



ME/6917/20

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

CK Hutchison's response to Chapter 5 of the CMA's Provisional Findings

14 January 2022

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 submitted by the Parties to the CMA on 13 May 2021 and the CMA's Provisional Findings notified to the Parties on 17 December 2021.

1. Introduction and executive summary

- 1.1 This submission is made by CK Hutchison in response to Chapter 5 of the CMA’s Provisional Findings (the *CF Chapter*).

The counterfactual impermissibly departs from the prevailing conditions of competition

- 1.2 In the CF Chapter, the CMA departs radically from the prevailing conditions of competition: it assumes that CK Hutchison would have engaged in a different sales process, potentially over several years, and ultimately sold the assets to a different purchaser (or sought to realise their value via another route such as a partial sale or an IPO). This is the foundation for the CMA’s SLC finding because it is only in this counterfactual that the new owner/investor increases the competitive constraint on Cellnex compared to the pre-merger position.

- 1.3 If the CMA is going to base its SLC finding on a counterfactual that departs from the prevailing conditions of competition¹, it requires a convincing evidential basis for doing so. In order to make an SLC finding, the CMA must be satisfied on the balance of probabilities that the merger will cause an SLC.² Moreover, the Merger Assessment Guidelines³ explain at paragraph 3.13 that the CMA will select the “*most likely*” conditions of competition as its counterfactual.

- 1.4 However, there is no convincing evidential basis for the CMA’s counterfactual in the Provisional Findings. On the contrary, CK Hutchison has given clear evidence that, and explained why, in the absence of a sale of the UK assets to Cellnex, it would have retained those assets in the counterfactual. The CMA would need a compelling basis to reject CK Hutchison’s evidence on this point and would need to properly explain its reasons for doing so.

- 1.5 As set out below, the CF Chapter falls well short of providing the evidential or analytical basis to justify a counterfactual that departs radically from the prevailing conditions of competition and runs contrary to the clear evidence of CK Hutchison. The CMA cannot rationally conclude that the counterfactual it has asserted in the Provisional Findings is the “most likely” outcome. Indeed, the Provisional Findings are not only inherently unlikely and speculative; they reach conclusions that cannot be justified on the basis of CK Hutchison’s evidence.

The Provisional Findings do not reflect the evidence

- 1.6 The Provisional Findings create a fanciful counterfactual which distorts and mischaracterises the evidence. In particular, the counterfactual is inconsistent

¹ The EU Commission’s Guidelines, for example, provide that the prevailing conditions of competition will be the appropriate counterfactual in most cases (Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2003/C 31/03, paragraph 9)).

² (British Sky Broadcasting Group PLC v Competition Commission [2008] CAT 25 at [80]; Tobii AB v CMA [2020] CAT 1 at [341], [427].

³ Merger Assessment Guidelines, CMA129, 18 March 2021 (*Merger Assessment Guidelines*).

with all of the evidence provided by CK Hutchison and its senior executives. In summary:

- (a) The CMA has dismissed or ignored the factual evidence presented by CK Hutchison in respect of the sales process that was undertaken. CK Hutchison's experienced senior management are better placed than the CMA to identify CK Hutchison's strategic objectives for its passive infrastructure assets and in what manner it should seek to achieve those commercial objectives. The CMA has neither the knowledge nor the expertise to second-guess how CK Hutchison should (or would) make decisions as to the sale of parts of its business, particularly when the CMA's speculation runs contrary to all of the direct evidence of CK Hutchison.
- (b) The Provisional Findings rely on unsubstantiated assertions, or statements from Cellnex's competitors [*confidential*], and entirely disregard the evidence presented by the Parties.
- (c) The CMA has selectively relied on and cherry-picked from CK Hutchison's internal documents from an early stage of the internal re-organisation process to conclude that other options would have been available to CK Hutchison. In doing so, it has ignored the more probative and up to date evidence and oral submissions made by CK Hutchison's senior management, developments in the sale process and refinement of CK Hutchison's commercial objectives. This is a manifest error of assessment and a distortion of the evidence. As CK Hutchison has explained to the CMA on a number of occasions, as it progressed through its re-organisation and considered its various options for monetisation, its commercial objectives evolved. [*confidential*].
- (d) Similarly, the CMA has chosen to rely on [*confidential*] investment bankers' pitches as the basis for claiming that there were alternative viable transaction structures available to CK Hutchison. This is a further error of assessment and distortion of the evidence. These presentations were [*confidential*]: the investment banks did not have access to the relevant information [*confidential*]. CK Hutchison explored all possible options for the sale of its passive infrastructure assets. The only credible and realistic option capable of meeting CK Hutchison's broader commercial objectives was the Proposed Transaction with Cellnex.

1.7 There is no basis for the CMA to disregard CK Hutchison's consistent evidence in the manner in which it has. The CMA has failed to provide any explanation for this. Rather, it has elected to give more weight to speculative statements made after the fact, than the direct evidence of the alternative purchasers' contemporaneous conduct when presented with a concrete opportunity. There is no indication in the Provisional Findings that the CMA has engaged with any of the alternative purchasers based on the evidence provided by CK Hutchison. This is a material error in procedure.

The Provisional Findings proceed on the basis of an error of law – there is no rational basis for the CMA to include CK Hutchison’s European tower assets in the counterfactual

- 1.8 The Provisional Findings are inconsistent with the key fact that CK Hutchison’s European assets have been sold to Cellnex. Notwithstanding this, the Provisional Findings purport to find that, because the sale of the UK assets and the European assets formed part of one overall commercial transaction, the sale of the European assets was a “consequence” of the sale of the UK assets. This finding cannot be sustained.
- 1.9 The evidence clearly demonstrates that CK Hutchison was prepared to complete the sale of the European assets in circumstances where the UK assets were not sold. The fact that there was an overall commercial transaction with Cellnex cannot override this fundamental fact. The Provisional Findings incorrectly rely on only one aspect of the commercial structure of the transaction – the overall commercial deal with Cellnex – while ignoring all other relevant aspects. Since CK Hutchison was in fact prepared to, and did, enter into a transaction which contemplated the sale of the European assets independently of the UK assets there is no basis for the CMA to find that the sale of the European assets was a “consequence” of the sale of the UK assets. Moreover, the Provisional Findings have erroneously assumed that CK Hutchison would inevitably have the “incentive” to enter into an alternative towers transaction without taking into account that the five independent transactions involving the EU assets have completed [*confidential*].
- 1.10 The CMA’s persistence in finding that the European tower assets should be included in the counterfactual is inconsistent with the CMA’s own guidelines and is a material error of law. The CMA’s investigation and assessment has wrongfully proceeded on the basis that the European assets would be part of the package of assets available for sale, which infects both its evidence gathering and its analysis as to the likelihood of an alternative purchaser acquiring the assets in the counterfactual.

