer towers and thereby increase profits. Company D understands that Cellnex has built in rights to pursue this strategy into the long term supply agreements that it will enter into with CK Hutchison / 3UK pursuant to the Transaction; namely, by including in the contracts a right to decommission towers and move its tenants to a consolidated site. There is therefore a material risk that Cellnex could seek to decommission towers that are part of the divestment package in the period before completion of the divestiture. Such risk could also be guarded against by including appropriate safeguards in the final undertakings to prevent such action, and by the appointment of a monitoring trustee.¹³
13. Company D agrees with the CMA's proposal that the divestiture to a suitable purchaser be completed before the Transaction to allowed to complete.¹⁴ In particular, this would guard against adverse effects on competition in the period between CMA conditional clearance and completion of the divestment (such as the risks of decommissioning outlined in paragraph 7 above) and against any risk of Cellnex seeking to divest to a purchaser that would not impose a strong competitive constraint.

¹² Paragraph 31(d) of the notice of possible remedies.

¹³ Paragraph 36 of the notice of possible remedies.

¹⁴ Paragraph 35 of the notice of possible remedies.