The Provisional Findings present no cogent evidence to support the conclusion that CK Hutchison could have entered into a transaction involving only its UK assets with an alternative purchaser

- 1.11 The CMA’s conclusion that CK Hutchison could have concluded a transaction with an alternative purchaser contradicts all available evidence. In reality, CK Hutchison fully explored and exhausted all alternative options that were capable of meeting its commercial objectives at the time. Only the Proposed Transaction with Cellnex was available to it.
- 1.12 Generalised statements from potential purchasers as to their alleged interest in the UK market do not constitute credible evidence of a realistic possible alternative transaction, and certainly do not constitute evidence that a sale to an alternative purchaser is the “most likely” outcome in the absence of the Proposed Transaction. Likewise, *ex post* speculative statements of potential interest in an alternative transaction which have not specifically considered the specific features and complexities relevant to CK Hutchison’s tower assets –

specifically the [confidential] – are incapable of amounting to evidence of the availability of an alternative transaction.

- 1.13 The Provisional Findings have disregarded key facts relevant to the UK assets which, in reality, materially limit the possibility of any alternative sale. These key facts include:
- (a) that the majority of CK Hutchison’s UK tower assets are within the MBNL JV, the terms of which preclude their sale until the JV is dissolved in 2031 and that [confidential];
 - (b) [confidential]; and
 - (c) the Unilateral Sites are limited in number, are mostly not yet constructed and when constructed will be designed for only one tenant (3UK) with no growth potential in the absence of material investment and additional planning consents.
- 1.14 The above points are material commercial considerations for any alternative transaction involving the UK assets. Yet it is apparent that the third-party statements on which the Provisional Findings rely have not taken these issues into account and that the relevant third parties were unlikely to have been aware of them when making their statements. In those circumstances, the CMA has failed to make reasonable inquiries.
- 1.15 In any event, the Provisional Findings set out no cogent evidence to support the conclusion that a sale of the UK only assets to an alternative purchaser is the “most likely” outcome in the counterfactual.

The Provisional Findings are based on speculation and a selective approach to the evidence

- 1.16 It is striking, that although the Provisional Findings conclude that CK Hutchison would, and could, sell its UK assets to an alternative purchaser, the Provisional Findings [confidential].
- 1.17 The Provisional Findings seek to rely heavily on one isolated and selectively quoted statement that CK Hutchison would need to [confidential] in the absence of the Proposed Transaction as the bedrock of its findings on the counterfactual. This is a gross distortion of CK Hutchison’s evidence. As is clear from the full extract of the transcript where this statement was made, CK Hutchison’s evidence in this respect was directed towards [confidential]. The CMA has wrongly assumed that [confidential] would, in those circumstances be focussed only on options for the sale of 3UK’s tower assets. CK Hutchison’s commercial objective for 3UK is to [confidential]. However, CK Hutchison’s potential options for doing so are not limited to alternative tower transactions on less favourable terms. On the contrary, in the absence of the Proposed Transaction [confidential]. An alternative UK tower transaction would never be the only, far less the “most likely”, outcome.

[confidential]

1.18 The Provisional Findings set out the CMA’s findings in relation to certain specific purchasers that would allegedly be credible purchasers in the counterfactual. However, the evidence before the CMA demonstrates:

- (a) none of the other purchasers in fact pursued a transaction with CK Hutchison in relation to its tower assets [confidential];
- (b) [confidential]; and
- (c) [confidential].

There is no basis for the CMA to consider that CK Hutchison would have conducted an alternative sale process over a longer time horizon and/or accepted a less attractive offer

1.19 The CMA claims that CK Hutchison would have conducted an alternative sales process if the Proposed Transaction did not proceed, that it would have done so within approximately three years of its decision to sell its passive infrastructure assets to a third party and that it would have accepted an offer that was materially less attractive than the Cellnex offer.⁴ This conclusion is untethered from reality.

1.20 [confidential]

1.21 The CMA is the UK’s competition regulator. It has no greater expertise or insight into how CK Hutchison should meet its commercial objectives than the senior management of CK Hutchison itself. The reorganisation process leading up to the Proposed Transaction proceeded for 15 months and [confidential] to CK Hutchison. There is no evidence whatsoever before the CMA that CK Hutchison would have been prepared to wait for up to three years in order to further explore other transaction options, that this would have been in accordance with its broader commercial objectives, or that it would be in its shareholders’ best interests. This finding cannot be sustained. [confidential]

1.22 The counterfactual must assume that the European assets had been sold. In such circumstances, CK Hutchison would not have engaged in a prolonged process of attempting to sell the UK assets over several years, [confidential]. As the Provisional Findings record as evidence at paragraph 36, in the absence of a timely and attractive offer, “[CK Hutchison] would continue to own and operate its UK passive infrastructure assets as at present”.

1.23 If, contrary to CK Hutchison’s primary submission, the counterfactual must assume that the European assets have not been sold, the points above would still apply. [confidential]

[confidential]

1.24 The evidence before the CMA clearly demonstrates that CK Hutchison fully explored all other potential options to commercialise its European tower assets (of which the UK tower assets form part) and that it decided not to pursue those

⁴ CF Chapter, paras 5.161 and 5.237.

options because they were incapable of meeting CK Hutchison's broader commercial objectives.

- 1.25 As regards a potential strategic combination, [confidential]. In particular, from CK Hutchison's perspective this option would not [confidential].
- 1.26 Likewise, an IPO was not pursued both because [confidential]. Similarly, the sale of a minority stake in the passive infrastructure assets was not pursued [confidential].
- 1.27 No other alternative options would be feasible or capable of meeting CK Hutchison's objectives. The CMA has no evidence justifying its assertions that these options might be realistic options for CK Hutchison in the counterfactual, far less that any of these options are the "most likely" outcome in the absence of the Proposed Transaction.

The CMA's procedure has prevented CK Hutchison from being in a position to see all relevant evidence relating to the counterfactual and is unfair

- 1.28 Notwithstanding repeated requests, the CMA has withheld material evidence from CK Hutchison relating to the basis on which the CMA has reached its Provisional Findings on the counterfactual. This is unfair to CK Hutchison and has prevented it from being in a position to respond fully and effectively to the Provisional Findings. CK Hutchison reserves all of its rights in this respect.

The Provisional Findings must be fundamentally reassessed in the light of the objective evidence

- 1.29 The Provisional Findings must be fundamentally reassessed if the CMA's final determination is to be lawful and in line with the evidence before it. The SLC finding in the Provisional Findings is predicated on the novel and implausible conclusions reached in relation to the counterfactual which proceed on the basis of errors of law as well as a distortion of evidence. In reality:
 - (a) The European assets have been sold and cannot be considered to be part of the counterfactual.
 - (b) There is no cogent evidence presented in the Provisional Findings that any other credible purchaser [confidential].
 - (c) [confidential] Having fully explored its alternatives, CK Hutchison's evidence is that it was not feasible to reach any alternative agreement with any alternative purchaser.
 - (d) No other options were feasible [confidential]. In particular, CK Hutchison fully considered and determined not to pursue a strategic combination or an IPO. CK Hutchison's reasons for deciding not to pursue these routes would not change in any counterfactual.
 - (e) It is not sufficient for the CMA to contrive a counterfactual for which there is no direct evidence solely on the basis that the CMA considers that CK Hutchison has the "incentive" to enter into an alternative transaction. The CMA must take account of all aspects of CK Hutchison's commercial objectives, which include transacting with an

acceptable counterparty on acceptable commercial terms. [confidential]⁵ CK Hutchison has no incentive to enter into any transaction that does not meet all of its commercial objectives and it would not do so. In any event, CK Hutchison’s ability to sell the UK assets [confidential], as noted above.

1.30 Since there is no evidence of any alternative transaction, all the available evidence demonstrates that no credible alternative purchaser or transaction exists or existed, [confidential], there is only one rational conclusion open to the CMA. The CMA must conclude, as CK Hutchison has itself, that the only alternative to the sale to Cellnex is for CK Hutchison to retain its UK tower assets. This is the counterfactual which the CMA must adopt in its final determination and the SLC finding must be revised in that light.

2. The inclusion of CK Hutchison’s European assets in the counterfactual is an error of law

2.1 The CMA’s inclusion of CK Hutchison’s European assets in the counterfactual is: (a) an irrational failure to apply the CMA’s own Guidance; (b) inconsistent with the statutory scheme; and (c) highly material to the CMA’s conclusion.

Irrational failure to apply the CMA’s Guidance

2.2 The CMA is required to select the “most likely” conditions of competition as its counterfactual.⁶ The CMA’s assessment of the counterfactual must therefore be grounded in relevant facts and cannot be entirely speculative. A realistic and factually sound assessment of the counterfactual is particularly important in circumstances where the Provisional Findings have relied on the counterfactual as the key basis on which an SLC has been found. The analysis in the Provisional Findings, however, is fanciful and is not based on a cogent assessment of the relevant facts.

2.3 In accordance with the CMA’s guidance, unless the evidence demonstrates on the balance of probabilities that the sale of the non-UK assets was a “consequence” of the sale of the UK assets – i.e., would not have occurred absent the Proposed Transaction – the CMA *cannot* legally or rationally adopt a counterfactual in which the non-UK assets remain available to a third-party purchaser or investor.⁷

2.4 As the CMA correctly states in paragraph 5.38 of the CF Chapter, the key question is therefore whether the sale of CK Hutchison’s non-UK assets would have proceeded absent the Proposed Transaction. The evidence on this issue is

⁵ [confidential]. See, for example, paras 2.17.7 and 2.43 – 2.46 of the Response to the Issues Statement and page 9 of the Main Party Hearing transcript.

⁶ Merger Assessment Guidelines, para 3.13; CF Chapter, para 5.4.

⁷ Footnote 191 to the Provisional Findings seeks to suggest that the CMA is not required to determine the counterfactual on the balance of probabilities. However, in the present case, the CMA’s Provisional Findings on the counterfactual are the bedrock of its subsequent finding in relation to the statutory question of whether the Proposed Transaction can be expected to result in a substantial lessening of competition. Moreover, the CMA’s Guidelines require it to consider the “most likely” conditions of competition in the counterfactual. In those circumstances it would be wrong to suggest that the CMA can identify the counterfactual on the basis of a less rigorous approach.

clear and is not disputed. All of CK Hutchison's non-UK assets were, in fact, sold and completion of those sales has taken place separately from the sale of the UK assets. CK Hutchison's strategy for the sale of its assets outside the UK was not, in fact, a consequence of the sale of the UK assets. This is clearly demonstrated by the terms on which CK Hutchison transacted for the sale of its passive assets in the UK and outside the UK. These separate sales [*confidential*] and, in fact, have proceeded separately.

- 2.5 The Provisional Findings therefore proceed on the basis of a gross distortion of the evidence by stating that “*in the absence of an agreement to acquire the UK assets, the overall deal between CK Hutchison and Cellnex – including in relation to the EU assets – would not have been done in its current form.*”⁸ There is no rational basis for the CMA to make this finding, which plainly contradicts the clear evidence before the CMA of what CK Hutchison not only would have done, but actually planned to do and ultimately did do.
- 2.6 The fact that CK Hutchison's European assets have in fact been sold and CK Hutchison no longer owns these assets is clearly a highly material fact that is relevant to the most likely conditions of competition in the absence of the Proposed Transaction. The Provisional Findings assert that “*...the fact that the non-UK assets cannot now be sold to an alternative purchaser if the Merger does not go ahead because they have already been sold does not prevent us from considering counterfactual scenarios involving the sale of non-UK assets.*” However, for the reasons explained above, the CMA is proceeding on the basis of a fundamental error of approach.
- 2.7 The Provisional Findings purport to find that, because the sale of the European assets and the UK assets formed part of an “overall commercial transaction” between the Parties, the sale of the European assets can be considered to be a “consequence” of the sale of the UK assets.⁹ This finding is nonsensical and is not based on any cogent evidence. It is the opposite of the evidence provided to the CMA by both Parties.
- 2.8 The basis of the Provisional Findings in this respect is that CK Hutchison agreed one overall commercial transaction with Cellnex involving all of CK Hutchison's tower assets in Europe.¹⁰ However, this simply describes the nature of the overall commercial agreement with Cellnex. It is not evidence of CK Hutchison's ability or willingness to proceed with the sale of the European assets as a consequence of the sale of the UK assets or what the “most likely” position would be in the absence of the Proposed Transaction. In particular, even if there was one overall commercial discussion with Cellnex involving all of CK Hutchison's tower assets, this cannot override the key fact – which has been dismissed in the Provisional Findings – that the terms of that transaction did in fact contemplate that the sale of the European assets would proceed independently of both the UK and individually by country, irrespective of completion of the sale of the UK assets. Not only was this contemplated in the transaction agreements, it has happened, as a matter of fact. Completion of the

⁸ CF Chapter, para 5.47.

⁹ CF Chapter, para 5.48

¹⁰ CF Chapter, para 5.39, 5.42.

sale of all of the European assets outside the UK has long since taken place regardless of the fact that the UK sale has not.

- 2.9 The key relevant evidence from CK Hutchison is that it deliberately and carefully structured the transactions with Cellnex separately in the knowledge that they would likely complete at different times and on terms that provided for the sale of the European assets to proceed [*confidential*]. Likewise, the evidence from Cellnex is to the same effect: Cellnex did not consider the acquisition of the European assets to be a consequence of the acquisition of the UK assets as “*the Merger formed part of an overall commercial transaction that included the UK assets and the non-UK assets*”.¹¹
- 2.10 The Provisional Findings seek to dismiss the only reasonable conclusion that can be drawn from this – that the sale of the European assets was not a consequence of the sale of the UK assets – on the following basis: “*we do not consider that a contractual structure that allows certain parts of an overall commercial transaction to proceed ahead of others equates to agreeing a transaction that does not include the UK assets at all.*”¹² This is said to be “*consistent with the commercial reality of the transaction according to CK Hutchison*”.¹³ But this finding ignores the real “commercial reality of the transaction”, the carefully negotiated terms of which do, in fact, provide for the possibility that the sale of the European assets proceeds in the absence of the sale of the UK assets. The Provisional Findings’ assessment of “commercial reality” is contradicted by the true commercial reality which was negotiated and then recorded in detail in the transaction agreements between the Parties.
- 2.11 The Provisional Findings impermissibly seek to rely on one aspect of the transaction structure – whether it was an overall commercial transaction between the Parties – without considering all relevant aspects of the Proposed Transaction. It is not rational to take account of only one aspect of the transaction structure in this manner. If the CMA seeks to rely on the nature of the commercial transaction, it should also take into account that the terms of the Proposed Transaction are the clearest and most reliable articulation of the nature of the commercial transaction, and these provided for separate sales in Europe and the UK. The Provisional Findings’ reliance on this aspect of transaction structure is also inconsistent with the statement in the Provisional Findings that “[*t*]he question of whether events are a consequence of a merger under review is fact-specific and is not determined by the transaction structure chosen by the merger parties.”¹⁴ The CMA cannot rationally rely on some aspects of the transaction structure and ignore others which do not suit its preferred narrative.

¹¹ CF Chapter, para 5.43.

¹² CF Chapter, para 5.46.

¹³ Ibid.

¹⁴ For completeness, the reference in footnote 196 of the Provisional Findings to the CMA’s own report in *Reckitt Benckiser / K-Y Brand (RB/K-Y)* is irrelevant. First, as the Provisional Findings acknowledge, the assessment of the counterfactual is fact-specific, and therefore the CMA’s approach to different facts in another case cannot determine the assessment of the facts of this case. In any event, there are so many distinguishing features of the RB/K-Y case as to make it entirely irrelevant to the CMA’s assessment of the counterfactual in this case. Those distinguishing features include: (a) the RB/K-Y transaction involved the sale of a single branded consumer product business globally and not, as in this case, the sale of entirely separate assets

2.12 The only other basis for the CMA’s conclusion is in paragraph 5.47 of the Provisional Findings. This states that the “available evidence” in relation to the rationale for, and negotiation of, the overall commercial transaction entered into by the Parties shows that, in the absence of an agreement to acquire the UK assets, the overall deal between CK Hutchison and Cellnex, including in relation to the European assets, would not have been done in its current form. This paragraph is not capable of providing a rational basis for a conclusion that the sale of the European assets was a consequence of the sale of the UK assets, in particular because:

- (a) although the Provisional Findings refers to the “available evidence”, no evidence is cited or referred to in this paragraph; and
- (b) there is no explanation in this paragraph as to why the CMA considers, even if the overall deal would not have been done “in its current form”, the sale of the European assets was a “consequence” of the sale of the UK assets.

2.13 The provisional conclusion that the counterfactual would have included the sale of both the European assets and the UK assets to an alternative purchaser is also inconsistent with the CMA’s own finding in paragraph 5.50 which states: “*We recognise that, within the scope of the existing overall commercial transaction, the Parties were willing to take the risk that some or all of the EU assets might ultimately be sold without the UK assets.*”¹⁵ Since the CMA recognises that CK Hutchison was indeed prepared to, and did, enter into a transaction that contemplates the sale of the European assets separately from the UK assets, this finding precludes a conclusion that the sale of the European assets was a “consequence” of the sale of the UK assets. This conclusion cannot rationally be sustained in the CMA’s Final Report.

Inconsistency with the statutory scheme

2.14 The approach in the Provisional Findings is also inconsistent with the statutory scheme (or in any event irrational) in circumstances where the non-UK assets are outside the jurisdictional scope of the CMA’s investigation:

- (a) the relevant merger situation over which the CMA has exercised jurisdiction for the purpose of section 36(1) of the Enterprise Act 2002 is the acquisition by Cellnex UK Limited of the UK assets;
- (b) competition authorities other than the CMA had jurisdiction in respect of the transactions involving the non-UK assets, no regulatory

in different countries which are used to support different mobile operators whose businesses are confined to single countries and were, and are, operated entirely separately from each other; (b) the CMA had identified a single most likely alternative purchaser in the counterfactual and this had been confirmed to the CMA by the Seller (R-B/K-Y Report, para 7.28) whereas in this case the CMA’s counterfactual is open-ended, speculative and is entirely refuted by CK Hutchison; and (c) the CMA in any event concluded that the “standard” counterfactual, i.e. the pre-merger conditions of competition, were applicable (RB/K-Y Report, para 7.31) whereas in this case the CMA posits an entirely novel and non-standard counterfactual involving more competitive conditions of competition than existed pre-merger. The CMA can place no reliance on this report to support the counterfactual analysis in the Provisional Findings.

¹⁵ CF Chapter, para 5.50.

objections have been raised in respect of those transactions, and those transactions have now completed;

- (c) the geographic scope of the relevant market that is the subject of the CMA's investigation is the United Kingdom;
- (d) the statutory obligation on the CMA is to identify whether the Proposed Transaction is expected to result in an SLC in that market (section 36(1)(b) of the Enterprise Act 2002);
- (e) if the CMA finds that the Proposed Transaction will cause an SLC in that market, then it must decide whether to adopt a remedy in respect of that SLC, having regard to the need to achieve as comprehensive a solution as is reasonable and practicable to that SLC (sections 36(2)-(3) of the Enterprise Act 2002); and
- (f) in the circumstances immediately described above and long after the European assets have been sold, it is clear that the non-UK assets could never be part of any remedy ordered by the CMA. It is therefore nonsensical for the CMA to undertake a competition and counterfactual analysis which is predicated on the fiction that, in the absence of the Proposed Transaction, CK Hutchison may offer for sale the entirety of its European passive infrastructure assets.

Materiality

- 2.15 The errors set out above are material: the CMA's investigation and assessment has wrongfully proceeded on the basis that the European assets would be part of the package of assets available for sale (or some other form of value realisation such as an IPO). The CMA has also impermissibly overlooked the effect on CK Hutchison's incentives from the fact that [confidential]. Accordingly, the CMA's analysis of the counterfactual is vitiated by errors of law and approach and cannot be sustained.
- 2.16 The CMA should have focussed its discussions with third parties and its assessment of the counterfactual on the UK assets only. If it had done so, it would have appreciated: (a) the specific issues which make a sale (or IPO) of the UK assets [confidential] (explored further below); (b) that there was no credible third party purchaser of the UK assets other than Cellnex; and (c) in the counterfactual scenario in which Cellnex does not purchase the UK assets, [confidential].
- 2.17 These errors require the CMA to revisit its entire approach to the counterfactual.
- 3. **There is no cogent evidence to support the Provisional Findings that CK Hutchison could have entered into a transaction involving only its UK assets with an alternative purchaser**
- 3.1 The CMA has provisionally concluded that the sale of the UK assets, either individually or as part of a wider package of assets, to an alternative purchaser

would have been the “most likely” counterfactual in the absence of the Proposed Transaction.¹⁶ There is no cogent evidence to support this Provisional Finding.

3.2 In support of this Provisional Finding, the CMA first relies on the alleged “overall attractiveness of CK Hutchison’s passive infrastructure assets” in the UK.¹⁷ However, none of the “evidence” cited in the Provisional Findings relates specifically to the Transaction Sites. Rather, the Provisional Findings set out a series of highly generalised statements from investors regarding the attractiveness of the UK as an investment market¹⁸ or are statements from Vodafone regarding interest from investors in investing in Vantage Towers. None of these statements is capable of amounting to evidence that is directly relevant to CK Hutchison’s tower assets since:

- (a) there are a number of distinctive features of CK Hutchison’s tower assets in the UK and the implications of these features for any transaction involving CK Hutchison’s assets in the UK have been explained extensively in CK Hutchison’s evidence to date.¹⁹ There is no indication in the Provisional Findings that the investors cited in paragraph 5.110 were commenting specifically on CK Hutchison’s tower assets in the UK or that their attention was specifically drawn to these distinctive features when making the comments which are attributed to them; and
- (b) the statements attributed to Vodafone simply record general interest in investing in Vantage Towers and are not specific to the UK. Furthermore, Vantage Towers does not have the same features as CK Hutchison’s UK tower assets and, in particular, the relevant joint venture arrangements are markedly different and Vantage Towers’ UK assets [confidential].

3.3 The CMA cites an [confidential]²⁰ that mentions the possibility of [confidential]. This single internal document from the very earliest stages of CK Hutchison’s internal reorganisation [confidential]. As the Provisional Findings note, this document also stated that [confidential] the Provisional Findings state that “*the available evidence shows that CK Hutchison thought that it was not necessary for it to retain control of the assets but that sufficient protection could be obtained either through contractual protections or governance arrangements*”.²¹ It is inconsistent for the CMA to seek to rely on isolated statements in a very early stage presentation for some purposes but to disregard those statements for other purposes. In fact, no significant reliance can be placed on this presentation as to the likelihood or feasibility of CK Hutchison [confidential] as it did not set out the considered position of CK Hutchison on that issue.

3.4 Both CK Hutchison and Cellnex have explained, at length, [confidential]. It is striking that the Provisional Findings do not attempt to seriously engage with

¹⁶ CF Chapter, para 5.163.

¹⁷ CF Chapter, para 5.110.

¹⁸ CF Chapter, para 5.110(a).

¹⁹ See, for example, paras 2.6 – 2.16 of the Response to the Issues Statement.

²⁰ CF Chapter, para 5.51.

²¹ CF Chapter, para 5.86

those [confidential] and instead dismiss them on the basis of brief and unsubstantiated statements from third parties who are not themselves aware of all of the issues because: (a) they had not conducted any examination or due diligence relevant to the UK assets; and (b) [confidential].

- 3.5 [confidential]²²
- 3.6 Furthermore, the Provisional Findings set out no evidence to show that any other parties were aware of the complexity of the [confidential] or their implications and would nevertheless have been willing to entertain a transaction involving only the UK assets. These issues [confidential] and include:
- (a) the MBNL Sites (which represent the majority of CK Hutchison’s towers in the UK) [confidential];
 - (b) [confidential];
 - (c) even after 2031, the majority of MBNL Sites will continue to host equipment from both BT and CK Hutchison, limiting the practical ability of any purchaser to commercialise the assets with additional tenants; and
 - (d) CK Hutchison’s unilateral sites are mostly not yet constructed and when constructed will have space for only one tenant (3UK). Additional planning approval [confidential] would be required in order to commercialise any of these sites in future. In addition, the evidence quoted by the CMA demonstrates that the capital expenditure required to seek to enable these sites to be commercialised would be [confidential]: Cellnex estimated the costs of upgrading the Unilateral Sites to host another tenant would be between £[confidential] and £[confidential] for sites which have not been deployed yet. Cellnex also provided a wide estimate range between £[confidential] and £[confidential] to upgrade monopoles, depending on the Streetwork monopole and site.²³
- 3.7 None of these facts is disputed in the Provisional Findings and there could be no basis for disputing them. Yet the Provisional Findings take no proper account of them. There is no evidence in the Provisional Findings, and no statement from any third party, which engages with these key facts and limitations. The failure to engage properly with third parties on these points is a failure to make reasonable inquiries. In any event, the CMA has no evidential basis to dismiss CK Hutchison’s consistent evidence that these are [confidential].
- 3.8 It is not sufficient, as the Provisional Findings suggest, that “some aspects” of the MBNL JV are in the public domain. The key facts, which are set out above, were not in the public domain. Therefore, any statements from third parties on their likely ability to enter into a transaction relating to the MBNL Sites must be treated with extreme caution as they are, by definition, not made with knowledge of the relevant facts.

²² CF Chapter, para 5.43.

²³ Para 8.32(a) of the Provisional Findings.

- 3.9 Nor, despite CK Hutchison’s request, has the CMA disclosed the questions that it put to the third parties or the wider context of the responses provided by those third parties. CK Hutchison strongly suspects that disclosure of the CMA’s questions and the third parties’ full responses would reveal further evidence which would support its view that the third-party statements cannot be relied upon to support any finding that there are alternative purchasers with knowledge of the relevant facts who would be prepared to enter into an alternative transaction in the UK.
- 3.10 Indeed, the questions put by the CMA to certain alternative purchasers which the CMA has chosen to disclose demonstrate that the questions posed were inaccurate, incomplete and entirely misleading. As a result, the responses provided by the alternative purchasers in question cannot be relied upon. For example:
- (a) [confidential]
 - (b) [confidential]
- 3.11 These questions posed by the CMA to potential alternative purchasers appear to focus on a UK-only transaction. However, the transaction agreed with Cellnex comprises all of CK Hutchison’s European assets [confidential]. It does not appear that the CMA has asked potential alternative purchasers whether they would be willing to undertake a transaction for all of the European assets. This is a further, key reason why the responses from potential alternative purchasers cannot be relied on.
- 3.12 In addition to being uninformed and high level, none of the third-party statements on which the Provisional Findings rely is capable of forming the basis of a conclusion that a UK-only transaction would be feasible or the “most likely” outcome in the absence of the Proposed Transaction. Three third parties are cited in para 5.116:
- (a) [confidential];
 - (b) [confidential]; and
 - (c) [confidential].
- 3.13 The Provisional Findings fail to articulate how CK Hutchison could have executed such a transaction in light of all the relevant facts discussed above. In fact, CK Hutchison fully explored [confidential].
- 3.14 The CMA’s Provisional Finding that “*whilst including assets held within the MBNL JV may add an additional level of complexity to a sale to an alternative purchaser, it would not prevent (or make materially less likely) that the UK assets could be sold, either on a standalone basis or as part of a wider package*”²⁴ cannot be supported by an objective assessment of the available evidence. [confidential]. This is supported by [confidential]. The CMA’s Provisional Finding that the inclusion of these assets would not prevent, or make materially less likely, a transaction involving the UK assets (particularly on a

²⁴ CF Chapter, para 5.118.

standalone basis) is based on a mischaracterisation of the MBNL JV and an undue reliance on statements made by third parties with little understanding of the MBNL JV.

- 3.15 No rational decision-maker could conclude that the key limitations affecting the UK assets do not affect the likelihood of their sale in the counterfactual.

4. The CMA’s claim that CK Hutchison would have sold its assets to another purchaser or undertaken a different type of transaction is pure speculation

CK Hutchison could not have sold the assets to an alternative purchaser

- 4.1 The evidence demonstrates that CK Hutchison took the necessary steps to explore all credible options to monetise its passive infrastructure sites. Despite assessing all of its options and receiving a number of approaches, the Cellnex offer was the only one that met all of CK Hutchison’s requirements.
- 4.2 However, the CF Chapter makes an unsustainable leap of logic from the fact that certain initial exploratory discussions took place to concluding that other credible options to monetise the tower assets were available to CK Hutchison in the counterfactual. In fact, the only sustainable conclusion that can be drawn from the evidence is that CK Hutchison *did* seek to explore whether other potential purchasers might be available to it, sought to elicit potential interest from such purchasers, but no other offers were forthcoming, [confidential].
- 4.3 The Provisional Findings seek to rely heavily on CK Hutchison’s “strong incentive” to enter into an alternative transaction, in particular in order to support 3UK’s 5G rollout.²⁵ The CMA also seeks to rely on CK Hutchison’s statement at the Main Party Hearing that it would need to [confidential] in the absence of the Proposed Transaction as “evidence” that it would, and would be able to, sell the UK assets to an alternative purchaser. Neither of these arguments is capable of supporting the Provisional Finding that a sale of the UK assets to an alternative purchaser is the “most likely” outcome in the absence of the Proposed Transaction.
- (a) In relation to CK Hutchison’s incentives, it is not disputed that the proceeds from the Proposed Transaction are [confidential] required by CK Hutchison to support 3UK’s 5G roll-out. The correct inference that the CMA should have drawn from this, and CK Hutchison’s direct evidence to the CMA has shown, is that CK Hutchison was fully incentivised to explore all realistic options for the sale of the UK assets at the time of the Proposed Transaction. CK Hutchison did explore all realistic options and only the Proposed Transaction with Cellnex was feasible and met CK Hutchison’s requirements.
- (b) The CMA has wrongly assumed that if CK Hutchison is compelled to [confidential] it would have to focus only on options for the alternative sale of 3UK’s tower assets. This assumption is wholly incorrect. CK Hutchison’s commercial objective for 3UK is to [confidential]. However, CK Hutchison’s potential options for doing so are not limited

²⁵ CF Chapter, paras 5.80 and 5.83.

to alternative tower transactions on less favourable terms. CK Hutchison's clear and consistent evidence is that it would not enter into any alternative tower transaction that does not meet all of its commercial objectives and requirements, including its financial requirements,²⁶ and the nature and identity of the counterparty. On the contrary, in the absence of the Proposed Transaction, [confidential].

- (c) [confidential]:
 - (i) [confidential];²⁷
 - (ii) [confidential];²⁸
 - (iii) [confidential].²⁹
- (d) [confidential]

4.4 Likewise, CK Hutchison's statement at the Main Hearing that it would [confidential] in the event that the Proposed Transaction does not proceed is not "evidence" that CK Hutchison could and would easily enter into an alternative tower transaction. This statement has been taken wholly out of context in the Provisional Findings.

4.5 The relevant extract from the transcript of the Main Hearing which the Provisional Findings has selectively quoted is set out below:

THE CHAIRMAN: Can I just ask? I mean, I think you answered this earlier, but I want to check my understanding. That in the event that you've gone through this sales process and Cellnex hadn't turned up [confidential]. So you're ending up -- you're still holding these UK towers. What would you have done at that point?

[confidential]

Q. (Mr Thatcher) [confidential] trying to commercialise yourself in the short term, and then perhaps going out to the market again. Would that be, sort of -- might be something you would consider?

A. [confidential]

4.6 As the above extract demonstrates, CK Hutchison's actual evidence on this issue included the following critical points disregarded by the Provisional Findings:

- (a) CK Hutchison would not [confidential] in the absence of the Proposed Transaction [confidential];

²⁶ [confidential]. See, for example, para 2.17.7 of the Response to the Issues Statement and page 9 of the Main Party Hearing transcript.

²⁷ Para 8.145 of the Provisional Findings.

²⁸ Para 8.147 of the Provisional Findings.

²⁹ Para 8.148 of the Provisional Findings.

- (b) whatever happened, CK Hutchison would not conduct a fire sale of the assets in the UK or elsewhere and CK Hutchison would only consider a transaction that *[confidential]*;
 - (c) the likelihood would not be an alternative transaction but that CK Hutchison would *[confidential]*;
 - (d) when specifically asked whether the *[confidential]* would include going out to market again, CK Hutchison specifically noted that *[confidential]* because the bulk of its UK towers assets were within the MBNL JV *[confidential]*.
- 4.7 When CK Hutchison referred to *[confidential]* this was therefore never intended as a reference to the need to find an alternative way to monetise the passive infrastructure assets (for example, by finding an alternative purchaser). Rather, CK Hutchison was referring to the need to fund its 5G roll-out in the UK and across Europe. In other words, the *[confidential]* funds required for the 5G investment. *[confidential]*
- 4.8 The reliance in the Provisional Findings on CK Hutchison's statement that it would *[confidential]* is accordingly a gross distortion of the evidence that was actually presented to the CMA. The evidence actually given by CK Hutchison was that there is no alternative transaction, that CK Hutchison is *[confidential]* and that the MBNL JV Agreements would *[confidential]*.
- 4.9 The Provisional Findings recognise at paragraph 5.88 that 3UK's ongoing reliance on the passive infrastructure assets would influence CK Hutchison's choice of counterparty. However, the Provisional Findings go on to assert that CK Hutchison needed to balance 3UK's needs for a reliable long-term counterparty with its incentives to realise a value uplift such that CK Hutchison would be prepared to sell its passive infrastructure assets to a range of purchasers.³⁰ This is simply not correct. 3UK's telecommunications business relies on the passive infrastructure assets, and CK Hutchison would not be prepared to put these valuable assets in the hands of just any counterparty. Contractual protections, while important, can only go so far in ensuring the proper maintenance and operation of these assets, which makes the credibility of the counterparty as a long-term partner for CK Hutchison absolutely essential – this has been explained to the CMA at length in this process. For this reason, CK Hutchison would not have sold the assets to, for example, *[confidential]* without the requisite long-term investment horizon, or a WIP without the requisite knowledge, expertise and reputation to manage tower assets at this scale.
- 4.10 The clear fact remains that no credible offers other than Cellnex's were forthcoming, despite the market being on notice for 15 months. The extensive discussions held with other potential counterparties are evidence that there was no other viable transaction available to CK Hutchison and that CK Hutchison had exhausted its options. The CMA's argument that CK Hutchison would have

³⁰ CF Chapter, paras 5.85 and 5.92.

pursued another transaction with another purchaser is accordingly contrary to the evidence and unsustainable.

5. [confidential]

5.1 The CF Chapter states that in the CMA's view, CK Hutchison could have concluded a transaction with [confidential]³¹ [confidential]³² if the Proposed Transaction had not gone ahead. However, the facts before the CMA clearly demonstrate that [confidential] for the following reasons:

5.2 [confidential]:

- (a) [confidential]
- (b) [confidential]
- (c) [confidential]³³
- (d) [confidential]³⁴
- (e) [confidential]³⁵ [confidential]

5.3 [confidential]:

- (a) [confidential]
- (b) [confidential]
- (c) [confidential]
- (d) [confidential]
- (e) [confidential]³⁶

5.4 In addition, the CMA also seems to suggest that CK Hutchison could have concluded a transaction with a number of other alternative parties. However, the facts demonstrate that CK Hutchison could not have agreed a transaction which met its requirements with any of these parties – specifically:

- (a) [confidential]
- (b) [confidential]
- (c) [confidential]
- (d) [confidential]

5.5 In summary, although CK Hutchison fully explored all available alternatives, no alternative purchaser made any credible offer to CK Hutchison for its European or UK tower assets at the time. There is no credible evidential basis

³¹ CF Chapter, para 5.139.

³² CF Chapter, para 5.147.

³³ [confidential]

³⁴ CF Chapter, para 5.133.

³⁵ CF Chapter, para 5.135.

³⁶ CF Chapter, para 5.146.

for the CMA to consider that any of these parties was a viable alternative purchaser in the counterfactual, let alone be the “most likely” outcome absent the Proposed Transaction. The Provisional Findings’ conclusion that the above parties would have been credible alternative purchasers is speculative and hypothetical and all available evidence is to the contrary.

6. There is no basis for the CMA to consider that CK Hutchison would have conducted a sale process over a longer time horizon and accepted an unattractive offer

- 6.1 As the CMA itself recognises in the CF Chapter,³⁷ the investment in 3UK’s network, including its rollout of 5G, is particularly important [*confidential*] for 3UK. The CMA also recognises that this is consistent with the evidence submitted to it by other parties, including Ofcom. CK Hutchison also explained that it would only conclude a transaction that would have [*confidential*].
- 6.2 As the CMA itself notes, [*confidential*].³⁸ However, CK Hutchison was not, and is not, a forced seller and would not have sold its passive infrastructure assets if it had not received an offer that met all of its requirements.
- 6.3 The CMA provisionally finds that in the counterfactual, CK Hutchison would have conducted an alternative sales process and that it would have done so within approximately three years of its decision to sell its passive infrastructure assets to a third party. There is no evidential basis for this speculative assertion which is contradicted by all of the evidence before the CMA.
- 6.4 The counterfactual must assume that the European assets had been sold. In such circumstances, CK Hutchison would [*confidential*]. As the Provisional Findings record as the evidence at paragraph 36, in the absence of a timely and attractive offer, “[*CK Hutchison*] would continue to own and operate its UK passive infrastructure assets as at present”.
- 6.5 If, contrary to CK Hutchison’s primary submission, the counterfactual must assume that the European assets have not been sold, the points above would still apply. [*confidential*]
- 6.6 Given that the Provisional Findings accept that CK Hutchison had reasons for wanting to achieve a sale [*confidential*] it is entirely unclear how the CMA has concluded that it would be acceptable to delay any sales process by up to three years. In relation to the UK, the need to deploy the transaction proceeds to support 3UK’s 5G roll-out is [*confidential*]. The commercial rationale for any sale of passive infrastructure is likely to be very different in three years’ time as competitive conditions in the mobile market are likely to be different. There can be no assumption that CK Hutchison’s strategy would remain static for three years and the likelihood is that its strategy would not remain the same, given the fast-moving nature of developments in the mobile market.
- 6.7 The CMA provides no evidence to support its assertion that CK Hutchison might have agreed a different transaction with an alternative counterparty in a

³⁷ CF Chapter, para 5.83.

³⁸ CF Chapter, para 5.158.

potential sales process in the future, despite not receiving any credible offers at the time. This assertion is pure speculation and unfounded given that CK Hutchison fully tested the market at the time.

- 6.8 Here, again, the Provisional Findings seek to rely on CK Hutchison’s statement that it would [confidential], out of context. As explained above, the CMA’s reliance on this selective quotation is a distortion of CK Hutchison’s evidence.

7. No other “alternative option” is feasible or likely in the counterfactual

A strategic combination is not a realistic alternative option

- 7.1 The CMA is also mistaken in asserting that, if the Proposed Transaction did not proceed, CK Hutchison could have undertaken a combination with a strategic partner. Again, the evidence points to the opposite conclusion. CK Hutchison **did** explore such alternative options [confidential].

- 7.2 As regards the Provisional Findings’ suggestion that CK Hutchison could conclude a combination with a strategic partner, [confidential]

(a) [confidential];

(b) [confidential];

(c) [confidential]³⁹ [confidential]⁴⁰ and [confidential];⁴¹ and

(d) [confidential].

- 7.3 Furthermore, the CMA itself notes that there is evidence which indicates that CK Hutchison took some steps to explore a combination of its passive infrastructure assets with either another MNO or a WIP.⁴² [confidential] – this is recognised by the CMA but entirely ignored in the conclusion it reaches.⁴³

- 7.4 The Provisional Findings themselves state that “*it is difficult to assess the extent to which such a combination could have been successfully pursued by CK Hutchison absent the Merger*”.⁴⁴ In those circumstances, there can be no basis for a conclusion that such a combination would be the “most likely” outcome in the counterfactual, even on the erroneous basis set out in the Provisional Findings.

Retaining ownership of the assets and commercialising them [confidential]

- 7.5 The CMA addresses different options that were, according to the CMA, not fully explored by CK Hutchison. It states that these are “*other options that other MNOs have used, either in isolation or in conjunction, in order to commercialise their passive infrastructure assets*”.⁴⁵ One of these options is commercialising the assets while retaining ownership. The CMA seems to

³⁹ CF Chapter, para 5.192.

⁴⁰ CF Chapter, para 5.192.

⁴¹ CF Chapter, para 5.116(c).

⁴² CF Chapter, para 5.181.

⁴³ CF Chapter, para 5.184.

⁴⁴ CF Chapter, para 5.203.

⁴⁵ CF Chapter, para 5.204.

suggest that CK Hutchison would have pursued this option in the absence of the Proposed Transaction due to the “*success that other market participants have had in doing so.*”⁴⁶ However, this suggestion is contrary to the evidence before the CMA. [confidential]⁴⁷ [confidential]:

- (a) [confidential] [confidential]⁴⁸ [confidential]⁴⁹
- (b) The Streetworks Sites are designed solely with 3UK’s network needs in mind and have been (and are being) built for 3UK as single tenant monopolies. The scope for additional co-location is therefore limited, as it would require significant planning consents and investment. While streetworks can in theory be built to host multiple tenants (as several other WIPs and MNOs may have chosen to do so), this is simply not the case for 3UK’s Streetworks Sites.
- (c) The UKB Sites are also predominantly rooftop sites, many of which are unsuitable for further commercialisation, given that (i) adding further tenants would typically require building a new structure and thus require further planning permissions and entail significant additional costs; (ii) it is therefore often more attractive for a customer to negotiate with the rooftop owner directly rather than through a third party (given the customer can use a different part of the roof); and (iii) approx. two thirds of rooftop sites typically already have multiple tenants limiting the available space for further tenants.

7.6 In addition, [confidential]⁵⁰

7.7 [confidential] banker presentations [confidential]⁵¹ cannot be relied on as evidence of CK Hutchison’s strategy for commercialising its passive infrastructure assets in the context of the Proposed Transaction, or to support a theory that CK Hutchison was actively considering options other than a sale of the passive infrastructure. This is a clear distortion of the evidence.

An IPO of the assets would not have been feasible

7.8 Another option to monetise the passive infrastructure assets identified by the CMA that was, according to the CMA, not fully explored by CK Hutchison is an IPO. The CMA suggests that CK Hutchison would have pursued an IPO in the absence of the Proposed Transaction “*as it may have been preferable to the status quo.*”⁵²

7.9 However, this is simply incorrect and a departure from the CMA’s view in the Counterfactual Working Paper where it concluded that “*CK Hutchison would have had limited ability and incentive to undertake an IPO of its UK passive*

⁴⁶ CF Chapter, para 5.209.

⁴⁷ CF Chapter, para 5.205.

⁴⁸ CF Chapter, para 8.145.

⁴⁹ CF Chapter, para 8.115.

⁵⁰ CF Chapter, para 5.192.

⁵¹ CF Chapter, para 5.209.

⁵² CF Chapter, para 5.208.

infrastructure assets”.⁵³ As the CMA notes, some investment banks suggested an IPO as a possible option to CK Hutchison. But CK Hutchison discounted this option further [confidential] and also because an IPO was incapable of meeting CK Hutchison’s broader commercial objectives. CK Hutchison knew that an IPO would be entirely unrealistic for the following reasons:

- (a) [confidential]
- (b) In addition, investor appetite to invest in such a structure would have been extremely limited especially considering the competing availability of more straightforward European or global telecom tower sector alternatives in the global public markets (e.g., Inwit, Cellnex, Vantage Towers, ATC etc.) that did not present the same complexities as the MBNL JV.
- (c) Finally, even if an IPO had been a viable option, an IPO would typically only facilitate a partial stake sale in the business (i.e., typically 20-40 per cent). [confidential]

7.10 The CMA seeks to rely on Vodafone’s IPO of Vantage Towers to demonstrate that CK Hutchison could have pursued this route, but Vantage Towers is not a relevant comparator for 3UK and MBNL. [confidential]

7.11 The Provisional Findings themselves acknowledge that it is “unclear” whether the constraints mentioned by CK Hutchison would have prevented it from successfully undertaking an IPO and that the evidence available to the CMA on the likelihood of an IPO is “limited”.⁵⁴ In those circumstances it is not open to the CMA to reach a conclusion that an IPO would be the “most likely” outcome in the counterfactual.

8. The CMA’s approach to disclosure of evidence relied on in the CF Chapter is procedurally unfair

8.1 The information provided by third parties relating to the counterfactual has been provided to CK Hutchison’s external legal advisers under a confidentiality ring. The information in the confidentiality ring is highly fact specific. The Provisional Findings do not set out any basis for rejecting CK Hutchison’s clear and consistent evidence on the counterfactual. Hypothetical statements made by third parties after the fact cannot be afforded more weight than evidence of statements and actions taken at the time. In order for CK Hutchison to understand the basis on which the CMA has rejected its consistent evidence and to be in a position to provide an informed and meaningful response to the CMA’s Provisional Findings, it is essential that all the information relied on by the CMA to support the counterfactual is disclosed to it.⁵⁵ Limiting the disclosure of the CMA’s summaries of information provided by third parties,

⁵³ Counterfactual Working Paper, para 75. While the CMA concluded that CK Hutchison would have had a greater ability and incentive to undertake an IPO of its European tower assets, the CMA also noted that the same challenges concerning the UK towers would continue to apply (para 76).

⁵⁴ CF Chapter, para 5.207 and 5.212.

⁵⁵ Although the CMA has elected to provide limited disclosure to CK Hutchison, this is not sufficient. [confidential]

and other key information to external legal advisers only does not provide sufficient disclosure for this purpose, as it is impossible for CK Hutchison's external legal advisers to meaningfully comment on the information without input from relevant individuals at CK Hutchison.

- 8.2 Furthermore, CK Hutchison notes that even the information disclosed to external advisers in the confidentiality ring is incomplete. The CMA has been selective in providing only a small number of the questions that were put to some of the alleged alternative purchasers. Understanding the full basis on which third parties were asked to provide information to the CMA is essential for CK Hutchison to understand the context of the alleged alternative purchasers' submissions including, for example, whether they have been made with full knowledge of relevant facts. Likewise, it is essential to understand the entirety of the third-party evidence provided to the CMA, the extent to which it is based on contemporaneous materials and the context in which it was given. Since the CMA relies on statements from third parties and ignores evidence from CK Hutchison in reaching its conclusions, the full questionnaires sent to third parties and their full responses are required in order to respond fully to the Provisional Findings. The CMA's refusal to grant CK Hutchison's requests for access to this evidence is procedurally unfair. CK Hutchison reserves its right to make further submissions to the CMA in the event that further disclosure is made.

9. Conclusion

- 9.1 The Provisional Findings create a counterfactual that is inconsistent with all of the evidence provided by CK Hutchison and its senior executives, and fall well short of providing the evidential or analytical basis to justify a counterfactual that departs radically from the prevailing conditions of competition. The CMA's counterfactual is based on a material error of law and disregards the highly material fact that CK Hutchison's European assets have been sold.
- 9.2 The Provisional Findings are based on a speculative and selective approach to the evidence. In particular, the Provisional Findings disregard the following:
- (a) CK Hutchison fully explored and exhausted all alternative options that were capable of meeting its commercial objectives at the time;
 - (b) *[confidential]*;
 - (c) there is no basis to claim that CK Hutchison would have conducted an alternative sales process over a longer time horizon and/or accepted a less attractive offer; and
 - (d) no other "options" were *[confidential]* for CK Hutchison to commercialise its European tower assets (including an IPO, a strategic combination or selling a minority stake).
- 9.3 The CMA's procedure has furthermore prevented CK Hutchison from reviewing the relevant evidence relating to the counterfactual. This is unfair to CK Hutchison and has prevented it from being in a position to respond fully and effectively to the Provisional Findings.

- 9.4 In the circumstances, the Provisional Findings must be fundamentally reassessed if the CMA's final determination is to be lawful and in line with the evidence before it. The CMA must conclude that the only counterfactual is for CK Hutchison to retain its UK tower assets.
